Neutral citation number: [2014] EWCOP 1

IN THE COURT OF PROTECTION **No. 11843118**
SITTING AT MANCHESTER

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Thursday, 10th April 2014

Before:

HIS HONOUR JUDGE HODGE QC
Sitting as a Nominated Judge of the Court of Protection

In the Matter of GLADYS MEEK

Between:

HUGH ADRIAN SCOTT JONES Applicant

-v-

MR JASON PARKIN First Respondent

-and-

MISS MARGARET LYNNE PARKIN Second Respondent

-and-

MRS JANET MILLER Third Respondent

-and-

MRS MARGARET PHYLLIS JOHNSON Fourth Respondent

-and-

MRS GLADYS MEEK
(BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR)
Fifth Respondent

Counsel for the Applicant:	MR DAVID REES
Solicitor for the First Respondent:	MR ALAN RADFORD
Solicitor for the Second Respondent:	MR ALASTAIR ROSS
Counsel for the Third and Fourth Respondents:	MRS NICOLA PRESTON
Counsel for the Fifth Respondent:	MISS RUTH HUGHES

APPROVED JUDGMENT

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APPROVED JUDGMENT

JUDGE HODGE QC:

1. This is my extemporary judgment in the matter of Gladys Meek, Court of Protection case number 11843118. This extemporary judgment is a sequel to, and should be read in conjunction with, an earlier decision of Senior Judge Lush handed down on 22nd April 2013 and which is reported under the name *Re: GM*, MJ *and JM (as applicants) v The Public Guardian (as respondent)* at [2013] COPLR 290.

2. This is the hearing of an application by Mr Hugh Adrian Scott Jones, the property and affairs deputy for Gladys Meek, for:

   (i) authority pursuant to section 18(1)(i) of the Mental Capacity Act 2005 to execute a statutory will on behalf of Mrs Meek; and

   (ii) consequential directions in relation to Mrs Meek's property and affairs, and in particular:

      (a) an order calling in the £275,000 security bond of Mrs Meek's two former property and affairs deputies, Mrs Janet Miller and Mrs Margaret Phyllis Johnson; and

      (b) a direction as to whether the deputy should refer the conduct of Mrs Miller and Mrs Johnson to the police.

3. The application arises out of the decision of Senior Judge Lush to which I have already made reference. By that decision Mrs Johnson and Mrs Miller were removed as Mrs Meek's property and affairs deputies. In his position statement the deputy's counsel

suggests that the present application raises two issues which have wider significance beyond the particular facts of this case. These are said to be:

(i) How should the court approach an application for a statutory will where, as is said to be the case here, there is compelling evidence that it would not be in the incapacitous person's best interests to leave her estate to any family members; and

(ii) What approach should the court take to the calling in of a deputy's security bond in circumstances where it has declined to ratify unauthorised transactions made by that deputy, and which have caused significant financial loss to the incapacitous person's estate.

4. On the evidence in the present case I am entirely satisfied on the evidence - and indeed it is not challenged - that Mrs Meek lacks the capacity to manage her property and affairs and, in particular, that she lacks testamentary capacity, and that there is no reasonable anticipation that she is likely to have such capacity in the foreseeable future. It is also common ground - and I so find - that Mrs Meek is wholly unable to participate in any decision as to the making of a statutory will, or the calling in of the security bond.

5. The background to the present application is as follows: Gladys Meek was born in October 1919, and she is now 94 years of age. She was married, but her husband, Bert, died as long ago as 1961. He was at the time some 44 years of age. Gladys and Bert Meek had one child, Barbara, but she died in 2010, aged 67. Bert Meek had died intestate, and letters of administration had been taken out to that estate on 26th September 1961 by Gladys Meek as his lawful widow and only person entitled to

his estate on intestacy. The net value of the estate was £606/8s. Barbara also died intestate, and her estate passed to Mrs Meek absolutely.

6. Mrs Meek is currently intestate and, as matters currently stand, her estate would be inherited by her niece, Margaret Lynne Parkin, and her great nephew, Jason Parkin. Margaret Lynne Parkin (known as Lynne,) is the daughter of Frank Parkin, Mrs Meek's brother, who died in 1984. Lynne Parkin is now 55 years of age. Jason Parkin is the son of Frank's deceased son, Kevin Parkin, who was Mrs Meek's nephew; and Jason is 43 years of age.

7. Mrs Meek lives at a nursing home in Derbyshire. She suffers from vascular dementia. A capacity assessment prepared by her GP for the previous two years, Dr Adam Tooley, on 2nd August 2013, confirms that Mrs Meek lacks testamentary capacity, and that she has suffered from vascular dementia since about the year 2007.

8. Following the death of Barbara Meek in 2010, two relations of Mrs Meek's late husband Bert were appointed to act as her deputies for property and affairs by an order made by District Judge Batten on 25th August 2010. Mrs Johnson is aged 61. She is a great niece by marriage, being the granddaughter of Bert Meek's sister, Phyllis. Mrs Miller is 72 and she is a daughter of Bert's sister, Gladys. The appointment of Mrs Johnson and Mrs Miller as Mrs Meek's deputies was joint and several; and they were ordered to obtain and maintain security in the sum of £275,000 in accordance with the standard requirements as to the giving of security.

9. Subsequently, and in the circumstances related by Senior Judge Lush in his judgment previously cited, Mrs Miller and Mrs Johnson engaged in a course of conduct involving extravagant gifts, not only to charities, but also to themselves and members of their respective families, and involving the purchase of a motor car for each of

them, computers, jewellery, watches, designer handbags and football season tickets, and involving very large transfers of cash.

10. I do not propose to repeat in any detail the matters set out in Senior Judge Lush's judgment. In summary, having made various gifts and transfers of cash, and having been alerted to the fact that such transactions might be outwith the scope of their authority as deputies, in October 2011 Mrs Miller and Mrs Johnson, acting in person, applied (in an application described by Senior Judge Lush as "eccentric") for ratification of unspecified gifts which they had made. In their application they stated that they had "acted as we thought the Court of Protection order granted us, enabling us to gift and donate in relation to the size of the estate". As Mrs Meek was 92 years old, they said that they believed that approximately £200,000 would be adequate, and if that were not enough for her to live, on it was said that there was no way that she would "go short". The court subsequently joined the Public Guardian as respondent to the application and directed investigations into the deputies' conduct. A final hearing took place on 3rd April, and Senior Judge Lush's written judgment was handed down on 22nd April 2013.

11. By the time of the final hearing, Mrs Miller and Mrs Johnson were seeking ratification of gifts of some £231,000 odd and expenses of some £46,000 odd. Senior Judge Lush ratified charitable gifts totalling £57,352, gifts to Mrs Miller and Mrs Johnson and their families totalling £13,500, and gifts to Susan Grimshaw (who is a friend dating back to university days of Barbara Meek) and her family totalling £2,500.

12. Senior Judge Lush's reasons are set out at paragraphs 95 to 99 of his judgment:

> "95. I do not accept that the gifts were made in GM's best interests. They are completely out of character with any gifts she had made before

the onset of dementia. There was no consultation with her before they were made and there was no attempt to permit and encourage her to participate in the decision-making process, or to ascertain her present wishes and feelings.

96. Nor do I accept the applicants' argument that they believed that the order appointing them allowed them to make gifts on such an extensive scale. They should have been aware of the law regarding their role and responsibilities. Ignorance is no excuse.

97. The fact that GM's remaining assets were in the names of one or other of the applicants, rather than in GM's name, is a further example of what is, at best, ignorance, and, at worst, stealth.

98. I realise that MJ and JM are the only visitors that GM receives, but this does not give them a licence to loot, and I was unimpressed by the veiled threat that, if the court were to remove them as deputies, they would find it difficult to continue seeing GM.

99. If they had made a proper application for the prospective of approval of gifts, I would possibly have allowed them to make gifts to themselves and their families to mitigate the incidence of Inheritance Tax on GM's death, but only if they had been the residuary beneficiaries under her will."

