IN THE COURT OF PROTECTION Case No 11875043/01

HER HONOUR JUDGE HAZEL MARSHALL QC

4th November 2011

IN THE MATTER OF HM

SM

Applicant

v

HM

(by the Official Solicitor as her litigation friend)

Respondent

JUDGMENT

Mr Simon Heapy of Linder Myers LLP (solicitors) for the Appellant

Mr David Rees, Counsel (instructed by the Official Solicitor) for the Respondent.

1st May and 4th November 2011

This judgment was handed down in private, but the judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the parties must be strictly preserved.

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.

(signed) HH Judge Hazel Marshall QC

HER HONOUR JUDGE HAZEL MARSHALL QC

Introduction

1. This is a reconsideration under Rule 89 of the Court of Protection Rules 2007 of an order of DJ Ashton made on 10th September 2010, which raises an apparently controversial point about the administration of the affairs of persons who lack capacity under the Mental Capacity Act 2005 ("the 2005 Act"). The issue is whether it is ever, and if so in what circumstances, appropriate for the Court (ie the Court of Protection) to authorise the creation of a trust – in particular a personal injury trust - of P's assets as the means of administering those assets for him, rather than appointing a deputy for him under s 16 of the 2005 Act.

2. DJ Ashton refused to authorise the creation of such a settlement in the present case. The reconsideration has been referred to me to enable the above point of principle to be fully argued and a guiding judgment obtained. Various people have given their time and services pro bono, as mentioned below, to enable this to be done, and I express my gratitude, as well, I am sure, as that of the parties, for their generosity and professionalism in so doing.

3. The person whose affairs are the subject of the application in this matter (a status usually abbreviated to "P") is HM. She was born on 3rd April 2004 and is thus now 7 years old. She suffers from cerebral palsy as a consequence of injuries sustained during her birth. From the medical evidence filed, it appears that she is likely to lack capacity upon attaining the age of 18. It is agreed, therefore, that the Court of Protection has jurisdiction over her property and affairs notwithstanding her minority (see the 2005 Act, s.18(3)).

4. Proceedings were brought on HM's behalf against the relevant NHS Trust for damages. They were compromised by an order of Swift J on 15th July 2010. The terms approved by Swift J provided for a lump sum payment to HM of £450,000 (gross) and periodical payments of £25,000 pa during her minority, and thereafter £50,000pa. This compromise figure represented a very significant discount on the total of HM's potential

claim for damages or loss, as quantified by her advisers. However, it was also their assessment that HM's claim stood far less than a 50% chance of success. The opinion of leading counsel was therefore taken as to whether the compromise offer could be recommended. He advised that it could and should be accepted. His opinion is part of the evidence in this application.

5. The structured settlement offer did not expressly include any element for the costs of administering a deputyship on HM's behalf, However, the evidence shows that leading counsel referred to the proposal to set up a personal injury trust, (intended to take the form of a bare trust with administrative powers) to administer the damages award for HM, with the trustees being SM (HM's mother, and the present applicant) and Mr Andrew Cusworth, (a partner of Linder Myers LLP, the solicitors who have been acting for HM). The view was recorded that this could save between £1,000 and £2,000 pa as compared with the costs of a deputyship.

6. The order of Swift J recites

> "AND UPON the Court being informed that it is the intention that the damages and periodical payments payable to the claimant should be managed by a Personal Injury trust …..("the Trust") and UPON THE UNDERTAKING of the Claimant's solicitors to make the necessary application to the Court of Protection for the permission of that Court to set up the Trust and thereafter deal with the damages and periodical payments by means of the Trust …."

7. SM therefore applied to the Court of Protection for authority to set up the proposed trust to receive HM's damages and periodical payments. The application came before DJ Ashton on paper on 10th September 2010. He refused the application on the grounds that he was not satisfied that it would be in HM's best interests for her personal injury damages to be administered otherwise than through the Court of Protection. In practice this would mean a deputyship order.

8. DJ Ashton did not provide a written decision but set out reasons for the refusal in his order. They are sufficiently succinct for me to quote them in full:

"(1) The jurisdiction of the Court of Protection has been established by statute specifically for managing and administering the financial affairs of persons who lack mental capacity to do so for themselves;

(2) The procedures of the Court of Protection and role of the Public Guardian are for the benefit of the incapacitated person and provide safeguards that Parliament has deemed necessary;

(3) There would not necessarily be a significant reduction in overall costs in the event of a Personal Injury Trust and the involvement of the Court of Protection would be required in any event upon a change of trustees;

(4) Any overall financial savings that may be achieved would not justify a departure from the statutory jurisdiction;

(5) There would be less supervision and diminished protection if [HM']s funds were placed in a personal injury trust;

(6) Any future intervention would potentially involve a Chancery Court as well as the Court of Protection and would in consequence be more protracted and expensive;

(7) The principal benefit of a personal injury trust, namely ring-fencing from means-testing, is likely to be available if the fund is retained in the Court of Protection."

9. SM thereupon sought reconsideration of the decision pursuant to rule 89 of the Court of Protection Rules 2007. On 21st October 2010, DJ Ashton made two further orders by which he directed (1) that SM's solicitors should have authority to receive and invest HM's damages and periodical payments pending further order (effectively acting as interim deputies); and (2) that the order of 10th September 2010 refusing permission to set up the personal injury trust should be reconsidered at Circuit Judge level, and that this reconsideration should be referred to me.

10. In view of the general public interest in the point at issue, I was concerned to ensure that the case could be fully argued. On 22nd December 2010 I made directions inviting the Official Solicitor's involvement to support the approach taken by DJ Ashton against the challenge being made by SM.

11. For obvious reasons, legal costs are a very significant matter in this case, where HM's damages are already only a part of the assessed full costs of her needs, and it would

clearly not be in her best interests for her money to be spent simply in order to run a test case. It was therefore, at one point, not certain that the reconsideration could even proceed. However, at a subsequent telephone directions hearing on 25th February 2011 the Official Solicitor appeared. Whilst he respectfully declined my earlier invitation to "support" the general approach taken by DJ Ashton, he did agree, given the wider considerations raised by the application, to be appointed as HM's litigation friend and to arrange representation for her without charge, for the purpose of the application. He also said, through counsel, that he envisaged providing the court with material which could be of assistance with regard to the wider considerations raised by the decision. This he has done, and the matter has come before me on that basis.

The hearing, evidence and argument

12. On this reconsideration hearing, the Applicant, SM has been represented by Mr Simon Heapy of Linder Myers LLP, who is a solicitor in their specialist Court of Protection department, and who advised the creation of a personal injury trust as the appropriate way forward for HM in the circumstances. Mr Heapy filed two witness statements and a skeleton argument in support of the reversal of DJ Ashton's order. He also filed a witness statement from SM herself. All this evidence was, of course, focused principally on the facts and considerations of this particular case.

13. The Official Solicitor, on behalf of HM, instructed Mr David Rees of counsel, who presented a comprehensive argument at both a general and a specific level. He also adduced statements from four witnesses, three being solicitors all of whom have considerable experience of deputyships and personal injury trusts. These were Ms Lynne Bradey of Wrigleys Solicitors LLP, Mr Niall Baker of Irwin Mitchell LLP and Mr Martin Terrell of Thomson Snell & Passmore. The fourth statement was from Mr Mark Quilter, a Specialist Investment Manager of Charles Stanley Group Plc who has wide experience in the investment of assets by both deputies and trustees.

14. Whilst there was no objection from Mr Heapy to my admitting this evidence, Mr Rees was rightly concerned to show me that it was properly admissible. He emphasised that it

was not being produced as "Expert Evidence" (there was no direction for this) but rather as evidence of fact, namely the first hand experience of the practical problems or advantages that can arise with deputyships and personal injury trusts, as recorded by the four deponents. He referred me to Rule 95 of the Court of Protection Rules 2007, and in particular Paragraph 95 (d) which allows the Court to "admit such evidence as it thinks fit" and submitted that this was of a much wider ambit than the rules of evidence in civil cases.

15. I accept that submission by Mr Rees, although I think that in fact this evidence is admissible under the general rules of evidence in any event. It is introduced to inform the court of what actually happens and to give examples of the current practice and experience of certain professionals in the field. As such, it is evidence of fact observed by them. It is also material which is, in my judgment, useful, and therefore relevant, in assisting the court about making the kind of "best interests" assessment which is required in this case. Insofar as any witness might stray beyond recounting fact into expressing opinion, I am satisfied that their expertise in general qualifies them to express such opinions – short of course, of an opinion on the very issue before the court for decision - and such evidence would therefore be admissible in any event, under s 3 of the Civil Evidence Act 1972.

16. These witnesses have very kindly provided extremely useful statements about their experience and therefore inevitably their views about the relative merits and demerits of administering assets for P through either a personal injury trust or a deputyship. They have each done so without charge and I am grateful for the insight and assistance they have provided. I will deal with the tenor of their evidence later.

17. As mentioned, Mr Rees provided a comprehensive skeleton argument ranging over general considerations as well as this particular application. Mr Heapy, on whom it technically fell to open the matter, said immediately that there was really no dispute between him and Mr Rees, on points of general principle and as to what matters were or might be of relevance. In the end, the difference between him and Mr Rees was really a matter of judgment or impression as to the weight to be attributed to particular matters,

and therefore the end result of applying agreed principles to the particular facts of HM's case.

18. I have found it generally convenient to follow the structure of Mr Rees's argument in this judgment, because of its broader ambit, but this is not to belittle Mr Heapy's robust and able argument on behalf of his client, to which I also pay tribute. Once again, I understand that he has represented her without additional charge in the interests of saving costs, and he has done so both with a sense of proportion, and very effectively.

The issues

19. Mr Rees identified the issues raised by this application as follows:

(1) Is some form of structure required to manage HM's property and affairs?

(2) If so, is it open to the Court to authorise the settlement of her assets as an alternative to a deputyship?

