Cases No: 11475121 &
11475138

IN THE COURT OF PROTECTION

ON APPEAL

Sitting at
26 Park Crescent
London W1B 1HT

Date: 25th November 2008

Before :

HER HONOUR JUDGE HAZEL MARSHALL QC

Sitting as a nominated Judge of the Court of Protection

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Re: S and S (Protected Persons)

Between :

C	**Appellant**
- and -	
V	**Respondent**

Miss Barbara Rich (instructed by Harcus Sinclair) for the Appellant
Miss Beverly-Ann Rogers (instructed by Halliwells) for the Respondent
Mr Thomas Entwistle (instructed by Boyes Sutton & Perry) for S and S

Hearing date: 20th and 25th November 2008

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic

Her Honour Judge Hazel Marshall QC

Her Honour Judge Marshall QC:

Introduction

1. This is an appeal from an order of DJ Rogers made on 2nd July 2008 after a hearing convened pursuant to r 89 of the Court of Protection Rules 2007 ("the Rules"). This took place at the request of (inter alia) the appellant C, for reconsideration of a previous order of DJ Rogers made on paper on 4th February 2008 appointing her sister, V, as Deputy for their parents, Mr and Mrs S.

2. That order dismissed objections made by C, by C's adult children, and by Mr and Mr S themselves. They had all initially taken the objection that Mr and Mrs S did not lack capacity. However, by the time of the reconsideration hearing, they had changed their views to accept that a Deputy must be appointed, but to propose that it should be an independent professional and not V. At the hearing, Mr and Mrs S, C and V each appeared by the counsel representing them today.

3. Following DJ Rogers' order, C sought permission to appeal under r 173 of the Rules. I granted this on 29th August 2008. As will be gathered, Mr and Mrs S themselves had expressed views as to whom they would wish to have managing their affairs (it now being accepted, on medical evidence, that they are not capable of doing so themselves), and these views are at odds with the District Judge's order. The central issue in the appeal, therefore, is whether the District Judge erred in law, or in the matters which he considered or failed to consider in reaching his decision, and in particular whether he placed insufficient weight, in all the circumstances, on the expressed wishes of Mr and Mrs S. In the context of the new policy of the Mental Capacity Act 2005 ("the Act") I considered this to be a fit subject for an appeal.

4. Mr and Mrs S did not seek permission to appeal. I directed that provided the solicitor who had had instructions to represent them certified that s/he considered them capable of giving instructions with regard to the subject matter of the case and the appeal, they should be joined in to the appeal with permission to appear. Such certificate was given, and Mr Entwistle has again represented them. They have supported the appeal.

Background facts

5. Mr and Mrs S are now aged respectively 83 and 81. Mr S was a high-powered executive in a major construction company until his retirement at age 63, and plainly had a formidable intellect and a good deal of energy in his younger years. I do not think Mrs S has ever had a career, and she is also dyslexic. She has therefore, unsurprisingly, left the conduct and management of the family's financial affairs mainly to her husband. They live in a four bedroom house in a relatively high class area of London. Apart from their house, worth probably over £500,000, they have around £800,000 in free investments, and an income of about £66,000 pa, although, against that, the costs of their care are quite high. They have thus had, and still have, a comfortable standard of living.

6. Mr and Mrs S have two daughters, C, now aged 59, who is divorced, works as Executive Assistant to a director of a major company, and has two adult sons who are respectively an accountant and a barrister, and V now aged 55, who is married without children, has a career in a successful consultancy company with her husband, and is shown by the evidence to be an eminently efficient and organised administrator. Both daughters plainly love and care deeply about their parents. C lives very near them and V lives only five miles away. Both C and V are accustomed to visiting Mr and Mrs S several times a week, and they have both clearly, for a long time, done a great deal to look after them and see that they were cared for. Unfortunately, however, the daughters no longer get on with each other and are in contact only by correspondence or email.

7. In 2004, when relations between the daughters were apparently better, Mr and Mrs S each executed an Enduring Power of Attorney ("EPA") appointing both daughters, jointly, to be their Attorneys such power to continue in the event of their losing capacity. There is no suggestion that they lacked capacity to make this appointment. In doing so, they made a conscious decision that they wished the appointees to act jointly, rather than jointly and severally. The difference is explained in the notes to the form as being

    - jointly (that is they must all act together)
    - jointly and severally (that is they can all act together but they can also act separately if they wish).

8. Mr and Mrs S were each in deteriorating health. Mr S is diabetic, and as already mentioned, Mrs S is dyslexic. In late 2006, the question whether the time had now come to register the EPAs was raised, either by Mr and Mrs S's GPs or by V, and gave rise to disagreement between the daughters. C did not wish to register the EPA, she says because she did not think her parents had lost capacity, and because of the indignity for them of doing so; she wished to continue the arrangements as they existed. V did wish to register the EPA. It was she who was conducting her parents' financial affairs, bookkeeping, bill paying and so on, and she was therefore concerned at the legality of the position, with her parents' capacity being questioned. She was also concerned that the care of Mr and Mrs S, arranged by C, was not of an adequate standard, and that the carer was either an illegal immigrant or at any rate without a valid work permit.

9. With C refusing to join in a joint registration, V was advised that her only available course was to apply to the Court of Protection to be appointed Receiver for her parents (this being the regime under the former legislation). She made such an application on 29th April 2007, and for that purpose she commissioned a report on Mr and Mrs S by Dr Monica Greenwood.