13. Senior Judge Lush made an order removing Mrs Miller and Mrs Johnson as Mrs Meek's deputies; and he appointed Mr Jones in their place. He also indicated that he considered that a statutory will application was needed for Mrs Meek. Such indication

had been given when Mrs Johnson and Mrs Miller had appeared before him at a directions hearing on 22nd August 2012. Having given such advice, the Senior Judge recused himself from adjudicating on any statutory will application.

14. The Senior Judge concluded his judgment as follows:

> "100. GM is currently intestate and MJ and JM have no entitlement to her estate on death. It was for this reason that I suggested at a hearing on 22nd August 2012 that they obtain legal advice and consider making an application for a statutory will. I am surprised that seven months later no further action has been taken in this respect.
>
> 101. In this case, a statutory will is the missing piece of the jigsaw and, until it is in place, the picture is incomplete.
>
> 102. The applicants were seeking approval of gifts and expenses totalling £277,811.74. The approval of only £73,352 has left them personally liable to GM's estate in the sum of £204,459.74, which they must pay back.
>
> 103. I shall not attempt to prejudge the outcome of any statutory will application, but, if an order is made for the execution of a will on GM's behalf, there is a possibility that MJ and JM could become her residuary beneficiaries, in which case their liability to her estate may become less relevant.
>
> 104. On the other hand, the judge who considers the statutory will application may take the view that, if she had testamentary capacity and was fully aware of what has been going on, GM would be

outraged by the applicants' conduct and would make no provision for them at all.

105. Alternatively, the judge may find that GM's intestate heirs had closer contact with her than the applicants suggest, or that certain charities, such as the Christadelphian Church, the Scottish National Trust or the National Deaf Children's Society, have a more meritorious claim on her bounty and should receive the lion's share of her estate.

106. In any event, there is no immediate need to call in the security bond, and any decision to enforce it can be deferred until a statutory will has been executed and the picture is complete.

107. For the purposes of section 16(8) of the Mental Capacity Act, I am satisfied that the deputies have behaved in a way that contravened the authority conferred on them by the court and was not in GM's best interests.

108. I am not persuaded by any of [counsel's] submissions on their behalf, and I have no hesitation in revoking their appointment as deputies. GM's finances are in disarray because of their conduct, and it is in her best interests that someone with experience of cases of unjust enrichment and restitution, such as a panel deputy, is appointed to manage her affairs in their place."

15. The present application is the statutory will application which was foreshadowed in that judgment. Up to date figures for Mrs Meek's finances are exhibited to the second witness statement of Mr Jones. They show current assets in the deputy's hands of

approximately £114,575, a sum which is likely to be substantially depleted by the costs of the current proceedings.

16. I invited, at the outset of this hearing, an estimate of the costs of and incidental to this application. The deputy's costs were anticipated as being in the order of some £30,000. Those of the Official Solicitor, representing Mrs Meek as her litigation friend, were estimated in the order of £20,000. The costs of Lynne Parkin were estimated at some £12,600, and those of Jason Parkin at some £11,000. The combined costs of Mrs Miller and Mrs Johnson were estimated to be in the order of some £18,000. That makes something in the order of £92,000 in total, which would leave little more than £20,000 remaining in Mrs Meek's estate, although this takes no account of the funds owed to Mrs Meek by Mrs Johnson and Mrs Miller. Mrs Meek's annual income is approximately £9,400, and her annual expenditure is estimated to be about £34,500, so there is an annual income shortfall of around £25,000. In addition to the costs to which I have already made reference, the deputy has also incurred fees in the order of £15,000 independently of this statutory will application and its associated costs.

17. The statutory will application was issued in December 2013 by the panel deputy, Mr Jones. It is supported by his witness statement of 4th December 2013 together with exhibits HASJ1 through to HASJ13. Mr Jones concludes, for the reasons set out at paragraph 34 of his witness statement, that it would be in the best interests of Mrs Meek for the court to authorise a statutory will leaving her estate equally to the National Trust for Scotland and a charity connected with the Christadelphian Church.

18. He also addresses the further directions required regarding the recovery of the sums owed by the former deputies. He suggests that it would not be in Mrs Meek's best

interests for him to be required to bring recovery proceedings against Mrs Miller and Mrs Johnson, and he invites the court to adopt a broad brush approach, calling in the security bond in the sum of £250,000 and forgiving Mrs Johnson and Mrs Miller any sums owed by them beyond that amount. He suggests that as a condition for the court not seeking to call the sum calculated as owing in full, or directing an account, the former deputies should be required to waive any further claims for expenses against the estates of either Mrs Meek or Barbara. He also invites the court to give directions as to whether he should take any steps to bring the conduct of Mrs Miller and Mrs Johnson to the attention of the police.

19. There is a second witness statement from Mr Jones dated 3rd April 2014. Mr Jones gave evidence before me for about 30 minutes on the morning of the first day of the hearing, Wednesday 9th April 2014. This application was listed for hearing before me for two days on 9th and 10th April by letter dated 28th January 2014. The deputy served the proceedings by post on the Official Solicitor, Jason Lee Parkin, Margaret Lynne Parkin, Janet Miller and Margaret Phyllis Johnson. On the application of the Official Solicitor, and with the deputy's consent, on 7th March 2014 I made an order:

(i) joining Gladys Meek as a party to the application and, with his consent, appointing the Official Solicitor to act as her litigation friend; and

(ii) directing service of a copy of the order upon Jason and Lynne Parkin, Mrs Miller and Mrs Johnson, and giving further case management directions, including an order for witness statements to stand as evidence in chief, with deponents attending for cross-examination unless released.

20. As a result of that order, and in consequence thereof, witness statements were received from those notified of the order as follows:

(i) Lynne Parkin filed two witness statements dated 24th March and 3rd April 2014;

(ii) Jason Parkin filed a witness statement dated 26th March 2014;

(iii) Mrs Johnson filed a witness statement dated 29th March 2014; and

(iv) Janet Miller filed a witness statement dated 29th March 2014.

All of those persons attended trial and were cross-examined.

21. The court also received witness statements from the following:

(i) Berys Marianne Gillott, a cousin by marriage of Lynne Parkin, dated 24th March 2014;

(ii) Judith Bartram, a solicitor with the Office of the Official Solicitor, dated 3rd April 2014. She had visited Mrs Meek at her care home on 2nd April 2014 and (amongst other documents) she exhibited attendance notes of that visit;

(iii) Susan Grimshaw, the university friend of Barbara, dated 5th April 2014; and

(iv) Rachel Grimshaw, Susan's daughter and Barbara Meek's god-daughter, dated 6th April 2014.

None of those four additional witnesses were asked to attend the trial, and none of them were required for cross-examination.

22. At the hearing, which began at 10.30 yesterday, 9th April 2014, the parties were represented as follows:

(i) For the panel deputy, Mr Jones, Mr David Rees of counsel appeared;

(ii) For Mr Jason Parkin, Mr Alan Radford, a solicitor of Browne Jacobson, appeared;

(iii) For Lynne Parkin, Alistair Ross, a solicitor with Miles & Cash, appeared;

(iv) For Mrs Johnson and Mrs Miller, Mrs Nicola Preston of counsel, instructed by the Wilkes Partnership, appeared; and

(v) For Mrs Meek's litigation friend, the Official Solicitor, Miss Ruth Hughes of counsel appeared.

All the advocates had previously filed helpful written position statements which, together with the evidence, I had pre-read by the time the hearing began.

23. Mr Rees for the panel deputy opened the application, and I was addressed briefly in opening also by Mr Ross for Lynne Parkin. Mr Jones was then called and cross-examined for about 30 minutes. After the luncheon adjournment, Mrs Johnson was called and cross-examined on behalf of various parties for about an hour and 50 minutes in total. There was then a short ten minute break before Mrs Miller was called and cross-examined for just over an hour. The hearing concluded yesterday at about 5.15. The court sat at ten o'clock this morning when it heard briefly from Mr Jason Parkin, who was cross-examined for about 15 minutes, and then from Lynne Parkin, who was cross-examined for a similar period of time. That concluded the evidence.

