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Neutral Citation Number : [2020] EWCOP 48

IN THE COURT OF PROTECTION **CASE NO: 12501237**

THE MENTAL CAPACITY ACT 2005

IN THE MATTER OF AH

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

Date: 28th September 2020

Before: Her Honour Judge Hilder

PENNTRUST LIMITED

Applicant

- and -

WEST BERKSHIRE DISTRICT COUNCIL

First Respondent

- and -

THE PUBLIC GUARDIAN

Second Respondent

Hearing: 19 May 2020

Mr. Chandler (instructed by Penningtons Manches LLP) for the Applicant
Ms. van Overdijk (instructed by West Berkshire District Council) for the First Respondent
Ms. Whittington (instructed by The Public Guardian)

The hearing was conducted in public subject to a transparency order made on 15th March 2020. The judgment was handed down to the parties by e-mail on 28th September 2020. It consists of 21 pages, and has been signed and dated by the judge.
The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

A. The Issue

1. Practice Direction 19B provides for fixed costs in the Court of Protection. There is specific provision in the Practice Direction "where the net assets of P are below £16000." The option for detailed assessment of costs for such estates "will only arise if the court makes a specific order."

2. The Applicant trust corporation was formerly appointed as property and affairs deputy for AH. At all times during the deputyship AH's liquid assets were less than £16 000 but her total assets, including a property in which she lives, were substantially higher. The deputyship order includes authorisation to seek SCCO assessment but makes no explicit reference to the size or nature of AH's estate. The Applicant contends that it is entitled to rely on the authorisation in its deputyship order to seek SCCO assessment of its costs. In the event that the Court does not agree, the Applicant seeks retrospective authority to obtain SCCO assessment.

3. The Respondents take no substantive position on the issue to be determined. West Berkshire District Council is "largely neutral" but, as current deputy, is concerned to understand what debt AH has incurred. The Public Guardian "seeks no specific outcome." His approach to the matter has simply been to assist the Court where he can.

B. Matters considered

4. I have read all the documents collated into the hearing bundle and additional documents filed at and after the hearing, including:

    a. filed by the Applicant:

    statement by Julie Burton dated 3rd January 2019 [**15**]
    statement by Gary Tidmarsh dated 18th May 2020
    skeleton argument by Mr. Chandler, dated 13th May 2020

    b. filed by the First Respondent:

    statement by Jo England dated 22nd March 2019 [**92**]
    skeleton argument by Ms. van Overdijk, dated 13th May 2020

    c. filed by the Public Guardian:

    skeleton argument by Ms. Whittington, dated 12th May 2020

5. I have heard oral submissions from Counsel for each party.

C. The Background

6. AH is now 93 years old. She was born in Poland but she has lived in the UK since the age of 15. Her husband died in 2003 and her son shortly afterwards but she has two living daughters, M and Z. She lives in her own home at 25 CW, with her grandson, D (who is the son of Z). She has dementia and receives a package of care support which is funded by West Berkshire Council.

7. In or about 2013, some financial transactions made on AH's account were questioned but AH was unable to recall or explain them. The Local Authority conducted a safeguarding investigation. No definitive conclusion was reached. At the same time, the Local Authority was involved in relation to the package of care provided to AH.

8. In 2014 West Berkshire District Council commenced proceedings in respect of assessment of AH's capacity. The matter was transferred from the central registry of the Court of Protection to a regional court.

9. In the course of those proceedings a report was obtained from Dr Hugh Series dated 19th July 2014 [**35**]. He confirmed that AH lacks capacity to manage her property and affairs, to make decisions about her care management, to decide on contact with family members and to litigate the proceedings.

10. There was an attended hearing on 27th August 2014. West Berkshire District Council has filed an attendance note, which includes the following account:

> *"J[udge] asked what the current position was with P's finances. KB explained that currently [P's grandson] was managing them, but that it had been made clear by P's daughters that this situation was unacceptable to them. As far as they were concerned it needed to be formalised and they wanted it to be either themselves or, in the alternative a panel deputy. Confirmed that the Council's view was that a Panel would be appropriate as it would be independent from the Council and due to the complaints this was preferable, equally it would be independent from each of the family members, and that due to disagreements between the family this would be appropriate. If necessary the Council were prepared to make the relevant application.*
>
> *J[udge] asked what knowledge there was of the size of the estate. Outlined that there was potentially circa £1k in the bank plus a small income from state pension, benefit allowances and a private pension but that the major asset was the house. Agreed that it was likely to be mortgage free …. Approximate value of the house is assumed to be £230-240k…*
>
> *J[udge] queried if the Council has considered appointeeship in the interests of keeping control of the costs and time of the proceedings. HW pointed out that the private pension would not be covered…*
>
> *J[udge] raised the fact that there was apparently no conflict between the sisters…. Queried why there had been no application. KB outlined that they had not indicated any intention to make their own. J[udge] asked what the cost of a panel deputy was, LH indicated that the current level was*

unknown (£320/annum – as of 02/12). J[udge] agreed that a deputy seemed like a better option that (sic) the OS … but what are other options? KB repeated that we could wait for either side of the family to make an application or we could make one for them.

J[udge] handed down a draft order using the courts powers under 16(6) to make an order without application. J[udge] outlined that the next step was that the London office would find a relevant deputy and appoint them…."

11. With the usual assistance from staff at the central registry of the Court of Protection, PennTrust Ltd was identified as the appropriate panel member. On 6th October 2014 [**25**] the hearing judge duly made an order appointing PennTrust Ltd as property and affairs deputy for AH.

