



Neutral Citation Number: [2009] EWHC 2525 (Fam)

Case No: 11297039-03

IN THE COURT OF PROTECTION
(In Private)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12 October 2009

Before :

MR JUSTICE MUNBY

In the Matter of the Mental Capacity Act 2005
And in the Matter of M

Between :

ITW

Applicant

- and -

(1) Z

**(2) M (by her litigation friend the Official Solicitor
to the Senior Courts of England and Wales)**

(3)-(9) VARIOUS CHARITIES

Respondents

Mr Howard Smith (instructed by Farrell Matthews & Weir) for the Applicant (M's Deputy)

Miss Barbara Rich (instructed by the Official Solicitor) for the Second Respondent (M)

Miss Charlotte Edge (instructed by Withers LLP) for the Third – Ninth Respondents (the Charities)

The First Respondent (Z) in person

Hearing date : 6 October 2009

Approved Judgment

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

.....

MR JUSTICE MUNBY

This judgment was handed down in private but the judge hereby gives leave for it to be published in this anonymised form

Mr Justice Munby :

1. This is an application by M's Deputy, ITW, for an order authorising him to execute a statutory will for M.
2. It is common ground that M, who was born in 1922, lacks testamentary capacity.
3. The application is supported by the Official Solicitor, who acts as M's litigation friend, and, save only as to one comparatively minor aspect, also by the various charities whose involvement I will explain in due course. The application is opposed by Z who is a former carer for M and was the sole beneficiary under a previous will.

The background

4. M is a childless widow who from June 2004 until I directed her removal to a care home in October 2008 lived with and was cared for by Z and his family. On 30 September 2004 M executed a will and an enduring power of attorney (EPA), both in favour of Z.
5. There is no doubt that, whilst she was living with him and his family, M transferred to Z very significant sums of money, being in substance the whole of her savings and capital with the exception of her house: a total of at least £177,041 between 6 July 2004 and the beginning of January 2006. And the fact, whatever Z may protest, is that despite the strong adverse comments that I felt compelled to express first in a judgment I gave on 12 May 2008 and, again, in a judgment I gave on 19 December 2008, and despite the orders I made on those two occasions, Z has never provided a full and proper accounting of what has become of these monies. What he says was a specific gift of £110,041 in April 2005 was, he says, applied in the purchase in his own name of a property in Cyprus; some £26,000 he says he applied in repairs and improvements to M's house; and some £32,000 he says he applied to M's general maintenance and living costs whilst she was living with him and his family.
6. By the order I made on 19 December 2008 the Deputy was authorised to commence proceedings in the Chancery Division to recover M's funds from Z. The relevant proceedings have been drafted but have not yet been issued, the Deputy understandably wishing to await the outcome of the present application.
7. In 2007 the London Borough of Ealing, the local authority which had statutory obligations towards M as a vulnerable adult, commenced proceedings in the Family Division (FD07P00428) in relation to her personal welfare. Z applied to the Court of Protection (11297039) to register the EPA. In the Family Division proceedings the local authority contended that it was not in M's best interests to continue to live with and be cared for by Z and his family. In the Court of Protection proceedings the local authority objected on various grounds to the registration of the EPA.
8. So far as is important for present purposes I can summarise the subsequent history of the litigation as follows.
9. The Family Division proceedings: On 12 May 2008 I made an order that it was in M's best interests to continue to live with Z and his family, subject to certain conditions imposed by way of undertakings given to me by Z and subject also to further review.

Following that review at a hearing before me in October 2008, M was removed on 24 October 2008 to her present address for assessment. At a further review hearing in December 2008 I declined to direct M's return to Z's care, explaining my reasons in the judgment I gave on 19 December 2008: [2008] EWHC 3425 (Fam). Following a further review hearing before me in February 2009 I made a final order on 13 February 2009 that M remain at her present address and have no further contact with Z or his family.

10. The Court of Protection proceedings: On 23 April 2007 the local authority abandoned its objections to registration of the EPA on the grounds of incapacity and undue pressure, limiting its objections to the unsuitability of Z as attorney. On 19 March 2008 Z withdrew his application to register the EPA and the Official Solicitor was appointed as interim property and affairs deputy. The local authority's objection on the ground of Z's unsuitability had been supported throughout by the Official Solicitor and was accepted by me in the judgment I gave on 12 May 2008 and which also explained why I was appointing ITW to act as M's property and affairs deputy. The order dated 12 May 2008 appointing ITW contained a number of directions as to the provision of co-operation and information to ITW by Z. Z's default in complying with this order compelled me to make a further, more stringent order, in October 2008 and a yet more stringent order, backed by a penal notice, on 19 December 2008.

11. In my judgment of 19 December 2008 I voiced strong criticism of Z in relation to both aspects of his dealings with M:

i) M's personal welfare: I found that Z had broken the undertakings he had given me as embodied in the order I made in October 2008. I referred to Z's

“complete inability or unwillingness ... to understand the pressing welfare requirements of the ... elderly lady for whom he puts himself forward as the most appropriate carer, a complete inability to prioritise her needs before his own wishes and feelings, and in particular a complete inability or unwillingness on his part to appreciate that whether or not he agrees with the order of the court, the court having made that order it was his responsibility as the carer of the patient to make the inevitably unhappy task of complying with the court order as easy from her point of view as lay within his power.”