24. The court was then addressed by the various counsel and solicitors. I heard first from Mr Rees, then from Mr Radford. He was followed by Mr Ross, and then by Mrs Preston. Mr Rees then replied, and Miss Hughes addressed me last of all, her address extending either side of the luncheon adjournment. Submissions concluded just after 2.20 this afternoon, whereupon I began to deliver this extemporary judgment.

25. By the time the hearing began there had been discussions between Mr Rees and Mrs Preston as a result of which they had reached agreement to the effect that Mrs Johnson and Mrs Miller acknowledged that they presently owed £250,000 to Mrs Meek. That was accepted by each of Mrs Johnson and Mrs Miller in the course of their cross-examinations.

26. Mr Ross had suggested in opening that, in relation to that sum, the security bond should be called upon up to its full extent on the footing that the bond was in respect of the amount of loss suffered by failure to carry out the former deputies' duties, and that that loss should extend to the substantial element of costs which had been incurred by the panel deputy, Mr Jones, and which, but for the matters leading to the removal of the former deputies, would not otherwise have been incurred by Mrs Meek's estate. His submission was that as a result of the conduct of the former deputies, they had got the estate into a state where a panel deputy had had forensically to consider the implications of all that had gone before. Reliance was placed upon what was said at paragraph 108 of Senior Judge Lush's judgment, where he had described Mrs Meek's finances as being "in disarray" because of the conduct of the former deputies.

27. In their respective position statements, Mr Rees and Miss Hughes had addressed me as to the law governing the making of a statutory will, and also as to the law governing security bonds given by a court appointed deputy. The jurisdiction to make a statutory will is conferred by section 18(1)(i) of the Mental Capacity Act 2005. Any decision to authorise, or not to authorise, a statutory will must be made in Mrs M's "best interests": see section 1(5) of the Act. "Best interests" is not defined exhaustively in the Act, but section 4 contains a checklist of matters for the court to consider. By

section 4(2) the court is required to consider "all the relevant circumstances". By section 4(6) the court must consider, so far as is reasonably ascertainable:

(a) the person's past and present wishes and feelings,

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

28. By section 4(7) the court must take into account, if it is practicable and appropriate to consult them, the views of (amongst others, and so far as presently relevant):

(b) anyone engaged in caring for the person or interested in his welfare, and

(d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in sub-section (6).

29. By section 4(11) "relevant circumstances" are those:

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

30. I was taken to a number of authorities by Mr Rees in opening. I was taken first to the decision of Mr Justice Lewison in the case of *Re: P* [2009] EWHC 163 (Ch), reported at [2010] Ch 33, at paragraphs 36 through to 44. I was then taken to the decision of Mr Justice Munby in the case of *Re: M* [2009] EWHC 2525 (Fam), reported at [2011] 1 WLR 344, at paragraphs 26 through to 38.

31. I was next taken to the decision of Mr Justice Morgan in the case of *Re: G (TJ)* [2010] EWHC 3005 (COP), reported at [2010] COPLR 403, at paragraphs 52 through to 58 and paragraph 65. I was next taken to the decision of Senior Judge Lush in the case of *Re: JC* [2012] COPLR 540 at paragraphs 48 through to 54. I was taken to what was described as an "excellent summary of the authorities" by His Honour Judge Behrens in the case of *NT v FS* [2013] EWHC 684 (COP), reported at [2013] COPLR 313, at paragraph 8.

32. Finally I was taken to the observations of Baroness Hale of Richmond, speaking for the Supreme Court, in a medical treatment case, *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67, reported at [2013] COPLR 492, at paragraph 45. Mr Rees cited that authority as making it clear that, in the context of section 4 of the Mental Capacity Act, the wishes and feelings to be considered are those of the incapacitous person herself, and not those of what a reasonable person in that person's position might think.

33. It is sufficient for me in the present case to paraphrase the observations of Judge Behrens in *NT v FS* [2013] EWHC 684 (COP). There, the guidance from the authorities was summarised in the following terms:

(i) The 2005 Act marks a radical change in the treatment of persons lacking capacity. The overarching principle is that any decision made on behalf of P must be in P's best interests. This is not the same as inquiring what P would have decided if he or she had had capacity. It is not a test of substituted judgment, but requires the court to apply an objective test of what would be in P's best interests.

(ii) The court must follow the structured decision-making process laid down by the 2005 Act. Thus, the court must consider all relevant circumstances, and, in particular, must consider, and take into account, the matters set out in sections 4(6) and 4(7).

(iii) The court must then make a value judgment, giving effect to the paramount statutory instruction that the decision must be made in P's best interests.

(iv) The Act contains no hierarchy between the various factors which have to be borne in mind. The weight to be attached to different factors will inevitably differ depending on the individual circumstances of the particular case. There may, however, in a particular case be one or more features which, in a particular case, are of "magnetic importance" in influencing, or even determining, the outcome.

(v) The authorities contain a discussion of the weight to be attached to P's wishes and feelings. The decision-maker must consider the beliefs and values that would be likely to have influenced P's decision if he had capacity, and also the other factors that P would be likely to have considered if he were able to do so. That did not, however, necessarily require those to be given effect. P's wishes and feelings will always be a significant factor to which the court must pay close regard, but the weight to be attached to those wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular *a priori* weight or importance to P's wishes and feelings. It all

depends, and it must depend, upon the individual circumstance of the particular case.

(vi) Differing views have been expressed in the authorities as to relevance to the decision-maker of P having "done the right thing" by his will, and being remembered for that after his death. Both Mr Justice Lewison and Mr Justice Munby took the view that this was a relevant matter to be placed in the balance sheet. However, Mr Justice Morgan and Senior Judge Lush have expressed doubts. As Mr Justice Morgan pointed out, the making of the gift and/or the terms of the will are not being made by P, but by the court; and, furthermore, insofar as there is a dispute between family members, the unsuccessful members are not likely to think that he had done the right thing. In *NT v FS* [2013] EWHC 684 (COP) Judge Behrens stated that, for his part, he thought there was force in Mr Justice Morgan's views on the facts of the instant case, with the result that Judge Behrens did not intend to place any weight on that factor.

34. Speaking for myself, I do not consider that either Lord Justice Lewison, or the present President of the Court of Protection, were oblivious to the considerations identified by Mr Justice Morgan in the case of *Re: G (TJ)* [2010] EWHC 3005 (COP). In my judgment, what Mr Justice Lewison referred to as "the right thing" is to be judged from the perspective, not of any relatives or friends who may be competing for a share of the incapacitous person's testamentary bounty, but rather from the perspective of the well-informed, and disinterested, objective bystander. Nevertheless, "the right thing" is to be judged, as Baroness Hale's recent speech makes clear, by reference to the standards of the incapacitous person himself, and not by what the reasonable

incapacitous person might be thought to think. Further, in my judgment, the concept of being remembered "as having done the right thing" still has relevance even if, because of the lack of testamentary capacity, the right thing has to be done for the testator by the Court of Protection.

35. I should also say something about the balance sheet approach. In the case of *Re: JC* [2012] COPLR 540 Senior Judge Lush (at paragraph 53) stated that he had doubts about the effectiveness of the balance sheet approach in statutory will applications. He said that the balance sheet approach worked satisfactorily in certain cases, where a risk analysis was involved; but in the case he was considering, Senior Judge Lush said that he had struggled to identify any "factors of actual benefit" or "counterbalancing dis-benefits", or "risks of possibility of loss" or "possibilities of gain". He did, however, recognise that, despite his doubts about the efficacy of the balance sheet approach, there would usually be at least one factor of "magnetic importance" to assist the judge in reaching a decision.