12. Paragraph 4 of the deputyship order provides as follows:

> "*the deputy is entitled to receive fixed costs in relation to their application and to receive fixed costs for the general management of the affairs of [AH]. If the deputy would prefer the costs to be assessed, the order is to be treated as authority to the Supreme Courts Costs Office to carry out a detailed assessment on the standard basis."*

13. Paragraph 5 of the deputyship order required the Deputy to obtain and maintain security in the sum of £150 000.

14. The deputyship apparently did not run smoothly. Ultimately the Applicant came to the conclusion that there were "*potentially complex issues*" [**20**] to deal with, and it would be appropriate for its appointment as deputy to be discharged and the Local Authority to be appointed instead as "*this would ensure that decisions can continue to be made on [AH's] behalf without incurring additional fees which would further deplete her capital*." [**20**]

D. <u>These proceedings</u>

15. By COP1 application dated 3rd January 2019 [**5**] PennTrust Limited applied for:

    a. its appointment as property and affairs deputy for AH to be discharged;

    b. authority to bill costs which had been incurred between 6th October 2014 and 5th October 2017 and assessed in the sum of £34 935.95;

    c. authority to have costs from 6th October 2017 to the date of discharge assessed by the SCCO; and

    d. authority to secure a charge against 25CW in relation to all outstanding costs.

16. D filed a COP5 Acknowledgment dated 2nd February 2019 [**86**] objecting to the appointment of West Berkshire Council as replacement deputy.

17. By order made on 9th May 2019 [**97**] the matter was transferred to the regional court for listing of a Dispute Resolution Hearing, which was then arranged for 17th July 2019.

18. At the Dispute Resolution Hearing, an order was made [**108**] which recorded that the issues in the case were separated into the "Deputyship Element" and the "Fees Element":

    a. M and Z confirmed that they had no objection to the Deputyship Element, and did not intend to pursue any objection in respect of the Fees Element;

    b. D withdrew his objection to the Deputyship Element, and also indicated that he did not intend to pursue an objection in respect of the Fees Element;

    c. The appointment of PennTrust Limited as deputy for AH was discharged and (in a separate order [**111**]) the authorised officer of West Berkshire District Council was appointed as replacement deputy.

    d. The Council indicated that it had "queries" in relation to the Fees Element;

    e. The matter was listed for a final hearing "for the purposes of determining the Fees Element" on the first open date after eight weeks.

19. By COP9 application dated 5th November 2019 [**114**] the Local Authority Deputy applied for outstanding issues to be transferred for consideration by me, on the basis that they raise "a broader point of principle concerning the application of Practice Direction 19B and following on from the *Matrix* case."

20. By order made on 6th November 2019 [**123**], the case was transferred for initial consideration on the papers. The issues to be considered were identified as follows:

    a. whether D should be discharged as a party to these proceedings;

    b. whether the OPG should be invited to join the proceedings

    c. whether the Applicant should have applied to the SCCO for detailed assessment of its professional fees (and is entitled to charge the assessed bills) against [AH's] estate pursuant to:

        i. paragraph 4 of the deputy order issued on 6th October 2014;
        ii. Practice Direction 19B as applicable to professional deputy costs for remuneration periods ending on or before 31st March 2017; and/or
        iii. Practice Direction 19B as applicable to professional deputy costs for remuneration periods ending on or after 1 April 2017

    d. Whether "net assets" for the purposes of PD19B as applicable to professional deputy costs for remuneration periods ending on or after 1 April 2017 does or does not include the property P is living in.

    e. In the event that the Applicant is/was not authorised to seek assessment of any or all of its assessed costs by the SCCO, whether the Court will grant retrospective authorisation in relation to any fees already assessed for which the Applicant was not entitled to seek assessment and whether the Court will authorise detailed assessment in relation to any unauthorised fees for which the Applicant is not presently authorised to seek assessment and authorise the applicant to charge the same.

    f. In the event that the Court determines that some or all of the Applicant's fees (as assessed or to be assessed) are payable by [AH], whether it is in [AH's] best

interests for the Court to make orders in relation to the charge against [AH's] property proposed by the Applicant to discharge its professional fees and, if so, the appropriate orders to make."

21. The matter was duly referred to me. By order made on 21st November 2019 I discharged D as party to these proceedings, joined the Public Guardian as party and provided for an attended hearing. Unfortunately that order was not issued until 16th March 2020 due to administrative oversight. A further order was made on 15th March amending the case management dates to account for this; and a transparency order was also made.

22. Of the issues identified in paragraph 20 above, (a) and (b) have been resolved. The four others remain.

23. West Berkshire District Council has filed an up to date summary of AH's estate. Save that the property is now said to be valued at approximately £340 000, it is broadly the same as outlined in the August 2014 hearing. AH's liquid assets are minimal, and she still lives at 25CW.

E. Law and Practice

24. Section 19(7) of the Mental Capacity Act 2005 ("MCA") provides as follows:

> *(7) The deputy is entitled–*
>
> *(a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and*
>
> *(b) if the court so directs when appointing him, to remuneration out of P's property for discharging them.*

25. As set out by Charles J in *Re AR* [2018] EWCOP8 at paragraph 32, a decision as to remuneration is a "best interests" decision, to be determined by reference to the individual facts of a particular case.

26. Further provision as to costs is made in Part 19 of the Court of Protection Rules 2017. Relevant terms are defined in Rule 19.1 as follows:

> *'**detailed assessment**' means the procedure by which the amount of costs or remuneration is decided by a costs officer in accordance with Part 47 of the Civil Procedure Rules 1998 (which are applied to proceedings under these Rules, with modifications, by rule 19.6);*
>
> *'**fixed costs**' are to be construed in accordance with the relevant practice direction;*

27. The range of options for remuneration is set out in Rule 19.13:

> *(1) Where the court orders that a deputy, donee or attorney is entitled to remuneration out of P's estate for discharging functions as such, the court may make such order as it thinks fit including an order that –*
>
> *(a) the deputy, donee or attorney be paid a fixed amount;*

(b) the deputy, donee or attorney be paid at a specified rate; or

(c) the amount of the remuneration shall be determined in accordance with the schedule of fees set out in the relevant practice direction.