(3) If it is, what principles should it apply, and what factors is it likely to wish to weigh up, when deciding whether to do so?

(4) Should the settlement of HM's personal injury award be authorised in the present case?

The law

20. Mr Rees first referred to what is now an entirely incontrovertible starting point in cases under the 2005 Act. This is that the basic principles to be applied in deciding the above issues can be identified from ss 1 and 16 of the 2005 Act, and are the following:

(1) Any act done or decision made on HM's behalf must be done or made in her best interests (s.1(5));

(2) Before the act is done, or decision 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(s.1(6)); and

(3) In deciding whether it is in HM's best interests to appoint a deputy the court must have regard to the principle that

(a) a decision by the court is to be preferred to the appointment of a Deputy to make a decision; and

(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances (section 16(4)).

21. Guidance on the approach to applying these principles is then to be found in s.4 of the 2005 Act.

Issue 1 Is a management structure required?

22. The first issue is therefore whether some form of management structure (whether a trust or a deputyship) is required at all. Mr Rees submitted, and Mr Heapy agrees, that it plainly is, not least because of the size of the sums in question. In a case where P lacks capacity but is the recipient of a substantial personal injury award, it is clear that, notwithstanding the terms of s 16(4) of the 2005 Act, it will not be in P's best interests for decisions about the day to day management of his or her finances to be taken by the court. This is cumbersome, slow and expensive, and some form of management structure will inevitably be required.

23. The doubts which I previously expressed in *Baker v H* [2010] 1 WLR 1103 (para 32) as to the literal effect of s.16(4) of the 2005 Act apparently being at odds with this approach have been echoed and tacitly endorsed by Baker J in *G v E* [2011] WTLR 199 (para 59). It therefore now appears to be recognised that s.16 (4) will carry greatest weight where major health and welfare decisions need to be taken. Day to day decisions about

property and affairs will usually require the appointment of a deputy, as a matter of practicality.

24. Both parties agree, (and it accords with common sense) that some form of management structure for HM's damages settlement, operable outside the Court, is required in her best interests.

Issue 2 <u>Can</u> a settlement be used as an alternative to a deputyship?

25. This is a point of law. Both parties are agreed that as a matter of law it can. Sub-s.18(1)(h) of the 2005 Act permits the court to authorise the settlement of P's property whether for P's benefit or the benefit of others. It is therefore clear that the court has the necessary power, and nothing else on the face of the 2005 Act prevents the Court from authorising the settlement of P's property as an alternative to a deputyship, so long as it considers this to be in P's best interests.

26. Mr Rees observed that making such a power available appears to have been the intention of the draftsman of the 2005 Act, citing the discussion at paragraph 8.34 of the 1995 report of the Law Commission: "Mental Incapacity", which was the origin of many of the principles ultimately embodied in the 2005 Act. The terms of that paragraph are worth quoting as they foreshadow some of the considerations which could be relevant here:

> "...The Court of Protection already has ... power to make a settlement of the patient's property. We mentioned in our consultation paper that it is not common for the Court of Protection to make settlements for the benefit of the patient himself or herself, and expressed the provisional view that there would be little advantage in providing any new power for a trust (for the benefit of a person without capacity) to be set up. A number of our expert consultees, however, argued that such a trust might sometimes be the best solution for the person concerned, and we are persuaded that the court should certainly have this option available to it. *It is likely to be attractive only where substantial assets are involved or perhaps where issues of tax planning are important*. It may be necessary for a financial manager [sc. a deputy] to be appointed at the same time as property is ordered to be settled. Alternatively, the making of the settlement may mean that there is no need for anyone to hold management powers and responsibilities." (Emphasis added).

27. The Law Commission's recommendation was therefore that such a power should be available to the Court of Protection, and this eventually became enacted as s.18(1)(h) of the 2005 Act, and thus the availability of a settlement as a general proposition is non-controversial. It is worth noting that the underlying view appears to have been that it would be an exceptional case, and that size and tax planning would be the impetus for taking this course. I remind myself however, that this view was expressed in the circumstances of 1995.

28. The crucial general question is now, therefore, the next one.

Issue 3 What principles should the Court apply, and what factors are likely to be relevant, in deciding whether (or not) to authorise a settlement?

29. As mentioned, it is trite law that the overriding principle is that such a decision must be justified on the grounds that it is in P's best interests (see s. 1(5) of the 2005 Act). It is equally well-rehearsed that the guidance in s.4 of the 2005 Act must be observed. However, apart from a direction to consider "all the relevant circumstances" (s 4(2)), and the inferential emphasis in the section on giving weight to P's actual or likely wishes (a matter which may not play much part, though, in considering the best method of financial administration of significant funds for a person, especially a child, who lacks capacity) that guidance relates more to direction as to how to gather the material on which to make the decision than to listing relevant considerations.

30. It cannot, therefore, be over-emphasised that any actual decision is completely fact sensitive to the individual case, and that the weight of superficially similar factors may be very different in different cases. This was emphasised by Munby J in *Re M; ITW v Z* [2011] 1 WLR 344, although he also noted that on the facts of any individual case one or more factors might be of "magnetic importance". This last point is readily understandable, but only illustrates that on occasions some particular factor may be of such obvious weight regarding P's apparent "best interests" that it outweighs any factors which might otherwise seem to point in a different direction. It is therefore really just an example of how the balancing exercise may operate at its limit, and, as such, it only underlines the individuality of every decision

31. With that said, though, it is again common ground between the parties that deputyship should be taken to be the norm for the due administration of P's assets, and that authorisation of a settlement must therefore be justified as a departure from this norm. That agreement is tantamount to a concession that it must "normally" be in P's best interests for his assets to be administered under the deputyship regime, and I ought therefore to consider whether such a concession is correct. This may not be quite as obvious as it seems, because the provision by statute of a particular scheme may mean no more than that Parliament thinks that this should be one option, available to citizens, amongst others. I am satisfied, though, that it is a proper concession, for the reasons below, but in my judgment it must also be kept in perspective.

32. The deputyship regime was devised and enacted, after consultation and careful consideration, to make generally available a mechanism for the management of the assets of persons lacking capacity to whom the state owes a duty of protection. It was therefore, naturally, intended to do this to best effect as a general proposition. It was devised in the light of both experience, and the modern guiding principle about mental incapacity, which emphasises proper and appropriate respect for the autonomy and the wishes of persons lacking capacity. The jurisdiction of the old Court of Protection to appoint a receiver to manage the property of a person lacking capacity, although latterly codified under the Mental Health Act 1983 was rather a blunt instrument, which had developed reactively and incrementally out of the Crown's *parens patriae* jurisdiction, and was focused on the management of property rather than directly on the well-being of P.

33. The 2005 Act brought a new approach and now provided a statutory scheme especially tailored to the administration of the affairs (not, of course, confined to property) of people lacking capacity, under the title of "deputyship". Providing for the general case, the scheme makes available elaborate and broad powers which can be conferred on a deputy (thus giving maximum flexibility to fit individual cases) whilst also providing safeguards to protect P. The advantages of deputyship for P are clear. The powers of a deputy can be controlled by the court to fit the individual case, and coupled with robust safeguards

for P's interests, in particular appropriate provision of security and an organised system of supervision and of reporting to the Office of the Public Guardian.

34. Parliament has thus devised deputyship for the very purpose of operating in P's best interests, as a general proposition. It did not, however, enact that it was the only possible mechanism. Apart from the fact that it left open the possibility of a private settlement being authorised (as mentioned above), this is apparent also from the fact that the administration of P's affairs by a validly appointed Attorney under an Enduring, or Lasting, Power of Attorney takes precedence over deputyship, absent any unfitness or misbehaviour by the Attorney. This is notwithstanding that the protections for P (controls and security) are lower, and it shows the application of the principle of proper respect for the wishes of P, expressed by the appointment he has made. Parliament has, in short, provided a scheme which is designed to operate in what generally is P's best interests, but it has not ruled out alternatives, and has instead enacted that the ultimate test is: what is in P's best interests in the individual case?

35. In my judgment, this leads to the conclusion that deputyship is properly treated as the normal arrangement, and as the benchmark against which to compare any other proposed method of administering P's assets and it is therefore the starting point in any case where P has not himself appointed an attorney. The point though is that this *is* only a starting point. Deputyship is a means to an end, and not an end in itself. The end is doing what is best in P's interests, not promoting the use of the statutory scheme, however highly it may be regarded. Deputyship will therefore certainly be the usual course where some formal scheme for managing P's assets is needed at all. However, if the court is satisfied that P's best interests are better served, in the particular case, by the authorisation of a settlement rather than the appointment of a deputy, that will prevail. The key is that the test is a relative one, namely, in all the particular circumstances, are P's best interests <u>better</u> served by taking that course?

36. Given that deputyship has been constructed with obvious care and thought to provide a scheme which will protect P's best interests, the court will therefore need to be satisfied that there is a clear and significant advantage to P in the particular case if it is to depart

from that and to authorise the settlement proposed. This will need to be proved by clear and cogent evidence, and the burden of so proving will be on the applicant.

37. It follows that insofar as any factors are claimed to be a disadvantage of deputyship as compared with trust, then the first question must be whether such a concern can be adequately addressed by framing a deputyship order in suitable terms. Only if using deputyship cannot provide some sufficiently important advantage which can be provided by the proposed settlement will the latter be justifiable.

Material evidence

38. Before identifying relevant considerations, I will summarise the evidence from the professionals indicating their different experiences and perceptions.