36. I must say that I do not, at least in the present case, share Senior Judge Lush's doubts about the efficacy of the balance sheet approach. At paragraph 53 of the Official Solicitor's position statement, a balance sheet approach is adopted; and I have found it particularly useful, as will appear later in this judgment. In my judgment, it may be helpful to prepare a table of arguments for, and against, both the making of a statutory will and, if it is decided that one is appropriate, the identification of the various beneficiaries, and the shares of the incapacitous person's estate which should pass to each of them. This exercise is not one that involves the exercise of a judicial discretion. It requires an exercise of judicial judgment; but one that is very much a

value judgment, which inevitably involves weighing various factors against each other in the balance before deciding where the balance falls.

37. Both Mr Rees and Miss Hughes addressed the law on security bonds in their respective position statements. Section 19(9)(a) of the Mental Capacity Act 2005 provides that the court may require a deputy to give such security as the court thinks fit for the discharge of his functions. The giving of security is governed by rule 200 of the Court of Protection Rules and regulations 33 to 37 of the Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (Statutory Instrument 2007/1253) as amended.

38. Some detail as to the workings of the bond can be found in the judgment of Her Honour Judge Hazel Marshall QC in the case of *Baker v H* [2010] 1 WLR 1103 at paragraphs 35 through to 43. Effectively, the bond scheme offers an alternative to a deputy bringing an action against a previous defaulting deputy to recover lost or stolen funds. It provides an immediate, and straightforward, mechanism by which the court can ensure that an incapacitous person is compensated for losses that have been incurred through the default of his deputy. It avoids the delay and expense which the incapacitous person would otherwise face in bringing proceedings against a defaulting deputy, who may be of questionable solvency, and enforcing any judgment obtained within those proceedings. The defaulting deputy does not get off scot-free, but he is instead likely to face proceedings brought by the bond provider.

39. There is, however, no statutory guidance on the circumstances in which the court should call in a security bond. Mr Rees submitted that the decision is not one that is being made for or on behalf of the incapacitous person and therefore it does not fall to

be taken by reference to that person's "best interests", although whilst such best interests may not be determinative, they may still be relevant.

40. In that context, reference was made by Mr Rees to the decision of Sir James Munby, sitting as President of the Court of Protection, in *Re: PO* [2013] EWHC 3932 (COP), reported at [2014] COPLR 62, at paragraphs 30 through to 32. In that case, Sir James Munby was considering the *forum non conveniens* principle. In applying that principle, Sir James considered whether the Court of Protection was required to treat the incapacitous person's best interests as determinative. Although he found it unnecessary to reach any concluded decision on the point, his view was that when the Court of Protection was considering a question of *forum conveniens*, it was fundamentally deciding not what should be done for, or on behalf of, the incapacitous person; it was deciding only which court should make those decisions. Therefore his view was that section 1(5) did not apply.

41. In her position statement (at paragraph 46) the Official Solicitor's submission was that whilst the incapacitous person's best interests were not irrelevant, they were not a governing criterion. In my judgment, the "best interests" principle **does** apply to a decision by the court whether to call in a security bond provided by a defaulting deputy. I accept that when the court is considering a question of *forum conveniens*, it is not making any decision for or on behalf of the incapacitous person. But it seems to me that that is not the position where the court is deciding whether a security bond provided by a defaulting deputy should be enforced. Such a decision is clearly one made "for or on behalf of" the incapacitous person because the decision will affect the amount of the incapacitous person's estate. It therefore seems to me that such a

decision falls to be decided by reference to the incapacitous person's "best interests", pursuant to section 1(5) of the 2005 Act.

42. By way of illustration of the circumstances where the court considered it to be appropriate to call in a security bond, I was referred to the recent decision of Senior Judge Lush in the case of *Re: Joan Treadwell (Deceased), Public Guardia & Lutz* [2013] COPLR 587. There, the court called in the security bond of a deputy who had made unauthorised gifts, rather than leave the incapacitous person's executors to bring proceedings after his death to recover the misappropriated funds from the deputy personally.

43. In her position statement, Miss Hughes recognised that there was little law relating to security bonds. She too made reference to Her Honour Judge Hazel Marshall's decision in *Baker v H* [2010] 1 WLR 1103, which concerned the level at which the bond should be set. Miss Hughes submitted that the court had a discretion whether or not to call in the security bond, and that there was at present no guidance as to how that discretion should be exercised. Miss Hughes submitted for the Official Solicitor that it should be a rare case indeed when the court decided not to ratify gifts made by a deputy, but refused to call in the security bond. In a situation, as in the present case, where the court had refused to ratify gifts, those gifts would have been made:

(i) by a deputy in breach of duty, without authority from the court; and

(ii) the gifts will not have been in the incapacitous person's best interests because, if they had been, they would have been ratified.

44. Assuming that the defaulting deputy had been replaced, the new deputy would be in a position to sue the defaulting deputy for breach of duty to recover the loss suffered.

Calling in the security bond would merely short-circuit that process, and save the incapacitous person the costs and delay of suing the defaulting deputy, and enforcing judgment against him. It is said by the Official Solicitor that failure by the court to call in the security bond would denude the incapacitous person of the protection which Parliament, the Office of the Public Guardian, and the court intended him to have, which is implicit in the security system itself. If the court would not, almost as a matter of course, enforce the security bond in circumstances where the deputy had run away with a significant portion of the incapacitous person's estate, then it is said that this would significantly undercut the effectiveness of the whole system, and the benefit which persons lacking capacity generally obtain from paying the premiums on security bonds year in year out. It is said that the impecuniosity of the defaulting deputy cannot be a reason for the court to refuse to enforce a security bond because this fact would make it all the more difficult for a new deputy to obtain satisfaction independently.

45. If the court acceded to the argument that a defaulting deputy, who is a family member of the incapacitous person, ought not to face a claim under the bond from the bond company, then there would be very little point in the courts requiring security of a deputy who is close to the incapacitous person, which the court did as a matter of course. This was because such a deputy would almost invariably be able to say that they were close to the incapacitous person, and, notwithstanding their default, he would not wish them to suffer, and therefore the security bond ought not to be called in.

46. It was said to be key to the whole system that the court is willing to enforce a security bond when a deputy is in default. A reluctance on the part of the court to refuse to call in a security bond, where the defaulting deputy was close to the incapacitous person,

would very significantly undermine the protection which Parliament had decided that the incapacitous person should enjoy.

47. Those were the legal submissions that were advanced before the court. I turn then to the position of each of the parties before the court. The position of the deputy is that there should be a statutory will, and that the court should direct that the security bond be called in.

48. The position of the Official Solicitor is that there should be a statutory will, but that the beneficiaries under that will proposed by the panel deputy, namely the National Trust for Scotland and Christadelphian Care Homes, should be expanded. The Official Solicitor submits that the personal chattels should go to Susan Grimshaw or, failing her, to her daughter Rachel, or Rachel's issue. In the light of the most recent visit by the representative of the Official Solicitor to Mrs Meek's room, it would appear that the scope of that gift of personal chattels is likely to be extremely limited. The residuary estate is proposed by the Official Solicitor to be divided into eight equal parts. Two parts should go to Rachel Grimshaw, with substitutionary provisions for her issue. Two parts should go to each of Christadelphian Care Homes and National Trust for Scotland; and one part should go to each of the Royal Society for the Protection of Birds and Ashbourne Animal Welfare. There should also be a cross-accrual provision. The Official Solicitor supports the application of the panel deputy for the court to direct the Public Guardian to call in the former deputies' security bond.

49. The position of Jason Parkin is that there should be a statutory will, but that it should not exclude entirely the beneficiaries who would otherwise be entitled on intestacy. In particular, he should take some benefit under the will, although, in evidence, he said that he was not asking for as much as the half of Gladys Meek's estate to which he is

presumptively entitled on her intestacy. He suggested in his evidence that the majority of the estate should go to charities, with 25 percent to him and 25 percent to Lynne Parkin.

50. The position of Lynne Parkin is that whilst there should be a statutory will, she should not be prejudiced as to her 50 percent presumptive beneficial interest in Gladys Meek's net estate in accordance with the rules of intestacy.