10. Dr Greenwood interviewed Mr and Mrs S for about 30 minutes each. Mr S, in particular, was far from pleased that Dr Greenwood had come, and was not very co-operative. Dr Greenwood's conclusions, in a report of 30th April 2007, were that Mr S had a dementing illness of moderate severity, lacking planning, losing memory and lacking insight, such that it would be appropriate to register his EPA, but she added that in view of the dispute between V and C it would be in Mr S's best interests for an independent Receiver to be appointed. This opinion would appear to have been based on Mr S's expressed unhappiness at the quarrelling between C and V. Dr Greenwood reached a similar, though less detailed, conclusion in relation to Mrs S.

11. Both C and Mr and Mrs S were notified of V's application. C and her two sons each registered objections, arguing that the route of registration of the EPAs was to be preferred, and that V's application was premature because there was no want of capacity. Mr and Mrs S gave instructions to a firm of solicitors, ("BS&P"), in which they each recorded their own wishes to object to V's application, referring to, and confirming, their wishes that the joint EPA should operate, and stating that they did not wish either

daughter to act as sole Receiver. It is plain, and is not disputed, that these letters were composed for Mr and Mrs S by some other person, by implication C or one of her sons. Nonetheless, these wishes are consistent with comments which Dr Greenwood recorded.

12. The tenor of the situation quickly became hostile. C thought it appropriate to try to mobilise objections from other relatives as well, and corresponded with the Public Guardianship Office ("PGO"). The PGO rejected this as pointless, and enquired whether there was no possibility of a joint registration of the EPAs being made. In the course of the correspondence, a statement was made by the PGO, in a letter of 17th July 2007, that, since resources were not an issue in this case, if the two joint appointees were unable to act together, the Court of Protection would favour the appointment of an Independent Receiver. At that time, of course, the Court of Protection was effectively part of the PGO, as this was prior to the clear separation effected by the Act, when the Court of Protection was reconstituted on 1st October 2007. C heard nothing further of substance from the court until notified of DJ Rogers' order in February the following year.

13. At about the same time, there were negotiations within the family, with the help of a cousin from Norfolk. The sisters were requested to agree to register the EPAs together. V had been willing to agree but C was not persuaded that it was yet necessary.

14. Meanwhile, Mr and Mrs S had commissioned their own psychiatric report, from Dr Nori Graham. It is dated 16th July 2008. She had visited them twice and interviewed them for three hours each in total. Her conclusion was that neither was at a stage where they were incapable of managing their affairs, but that they required support and help to do so. By the same token, she considered they were still capable of revoking and making a fresh EPA, and it was therefore premature to register the existing ones. She too expressed the view, though, that when the time came to register the EPAs, then if the daughters could not act jointly an independent Receiver would be appropriate.

15. At the first hearing of V's application, on 19th July 2007, faced with the two conflicting reports, the court ordered yet a further report from the Lord Chancellor's visitor, Dr T G Tennent. Obviously this was likely to be determinative. Dr Tennent did not report until

after the Act came into force on 1st October 2007 - thereby also converting V's application to be appointed Receiver, into one to be appointed a Deputy.

16. Dr Tennent's reports are dated 5th October 2007. They are relatively brief. He concluded that each of Mr and Mrs S suffered from a degree of dementia so as to be incapable of executing an EPA, or of managing his or her affairs (by reason of mental disorder) and that the existing EPAs should be registered. However, his report records that each of Mr and Mrs S had expressed a wish to retain, and not to change, the arrangements made in the existing EPAs, ie a joint, and not a joint and several, appointment of their daughters.

17. On being shown Dr Tennent's report, Dr Graham wrote an open letter dated 27th November 2007, which criticised it for being overhasty, including some obvious errors, and not recognising the spirit of the new Mental Capacity Act. However, she reluctantly agreed that, in view of the opinion expressed by Dr Tennent, and the inappropriateness of subjecting Mr and Mrs S to yet further assessment, the only way forward would now appear to be for the EPAs to be registered.

18. In the light of this, C wrote to V offering to agree to register the EPAs. However, by this time the disagreement between the two daughters over the care arrangements for Mr and Mrs S had become seriously entrenched. Tensions were rising ever higher, and solicitors were heavily involved. V was not willing to agree to a joint registration whilst these issues remained unresolved.

19. On 4th February 2008, DJ Rogers considered the files, and under a "Directions Order" concluded that on the basis of Dr Tennent's report the EPAs ought to be registered, that as no application had been made, and it was apparent from the disagreements between the two daughters that they could not work jointly, the only means by which the court could ensure that the affairs of Mr and Mrs S were properly managed was to appoint a Deputy, and that the objections made, and that the evidence before him, did not suggest that V was unsuited to that role, or unable to act. V was therefore appointed Deputy for Mr and Mrs S, subject to final order and security.

20. On receipt of the sealed order, both C and Mr and Mrs S made applications for review of the order at an oral hearing. C applied for the order to be varied by substituting an order that a professional Deputy be appointed in place of V. Mr and Mrs S both applied for the order to be revoked on the grounds that neither of them lacked capacity to manage his or her own affairs. However, by the time of the hearing before DJ Rogers, they conceded this point and, instead, supported C's application.

21. Evidence was put before the court in advance of the hearing on 16th June 2008. I need to record that C made various criticisms impugning V's conduct, integrity and even-handedness in managing Mr and Mrs S's financial affairs, as well as relying on the fact that Mr and Mrs S had both expressed the wish that if both daughters could not act together, neither should do so alone. Bearing in mind that her attention had been directed by the terms of the PGO letter of 5th June 2007, and by DJ Rogers' order, to the question of V's *suitability* to act, this is perhaps not surprising, but it was, of course, highly inflammatory. Upon V's answering these accusations, and with a further round of relatively late evidence being produced, C accepted and continues to accept, that much of what she had said was based on misunderstandings, that there are no grounds for questioning V's integrity, and that V is, in principle, a perfectly suitable person to be appointed as a Deputy. However, it would appear that this issue was only firmly put to rest at the hearing in front of DJ Rogers, and C still contended that V was not the appropriate Deputy.