Miss Bradey

39. Ms Bradey is a solicitor of 8 years' experience in both Court of Protection work and trusts for vulnerable people, in a niche private client practice. She is also a lecturer and is co-author of *Coldrick on Personal Injury Trusts*. I think it fair to say that she is passionately of the view that a personal injury trust is preferable to deputyship, based on her experience. She gave the key benefits of trusts as being reduced delays and maximum flexibility, the use of both professional expertise and family knowledge and skill-sets to maximum advantage, and the financial checks and balances of interaction between professional and family trustees. She also emphasised the value for the family of a feeling of release from the court process after harrowing litigation. She did not see the financial protections of the deputyship system as being of any material value other than in extreme cases (and did not consider HM's case to be such). She recognised the usefulness of extraneous limits on powers in enabling a deputy to resist irresponsible demands by P or his family without personal confrontation, but felt that the benefits of a trust for family dynamics were very great; deputyship was seen as an imposed solution, rather than a co-operative one. She felt that trustees could act more quickly than a deputy especially where a release of funds was needed, or in applications to the court, and she said that average court disbursements in a year could be £1000 for a deputy. She

reported that her firm's files showed average second year costs of an active deputyship matter to be about £12,200 plus VAT, (apart from the above costs) whilst the comparative annual administration costs of a personal injury trust were £6-8000 plus VAT.

Mr Baker

40. Mr Baker has 20 years' post qualification experience, specialising in Court of Protection work in a large specialist firm and acts as both deputy and a trustee of personal injury settlements. He was far more inclined to favour deputyship over a trust. His experience was that the roles of professional trustee and deputy were now very similar since the broadening of powers usually conferred on deputies, under the 2005 Act; both dealt with holding funds, suitable investment, agreeing expenditure, purchasing property if appropriate, tax matters and administration. He emphasised the constraint that trustees' powers are limited to the ambit of the trust; they would not have authority to deal with any other funds coming to P, such as benefits, local authority or NHS payments or inheritances, nor to deal with P's personal tax affairs. Nor, unlike a deputy, could they invest in a (tax efficient) ISA for P. Mr Baker cited the lack of supervision and in particular the possibility of uncontrolled and unchallenged expenditure, as a disadvantage of a trust, as well as the potential for conflict in decision making. He saw the deputy's duty to report and to account to the OPG, the OPG's power to seek information and ultimately apply to the Court of Protection in cases of concern, the routine visits of Court of Protection Visitors, and the standard practice of a deputy's costs being subject to assessment by the Senior Court Costs Office, as robust financial safeguards for P in the case of deputyship. He thought that administration costs were broadly similar in practice, apart from the costs of supervision and security for deputies. His comparison was about £7,300 pa for a deputy and £5,100 for a trustee, excluding costs of court applications, which he again thought likely to be similar. His view was that the groundswell for creating trusts had arisen about 10 years ago, when the administration of the Court of Protection simply was not providing an acceptably efficient service, but his view was also that this no longer applied.

Mr Terrell

41. Mr Terrell is likewise a solicitor specialising in Court of Protection work, for over 17 years, and a very experienced receiver/deputy, with a little experience of administering trusts for incapacitated persons. He too was strongly in favour of deputyship over a trust in the general case. He noted the drawback that a family member as deputy might be dependent on, or have a conflict of interest with P, and that the advantages of appointing a professional deputy were the added layer of protection in involving a professional, lower security and supervision costs, the likelihood of the court being willing to confer wider powers, reduced potential for conflict and the assessment process for controlling costs. He thought that the usual reasons for proposing a trust were the ability to involve family members, the perceived ability to save costs through reduced court applications and the absence of security and supervision fees and of the cost of providing the OPG with accounts, and the avoidance of a feeling of state intrusion in what was often a very sensitive situation. He perceived a rather negative attitude to deputyship, which he felt might well be the product of "collective memory" of frustrations in the past. He thought that the increase in powers now given to deputies had reduced court applications, and that the perception of trusts requiring less court involvement was exaggerated. Whilst supervision and security costs were greater, these were good value for P's protection. He saw the most compelling argument in favour of a trust as being that it was less impersonal than deputyship, but thought that this could be addressed by appointing joint deputies and an appropriately skilled professional deputy. Amongst many disadvantages in the trust structure which he listed, the main ones were: lack of accountability over costs, lack of certainty (and hence complications especially if problems arose or circumstances changed), not controlling all P's assets, and potential adverse tax consequences. He saw these overall as counterbalancing the disadvantages of deputyship, leading him to prefer the latter. His view was that only some very prominent factor in any individual case should justify resorting to a trust. He cited two such cases from his experience, (each, notably depending on the effects of deputyship on P's carer, in the one case practical, and in the other psychological.) He suggested two further situations which might favour trust over deputyship, the first being where it was

necessary to avoid the possible effects of intestacy on the death of an incapacitated child. The second was where there might be fears of financial abuse if P regained capacity (thus terminating the deputy's power to act), although he acknowledged, rightly, that this would raise other, wider, issues.

Mr Quilter

42. Mr Quilter is a specialist manager with Charles Stanley Group plc, with wide experience of giving investment advice and running accounts for both deputies and personal injury settlement trustees, lay and professional, over 20 years. His evidence was that, at least in his company's practice, there was no difference with regard to investment management charges whether funds were held by a deputy or a trustee, but that other institutions might well charge normal private client rates to trusts, which could well be higher. Deputyship might keep fees down because the adviser or broker would need to deal only with one person. His experience was that the degree of family involvement, if desired, could be very similar in practice in each case. He thought that after the new scheme under the 2005 Act had bedded down, not only had the administration of the Court of Protection speeded up, but the wider forms of deputyship orders reduced the need for further court applications.

Mr Heapy

43. Mr Heapy made two witness statements in support of this application in addition to SM's statement. He said that the main driving force behind this application for a settlement to be authorised was, indeed, costs savings, and in particular the fact that HM's damages claim had had to be compromised at such a low percentage of her real care needs, so that even a small economy in costs would be a significant benefit to her. He did not give detailed evidence as to the likely figures of costs savings in his first witness statement, but did so in a second witness statement, for the purpose of these proceedings. I will consider this evidence later.

<u>Potentially material factors</u>

44. What then, should be the approach, and what are the pertinent factors when considering whether it is in P's best interests that the court should exercise its power to settle P's assets rather than simply appoint a deputy? Leaving aside the possibility of some particular factor of magnetic importance, this must involve a comparison of the features of deputyship and of a settlement generally, and their effect and impact in any particular case. I would suggest that they fall under the following useful headings, namely

- Fundamental considerations
- Statutory directions
- Protection of P and his assets
- Expenditure considerations
- Administrative considerations
- Indirect benefits/drawbacks

45. As well as making general observations, Mr Rees very helpfully provided a list of suggested particular points which the court might need to consider and Mr Heapy commented on the most pertinent of these in his skeleton argument and a position statement . From all this I have distilled the non-exhaustive list below. The order of this is related to the above headings and is emphatically <u>not</u> any suggested order of importance. The list comprises

(i) possible limits of deputyship as against a trust;
(ii) the totality of P's affairs;
(iii) possibility of joint office;
(iv) availability and willingness of a suitable trustee or trustees;
(v) the less restrictive option for P
(vi) the views of P's carers and those interested in P's welfare;
(vii) relevance and impact of different duties of trustees and deputies;
(viii) the degree of supervision applied to each;
(ix) the degree of protection each affords to P;
(x) tax considerations;
(xi) means-tested benefits considerations;
(xii) comparative cost and expense;
(xiii) availability of budget sums;
(xiv) costs oversight and control;
(xv) administrative efficiency;
(xvi) investment powers;
(xvii) continued court involvement and

(xviii) family involvement.

46. Not only are these not listed in any suggested order of importance, but they can also overlap, eg, supervision is obviously one aspect of protection for P, and further involvement of the court has cost and expense implications. All such points will need to be considered, although I again emphasise that their weight, and that of any others, will be individual to the case.

(a) Fundamental considerations

47. It is convenient to begin by noting one or two factors which Mr Rees suggested might be seen among those which were either basic points or factors which might be suggested to have "magnetic importance" as mentioned above.

(i) Limits of the deputyship regime compared to settlement

48. The first arises from the consequences of P being a minor. Section 18(2) of the 2005 Act forbids the execution of a statutory will for a child. However, in some situations, it may be thought not to be in P's best interests for the rules of distribution on intestacy to apply if P dies before attaining majority. One such instance could be where P has been abused or abandoned by an absent parent. In that case, the only way of preventing such parent from succeeding to a share of P's assets would be to settle them so as to provide otherwise in the event of P's dying before age 18.

49. Of course, P is not going to know, or be directly concerned in what happens to the residue of his or her assets after death, and in deciding whether or not it is in P's best interests to fix this through a settlement, the decision-maker must be careful not to allow his own moral judgment to affect what should be a dispassionate view of what is in P's best interests, currently. Even an instinctive feeling that "I am sure that P would want that" needs to be critically examined. However, English law is quite astute to see indirect benefits when approving arrangements for those under disability. It can recognise these in, for example, a benefit to P in the attitude of others which a particular

course of action is likely to promote. This may therefore provide a reason for sanctioning a settlement in such circumstances.

50. A second possible example could be where P is an adult, who might possibly regain relevant capacity, thus terminating a deputy's power to make decisions: (see s.20(1) of the 2005 Act) but where he might be perceived then to be vulnerable to financial abuse. As Mr Terrell notes (and I agree) providing an appropriate level of protection for P in this kind of case, without being unduly restrictive, is a very difficult balance. Indeed, the whole issue of appropriate protection for vulnerable people who do not lack the relevant capacity is an extremely difficult one and outside the scope of consideration here. This point does, though, indicate concerns which may be material.

51. If either of the above factors were of particular importance to P's best interests, then that would, in my judgment, be a strong factor in favour of the principle of authorising a settlement rather than appointing a deputy, although it would never remove the need to consider any counter-argument from other factors.

(ii) Ability to deal with totality of P's affairs;

52. This point is also one of administrative efficiency, but it seems to me to arise at a fundamental level. The two options of settlement or deputyship should be seen as mutually exclusive. It is difficult to envisage circumstances where it would be in P's best interests for part of his property to be settled for his benefit and part retained to be dealt with by a deputy.

53. A property and affairs deputy, once appointed, can and does take control of all of P's assets in principle, subject to any limitations contained in the deputyship order. This provides simplicity, clarity, and a ready means of handling future events.