51. The position of Mrs Johnson and Mrs Miller is that they should each be entitled to share in the bounty conferred by any statutory will. They should be entitled to 50 percent of the estate.

52. The Official Solicitor has not found the case to be an easy one. That is certainly so. It seemed to me that each of the advocates had sought to identify a particular factor in the case of "magnetic importance". The difficulty in this case is that it seemed to me also that each advocate had latched upon a different factor of "magnetic importance", with the possible exceptions of Mr Rees and Miss Hughes who, I think, were in accord.

53. For Mr Rees, and I think also Miss Hughes, the factor of magnetic importance was essentially the wishes, feelings, beliefs and values entertained by Gladys Meek at the time she possessed testamentary capacity. For Mr Radford (for Jason Parkin), the factor of magnetic importance in the case was said to be the conduct of Mrs Johnson and Mrs Miller. For Mr Ross (representing Lynne Parkin), the factor of magnetic importance was, I think, identified as the status quo, which was intestacy. For Mrs Preston (representing Mrs Johnson and Mrs Miller), the factor of magnetic importance was said to be that they were the only ones who had shown any interest in Gladys Meek's welfare or well-being in recent years.

54. Lynne Parkin seeks no change in the position that would apply to her under the law of intestacy. Jason Parkin is more modest but, nevertheless, he says that he should still be entitled to some share in accordance with the laws of intestacy that would apply if there were no statutory will. Mrs Johnson and Mrs Miller say that they should have an entitlement under any statutory will, thereby departing from the intestacy position.

55. Everyone, but for Mrs Preston, urges the court to direct the enforcement of the security bond. Mrs Preston's position is that her clients should be given an opportunity to repay half of the agreed amount outstanding of £250,000 within three months. The residue should only be called in during Mrs Meek's lifetime if she requires any further sums to meet the annual shortfall of income over expenditure in the order of £25,000 a year. The remaining £125,000 of the amount owed should be satisfied out of the presumptive entitlements of Mrs Miller and Mrs Johnson under the statutory will. Mrs Preston acknowledges that it is in Mrs Meek's best interests for the bond to be called in, rather than for the deputy to take proceedings against Mrs Miller and Mrs Johnson; but she says that it is not necessary or appropriate for the bond to be called in immediately or all at once. Half of the bond should be called in in three months, and the remainder only after Mrs Meek's estate falls to be distributed, unless Mrs Meek needs further capital during her lifetime. Mrs Preston submits that her clients should not be placed under the additional stress of the bond being called in. She says that they were genuine in spending money on items, for the reasons that they gave.

56. Notwithstanding the attractive way in which Mrs Preston sought to make bricks out of straw when she was really lacking in any substantial quantities of straw, I cannot accept Mrs Preston's submissions. I had the opportunity of observing Mrs Johnson for a little under two hours, and Mrs Miller for about an hour, when they were giving

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evidence under cross-examination in the witness box. Mrs Johnson I found to be quietly spoken. She displayed no outward appearance of undue avarice. But Mr Rees described her as demonstrating a lack of frankness; and I agree with his assessment. Mrs Johnson was unable to give any satisfactory explanation for certain of the payments or actions on her part, and that of Mrs Miller. I have no doubt whatsoever that Mrs Johnson effectively treated her appointment as one of Gladys Meek's deputies as though it were a lottery win, which entitled her to treat Mrs Meek's money as though it were her own.

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57. Judged on her own standards, I suspect that Mrs Johnson did not consider that what she was doing was dishonest. But I have reminded myself of the standard direction on dishonesty in criminal cases, derived from the Court of Appeal's decision in the case of *Ghosh* (1982) 75 Criminal Appeal Reports 154. If I apply that test and ask myself:

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(i) was what Mrs Johnson was doing dishonest by the ordinary standards of reasonable and honest people, and, perhaps more pertinently,

(ii) must Mrs Johnson herself have realised that what she was doing would be regarded as dishonest by those standards,

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and if I focus upon Mrs Johnson's own state of mind, then I have no hesitation in holding, on the civil standard of balance of probabilities, and notwithstanding the seriousness of the matter, that both questions should be answered in the affirmative. In other words: Yes.

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58. Mrs Miller was rather more circumspect and contrite when giving evidence. That may be because she had had the opportunity of observing questions put to Mrs Johnson, and

reflecting upon Mrs Johnson's answers. But, nevertheless, I found Mrs Miller's answers also to be unsatisfactory.

59. I accept the submission that even now both Mrs Johnson and Mrs Miller have demonstrated a lack of understanding of the seriousness, and total unacceptability, of their conduct in the discharge, on Mrs Gladys Meek's behalf, of her financial affairs. They have demonstrated a complete lack of insight and remorse. When Mrs Miller was asked to consider how Mrs Meek might have viewed herself and Mrs Johnson taking some £204,000 from Mrs Meek's estate, Mrs Miller's answer was "I really don't think that Gladys would've minded." I have no doubt that Gladys Meek would (as Mr Rees submitted) have been totally horrified. The evidence - which I think was common ground - was that Mrs Meek and her daughter, Barbara, had always lived modestly, and that it was totally out of character for them to spend sums of money in the way that Mrs Johnson and Mrs Miller had done with Mrs Meek's assets.

60. There was a continuing lack of frankness, up almost to the door of the court, from Mrs Johnson and Mrs Miller. That was demonstrated by the fact that Senior Judge Lush's judgment had proceeded on the footing that there had been a charitable gift to Codnor Castle of £5,000. It turned out that that sum was still sitting in a bank account in the name of one of the former deputies; but that fact was not disclosed until the day before the hearing. There was complete confusion on the part of Mrs Miller about whether she had spent £7,000 or £17,000 on a watch. I have no doubt whatsoever that Mrs Meek would have been absolutely horrified at the expenditure of even the lesser of those two sums on a watch, and even more horrified that Mrs Miller could not remember whether she had spent £7,000 or £17,000.

61. In her witness statement (at paragraph 43) Mrs Johnson, who gave written evidence on behalf of Mrs Miller as well as herself, had said that she and Mrs Miller had searched their records and were unable to recall a £7,000 purchase, a receipt for which she exhibited at page 325 of the application bundle. When cross-examined about that, it was clear that Mrs Johnson was of the opinion that this was a Visa payment for a watch purchased by Mrs Miller from a jeweller in Derby, W E Watts, for £7,000. She accepted that the witness statement was not right in stating that she was unable to recall what the purchase was for. It was quite clear also that Mrs Johnson had not been frank and honest with the Court of Protection about payments for Derby County Football Club season tickets. The most recent of them had been made not too long before the Court of Protection hearing before Senior Judge Lush, and yet it had not been mentioned to the Court of Protection at all. Monies had been invested in premium bonds which had won prizes, but those prizes had not been mentioned or accounted for.

62. I am afraid that I simply cannot regard the conduct of either Mrs Johnson or Mrs Miller in the way in which it was sought to be presented by Mrs Preston. I cannot accept her submission that her clients had not tried to conceal anything; and that all their failings were due to a misunderstanding of paperwork, and an inability to address matters of fine detail.

63. Mrs Preston's most powerful submission was by reference to the observations of Baroness Hale in *Aintree University Hospitals NHS Trust v James* [2013] UKSC 67 that when considering what was the right thing to do, the Court of Protection must take a subjective, rather than an objective, view, and have regard to the individual views, wishes, feelings and beliefs of the particular incapacitous party, rather than persons

lacking in capacity in general. I accept that as a submission of law; but, in my judgment, it does not assist Mrs Johnson or Mrs Miller on the facts, and in the light of the evidence, in the present case.

64. In my judgment, applying the various factors, and having regard to the considerations I have already identified earlier in this judgment, I have to prepare a balance sheet of the various factors for and against the identification of the proposed beneficiaries under the statutory will, which it is common ground I should direct as being in Gladys Meek's best interests.

