Neutral Citation Number: [2021] EWCOP 43

Case No: COP11919290

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/05/2021

Before :
MR JUSTICE KEEHAN
- -
Between :

YH	**Applicant**
- and -	
KENT COUNTY COUNCIL	**1st Respondent**
-and-	
AB	**2nd Respondent**
-and-	
BB	**3rd Respondent**
-and-	
CB	**4th Respondent**

(by her litigation friend, the Official Solicitor)
- -
- -

Ms R Kirby QC (instructed by **Montecristo LLP**) for the **Applicant**
Mr M Bailey (instructed by **Legal Services**) for the **1st Respondent**
The 2nd and 3rd Respondents were neither present nor represented
Ms S Roper (instructed by **Bindmans**) for the **4th Respondent**

Hearing dates: 4th May 2021
- -

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 KEEHAN

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

The Hon Mr Justice Keehan:

Introduction

1. This is the third set of proceedings issued in the Court of Protection in respect of a 28-year-old young woman, CB. She has been diagnosed as having learning difficulties, epilepsy and autism. In addition, she suffers from a range of other medical conditions.

2. These proceedings were brought by CB's sister, YH. The first respondent is the local authority, Kent County Council, and the second respondent is CB, represented by her litigation friend the Official Solicitor.

3. Over the course of the last ten years there has been litigation about the care provision for CB involving first, CB's mother, AB, and subsequently her sister, YH. AB and, in particular, YH has not enjoyed a positive or productive working relationship with the local authority, although in more recent times this relationship has improved with the appointment of a new social worker.

4. There is no doubt that YH has fought long and hard to promote her sister's well-being and to ensure that she received the appropriate care and medical treatment to meet her complex needs. It is apparent that some social care and/or medical professionals have viewed this approach through the prism of YH being obdurate and opinionated. YH is clearly of the view that she has been side-lined and her views ignored by almost all of the professionals involved in the care and treatment of CB.

5. On 26th April 2021, YH and the local authority engaged in mediation which resulted in a substantial degree of agreement about the future care plan for CB. The Official Solicitor was not involved in the mediation process.

6. There were two principal issues for me to determine at this hearing, namely:

    i) whether I should appoint YH to be CB's personal welfare deputy in addition to being her property and affairs deputy; and

    ii) whether I should grant YH's application for an order for the costs of these proceedings against the local authority.

7. The local authority supported YH's appointment as CB's personal welfare deputy because it may advance the improving relationship between YH and the local authority. The Official Solicitor opposed the appointment because it was being sought, not in reality to enable YH to make decisions on behalf of her sister, but rather to give her status and standing in her engagement with the social care and medical professionals involved in CB's life.

8. The local authority opposed YH's application for costs on the ground that there was no basis for departing from the general rule of no order for costs. The Official Solicitor took a neutral stance.

Background

9. The extensive background to this matter is helpfully set out in an agreed statement of facts and an agreed chronology which are appended to this judgment as Appendix 1 and

Appendix 2 accordingly. These documents are agreed by YH and the local authority. In the absence of a fact-finding judgment the Official Solicitor was not in a position positively to agree either document but had accepted the contents of the same for the purposes of this hearing.

10. On the 10th March 2021, whilst living at her care home, CB was found in bed and to have a swollen leg. She was taken to hospital by ambulance where she was diagnosed with two spiral fractures of her leg. CB underwent surgery to fix her broken bones. Regrettably and despite extensive investigations, the circumstances in which CB had sustained these injuries remains unknown.

11. An issue arose between YH and the local authority about where CB should live immediately after her discharge from hospital. YH wanted CB to come and live with her during her period of rehabilitation whereas the local authority opposed this move and sought for CB to return to her care home or to be placed in an alternate care home. The local authority undertook extensive enquiries in an attempt to identify alternative provision for CB.

12. The issue was listed for determination by Peel J on 19th March, but the hearing had to be adjourned. It was re-listed before Hayden J on 29th March. Just prior to the commencement of that hearing the local authority agreed that CB should move to live with YH upon her discharge from hospital.