I also referred to his

“striking inability or unwillingness ... to understand and promote her welfare, let alone to prioritise her welfare to his own wishes and feelings.”

ii) M's financial affairs: I found that Z had “failed completely” to comply with the directions in my order of October 2008, referring in this connection to what I described as his

“total non-compliance with, in circumstances I can only describe as defiance of, the order I made”

and to his

“prevarication, obfuscation and time-wasting delay [in] answering questions which cry out for answer”.

This reflected comments I had earlier made in my judgment of 12 May 2008 when, referring to the fact that Z “has had many opportunities to give details, in particular in relation to the £26,000 and the £32,000”, I drew attention to his “seeming unwillingness to engage frankly in the process and to make the fullest and frankest disclosure that was open to him.”

12. In summary I concluded in December 2008 that Z

“is someone in whom the court cannot, as present, have that trust and confidence which in this kind of situation the court must have if such a person is to be in a caring relationship with the patient.”

I continued:

“Z seeks unsupervised contact. That, in my judgment, is unthinkable in the context of a carer who ... has ... forfeited the trust and confidence of the court. Should there be supervised contact? The answer to that, in my judgment, is no.”

13. On 19 December 2008, as I have said, I made an order, endorsed with a penal notice, spelling out in great detail and with very considerable precision the disclosure required of Z in relation to his various dealings with M’s property. Z asserts that he has complied in full with that order. He has not. Let me give just one striking example. Paragraph 2.7.1 of the order required Z to give a “detailed account” of how certain specified withdrawals from M’s bank account were “utilised”, including, as specified in paragraphs 2.7.1.5-2.7.1.12, withdrawals on various identified dates between November 2004 and October 2005 of the sums of £2,000, £3,000, £3,000, £200, £3,000, £3,000, £10,000 and £6,000 respectively – a total of some £30,000. Z’s response to this, in an affidavit he swore on 16 January 2009, was simply “I cannot remember how these payments were utilised.” Given the size of the sums involved this assertion is simply incredible.

The application

14. In accordance with directions I had included in my order of 19 December 2008, on 27 January 2009 the Deputy applied for an order authorising the making of a statutory will for M under section 18(1)(i) of the Mental Capacity Act 2005. By an order dated 13 February 2009 I directed the making of an interim will which, in the event was executed on 16 February 2009.

15. I had before me the evidence of Dr PO, a consultant psychiatrist, and of Janet Ilett, the Official Solicitor’s representative, both of whom had interviewed M on 12 February 2009 at my direction specifically with a view to ascertaining, in the case of Dr PO, whether M had testamentary capacity and, in the case of Ms Ilett, what M’s testamentary wishes and feelings (if any) might be. In a report dated 13 February

2009 Dr PO, giving clear and convincing reasons for having come to this conclusion, said that he believed M to be without testamentary capacity. He described M as:

“someone without a compass in her life ... easily led ... primarily motivated by insecurity in her attachment to others which leads her to demonstrate her evident vulnerability through a clinging and dependent attachment style which seems to be able to shift its focus according to her circumstances between whichever party appears to offer her support or protection ... wholly preoccupied by her own insecurities.”

Ms Ilett’s attendance note of her meetings with M, the first with her (Ms Ilett) alone, the second together with Dr PO, provided much material supportive of that conclusion, as of her own conclusion to the same effect.

16. The will executed on 16 February 2009 is final in the sense that it will be admitted to probate if M dies whilst it remains unrevoked, but paragraph 1 of my order dated 13 February 2009 made it clear that the terms of the will thus executed were to be “further reviewed” at a further hearing in relation to which I gave certain directions both in that order and subsequently in a further order dated 18 May 2009. Pursuant to those directions M’s former neighbour PM and his daughters, together with all nine of the charities named as beneficiaries in certain earlier wills (see below) were notified of the proceedings. Seven of the charities have acknowledged service and have accordingly been joined as respondents, but neither they nor any of the other notified parties have filed evidence in the form of a witness statement.

The hearing

17. The hearing took place before me on 6 October 2009. The Deputy was represented by Mr Howard Smith, the Official Solicitor by Miss Barbara Rich and the eight charities who had indicated an interest in the proceedings by Miss Charlotte Edge. Z appeared in person. There was written evidence in the form of witness statements by the Deputy dated 15 October 2008 and 23 September 2009 and a witness statement by Z dated 27 February 2009. Z had also filed a very clear and helpful position statement dated 5 October 2009. There were various attendance notes and other materials gathered by Ms Ilett. No one suggested that there was any need for me to hear oral evidence and I did not.
18. At the end of the hearing on 6 October 2009 I announced that I was authorising the making of a statutory will in the terms proposed by the Deputy but *not* including any provision for M’s cousin J (see below). I said that I would give my reasons in writing.
19. A draft of the order I had made orally on 6 October 2009 was put before me for my approval on 7 October 2009. On 8 October 2009 I informed the parties that I approved the form of the order as drafted. The order is dated 6 October 2009. I now hand down judgment.

