COURT OF PROTECTION **No. 10334473**

MENTAL CAPACITY ACT 2005

In the matter of
JDS

BETWEEN:

KEVIN GERALD SMYTH

Applicant

-and-

JDS
(by his litigation friend, the Official Solicitor)

Respondent

The background

1. This is an application for a gift to be made to the parents of a young man who has been awarded damages for clinical negligence. The purpose of the gift is to reduce the amount of Inheritance Tax that they may have to pay on his death.

2. I shall refer to the person to whom the application relates as James. He has cerebral palsy as a result of complications at the time of his birth in 1991 at the Royal Sussex County Hospital.

3. Proceedings were brought against East Sussex, Brighton & Hove Health Authority. Burt Brill & Cardens, Solicitors, Brighton acted for him in the claim, and Margaret Bowron QC was his leading counsel.

4. The claim settled for £2,090,000 at the end of the first day of a contested quantum trial in July 2001, and the settlement was approved by Nigel Baker QC, sitting as a deputy high court judge. £90,000 was paid to James's parents in respect of their gratuitous past care, and £1,611,222 of the remaining £2,000,000 was attributable to his future care needs.

5. Kevin Gerald Smyth of Burt Brill & Cardens was appointed as James's receiver by a first general order dated 24 March 2000, and subsequently became his deputy when the Mental Capacity Act 2005 came into force.

6. James is an only child. His father was born in 1959 and his mother was born in 1962.

7. He lives with his parents in a house that was bought in October 2000 for £349,950 from an interim payment and is held by his parents and Mr Smyth as his trustees. Its current value is estimated at £675,000.

James's life expectancy

8. In a report dated 14 May 1998 Dr Venkateswaran Ramesh, a consultant paediatric neurologist, based at Newcastle General Hospital, reckoned that: "Survival to late twenties and early thirties is probable if current pattern of care is sustained."

9. In a later report, dated 20 March 2000, Dr Ramesh concluded that:

> "I would expect James to survive into his mid forties and perhaps into early fifties if his current pattern of round the clock care and appropriate medical treatments are given to him. This is an upward revision in his estimated survival figure from my last report."

10. On 4 February 2008 Dr Charles Fairhurst, a consultant in paediatric neurodisability, based at Evelina Chidren's Hospital, Guy's and St Thomas' NHS Foundation Trust, concluded his report by stating:

> "For James this raises his life expectancy to between 40 and 45 years at present, as per the joint statement agreed by Drs Ramesh and Rosenbloom. However the data continues to show improved survival rates and it may well be that revision of the epidemiology in years to come may show further increments in James' life expectancy. For these reasons I feel it is entirely reasonable to perform major structural renovations at his home."

The application

11. On 15 October 2008 Kevin Smyth, the deputy, applied to the court for the following order:

> "Giving approval to the deputy to transfer equity to the value of £500,000 in the patient's property (being the family home) to his parents according to a declaration of trust exhibited hereafter together with an appropriate order for the costs of this application to be assessed."

12. In response to the standard question in the application form, enquiring how the order would benefit the person to whom the application relates, Mr Smyth stated:

> "The patient lives with his parents who are his main carers. The benefit to him is twofold. Firstly he is taking a step which preserves the value of his estate post death as he would want his parents to benefit to the extent that tax is saved. Only he can do this. Secondly by enhancing their future inheritance prospects in the way proposed, it is all the more likely that his parents will be better enabled to remain living with the patient together under one roof in the years ahead and this clearly will be of great benefit to him."

13. The Official Solicitor was invited to act as James's litigation friend, and the application came before District Judge Dawson on 28 January 2009. The Official Solicitor was unable to support the application, mainly because he did not believe that it was in James's best interests to dispose of such a large amount of capital which he may need in years to come. District Judge Dawson declined to approve the gift and ordered that the application be adjourned generally with liberty to restore.

14. On 28 April 2011 Kevin Smyth submitted a revised application. This time, the order he was seeking from the court was as follows:

> "Permission to transfer £325,000 of the patient's funds into a flexible power of appointment trust with the intent that substantial Inheritance Tax will be saved (at today's rates £130,000) provided he lives 7 years."

15. The applicant set out the following grounds in support of such an order:

    (a) There is every reason to believe that the patient would wish his parents to be spared the consequences of such tax having to be paid.

    (b) The probability is that one or both of his parents will survive him. James is now aged 20 and currently he has a life expectancy of only another 20 to 25 years at which time both parents will be in their mid to late 60s.

    (c) In the very unlikely event that the patient were to marry and/or have a child or children, the saving in tax could benefit his wife and/or any such child or children.

    (d) Unlike the tax saving scheme that was before the court for consideration on 28th January 2009, that which is now presented for consideration is tax efficient in that it will have the desired result: in particular it will be noted that there can be no reservation of benefit of the type which would have adversely affected the earlier scheme. In this regard I rely upon the recommendations and advices of John Kelly FCA of DKM Wealth Ltd which are set out in his reports dated 3rd November 2009 and 27th April 2011.

    (e) When the application for permission came before District Judge Dawson on 28th January 2009 he said, inter alia, that "James should be in the same position as anyone else when it comes to being at liberty to take lawful steps to avoid or mitigate a potential tax liability: in his case the saving of a very substantial amount of IHT, the payment of which would obviously be detrimental to his parents. In this regard I have noted that there is evidence before the court relating to James' much impaired life expectancy."

The hearing

16. The hearing took place before me on Friday 25 November 2011, and was attended by:
    - Georgia Bedworth (counsel), Kevin Smyth (the applicant), David Edwards (solicitor), John Kelly (investment adviser);
    - Joseph Goldsmith (counsel) and Benjamin Blair from the Official Solicitor's Office; and
    - James's parents.

17. To do justice to their arguments, I shall set out both barristers' submissions verbatim, rather than summarise them.

The applicant's submissions

18. In her skeleton argument dated 18 November 2011, Georgia Bedworth of counsel stated as follows from paragraph 14 onwards:

    <u>The Proposed Scheme</u>

    14. The Deputy proposes that James should transfer £325,000 into a Flexible Power of Appointment Trust. Details of the scheme are set out in Mr Kelly's reports. The proposed form of declaration of trust is at [*page numbers*].

    15. The scheme operates in the following way. Insurance policies are purchased with successive maturity dates, which are held on bare trust for the settlor (James). The settlor then takes all rights under the policies on a discretionary trust from which he is excluded from benefit but retains the maturity benefit. At the maturity date of the policy, the trustees (who will include the

deputy) have a discretion whether to postpone the maturity date, surrender the policy or allow it to mature. If the policy is allowed to mature, the benefit is to be paid to James. If the trustees do nothing, this is the default position.