65. Miss Hughes has prepared such a balance sheet at paragraph 53 of her position statement. Miss Hughes first considers the factors in favour of, and those against, the inclusion within the statutory will of the intestacy beneficiaries, Lynne and Jason Parkin. In favour of the intestacy beneficiaries is the status quo; but against them is the fact that whilst the status quo had been adequate whilst Barbara was still living, and Gladys Meek could reasonably have anticipated that Barbara would survive her and take her estate in its entirety, the status quo was no longer adequate once Barbara had predeceased Mrs Meek, at a time when Mrs Meek was already suffering from dementia and lacked the necessary testamentary capacity to make a will.

66. For Lynne Parkin Mr Ross made a powerful submission that the court should not assume that Gladys Meek and her daughter, Barbara, had made anything other than a deliberate decision not to make wills. Mr Ross stressed the fact that Bert Meek had died in 1961, at the age of 44, and that Gladys's brother, Frank, had died early from emphysema, apparently at the age of 61. Throughout some 88 years until 2007, when she first suffered a lack of testamentary capacity, Gladys had resolutely refrained from making a will, even though she had taken out letters of administration to her late

husband's estate in 1961 on his intestacy, and even though she and Barbara had been involved in a number of property transactions which would have afforded them the opportunity of making a will. Mr Ross submitted that it would be an exercise in unjustified paternalism for the court to assume that Gladys could not, had she wished, have made a will, even one in favour of Barbara, but with provision for a substituted beneficiary, or beneficiaries, if Barbara should predecease her. He pointed to the fact that Mrs Meek was, on the evidence, an intelligent woman. He made the point that, for many, many years, Gladys Meek had visited Scotland and attended the Christadelphian Church, and yet she had at no stage thought fit to leave them even a modest pecuniary legacy in a will.

67. I bear all of those considerations in mind; but, nevertheless, it does seem to me that the factor of magnetic importance in this regard is that until Barbara's death, she was her mother's statutory next of kin, and her mother would have anticipated that Barbara would survive her. Even if she did not, Mrs Meek could have hoped that she might be able to make a will then. In fact, by the time of Barbara's death, Mrs Meek was unable to do so. In my judgment, it is a factor of magnetic importance that when Barbara, then Mrs Meek's sole statutory next of kin, passed away:

(i) Mrs Meek's estate was increased in value from some £200,000 to £500,000 by inheriting from Barbara, and

(ii) by that time Mrs Meek was without the necessary capacity to make any will to distribute her estate.

68. I bear in mind the other factors identified by Miss Hughes. The fact that Gladys Meek had been close to Lynne before the dog incident – a falling out over whether a Labrador dog belonging to Lynne Parkin should have been put down – but after that

she was hostile to Lynne thereafter. As Miss Hughes pointed out, Lynne accepted in evidence that both Gladys and Barbara would avoid her in the street after the incident over Sadie (the name of the Labrador). Lynne herself accepted that Gladys was a difficult and unbending lady. She agreed with the proposition that once one had fallen out with Gladys, there was no going back. As against that evidence, I do bear in mind that Lynne said that even though Gladys had fallen out with Ida (Mrs Meek's sister), she thought that Gladys would still have wished to leave something to Ida in her will if Ida had still been alive, and had survived Gladys. When I questioned Lynne about that, she said that her reason for saying that was because she thought that they would have made it up in the end.

69. I bear in mind also that in March of this year Lynne had visited Gladys at her residential home and they appear to have talked amicably; but, in that regard, I bear in mind the point that has been made by Miss Hughes that by the time of that meeting, Gladys Meek's mental condition was such that she thought that both her husband and her daughter were still alive. It seems to me clear that Mrs Gladys Meek has now simply forgotten the falling-out, and the reasons for it.

70. In favour of the intestacy beneficiaries are the facts also that Mrs Meek no longer recalls the feud, that she has never been particularly charitable, and that the former deputies have behaved extremely badly. I also bear in mind that the intestacy beneficiaries are Mrs Meek's only surviving blood relatives. In my judgment, none of those factors outweigh the fact that after they fell out over the incident over Sadie, both Gladys and her daughter, Barbara, had fallen out irretrievably with Lynne Parkin; and that Gladys Meek has had no contact with Jason Parkin for many years.

71. In my judgment, balancing all those factors in the account, it would not be appropriate to include either of the intestacy beneficiaries in any statutory will. I accept the assessment of the Official Solicitor that it would not be in Gladys Meek's best interests to benefit the intestacy beneficiaries.

72. So far as the former deputies are concerned, the factors for and against are the following: They have been there for Mrs Meek when no one else was, and they have done a great deal for her. Against that, however, is the fact that they have abused the trust that they assumed in the most spectacular manner. In my judgment, this is a serious case of breach of trust, meriting Miss Hughes's description of it being "tantamount to daylight robbery".

73. In favour of the former deputies is the fact that Mrs Meek loves them "to bits". There is objective evidence for that in Judith Bartram's note of her recent meeting with Sue Basra at the residential home on 2nd April 2014 (at page 347 of the hearing bundle). Sue Basra said that Mrs Johnson and Mrs Miller did visit Mrs Meek and that she "loves them to bits". Susan Grimshaw in her witness statement said that she did not meet Mrs Miller and Mrs Johnson until Barbara's funeral; but both Barbara and Gladys had spoken extremely highly of them, and they appreciated the support they gave, commenting that they were the only people who gave them any help or took any notice of them.

74. Against that, however, must be set the fact that I have no doubt that Mrs Meek would have been appalled by their behaviour had she been able to know and appreciate its nature, and that once she had broken with any friend or relative she would not brook any rapprochement. In my judgment, that outweighs the fact that Mrs Meek had never

fallen out with either Mrs Johnson or Mrs Miller, as she had fallen out with so many other people.

75. In favour of benefiting the former deputies is the fact that they will suffer as a result of the security bond being called in. As against that, however, is the fact that they have not been candid about the money which was in issue before Senior Judge Lush, and they have made no effort to repay it, even though it is quite clear that they do have, at least in the case of Mrs Johnson, some clear funds available.

76. Miss Hughes also makes the point that Mrs Johnson and Mrs Miller continue to visit Mrs Meek weekly. But as against that she says that it was their own fault that they did not understand their duties, and it is difficult to believe that they could have considered themselves to be acting in Gladys Meek's best interests. She also points to the fact that they did not ensure that Gladys Meek had adequate funds for clothing, and they have not maintained her room in the care home well, and continue to question expenditure.

77. I accept Miss Hughes's submission that, but for their misconduct, the former deputies would have been obvious people to benefit from Gladys Meek's estate, but that their conduct has been outstandingly bad. I accept the Official Solicitor's assessment that neither Mrs Johnson nor Mrs Miller ought to benefit over and above the level of the gifts ratified by Senior Judge Lush.

78. Given the close relationship between the Grimshaws, Susan and Rachel, and the Meeks, Gladys and Barbara, the Official Solicitor accepts that a substantial testamentary gift should go to the Grimshaws. Reasons are given in the Official Solicitor's position statement. Mr Rees accepts, for the panel deputy, that they should benefit from the statutory will, although he questions whether the benefit should be to

the extent of 25 percent of the estate. Miss Hughes points out that the Grimshaws have not expected to benefit; but she observes that just because one does not come along to the Court of Protection to make one's case does not mean that one should be denied the consideration of that court. She submits - and I accept - that modesty and reticence are to be respected. I accept also the point that the principal friendship was that of Barbara, rather than her mother. But, in that regard, it is appropriate to bear in mind that Gladys Meek inherited the major part of her assets from Barbara's estate, and the relationship between Barbara and Susan Grimshaw and Susan's daughter, Rachel, was an extremely close one.

79. I have no doubt that Miss Hughes is right to say that Barbara's own wishes and feelings towards the Grimshaws are a relevant factor because I have no doubt that Gladys Meek would have taken her daughter's wishes and feelings into account. I accept the submission that they are the only people who have any real continuing claim on the bounty of Gladys Meek, albeit to some extent that is simply because she has inherited through her daughter.