Previous wills

20. There are five previous testamentary instruments:

- i) The first is M's will dated 31 May 1996: M appointed her cousin, J, to be sole executor, gave the sum of £20,000 to her neighbour (described in the will as "my friend") PM and gave the residue to six named charities, five of them each taking two eleventh parts and the sixth taking one eleventh part of the eleven parts into which she directed the residue was to be divided.
 - ii) The second is M's will dated 20 June 2001: M appointed PM to be her executor and gave him, by clause 3, a pecuniary legacy of 5% of her gross estate after deduction of inheritance tax, expenses and debts. By clause 4 she gave the residue to be divided equally between nine named charities – the six named in her previous will together with three others.
 - iii) The third is what is described as a First Codicil to that will; it is dated 13 December 2003. I should record that the parties and the court were not aware of its existence (nor therefore of its contents) at the time of the hearing in February 2009. It is on any basis a curious document the meaning of which is far from clear. Clause 1 directs the insertion after clause 2 of the 2001 will of a new clause 2A, whilst clause 2 provides that "in all other respects I confirm my Will." The new clause 2A appears to contain both a devise of M's house (described as "the Property") and a discretionary trust of her residuary estate. As to the former, it is to be noted that although clause 2A(2) provides for the house to be held "upon a trust of land and with and subject to the powers and provisions hereinafter declared concerning the same", none are set out, unless (which is not what clause 2A says) this is intended to be a reference to what is set out in clause 2A(3) in relation to the discretionary trust of residue. As to the latter, it is to be noted that whereas, on the face of it, the effect of clauses 1 and 2 of the Codicil is to preserve the gift of the residue in clause 4 of the Will (ie, the gift to the various charities), clause 2A(3) identifies the beneficiaries under the discretionary trust of residue as being, primarily, PM and his issue.
 - iv) The fourth is a will dated 30 September 2004: M appointed Z to be her executor and gave him the whole of her estate.
 - v) The fifth is the statutory will executed by the Deputy on 16 February 2009 pursuant to the order I had made on 13 February 2009: This provided for PM to receive a pecuniary legacy of 5% of the gross estate after deduction of inheritance tax, expenses and debts and for the residue to be shared equally between the nine charities named in the 2001 Will. In other words, as to the substance it reinstated the 2001 Will.
21. No further comment is required in relation to the first, second and fifth of these documents. Mr Smith and Miss Rich do, however, make observations which it is convenient to consider at this point about the third and fourth.
 22. I have already drawn attention to some of the difficulties in relation to the codicil dated 13 December 2003. But it is necessary, as counsel point out, also to have regard to what appear to have been M's instructions to the solicitors who prepared the codicil. Here I focus only on the essentials. A letter from M to the solicitors and signed by her dated 15 September 2003 referred to "the residue of my estate" being "passed to my nominated charities." A letter to PM (who appears to have been assisting M on the matter) from the solicitors dated 27 October 2003 refers to the

effect of the draft codicil as being “to place her property into a discretionary trust” – “property”, as I have noted, being the word used in the codicil to describe M’s house. When the unhappy drafting of the codicil is considered in the light of these circumstances, there are, as it seems to me, and as Mr Smith and Miss Rich submit, powerful arguments in favour of the view that the codicil as drafted did not properly give effect to M’s wishes and that accordingly she did not ‘know and approve’ its contents, with the consequence that an action for rectification under section 20 of the Administration of Justice Act 1982 would have been successful. Specifically, there is a powerful argument that M’s intention was to give only “the Property” – her house – to PM and his family whilst leaving the residue to the charities.

23. In relation to the will dated 30 September 2004 the question is raised by Mr Smith and Miss Rich as to whether M had testamentary capacity or whether, as they suggest, the testamentary incapacity which it is common ground now prevails was already present then. In this connection they point to a report dated 21 September 2004 by a Locum Consultant Psychiatrist, Dr SM, who on 1 September 2004 – that is, just four weeks before the will was executed – assessed M in relation to “her mental state and her capacity to make financial and other decisions” and who concluded that M “obviously has significant cognitive impairment which could indicate a diagnosis of early dementia”, albeit she had “a very basic understanding about financial issues.” They point also to a report dated 4 March 2005 by another Consultant Psychiatrist, Dr MG, who had assessed M on 23 February 2005 and, specifically addressing the issue of testamentary capacity, expressed the opinion that “on the balance of probabilities” M had not been of testamentary capacity “for at least 18 months” – which would, of course, take one back to a date well before the execution of the 2004 will.
24. As against this, Z points to statements by the two witnesses to the 2004 will, the first, dated 6 April 2006, by Dr T, a retired GP who had met M in July 2004 and last saw her in March 2006, and the second, dated 24 April 2006, by Ms D, the solicitor who had drafted the will. Dr T, describing the occasion when she witnessed M’s signing of the will, says that M was “fully aware of what she was signing”, that she “had the mental capacity to understand the meaning and effect” of the will, and that “she was of sound mind and had made her own decision to sign the document.” She adds: “Had I thought otherwise, I would not have agreed to witness her signature”. Ms D says that she was “very conscious of the question of mental capacity and undue influence” although, she says, she had seen no evidence of either. On the contrary, she says that her own opinion of M was that she was “mentally well and alert but physically frail.” She describes the events when M, Z and Dr T attended at her offices for the will to be signed: M “appeared well and in good spirits”. She handed M the will and allowed her time to read it and then went through it with her. M said that she understood it and was happy to go ahead and execute it. The will was then executed. I should add that the will is a very short and simply expressed document covering only two pages of text, the central provisions covering no more than ten lines of text on the first page.
25. I shall return to the 2004 will below.