Inheritance Tax ("IHT") Consequences

16. IHT is mitigated by transfer of property out of a person's estate. The proposed gift is within the current nil rate band so that although the creation of a discretionary trust is an immediately chargeable transfer, there will be no IHT immediately payable. If James survives for 7 years, the sum will be left out of account in calculating IHT on James's estate, resulting in an IHT saving of £130,000.

17. There are anti-avoidance provisions at s.102-102C Finance Act 1986 which prevent a donor from giving away property but retaining a benefit in it. This is known as reservation of benefit.

18. Under the proposed arrangement, James is capable of benefiting from the policy on maturity. At first sight, this appears to be a reservation of benefit. The reservation of benefit provisions avoid a person "having his cake and eating it." However, it is well established that there is nothing to prevent a party from dividing property into separate rights and giving away only some of those rights and retaining others for himself. The rights retained were never given away in the first place, so no benefit has been reserved out of the gifted property: *Ingram v IRC* [2000] 1 AC 293. Such arrangements are known as "carve out" arrangements. The proposed arrangement is one such arrangement – the maturity benefit is not part of the property which is given to the trustees. It is not a benefit which is reserved out of the gifted property. Her Majesty's Revenue and Customs ("HMRC") accepts this analysis: Fosters Inheritance Tax C4.16: Technical Note published May 2007.

19. Pre-owned asset tax ("POAT") applies in certain circumstances where a person continues to derive a benefit from property which they previously owned. The insurance policies are intangible property. Pre-owned asset tax applies where the settlor retains the right to income from intangible property (such as an insurance policy) subject to a settlement: para 8 Schedule 15 Finance Act 2004. This does not apply here because the maturity benefit is held on bare trust. A bare trust is not a settlement, even for tax purposes. James only derives a benefit under a bare trust. He is not entitled to any benefit under the settlement. HMRC accepts that POAT does not apply to arrangements such as this: HMRC Pre-Owned Assets Guidance, section 5.

Best interests

20. Entering into the settlement would be in James's best interests, looked at objectively and in accordance with the principles under the Mental Capacity Act 2005 ("MCA 2005").

21. The best interests test is an objective test which depends on all of the circumstances of the case: *Re M* [2010] 3 All ER 682; *Re P (Statutory Will)* [2010] Ch 33.

22. The court should not put a gloss on MCA 2005 by applying presumptions which are not set out in the statute. In particular there is no statutory or other justification for the presumption that the court should not direct a settlement where P's capital derives from a damages award. The court simply has to take into account the financial circumstances in the particular case and the nature of the proposal before the court.

23. James's financial interests are important but they are not the only factor that the court should consider. The purpose of the settlement is to save IHT on James's death, to assist his parents and avoid the possibility of them having to sell the home in which they live. The proposal does not provide any direct financial benefit to James (although for reasons set out below, the scheme is not to James's financial detriment). "Best interests" is not synonymous with "self interest": *Re G (TJ)* [2010] EWHC 3005 (COP) para 35, 56. MCA itself contemplates altruistic interests being

taken into account. It permits the Court of Protection to authorise gifts, settlements and wills which are not necessarily in P's self-interest.

24. The court can authorise a settlement in an appropriate case for tax planning purposes. This is an appropriate case to do so.

25. James has sufficient capital to meet his needs, even taking an over-cautious view. In any event, the proposed arrangement does not deprive James of access to the capital. The primary beneficiaries of the proposed arrangement are James's parents who are devoted to him. However, James is not dependent on the good will of the beneficiaries to derive a benefit under the arrangement.

26. James has assets of a little over £2.2 million. The potential inheritance tax bill on his estate is significant. Although £1.6 million was awarded in respect of James's future care, some 10 years ago, the capital value of the fund is the same as when the damages award was made. The figure provided for did not take into account capital growth: w/s of the deputy dated 4.11.11.

27. If the transfer is made James would be left with capital of £1.875 million. The value of James's home is £675,000. If the value of the property is left out of account, the liquid funds available to meet the cost of James's future care, in the event that the proposal is implemented is £1.2 million (ignoring any future capital growth). James's outgoings currently exceed his income. This is likely to continue at a rate of £32,500 for the next 5 years. If outgoings exceed income at this rate for the rest of James's life expectancy, James will be left with liquid capital cushion of £387,500 plus the entire value of his home, even if capital growth is ignored. This adequately caters for contingencies. In order to exhaust James's liquid capital (ignoring both capital growth and the value of his home), James's costs would have to exceed his income by an average of £51,1875 per annum over the remainder of his life expectancy (after the next five years). This is based on the wholly unrealistic assumption that there will be no capital growth. James's safety net is potentially larger. Therefore, even if the proposal is implemented, there will be sufficient sums to meet James's future needs, even on a cautious approach.

28. Further, this is not a case where James will be unable to derive any benefit from the fund or access once the settlement is entered into. The proposal should not be treated as equivalent to an absolute gift. James will be entitled to the capital if a policy is allowed to mature. Maturity of the policy is the default position in the event that the trustees do not exercise their discretion. As one of the trustees, this is within the control of the deputy. The proposal does not, in reality, damage James's long term financial security.

29. James is not dependent on the goodwill of his parents should he need the funds. Importantly, James's accommodation is secure notwithstanding the implementation of the proposal.

30. In the event that James's parents encounter financial difficulties (a concern raised by the Official Solicitor ("OS") previously), the funds are also safe from any creditors of James's parents. In the event of a financial difficulty, the OS contemplates that it might be in James's best interests to make funds available to his parents: OS skeleton argument para 30. The proposal provides a mechanism for dealing with any such difficulty immediately and proportionately, without the need for a further application to be made to the court and the delays that that may entail.

James's age

31. The decision must not be made solely on the basis of James's age: MCA 2005 s 4(1)(a). The fact that James is young does not prevent the court from directing a settlement. Given the financial position and James's limited life expectancy, the fact that James is only 20 years old should not be regarded as a factor which weighs heavily against entering into the proposal.

Present wishes and feelings

32. James has not expressed his current wishes and feelings with regard to the proposal.

Wishes that James would have if he had capacity and factors that would have been likely to influence him if he had capacity

33. Although the relevant test is not one of substituted judgment, the decision that James would have made for himself had he had capacity is a highly relevant factor, particularly in considering whether or not to make provision for third parties: *Re G (TJ)*, above at [55].

34. The primary beneficiaries of the proposed arrangement are James's parents. James's parents are devoted to him and provide him with care. He too loves them very much. Given James's reduced life expectancy, it is likely that he will pre-decease his parents. The deputy considers that James would wish his parents to benefit from the mitigation of inheritance tax that the proposal would involve. The home in which James and his parents live is already worth more than the current nil rate band. James would not wish his parents to have to sell their home to meet the inheritance tax bill.

35. Tax mitigation is something that James would probably consider if he had capacity to do so.

36. In the circumstances, if James had capacity, he would have wanted to enter into the scheme to mitigate inheritance tax.

Views of those concerned for James's welfare

37. Both of James's parents support the application. Further, the deputy considers that the application is in James's best interests.