22. Before DJ Rogers, it was therefore agreed that a Deputy must be appointed for Mr and Mrs S, and the only real issue was whether it should be V, or an independent professional. A further issue as to whether Mr S's accountant would be appropriate as such independent professional, instead of V, was also raised, late in the day by C. This was opposed by V, with particular objection to the introduction of late evidence on this score. The evidence was not admitted, and I have not investigated how far this point was therefore pursued at the hearing itself. It is not an issue with which I am concerned today.

The law

23. Before considering the judgment under appeal, I should refer to the relevant sections of the Act. The Act, of course, deals with all forms of decisions which may have to be

made in relation to persons who lack capacity, in the field of their property and affairs, and as to their health and welfare. Such decisions may be major or minor, and the guidance as to principle is of general application. I set out below only those parts of the guiding sections which are of particular relevance to this case, and not those concerned in particular with other matters such as medical treatment.

24. Section 1 of the Act sets out general principles, which are to apply for the purposes of the Act. Of particular relevance are the following subsections:

> "(2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

25. Section 2 of the Act makes it clear that a want of capacity is to be judged in relation "to a matter" - ie it is issue specific, and not to be treated in blanket fashion - but is then to be determined on balance of probabilities.

26. Section 3 sets out an analysis of what constitutes an inability to make a decision, with an emphasis on supporting the person in difficulty to make his or her own decision if possible.

27. Section 4 deals with "best interests". The Act does not so much lay down a list of matters which are to be taken into account, in determining a person's "best interests" as direct particular steps to be taken in the course of doing so. The relevant sub-sections for present purposes are

"(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.
…

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.
…

(6) He must consider, so far as is reasonably ascertainable—

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
(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.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
(b) anyone engaged in caring for the person or interested in his welfare,
(c) any donee of a lasting power of attorney granted by the person, 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 subsection (6).

28. Section 16 of the Act enables the Court, if appropriate, to appoint a Deputy on behalf of "P". Such power is to be exercised in accordance with the provisions of the Act and in particular the principles set out in s1 and the guidance on determining what is in P's best interests set out in s4. It also makes it clear that the court has very wide powers to craft an order according to the circumstances of the case in P's best interests.

29. Further guidance is given in the statutory Code of Practice which has been laid down to assist persons charged with making decisions under the Act to fulfil their duties. These also help, therefore, to illustrate the underlying approach of the legislation. Of particular relevance is Chapter 5: "What does the Act mean when it talks about "best interests"? This emphasises within its Quick Summary, that

- the person whose capacity is in issue is to be encouraged to participate in making the relevant decision;

- the decision maker must try to identify all the things that the person lacking capacity would take into account if they were making the decision for themselves;

- the person's views, or their likely views, should be ascertained or deduced, especially any views expressed in the past which might shape the decision;

- close relatives, carers or persons who may have been trusted by the person to express views on his best interests should be consulted for those views or for other relevant information;

- an option which is less restrictive of the person's rights is to be preferred to a more restrictive one.

30. From the later discussion in the Chapter one or two more material comments emerge. It is pointed out that even if a person lacks capacity to make the decision himself, he may still have views on relevant matters affecting the decision and its outcome which help in working out what is in his best interests (Para 5.22). Whilst the person's views and wishes must be fully taken into account, they will not necessarily be the deciding factor in working out what is in his best interests, but must be considered alongside other factors (Para 5.38). If a decision-maker fails to follow the views of the person lacking capacity which have been previously expressed in writing, then he should record his reasons for so doing, so as to be able to justify his decision subsequently (Para 5.43).

31. Although I have drawn attention to the above points, this in no way detracts from the general overall principle that the taking of a decision on behalf of a person who lacks capacity to do so for himself must be done in his best interests with regard to <u>all</u> relevant circumstances (s 4 (2)), ascertained by taking steps including those set out in the rest of that Section.

The judgment under appeal

32. DJ Rogers gave his judgment, deciding to confirm the order which he had made on 4th February 2008, on 2nd July 2008.

33. In his judgment, he introduced the case, stated that the sole issue was now whether the Deputy to be appointed should be V or an independent professional, and described Mr

and Mrs S and their assets and income. He then noted the jurisdiction under the Act and recorded his own satisfaction that the qualifying condition in s.1, namely that Mr S and Mrs S each lacked capacity, was fulfilled.

34. He then said that he would refer to such of the evidence and issues as he considered to be "*truly determinative*" of the "*narrow issue of whether V should be appointed as deputy*" and summarised the submissions of the parties.

35. After noting that Miss Rich on behalf of C *"correctly submitted that their capacity to give instructions and tender views was clearly distinct from their capacity to manage their own affairs"* he summarised the submissions, as being, on behalf of C and Mr and Mrs S, that the proper approach was to appoint an independent Deputy so as to give parity between the sisters and to give effect to the discernible wishes of the parents, and as being on behalf of V, as being that the letters of instruction from Mr and Mrs S were really valueless, that she had good answers to the various allegations and practical objections to her being Deputy made by C, (although he recorded that it was accepted that V's integrity was not in issue), and that the argument for "parity" was no argument against V being Deputy, bearing in mind that she (V) had conducted her parents' financial affairs for many years and would naturally keep C informed.

36. He then turned to the law, referring to s16 of the Act (the power to appoint a Deputy) in general and s.19 (4) relating to the appointment of two or more deputies. He reminded himself that the court's discretion to appoint a Deputy was a decision which must be taken in the best interests of "P" (ie Mr and Mrs S): see s.1 (5) of the Act. He referred to the court's preference to appoint a family member as a Deputy wherever possible, on grounds of such a person's useful familiarity with and closeness to P, and also of economy, and listed the various reasons why a particular person might nonetheless be thought an unsuitable candidate for deputyship, such as lack of expertise, poor financial history, having aligned him/herself with one faction in any dispute close to P, or having previously failed to act in Ps' best interests. He reminded himself of the particular matters to which he was enjoined to have regard under ss 4 (3) – (7), when considering P's best interests, in all the circumstances of the case.