13. In broad terms the care plan provided for CB to remain living with YH and her family until she had recovered sufficiently from her fractures to move to live in her old family home with the support of full-time carers. The ultimate plan is for CB to live in a home purchased for her on the coast with live in carers attending to all of her needs.

The Law

Appointment of a Deputy

14. The statutory provisions relating to the appointment of a deputy for personal welfare and/or for property and affairs are set out in ss. 16-18 of the Mental Capacity Act 2005. The power to appoint deputies is provided for in s.16 of the 2005 Act:

> "Powers to make decisions and appoint deputies: general
>
> (1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning—
>
> (a)P's personal welfare, or
>
> (b)P's property and affairs.
>
> (2) The court may—
>
> (a)by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
>
> (b)appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.

> (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).
>
> (4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—
>
> (a)a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
>
> (b)the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.
>
> (5)The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).
>
> (6)Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms."

15. The approach of the court to an application for the appointment of a welfare deputy was considered by Baker J, as he then was, in the case of *G v. E* [2010] EWCOP 2512 where at paragraphs 56 to 63 he said:

> "56. The vast majority of decisions about incapacitated adults are taken by carers and others without any formal general authority. That was the position prior to the passing of the MCA under the principle of necessity: see *Re F* (supra) and in particular the speech of Lord Goff of Chieveley. In passing the MCA, Parliament ultimately rejected the Law Commission's proposal of a statutory general authority and opted for the same approach as under the previous law by creating in section 5 a statutory defence to protect all persons who carry out acts in connection with the care or treatment of an incapacitated adult, provided they reasonably believe that it will be in that person's best interests for the act to be done. Crucially, however, all persons who provide such care and treatment are expected to look to the Code. Certain categories of person are required by the statute, under section 42(4), to have regard to the Code (for example, anybody acting in relation to the incapacitated person in a professional capacity). In addition, however, as the Code itself makes clear, the Act applies more generally to

everyone who looks after incapacitated persons, including family carers. Although not legally required to have regard to the Code, the Code itself stipulates that they should follow the guidance contained therein insofar as they are aware of it.

57. The Act and Code are therefore constructed on the basis that the vast majority of decisions concerning incapacitated adults are taken informally and collaboratively by individuals or groups of people consulting and working together. It is emphatically not part of the scheme underpinning the Act that there should be one individual who as a matter of course is given a special legal status to make decisions about incapacitated persons. Experience has shown that working together is the best policy to ensure that incapacitated adults such as E receive the highest quality of care. This case is an example of what can go wrong when people do not work together. Where there is disagreement about the appropriate care and treatment, (which cannot be resolved by the methods suggested in Chapter 15) or the issue is a matter of particular gravity or difficulty, the Act and Code provide that the issue should usually be determined by the court. The complexity and/or seriousness of such issues are likely to require a forensic process and formal adjudication by an experienced tribunal.

58. To my mind, section 16(4) is entirely consistent with this scheme. Manifestly, it will usually be the case that decisions about complex and serious issues are taken by a court rather than any individual. In certain cases, as explained in paragraphs 8.38 and 8.39 of the Code, it will be more appropriate to appoint a deputy or deputies to make these decisions. But because it is important that such decisions should wherever possible be taken collaboratively and informally, the appointments must be as limited in scope and duration as is reasonably practicable in the circumstances.

59. Clearly, practicalities will be an important consideration in determining an application for the appointment of a deputy. As the examples in paragraphs 8.38 and 8.39 demonstrate, it is sometimes impracticable to insist on decisions being taken by the court. The instances which stand out are those which involve a series of decisions (for example, about medical procedures) and where the assets of an incapacitated adult are of a magnitude that requires regular management. Common sense suggests that the second of these examples is likely to arise more frequently than the first, and that the appointment of deputies is likely to be more common for property and affairs than for personal welfare. As Her

Honour Judge Marshall QC observed in *Baker v H* [2010] 1WLR 1103 at para. 32

> "the terms of section 18 make it clear that the exercise of the very broad decision-making powers by a property and affairs deputy is readily contemplated"

(and see also the note to section 19 of the MCA in the Court of Protection Practice 2010 edition at page 411). Furthermore, as asset management is likely to be required on an indefinite basis, the appointment of deputies is likely to be of a longer duration for property and affairs than for personal welfare.