Other factors

38. Best interests do not end at the date of death: *Re D (Statutory Will)* [2010] EWHC 2159 at [13]. Part of best interests is whether P would wish his beneficiaries to avoid being faced with a large tax bill.

39. The purpose of the MCA 2005 is to place a person lacking capacity in the position of a person who had capacity. A person with capacity would be able to enter into inheritance mitigation. A person lacking capacity ought not to be deprived of this right. As the arrangement does not inhibit James's financial security, the arrangement ought to be permitted.

40. The proposal does not affect the security of James's accommodation. In the event that James did need to relocate in the future, the whole of the value of the property would be available to meet James's needs.

Conclusion

41. The arrangement is in James's best interests. It does not affect his financial security but allows him to make provision for his parents and mitigate inheritance tax. This gives effect to the wishes and feelings that James would have had, had he had capacity. The honourable court is respectfully requested to grant the application.

The Official Solicitor's submissions

19. The Official Solicitor opposed the application, and in his position statement on behalf of the Official Solicitor, Joseph Goldsmith of counsel stated as follows from paragraph 29 onwards:

29. Given the unfortunate circumstances and consequences of James' birth, he is not able to partake in the decision-making process. Furthermore, he cannot (and never has been in a position to) comment on the proposals currently before the court or to express any relevant wishes or feelings that might be of assistance to the court in determining what is in his best interests. In the circumstances, therefore, several of the factors set out in s.4 of the MCA 2005 and several of the propositions that arise from the decision of Munby J. in *Re M* are of no assistance to the court in determining what is in James' best interests as regards the proposal before the court.

30. In the circumstances, therefore, the court is limited in the factors upon which it can sensibly rely when determining what is in James' best interests.

    30.1 The court must have regard to the beliefs and values that would be likely to influence James if he had capacity and other factors that he would be likely to consider if he had capacity to do so. In the case of a person such as James, whose capacity has been severely impaired since birth, there is little (if any) scope for the court to rely on subjective beliefs and values. It is limited to relying on an assumption that James would have been guided by the belief that, all other things being equal, he should seek to arrange his affairs in such a way as to minimise insofar as is financially prudent and reasonably practicable, the exposure of his estate to IHT with a view to maximising the benefit from that estate receivable by his family. However, given that this is a mere generalisation and is not reflective of any particular beliefs or values that, in fact, are exhibited by James, the weight to be attributed to this factor must be limited. In more general terms, however, the Official Solicitor accepts that James would, if he had the requisite capacity, wish to benefit his parents (who, of course, are his primary carers) as far as is reasonably possible, practicable and sensible in the light of his own actual and potential needs and requirements.

    30.2 As noted above, the court may (and, in the Official Solicitor's submission, should) have regard to the views of the deputy and James' parents as to what is in the best interests of James. Although they have adduced no evidence, it is understood that James' parents support the deputy's application.

    30.3 As regards the obligation to have regard to the other factors to which James would have regard if he had capacity and, more generally, the obligation to have regard to all the relevant circumstances, the Official Solicitor submits that there are two factors of overwhelming – or, to use the language of Munby J. in *Re M*, magnetic – importance. They are the same two factors as were relied upon by the Official Solicitor when the original application came before District Judge Dawson in January 2009, *viz*. the financial prudence and affordability of the proposal, and the effectiveness of the tax planning.

Prudence and affordability

31. The deputy is candid in explaining the motivation behind this application: it is an attempt to reduce the IHT that will arise in respect of James' estate upon his death (which, as matters now stand, will pass to his parents under the rules relating to intestacy). The Official Solicitor does not consider that the gift would provide any other direct benefit to James.

32. The Official Solicitor accepts that, in an appropriate case, the court may authorise the gift of a property as being for the benefit of an incapacitated person where the sole motivation is IHT mitigation. An example of such a situation, albeit one that arose under the pre-MCA 2005 legislation, is *Re C (a Patient)*. The Official Solicitor is not satisfied, however, that the present case is an appropriate one for a substantial gift that is driven purely by an intention to save IHT.

33. The Official Solicitor submits that this is not a case where an incapacitated person has more capital than he could possibly need, even on an overly-cautious view, for the rest of his life. Where a person has such a surplus, it may well be in his interests to mitigate future IHT by making gifts *inter vivos*. A clear example of such a case would be where an elderly person (but one with a life expectancy of more than seven years) has considerably more capital than he could reasonably need to meet, even on a worst-case scenario, his needs for the remainder of his life. The Official Solicitor submits, however, that a purely tax-driven disposal of assets can be in the best interests of the disponor only if the court is satisfied that the disposal of the capital would result in no risk to his future financial security, even on a cautious appraisal of his future needs.

34. The amount of capital that James received by way of damages was calculated on the basis that it should provide for losses already incurred and for his future care and other needs for the duration of his life. As noted above, James' life expectancy has been revised upwards since the date of the settlement. The Official Solicitor submits that, where a damages award has been calculated to make provision for an incapacitated person for the rest of his life, it cannot be said that any part of those damages is surplus to that person's requirements and, hence, it cannot be in that person's best interests to dispose of any part of his damages award.

35. Even if James' financial position has improved, i.e. even if the income from his assets is now expected to be sufficient to cover his future expenses or if there has been an unexpected or unaccounted for capital appreciation (and in the present case there is no evidence of such capital appreciation except in the case of the property), it is still in his best interests that he should retain significant amounts of capital to cover as-yet unforeseen circumstances (including, it is to be hoped, future increases in his life expectancy). For example, if James' parents were to predecease him or become unable for them to care for him themselves, his care costs could well increase. It is in his best interests that he should retain sufficient capital to deal with such a possibility.

36. In *Re S (Gifts by Mental Patients)* [1997] 1 FLR 96 at 97, Ferris J. held that the evidence before him showed that an elderly spinster had "*a substantially greater estate than she needs for her current purposes or, on any realistic and even cautious appraisal of what may happen in future, she is ever likely to need*." That is not remotely true of James' case. Not only is he a 20-year old person with a life expectancy of perhaps 25 years, rather than an elderly spinster, but also the only capital that it is suggested he should give away is a share of a damages award calculated to meet his needs for a lifetime that was expected to be shorter than his current life expectancy. It is not a gift of an unexpected inheritance or other windfall, nor is it a gift of savings that, even on a cautious view, he will never need. On the contrary, James' medical condition is such that it would be prudent (and manifestly in his best interests) to prepare for (and to save for) every contingency to ensure that he can continue to meet his future needs, whatever they may be. Such needs cannot be predicted by James, by the deputy, by his parents or by the court and, accordingly, it cannot (the Official Solicitor submits) be in his best interests to dispose of assets that might otherwise be available to meet those needs (and which, it should be remembered, were the result of a negotiation with a paying party, viz. the health authority, in whose interest it was to minimise the amount payable to James). It should also be noted that the schedule of past and future losses shows a total amount claimed (excluding general damages) of £2,881,931 [p.86] but the compromise agreed was for a total of only £2,220,854.20 (including interest). In a situation where a compromise was agreed, and full liability was not accepted, this makes it all the more likely that James' assets may be needed for his own care during his lifetime.