37. He then gave his conclusions. He recorded that V's competence and integrity were not an issue, and that he found the concerns and criticisms of V's ability to administer Mr and Mrs S's affairs, or of things she had previously done when so doing, to be unfounded and in fact "*unnecessary and unsupported*". He further found that these arose from a "*sense of grievance*" affecting C, and that her motivation in making her objections were "*clear. If I am not to be appointed then neither should my sister be appointed*". Whilst accepting that the letters from Mr and Mrs S expressed a preference for both sisters to act, he attributed these to influence from C or her sons, which caused him to reduce their weight. He dismissed the argument that the deliberate execution of an EPA to two persons jointly (rather than jointly and severally) carried with it an implication that if one person could not act, the other should not act, and he dismissed what he called the "*overarching …concept of parity*" which he saw as a foundation of Miss Rich's submission, finding nothing in the Act or the Code of Practice to support it. He held that the effects of appointing one particular family member were simply one of the circumstances to be considered in the particular case. He then continued:

> *"Having regard to all the evidence and the expressions of Mr and Mrs [S], I consider that whilst a preference was given for both daughter s to act and a wish for an independent professional, that such expressions whilst within the capacity of Mr and Mrs [S] to make, have to be mapped as against their lack of capacity to manage and control their property and affairs. The court is looking deeper than the mere issue of preference or choice, but as to who can and could effectively deliver the administration of their property and affairs in their best interests"*

38. He concluded that, V having demonstrated her ability to do this in practice for four years without complaint by Mr and Mrs S, the appointment of a professional Deputy was *"neither appropriate or necessary*". As to the possibility of the appointment of V causing dispute, he dismissed this, asking rhetorically: What if C might disagree with an independent Deputy? He then continued

> *"Balancing the expressions of Mr and Mrs S with the positive elements of the continuance of involvement of V ….. I consider that V is suitable to act as Deputy."*

39. Having further considered the effects of the disappointment of C at this decision, and the possible effect on Mr and Mrs S of a decision which was not in accord with *"the choice put forward by them"* he remained, on balance, satisfied that *"such an order is still warranted and*

in the parents' best interests" because of their being used to V dealing with their affairs and because of the greater potential for their involvement and dignity than might be possible with a professional.

40. For those reasons he proceeded to confirm his order made on 4th February 2008, appointing V as sole Deputy.

Appeal

41. It is common ground that the principles which are to be applied on an appeal such as this under r 179 of the Court of Protection Rules are identical in effect to those in CPR Part 52 (1). The appeal should therefore only be allowed if the decision of the court below was either (a) wrong, or (b) unjust because of some serious irregularity in the proceedings below (r 179 (3)). It is common ground that only (a) applies in this case.

42. Both Miss Rich and Miss Rogers refer me, for guidance, to *Tanfern Ltd v Cameron MacDonald* [2000] 1 WLR 1311 at paragraph 32 in which Brooke LJ approved the following passage of Lord Fraser in *G. v G. (Minors: Custody Appeal)* [1985] 1WLR 647 at 652:

> "…*the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."*

43. Clarke L.J. also addressed the basis upon which an appellate court could interfere in *Asiansky Television Plc v Bayer-Rosin* [2001] EWCA 1792 at paragraph 14:

> *On a review of a decision like that of Master Eyre which involved the exercise of discretion the appeal court, subject to one proviso [where the appeal court receives fresh evidence], is limited to considering whether he took account of irrelevant considerations, or failed to take account of relevant considerations, or whether he was wrong in the sense described by Lord Fraser in G v G in the passage quoted by Brooke L.J."*

44. Miss Rich submitted that the learned judge's decision was wrong, and that he had erred in law both in substance and approach. As a general matter, he had approached the reconsideration hearing from the wrong starting point, namely on the basis that it was for

the applicant to justify changing his order of 4th February 2008 made on paper, rather than an exercise simply of making the order that appeared to be right after hearing the whole of the evidence and arguments unavailable when the paper order was made. This had distorted his approach to the real issues and arguments.

45. Specifically, as to the decision she submitted that

    (a) He fell into error in refusing to draw any inference as to Mr and Mrs S's wishes from the fact that a joint EPA rather than a joint and several EPA had been executed.
    (b) He had wrongly discounted the evidence of the letters of instruction completely, failing to take into account the other evidence that this had been the consistent instruction of Mr and Mrs S at all times.
    (c) He had wrongly given insufficient weight to the expressed wishes of Mr and Mrs S, either for the reasons given above or by wrongly discounting those wishes because of their acknowledged incapacity to manage their own affairs *in toto*. In particular, he had failed to appreciate that Mr and Mrs S's lack of capacity to execute a replacement for their EPAs lay in their inability to understand the concepts of doing so, and not in their inability to have valid views as to who they wanted to be in charge of their affairs.
    (d) He had misdirected himself by failing to distinguish between the *administration* of the incapable party's affairs, and their *management*. Whilst the suitability of V as an administrator (competence and integrity) was not questioned, the issue was whether it was appropriate for her to be the manager of Mr and Mrs S's affairs in all the circumstances.
    (e) He had in any event failed to consider his own point that a family member might be unsuitable if s/he had aligned himself with one faction in a family dispute.