60. If Hedley J's comments in paras 8 and 9 in the judgment in Re P were intended to indicate that family members should as a matter of course be appointed deputies irrespective of the circumstances, I would respectfully disagree. But I do not read his judgment in that way. The unusual facts of Re P - the extraordinary gifts bestowed on P which enable him to have a career as a performer and earn significant sums of money - mean that many decisions will have to be taken about his personal welfare and property and affairs over and above the normal decision making involved in caring for a person who lacks capacity. Since it would be manifestly impracticable in those circumstances for the Court of Protection to make those decisions, the appointment of deputies was unavoidable and indeed desirable. As I read Hedley J's judgment, this was agreed by all parties and the issue to be determined by the court was the identity of the deputies. The greater part of that judgment is devoted to the terms on which the deputies were to be appointed and, in particular, whether an independent deputy should be appointed in addition to members of the family. As I read Hedley J's judgment, his comments about the importance of the family were directed more to the question of who should be appointed as deputy rather than the question of whether any deputy should be appointed at all.

61. It is axiomatic that the family is the cornerstone of our society and a person who lacks capacity should wherever possible be cared for by members of his natural family, provided that such a course is in his best interests and assuming that they are able and willing to take on what is often an enormous and challenging task. That does not, however, justify the appointment of family members as deputies simply because they are able and willing to serve in that capacity. The words of section 16(4) are clear. They do not permit the court to appoint deputies simply because "it feels confident it can" but only when satisfied that the circumstances and the decisions which will fall to be taken

> will be more appropriately taken by a deputy or deputies rather than by a court, bearing in mind the principle that decisions by the courts are to be preferred to decisions by deputies. Even then, the appointment must be as limited in scope and duration as is reasonably practicable in the circumstances. It would be a misreading of the structure and policy of the statute, and a misunderstanding of the concept and role of deputies, to think it necessary to appoint family members to that position in order to enable them better to fulfil their role as carers for P.
>
> 62. On the facts of this case, the application for the appointment of F and G as personal welfare deputies is, in my judgment, misconceived. The routine decisions concerning E's day-to-day care, including decisions about holidays and respite care can be taken by F as his carer. Decisions about his education should be taken collaboratively by F, G, his teacher, and other relevant professionals. Decisions about possible medical treatment should be taken by his treating clinicians, who will doubtless consult both F and G and others as appropriate. If there is any disagreement about any of these matters, an application can be made to the Court of Protection. Decisions about who should look after E in the event that F is no longer able to do so should equally be considered (when the need arises) in a collaborative way and only referred to the court for endorsement if required or if there is any disagreement. That is an issue for the very long term and it would be wholly inappropriate to appoint a deputy or deputies now to make that decision.
>
> 63. I have already acknowledged on a number of occasions the devotion and dedication which F and G have each shown towards E. This court will do whatever it properly can to support their commitment. I sympathise with their feelings that their commitment would be buttressed by being appointed as deputies for E's personal welfare. In my view, however, the law does not permit such an appointment for that purpose, and the circumstances of this case do not warrant such an appointment at this stage.

16. In *Re Lawson, Mottram and Hopton (Appointment of Personal Welfare Deputies)* [2019] EWCOP 22 the Vice President of the court, Hayden J, considered the extensive case law in this area and observed at paragraph 46:

> "Evaluating the "proportionality" of appointing a welfare deputy as potentially less restrictive than informal decision making under s.5 MCA, requires us to discount both the efficacy and desirability of taking decisions collaboratively and informally wherever possible. To disregard the very clear lessons from both research and public enquires, stretching back over thirty years, which emphasise the importance of agencies working together in

> order most effectively to promote the best interests of the vulnerable, would be irresponsible. Thus, evaluating the proportionality of the two options is misconceived. They are apples and pears. They are essentially different regimes which are triggered by P's individual circumstances."