37. The Official Solicitor accepts that it might be in the best interests of an incapacitated person (and, hence, appropriate for the court) to take a less conservative approach where there is some compelling reason to benefit the donee of a proposed gift. For example, if the proposed donee were in some particularly acute financial need and if the court were satisfied that it was in the best interests of the incapacitated donor to alleviate that need, it could well be in

the latter's best interests to make the gift notwithstanding that, all other things being equal, it would not be considered affordable or financially prudent to do so. In other words, the court should, it is submitted, be prepared to take a greater risk as to affordability where there is some compelling reason why the proposed gift is in the donor's (non-financial) best interests.

38. In the present case, however, the Official Solicitor is not convinced that there is any such compelling reason. The proposal would result (subject to the observations set out below regarding IHT) in a financial benefit to James' parents (or the other beneficiaries of his estate) upon his death. It is stated that the proposed IHT saving would give rise to a greater prospect that James' parents would not have to move out of the property following his death in order to meet the IHT liability. In response to this, the Official Solicitor notes: (1) that any IHT payable in respect of the property could, as the law now stands, be paid over a period of ten years, thereby reducing the likelihood that the property would have to be sold; and (2) that the total IHT payable if James were to die today (*c.* £800,000) would, on the deputy's figures, be capable of being paid from James' assets other than the property. After tax, the net estate would be worth about *c.* £1.2 million, represented by a property worth £675,000 and investments worth *c.* £500,000. Similarly, under the proposals, James' parents, as objects of the discretionary trusts, could during James' lifetime receive immediate benefits from a surrender of one or more of the policies. There is, however, no evidence of any pressing need on their part for such financial assistance.

39. In short, where there is good reason to do so, it could be in a person's best interests to make a decision that, in an ideal world, would not be considered affordable; but in James' case there is no evidence before the court to suggest that it should adopt anything other than a conservative, worst-case scenario approach to assessing his future needs and resources.

40. In terms of affordability, the Official Solicitor also relies on the observations in para. 49 below regarding the ability (or otherwise) of the deputy to reclaim the settled funds for James' benefit if such a need should arise.

41. In the circumstances, it is submitted that it is not in James' best interests for him to dispose of capital for the sole purpose of mitigating IHT on his death.

The efficacy of the proposals from an IHT perspective

42. The deputy relies on the report of Mr John Kelly dated 3.11.09 and the addendum to that report dated 27.4.11 in relation to the IHT implications of the proposed 'Flexible Power of Appointment Trust.' Mr Kelly has also made a witness statement on 4.11.11. The Official Solicitor notes that no permission has been given by the court pursuant to r. 120 of the Court of Protection Rules 2007 to any party to adduce expert evidence. He also notes that Mr Kelly, who is a director of the 'financial services arm' of the deputy's firm, cannot necessarily be considered an independent expert. In any event, however, the IHT implications of the proposals are not a matter for expert opinion but rather a mixed question of fact and law to be determined by the court with the benefit of such assistance as it may receive from the submissions of the parties. That said, the Official Solicitor accepts that the court may derive some assistance from Mr Kelly's report and its addendum and he does not seek to prevent those documents from being considered by the court.

43. In principle and in general terms, the Official Solicitor agrees that the proposal could be effective from an IHT perspective. He does have several concerns, however, as to how the proposal would apply in circumstances where one of the trustees is the deputy, who owes separate, fiduciary obligations to the settler (who, of course, would be James – and not the deputy, as is suggested at p 3 of Mr Kelly's addendum).

44. Mr Kelly's report states that of the four benefits (death benefit, maturity benefit, surrender benefit and right to extend the term) under the policies, three of those benefits (viz. death

benefit, maturity benefit and surrender benefit) would be given up by the settlor but that he would 'retain' the maturity benefit. In practical terms, that is correct. However, it appears from the instructions given to Mr Bretten QC and from clause 5 of the pro forma settlement that the precise mechanism is a little more complicated. As discussed above, it appears that all of the benefits are assigned to the trustees of the discretionary trust (from which the settlor is excluded from benefit) but that the trust period for any given policy terminates upon maturity, whereupon a reversionary interest belonging to the settlor falls into possession. The practical effect of this, of course, is that the settlor is entitled to the maturity benefits. In that respect, Mr Kelly's simplified description accurately describes the outcome.

45. The Official Solicitor agrees that a scheme as described in the instructions to Mr Bretten QC should be effective for IHT purposes in that the value of the death benefit, maturity benefit and surrender benefit would not be included in the settlor's estate (provided that he survives seven years) but that the value of the maturity benefit would, in effect, remain in the settlor's estate. In other words, this is a case of a 'carve-out' or 'shearing' scheme. The Official Solicitor accepts that retention by the donor of a reversionary interest does not amount to a reservation of benefit in the carved-out interest; for the reasons set out in the following paragraphs, his concern relates to the value of the retained reversionary interest.

46. Mr Kelly's report does not analyse the manner in which the value of the maturity benefits are retained in the settlor's estate. In fact, the value of those benefits is reflected in the value of the settlor's reversionary interest. Whilst most reversionary interests are excluded property for IHT purposes (and, hence, not included in the beneficiary's estate for the purposes of calculating its value for IHT purposes), that is not the case where the settlor himself is the reversionary beneficiary: see Inheritance Tax Act 1984, s. 48(1)(b). Therefore, the value of that reversionary interest does remain in the settlor's estate.

47. In the typical case, the retention of the reversionary interest as non-excluded property is not problematic from an IHT perspective because the value of that interest is likely to be only nominal whilst the policy in question is in force because the possibility always remains that the trustees might extend the term or surrender the policy. In other words, the settlor's reversionary interest is precarious and its market value is effectively negligible. This is the typical case. In James' case, however – where, it should be remembered, James is the settlor – it is envisaged that the deputy would be one of the trustees and, hence, in a position effectively to veto any proposal to extend the term or to surrender the policy. In the present case, given that the deputy is under a fiduciary obligation by virtue of his appointment to act in the best interests of James, the Official Solicitor submits that James' reversionary interest is rather less precarious than in the typical case because it is rather more likely that the reversionary interest will fall into possession through an omission on the part of the trustees (forced upon them by the deputy's veto) to extend the term or to surrender any given policy before its maturity date. For this reason, the Official Solicitor has considerable concerns that Her Majesty's Revenue and Customs ('HMRC') would seek to place a greater-than-nominal value on the reversionary interest. Although this would not completely undermine the IHT analysis and the rationale of the scheme, it is clear that the greater the value placed on the reversionary interest by HMRC, the less advantageous from an IHT-saving perspective the scheme is likely to be.