46. Mr Entwistle supported Miss Rich's arguments, but emphasised particularly that the District Judge had gone wrong in failing to give sufficient weight to the wishes expressed by Mr and Mrs S. Whilst it might be right to view the letters of instruction with caution, these letters were not isolated, but were consistent both with the wishes of Mr and Mrs S appearing from the form of their EPAs made when they undoubtedly had capacity, and their wishes consistently expressed for over a year and in situations where any influence

giving rise to the letters of instruction was not operating. He submitted that the object of the new legislation was that people should be entitled to make those decisions which they have the capacity to make, and their preferences, albeit not decisive, must be treated as weighty, and should not be overruled unless there was an even more weighty factor in the other direction.

47. That the District Judge had given insufficient weight to the wishes of Mr and Mrs S, was, he said, betrayed by his description of these as "mere" preferences. He had in addition placed too much weight on his own perceptions of the detrimental effects for Mr and Mrs S of a third party being appointed rather than V, which effects were in any event overstated.

48. Miss Rogers emphasised that this is an appeal, and that therefore, having regard to the guidance above, C must show that the judge took into account some irrelevant matter, or failed to take into account some relevant matter, or reached a decision which was "Wednesbury" unreasonable, ie that no reasonable judge could have reached it. She submitted that DJ Rogers had plainly considered carefully (she would submit) all relevant matters, including the wishes expressed by Mr and Mrs S, and his decision was well within the ambit of being an objectively supportable one. Indeed, she appeared to go almost as far as to submit that unless it could be shown that DJ Rogers had given those wishes no weight at all, their weight was an assessment within his discretion, and there was really no basis on which his decision could be impeached.

49. She submitted that C's approach on the appeal sought to elevate the wishes of Mr and Mrs S to one of "paramount" (a word indeed used by Miss Rich) importance, whilst the law showed that it was simply one of the matters to be taken into consideration in deciding what was truly in Mr and Mrs S's best interests, none of which had a primacy, nor even a ranking in priority. The judge had therefore approached the matter correctly. Otherwise, she generally supported the judge's reasons based on his views of C, and the family dynamics, and submitted that as he had taken into account all relevant factors in deciding, in his discretion, what was in the best interests of Mr and Mrs S, there were no grounds for interfering with his decision.

Conclusion

50. I have come to the conclusion that this appeal should be allowed. Before giving my detailed decision, I will make some observations about the statutory regime, which I have set out above at paragraphs 23 – 31.

51. What is apparent from that account is that there has been a whole sea change in the attitude of the law to persons whose mental capacity is impaired. The former approach was based on a stark division between those who had capacity to manage their own affairs, and those who did not. The former took their own decisions for better or worse, and the latter fell under a regime in which decisions were made for them, perhaps with a generous, and in some cases patronising, token nod to their feelings by asking them what they wanted, and then deciding what nonetheless was objectively "best" for them.

52. This is no longer appropriate. The statute now embodies the recognition that it is the basic right of any adult to be free to take and implement decisions affecting his own life and living, and that a person who lacks mental capacity should not be deprived of that right except insofar as is absolutely necessary in his best interests.

53. Two major changes are therefore embodied in the statute. The first is official recognition that capacity is not a blunt "all or nothing" condition, but is more complex, and is to be treated as being issue specific. A person may not have sufficient capacity to be able to make complex, refined or major decisions but may still have the capacity to make simpler or less momentous ones, or to hold genuine views as to what he wants to be the outcome of more complex decisions or situations.

54. The second change is the emphasis throughout the Act on the ascertainment of the actual or likely wishes, views and preferences of the person lacking full capacity, and on involving him in the decision making process. This approach underlies s.1(2) (presumption of capacity), s 1(3) (duty to help P to make his own decision if he can), 1(4) (recognition that a person's capacity, and therefore right, to make decisions does not depend on how objectively "wise" those decisions are), s1(6) (P's rights and freedom of action should be restricted as little as practicable), and s 4(4) (duty on decision maker to involve P in decisions), and it is the only conceivable reason for imposing the duty to

consider P's wishes or likely wishes (s 4.(6)) and to take trouble to ascertain them s (4 (7)).

55. In my judgment it is the inescapable conclusion from the stress laid on these matters in the Act that the views and wishes of P in regard to decisions made on his behalf are to carry great weight. What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?

56. The Act does not, of course, say that Ps' wishes are to be paramount, nor does it lay down any express presumption in favour of implementing them if they can be ascertained. Indeed the paramount objective is that of P's "best interests". However, by giving such prominence to the above matters, the Act does, in my judgment recognise that having his views and wishes taken into account and respected is a very significant aspect of P's best interests. Due regard should therefore be paid to this recognition when doing the weighing exercise of determining what is in P's best interests in all the relevant circumstances, including those wishes.

57. As to how this will work in practice, in my judgment, where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impracticable as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources (ie whether a responsible person of full capacity who had such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this..

58. That might be some extraneous consequence, or some other unforeseen, unknown or unappreciated factor. Whether this further consideration actually should justify overriding P's wishes might then be tested by asking whether, had he known of this further consideration, it appears (from what is known of P) that he would have changed his wishes. It might be further tested by asking whether the seriousness of this

countervailing factor in terms of detriment to P is such that it must outweigh the detriment to an adult of having one's wishes overruled, and the sense of impotence, and the frustration and anger, which living with that awareness (insofar as P appreciates it) will cause to P. Given the policy of the Act to empower people to make their own decisions wherever possible, justification for overruling P and "saving him from himself" must, in my judgment be strong and cogent. Otherwise, taking a different course from that which P wishes would be likely to infringe the statutory direction in s.1(7) of the Act, that one must achieve any desired objective by the route which least restricts P's own rights and freedom of actions.