17. In the conclusion of his judgment Hayden J set out a number of clear principles at paragraph 53:

> "Thus, a number of clear principles emerge:
>
> a) The starting point in evaluating any application for appointment of a PWD is by reference to the clear wording of the MCA 2005. Part 1 of the Act identifies a hierarchy of decision making in which the twin obligations both to protect P and promote his or her personal autonomy remain central throughout;
>
> b) Whilst there is no special alchemy that confers adulthood on a child on his or her 18th birthday, it nevertheless marks a transition to an altered legal status, which carries both rights and responsibilities. It is predicated on respect for autonomy. The young person who may lack capacity in key areas of decision making remains every bit as entitled to this respect as his capacitous coeval. These are fundamental rights which infuse the MCA 2005 and are intrinsic to its philosophy. The extension of parental responsibility beyond the age of eighteen, under the aegis of a PWD, may be driven by a natural and indeed healthy parental instinct but it requires vigilantly to be guarded against. The imposition of a legal framework which is overly protective risks inhibiting personal development and may fail properly to nurture individual potential. The data which I have analysed (paragraph 26 above) may, I suspect, reflect the stress and anxiety experienced in consequence of the transition from child to adult services. As a judge of the Family Division and as a judge of the Court of Protection I have seen from both perspectives the acute distress caused by inadequate transition planning. The remedy for this lies in promoting good professional practice. It is not achieved by avoidably eroding the autonomy of the young incapacitous adult;
>
> c) The structure of the Act and, in particular, the factors which fall to be considered pursuant to Section 4 may well mean that the most likely conclusion in the majority of cases will be that it is not in the best interests of P for the Court to appoint a PWD;
>
> d) The above is not in any way to be interpreted as a statutory bias or presumption against appointment. It is the likely

consequence of the application of the relevant factors to the individual circumstances of the case. It requires to be emphasised, unambiguously, that this is not a presumption, nor should it even be regarded as the starting point. There is a parallel here with the analysis of Baroness Hale in *Re W* [2010] UKSC 12. In that case and in a different jurisdiction of law, the Supreme Court was considering the perception that had emerged, in the Family Court, of a presumption against a child giving oral evidence. The reasoning there has analogous application here:

22."However tempting it may be to leave the issue until it has received the expert scrutiny of a multi-disciplinary committee, we are satisfied that we cannot do so. The existing law erects a presumption against a child giving evidence which requires to be rebutted by anyone seeking to put questions to the child. That cannot be reconciled with the approach of the European Court of Human Rights, which always aims to strike a fair balance between competing Convention rights. Article 6 requires that the proceedings overall be fair and this normally entails an opportunity to challenge the evidence presented by the other side. But even in criminal proceedings account must be taken of the article 8 rights of the perceived victim: see SN v Sweden, App no 34209/96, 2 July 2002. Striking that balance in care proceedings may well mean that the child should not be called to give evidence in the great majority of cases, but that is a result and not a presumption or even a starting point."

e) To construct an artificial impediment, in practice, to the appointment of a PWD would be to fail to have proper regard to the 'unvarnished words' of the MCA 2005 (*PBA v SBC* [2011] EWHC 2580) (Fam). It would compromise a fair balancing of the Article 6 and Article 8 Convention Rights which are undoubtedly engaged;

f) The Code of Practice is not a statute, it is an interpretive aid to the statutory framework, no more and no less. It is guidance which, whilst it will require important consideration, will never be determinative. The power remains in the statutory provision;

g) The prevailing ethos of the MCA is to weigh and balance the many competing factors that will illuminate decision making. It is that same rationale that will be applied to the decision to appoint a PWD;

h) There is only one presumption in the MCA, namely that set out at Section 1 (2) i.e. 'a person must be assumed to have capacity unless it is established that he lacks capacity'. This