The legal framework

26. The legal principles by which this application falls to be determined are those to be found in the relevant provisions of the Mental Capacity Act 2005. So far as is material

for present purposes they are to be found in sections 1 and 4 of the Act. So far as material section 1 provides as follows:

“(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”

27. So far as material in a case such as this, where what is in issue is the question of whether the court should authorise a statutory will for someone who is not going to regain testamentary capacity, section 4 provides as follows:

“(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.

...

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

...

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

- (a) the person’s past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
- (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
- (c) the other factors that he would be likely to consider if he were able to do so.

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

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

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

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

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

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

28. These provisions were the subject of analysis by Lewison J in *Re P* [2009] EWHC 163 (Ch), [2009] WTLR 651, a judgment, if I may say so, of compelling force with which I respectfully agree. As Lewison J said (para [36]), the 2005 Act marks a radical change in the treatment of persons lacking capacity, in particular (para [37]) by enacting the overarching principle that any decision made on behalf of P must be made in P's best interests. Thus it follows, as he says (para [38]), that the guidance given in the cases decided under the Mental Health Acts 1959 and 1983 about the making of settlements or wills can no longer be directly applied to a decision being made under the 2005 Act.
29. I would go somewhat further. It seems to me that, not least for all the reasons given by Lewison J, such well-known authorities as *In re L (WJG)* [1966] Ch 135, *In re D (J)* [1982] Ch 237, *In re C (A Patient)* [1992] 1 FLR 51 and *G v Official Solicitor* [2006] EWCA Civ 816, [2006] WTLR 1201, are best consigned to history. The starting point now must be what Lewison J aptly described (para [38]) as the "structured decision making process" prescribed by the 2005 Act, a process which requires the decision maker – here the Court of Protection – to take a number of steps before reaching a decision, including, as Lewison J described it, encouraging P to participate in the decision, "considering" P's past and present wishes, and her beliefs and values, and "taking into account" the views of third parties as to what would be in P's best interests. And there is, in my judgment, no place in that process for any reference to – any harking back to – judicial decisions under the earlier and very different statutory scheme, decisions which, as Lewison J justly observed, required the judges to perform "mental gymnastics" and which, as Palmer J equally justly observed in *Re Fenwick, Application of JR Fenwick & Re Charles* [2009] NSWSC 530 at para [87], reached the high water mark of artificiality in *In re C*.
30. As Lewison J said in *Re P* at para [39], and I entirely agree:
- "Having gone through these steps, the decision maker must then form a value judgment of his own giving effect to the paramount statutory instruction that any decision must be made in P's best interests. In my judgment this process is quite

different to that which applied under the former Mental Health Acts.”

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.
33. I have laboured these points because they seem to me to inform a proper understanding of how one is to evaluate the significance and the weight to be attached to P’s “wishes and feelings”, the phrase in section 4(6)(a) of the 2005 Act which mirrors the corresponding phrases in section 1(3)(a) of the 1989 Act and section 1(4)(a) of the 2002 Act.
34. The weight to be attached to P’s wishes and feelings in the context of the 2005 Act was considered by Her Honour Judge Marshall QC in *Re S and S (Protected Persons)* [2009] WTLR 315, the relevant passages of which were set out by Lewison J in *Re P*

at para [40], and then by Lewison J himself in *Re P* at para [41]. If I may adopt a phrase used by Lewison J, I agree with the broad thrust of what he and Judge Marshall were saying.

35. I venture, however, to add the following observations:

- i) First, P's wishes and feelings will always be a significant factor to which the court must pay close regard: see *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at paras [121]-[124].
- ii) Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular *a priori* weight or importance to P's wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P's wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic. Just as the test of incapacity under the 2005 Act is, as under the common law, 'issue specific', so in a similar way the weight to be attached to P's wishes and feelings will likewise be issue specific.
- iii) Thirdly, in considering the weight and importance to be attached to P's wishes and feelings the court must of course, and as required by section 4(2) of the 2005 Act, have regard to *all* the relevant circumstances. In this context the relevant circumstances will include, though I emphasise that they are by no means limited to, such matters as:
 - a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings: *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];
 - b) the strength and consistency of the views being expressed by P;
 - c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to: see again *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];
 - d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
 - e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.