(2) Any amount permitted by the court under paragraph (1) shall constitute a debt due from P's estate.

(3) The court may order a detailed assessment of the remuneration by a costs officer in accordance with rule 19.10(b).

Pursuant to Rule 19.14, a Practice Direction sets out further provisions. The relevant practice direction is PD19B. For the purposes of these proceedings, two versions of PD19B are relevant:

a. "the old version," which was effective between 1st February 2011 and 30th March 2017; and

b. "the current version," which has been in effect since 1 April 2017.

28. Both the old version and the current version of PD19B set out the same provision in respect of "Claims generally:"

"5. The court order or direction will state whether fixed costs or remuneration applies, or whether there is to be a detailed assessment by a costs officer. Where a court order or direction provides for a detailed assessment of costs, professionals may elect to take fixed costs or remuneration in lieu of a detailed assessment."

29. Both the old version and the current version of PD19B have a section headed 'Remuneration of solicitors appointed as deputy for P', which sets out the fixed rates of remuneration that will apply where the court appoints a solicitor to act as deputy. In respect of 'Category III' costs, both versions of the PD state that:

"*Where the net assets of P are below £16,000, the professional deputy for property and affairs may take an annual management fee not exceeding 4.5% of P's net assets on the anniversary of the court order appointing the professional as deputy."*

30. There is further provision in respect of small estates in each version of the Practice Direction. A typographical error in the old version has been removed and the initials of the SCCO (rather than its full title) are used, but otherwise paragraph 11 of the old version and paragraph 12 of the current version both provide as follows:

"In cases where fixed costs are not appropriate, professionals may, if preferred, apply to the SCCO for a detailed assessment of costs. However, this does not apply if P's net assets are below £16,000 where the option for detailed assessment will only arise if the court makes a specific order for detailed assessment in relation to an estate with net assets of a value of less than £16,000."

31. However, the two versions of PD19B differ in the extent of information provided to aid interpretation of the term "net assets". The current version of PD19B offers no explanation at all. The old version includes a footnote which provides some definition, in the following terms:

> *"∗ Net assets includes any land or property owned by P except where that land or property is occupied by P or one of P's dependents."*

32. In response to my request, the parties have now filed historical versions of provision in respect of fixed costs. In particular, it is to be noted that:

    a. In respect of arrangements before the Mental Capacity Act 2005 was implemented, a Practice Note signed by Master Lush on 7th December 2005 and having effect from 1st January 2006 provides for Category III costs for small estates as follows:

    "(e) Where a professional is dealing with the affairs of an individual under an order of the court, and the assets of that individual are less than £16 000, then the professional may take a general management fee not exceeding 4% of the patient's assets on the anniversary of the date of the order appointing the professional to act (plus VAT)."

    There is no qualification of assets as "net" or otherwise, and there is no suggestion that occupation of a property affects the calculation.

    The Practice Note further provides for assessment of costs as follows:

    "In all categories, except for category III(e), professionals will have the option of the Costs Officer carrying out a detailed assessment of the costs rather than accepting fixed costs, if they wish. However, professionals must take fixed costs where it is appropriate to do so: in other words, where the amount of the bill is within the maximum allowed under the relevant category…"

    b. The qualification of "assets" by the word "net" is common to all versions of Practice Direction 19B (ie post-implementation of the Mental Capacity Act 2005) but the version effective between 1st February 2011 and 1st April 2017 is the only one which includes any definition of the term "net" or indeed any suggestion that occupation of a property affects the calculation.

    c. Despite invitation to do so, the parties have not filed any document or other point of reference which may illuminate any policy behind the difference in the 2011 – 2017 version of the Practice Direction, or why the current version does not replicate it, seemingly because they were unable to identify any such information.

33. I have previously considered the meaning and effect of PD19B in *London Borough of Enfield v Matrix* [2018] EWCOP 22. In so far as is relevant to the present case, it was there concluded that:

    a. The authority for the deputy to charge a fee comes from the court order alone. SCCO assessment does not itself give authority to charge the assessed fee. (paragraph 69)

b. Where assessment has been obtained without authorisation, the deputy will need to make an application for relief of any liability which attaches to the taking of the unauthorised fee. In such application the deputy may seek to rely on the SCCO assessment as demonstrating some independent, reasonably contemporaneous acceptance of the reasonableness of the fee but it will be for the court to decide whether or not it is appropriate to grant the authorisation and effectively authorise the fee retrospectively. (paragraph 71)

c. Where an order permitting SCCO assessment had been made at a time when an estate exceeded £16,000, but the estate subsequently fell below that level, the deputy could not continue to rely on that authorisation to seek assessment. At the point when the estate fell below £16,000, the deputy should either accept the stipulated percentage or seek further, specific authority for assessment in respect of a small estate. (paragraphs 74 -78)

34. The underlying logic for the requirement for specific authorisation to obtain SCCO assessment where an estate reduces to less than £16 000 was set out (at paragraph 76) in the following terms:

> "*When funds are reduced to £16 000, in the ordinary run of events the demands of deputyship, and therefore the reasonableness of seeking costs higher than the stipulated percentage rate, are likely to be few. It is a sensible protective measure to require that any deputy who does seek assessment in those circumstances, with the attendant costs of the procedure and the aim of higher charges, should be obliged to explain to the court why*."