54. A settlement applies only to the assets placed within it, and this may result in complexity or duplication, or increase in administration and therefore costs. The administration of P's affairs outside the trust is still going to have to be dealt with. If P were to inherit a significant sum of money, this could not be dealt with by trustees without being added to

the trust. The receipt of any benefits or similar payments, and possibly the completion of P's own tax returns, if the trust is other than a bare trust, would also be outside the trustees' remit. In any event, the trustees of the settlement could not take over management of benefits. Whilst it might be possible to arrange for these to be paid to a family member as an appointee for P, that would take them outside the scope of any protection afforded to P by either a security bond or professional indemnity insurance.

55. The desirability of simplicity in the administration of P's affairs with consequent containment of costs may well be a forceful initial point in favour of a deputyship.

(iii) Possibility of joint office

56. A factor which often seems to be suggested as an advantage of settlement over deputyship is the fact that there will be more than one trustee, widening the skills available to manage P's affairs. However, where this is seen as an advantage, it may well be possible to provide it under a deputyship by the appointment of joint deputies.

57. Formerly, the courts did not readily appoint joint receivers, but under the new regime of the 2005 Act, the court has been more receptive to the idea of joint deputies (see eg *Re P* [2010] EWHC 1592 (Hedley J)). The opportunity for formally involving someone close to P in administering his affairs directly under the deputyship regime is now greater than before, and there are increasing instances of the appointment of a lay deputy who will generally deal with personal and everyday matters with regard to P, jointly with a professional deputy who deals with formal administration and management, This does not of course prevent possible disagreement or conflict between them, and the suitability of appointing joint deputies will certainly depend on there being an appropriate family member willing to take up such a joint role, but in appropriate cases it can prove to be a very practical course.

58. This consideration is therefore unlikely to amount to a sufficiently significant point in favour of a settlement, so long as appointing joint deputies can achieve the same practical result, and it very often will.

(iv) Availability of suitable family member as trustee

59. The availability of a member of P's family who is able, willing and suitable to act as trustee at all must be a virtual pre-condition to the proposal of a trust rather than a deputyship.

60. The appointment solely of professionals as trustees rather than deputies would, in itself, carry no apparent advantage over deputyship, and has the disadvantage of the reduced control over trustees which exists (see below) even without any likelihood of misfeasance. In the case of a trust for competent adults, the beneficiaries can, and in all likelihood will, monitor the fees and conduct of trustees and, if necessary, ask questions or apply to the court. In the case of a beneficiary lacking capacity, that safeguard is absent. That is why such protection is provided by the scheme of deputyship itself. It is therefore difficult to see how there could be any sufficient justification for foregoing this protection unless there were, at least, a competent lay trustee able to provide that kind of scrutiny. However, I put this more as a pre-condition for considering authorising a settlement at all in the first place, because on its own it would seem to confer no greater advantage for P than can be achieved by appointing joint deputies.

(b) Statutory considerations

(v) Which is the less restrictive option for P?

61. It is a statutory requirement to consider this point (see s.1(6) of the 2005 Act). However, as regards the decision whether P's affairs should be administered through a deputy or through a trust, it seems to me to become almost entirely theoretical.

62. In fact, Mr Rees and Mr Heapy were each able to argue that his preferred solution was the less restrictive. In favour of deputyship, Mr Rees argued that because a deputy acts directly under the authority of the Court of Protection and draws his authority from a court order, deputyship is the less restrictive of P's rights and freedom of action because all decisions made on his behalf would necessarily respect these, under the principles of

the 2005 Act. The trustees of a settlement, in contrast, would draw their authority from the terms of the instrument, and whilst it was possible to frame these in such a way as still to give the court a suitable degree of control over the trustees, this did not detract from the fundamental fact that by settling P's assets the court would be handing these to a third party to manage, outside the safeguards of deputyship applied by the 2005 Act. This, he submitted, made a settlement the more restrictive option for P.

63. He further submitted that to make a settlement on irrevocable terms – a course which he submitted elsewhere (see below) could probably never be justified as being in P's best interests as a matter of principle - would plainly be more restrictive than appointing a deputy. I accept this, although it seems to me to illustrate that it is the individual terms of any proposed scheme, whether a deputyship order or an instrument of trust, which need to be considered.

64. Mr Heapy argued first (and practically) that where P is unable to make decisions, both courses are, in reality, equally restrictive of P insofar as they are restrictive at all. His argument that a trust was in fact less restrictive in this case rested mainly on the fact that if a deputy were appointed, and if, when HM reached 18, she did in fact have capacity to manage her own funds, it would be necessary to apply to the court for the deputy's discharge, whereas if those funds were settled appropriately, no such application would be necessary; the trustees could simply transfer the property out of the trust, or, more likely (in order to retain protection for any benefits by keeping the trust alive – see below) HM would simply appoint herself trustee. I accept this, but it seems to me to be a very small point in the overall picture.

65. These arguments therefore seem to me to be theoretical points rather than practical ones and largely demonstrate that broad pronouncements of principle do not provide much assistance where they are focused on the different nature of deputyship and trusts. At best they could only give a possible steer, and in this instance they do not seem to me to do so. It is the effect of the detail of any proposal which is ultimately material, and this is properly approached by considering individual points and weighing up their combined effect overall.

(vi) The views of P's carers and those interested in P's welfare.

66. This is, again, a statutorily required consideration: see s.4(7)(b) of the 2005 Act. However, assessing the weight to be given to any such views must be done in context. As an obvious example, the home-help is hardly likely to have worthwhile views on whether P's assets should be administered by a trustee or a deputy.

67. It is more than likely that, as in this case, it is a potential candidate as trustee under a proposed settlement who will be expressing views in favour of creating it, and of this being in P's best interests. The court will therefore have to consider the weight to be given to any such expressed opinion very carefully, especially if any potential conflict of interest may come into play.

68. The ultimate aim is to decide what is in P's best interests, and in this regard there seem to me to be three reasons for the statute's directing the enquiries laid down in s.4(7).

69. First this is expressly a means of trying to ascertain P's <u>own</u> likely wishes, as part of the general principle of ensuring respect for P's right to autonomy so far as practical. In the case of a child and a decision of this nature, that is unlikely to be a factor of much weight.

70. Second, it is a means of obtaining evidence which may directly assist in forming a view of what is in P's best interests. This is because the persons in question will themselves have deeper and broader knowledge of P and of circumstances on which to base their own expressed view, such that this can be of some assistance.

71. Third, and more subtly, there is the indirect consideration that since those concerned with caring for P are likely to be involved in operating the regime fixed for P and making it work to P's best advantage, it is sensible, if only as a matter of psychology, to consult them, and assess the possible impact their views may have for P in practical terms.

<u>(c) Protections of P and his assets</u>

(vii) The differences between trustees and deputies (duties)

72. The point here is the underlying difference in the respective functions of trustees and deputies, even though, at a practical level, they have the same general objective. A deputy has the duty of acting in P's best interests directly imposed upon him under the statute. Trustees of a settlement, by contrast, have a fiduciary duty to manage the trust assets properly in accordance with the terms and objects of the trust. Their discretions will usually be exercisable for the "benefit" of the stipulated beneficiary (ie P), but this is not directly equivalent to a duty to act in P's best interests. Acting for P's "benefit" is arguably a wider concept, and may well be less clear cut.

73. Once again, considered at the level of general principle this point may not appear likely to have great, let alone decisive, impact on the question under consideration, but it ought not to be overlooked. However, in any particular case it would seem likely that it could be dealt with by suitably tight drafting of the trust in question, if it were material.

74. Both trustees and deputies are under a duty to keep accounts. Deputies can and will be obliged to produce these for the OPG or the Court. In the case of a trust, the duty will be enforced only if someone is prompted to take the point, but, again, this duty can be written into a trust deed if appropriate. The costs of preparing accounts would seem to be comparable for both.

(viii) Supervision

75. This is again a protection point for P, and in principle a very important one. A deputy is subject to supervision by the OPG under its statutory obligation (s.58 of the 2005 Act). A deputy may also be subject to a report by a Court of Protection Visitor. Trustees, on the other hand, are subject to supervision only by each other on a day to day basis. Although they are ultimately subject to the jurisdiction of the High Court, any supervision by that court depends on the matter being brought to its attention.

76. Quality and extent of supervision are, of course, hugely important, and once again this may need to be considered according to the particular circumstances. It is the OPG, and not the Court of Protection, which assesses the required level of supervision, and whilst supervision of a deputy is required by law, it is naturally only as good as the resources

which are devoted to it. It must be a matter of regret that recent imperatives to cut administrative expenses may result in the amount of supervisory contact being reduced.

77. As between trustees, the efficacy of the internal supervision, ie trustees monitoring each other, will depend on the quality and personality of the individual trustees and the dynamics between them. A strong and articulate lay trustee may well have a forceful effect in "supervising" a professional trustee.

78. In the final event, P can be protected by the Court of Protection in either case, in that that court can remove the deputy pursuant to s.16(8) of the 2005 Act, and provided that the power to remove a trustee is vested in P by the trust instrument (as it should be in a well-drawn instrument) the court will also be able to exercise that power on P's behalf under a trust. Again, if the power of revocation remains vested in P, the court can, ultimately, revoke the settlement.

79. The tests for removal of a deputy and removal of a trustee are not identical. The court can remove a deputy if (in short) he behaves, or is likely to behave, in a way which contravenes his authority or is not in P's best interests (s16(8)). The power of a court to remove a trustee is exercisable for the benefit of the beneficiaries and the competent administration of the trust on their behalf, (and can therefore be invoked in appropriate cases of loss of confidence) whether under the power usually inserted in a trust instrument or under the court's inherent power. There is unlikely to be any practical difference in the case of a trust but these points reinforce the need to preserve such powers as basic safeguards. They ought always to be included in a way which retains the control of the court (here, the Court of Protection) in any proposed trust.

