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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral Citation Number: [2014] EWCOP 31

Case No: 12443011

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

First Avenue House
42-49 High Holborn
London WC1V 6NP

Date: 3 September 2014

Before:

SENIOR JUDGE LUSH

IN THE MATTER OF DG

Between:

DAVID and BARRY

Applicants

- and -

PETER

Respondent

Andrea Watt (instructed by W H Matthews & Co) for the Applicants
The Respondent in person

Hearing date: 19 August 2014

JUDGMENT

Senior Judge Lush:

1. The practice guidance on the publication of judgments in the Court of Protection, [2014] COPLR 78, requires me to publish a judgment in “any case where there is a dispute as to who should act as an attorney or deputy”, unless there are compelling reasons why it should not be published.
2. This is a contested application for the appointment of a deputy for property and affairs and there are no compelling reasons why this judgment should not be published.

The background

3. DG was born in 1921. His wife, FG, who was two years older than him, died on 24 April 2014. Since October 2013 he has been a resident in a care home in Surrey run by Anchor.
4. He has three sons, all of whom have an accountancy or book-keeping background and at one time worked for the printing company he founded in 1971:
 - o David, who was born in 1948 and lives in Surrey;
 - o Peter, who was born in 1951 and has lived in Yorkshire since 2005; and
 - o Barry, who was born in 1955 and lives in Surrey.
5. DG has Alzheimer’s disease and was admitted to hospital on 26 September 2013 following an acute delirious episode.
6. On 20 January 2014 David and Barry applied to be appointed jointly and severally as his deputies for property and affairs. They predicted (correctly) that their brother Peter would object to the application, and considered that his objection would be unnecessary, time-consuming, expensive, and generally contrary to their father’s best interests, so they did not bother to give him notice.
7. It is one of the fundamental principles of justice that a judge should hear what the other side has to say, too, and on 24 April 2014 I made an order requiring the applicants to send a copy of the application to Peter.

The objection

8. On 31 May 2014 Peter filed an acknowledgment of service, in which he objected to the application and proposed that he should be appointed as his father’s deputy, instead of his brothers. It was accompanied by an extremely lengthy witness statement, in which he described the events leading up to his parents’ admission into a care home.
9. In essence, DG and his wife FG had become increasingly frail and infirm and were still living in their own flat. When DG was admitted to hospital in September 2013, it was impossible to leave his wife, FG, in the flat on her own, so David and Barry, with the agreement of Surrey Social Services and her General Practitioner, arranged for her to be admitted to a residential home for respite care. They never consulted Peter, and they used the excuse that they were taking her to the care

home for a cup of tea, and simply left her or ‘dumped’ her there, as Peter likes to put it.

10. Peter has never approved of the residential home and has raised numerous complaints relating to issues such as diet, cleanliness and security. He has seen his role as championing his parents’ wish to be liberated and returned to their own flat, and he blames the care home for his mother’s death.

11. On 30 May 2014 Surrey County Council made the following best interests decision:

“Taking into account all the views of those consulted, the social care team has concluded that the decision is that DG remains living in [the residential care home], where his assessed care needs are appropriately met.”

12. On 13 June 2014 I made an order setting out a timetable for the filing of evidence and listed the matter for hearing on Tuesday 19 August 2014.

13. On 16 July 2014 W H Matthews & Co, Solicitors, 11 & 13 Grove Road, Sutton, Surrey SM1 1DS filed a notice stating that they were acting for David and Barry and lodged witness statements made by each of their clients. They also instructed Miss Andrea Watts of 1 King’s Bench Walk to represent the applicants at the hearing.

14. On 3 August 2014 Peter filed a second witness statement.

Andrea Watts’ submissions

15. Shortly before the hearing Andrea Watts filed a skeleton argument, in which, having briefly summarised the facts, she described the parties’ positions as follows:

“The applicants have followed the local authority’s advice and so believe it is in DG’s best interests for him to remain at [the residential care home]. He clearly lacks capacity to deal with his property and affairs and requires a deputy. The applicants have been assisting and supporting DG with his general care and finances for many years now and they see this as a natural extension of the support they have been providing.

The respondent’s objections stem largely from concerns he raises that his brothers have not informed him about certain decisions and have not always shared information and documentation with him. The applicants accept with hindsight that they should have kept their brother better informed. However, it is clear that the applicants care deeply for DG (as indeed the respondent does), have devoted a huge amount of time and energy to supporting and caring for him, and have always tried to do what is in his best interests. The court can be satisfied that they will continue to act in this way. They have certainly not demonstrated the ‘dismissive attitude’ towards their father that the respondent makes reference to. It is all too easy to criticise people in the applicants’ position at arm’s length

but they have had to make very difficult decisions about the care of their parents.

The reality of the situation is that the applicants are in a position to assist with day to day care and decision making, and the respondent is not. It is not a criticism of him, but the geographical distance simply makes him a less suitable choice of deputy than the applicants.