48. The deputy's fiduciary duty towards the settlor, James, by virtue of his appointment as James' deputy has been noted in the previous paragraph. The Official Solicitor is concerned that this duty could be seen (with very good justification) to be in conflict with that individual's duty *qua* trustee to the other beneficiaries of the settlement. In the circumstances, therefore, there would be *prima facie* grounds for an application by the beneficiaries of the settlement for the removal of the deputy as trustee because of his clear conflict of interests. If he were to be removed, the safeguards to which Mr Kelly refers – namely, the effective veto that the deputy would have over his fellow trustees to prevent the benefits passing away from James – would be removed. The Official Solicitor submits that the risk of such removal considerably reduces the benefits of the proposals to James and

increases the likelihood that the terms of the proposed settlement could be executed in a manner inconsistent with James' best interests.

Final concerns

49. The Official Solicitor has two final concerns. In the penultimate paragraph of p. 4 of his addendum [p.333], Mr Kelly states:

    In fact the limit [on the amount of capital that could be withdrawn for the benefit of James] *in any given year would be one seventh of all that is in the trust and in an emergency, all of the trust fund could be accessed at any time.*

    Subject to the caveat mentioned below, the Official Solicitor agrees with the first half of that sentence. However, he respectfully disagrees with the second half insofar as it is suggested that James could access the entire fund in an emergency. The only way to access the fund during James' lifetime and before the maturity of the policy in question would be to exercise the surrender right. However, the surrender benefits are held on the discretionary trust from which James must be excluded from benefit. Therefore, it is not the case that James could gain access to the entire fund in an emergency: any surrender would pass funds to the discretionary trust rather than to James. The caveat that is mentioned above is that the one-seventh of the total value that can be accessed in any given year could be accessed (by allowing the policy in question to mature) only on the maturity date. Crucially, it could not be accessed prior to the maturity date. Therefore, even if James had an urgent need of funds early in the year, he would have to wait until the maturity date in order to access those funds. In the circumstances, the Official Solicitor respectfully submits that the comment made at the first bullet point of paragraph 5 of the deputy's letter to Miss McQuire dated 24.8.10 [p.375] is incorrect: the Trust Fund is not 'readily available to the deputy.'

50. The Official Solicitor is also concerned that there has been no consideration (as far as he is aware) of the effect, if any, of James' reduced life expectancy on the premia payable for the policies of life assurance central to the Canada Life scheme or the death and other benefits payable under those policies. It may be that a scheme of this sort that would be attractive to a 20-year old with an average life expectancy is less attractive to James.

    Conclusion

51. In all the circumstances, the Official Solicitor is not satisfied that the revised proposals are in James' best interests.

The law regarding the making of a gift

20. Section 18(1)(b) of the Mental Capacity Act 2005 ("the Act") confers on the Court of Protection the power to make orders regarding "the sale, exchange, charging, gift or other disposition of P's property."

21. Section 1(5) of the Act states as a general principle that "an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests."

22. "Best interests" is not defined in the Act, but section 4 provides the following checklist of the factors that anyone doing the act or making the decision must consider when deciding what is in an incapacitated person's best interests:

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of -

(a) the person's age or appearance or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

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

(3) He must consider -

(a) whether it is likely that the person will at some time have the capacity in relation to the mater in question, and

(b) if it appears likely that he will, when that is likely to be.

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

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

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

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

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

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

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

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

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

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed by the court.

23. When carrying out a best interests' analysis in health and welfare cases, judges of the Court of Protection generally apply what is known as "the balance sheet approach" and then look for any "factor of magnetic importance" which may tip the balance, so to speak. Both of these expressions were originally coined by Lord Justice Thorpe:
    - "the balance sheet approach" in *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FLR 549; and
    - "factor of magnetic importance" in *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, at para [15], where he said, "All these cases are fact dependent and this is a quite exceptional case on its facts, but if ever there is to be a paradigm case in which the court will look to the prenuptial agreement as not simply one of the peripheral factors in the case but as a factor of magnetic importance, it seems to me that this is just such a case."

24. *Re A* involved a 29-year-old man with Down's syndrome. His mother applied to the High Court for a declaration that it would be in his best interests to have a vasectomy, and the judge, Mr Justice Sumner, decided that a vasectomy was not essential for A's future wellbeing. A's mother appealed and the Court of Appeal dismissed the appeal. In the course of his judgment, Lord Justice Thorpe advocated what has subsequently become known as "the balance sheet approach" in the following manner:

"I turn from the outcome in the present case to some more general observations. There can be no doubt in my mind that the evaluation of best interests is akin to a welfare appraisal. The speeches in *Re F (mental patient: sterilisation)* [1990] 2 AC 1; sub nom *F v West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All ER 545 read in their context can only bear this interpretation: see particularly the speech of Lord Goff ([1990] 2 AC 1 at 77, [1989] 2 All ER 545 at 567). Subsequently the Law Commission in their 1995 report on mental incapacity recommended an extensive evaluation of best interests: see para 3.28. The latest statement of government policy in *Making Decisions* shows that the government currently accepts the Law Commission's recommendation: see para 1.10.

Pending the enactment of a checklist or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw up a balance sheet. The first entry should be of any factor or factors of actual benefit. In the present case the instance would be the acquisition of foolproof contraception. Then on the other sheet the judge should write any counterbalancing dis-benefits to the applicant. An obvious instance in this case would be the apprehension, the risk and the discomfort inherent in the operation. Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant.

I suggest this approach only because Sumner J's judgment in the present case seems to me to concentrate too much on the evaluation of risks of happenings, some of which seem to me at best hypothetical. A risk is no more than a possibility of loss and should have no more emphasis in the exercise than the evaluation of the possibility of gain."

25. Lord Justice Thorpe originally intended the balance sheet approach to be only an interim measure "pending the enactment of a checklist or other statutory direction". This checklist has now been enacted as section 4 of the Mental Capacity Act 2005, but the balance sheet approach has survived the implementation of the Act and is widely used today.

26. In *Re M, ITW v Z and others* [2009] WTLR 1791, [2009] EWHC 525 (Fam), Mr Justice Munby considered a statutory will application in a case in which an elderly woman had been the victim of financial abuse by a neighbour. Having commented on the checklist of factors in section 4 of the Mental Capacity Act 2005, he made the following observations at paragraphs 31 and 32 of his judgment:

"31. It is, in contrast, a process very familiar to judges in the Family Division, with their long experience of applying structurally somewhat similar schemes such as the statutory schemes under section 1 of the Children Act 1989 and section 1 of the Adoption and Children Act 2002 and, in a financial context, under section 25 of the Matrimonial Causes Act 1973. And a similar approach has, unsurprisingly, been adopted by the judges when exercising the inherent jurisdiction of the Family Division in relation to incapacitated or vulnerable adults: see, for example, *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443.