80. This ultimate safeguard is therefore effectively the same for each form of administration, and it would not in practice necessarily require the additional intervention of the Chancery Division of the High Court (or the County Court in the unlikely event that there were a trust of a fund falling below the equity jurisdiction limit, currently £30,000).

81. Thus, in my judgment, the automatic supervision provided by the deputyship regime is a good reason to prefer deputyship over trust. In any event, it would not be appropriate to

authorise any proposed trust which did not retain ultimate powers of supervision and control in the hands of the Court of Protection (power to appoint and remove trustees and power to revoke), as such a transfer of control away from the court could never, in my judgment, be in P's best interests.

(ix) The degree of protection afforded to P;

82. This falls into two distinct parts. The first is the extraneous protection which P may have under either regime; the second is the internal protection give to P by limitations either written into a deputyship order, or imposed by restrictive drafting in the provisions of the trust instrument itself.

(a) Extraneous protections

83. A solicitor who acts either as a professional deputy or as trustee will carry professional indemnity insurance covering his activities in this respect, as a professional requirement. This will protect P against both negligent and deliberate default (short perhaps of actual fraud) by that professional. The position of other professionals is not as clear as that of solicitors, and a lay deputy or trustee is most unlikely to carry indemnity insurance - although default by a lay trustee or deputy may well give rise to a cause of action (for example for negligent supervision) against a professional co-trustee or co-deputy.

84. A deputy appointed by the court will be required to put in place a security bond in accordance with relevant Regulations. A bond is payable on demand, and, except in unusual cases, the level of security will be fixed by the Court so as to provide P either with sufficient funds to remedy any potential loss suffered by default in itself, or to provide enough immediate funds to cover the time needed to process an insurance claim.

85. This is a valuable safeguard for P in the deputyship context. It is not normally available under a trust, although one can envisage the possibility of writing such a requirement into a trust deed if necessary and if an insurer could be found who would be willing to cover such a risk. However, simply making a settlement provide the equivalent of a deputyship order does not justify authorising the settlement rather than deputyship, as

there must be some sufficiently worthwhile advantage to P to justify departing from the normal regime.

86. The strongly entrenched financial protection for P provided by deputyship is therefore, once again, a very strong reason to prefer deputyship over trust.

(b) Internal protections

87. "Internal" protection for P is provided by the terms under which either a deputy or a trustee is appointed.

88. It is now commonplace for advantage to be taken of the flexibility of the powers which can be conferred on deputies under the 2005 Act (ss 16(5) and 18)) and of the Court's ability to limit the assets over which a deputy is given powers, so as to minimise the risk to P of default or negligence in any particular case: see *Baker v H* 2010 1 WLR 1103 at [61]-[63]. The price of such restrictions is the greater possible need for applications to the court for further authority at a later date. However, the best balance between flexibility and risk will be assessed by the court when formulating an appropriate deputyship order.

89. With regard to a trust, similar limitations to those which can be imposed through a deputyship order can be created. The protections afforded to P by the terms of the proposed trust deed will therefore be a very material point.

90. Some aspects have already been touched on. Mr Rees submitted, (and I accept) that the bare minimum for a trust to start to qualify as an acceptable alternative to deputyship should be the following:

(1) The trust should either be a bare trust, or one which provides for the accumulation of income (so as to satisfy s.89 of the Inheritance Tax Act 1984) where appropriate, and it should not permit any other person to benefit from the trust property during P's lifetime. Using P's assets to benefit others would raise other, and separate, issues.

(2) The trust should be revocable, so as to enable the Court of Protection to preserve ultimate control over the trustees, and enable P to recover his property if he regains capacity. The power of revocation should be expressed to be vested in P as this will enable the Court of Protection to exercise it on his behalf under s.18(1)(j) of the 2005 Act (although tax implications might need to be considered in the case of a s.89 trust).

(3) The composition of the trusteeship should be carefully considered. The court would probably take the view that there should at all times be a professional trustee, because of the protections this gives P against possible family abuse and through professional indemnity insurance against default. To safeguard this, restrictions on the powers of surviving trustees pending a replacement of a deceased professional trustee might well be appropriate. Equally, there may well also be a case for ensuring that there was always a lay trustee, as a means of promoting costs control (see below).

(4) The trust should provide that on P's death the capital reverts to his estate or is subject to an overriding testamentary power of appointment exercisable by P, so as to ensure appropriate future disposition.

(5) S.31 of the Trustee Act 1925 should be excluded, to ensure that it is indeed a bare trust.

(6) Whilst it may be apparently useful to provide for an extended power of advancement (cf s.32 of the Trustee Act 1925), and this is a power often incorporated into bare personal injury trusts, this should be carefully considered (although tax considerations may prevent its extension in the case of a s.89 trust). The danger of such an extended power is that it could be used to resettle trust property onto other trusts, unless circumscribed, eg by making the power exercisable only with P's consent, which would, in effect, mean that of the Court of Protection.

91. The effect of these restrictions will, once again, reduce the distinctions between trust and deputyship, in particular by subjecting both to similar Court of Protection control. Once again, therefore, whilst this may be a minimum requirement to remove disadvantages as against deputyship, including such terms would not suffice on its own; more would be required in order to show that there was a sufficiently worthwhile advantage to P, rather than merely no apparent disadvantage.

(d) Financial considerations

(x) Tax considerations.

92. Obviously this could be an extremely important consideration in any particular case, and possibly even a "magnetic" one, but detailed tax consideration is outside the scope of general guidance. Neither the creation of a bare trust nor the appointment of a deputy should make any difference to the tax treatment of P's assets. However, the creation of a more sophisticated trust could do so upon creation and during its continuance (eg, a decennial charge to Inheritance Tax can arise with certain types of trust) and could give rise to further tax charges if it should need to be dismantled.

93. One possible form of trust which might be contemplated would be a Disabled Persons' Trust, formulated to take advantage of the Inheritance Tax treatment given by ss 89, 89A and 89B of the Inheritance Tax Act 1984 to trusts for disabled persons (which include persons who suffer from a mental disorder according to the definition in the Mental Health Act 1983). The provisions and effects of such a trust on all aspects of taxation are complicated and can only be considered in regard to individual circumstances. This is, therefore, noted simply as an illustrative possibility.

94. Both deputies and trustees are obliged to file tax returns. Where there is a settlement other than a bare trust, and P has other sources of income outside it, then it may be necessary to file two returns, at additional expense. This will not arise in a deputyship case, as the deputy will be the only party controlling all P's property and affairs.

95. The strength of advantages and disadvantages of tax and related considerations for P will therefore be individual to each case.

(xi) Means-tested benefits considerations;

96. A reason often put forward for creating a personal injury trust for P is that it will avoid P's personal injury damages being taken into account in the assessment of means- tested benefits. However, this view appears to be misplaced.

97. Under the Income Support (General) Regulations 1987 Sch 10, the following capital is disregarded for the purposes of assessing entitlement to means-tested benefits:

(1) Paragraph 12: "Where the funds of a trust are derived from a payment in consequence of any personal injury to the claimant ... the value of the trust fund and the value of the right to receive any payment under that trust."

(2) Paragraph 44: "Any sum of capital [derived from an award of damages for a personal injury to the claimant]

(a) which is administered on behalf of a person by the High Court or County Court under rule 21.11(1) of the Civil Procedure Rules 1998 or by the Court of Protection; [or]

(b) which can only be disposed of by order or direction of any such court."

98. It is thus clear that property held either within a personal injury trust (Paragraph 12) or in the Court Funds Office or under the direct control of the Court of Protection (Paragraph 44) is disregarded for the purposes of calculating means-tested benefits. However, it has sometimes been suggested that property held by a deputy under a wide form deputyship order does not fall within these disregards, so that, for example, (see Miss Bradey's evidence) care needs to be taken to keep funds under the deputy's control below any exemption limit.

99. Both Mr Rees and Mr Heapy submit that this contention is not correct, and that capital under a deputy's control remains "administered" by the Court of Protection because the

deputy's powers derive solely from an order of that court, and in any event the capital can only be disposed of by an order of the court. I think that this view would be correct, although I am not called upon to decide the point in this case. Even if the general point that the capital was still "administered" by the Court through a deputyship order could not be treated as clear without full argument, so long as the deputyship order contained the usual safeguard that any disposal of capital required a court order, that would appear to me to bring the case within Paragraph 44. The remedy here, therefore, lies in appropriate drafting of the deputyship order.

100. This point is, I think, sometimes urged as "playing safe". However, it does not seem to me that this is needed, and therefore, on the face of it, this is not a point which provides any sufficiently compelling reason for authorising a trust rather than appointing a deputy.

(xii) Comparative cost and expense

101. This is probably the most common reason for seeking a settlement rather than a deputyship.

102. I am here dealing with the general position, and not HM's particular case. Mr Rees submits that the conclusions which can be drawn from the evidence are that the contention that settlements produce a clear costs saving as against deputyship is not as strong as is often suggested. He submits that the evidence shows the following:

(1) Similar initial costs will be incurred by an applicant in applying for the appointment of a deputy, or the authorisation of a settlement;

(2) However, the Official Solicitor will usually be invited to represent P on the latter application (but not on the former) and so the initial cost of an application for a trust may actually be more expensive, even with the fee for the appointment of a deputy (currently £100) taken into account;

(3) On the other hand, the use of a deputyship will also result in an annual supervision fee payable to the OPG (formerly up to £800 pa, but since 1st October 2011, evened out at £320 in anything but "minimal" cases (£35) which the present case is not going to be) and an annual security bond premium, according to the amount of cover. A settlement will avoid these costs – although of course at the cost of removing the protection afforded to P;

(4) Aside from these disbursements, the overall cost of running a deputyship and a settlement may not be very different. Where the deputy has been given wide powers within the order appointing him, the need for (and costs of) future applications to the court will be similar under either a deputyship or a trust.