F. Common ground

35. After some discussion, all parties now agree that:

a. the old version of PD19B (which includes a definition of net assets) applies to the first two periods of the costs claim in this matter (2014/2015 and 2015/16); and

b. the current version of PD19B (which has no definition of net assets) applies to all other parts of the costs claim (2016/2017 and all the as yet unassessed costs.)

G. The Applicant's Position

36. In Mr Chandler's position statement (using figures taken from the statement by Ms. Burton) it was said that the Deputy has incurred the following costs:

a. for the period 2014/15 £9 660 [A58];

b. for the period 2015/16 £15 850 [A60]; and

c. for the period 2016/17 £9 425 [A62].

(These sums total £34 935.)

d. further costs up to the discharge of the appointment in the region of £20 000 (but not yet assessed.)

37. In oral submissions Mr Chandler clarified that these figures are in fact only the amount which are said to be due to the Deputy in respect of managing AH's funds. There are additional disbursements, so that the costs claim is in fact as follows:

    a. for the period 2014/15 £16 899.12 [**A57**];

    b. for the period 2015/16 £20 994.97 [**A59**]; and

    c. for the period 2016/17 £12 541.38 [**A62**].

        (These sums are the result of SCCO assessment inclusive of VAT and they total £50 425.47.)

    d. further costs up to the discharge of the appointment in the region of £20 000 (but not yet assessed.)

38. Mr. Chandler further clarified that the only amount so far billed to AH is an interim amount of £4 000 in the first year of deputyship, which is included in the sum itemised at paragraph 37(a) above. In view of AH's lack of liquid funds, no other costs have yet been paid from AH's estate.

39. The Applicant considers that, throughout its appointment as deputy for AH, the level of activity required was "high." [**22**] Mr. Tidmarsh's statement describes difficulties establishing an acceptable regime for day to day expenditure against a background of family conflict and requests from D for capital expenditure. It was necessary to review transactions in AH's account, and to review her will. There was liaison between three family members. The possibility of an equity release scheme was investigated but sourcing a financial institution willing to enter into such an arrangement was complicated by the fact that D lives in the property, and then Z indicated that she felt AH's interests required her to move into residential care. Two applications to the Court have been required (for release of the will and for authority to enter into an equity release scheme).

40. The Applicant accepts (as it must) that, if the property is not included in the calculation, AH's assets have at all material times been less than £16 000 but emphasises that, if the value of the property is included, AH's estate clearly has at all material times had a value significantly above £16 000.

41. The Applicant's primary case is that paragraph 4 of the deputyship order authorises the assessment of its costs in every charging period. Mr. Chandler points out in his position statement (**paragraph 34**) that the deputyship order was made against a known background of family discord, when the assets other than the property in which AH lived were already less than £16000. There was no discussion at the hearing in respect of SCCO assessment, and there were some six weeks between the hearing and the making of the deputyship order, but it should be inferred that the judge "positively decided" to include authority to seek assessment, and so there has been "a specific order for detailed assessment in relation to an estate with net assets of a value of less than £16,000." (I shall refer to this as "the Context Argument.")

42. Mr. Chandler asserts that Public Guardian's contrary interpretation requires that the order is understood to mean "the antithesis" (**paragraph 35(b)**, *emphasis in original*) of the plain words of the order. The order should, he says, be taken at face value.

43. In the alternative the Applicant contends that, where the current version of PD19B applies (ie in respect of the 2016/2017 costs and all the as yet unassessed costs), paragraph 12 is of no import because AH's total assets exceed £16 000. In the absence of the footnote defining "net assets" by exclusion of property where the protected person lives, the term means "what the words naturally denote ie all of P's net assets, including property which he or she occupies." (**position statement paragraph 38**). That being so paragraph 12 does not apply, and the Deputy has authority in paragraph 4 of the deputyship order to seek assessment. (I shall refer to this as "the Definition Argument.")

44. Further in the alternative, if the Court concludes that there is no extant authority to seek assessment, the Applicant seeks such authorisation now, on the following grounds (which I shall refer to as "the Best Interests Argument"):

    a. The circumstances of the Applicant's appointment, namely allegations of misappropriation against D and complex family dynamics, make clear that this was never a straightforward deputyship where fixed costs would be appropriate;

    b. The statements of Julie Burton and Gary Tidmarsh are evidence of what was actually done on behalf of AH by the Applicant as deputy (and any suggestion that any of this work was inappropriate or unnecessary is rejected);

    c. The Applicant did genuinely understand that it already had such authorisation. ("*It is in the context of the proceedings for its replacement, together with a changing jurisprudential backdrop, that uncertainty has now arisen*." (**Position statement paragraph 40(c)**);

    d. The overall value of AH's estate – more than £340 000;

    e. The costs, accumulated over a long period, have been (in part at least) assessed by the SCCO as reasonable.

    f. The Applicant will only take steps to recover the costs when the property is sold.

45. In so far as West Berkshire District Council sought to suggest that the Applicant had not acted appropriately either (whilst appointed as AH's deputy) by failing to make proper applications for carer assessments or (whilst appointed and afterwards) by failing to answer questions about AH's property and affairs, the Applicant explained at the hearing [**129**] that it had taken the view - in circumstances where the Council "was raising a whole host of criticisms whilst professing to act neutrally" - that it was "not proportionate to respond to each and every criticism."

46. The Applicant's position as to security for its costs changed in the course of the hearing. It was initially contended that, using powers under section 18(1)(b) of the Mental Capacity Act 2005, I should now make provision for the sums due in costs to be charged to AH's property. By the time of his closing submissions, Mr. Chandler sought instead an order authorising the present deputy to execute a charge in respect of costs due to the Applicant.