36. I add only one point, which is perhaps obvious but may bear emphasis. Material which falls outside the defined provisions of sections 4(6) and 4(7) does not on that ground alone fall out of account altogether, for it may, notwithstanding that it does not fit precisely within the language of sections 4(6) and 4(7), still be a “relevant circumstance” within the meaning of section 4(2). Thus, for example, section 4(6)(a) refers to “any relevant *written* statement made by him when he had capacity.” An oral statement, if relevant, is not, however, to be ignored, for it will be a “relevant circumstance” within the meaning of section 4(2) and, if it goes to wishes and feelings, will in any event fall within the opening words of section 4(6)(a). And, to give another example, the use of the words “engaged in caring” in section 4(7)(b), which would seem to connote only someone who is currently caring and to exclude someone whose caring has come to an end, does not mean that the views of a past carer are irrelevant. The effect of section 4(7)(b) may be to limit the decision-maker’s duty to consult to current carers, but the views of a past carer if known are nonetheless part of the circumstances which have to be taken into account under section 4(2).
37. I need not embark here upon any extended analysis of what is meant in this context by P’s best interests, agreeing as I do with everything Lewison J said on the topic in *Re P*. I should however refer to what he said at para [44]:
- “There is one other aspect of the “best interests” test that I must consider. In deciding what provision should be made in a will to be executed on P’s behalf and which, *ex hypothesi*, will only have effect after he is dead, what are P’s best interests? Mr Boyle stressed the principle of adult autonomy; and said that P’s best interests would be served simply by giving effect to his wishes. That is, I think, part of the overall picture, and an important one at that. But what will live on after P’s death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done “the right thing” by their will. In my judgment the decision maker is entitled to take into account, in assessing what is in P’s best interests, how he will be remembered after his death.”
38. I agree entirely with this. Best interests do not cease at the moment of death. We have an interest in how our bodies are disposed of after death, whether by burial, cremation or donation for medical research. We have, as Lewison J rightly observed, an interest in how we will be remembered, whether on a tombstone or through the medium of a will or in any other way. In particular, as he points out, we have an interest in being remembered as having done the “right thing”, either in life or, *post mortem*, by will. Lewison J’s analysis accords entirely with the powerful analysis of Hoffmann LJ in *Airedale NHS Trust v Bland* [1993] AC 789 at page 829. I respectfully agree with both of them.

The basis of the application

39. As I have said, M is a childless widow. She has no close relatives, being an only child of now-deceased parents. On intestacy the persons entitled to her estate under section 46(1)(v) of the Administration of Estates Act 1925 would be the present living

beneficiaries of the statutory trusts for her uncles and aunts of the whole blood, in other words, as the family tree before me shows, the members of the first surviving generation of issue of her three maternal aunts and her paternal uncle. It is clear that any distribution on intestacy would require further genealogical research. The evidence filed strongly suggests that only M's cousin J (a son of one of her maternal aunts) has had any personal connection with her or taken any interest in her welfare in recent years. There does not appear to be any person eligible to make a claim on M's estate under the Inheritance (Provision for Family and Dependants) Act 1975.

40. In these circumstances Mr Smith submits that I should authorise a further statutory will in the same terms as that which I authorised on 13 February 2009 with the sole exception of the legacy to PM which he submits ought to be increased from 5% to 10%. He also raises the question of whether the will ought to make some provision for J – he suggests a legacy of 5% of the gross estate.
41. To put these figures into context the Deputy has filed a witness statement dated 23 September 2009 showing M's known liquid assets to be £368,638, and the total liability of the estate in relation to costs to be approximately £210,000, leaving a net balance of some £158,638. This, however, is subject to possible diminution in respect of potential tax liabilities and certain claims, including claims in relation to costs, being pursued by Z; on the other hand there is the possibility that the Deputy may succeed in recovering assets from Z. M's annual income from state benefits and an occupational pension is some £16,135, whilst the residential care home fees are £29,100 per annum, so there is an annual shortfall of income over expenditure of some £12,965 which has to be met out of the assets.
42. Unsurprisingly, given the uniformity of their overall positions, Mr Smith's and Miss Rich's submissions cover much the same ground and make much the same points. I can summarise their arguments as follows, going first to their analysis of the evidence so far as it bears upon the factors relevant under sections 4(6) and 4(7):
 - i) Section 4(6)(a) – M's past and present wishes and feelings: Except in relation perhaps to J, it is clear in my judgment that M is not capable of reliably expressing any present wishes and indeed evinces little interest in the matter. Ms Ilett's attendance note of her visit to M on 12 February 2009 contains the following illuminating passage: "This comment and other comments made by M during the meeting left me with the impression that M's expressed views as to the contents of her Will were motivated by what she thought was expected of her rather than what she actually wanted. She also appeared to believe that, having made a Will, its terms should not really be departed from." So far as concerns her previous wishes, Miss Rich submits that the previous wills are prima facie evidence of M's past wishes (save, as she points out, to the extent that the 2003 codicil seems not to have been executed in accordance with M's true intentions). And as Mr Smith points out, until the making of the 2003 codicil M had reasonably settled wishes, giving a legacy to PM and the residue to charities.
 - ii) Section 4(6)(b) – the beliefs and values that would be likely to influence her decision if she had capacity: Miss Rich submits that there is little or no relevant evidence on this point. There is no evidence of any belief by M in adherence to a 'dynastic' pattern of inheritance nor is there evidence of any

particularly strong connection with any of the charities named in the 1996 and 2001 wills. On the other hand, as Mr Smith puts it, there does seem to be a consistent desire from 1996 to 2003 to benefit charities.