80. I accept that they are worthy of a share in Gladys Meek's estate; and, given the absence of any other worthy individual claimants, I accept the submission that the extent of the entitlement should be a quarter. I accept that the beneficiary should be Barbara's god-daughter, Rachel, with substitutionary provision for her issue if she, as is unlikely, were to predecease Gladys Meek.

81. So far as the remainder of the estate is concerned, it seems to me that that should pass to charity. I accept that the charitable beneficiaries identified by the Official Solicitor are appropriate, given what is known about Gladys Meek's wishes and feelings, and her views and beliefs. I accept that it is appropriate for two parts to pass to the

Christadelphian Care Homes, two parts to the National Trust for Scotland, one part to the RSPB and one part to an animal welfare charity. In the absence of any better candidate, it seems to me that it is appropriate for that animal welfare charity to be a local welfare charity, Ashbourne Animal Welfare, whose principal activities are the rescue and re-homing of cats and dogs, the provision of necessary veterinary care and treatment, and the promotion of good practice in animal care and welfare.

82. Had the standing order mentioned in the judgment of Senior Judge Lush in favour of the National Deaf Children's Society been established by Gladys Meek herself, while she still had capacity to manage her affairs, then I would have included that charity as a beneficiary. But it is clearly stated by Mrs Johnson in her witness statement that that donation was set up by Mrs Johnson and Mrs Miller rather than Gladys Meek. In those circumstances, and given that there is no other evidence of any interest on the part of Gladys Meek in the deaf, I do not consider that it would be appropriate to include that charity as one of the beneficiaries under the statutory will.

83. I turn then to the position of the security bond. As to that, I have no doubt whatsoever that that should be called upon in order to redress the wrongdoing on the part of Mrs Miller and Mrs Johnson, the former deputies. I accept the submission that the present means of the former deputies is a factor which should carry very little weight in deciding whether to call in the security bond. I accept Mr Rees's submission that there is really no other option. Senior Judge Lush has declined to ratify the payments that the former deputies have made, and there has been no appeal against that order.

84. If the court does not call in the security bond, the reality is that the present deputy will need to take proceedings, at Mrs Meek's expense, to recover the monies owed as they are likely to be needed for her care during her lifetime. Particularly given the likely

costs of these proceedings, and the consequent effect upon Mrs Meek's existing assets, it would be imprudent in the extreme for the deputy to wait before taking any action as by that stage he could not be confident that he would have the necessary funds available to see the proceedings through. Moreover, Mrs Meek needs the income which would otherwise be generated by the funds which her former deputies have misappropriated.

85. I accept Mr Rees's submission that there can be no proper basis upon which the court can conclude that declining to call in the security bond would be an appropriate step to take. I have already indicated that in my view the appropriate test is the "best interests" test. Even if that is not correct, I would accept that it is plainly a relevant factor. It cannot be in Mrs Meek's best interests to require what is left of her dwindling resources to be expended on litigation when a straightforward alternative is available. I also accept that the whole purpose of requiring a deputy to provide security, the premiums for which are paid at the expense of the incapacitous party, is to put in place a cheap, quick and simple mechanism to reimburse the incapacitous party's estate in the event of a deputy's default.

86. I also bear in mind that despite a year having passed since Senior Judge Lush's judgment, no serious proposals for repayment of any of the sums owing have been put forward. I also bear in mind in that regard that £5,000 said to have been paid over to Codnor Castle had in fact, and unknown to the Court of Protection or (until a couple of days ago) to the present deputy, been retained by the former deputies.

87. I accept that the security bond should be called in. That view is supported by the Official Solicitor on behalf of Mrs Meek.

88. At one stage during the course of the hearing I did consider whether a lesser sum than £250,000 should be called in, such lesser sum representing the benefit that Mrs Miller and Mrs Johnson might otherwise have been expected to receive had they been made beneficiaries under a statutory will. My thinking had been that it would be to penalise the former deputies twice over if the security bond were to be called in, and reparation thereby made to the estate, yet the former deputies were denied any entitlement under the statutory will.

89. Mr Rees opposed such a course. His submission was that because of the way in which they had conducted themselves, and abused their fiduciary position with regard to Gladys Meek, it could not be said to be in her best interests for any reduction to be made in the amount to be called in on the security bond. He emphasised that Gladys Meek and her daughter, Barbara, had lived modestly, and would have been horrified had they known, and appreciated, the nature and effects of the conduct of Mrs Miller and Mrs Johnson. Even if they were now to repay the money back, or if it were to come back to the estate through enforcement of the security bond, it would not be appropriate to allow the former deputies anything.

90. Mr Rees also made the point that although enforcement of the security bond would result in £250,000 coming in, that is considerably less than the amount that Mrs Miller and Mrs Johnson have removed from the estate.

91. Miss Hughes submitted that if any concession is to be made to Mrs Johnson and Mrs Miller, then it should be through the medium of a statutory will, and not through the reduction in the amount for which the security bond should be enforced. The reason for that is that Gladys Meek needs the money brought back into her estate quickly. Care costs have been depleting Mrs Meek's estate over time, and they will represent a

significant factor for the future. The Official Solicitor is very concerned for the money to come back into Mrs Meek's estate so that she can have the security of knowing that her future care home fees will be met.

92. Moreover, Mrs Miller and Mrs Johnson should not be entitled to any consideration by the court in view of their failure to put in place, or even to suggest, any realistic mechanism to effect repayment of the amounts they have taken from Gladys Meek's estate. They have failed to offer any realistic mechanism to replace even the £204,000 that Senior Judge Lush found that they had taken, and their failure to do so indicates a lack of understanding, insight and remorse.

93. In my judgment, the appropriate course the Court of Protection should take in cases of default by a deputy is to call in the security bond almost as a matter of course. In the present case, I am not satisfied that there is any sufficient reason for not taking that course. The whole purpose and object of the security bond is, as has been submitted, to provide a speedy and effective source for remedying any default on the part of a deputy. Enforcement of the security bond in those circumstances should be viewed almost as a matter of course.

94. I reject Mrs Preston's invitation to defer enforcement of part of the security bond until after three months to give the former deputies an opportunity to make reparation, and to defer the enforcement of the balance until after Mrs Meek's death unless circumstances require earlier enforcement. In my judgment, the conduct of Mrs Johnson and Mrs Miller does not merit any such consideration on the part of the court.

95. So, for those reasons, I will direct a statutory will in the terms proposed by the Official Solicitor on behalf of Mrs Meek as her litigation friend; and I will also direct the calling in of the security bond. In my judgment, the amount for which it should be

called in should be the full amount of the bond, in the sum of £275,000. It is acknowledged by Mrs Johnson and Mrs Miller that they owe Mrs Meek £250,000. I am entirely satisfied that the balance of £25,000 represents loss suffered by Gladys Meek's estate as a result of the defaults of Mrs Miller and Mrs Johnson. When one looks at the figures to which I have already made reference, I have no doubt whatsoever that the unnecessary expenditure in legal costs that has been, and will be, incurred by the panel deputy exceeds the sum of £25,000, and therefore the full amount of the bond ought to be called in.

96. The deputy is neutral as to whether the matter should be reported to the police. In my judgment, it would not be in Mrs Meek's best interests for this to be done. Were the police to be alerted to this, I have no doubt that they would wish to contact the deputy, and that further costs would be incurred by him which would have to be defrayed out of Mrs Meek's estate. I am also concerned that any police investigation would raise a serious risk that Mrs Johnson and Mrs Miller would be advised to cease any continuing contact with Mrs Gladys Meek whilst the police investigation, and any subsequent prosecution, were continuing and pending. I am also concerned that a police investigation might result in an approach, or approaches, whether directly by the police themselves, or indirectly through Social Services or some other body, to Mrs Meek; and again that would not be in her best interests. I am also concerned that it may be that any police investigation would involve Mrs Johnson or Mrs Miller in having to fund the defence of those criminal proceedings; and again that might operate to Mrs Meek's detriment in diverting resources away from her continuing care. So, for those reasons, I am not proposing to direct that the panel deputy should refer the matter to the police.