59. I turn now, then to the facts of this appeal and why I find that it must be allowed. In essence, I find that the learned judge's decision was wrong, and that he fell into error in failing to give due weight to the wishes of Mr and Mrs S, both as a matter of evidence and in principle, and he gave undue weight to the supposed disadvantages to them attendant on having an independent Deputy appointed, as being sufficient to override those wishes. He was led into this error by a wrong approach to the 16th June hearing, and his attitude to the dispute between V and C.

Approach to the 16th June 2008 hearing

60. This is not a central plank of Miss Rich's submissions; she very rightly concentrated her criticisms on the way in which the District Judge had purported to deal with the issue of Mr and Mrs S's wishes, but she did raise it as a matter which, she submitted, had brought about the judge's attitude to that main issue, and which she said was erroneous.

61. The 16th June 2008 hearing was a reconsideration of the order made by DJ Rogers himself on 4th February 2008. Such a reconsideration is not an appeal. The processes in the Court of Protection are intended to give the court wide flexibility to reach a decision quickly, conveniently and cost effectively where it can, whilst still preserving a proper opportunity for those affected by its orders to have their views taken into account in full argument if necessary. To that end, on receiving an application, the court can make a decision on the papers, or direct a full hearing, or make any order as to how the application can best be dealt with. This will often lead to a speedy decision made solely

on paper which everyone is content to accept, but any party still has the right to ask for a reconsideration.

62. If this occurs, the court should approach the matter as if making the decision afresh, not on the basis that the question is whether there is a justifiable attack on the first order. The party making the application has not had a proper opportunity to be heard, and should be allowed one without feeling that s/he suffers from the disadvantage of having been placed in the position of an appellant by an order made without full consideration of his points or his views.

63. Of course it is likely that there will be further material introduced, further argument deployed or even, as in this case, a change of stance by parties concerned, but that is just a product of events developing. The point is that the court should consider the matter anew, with the evidence and argument then available, and not from the standpoint that the issue is whether the original order was wrong. The judge appears to have approached the matter as if the issue was whether V should be removed, ie whether the initial order was unjustified, rather than "who is the better person to be appointed in the best interests of Mr and Mrs S?"

64. To approach the matter in that way inappropriately entrenched the initial decision. It also, in this case, led naturally to the second way in which the learned judge fell into error, namely that he leaned towards treating the 16th June hearing as an adversarial contest between C and V, rather than as the inquisitorial exercise of ascertaining which course of action was more in Mr and Mrs S's best interests. He plainly disapproved of the objections which C had raised regarding V's personal suitability to be Receiver or Deputy, regarding them as "*unnecessary and unsupported*". They were, however, withdrawn at the hearing and V's integrity was agreed not to be in issue. That should have made those objections, the fact that they had been made, and the reason why they might have been made virtually irrelevant to the true issue before the judge. He had indeed recognised them to be "unnecessary". However, he still thought it necessary, in his judgment, to explain why he regarded the objections as unfounded, and his judgment has the clear undertone that, in his view, C did not "deserve" the result for which she was contending because the conduct of which he disapproved ought not to be rewarded with success. Whilst that may well be a proper concern of a court exercising its discretion in

an adversarial dispute between two parties, it is not an appropriate consideration where the issue is what is in the best interests of a third party. It is merely part of the context in which that issue must be decided. The dispute, however, regrettable it may be, and whoever is more in the right, is simply a fact, the consequences of which have to be managed in Mr and Mrs S's best interests.

65. I find that Miss Rich is right when she submitted that the evidence about whether V was a "suitable" person to act as Deputy became a distraction. In my judgment, this aspect, and his views on it, distracted the learned judge from the sole question which was for decision (namely: who is the better Deputy for Mr and Mrs S?) and reinforced the wrong approach, ie considering whether C could, in effect, justify removing V.

Substance of the decision

66. None of the above would matter, however, if the actual decision of the learned judge had been right, and properly arrived at, as if taken on a fresh assessment of the matter, ie properly considering all and only the material evidence before him and what was in Mr and Mrs S's best interests according to the Act. However, on analysis of his judgment, that was not what happened. In particular, as submitted by Miss Rich and Mr Entwistle, he did not pay sufficient regard to the wishes of Mr and Mrs S, either on a proper application of principle, or on a proper assessment of the evidence in the case.

67. In my judgment the learned judge was wrong to dismiss as non-existent the implications from the EPAs' having been joint appointments of the two daughters and not joint and several appointments. The difference between those two regimes is clearly spelled out in the notes on the form itself, and it must be assumed was appreciated and intended by Mr and Mrs S. On that basis, it was an almost inescapable inference that they, as donors of the powers, wanted relevant decisions either to be joint, or to be made by neither appointee, and did not want their affairs to be dealt with by the sole decision of one appointee alone.

68. I am not to be taken to be suggesting that this factor weighs conclusively against ever making an appointment of one only of jointly appointed Attorneys to be a Deputy, in all circumstances. For example, one donee of the power may have died or emigrated, or

there may be other unusual considerations. However, in my judgment it does raise a presumption, of greater or lesser weight, in favour of appointing a third party rather than one of the original joint appointees. The presumption that sole decisions would be unacceptable to the donor of the power may be less strong in situations where the donees are not linked, such as where they are, perhaps, suitable professional acquaintances. However, where the appointees are two relatives of similar relationship to P, the inference is rather stronger.

69. Mr and Mrs S knew their daughters' personalities far better than the court ever could, or should presume to investigate. They may well have had very good reasons for taking the view that the dynamics of their family overall were best served, in their own best interests, by ensuring that either both daughters should take decisions jointly for them, or that their views should merely carry equal weight in the decision making process of a third party, and that neither should have ascendancy, actual or perceived, over the other. To dismiss their deliberate choice of a joint appointment rather than a joint and several appointment as signifying nothing was therefore, in my judgment, illegitimate.