- iii) Section 4(6)(c) – the other factors she would be likely to consider if she were able to do so: As Miss Rich points out, since making her 2004 will there have been considerable changes in all aspects of M’s life which she could not have foreseen at that time, and which are largely changes resulting from orders made in her best interests in the Family Division proceedings and the Court of Protection proceedings, rather than from decisions that she has made herself. M no longer lives with Z and his family or has any contact with them, and is unlikely ever to return to live in her own home or another private household. Z is not responsible for her property and affairs and the validity of substantial transfers of funds from M to Z has been questioned and may be pursued in litigation on her behalf. And Z has not as yet provided sufficient or satisfactory explanation of his dealings with M’s property and affairs.
 - iv) Section 4(7): ITW and Z have given evidence of their views as to what would be in M’s best interests. The views of the local authority and its employees engaged in caring for M or interested in her welfare are not in evidence and, says Miss Rich, are unlikely to be relevant, as the local authority has no concern with M’s property and affairs or knowledge of matters which would be relevant under section 4(6). PM’s daughter has provided the Official Solicitor with some evidence of the extent of family friendship between M and PM’s family, in particular some photographs and a video film of a family occasion from 1995.
43. In the light of these circumstances, the Official Solicitor considers that a statutory will should be made for M. It should contain the same dispositive provisions as the interim statutory will, save that the legacy for PM should be a higher percentage of the estate. Given the valuation uncertainties, Miss Rich submits that it would be appropriate for any legacy or legacies to be expressed as shares rather than as fixed sums, in order to avoid a potentially unjust imbalance between legatee(s) and residuary beneficiaries on eventual distribution.
44. In support of this Miss Rich makes the following submissions:
- i) All of M’s earlier wills, save for the 2003 codicil as it stands, but including the 2004 will, should be regarded as “relevant written statements” within the meaning of section 4(6)(a). As she points out, the Court of Protection has no jurisdiction to rule on the validity or invalidity of any will, and the 2004 will does appear to have been substantially valid, having regard to the evidence of Ms D and Dr T on M’s capacity, knowledge and approval and her seeming freedom from any undue influence exercised by Z.
 - ii) As regards the 2003 codicil, there is, for all the reasons I have already rehearsed, a strong likelihood that it was not executed containing the provisions that M intended and that it might well have been subject to a successful rectification claim under section 20 of the 1982 Act if it had remained unrevoked and been admitted to probate. Miss Rich further suggests that knowledge and approval would have been in issue, given what she says

was the extent of involvement of PM's family in procuring the execution of the codicil via correspondence with professional intermediaries at the same time as giving instructions for work on PM's behalf, and given also the fact that the wording of the codicil as it stands suggests that M did not read it over and understand it before she executed it. In all the circumstances, she submits, I should accordingly consider it more likely than not that the "past wishes" which M intended to express in the 2003 codicil were in fact a wish to devise her house to PM's family, and the residue of her estate (which at that date included the value of her share portfolio and other cash in deposit accounts or other investments of a sum which may have been as much as £300,000) to the charities named in the 2001 will.

- iii) M's wills in the period 1996 to 2004 do not show a unified or settled pattern of testation, save for the exclusion of any members of her wider family (apart from the appointment of her cousin J as her executor). The 1996 and 2001 wills largely benefit charity (to a substantial extent the same charities as between the two) with a legacy to a friend and neighbour, PM, which is clearly above the level of being a token but nevertheless represents a minor fraction of her estate. The 2003 codicil (if analysed as she suggests I should) preserved the charitable intention and structure of the residuary gift of the 2001 will but introduced a substantial gift of property – the house – to PM's family. The 2004 will, made only nine months later, entirely excludes both PM's family and the charities in order to benefit Z alone.
- iv) Although there is, as Miss Rich accepts, no extrinsic contemporaneous documentary evidence in support of her analysis, she submits that it appears, from what is known of M's relationship with PM's family and then with Z's family, that in each case the codicil or will substantially benefiting them was made on the understanding that each would take on responsibility for her care for the remainder of her lifetime – an analysis which, as she points out, is consistent with the view expressed by Dr PO, based on a number of meetings with M, in the passage in his report of 13 February 2009 which I have already. Moreover, as Miss Rich also points out, Z himself in his witness statement of 27 February 2009 says that "when M signed the 2004 will she did so in the expectation that she would spend the remainder of her life in my home."
- v) Given the change in circumstances since the 2004 will, Miss Rich submits that M's past wishes can form only a limited template for a statutory will made in her best interests. As there is no longer any question of her care being provided by a neighbour or other private household on the basis of an understanding or expectation that the carer would inherit a substantial part or all of her estate, there is, she submits, no reason why either PM's family or Z should benefit to the extent of their expectations under the 2003 codicil and 2004 will respectively. As Mr Smith puts it, given that there is no longer an individual on whom M is dependent for her security, the impetus behind the 2003 codicil and the 2004 will has probably disappeared.
- vi) However, she acknowledges that PM had clearly been a long-standing neighbour and family friend to M, though his expectations under the 2003 codicil were significantly greater than they were under either the 1996 will or the 2001 will.