H. <u>The First Respondent's Position</u>

47. The First Respondent Local Authority – whose authorised officer is now AH's deputy for property and affairs - "remains largely neutral" on the issues in these proceedings but is concerned, as current deputy, to "understand what debts AH has properly incurred to

be able to deal with that debt in her best interests" and to assist the Court where invited to do so. (**position statement paragraph 6**)

48. In Miss van Overdijk's position statement it is asserted that:

    a. (at **paragraph 33**) "until 1st April 2017 PennTrust Ltd were required to apply to the Court for a specific order for detailed assessment of their costs as AH's net assets were below £16 000 at all material times given the express definition of net assets provided in the PD." No application was made, so the Deputy must seek retrospective authorisation.

    b. (at **paragraph 36**) "unless the Court takes a different view to the PG", since the current version of the PD took effect "the definition of 'net assets' remains unchanged…AH's assets were below £16 000 at all material times …If Penn Trust Ltd wish to charge more than fixed costs during this period, it must now seek retrospective authorisation from the court to allow their costs to be assessed by the SCCO…."

49. Miss van Overdijk addressed the Context Argument in oral submissions. She confirmed that there was no indication in the 2014 proceedings that the provision of PD19B in respect of "net assets" had been considered or raised; and that the Local Authority "follows the position of the Public Guardian." She agreed that the starting point was the order itself but submitted that the Applicant's approach makes the first sentence of paragraph 4 (re. fixed costs) "effectively redundant."

50. Miss van Overdijk also addressed the Definition Argument in oral submissions, confirming her neutrality on the issue and declining to advance any positive argument.

51. In respect of the Best Interests Argument, Miss van Overdijk went into some detail about questions the current deputy has in respect of PennTrust Limited's approach whilst acting as deputy:

    a. In summary, the questions boil down to "why did PennTrust Limited not disclose to the Local Authority the level of its fees so that they could be taken into account in the assessment of AH's liability to pay care home fees?"[1]

    b. Miss van Overdijk referred to questions posed by e-mail in August 2019 [**127-128**] and the Applicant's response [**129**] that the writer of the response was "*not prepared for my team to spend excessive time trawling through past papers and statements which are not reasonably needed for the new deputy to take over their duties*."

    c. The Local Authority's suggestion is that "*it is difficult to tell if AH benefitted*" from the work which was done by PennTrust Ltd as deputy – no equity release

[1] By e-mail timed at 16.24 on 26th May 2020, Miss van Overdijk has confirmed to the Court and the other parties the dates when financial assessment took place and the information that would have been requested by the Local Authority. It is said that PennTrust Ltd "*did complete and return the forms but the evidence for Disability Related Expenses ("DRE") was often missing or inaccurate*."

scheme was in fact ever applied for, and AH's living arrangements remain unchanged.

52. However, Miss van Overdijk expressly accepted that "*a lot of avenues were pursued that were unsuccessful*" and stopped short of saying that such avenues should not have been pursued – "*All I can do is raise concerns*." She suggested that the difficulties described by the Applicant are "*not that unusual*" and asked "*is the work really justifiable from the amount of money sought?*"

53. The First Respondent's position in respect of the application in respect of security for PennTrust Limited's costs was more forthright: the application is misconceived. Court of Protection orders may be enforced in the same way as orders of the High Court but the order which is being sought from the Court of Protection in these proceedings is not one which lends itself to enforcement by charging order. The order sought in these proceedings would grant retrospective authorisation to seek SCCO assessment but it would not confirm the debt. The debt is set out in the SCCO orders, which fall to be enforced through Part 70 of the CPR and civil proceedings.

54. Since the hearing, Miss van Overdijk has been able to take instructions on the Applicant's final position in respect of seeking a charge. By e-mail timed at 10.47 on 26th May 2020 she informed the Court and the other parties that:

    a. any authority to the current deputy to execute a charge (on AH's property to secure a debt in respect of costs) should be set out in a separate order identifying "the specific sum chargeable in terms of assessed costs (totals as per the SCCO certificates, minus the amount already charged and paid out of AH's estate – exact figures to be confirmed by Penn Trust" and "a specific sum for unassessed costs for the period 7 October 2017 to 16 July 2019 (to be assessed by the SCCO)";

    b. there should be a recital in the main order confirming that such separate order has been made "but that it is for the Deputy to action as appropriate in AH's best interests upon confirmation to the Deputy of the amount chargeable to AH";

    c. there should be a further order that Penn Trust Limited is required to serve on the current deputy within a set timescale and at the time of submission to the SCCO, a copy of the application and bill of costs submitted to the SCCO (as the SCCO has advised the current deputy is appropriate.)

I. <u>The Public Guardian's position</u>

55. The Public Guardian "seeks no specific outcome in this matter." His approach has been to assist the Court by providing an explanation of the advice given to the other parties by his Office in his statutory role.

56. In essence, the Public Guardian's position is that "[a]s there has not been a ruling or notification of a policy change, the policy remains the same with regards to 'net assets' as it did in the previous PD." [**133/position statement paragraph 32**] This position is taken on the basis that "the removal of the footnote from PD19B is believed to be an omission rather than intentional." [**131**] The Public Guardian acknowledges that "removal of text from a previous version of a practice direction may in some

circumstances be of material significance" but "so far as the OPG has been able to ascertain there has been no guidance or explanation for the removal of the footnote definition." Therefore "the OPG's position is that it remains the same definition under the current PD19B as the old one." (**position statement paragraph 26(d))**

57. In respect of the Context Argument, the Public Guardian contends that "the order needs to be read in the context of the Practice Direction." The 2014 deputyship order gave Penn Trust Limited "general authority" to have its costs assessed but "in line with PD19B (both versions) and the *Matrix* case, where AH's net assets fall below £16 000 … if they wished/wish to opt to have their costs assessed then specific further authorisation was/is required from the court." (**position statement paragraph 26(b)**) In this case, there was no such specific authorisation.