103. This certainly seems to be the general thrust of the evidence of both Mr Terrell and Mr Baker, the latter putting the difference at about £2,000 per annum, although I think on the basis that it covered the costs of administering a trust which might therefore not cover the administration of all P's property. Miss Bradey, however, appears to put the difference at more like £5,000 a year (plus VAT). Of course I have not had the opportunity of examining the basis of any of this evidence in detail, although I have to say that Miss Bradey's difference seems to me to be remarkably high. In weighing her evidence I was also troubled by her point that an initial saving of £1000 would, with investment, produce a much larger benefit to P over the years (she suggested the equivalent of £30,000), because her calculations assumed what seemed to me to be a highly optimistic 8% rate of return. However, again, I have not had the benefit of further explanation for her figures.

104. The important general point is that the discrepancy between these expert professionals seems to me to underline the fact that it is not good enough, in any particular case, simply to assert costs saving as a general proposition. Better evidence of the detailed justification for any such assertion in the particular case will need to be provided, and must be subject to serious scrutiny by the court.

105. In addition, the strength of any argument that P's financial needs justify trying to save costs of administration by using a trust structure rather than a deputyship order will depend not only on examining the real likely cost saving, but also the extent of the beneficial effects of any such savings on P in practice.

106. Financial benefit is obviously important, but the saving of a few pounds is not the be all and end all of the exercise under consideration. The degree of any cost saving is bound to be a matter of estimation, and therefore prone to a margin of error. Unless, therefore, it can be said with confidence that both the likelihood of saving, and the amount of saving are clear, departing from deputyship is a gamble, and probably will not be justified. However, this is a highly individual consideration, and, if funds are very short, it may be that the relatively large benefit of a relatively small saving, if this can be predicted with sufficient confidence, could provide sufficient justification for using a trust.

(xiii) Availability of budget sums

107. In a personal injury case, certain sums for the costs of administration of P's damages may well be included in the calculation of the quantum of damages, as has happened in HM's case. In principle any such quantum should include an assessment of administration costs based on the projected costs of appointing a deputy for P, because deputyship is the normal way in which P's assets will be administered. It is therefore generally foreseeable that such costs will have to be incurred by a brain-damaged claimant, and reasonable that they should be. Given the principles which I find to apply, it will not, in my judgment, be arguable as between the claimant (P) and the defendant in a personal injury claim that there should be any kind of assumption that P could, and therefore should, reduce his damage by seeking authorisation of a settlement in order to save costs, whether as a causation argument or by invoking the duty to mitigate loss. Deputyship is emphatically not a luxury; it is the normal regime in this situation.

108. It follows that the availability, or more usually the unavailability, of a budget sum covering costs of deputyship within P's assets when considering, at a later stage, whether

or not a settlement of damages should be authorised, should arise only in two kinds of case, namely (i) where there was a miscalculation (either of the likely costs of deputyship or their mistaken omission in any quantum calculation), or (ii) where there has been a reduction in liability (for example through a compromise agreement, or though a finding of contributory negligence), with the result that P has not received the whole value of his/her injury claim and hence of any provision for the prospective costs of a deputy.

109. However, the mere fact that this has happened will not be a reason in itself for the Court of Protection to authorise a settlement rather than appoint a deputy. The point is that that decision must be based on considerations of what is in P's best interests given the actual extent of P's available resources and what can be done with them, not why those resources are what they are.

110. In other words, the material considerations are those under the previous heading. Where such costs have been fully provided for in P's assets, there is likely to be no reason to prefer a settlement, absent a significant change of circumstance. Where they have not, the proposition that worthwhile practical benefits for P can be produced by such a cost saving <u>and</u> that they are sufficiently great that they justify forgoing the systematic protection of P provided by deputyship, may have more force. However, this will need to be justified as a proposition.

(xiv) Costs oversight and control

111. This is a matter of great concern in connection with the authorisation of a settlement, because doing so divests the court and the OPG of control and scrutiny of the fees charged by a professional trustee and of the oversight of external financial management fees. (As to the latter, Mr Quilter's evidence suggests that trustees may well need to be vigilant to ensure that they get the best negotiable rate of financial management charges on behalf of P.) If, therefore, the driving reason for proposing a settlement is the saving of the costs associated with deputyship, the court will need to be fully satisfied that any loss of control over fees and costs charged or incurred by trustees is not an unacceptable risk. The danger of a lack of oversight of professional fees or trust

management charges is obvious. Even without any professional misconduct, after the settlement has been set up under court scrutiny, there is then no more control, and fees can simply become an unchecked drain on P's resources, especially if the settlement regime continues, comfortably, for many years.

112. In the case of a deputyship, the deputy will either recover fixed costs pursuant to the relevant Practice Direction, or will be required to submit his bills for assessment by the Senior Courts Costs Office. This will apply the familiar test of scrutinising bills to see that the charges are "reasonable costs, reasonably incurred".

113. With no kind of detailed assessment applying automatically to the fees of a professional trustee, protection of P's interests in this respect lies only in the lay co-trustee being both capable and willing to police this, and ensure that the professional trustee's fees are both reasonable and reasonably incurred. Whilst this is some support for the argument that a combination of a professional and a family trustee can protect P's interests, this may again be no more than a factor seeking to redress a disadvantage of trust as compared to deputyship, rather than a positive advantage. In any case, though, the fact that the family trustee both can and will perform this task sufficiently rigorously needs to be shown.

114. The absence of rigorous control of professional fees is therefore, to my mind, a powerful factor militating against the creation of a trust rather than appointing a deputy. This is not to assume exploitation by a professional trustee, but simply that P needs protection from any tendency that fees might drift without any check, in a direction which is not to his benefit. Any application to authorise a settlement will therefore have to allay this concern.

115. In the present case, an attempt to do this has been made. Mr Heapy has volunteered that the professional trustee, his partner Mr Cusworth, will undertake not to charge fees at a higher rate than would currently be sanctioned on an assessment of costs by the Senior Courts Costs Office if he were a deputy. This goes some way towards meeting the above concerns, but not all the way. It provides some control on rates, but

not on the incurring of costs or the reasonableness of claimed time. I accept, though, that such an undertaking is a safeguard in the right direction, and the fact that it is offered is an encouragement.

(e) Administrative considerations

(xv) Administrative efficiency

116. This has been a frequently cited reason for seeking settlements as an alternative to receiverships in the past, on grounds not only of increased costs, but delays. The basis has been a perception of alleged inefficiency and unreliability of the old Court of Protection, and of receivership orders often being cumbersome means of administering P's property.

117. However, the regime under the 2005 Act should have changed much of the above, and the evidence satisfies me that this is now becoming accepted, certainly amongst experienced professionals. The Court of Protection's new structure is aimed directly at providing an efficient means of administration, and the Office of the Public Guardian has undergone radical changes from the former Public Guardianship Office, elevating its status to that of a separate and autonomous office. It readily provides help and assistance in non-contentious matters, and whilst, under human rights principles, it was thought appropriate under the 2005 Act to ensure that decisions taken about P's rights were the subject of court orders, procedures for efficient and quick (where needed) action were put in place. Both the Court of Protection and the Public Guardian are constantly reviewing practice and procedure to see where improvements in efficiency can be made.

118. In addition, and as noted, the express statutory provision of broad powers available for a deputy (s.18) emphasises the fact that a deputyship order can be individually formulated for the maximum administrative efficiency consistent with appropriate protection for P, in any particular case. Thus, for example, the inclusion of wide investment powers in the order appointing a deputy will eliminate any need for frequent or repeated applications to the Court for approval of minor transactions.

119. The evidence given to me also suggests, though, that there may still be a tendency to cite this ground somewhat automatically in support of an application to authorise a settlement, even though it may be no longer justified. In my judgment, therefore, any such assertion ought now to be examined carefully, and upheld only if founded on cogent evidence.

(xvi) Investment powers

120. Both a deputy and a trustee will be under a duty to invest P's capital appropriately.

121. The evidence of Mr Quilter suggests that the question of deputyship or trust should make no difference, whether to management strategy or to fees. This is hardly surprising given the similar objectives of both. Any relevant considerations are therefore likely to relate to incidental matters, such as the fact that an ISA cannot be acquired within a trust structure, whether there could be a discernible cost saving by reducing points of consultation or contact, or whether trustees are able to negotiate the best fee rates. I would not expect such considerations to be major.

(f) Indirect benefits/drawbacks

(xvii) Continued court involvement

122. There is sometimes an argument that continued involvement in what is seen to be "the court process" is unwelcome to some families (in particular in a case where a damages award has been made at the conclusion of lengthy and stressful litigation) and that there can therefore be a psychological benefit in creating a clear disengagement from that process by creating a settlement of the damages.

123. However, Mr Rees points out that the reality is that a deputy appointed with wide management powers will have little need to refer back to the Court of Protection, and that it would be the OPG, rather than the court, which would remain primarily involved in P's affairs in aspects involving contact with P and his family, mainly through its duty of

supervision. Furthermore, even if a settlement were authorised, P would still remain subject to the jurisdiction of the Court of Protection, and in the case of unexpected developments, there would still be a need to refer to the court.

124. It seems to me that, on the evidence, there is unlikely to be much difference in the likely need to refer back to the court, in either case. Because of the safeguards mentioned above which the Official Solicitor would wish to see included in the terms of an approved settlement, (such as the retention in P of powers of revocation and appointment of new trustees) further applications to the court may have to be made even in that case. Another perfectly foreseeable reason for the need to refer to the court in the case of a trust would be disagreement between trustees. This might be reduced in a well-drafted deputyship order in the case of joint deputies, and of course the appointment of a single deputy avoids the complications of deadlock.

125. The likely incidence and effect of further court involvement is therefore a point, which must be evaluated objectively in any case, as its rationale may well be mainly psychological. I do not diminish the importance of that in a decision which has an overarching effect on people's everyday lives (obviously the central concern being the effects on and benefits for P) but, in my judgment, there would need to be very compelling individual evidence before such an argument could provide a strong enough justification for preferring a settlement to deputyship.