32. Deriving from that experience it may be useful to make three points, very familiar in the context of those other jurisdictions, which, allowing for the somewhat different context with which I am here concerned, seem to me to be of equal application to the statutory scheme under sections 1 and 4 of the 2005 Act:

i) The first is that the statute lays down no hierarchy as between the various factors which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's "best interests".

ii) The second is that the weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case. A feature or factor which in one case may carry great, possibly even preponderant, weight may in another, superficially similar, case carry much less, or even very little, weight.

iii) The third, following on from the others, is that there may, in the particular case, be one or more features or factors which, as Thorpe LJ has frequently put it, are of "magnetic importance" in influencing or even determining the outcome: see, for example, *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, at para [15] (contrasting "the peripheral factors in the case" with the "factor of magnetic importance") and *White v White* [1999] Fam 304 (affirmed, [2001] 1 AC 596) where at page 314 he said "Although there is no ranking of the criteria to be found in the statute, there is as it were a magnetism that draws the individual case to attach to one, two, or several factors as having decisive influence on its determination." Now that was said in the context of section 25 of the Matrimonial Causes Act 1973 but the principle, as it seems to me, is of more general application."

27. So far as I am aware, *Re G (TJ)* [2010] EWHC 3005 (COP) is the only reported judgment on an application to make a lifetime gift since the Mental Capacity Act 2005 came into force. In his judgment, which was handed down on 19 November 2010, Mr Justice Morgan stated, at paragraphs 31 and 32:

> 31. The issue which needs to be addressed in the present case is: is it in the best interests of Mrs G to make payments to her daughter C?
>
> 32. One response to this question might be that, whilst such payments will be for the benefit of C, the payments will not be, in any real sense, for the benefit of Mrs G. If the word "interests" in the phrase "best interests" refers to the self-interest of Mrs G, it might be asked: what self-interest of Mrs G is advanced by payments to C? If the suggested answer is that such payments will benefit Mrs G and be in her interests because Mrs G will be pleased that the payments are made to her daughter, on the facts of this case, Mrs G will never know that the payments are being made and there will be no reaction, of pleasure or otherwise, to that fact.

28. In *Re G(TJ)*, at paragraph 37, Mr Justice Morgan seemed to believe that the balance sheet approach could be used in the context of assessing what is in P's best interests when making a lifetime gift. He said:

> "The provisions of section 4(6)(b) and (c) extend beyond the actual wishes of P. They refer to the matters which P would be likely to consider if he were able to make the relevant decision. P would be likely to consider any relevant beliefs and values and all other relevant factors. Therefore, the matters which the court must consider under these paragraphs of section 4(6) involve the court in drawing up the balance sheet of factors which P would be likely to draw up if he were able to do so. Of course, the ultimate question for the court is: what is in the best interests of P? The court will necessarily draw up its own balance sheet of factors and that may differ from P's notional balance sheet. The court is not obliged to give effect to the decision which P would have arrived at, if he had capacity to make the decision for himself. Indeed, section 4(6) does not expressly require the court to reconstruct the decision which P, acting reasonably or otherwise, would have reached. Nonetheless, if the court considers the balance sheet of factors which would be likely to influence P, if P had capacity, the court is likely to be able to say what decision P would be likely to have reached. The court is not obliged to give effect to the decision which P, acting reasonably, would have made (the test of "substituted judgment") but section 4(6) appears to require the court to consider what P would have decided (or, at least, the balance sheet of factors which P would be likely to have considered). My provisional view is that, in an appropriate case, a court could conclude that it is in the best interests of P for the court to give effect to the wishes which P would have formed on the relevant point, if he had capacity."

29. At paragraphs 62 and 63 of his judgment in *Re G(TJ),* Mr Justice Morgan suggested that a cautious approach should be taken to ensure that sufficient funds remain available for P for the rest of his or her life:

> 62. I next ask myself whether there are any other matters to be reflected in the balance sheet of relevant matters. At the hearing, there was reference to the fact that lifetime gifts from Mrs G to C might result in some modest saving of inheritance tax on Mrs G's death, depending on how long Mrs G continued to live after making any relevant lifetime gift. The submissions of Miss Rich and Mr Rees on that point attached comparatively little weight to that consideration. I agree with their approach. The tax saving possibility is a factor in favour of making the gifts in question but the factor has limited weight on the facts of this case having regard to the amount involved and the life expectancy of Mrs G. Nonetheless, this factor does not count against the making of the order which is sought.
>
> 63. For the sake of emphasis, I wish to repeat a matter I referred to separately earlier in this judgment. I have referred to the question whether Mrs G would retain sufficient funds to allow the Deputy to make proper provision for her for the remainder of her days. I also stated that an assessment of this kind must be a cautious one. These are plainly relevant matters."

The balance sheet

30. The balance sheet approach appears to work satisfactorily in health and welfare cases, though I have had one or two reservations in the past as to how useful it is in <u>all</u> property and affairs matters. Nevertheless, Mr Justice Morgan applied this approach without any apparent difficulty in *Re G (TJ),* which was in effect an application for a gift, and I shall attempt to do the same in James's case.

31. The balance sheet is as follows.

Advantages in making the proposed gift to James's parents	**Counterbalancing disadvantages to James in making the proposed gift to his parents**
1. The purpose of the gift is to provide financial security for James's parents and to avoid the possibility that they may have to sell the family home after his death. If he survives for seven years there will be an Inheritance Tax saving of £130,000.	1. There is no evidence that James's parents would need to sell their home after his death because of the incidence of Inheritance Tax. Joseph Goldsmith set out the arithmetic in paragraph 38 of his position statement on behalf of the Official Solicitor.
2. It is said that James would make the gift if he had the capacity to do so.	2. We do not know for certain whether James would make the gift if he had the capacity to do so. In any event, the court is not obliged to give effect to his wishes. The test is not one of "substituted judgment", or what he would do in the circumstances, if he had the capacity to make the decision himself. The test is what is in his "best interests." Admittedly, this test is more paternalistic than substituted judgment, but it was the will of Parliament when it enacted the Mental Capacity Act 2005 that best interests should be the criterion.