Further, the tone with which the respondent describes his brothers' behaviour in respect of decisions they have made about their parents indicates that he is unlikely to consult them or give any weight to their views in future decision making. He refers to them being "*untruthful, deceitful, unreasonable, uncooperative ... unethical ... suspicious ...*" There is not a sufficient level of cooperation between the brothers to enable all three of them to be appointed as deputies.

The respondent alleges that the applicants will use their role as deputies to take over DG's affairs in order to have 'total control'. However, the applicants as deputies will be monitored and supervised and clearly if their behaviour is not in accordance with the MCA Code of Practice and they are not making decisions in DG's best interests the Public Guardian will investigate and refer the matter back to the court."

The hearing

16. The hearing took place on Tuesday 19 August 2014 and was attended by Miss Watts and the three brothers, David, Barry and Peter.
17. Andrea Watts informed the court that, if it were minded to appoint the applicants as deputies, they would be happy for the court to build into the order a requirement that the deputies would send Peter:
 - (a) regular emails describing their father's present circumstances and state of health;
 - (b) copies of DG's bank statements; and
 - (c) a copy of the annual deputyship report submitted to the Office of the Public Guardian.

The law relating to the appointment of a deputy

18. Sections 1 to 4 of the Mental Capacity Act 2005 provide that, once it has been established that a person lacks capacity to make a particular decision at a particular time (such a person is referred to as 'P' in the Act), then any act done or any decision made by someone else on P's behalf must be done or made in his best interests.
19. The Act does not define 'best interests', but section 4 provides a checklist of factors that anyone making the decision on P's behalf must consider when establishing what is in his best interests. These are:
 - (a) to consider whether it is likely that P will have capacity in relation to the matter in question at some time in the future (s 4(3));

- (b) so far as reasonably practicable, to permit and encourage P to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him (s 4(4));
 - (c) to consider, so far as is reasonably ascertainable, P's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity) (s 4(6)(a));
 - (d) to consider, so far as is reasonably ascertainable, the beliefs and values that would be likely to influence P's decision if he had capacity (s 4(6)(b));
 - (e) to consider, so far as is reasonably ascertainable, the other factors that P would be likely to consider if he were able to do so (s 4(6)(c)); and
 - (f) to take into account, if it is practicable and appropriate to consult them, the views of anyone engaged in caring for P or interested in his welfare, as to what would be in his best interests and, in particular, as to the matters mentioned in section 4(6): (s 4(7)).
20. If someone lacks capacity in relation to matters concerning their property and affairs or personal welfare, the Court of Protection may make any decision on her behalf, or may appoint a deputy to make decisions on their behalf in relation to those matters (section 16(2)).
21. When it appoints a deputy, the Court of Protection exercises discretion and it must exercise this discretion judicially and in P's best interests. The court would prefer the appointment of a family member, if possible, in order to respect P's Article 8 right to private and family life and for a number of practical reasons that flow from that. A relative will usually be familiar with P's affairs, and his wishes and his ways of communicating his likes and dislikes. Someone who already has a close personal knowledge of P is also likely to be better able to meet the obligation of a deputy to consult with him, and to permit and encourage him to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him. And, because professionals charge for their services, the appointment of a family member is generally preferred for reasons of economy.

Discussion

22. The one thing on which the brothers are agreed is that there would be no point in the court appointing all three of them to act jointly and severally, because they simply cannot work together and would not see eye to eye.
23. In *In Re W (Enduring Power of Attorney)* [2000] Ch 343, at page 351, Jules Sher QC considered a similar situation where there were three siblings, and one of them consistently disagreed with the other two. He stated that "when the hostility does not interfere with the smooth running of the administration, the court should not interfere on the ground of unsuitability."
24. I do not believe that the hostility between David and Barry, on the one hand, and Peter on the other hand, will necessarily interfere with the day-to-day administration of DG's property and financial affairs, so I rule out the option of appointing a completely independent deputy.

25. I propose to apply a balance sheet approach to these competing applications, by comparing the respective strengths and weaknesses of David and Barry, on the one hand, and Peter, on the other, under various different headings.