(xviii) Family involvement

126. Similarly it is clearly also often suggested (and I note particularly Miss Bradey's very strongly expressed views) that the use of a settlement can enhance family involvement in P's affairs for his benefit, whilst a deputy may be seen as being impersonal or imposed, or somehow acting in the (assumed hostile) interests of "the court".

127. Once again, this seems to me to be a peculiarly individual consideration, requiring specific examination and justification, and not to be taken as an obvious generalization - nor even readily at face value - in any case.

128. First, the appointment of a professional deputy does not exclude family members from involvement in P's affairs, and the statutory requirement on such a deputy to act in P's best interests and to consult those concerned with his welfare must mean that practical involvement with family members is more than likely. Second, the possibility of a joint deputyship with a family member may well avoid any such tension.

129. There is also the converse psychological possibility, in that a deputyship may provide an appropriate "buffer" between P's family and P's funds. A professional deputy who is under pressure from P's family to use P's funds in a particular way has grounds for referring such a decision to the Court if necessary, whilst a trustee could not do so without asserting deadlock or disagreement between trustees and in all probability being inflammatory.

130. Indeed, in considering any contentions about the appropriateness of encouraging family involvement it is necessary to bear in mind the possibility of conflicts of interest arising, and how to try to forestall this. This may be particularly important if the family member trustee is also P's main carer and is therefore dependent on P's damages award for his or her own accommodation and income.

131. This aspect may become acute where P may be living in a house owned by another family member, such as a carer-parent, but adaptations or improvements are then made with P's money. In the general world, the mingling of resources in this way is notorious for causing dispute over the consequent beneficial interests in the property. Where one of those involved lacks capacity, it becomes all the more important to try to ensure that such conflicts are avoided either by clear provision at the outset, or by an administrative mechanism which will ensure that P's own interests are fully protected, even against co-family members. The distance and impersonality of a deputy, rather than trustees, might be thought better placed to manage such a situation.

Observations

132. I shall first make some broad comments about what seem to be the main general reasons why applications are made to the court to settle P's assets (usually damages awards) rather than appoint a deputy.

133. Mr Heapy's evidence was that the most common reasons advanced were: administrative efficiency, avoiding an intestacy, preserving means tested benefits and costs. Looking at the general evidence referred to above, it seems to me that the reasons acknowledged to be the main general reasons usually advanced are the practical ones of alleged costs savings and administrative efficiency, and also – a reason of more elusive quality, and therefore more difficult to identify and articulate – benefit for P as regards family attitudes or dynamics.

134. The cost savings point no doubt arises from the perception that a trust will be far cheaper to administer than the costs associated with deputyship, with the latter's obligatory inclusion of supervision fees and security bond costs. This is coupled with a perception that deputyship is administratively less efficient, because of a greater need to refer to the Court of Protection (also making it more costly). However, I am satisfied that these claims may often be unjustified assumptions and are quite likely to be overstated, so that they need to be examined carefully and critically. Changes both in the nature of deputyship and the administration and efficiency of the Court of Protection and the Office of the Public Guardian in the last four years mean that any such assumption may well be out of date. This is being recognized by experienced professionals such as those whose evidence I have received, but it may not yet be apparent to all.

135. In any event, as Mr Rees correctly submits, the issue of cost is relative and not absolute, and this means that the decision whether or not to authorise a settlement must be based on a risk/reward assessment of whether any cost-saving for P provides a sufficient benefit to him to justify taking any risk which is imported by the cost-saving measures. (This can be compared with the question whether the apparent solidity of a Deputy can, on its own, justify reducing the amount of security ordered: *Baker v H* [2010] 1WLR 1103 at [98] – [102]).

136. As regards the "family dynamics" arguments, they must of course be given weight and cannot just be dismissed, but, equally, care must be taken to see that they are real, genuine benefits, and are neither the product of sentiment, nor of any other agenda amongst the family members whose attitudes are being prayed in aid. In particular, the perception of deputyship as an intrusion of the state, or of the court, may be one which an explanation by a professional adviser will dissipate, especially if, as must be likely, a settlement would only be authorised with a professional trustee involved, and a joint deputyship order could be made involving a suitable family member. "Family dynamics" points are, however, particularly individual, and there can be little useful advice as to how to approach them generally. Even if they cannot be defined, they are likely to be immediately recognisable when they genuinely emerge.

Overall Summary for Issue 3

137. The authorisation of a settlement for P can only be justified if it is in P's best interests to do so. Since the statutory scheme of deputyship has been provided with the very objective of being in P's best interests in the usual case, departing from this needs to be justified on the basis that such departure is in P's best interest in the particular case.

138. In my judgment, this requires demonstration that the proposed settlement and its terms provide a sufficiently clear and significant overall state of advantage to P over that which is capable of being created by an appropriate deputyship order that it justifies such a departure. The burden of establishing this to the court's satisfaction is on the applicant seeking authorisation of the settlement.

139. The court will need to be satisfied, as a pre-condition, that a fully appropriate trust structure is proposed, including, in particular, the availability and willingness of suitable trustees (because of there being less close control of trustees than deputies) and a trust instrument framed in suitable terms.

140. In particular, the court will examine the proposed structure and terms of the trust critically as to the safeguards it provides for P. Where safeguards equivalent to those of deputyship are not, or cannot be, reproduced by the trust instrument, the court will need

to be satisfied that any reduced protection for P is sufficiently outweighed by other advantages, so as to make it in his best interests to proceed by way of trust notwithstanding this. However, ultimate controls, such as powers over the appointment and removal of trustees and revocation of the trust are so fundamental that it would probably never be justifiable to authorise a settlement which removed them from ultimate control by the Court of Protection.

141. In considering whether any such sufficient benefit can be shown to be conferred by use of a trust, the court will probably first wish to consider whether there is *prima facie* some factor of "magnetic importance" in favour of this. The obvious examples would be an effect which is plainly in P's best interests but which cannot be achieved through a deputyship order, such (i) major and unusual tax considerations, or (ii) preventing instestacy rules applying on the death of a child, (although even then it must always be remembered that the test is what is in P's best interests, and not the best interests of anyone else). That does not mean that, if any such factor is found, the exercise of considering all the circumstances can be dispensed with, but it would help shape that exercise by identifying a factor of very great weight.

142. Aside from any such individual factor, anticipated cost saving seems most likely to be advanced as a good reason for proposing a settlement rather than deputyship. However, if so, the court would need to be fully satisfied of the validity of any such assertion and will require evidence to establish both the likelihood and the amount of such comparative cost saving.

143. Further, the benefit to P of any identified prospective costs saving must then still be balanced against any disadvantages to him, many of which are likely to be risks. The obvious risks are: losing the three protections of (i) supervision, (ii) a security bond and - usually - full indemnity insurance protection for all P's affairs, and (iii) scrutiny and control of professional fees and expenses. The effects of the latter two may, to some extent, be capable of being mitigated by the terms of the trust and/or by undertakings of professional trustees. The degree of risk depends on the particular circumstances of the case.

144. Of course any other perceived benefits or disadvantages apart from the cost/risk factors just referred to can, and must, also be considered and given appropriate weight in the particular case. Alleged indirect benefits should not be underestimated simply because they may be intangible and not easily compared with financial ones. However, by the same token, if they are to be relied upon, the court will need to be satisfied that they are real, and have real value for P. Any such argument will need to be founded in evidence rather than speculative aspiration, or mere preference.

145. The choice between deputyship and trust is emphatically not just an even one. It will never be good enough to argue that a proposed trust structure is, overall, equivalent to or "as good as" the operation of a deputyship order and that there is therefore no reason not to authorise it. There has to be a positive reason to authorise it. If the balance between trust and deputyship is only even, or if any suggested practical advantage is only marginal, that will not suffice. It is for the applicant to prove the existence of a sufficiently clear and significant relative benefit to P so as to justify administering his assets through a private law structure rather than the tailor-made public law scheme of deputyship.

Issue 4 Should a settlement of HM's damages be authorised in the present case?

146. I turn now to applying the evidence and arguments to this case. As already mentioned, HM is a seven year old girl with cerebral palsy, and the issue is whether a personal injury settlement for her should be authorised by the Court of Protection, in respect of the damages of £450,000 (£436,200 net) and periodical payments of £25,000 rising to £50,000 on majority, awarded to her by a compromise and consent order, and as envisaged by that order.

147. Because of the hazards of litigation, the compromise approved for her represented about one third of the total of her claim. The assessment of leading counsel, reviewing the strength of the evidence, was that her claim stood only a 25% - 33% prospect of success. The compromise therefore produces a shortfall on even future projected care costs for HM (ie leaving aside sums for pain, suffering and loss of amenity) taken at a full

reasonable value. Providing for her needs is therefore going to be financially stretching.

148. Within the quantum calculation there was an assessment of £209,000 (odd) for projected Court of Protection fees, based on a presumed set up cost of £5000 and £6,500 per annum thereafter for projected deputy fees and associated costs (supervision fee and security bond). Leading Counsel records his understanding that the costs saving if a trust was created would be between £1000 and £2000 pa.

149. Mr Heapy's second witness statement gives detail about the predicted likely costs savings of a trust. The relevant comparison is obviously with the costs associated with appointing a professional deputy rather than a lay deputy (although he gives these) which would naturally be higher. He provides a comparison table of estimated costs of a deputyship and a trust and includes annual costs for supervision fee, security bond, preparation of deputyship reports, likely costs of extra correspondence because of dealing with the OPG, costs draftsman's fees and SCCO lodgment fees. He also includes "one-off" fees for the appointment of a deputy, and an estimated global sum for periodic attendances on a Court of Protection Visitor over the life of the deputyship. His conclusion is that taking these facts into account, there would be an annual average costs saving by using a trust as against deputyship of around £1,108 per annum if Linder Myers were never required to assess their deputyship costs, and of £1,458 if they were. (I must add that whilst he therefore says that the total saving over HM's lifetime could be as much as £100,000, with respect, I do not find this either convincing or helpful. The basis of this is not spelt out, and Mr Heapy is not giving evidence as a financial expert. Such supposed calculations are also, to my mind, highly theoretical and actually rather emotive.)