97. In my judgment, this judgment is one publication of which would be in the public interest; and, in accordance with paragraph 22(ii) of the *Practice Guidance* issued by the President of the Court of Protection on *Transparency in the Court of Protection: Publication Of Judgments*, reported at [2014] COPLR 78, the cost of transcribing the judgment should be at public expense.

98. The judgment will, in the first instance, be anonymised so far as individuals are concerned; but I would propose to review that position in the light of any developments there may be following determination of the reference to the President to which reference is made at paragraph 52 of Mr Rees's position statement [*Re: DP; The Public Guardian v JM* [2014] EWHC 84 (COP)]. I appreciate that there may be good reasons why Mrs Johnson and Mrs Miller should have their identities publicised. The reasons are similar to those which were given by Senior Judge Lush in the *Joan Treadwell (Deceased), Public Guardian & Lutz* [2013] COPLR 587 case to which I have already made reference; but I would not propose to do anything more about that until I have had the benefit of the views of the President of the Court of Protection following the application that has been made by the press for permission to name a defaulting attorney in the case of *Re: DP, The Public Guardian & JM* [2014] EWHC B4 (COP).

[Discussions re directions and costs application follow]

POSTSCRIPT: 15 May 2014

99. On 25 April Miss Hughes sent me an email informing me that Mrs Meek had sadly passed away on 21 April (after the execution of the statutory will I had directed). On 8 May I received the draft of this judgment for approval. On the same day I sent an email to all the parties' representatives informing them of my provisional view that

now that Mrs Meek had passed away, there was no reason why my judgment should not be published in full; but that I would welcome representations from the parties on the point. On 12 May I received a characteristically helpful email from Mr Rees stating that his client (the former panel deputy and applicant) had no views one way or the other as to whether the final judgment should be anonymised, that being a matter for the court, but making certain observations on the law. Mr Rees drew my attention to two authorities: *Re: C (Adult Patient Publicity)* [1996] 2 FLR 251 (Sir Stephen Brown P) and *Newcastle upon Tyne Foundation Hospitals Trust v LM* [2014] EWCOP 454 (Peter Jackson J). I accept Mr Rees's submission that neither of those authorities is directly relevant or of any application to the present case. Indeed, the former pre-dates both the Mental Capacity Act 2005 and the Human Rights Act 1998 and the consequent (and qualified) incorporation into domestic law of the European Convention for the Protections of Human Rights and Fundamental Freedoms (the ECHR).

100. For Jason Parkin, Mr Radford had nothing to add to Mr Rees's analysis and observations, and he expressed no firm opinion beyond instinctively being drawn to the fact that there is now no need for anonymity. Mr Radford recognised that the consequences might be hard for Mrs Johnson and Mrs Miller; but he pointed out that they would not be entitled to anonymity in any other form of equivalent civil recovery action. For Lynne Parkin, Mr Ross indicated that his client had no views on the question of the judgment and report being anonymised.

101. Miss Hughes indicated that the Official Solicitor takes the view that as his role as litigation friend ceases on death, he has no further part to play in these proceedings, and he therefore makes no detailed submissions on the anonymisation issue. He does

however raise the issue of Susan and Rachel Grimshaw because they became involved in these proceedings at the Official Solicitor's request, and they are neither parties to, nor legally represented in, the proceedings. Indeed, in the context of not making public information passed to them about the case, the Official Solicitor had informed the Grimshaws that the proceedings were in private. Had Mrs Meek not died, it is said to be very unlikely that they would have been named in any judgment. Now that it is proposed to publish the judgment in full, the Official Solicitor would simply draw the court's attention to the issue of the Grimshaws' rights under Article 8 of the ECHR, which need to be considered as part of any decision about whether they should be named, or should remain anonymous, in the judgment. The court is very grateful to the Official Solicitor and Miss Hughes for raising this issue, and for the assistance that they have provided in this regard.

102. The court received no representations on behalf of either Mrs Johnson or Mrs Miller.

103. I have concluded that this judgment should be published in full, without anonymisation. I accept Mr Rees's submission that this court has the jurisdiction, notwithstanding the death of Mrs Meek, to make an order under rule 91 (2) (b) of the Court of Protection Rules 2007 authorising the publication of the text of the whole of this judgment and of the court's order. By rule 93 (1) such an order may be made at any time and of the court's own initiative, although only where it appears to the court that there is good reason for making the order. Whilst aspects of the Court of Protection's jurisdiction plainly disappear on the death of the protected person (so that, by way of example, it can no longer authorise the making of a will or the making of a gift by the protected person after his death), other aspects (such as the power to make a costs order or to call in a security bond) plainly endure. The fact that rule 93 (1) (b)

provides that an order permitting the publication of the full text of a judgment (under rule 91 (2) (b)) may be made "at any time" makes it clear that the Court has the jurisdiction to authorise the reporting of an unanonymised judgment, even after the protected person's death, provided always that it is satisfied that there is good reason for making such an order. In the present case I am satisfied that there is such good reason; and I make an order under rule 91 (2) (b) accordingly authorising the publication of the text of the whole of this judgment on an unanonymised basis.

104. I accept that the death of the protected person (P) will not automatically render it appropriate to authorise the publication of any relevant Court of Protection judgment in unanonymised form; but it is clearly a relevant consideration. P's death means that P no longer has any need for the special protection afforded by anonymity. However, as Sir Stephen Brown recognised in *Re C* (cited above), the court must consider the potential effect on P's relatives and other family members, on clinicians treating P, and on persons caring for P, if they knew that on P's death, their anonymity might be lost. That public interest also extends to those who provide witness evidence for the purposes of Court of Protection proceedings. The court must be sensitive to the article 8 right to respect for the private and family life of such persons, as well as of P. Such sensitivity must extend not only to those who feature in the proceedings presently under consideration, but also to those involved in any previous relevant proceedings, whose identities may be exposed by the publication of an unanonymised judgment in the instant proceedings. It is in the public interest that those who aspire to care for an incapacitous person, or to manage his affairs, should not be exposed to the full glare of public criticism if they genuinely fall short. To do so might discourage others to take on such a role. But the court must also be sensitive to, and weigh in the balance, the article 10 right to freedom of expression, including the right to receive and impart

information. It is an important constitutional principle, and an aspect of the rule of law in any democratic society, that justice should be open to public scrutiny; and the media form the conduit through which the public may receive information about court proceedings. It is clearly in the public interest that those who may be found, not simply to have fallen short of the high standards required of them by the Court of Protection, but to have abused the trust placed in them properly to care for P or to manage P's affairs, should be exposed to the full glare of publicity. The knowledge of the risk of this may serve to deter others from doing the same.

105. In the present case, I am satisfied that the publication and reporting of the unanonymised text of this judgment affords no risks (whether to their article 8 rights or otherwise) to anyone other than Mrs Johnson and Mrs Miller. The statutory next-of-kin of Mrs Meek, and also her former panel deputy, have no objection. Mrs Grimshaw and her daughter can only receive credit for their role in P's life, and for their limited, and modest, involvement in this litigation. There is no conceivable criticism of any of those who have treated or physically cared for Mrs Meek during her lifetime. Even the conduct of Mrs Miller and Mrs Johnson towards Mrs Meek is not without its positive aspects since (as I have recorded) they have been there for Mrs Meek when no one else was, they have done a great deal for her, and she loved them to bits. However, there is force in Mr Radford's point that had this litigation taken the form of a claim to recover moneys allegedly procured as a result of undue influence exercised against a person now deceased, there would have been no question of anonymity. In my judgment, the general rule (in rule 90(1)) that hearings in the Court of Protection are to be held in private (which, as a **general** rule, should, in my judgment fall to be reconsidered) was never intended to afford a shield to those who abuse the trust of those whose interests the rule was promulgated to protect. In my judgment, not only is

there good reason to make an order in the present case, but there is no countervailing reason not to do so.