3. James will be pleased if the gift is made to his parents.	3. James will probably never be able to comprehend that a gift has been made to his parents on his behalf, and consequently there will be no reaction of either pleasure or displeasure.
4. It is said that James's best interests do not end at the date of his death and that he would wish to be remembered for having done "the right thing" with regard to his parents.	4. One can attach little weight to this consideration, principally because James is unable to participate in the decision-making process personally and the court is making the decision on his behalf. Furthermore, even though James's parents may consider that the court has done "the right thing" if it allows this application, an impartial observer would not necessarily concur.
5. A person who does not lack capacity would be able to enter into Inheritance Tax mitigation. It is wrong to discriminate against James and deprive him of this right simply because he lacks capacity. The decision must not be made solely on the basis of James's age.	5. Nobody is discriminating against James because he currently lacks the capacity to make a decision about Inheritance Tax planning. It would be unusual, to say the least, for a 20 year old man who has been awarded damages for personal injury, but retains the capacity to manage his property and financial affairs, to contemplate entering into an Inheritance Tax mitigation scheme for the benefit of his parents at such an early stage in his life.
6. There have been savings in respect of the cost of care. For example, the claimant's final schedule of loss, dated 5 July 2001, stated at paragraph 5.2 that, from the age of 14 years, the expert occupational therapist had costed for a second carer for 21 hours per week. James's parents have not considered that it has been necessary to implement this recommendation.	6. Without wishing to criticise the standard of care provided by James's parents, which I am informed is excellent and has resulted in the upwards reappraisal of his life expectancy, there is a conflict of interests insofar as the individuals who stand to benefit from James's death before the exhaustion of his damages award are the very people who are making the decisions about the quantity and quality of care he receives.
7. There have also been savings in the cost of the therapies James receives. These had been assessed in the claimant's final schedule as follows: Occupational therapy (including dietician and chiropodist) £17,659; Physiotherapy £75,372; and Speech therapy £12,985. Following a successful application to a tribunal, these are now provided by the NHS under the continuing health care scheme.	7. This looks uncomfortably like what is known in personal injury litigation as "double recovery", where a claimant recovers twice for the same loss.
8. It is asserted that the scheme is effective.	8. The Official Solicitor, acting as James's litigation friend has expressed concerns about the efficacy of the scheme. His concerns are set out in detail in paragraphs 42 to 48 of Joseph Goldsmith's submissions on his behalf.
9. It is said that James has sufficient capital to	9. It is essential to remember the purpose for which

meet his care needs for the rest of his lifetime, even on an over-cautious view.

the compensation was awarded in the first place, and the assumptions upon which it was calculated. Any best interests' analysis in respect of an application of this nature must be conservative with a view to preserving James's assets to protect him against the uncertainties of the future and enabling him to overcome them. The following factors on this side of the balance sheet reinforce the importance of exercising caution and prudence in the application of his funds.

10. James's life expectancy has progressively increased every time it has been re-assessed. If he survives for longer than was originally anticipated, his damages will be insufficient to meet his needs during the later years of his life.

11. The burden of care will increase rather than decrease over time. As James's parents get progressively older, their contribution towards his care requirements will gradually diminish and there will be an increasing need to employ professional carers.

12. Insofar as James's projected care costs were protected from inflation, they predate the decision in *Thompstone v. Tameside and Glossop Acute Services NHS Trust* [2006] EWHC 2904 (QB), in which Mrs Justice Swift held that the appropriate index to which care costs should be linked is ASHE 6115 (The Annual Survey of Hours and Earnings: Occupational Earnings for Care Assistants and Home Carers) rather than the Retail Prices Index.

13. One cannot predict with any degree of certainty what may happen during the course of the next twenty five years. For example:

    (a) The deaths of James and his father and mother may not occur in the order that they and those advising them currently anticipate.

    (b) Either of his parents could become physically incapable of looking after him as a result of an accident or illness.

    (c) James's parents may separate or divorce and it may even be necessary to resort to James's funds to acquire an additional property and adapt it to meet his needs.

    (d) James's condition may deteriorate and he may require a more extensive and expensive care regime than he currently requires.

14. James is an only child. This is not a case in which any siblings have contributed, either directly or indirectly, towards his care requirements. Nor is it a case where siblings' lives have been disrupted - but in other ways enriched - by living with someone with a disability. When James's parents die, the assets derived from his damages award, if they have not already been exhausted, will no longer be of benefit to James's immediate family and primary carers.

32. As can be seen, numerically, there are more factors in favour of dismissing the application than allowing it, and it will be recalled that Lord Justice Thorpe said "obviously only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant."

The factor of magnetic importance

33. However, the fact that there are more entries on one side of the balance sheet than on the other is not necessarily conclusive. For example, in *W v M* [2011] EWHC 2443 (COP), at paragraphs 247 and 248, Mr Justice Baker carried out a best interests' analysis using the balance sheet approach and identified nine possible reasons for withdrawing artificial nutrition and hydration ("ANH") from a woman in a minimally conscious state, but only seven reasons for continuing it. The decisive factor, which the judge identified at paragraph 249, was the importance of preserving life, and he therefore concluded that it would not be in her best interests for ANH to be withdrawn.

34. In paragraph 22 of her skeleton argument Georgia Bedworth, counsel for the applicant, stated that "there is no statutory or other justification for the presumption that the court should not direct a settlement where P's capital derives from a damages award." I agree that there is no such presumption, but, in my judgment, in most cases where an individual's assets derive exclusively from a damages award for personal injury, when determining whether making an *inter vivos* gift is in his or her best interests, the factor of magnetic importance is likely to be the purpose for which the compensation was awarded and the assumptions upon which it was based. This is not confined to the multiplicands and multipliers that have been applied in a specific case, but extends to the fundamental principles that underlie personal injury and clinical negligence litigation generally.

35. The most frequently cited statement of the purpose of a damages award was made by Lord Blackburn in *Livingstone v Rawyards Coal Co*. (1880) 5 App Cas 25, at 39:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sums of money to be given for reparation of damages you should nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting compensation or reparation."

36. In very simple terms, if the calculation for James's future care costs was correct back in 2001 when his claim settled, then, on the last day of his life, he should be in the process of spending the last pound of that head of damages. There should be nothing left over after his death. If the sum awarded runs out before then, it could be said that his parents and his deputy have been

extravagant and imprudent. Conversely, if there are substantial funds left over, it could be argued that they have been parsimonious and may have denied him the care, attention and quality of life to which he was entitled.

37. On 1 April 2005 section 2(1) of the Damages Act 1996 (as amended by the Courts Act 2003) came into force. This enables the court to impose an order for periodical payments (i.e. index-linked annual payments) in respect of future pecuniary losses without the consent of the parties. Since then periodical payments have become the norm for compensating claimants in clinical negligence proceedings. However, instead of receiving a modest capital sum and periodical payments, James received his damages by way of a conventional lump sum payment. The difficulty with lump sums was recently described by Lord Stewart in his opinion in the Court of Session in the first Scottish case in to address the question of periodical payments, *D's Parent and Guardian (AP) v. Greater Glasgow Health Board* [2011] CSOH 99. He said:

> The lump sum problem
>
> [8] Forecasting life-expectancy is currently the main challenge in resolving perinatal and early-life catastrophic injury cases. Typically the claimant's and defenders' experts are years apart, perhaps ten years apart or even more. These differences translated into lump sums can amount to millions of pounds.
>
> [9] The only reasonable certainty about forecasts of life expectancy is that they are bound to be wrong [*Lim Poh Choo* v *Camden and Islington Health Authority* [1980] AC 174 at 182-183 *per* Lord Scarman]. Consequently, lump sum awards are almost inevitably going to be too little or too much: either the patient outlives the award and is left without care; or the patient pre-deceases and the family receives a windfall, probably at taxpayers' expense in medical cases [*Thompstone* v *Tameside and Glossop Acute Services NHS Trust* [2006] EWHC 2904 (QB) (23 Nov 2006) at §§ 14–28].
>
> [10] The vagaries of the lump sum system are illustrated by the after-history of the tragic Dr Lim. She sustained catastrophic brain damage in 1973 when she was 36. The trial judge found life expectancy at the date of trial in 1977 to be 37 years. The multiplier for future case costs from the date of judgement in the House of Lords, 21 June 1979, was 12. The doctor in fact died in 2007, 30 years after the trial, at the height of the stock market boom, leaving an estate valued at over £1,000,000 [N Bevan, "Future Proof" (2), (2008) 158 NLJ, 1168].
>
> [11] There can also be a conflict of interest objection - not I hasten to add an issue in this case - that the individuals who stand to benefit from a death before the exhaustion of the fund may be the same people who are making decisions about the amount and quality of care.
>
> [12] It is difficult for relatives, parents especially, to compromise on life expectancy, thinking, as they are bound to, about what will happen when they die or are no longer able to assist with care. There is difficulty for defenders too, given the size of the sums at issue, in rejecting expert advice on life expectancy in favour of an "economic" settlement. It is particularly difficult for health authorities with public responsibilities. The situation is an anxious one for legal advisers on both sides. …..
>
> [15] The difficulty of inflation-proofing care costs using the standard measure has been advanced as an argument for lump sum awards [*A* v *B Hospitals NHS Trust*; *Taylor* v *Chesworth* [2007] EWHC 1001 (QB) (30 Apr 2007); *Sarwar* v *Ali and Motor Insurers' Bureau* [2007] EWHC 1255 (Q.B.) (25 May 2007); see also D Lush (Master of the Court of Protection), "Damages for Personal Injury: why some Claimants prefer a Conventional Lump Sum to Periodical Payments", (2005) 1(2) *London Law Rev*, 187].

38. In the article of mine to which Lord Stewart referred, I also considered the effect on the family of the premature death of a claimant in personal injury or clinical negligence proceedings. I

shall reiterate what I wrote to show that the court recognises the predicaments faced by the families of accident victims and tends generally to be sympathetic towards them.

> "When advocating periodical payments in preference to a lump sum, it is usually suggested that, if the claimant dies prematurely, there will be no windfall for his or her estate, and the underlying assumption is that this would be a desirable, just and equitable outcome. For example, the Lord Chancellor's Department said in its consultation paper, *Damages for future loss: giving the courts power to order periodical payments for future loss and care costs in personal injury cases* (March 2002):
>
> > "If a claimant dies much earlier than expected, a lump sum award will provide a windfall for the heirs of that claimant, and it will be they who benefit most from the award. It is sometimes argued that this does not matter because the lump sum payment still serves to penalise the defendant. But the purpose of tort law in these cases is to compensate claimants for loss, in particular by restoring them, so far as possible, to the financial position they enjoyed before the accident: it is not to punish defendants or provide heirs of the deceased with a financial gain beyond any compensation that was awarded to them by the court. And the cost of any 'windfall' or 'profit' is ultimately borne, for example, by other insurance premium payers or by users of the NHS."
>
> The following extract, from a recent advice on settlement written by a leading personal injury silk, provides a slightly different, more humane, and maybe more realistic perspective on the effect of the claimant's premature death on his or her family. In this case the claimant's mother and litigation friend preferred to accept a conventional lump sum of £2,850,000, and this was one of her reasons for making that decision:-
>
> > "Although she has not herself expressed a wish in these terms, it occurs to us as advisers on his behalf, to suggest that if, indeed, there is (as there appears to be) a very significant risk of early mortality, Jack would, had he been able to do so, have expressed the wish that he would leave the house, and funds to maintain it, to his mother and siblings, and although making provision for leaving an estate upon death is not, and could not reasonably be, one of the nominated purposes of any scheme of compensation (which must address directly the loss suffered by the injured party, on the restitutionary principle) nonetheless it may be said to satisfy better a social need of the claimant in the particular circumstances of his case. Periodical payments would cease on his death. A lump sum is likely to leave an inheritance."
>
> I am inclined to agree. The argument about a potential windfall for undeserving beneficiaries tends to be overstated. In most cases, one or both of the claimant's parents have given up work to care for their child, and may be the primary carers for ten or twenty years, or even longer. They become dependent on the damages award, and the child indirectly assumes responsibility for their maintenance: see the decision of the Court of Appeal in *Re B (deceased)* [2000] 1 All ER 665. There is often little prospect of their returning to the labour market if the child dies prematurely, and they could face hardship when the periodical payments cease on the claimant's death, and their income stream vanishes instantaneously.
>
> I mentioned earlier the case of *Wood v Wirral Hospitals NHS Trust*, where the claimant died a few days before her seventh birthday. With hindsight (and anyone can be wise after the event), it would have been preferable from her parents' perspective to have accepted a conventional lump sum instead of opting for periodical payments. Her premature death has left them with a property they can no longer afford to live in. They have a mortgage of £100,000, no means to pay it, and an Inheritance Tax bill of £50,000."

39. As I have said, the court is generally sympathetic towards family members who take on a caring role and dedicate their lives to looking after an injured relative. It seeks to support them so far as is possible and practicable and in the best interests of the person concerned, and it does so in a

variety of ways. However, it is not the function of the court to anticipate, ring-fence or maximise any potential inheritance for the benefit of family members on the death of a protected party, because this is not the purpose for which the compensation for personal injury was intended. The position would be different, of course, if the individual concerned had substantial funds surplus to his requirements that were derived from another source, such as an inheritance or a lottery win. For the sake of the record, each year between 300 and 400 claimants who have been awarded damages for personal injury or clinical negligence come within the court's jurisdiction. Speaking from personal experience, over the last fifteen years the number of applications of this kind does not extend into double figures.

Order

40. Having regard to all the circumstances, therefore, including the purpose for which his damages were awarded and the preponderance of disadvantages over benefits, I have come to the conclusion that it is not in James's best interests at this stage in his life to make any gift to his parents to mitigate the incidence of Inheritance Tax on his death, and accordingly I dismiss the application.

41. Having decided that the proposal is not in James's best interests, there is no need for me to make any ruling on the tax-efficiency or otherwise of the proposed scheme.

42. As far as costs are concerned, James's parents were *de facto*, though not *de jure*, the applicants and I recognise that they have become more or less entirely dependent on his damages award. I do not believe it would serve any useful purpose if I were to depart from the general rule regarding costs in property and affairs cases by ordering them to pay the costs of these proceedings personally.

DENZIL LUSH
Senior Judge
19 January 2012