70. The learned judge rejected Miss Rich's submissions as to "parity" on the grounds that there was no such concept to be found in the Act or the Code of Practice. That is correct. However, as Miss Rich submits, this seems to be a mischaracterisation of her submission, which was in fact making the point made above.

71. The third error highlighted by Miss Rich is, however, the central one, and it is the criticism of the passage of DJ Rogers' judgment already cited above

> *"Having regard to all the evidence and the expressions of Mr and Mrs [S], I consider that whilst a preference was given for both daughter s to act and a wish for an independent professional, that such expressions whilst within the capacity of Mr and Mrs [S] to make, have to be mapped as against their lack of capacity to manage and control their property and affairs. The court is looking deeper than the mere issue of preference or choice, but as to who can and could effectively deliver the administration of their property and affairs in their best interests"*

72. As regards the "expressions" of Mr and Mrs S, the learned judge in fact refers, in his judgment, only to the letters of instruction to BS&P, which he dismisses as being of little weight because of his view of the likelihood that they were procured by the influence of C or her sons. Nowhere in his judgment does he consider, or have regard to, the fact

that (a) such expressions were similarly made to the several independent psychiatrists who visited Mr and Mrs S, and who recorded them, (b) such wishes have been subsequently reiterated in these proceedings, in which it is fairly to be assumed that those taking instructions were aware of their duty to ensure that these were spontaneous and genuine, and (c) the overall evidence is that Mr and Mrs S have consistently expressed the wish that their daughters should act jointly, but not singly, at all times since before they began to lose capacity, and never expressed any other wish. In my judgment the learned judge either failed to appreciate these facts, or, if he did, he failed to accord them sufficient weight.

73. As regards principle, the clear implication from his use of the word "mere" suggests strongly that he did not accord the written expressions of previous wishes made by Mr and Mrs S the weight which the Act intends such expressions to have. Having acknowledged that Mr and Mrs S had capacity to make a valid expression of their wish that their daughters should act for them jointly, but not singly, he then went on to say that these expressions had to be *"mapped as against their lack of capacity to manage and control their property and affairs"*.

74. It is far from clear what he meant by this metaphorical turn of phrase, and it is unfortunate that he chose to express himself so opaquely. If he meant simply "viewed in the context of" that lack of capacity, then he was stating the obvious. If he meant that somehow their expressions of wishes had to be downgraded in weight because of their lack of capacity in other more general respects, then it was contrary to the principles of the Act, and also to the express recognition that Mr and Mrs S did have the necessary capacity on this particular matter. If he meant that the practical consequences of this preference had to be weighed against the practical consequences of Mr and Mrs S being unable in practice to manage their own affairs, then that is once again downgrading the significance of the fact that the preference had been expressed at all.

75. On any basis, it appears to me that the learned judge failed to pay due regard to Mr and Mrs S's expressed wishes. It is correct that such expressions of wish are not paramount, but, as stated above, the Act does, in my judgment, accord them significant weight (whether or not this is correctly described as "primacy") and the learned judge failed to

implement this obvious intention. That on its own would be sufficient reason to allow this appeal in principle.

76. The final criticism made by Miss Rich is that the learned judge's judgment shows a further error, namely that of concentrating on V's suitability to *administer* Mr and Mrs S's affairs, rather than her suitability to *manage* them in the sense of being an appropriate person to be given that status. The issue was not whether she was competent to undertake administrative tasks – as she obviously is – but whether she was the right person to be given the sole power of taking management decisions for Mr and Mrs S in their best interests, in all the circumstances.

77. I find that criticism of principle to be well founded. As to how it has operated in the case, insofar as this turns on the question of Mr and Mrs S's wishes, I have considered it above. However, the major factor relied on in the learned judge's decision on this aspect appears to have been that, because of her established systems and demonstrated ability to administer her parents affairs on a day to day basis, and because she was a close family member, V was a more suitable Deputy than an independent professional would be. She would be able to bring benefits to Mr and Mrs S by performing more little acts of care and consideration and giving them more little dignities and pleasures in life than an independent Deputy could do. He therefore held that this overrode the expression of Mr and Mrs S's wishes, with such weight he accorded them.

78. I observe that in placing weight on the fact that V was a close family member, the learned judge does not appear to have considered the point which he had previously acknowledged, namely that even a close family member may not be a suitable Deputy if s/he has aligned himself with one faction in a family dispute affecting P. Here, V <u>was</u> one faction. He does not appear to have considered how this should affect his decision, largely, I suspect, because of his disapproval of C's conduct mentioned above. However, as already stated, the facts surrounding this quarrel were merely a circumstance of the situation in which Mr and Mrs S's best interests needed to be assessed, and not evidence going to the actual issue: who was the better person to be Deputy?

79. This consideration of the possible loss of the personal touches which V can provide in the conduct and management of Mr and Mrs S's affairs is plainly a matter of common

sense and concern, and is not an insignificant point. Mr Entwistle argues, however, that it has been overstated. There is no reason why, if an independent Deputy is appointed, he should not devise a regime, either as a matter of discretion or even possibly an order devised by the Court, which would enable V to continue operating the kind of "systems" which might have given Mr and Mrs S small additional pleasures or dignities, such as being in apparent control of their own affairs, or receiving payments of Premium Bond winnings, and suchlike.

80. I am inclined to think that this is the case. There is very little evidence on this aspect other than V's own evidence about what she has been doing and how this might not be possible to continue. Obviously there would be some restrictions on V's ability to continue in exactly the same way as before, but so long as she is indeed doing these little acts of kindness out of concern for her parents (as the evidence of course suggests is the case) rather than making any point as against C, then I have no doubt that methods could be devised to ensure that these kinds of kindness could be continued to a significant degree.