58. Miss Whittington points out that paragraph 4 of the 2014 deputyship order is standard wording. She acknowledges that the Judge who made the order was clearly aware of the nature of AH's estate but suggests the possibility that no one in the case addressed their mind to the provisions of the Practice Direction in respect of small estates.

59. Miss Whittington rejects any suggestion that the Public Guardian's construction of the order renders the express provision for SCCO assessment otiose, on the basis that AH's estate would be likely to vary over time – for example her property may have been sold.

60. In respect of the Definition Argument, the Public Guardian's position (**position statement paragraph 32** and guidance to date) is that:

    a. save for the missing footnote, the wording in respect of the £16 000 threshold is identical in the 2011-2017 version and the current version of the PD;

    b. there is no additional legislation, guidance or case law of which the OPG is aware which suggests that the words "net assets" are intended to have any different meaning in the current PD19B to the express definition provided in the previous version;

    c. removal of text from a previous version of a practice direction may in some circumstances be of material significance;

    d. However, so far as the OPG has been able to ascertain there has been no guidance or explanation for the removal of the footnote definition. In the absence of some explanation of an intentional change, the words should have the same meaning as they were expressly defined to have previously.

61. In oral submissions Miss Whittington suggested that the logic of excluding a property which P occupies from the quantification of her assets for the purposes of costs entitlement is that P "doesn't have access to that asset, so it is logical to protect that sum." She further suggested that, whilst P is living in a property, "it's likely that the property doesn't require much management."

62. In respect of the Best Interests Argument and the application for a charge to secure PennTrust Limited's costs, the Public Guardian considers that each is outside the scope of his statutory role, and he therefore takes a neutral position. (**position statement paragraphs 33 and 34**)

J. Discussion

63. *The Definition Argument: does the express definition of "net assets" in the old version of PD19B 'carry over' into the current version?*

64. As all the parties agreed when asked, the ordinary accounting meaning of the term "net assets" is "total assets minus total liabilities." By excluding land or property which is occupied by P or P's dependents from the tally of P's assets, the 2011 – 2017 version of PD19B adopts its own specific meaning for an otherwise common term.

65. The Public Guardian's position in these proceedings rests on the proposition that, once a term has been defined in a particular context, even if the definition ceases to be express, in the absence of authority otherwise the definition simply 'carries over' in the same context.

66. Although the Public Guardian's approach has a simple logic, in my judgment it is not persuasive. An equally simple logic runs in exactly the opposite direction: where there was previously a specific definition but now it has been removed, in absence of authority otherwise, removal means the specific definition does not carry over.

67. It is helpful to consider the various versions of PD19B over a longer timescale. In defining the term "net assets" at all, the 2011-17 version is the outlier. Neither the earlier versions, nor indeed the pre-Mental Capacity Act equivalent, adopted that approach. In the absence of specific definition, the ordinary meaning of the language used must have applied.

68. Was there a reason why the definition was introduced into the 2011-2017 version? The parties have not been able to provide any explanation.

69. Miss Whittington suggests that it may have been intended to "protect" assets to which Ps themselves do not have access. This interpretation has attractions but, in my judgment, it is not compelling because:

    a. it confuses the quantification of deputyship costs with their enforcement. (It is notable that, even whilst believing that management costs of AH's estate were not limited by the "net assets" definition of the 2011-17 Practice Direction, PennTrust Ltd has taken no step in respect of AH's property or her occupation of it from which it could be said that AH should have been "protected");

    b. there are more effective ways of protecting P's home than defining how costs are quantified - such as excluding from the deputy's powers any authority to sell or charge P's property. (In fact, there was no such exclusion in PennTrust Ltd's deputyship order in this matter, and the level of the security requirement indicates that sale of the property was clearly considered as a possibility.)

70. Ms. Whittington further suggests that the definition in the 2011- 2017 version of PD19B may be explained by the consideration that, whilst P is living in a property, "it's likely that the property does not require much management." Experience suggests that this is too simplistic. When P is living in a property there are the ordinary day to day management issues which can indeed usually be arranged to operate smoothly (by direct debits etc) but there may also be one-off or sustained issues which require a lot of

management decisions (eg urgent repairs, dispute as to title or interest, adaptations to meet increasing needs, sale for 'downsizing').

71. Having included a specific definition of an otherwise common term in the 2011 – 17 version of the Practice Direction, why was no definition included in the current version? Again, the parties are unable to offer an explanation. Given that the current version follows so closely the terms of its predecessor, in my judgment it is difficult to see the limited points of difference as other than deliberate.

72. So, in respect of the definition argument, I am not persuaded to adopt the Public Guardian's approach. In my judgment, the definition from the 2011-17 version of Practice Direction 19B does not somehow "carry over" into the current version from which it is omitted. The term "net assets" in the version of PD19B effective from 1st April 2017 falls to be interpreted according to the ordinary meaning of the phrase, as "total assets minus total liabilities."

73. It follows that, for the periods 2016/17 and until discharge of PennTrust Ltds' deputyship order, the value of AH's net assets (within the meaning of the Practice Direction then current) were above £16 000, and the restriction at paragraph 12 does not apply. Therefore PennTrust Ltd already has sufficient authority, pursuant to paragraph 4 of the deputyship order, to seek SCCO assessment of those costs.

74. For the earlier periods (2014/15 and 2015/16), it is common ground that the version of PD19B which includes specific definition of the term "net assets" applied to the PennTrust Ltd deputyship in this matter. In respect of those costs, it is necessary therefore to consider next the context argument on which PennTrust Ltd relies.