26. Under the following headings, there is nothing to choose between the parties:

- (a) Willingness to act. Section 19(3) of the Mental Capacity Act states that “a person may not be appointed as a deputy without his consent.” All three brothers consent to act, so, in this respect, there is nothing between them.
- (b) Ability to act. This is not quite the same as willingness to act. There is no apparent impediment, such as bankruptcy or ill health, to any of the three brothers acting.
- (c) Qualifications. All three brothers have an accountancy or book-keeping background, and all have worked in the family business at some stage. Barry still does. In this respect, there is nothing between them.
- (d) The nature of their relationship with DG. All three parties are DG’s sons. In various ways each of them has been assisting him with his affairs for several years. David has had general oversight of DG’s day to day financial affairs and the payment of bills. Peter has completed his parents’ tax returns each year, and Barry has done the banking. There is nothing to choose between them.
- (e) DG’s past and present wishes and feelings and, in particular, any relevant written statement made by him when he had capacity. In June 2013 a Lasting Power of Attorney for property and financial affairs was prepared, in which it was proposed that DG would appoint all three sons jointly and severally to be his attorneys. In his witness statement dated 16 July 2014, David said:

“Peter implies that he was excluded from discussions regarding a Lasting Power of Attorney for father, but in fact the application had been drafted for all three of us to be appointed. Father was initially supportive of the application but later changed his mind. I therefore decided not to pursue the application.”
- (f) DG’s will. A person’s will may sometimes assist the court in exercising its discretion as to whom it should appoint as a deputy for property and affairs. DG made his last will on 9 July 2010. He appointed his wife and three sons as his executors and gave his entire estate to his wife. If she predeceased him (as, indeed, she did), then his residuary estate was to be divided equally between his three sons. Once again, there is nothing to distinguish between the contenders.
- (g) Remuneration. None of the three brothers expects to be remunerated.
- (h) Security. Section 19(9)(a) of the Mental Capacity Act provides that the court may require a deputy to give such security as the court thinks fit for

the due discharge of his functions. All are prepared to give security, and again there is nothing to choose between them.

- (i) Conflicts of interest. I cannot see that there are any major conflicts of interest, or that any one of the brothers is seeking to take advantage of his appointment as deputy.

Decision

27. In respect of the following two criteria, however, I can discern a difference between the candidates and these could be described as the 'factors of magnetic importance' that tip the balance in favour of the appointment of one side. They are:

- (j) Geographical location; and
- (k) The ability to interact with others.

28. The old authorities on mental capacity law showed a preference to appoint "persons whose residence admits of frequent visits to the patient and inspection of his affairs." David and Barry live in Surrey. Each of them visits DG two or three times a week. Their wives visit him separately, and their children go and see him regularly, too. By contrast, Peter lives in Yorkshire and gets to see his father about three or four times a year.

29. Andrea Watts summarised the position rather well in her skeleton argument when she said:

"The reality of the situation is that the applicants are in a position to assist with day to day care and decision making, and the respondent is not. It is not a criticism of him, but the geographical distance simply makes him a less suitable choice of deputy than the applicants."

30. I agree. Their geographical location gives David and Barry the edge.

31. There is a marked difference between David and Barry's attitude and approach and Peter's towards DG's carers and the management at the residential care home and the statutory authorities responsible for his care. At the hearing on 19 August, David admitted:

"Yes, we agree that [the residential care home] is not perfect, but if anything is wrong I go and talk to the person who is going to get it fixed. At any time I have an issue, I talk to them. They know me and my wife. I have no qualms about the management. It's not The Ritz. I wouldn't expect it to be, but the people - the carers - go out of their way to look after my father. Not just the carers but the gardener, the cleaner, the handyman. It's a very nice environment."

32. Peter, on the other hand, said:

"I've complained about cleanliness. I've complained about security."

“I complained to the chief executive of Anchor Homes.”

“I have made Freedom of Information Act requests.”

“My parents were put in [the residential care home] against their will: deprived of their liberty by my brothers.”

“I suggested that they feed my mother through a drinking vessel. The care home refused to do that on the grounds that it was undignified.”

“I sent 50 to 100 emails to Social Services badgering them to get Mum and Dad home.”

“Social Services have not followed through any of their promises.”

“The care home won’t talk to me, either. I don’t understand why they won’t talk to me. They won’t give me any information at all.”

“David and Barry don’t have it in them to challenge everybody. [The residential care home] needs challenging. Somebody needs to challenge them. If I were in charge of my father’s finances, I would.”

“In my desire to get deputyship the main reason is to look after the accounts like David, but I would be a lot harder with [the residential care home] in view of their *laissez faire* attitude.”

33. This is essentially a matter of attitude and approach or, as Miss Watts described it, ‘tone’. Whereas David and Barry are able to interact successfully with the carers and statutory agencies which have an interest in their father’s welfare, Peter’s relationship with almost everyone is fraught. Although occasionally his complaints have resulted in a successful outcome for his parents, his victories have been pyrrhic, and overall his approach has been counter-productive. He is a compulsive complainer who has unrealistic expectations and a tendency to become bogged down by minutiae. His brothers are not appeasing an enemy, but simply making appropriate responses and avoiding unnecessary conflict with those responsible for their father’s everyday care.
34. Having regard to all the circumstances, therefore, I am satisfied that it is in DG’s best interests to appoint David and Barry jointly and severally as his deputies for property and affairs and I shall make an order to that effect. The order shall include the requirements mentioned in paragraph 17 above.