81. Furthermore, I note that both Dr Greenwood and Dr Graham expressed independently the opinion that an independent Receiver or Deputy should be appointed in view of the disagreement between the two daughters. Whilst it is not their function to decide the point but the court's, the fact that they expressed such opinions as relevant health professionals, who would be fully aware of the practical implications of an independent Deputy as opposed to a family member, is in itself evidence tending to support the view that such an appointment is likely to be in Mr and Mrs S's best interests notwithstanding those implications. Not only is this a point which the learned judge does not appear to have considered at all, but it is some indirect evidence that concerns about those implications or consequences are overstated.

82. In addition, in considering whether it is in P's best interests for his actual expressed wishes to be overruled, regard must also be had to the sense of frustration, impotence, anger and lack of self-worth which P, depending of course on his mental state, might experience, on being aware that this had happened. Although he mentions this, the learned judge appears to have brushed this consideration aside as being of little weight, and indeed as having similar weight to the insubstantial consideration of *C's*

disappointment at a decision confirming V as Deputy. In my judgment, here again, the judge failed to give sufficient weight to a factor which, by implication, the Act regards as important. Mr and Mrs S's mental states are not so far impaired that it can safely be concluded that the dignity of having their wishes respected would not in practice be a matter of concern to them, or would cause them no significant upset or anger.

83. I conclude, therefore that the District Judge erred in his approach to this final balancing exercise, on any basis. However, the issue whether the risk of loss of this personal touch might be a sufficiently strong disadvantage to outweigh the expressed preferences of Mr and Mrs S even given their proper weight remained a matter of some concern to me, since there appeared to be no evidence that this rather more subtle point had actually been discussed with them. Against that, it can be said that the implications would be sufficiently obvious to someone with full capacity that it would not have been overlooked at the time Mr and Mrs S executed their EPAs, when they were fully competent.

84. Miss Rogers reminded me that Dr Greenwood had concluded, certainly in relation to Mr S, that he "lacked insight". Against that, however, I accept that he was, as Dr Graham commented, in a bad mood at Dr Greenwood's intrusion and therefore unco-operative, that Dr Greenwood's view of his insight was expressed in the context of the requirements of capacity to manage his own affairs, and that it is accepted that both Mr and Mrs S did have sufficient capacity to express a preference on the issue of who should manage their affairs if they could not. I am not satisfied that any lack of insight on Mr S's part would be sufficient to undermine the weight of a preference expressed by him on this context.

85. Even so, since the ability to express a valid preference depends on having been given information about, and being able to understand, the implications of that preference, I did not feel that the effects of this could just be ignored. I enquired of Mr Entwistle what information had been given to Mr and Mrs S about the effects of having an independent Deputy, rather than continuing with V, when instructions had been sought as to their attitude to this appeal. I was told that they had been informed that if an independent Deputy was appointed, V would no longer be in control of their cheque

books - such control would go to the Deputy - that they had been told that the Deputy would be able to decide matters such as that they should sell their house, and that they had been told that he would be obliged to consider both their views on such matters and those of both their daughters. I was told that even apparently understanding this, Mr and Mrs S still maintained their instructions that they would prefer an independent Deputy to one daughter only.

86. On balance, I am satisfied that the possible disadvantages of having an impersonal Deputy managing their affairs at a formal level rather than V have been sufficiently conveyed to Mr and Mrs S as to mean that even the later expressions of their preferences are not invalidated, and should not be downgraded in weight on that account. I derive support from the knowledge that Drs Graham and Greenwood came to conclusions consistent with this view.

87. Having held that the learned District Judge's decision was wrong, because he exercised his discretion on a wrong basis, I proceed to substitute my own assessment. Applying the working test I have derived from the Act's principles, I therefore find that the wishes which I am satisfied have been genuinely expressed by Mr and Mrs S, namely that if both daughters were unable to act jointly, neither of them should act singly, are not irrational. They are not impracticable to implement because that can be done by appointing an independent Deputy. They are not irresponsible in the sense of being an inappropriately disproportionate application of their resources; it has always been accepted that resources were not an issue in this case. Finally, there is no other sufficiently countervailing consideration, in terms of consequences which might be detrimental to Mr and Mrs S, which might, in my judgment, mean that implementing their wishes would not be in their best interests. Furthermore, doing so has the obvious merit of conferring on Mr and Mrs S the dignity of having those wishes respected, with the likely effects of that on their well-being.

88. I have therefore concluded that the decision of DJ Rogers was wrong, that this appeal should be allowed, and that an independent Panel Deputy should be appointed in place of V on the usual terms. I am minded to direct, however, that steps should be taken after a suitable period (and I have in mind at least one year) to ascertain whether the

arrangements then in force remain in accordance with the wishes of Mr and Mrs S, after they have had sufficient experience of this regime. I will hear counsel on this aspect.

89. I record that in reaching my conclusion, I have had in mind the guidance relied on by Miss Rogers, to the effect that it is not the court's function on an appeal against an exercise of discretion, to substitute one imperfect solution which it prefers for another imperfect solution preferred by the court below. First, that guidance was given in the context of a custody case, where the considerations are different. Second, in the context of this Act, there is a hierarchy of possibly imperfect solutions, and those which give effect to P's expressed preferences, and/or which restrict P's rights and freedoms less are regarded as less imperfect (all other things being sufficiently equal) than others. Third, I regard this case as being an example of a wrong decision produced by an error of law, and not merely a different exercise of the same discretion which I am now proceeding to exercise.

90. For those reasons my decision is as stated above. As this judgment concerns matters of wider interest than solely this case, I propose to direct pursuant to r 91 (2) (b) of the Court of Protection Rules that this judgment should be available for publication. It has been anonymised accordingly

HH Judge Hazel Marshall QC

25th November 2008