75. *The Context Argument: was the authority granted to PennTrust Ltd to seek SCCO assessment "a specific order" for the purposes of paragraph 11 of the old version of PD19B?*

76. The Practice Direction states that "…*if P's net assets are below £16 00… the option for detailed assessment will only arise if the court makes a specific order for detailed assessment in relation to an estate with net assets of a value of less than £16 000*." This wording leaves no doubt that, in principle, being authorised to seek SCCO assessment where net assets are below £16 000 is possible. The argument in this matter is whether the required "specificity" has to be in the determination, or the wording, of the order.

77. At paragraphs 74 - 78 of the *Matrix* judgment, the Court was expressly considering circumstances where the option to seek SCCO assessment was "*granted at a time when an estate exceeded £16000*" but it "*subsequently falls below £16 000*." Where an estate has dwindled since the costs authority was granted, it is indeed "*a sensible protective measure*" to require that at a particular threshold (£16 000) the deputy "*should be obliged to explain to the court why*" the more expensive costs regime remains appropriate. However, the circumstances in this matter are materially different. AH's estate was already less than £16 000 (as defined by the Practice Direction at the time) when the deputyship order was made. Where the costs authority is being determined in circumstances when the estate is already below the threshold, the court is already considering whether the more expensive costs regime is appropriate in relation to a small estate – from the outset - and there is no need for further protective opportunity.

78. Most property and affairs deputyship orders are made "on the papers" after consideration of a formal COP1 application, where the details of P's estate are set out in a supporting form COP1A. The costs authorisations are part of the determination. The basis of the decision may traced by reference to the paperwork. Any lack of clarity in the terms of the deputyship order can and should be quickly questioned by a COP9 application for reconsideration.

79. In this matter, the process was rather different. A highly experienced District Judge decided to make the property and affairs deputyship order "of the court's own motion" (which was properly within his powers under the Mental Capacity Act), when he perceived a need whilst considering a different sort of application at an attended hearing.

80. It is clear from the attendance note of the hearing in August 2014 that the District Judge was:

    a. fully aware of the background of family disputes in respect of AH;

    b. fully aware of the size and nature of AH's estate (and specifically that her liquid assets were minimal but she also owned a property where she lived); and

    c. fully aware of the need to keep the costs of managing AH's finances under control.

81. So it is very clear that, in this particular matter, the District Judge authorised the option of SCCO assessment specifically "*in relation to an estate with net assets of a value of less than £16000*" (within the definition of the version of Practice Direction then in effect.) What he did not do was spell that out explicitly in the wording of the order. (Miss Whittington may be right when she suggests that no one involved in the case actually addressed their mind to paragraph 11 of PD19B by name.)

82. In my judgment, the wording of the Practice Direction is ambiguous. An order may be "*a specific order for detailed assessment in relation to an estate with net assets of a value less than £16 000*" either by explicitly stating that fact, or by being made in that specific context.

83. In reaching that conclusion, I am persuaded in particular by the following considerations:

    a. As Mr. Chandler points out, the contrary conclusion would require this particular order to be understood, in respect of authorisation to seek SCCO assessment, as meaning the antithesis of what the plain words say. That is not a workable approach to court orders.

    b. Miss Whittington sought to suggest that the authorisation for SCCO assessment in this order would not be completely otiose, even if not effective whilst the estate remains as the judge settling the terms of the order knew it to be, because circumstances might change - in particular, AH's house may be sold. In my judgment, that argument is not persuasive. It still requires the order to be construed – until that change of circumstances – as meaning the opposite of its plain words. Moreover, it seems to me rather perverse to argue at once both that the plain words of the order when made do not have any practical meaning because the quantification of the deputy's costs should be restricted to protect AH's occupation of her home; but also that an authority to seek more generous

quantification of costs would be effective when P's house is sold. Such an interpretation entails an inherent incentive to the deputy to sell the house. The second argument effectively undermines the first.

c. I am not persuaded by Miss van Overdijk's submission that my conclusion renders the first sentence of paragraph 4 of the deputyship order "effectively redundant." It was always open to PennTrust Ltd to choose fixed costs if preferred. The limited likelihood that the deputy would do so does not make it any less a choice.

d. There is a material difference between an order being made in a specific context (as here, that AH's estate was within the definition of less than £16 000) and circumstances changing since an order was made (as considered in *Matrix*, where a larger estate has dwindled to a net value of less than £16000 *since* authorisations were determined.) The arguments in favour of further protective opportunity set out in *Matrix* do not apply where the Court's initial consideration is already in the circumstances where protection is considered necessary.

84. It follows that, in all the circumstances of this particular matter, I am satisfied that the context in which the order (including authorisation for SCCO assessment) was made is sufficient specificity for the purposes of paragraph 11 of the 2011-17 version of Practice Direction 19B. PennTrust Ltd therefore always had the necessary authority to seek SCCO assessment of their 2014/15 and 2015/16 costs.

85. I acknowledge that there are obvious disadvantages to not having explicitly recorded the context of the SCCO authorisation in this matter (and corresponding appeal in the Public Guardian's approach). It has allowed scope for doubt and argument, which have been resolved by reference to an attendance note not previously available to all relevant persons. Those disadvantages do not alter the fact that this order was specifically made "*in relation to an estate with net assets of a value of less than £16 000*" (as defined in the Practice Direction effective at the time) but they do illustrate the need for greater clarity in the future.