- vii) As regards Z, and the issue of whether he should be entitled to any legacy to reflect his expectations under the 2004 will, Miss Rich submits that M's past wishes have to be balanced against Z's subsequent conduct in relation to her and her property and affairs, the court-imposed cesser of contact between M and Z and his family, and the prospective proceedings for recovery of M's funds from him. The Official Solicitor, she tells me, considers that the weight to be given to these factors is sufficient to exclude Z and any member of his family from any benefit under a statutory will made on this application. It cannot conceivably, she says, be in M's best interests both to litigate the recovery proceedings (which have already been directed by the Court) and at the same time to make any provision under her will for Z, who is the prospective defendant to those proceedings. And for good measure, she adds, in considering M's best interests it would be wrong for the court to depart from the principle in *In re Rhodesia Goldfields Ltd* [1910] 1 Ch 239, which I referred to in my judgment of 19 December 2008, and make an order which conferred a prospective benefit on Z before he had restored any funds found to be due to M's estate.
- viii) Finally, says Miss Rich, Z's own views of what would be in M's best interests should be disregarded. Even if Z falls within section 4(7)(c) by virtue of having been the donee of an EPA or is a person "interested in M's welfare" under section 4(7)(b), I should not, she says, regard it as appropriate for him to be consulted as to what would be in M's best interests, if for no other reason than that he is not disinterested in the outcome of the application and insofar as his evidence consists of views rather than ascertainable facts is accordingly likely to be wholly self-serving.

45. Mr Smith adds the following points:

- i) He adopts a more questioning approach than Miss Rich to the validity of the 2004 will, submitting that, although, taking the evidence as a whole, M may not have lacked capacity at the time, she was vulnerable and dependant on Z and that there appears to be at least a serious risk that Z would have attempted to influence her to make a will in his favour. He relies in this context upon the large sums of money transferred by her to Z, my criticisms of Z as set out in the passages in the two judgments to which I have referred, the fact, as he suggests, that Z seems to have made himself the central focus of M's life at the time the 2004 will was made and to have discouraged her contact with others (as to which see my judgments) and the fact that the 2004 will left everything (that is, everything which had not already been transferred to him) to Z.
- ii) He also adopts a more stringent analysis of Z's misconduct as a reason for excluding Z altogether from benefit:
 - a) There is, he says, a strong prima facie case that Z is liable to M for the monies he received from her; he was a fiduciary, she placed trust and confidence in him and he owed fiduciary obligations to her; there is a presumption, not least given the size of the alleged 'gifts', that the payments she made to him were the result of abuse of confidence and/or undue influence; and it is for Z to prove that the transactions

were fair and to prove that there was no undue influence – a burden which, he says, Z has not yet come anywhere near discharging.

- b) It would also and in any event be inappropriate to make any provision for Z in circumstances where he has *still* failed to comply fully with the order I made on 19 December 2008.
 - c) Furthermore, and in any event, Z has already received what Mr Smith appropriately calls a very large sum from M.
- iii) In all the circumstances, the Deputy, he says, appropriately considers that:
- a) No provision should be made for Z.
 - b) In the absence of other beneficiaries it is appropriate to revert to the pre-2004 arrangement of a legacy to PM with the residue passing to the charities.
 - c) Whilst the gift of the house to PM and his family (or, now that it has been sold, the proceeds of sale) is not appropriate given in particular the fact that M is no longer dependent on PM, an increase from the 2001 will legacy of 5% to 10% is appropriate.

46. On behalf of the charities, Miss Edge supports the making of the statutory will as proposed by the Deputy, essentially for much the same reasons as those put forward by Mr Smith and Miss Rich. The charities agree that they should take equally, the approach in the 2001 will taking precedence over that in the 1996 will. Where she takes issue with their approach is in relation to the question of a possible legacy to J, a matter to which I return below.

Z's objections

47. Z's position is simply stated: that I should direct a statutory will in the terms of the 2004 will. In support of his case he puts forward four propositions:
- i) First, he says, relying upon the evidence of Ms D and Dr T, the 2004 will was legally valid and represented M's true wishes.
 - ii) Secondly, he says, he intends to appeal against the orders I made in February 2009. That may be, but the fact is he has not done so.
 - iii) Thirdly, and in any event, he says that the change in circumstances resulting from my orders removing M from his care are not so significant as to merit or justify the making of a statutory will at all; alternatively, and in any event, the terms of the proposed statutory will, excluding him completely when he was the sole beneficiary under the 2004 will, are unfair. The fact is, as he points out, that she did spend over four years with him and his family being looked after by them.
 - iv) Fourthly, he "utterly rejects" the claim that he misused M's money or that the gift to him was anything other than that. He disputes that what he calls any ill

motives on his part should be imputed to him; certainly not so as to justify excluding him completely as a beneficiary under M's will.

48. There is one other aspect of Z's case which requires emphasis. He makes clear in his position statement that, not merely does he seek to dispute any claim the Deputy may bring against him for recovery of any part of the monies transferred to him by M; he asks the court to "assess and repay to me the full time care costs of M from June 2004 until October 2008" at the rate of £20,100 per annum.