150. Mr Heapy had also researched the comparative range of bills for deputyships and for personal injury trusts from his firm's files, which showed a range from £500 to £21,500 (plus VAT) for deputyships, and from £180 to £7,500 (plus VAT) for trusts, although this appears to include trusts for competent persons. As a result, his final view was that costs savings for HM could in reality be between £1,000 and £2,500 per annum.

However, as Mr Heapy accepted that he is not able to explain why there is such a huge range in the charges mentioned, I do not find these comparisons particularly helpful. I also note that they do not cause Mr Heapy himself to alter his view of predicted costs savings very greatly.

151. I have not been supplied with any detailed evidence of the ways in which this kind of sum might benefit HM in practice, although I of course accept that the fact that extra funds may be available for her suggests that she will derive some benefit.

Arguments

152. Mr Heapy argues that there are four particular factors in this case which, in combination, show that it is in HM's best interests for a settlement to be authorised rather than the appointment of a deputy. These are: (i) costs savings, as mentioned above, (ii) the fact that Swift J approved the compromise on the assumption that a settlement would be created to achieve such costs saving, (iii) the view of SM, as HM's mother and carer, that this would be in HM's best interests, and (iv) the fact that SM is plainly a suitable and competent trustee, both well able and well motivated to provide full and effective supervision of the professional trustee and the reasonableness of his fees.

153. He emphasises the importance of the costs saving benefit here because HM's damages award was a compromise figure with such a deep discount from the real quantum of compensation for her needs that even modest cost savings will have a real and significant benefit for her everyday life by increasing available resources for her personal care needs. He also submits that his view of costs savings derives support from both Mr Baker's general figures, and from Ms Bradey's evidence.

154. Mr Rees, for the Official Solicitor submits that, of these four reasons, the costs issue is plainly the driving factor. He adds that the Official Solicitor is sceptical about the suggested costs savings, of £1,000 - £2,000 per annum. In general terms, he adds that the Official Solicitor is unpersuaded that any costs savings from a settlement could suffice to outweigh the loss of protection afforded by deputyship in terms of supervision

by the OPG and the court, security bonds and the cost supervision provided by the SCCO, in any but a very exceptional case.

155. He concedes that this case could be seen as very finely balanced. He emphasises that the Official Solicitor has no criticism or doubts about SM's fitness as a trustee, and he accepts the evidence that she has a responsible job and will be well capable of raising any costs (or other) concerns she may have with Mr Cusworth, and of taking any necessary action in that regard. He also accepts that the offer of Linder Myers to cap their charges at the rate set by the SCCO for deputyship costs, whilst not a complete answer to concerns about uncontrolled costs (as it does not address the extent to which costs have been reasonably incurred), is nonetheless welcome.

156. He is also prepared to concede that the fact that the settlement of HM's claim was approved by Swift J on the footing that her damages would be held in a PI trust is a factor which might have some persuasive effect.

157. On balance, though, he remains of the view, and accordingly submits, that this is not a case in which the court should be satisfied that it is in HM's best interests to authorise a settlement.

Discussion

158. In general terms, I am satisfied that there is a suitable form of Trust instrument proposed, incorporating the stated basic appropriate limitations and terms for the protection of HM, as discussed above. I am also satisfied from the evidence that there is a family member, SM, who is a suitable party to be a competent and effective lay trustee, with a temperament and skills which will both compliment the professional skills of Mr Cusworth and provide appropriate checks and balances to operate in HM's best interests. The evidence is that it was felt inappropriate to seek her appointment as HM's sole deputy because of expense considerations, the size of HM's award, and the fact that she herself felt that she needed the support of a professional trustee.

159. It is not urged that there is any factor of "magnetic importance" militating in favour of a trust in this instance. There is no application to incorporate terms in the trust to disapply the rules on intestacy if HM should die before attaining age 18 so as to exclude the absent father. The evidence is that this was a deliberate decision, because SM feared that if he became aware that HM had obtained a significant award of damages (and he would have to be informed of any application which affected his rights) he might stop paying child maintenance for HM. It was faintly suggested that this demonstrated a responsibility towards HM and a selflessness on SM's part which supported confidence in her ability to protect HM's best interests as a trustee, but I do not think it can really be elevated that far. It seems to me to be entirely neutral, as a risk to present resources to HM would surely be seen, in any event, as outweighing any contingent consequences of her early death.

160. To deal in a convenient order, then, with the four suggested reasons in support of authorising the trust, I consider first the evidence about the approval of the compromise of HM's damages claim. I am not concerned with Leading Counsel's opinion expressed before Swift J as to the merits or otherwise of deputyship as against a settlement and whether (as he thought) the detriment to HM of choosing the latter could be regarded as of "immaterial extent". His view seems to have been coloured somewhat by the erroneous assumption that there would inevitably be a sole deputy, so that it could even be argued that P was better protected under a trust as her affairs would not be in the hands of a single person. That is not a valid point, and would in any event be completely answered by appointing SM and Mr Cusworth as joint deputies, as has, indeed, been proposed if necessary.

161. Neither, despite Mr Rees's concession, do I think it can be material that the proposal for cost saving by seeking a settlement rather than the appointment of a deputy was part of the argument which persuaded Swift J to approve the compromise, and was even incorporated into her order. Mr Heapy does not suggest that it was a decisive point, and it seems to me to be improbable in the extreme that it could have been; it was at best a make-weight. However, even if it had been a consideration in Swift J's mind, I

am not bound by that, and it does not logically affect my consideration of what is in HM's best interests, now, in the circumstances where her resources have been fixed by the Order of Swift J, for good or ill.

162. The second matter is SM's view of HM's best interests. I accord this some, but not great, weight. It will undoubtedly have been coloured by the advice (perfectly bona fide as it will have been) of her legal advisers, and therefore adds very little to the submissions made on her behalf. The weight of this factor therefore lies not so much in the bald fact of this being SM's view, but because of what it says about the likelihood that the settlement proposal can and will be made to work in HM's best interest.

163. The third point is the suitability of SM to be a trustee, rather than a deputy. I am impressed by the evidence of SM as both a devoted parent and a potentially able, energetic and responsible trustee who will be both anxious to ensure that HM's best interests are protected and robust and capable in doing so.

164. None of the above, however, goes so far as to suggest that there is any reason to suppose that a settlement would provide any better situation for HM than would be provided by a joint deputyship appointment. This shows that it is the costs savings/benefit point (which is also the practical manifestation of the "administrative efficiency" point) that has to provide the basis of any sufficient reason for granting this application, if it is to be granted.

165. I confess to sharing Mr Rees' misgivings about overestimating the extent of costs savings as between deputyship and a trust. Leaving aside initial costs, it seems to me that the only clear additional expenditure is supervision fee, security bond premium, reporting, and possibly costs lodgment/assessment fees. I do not really see why, in practice, it should be assumed that the costs of running a deputyship (correspondence, attendances and suchlike) should be materially greater than similar costs in running a trust. However, the basic evidence of Mr Heapy is consistent with the evidence of Mr Baker, and more conservative than the view of Miss Bradey, and I am prepared to accept,

in this case, that a saving of between £1000 and £2000 a year has some likelihood of being made.

166. Whilst I do not know how any such saving would be used directly, I accept that in HM's case finances will be tight, and I can also see that in the current economic climate this will be all the more so.

Conclusion

167. In the end, and not without hesitation, I am persuaded that it is in HM's best interests in this case to authorise the creation of a personal injury settlement of her damages and I will do so.

168. The factors which have persuaded me are, first, that although I do not see the costs savings of trusteeship over deputyship as very great, I accept that costs savings are of greater importance than usual to HM's overall benefit, having regard to the amount by which her damages fall short of her calculated actual financial needs. Minimising this shortfall is therefore a powerful aspect of what must be in HM's best interests.

169. This alone might not be enough, in view of the protections which HM would lose, but the fact that, by very strong common consent, SM is a competent, forceful, well-educated and responsible person is also a very powerful factor, because it provides a safeguard against what I consider to be the insidious disadvantage to P inherent in a settlement, namely the potential for what I would call "fee drift", ie the uncontrolled escalation of professional fees and other charges.

170. In fact, my concerns in this regard are reduced by the third factor, namely Mr Cusworth/Linder Myers' voluntary undertaking to cap charges at the level which would be approved by the SCCO in respect of equivalent deputyship fees.

171. I have asked myself whether the appointment of SM and Mr Cusworth as joint deputies on HM's behalf shows that a joint deputyship order can in practice be drafted so as to be sufficiently in HM's best interests as to mean that the authorisation of a trust is

not justified. In the end, though, as I have mentioned, I am just satisfied that, in this case, possible costs saving is of sufficient benefit to HM for it to be in her best interests for the trust, as proposed, to be authorised.

172. Without the coming together of all the three factors which I have mentioned, I would not have been prepared to authorise the creation of the relevant settlement, and I should add that this particular decision should not be relied on as a precedent with regard to facts. As it has been a test case, I have perhaps taken a somewhat benevolent view of the evidence, in particular of tangible benefit to HM of the projected costs savings. However, it would not be in HM's best interests to prolong any uncertainty in this matter by seeking any additional evidence. I would not, therefore wish it to be thought that this individual case could be taken as a model, or a definitive example of where "enough" evidence might lie. My overall impression of the case and the parties involved is sufficiently strongly that it is in HM's best interests to accede to the application, and I am therefore prepared to do so.

173. With various legal representatives and advisers have acted pro bono in this matter (for which I once again express the court's appreciation) there will apparently be no need for any costs order, and I will not require the parties' attendance for the handing down of this judgment.

HH Judge Hazel Marshall QC

4th November 2011