86. Going forwards, to avoid the necessity for proceedings such as these, where a deputy is appointed in respect of a net estate worth – at the time of appointment - less than £16 000 (within the meaning current at the time of appointment) but with authority to seek SCCO assessment, the decision-maker (either judge or Authorised Court Officer) should make explicit reference to the nature of the estate and paragraph 12 of PD19B in the wording of the order (as has been the practice at the central registry for some time.) Additionally, the deputy should check the terms of the costs authorisation carefully on first receipt of the order. If it includes the option of SCCO assessment but does not expressly confirm that such authorisation applies even where the net estate is worth less than £16 000 for the purposes of paragraph 12 of Practice Direction 19B, the deputy should make a speedy COP9 application pursuant to Rule 13.4 of the Court of Protection Rules 2017 for reconsideration. Such an approach would be of minimal cost to P and would avoid future argument.

87. *The Best Interests Argument: should PennTrust Ltd now be granted authority (with retrospective effect) to obtain SCCO assessment of costs incurred in respect of management of AH's estate in the periods 2014/2015 and 2015/2016?*

88. It follows from the conclusions above that, since PennTrust Ltd already had authority to seek SCCO assessment for the entire period of the deputyship, it is not necessary to consider whether granting such authority now, with retrospective effect, would be in the best interests of AH. However, for the avoidance of doubt, I am so satisfied.

89. As a panel deputy, PennTrust Ltd was asked by the Court to take on deputyship for AH. I am satisfied that the deputyship was not a straightforward one. Even though some avenues of investigation pursued by the deputy were ultimately not given effect, there is nothing before me to suggest that such investigations were not appropriately pursued at the time. Sometimes establishing what is possible entails working out what is not possible. I bear in mind that there have been two applications to the Court, with no suggestion of any concern that PennTrust Ltd was acting inappropriately. Work has clearly been done on AH's behalf, and she has had the benefit of that. Any questions about whether fees claimed for are appropriate can properly be addressed through independent assessment by the SCCO. For the avoidance of doubt, in this matter I am satisfied that, had it been necessary to authorise assessment of PennTrust Ltd's costs retrospectively, it would have been appropriate to do so.

90. *The application in respect of a charge to secure assessed costs*: In my judgment, Miss van Overdijk's analysis of this part of the application is entirely correct. Indeed, in its change of position during the course of the hearing, PennTrust Ltd seems now to accept that too.

91. The management of AH's funds is now the responsibility of the authorised officer of West Berkshire District Council. The current deputy may take the view that it is in the best interests of AH to manage her debt to her former deputy by securing it against her property. If the Court agrees, the Court could authorise that. Miss van Overdijk has set out the structure of the order which would be required.

92. However, at present, AH's debt to PennTrust Ltd has still to be quantified. There seems to be a possibility that the arrangements for AH's residence will change, and her property be sold, before the debt is quantified. I am therefore not presently satisfied that it is in the best interests of AH that her current deputy is authorised to execute a charge on her property. The process may yet turn out to be an unnecessary expense to AH.

93. Instead, the emphasis now should be on the prompt resolution of such issues as remain outstanding. So, if (as seems likely) PennTrust Ltd wishes to have their costs for the period 2017/2018 and until discharge of their appointment assessed, it should make the application to the SCCO no later than 1st October 2020. It must provide to the current deputy a copy of the bill and the application at the same time as making the application to the SCCO; and further provide a copy of the final SCCO order within 7 days of receipt.

94. Once AH's debt to her former deputy is quantified, the current deputy will need to consider how to deal with it in the best interests of AH. The current and former deputies are encouraged to communicate directly with a view to agreeing an appropriate approach. If, in the circumstances of AH's residence arrangements then in place and in the light of any other options for settling the debt, the current deputy considers that securing the debt

on AH's property would be in her best interests, the Court can give the matter further consideration. The current deputy should make an application on form COP9 (in view of these proceedings, any requirement to file COP1 may be dispensed with) with a COP24 statement in support, no later than eight weeks after being notified of the SCCO determination. (Any such application shall be reserved for consideration by me if possible.)

K. Conclusions

95. Taking each of the issues identified at paragraph 20 above in turn:

    a. Yes, it is clear from the attendance note of the August 2014 hearing that the authorisation to seek SCCO assessment at paragraph 4 of the deputyship order was granted specifically in relation to an estate with net assets (as then defined by the Practice Direction) less than £16 000; and so the Applicant was always authorised to obtain SCCO assessment of its costs.

    b. In my judgment, "net assets" for the purposes of PD19B as applicable to professional deputy costs for remuneration periods ending on or after 1 April 2017 should be understood to have its ordinary meaning of "total assets less total liabilities." P's occupation of property does not exclude it from the quantification of assets for the purposes of the Practice Direction. (Realisation of such costs is a separate issue.)

    c. In this matter, it is not necessary to grant retrospective authorisation in relation to any fees already assessed or further authorisation in relation to the as yet unassessed fees of PennTrust Ltd.

    d. If PennTrust Ltd. seeks any further SCCO assessment of its costs, it should make the application to the SCCO no later than 1st October 2020. It must provide to the current deputy a copy of the bill and the application at the same time as making the application to the SCCO, and a copy of the final SCCO order within 7 days of receipt. Once AH's debt to her former deputy is quantified, if the current deputy seeks authority to secure the debt on AH's property, the current deputy should make an application on form COP9 with a COP24 statement in support, no later than eight weeks after being notified of the SCCO determination. (Any such application shall be reserved for consideration by me if possible.)

96. I would be most grateful if the parties could draft (and preferably agree) the wording of an order which gives effect to these conclusions.

97. Going forwards, it is not commonly the case that costs of deputyship higher than the fixed rate regime will be appropriate where P's assets are less than £16 000 but such cases do occur. In order to avoid the need for proceedings of this type in the future, where a deputy is appointed in respect of such an estate but with authority to seek SCCO assessment of their costs, the authorisation should explicitly state that it applies in the context of such an estate. If those are the circumstances when the appointment is made but the order does

not explicitly confirm it, the deputy should make an application for clarification promptly upon the order being issued.

HHJ Hilder