Discussion

49. I think it is helpful first to consider the position of Z. Is it in M's best interests that Z is a beneficiary under her will? In my judgment the answer to this is quite plainly No!
50. Subject to two points I agree with the broad thrust of the submissions by Mr Smith and Miss Rich. My two qualifications are these:
- i) I cannot agree with Miss Rich's proposition that Z's views of what would be in M's best interests should be *disregarded*, though I accept that, for all the reasons she gives, his views can in all the circumstances carry very little weight.
 - ii) It is not necessary, and I am far from persuaded that it would in any event be appropriate, for me to go all the way with Mr Smith in his submission that both the *inter vivos* transactions and the 2004 will were, or were very likely, the result of inappropriate influence exercised by Z. The Court of Protection has no jurisdiction to rule on the validity of any will; I have (appropriately) not heard all the evidence which it would be necessary to hear if findings were to be made on these issues; and it has to be borne in mind that the validity and propriety of the *inter vivos* transactions may yet be the subject of litigation in the Chancery Division.
51. In all the circumstances I can and I think I should proceed on a narrower front.
52. There are, in my judgment, a number of key reasons – magnetic factors – demonstrating why Z should be excluded from benefit:
- i) First, there is the fundamentally significant change of circumstances correctly relied on by Miss Rich and Mr Smith. Its significance, despite what Z would have me accept, is only borne out by his own acknowledgement that, and I repeat what he said, "when M signed the 2004 will she did so in the expectation that she would spend the remainder of her life in my home."
 - ii) Secondly, there is the fact that Z has already received large sums from M and, on top of what he has already had, is seeking in addition reimbursement at the annual rate of £20,100 for the cost of her care. Now it seems to me that Z is really here on the horns of a dilemma, impaled, as it were, upon one or other prong of Lord Chancellor Morton's well-known fork. Either he has properly received, and without any impropriety on his part, the various monies transferred to him by M or he has not. If he has, then what further call can he have upon M's bounty, given (a) the sums he has already received and (b) the

further sums he is claiming, when both are evaluated in the light of his caring for M for some four years and not, as matters have turned out, for the rest of her life? How can it be in her best interests on this hypothesis to give him yet more? The simple fact, in my judgment, is that there is only one possible answer to such questions. But if, on the other hand, he has not – if he has indeed been guilty of impropriety – then how can it possibly be in M’s best interests to ‘reward’ him by making yet further provision? Again, there is only one possible answer to the question.

iii) Thirdly, and in any event, there are the serious findings I have made against Z as set out in my earlier judgments and the fact that he has still failed to comply fully with the order I made on 19 December 2008. How can it possibly be in M’s best interests to make testamentary provision for someone who has shown himself so unwilling or so unable to act in her best interests and who has acted in defiance of orders of the court made for her protection and in furtherance of her best interests? Again, the answer is obvious.

53. For these key reasons in particular, and also, subject only to the two qualifications I have mentioned, for all the other reasons marshalled by Miss Rich and Mr Smith, I agree that Z should be excluded from M’s testamentary bounty.

54. I turn to PM and the charities. I can take this shortly. For all the reasons given by Miss Rich and Mr Smith I agree that provision should be made for both PM and the charities, essentially along the lines of the 2001 will. In contrast to the much more speculative questions raised in relation to the 2004 will, there is, as I have said, a compelling case for concluding that the 2003 codicil was intended to give PM’s family only M’s house and not her whole estate. Be that as it may, however, the changed circumstances since 2003 amply justify the submission that PM and his family cannot reasonably expect to receive – that it is not in M’s best interests that they receive – provision at the level which she may have thought appropriate in 2003. The balance, in my judgment, is appropriately struck in M’s best interests by giving PM the legacy proposed by the Deputy and the Official Solicitor.

A legacy for J?

55. Mr Smith invites me to consider whether it would be appropriate to include a legacy for M’s cousin, J, on the basis that, although M never included him as a legatee, he is the one member of her family to have maintained a relationship with her, that she had sufficient regard for him to name him as executor of the 1996 will, and that he continues to visit and telephone her.

56. The Official Solicitor has no strong views on this. Miss Edge, on behalf of the charities, objects, pointing to two factors identified in the evidence:

i) First, M’s reported statements as to why J should not benefit under her will. During her interview with M on 12 February 2009, Ms Ilett asked M whether she would want to benefit J and his wife; “she said that she would not as they did not need the money.” The information supplied by J himself to Ms Ilett, in a letter he sent her dated 11 March 2009 and in a telephone conversation with her on 12 March 2009, was particularly illuminating, for he reported what M had told him *when she still had capacity*. In relation to the 1996 will, of which

he was the executor, J recalled M commenting that “we had good provisions for ourselves” – the phraseology may be slightly odd but the meaning is clear. In the course of the telephone conversation, Ms Ilett told J what M had said: “she had been most emphatic that they” – J and his wife – “need not be included, as they had more than enough money of their own.” J’s response, as recorded by Ms Ilett was that M “had made the same comment to him when she had capacity.”

- ii) Second, the fact that J’s involvement in M’s life since she was removed from Z’s care has hardly been assiduous: seemingly a limited number of telephone calls and visits on two occasions

57. I agree with Miss Edge. A particularly compelling feature, as it seems to me, is that were J to be included as a legatee he would be gaining a benefit which M, while she had capacity, felt that he did not need and which, it would seem, she still thinks he does not need. How can it be in her best interests to go counter to such long-held views? The only proper answer, it seems to me, would be if it could be said that giving him a legacy was either an appropriate reward for what he is now doing for M or an inducement to him to do more for her; but neither, in my judgment, can be justified in the circumstances as they exist.

Conclusions and order

58. For these reasons, as I announced at the end of the hearing on 6 October 2009, I have authorised the making of a statutory will in the terms proposed by the Deputy but *not* including any provision for J. The order which I had made orally on 6 October 2009 was put before me for my approval on 7 October 2009 and on 8 October 2009 I informed the parties that I approved the form of the order as drafted. The order is dated 6 October 2009.