> recognition of the importance of human autonomy is the defining principle of the Act. It casts light in to every corner of this legislation and it illuminates the approach to appointment of PWDs;
>
> i) P's wishes and feelings and those other factors contemplated by Section 4 (6) MCA will, where they can be reasonably ascertained, require to be considered. None is determinative and the weight to be applied will vary from case to case in determining where P's best interests lie (*PW V Chelsea and Westminster Hospital NHS Foundation Trust and Others* [2018] EWCA Civ 1067);
>
> j) It is a distortion of the framework of Sections 4 and 5 MCA 2005 to regard the appointment of a PWD as in any way a less restrictive option than the collaborative and informal decision taking prescribed by Section 5;
>
> k) The wording of the Code of Practice at 8.38 (see para 20 above) is reflective of likely outcome and should not be regarded as the starting point. This paragraph of the Code, in particular, requires to be revisited."

18. I respectfully agree with both Baker J and Hayden J. In particular, I agree with the observations made by Baker J at paragraph 60 of his judgment in *G v. E* in respect of the decision of Hedley J in *Re P (Vulnerable Adult)* [2010] EWHC 1592 (Fam).

Costs

19. The Court of Protection Rules relating to costs are found in COPR Part 19. The general rule for cases relating to personal welfare, and the grounds for departing from the general rule, are set out at rules 19.3 and 19.5 respectively:

> "19.3 Where the proceedings concern P's personal welfare the general rule is that there will be no order as to the costs of the proceedings, or of that part of the proceedings that concerns P's personal welfare."
>
> "19.5 –
>
> (1) The court may depart from rules 19.2 to 19.4 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances including:
>
> (a) the conduct of the parties;
>
> (b) whether a party has succeeded on part of that party's case, even if not wholly successful; and
>
> (c) the role of any public body involved in the proceedings.

(2) The conduct of the parties includes –

(a) conduct before, as well as during, the proceedings;

(b) whether it was reasonable for a party to raise, pursue or contest a particular matter;

(c) the manner in which a party has made or responses to an application or a particular issue;

(d) whether a party who has succeeded in that party's application or response to an application, in whole or in part, exaggerated any matter contained in the application or response; and

(e) any failure by a party to comply with a rule, practice direction or court order.

(3) Without prejudice to rules 19.2 to 194 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction."

20. In *London Borough of Hillingdon v Neary & Ors* [2011] EWHC 3522 (COP), Peter Jackson J, as he then was, set out that the process for considering making an order is a two-stage one: is a departure from the general rule justified? If so, what order should be made? With regard to how to approach the order itself, Peter Jackson J rejected the approach of breaking down the proceedings into stages, preferring to look at the matter as a whole and using 'an approach that was as simple as possible'.

21. In *Manchester City Council v G & Ors* [2011] EWCA Civ 939, Hooper LJ stated that a court making a costs order should avoid detailed arguments and instead adopt a 'broad brush' approach to who pays what.

22. In *MR v SR & Bury Clinical Commissioning Group* [2016] EWHC EWCOP 54, Hayden J described the making of a costs order as 'an intuitive art reflecting the judge's feel for the litigation as a whole'.

Submissions on Personal Welfare Deputy

23. This third set of proceedings were commenced by YH in April 2020. Of particular concern at that time was that CB was in hospital and YH wanted CB to return her into the care of either her mother or sister rather than back to the care home, and there were issues relating to contact which had been suspended by the care home because of the Covid pandemic. The institution of these proceedings had the benefit of the Official Solicitor being appointed once again as litigation friend for CB. It was at the instigation of the Official Solicitor that multidisciplinary meetings took place, commencing in the latter part of last year, including a broad spectrum of assessments of CB, and the holding of, which continues, regular multidisciplinary meetings to make decisions about what treatment and what living circumstances are in the welfare best interests of CB.

24. Very regrettably, but in most unfortunate and indeed unknown circumstances, CB was taken to hospital on 10th March this year, when it was discovered that she had two fractures of her leg. The medical opinion was these fractures would have been caused by a twisting type injury. The carers asserted that CB had been found in her bed with a swollen leg. Other than that, there is no explanation for how CB came by her fractures. It was agreed eventually on 29th March, that upon CB's discharge from hospital, she should return to recuperate at the home of her sister, YH. It is agreed now between the parties, that once she is mobile, CB will move back to live in the family home, supported by carers. Her mother will move out of that home to live elsewhere.

25. In the medium/longer term, the plan is that CB would live in her own home on the coast. The Local Authority and YH entered into mediation on 26th April this year, which resolved all outstanding issues. It is agreed that YH, should be appointed the personal finance deputy for her sister. What is in contention is whether the Court should appoint her the personal welfare deputy for her sister, to make health and welfare decisions about CB. That order is sought by YH. The Local Authority, consequent upon the mediation, support the appointment on the basis that, in part because of the mediation and in part because of recent events, a level of trust which has previously been absent, has been built up between the Local Authority and YH.

26. To bolster and reinforce that level of trust and positive way of engagement, the Local Authority supports YH being given a greater voice in the decisions about her sister, by being appointed the personal welfare deputy for her. The Official Solicitor opposes the application on the basis that, while having sympathy for the position in which YH has found herself over the course of the years, the objective sought by YH, and the reasons she puts forward for seeking to be appointed a deputy, are not an appropriate use of the deputyship as provided for in s.16 of the Mental Capacity Act 2005.

27. YH gave brief evidence before me at this hearing, setting out her reasons why she seeks to be appointed her sister's deputy in personal welfare matters. Just before she gave evidence, Miss Kirby QC, on behalf of YH, helpfully provided the Court and the parties with a short list of what YH sought by way of an order. They are as follows:

> "To decide what leisure and social activities CB should do. To make day to day decisions about whether CB should go to the GP and/or what referrals to specialists should be sought via the GP. To ensure that written and properly informed protocols are available to all of CB's carers. To ensure proper records are kept by carers relating to the handover sheet information that have been in use since CB was placed with YH at home, such as liquid and food intake, skin colour, seizure activity, presentation, so that reliable information is provided to treating medical practitioners. To follow up referrals that are made for CB and not pursued by others. To pursue a care programme approach to CB's medical care. To be invited to all MDT or other multi professional meetings, and to have input in advance, of the agenda of any such meetings. To be consulted in advance of any changes to CB's care plan, including any proposed changes to the provider."

Discussion

28. It will be noted, and it is conceded, that it is only the first two of those matters which in fact involve any decision making. I have very considerable sympathy for the position that YH has found herself in over the last ten years. She is to be admired for the way in which she has consistently sought to support her sister, CB, and to seek to ensure that the care provided to CB and the medication that she received, was in her best interests. From time to time over the last ten years, YH has met, to put it mildly, resistance to some of the attempts that she has made to ensure that all professionals have acted in the best interests of her sister.

29. I do not for one moment doubt the intentions of YH in making this application for deputyship in relation to personal welfare matters, and I have no doubt that whatever order the Court makes, YH will continue with her valiant efforts to support her sister in her everyday life, and to ensure that she receives the care that she requires and is in her interests. It was, on a number of occasions, quite frankly, accepted by Miss Kirby QC on behalf of YH, that she seeks the deputyship in real terms, so that she has a label, so that she has status, and so that she will be listened to and consulted by professionals in a way which she asserts she has not been listened to or taken notice of, for very, very many years.

30. In relation to those two decision making issues, would, on the ground, YH in fact make a decision? In her evidence she, frankly, accepted that if she was not present with CB and her advice was sought about whether her sister required to be taken to the general practitioner, she could give advice, but if she was not present it would not be appropriate for her to make the decision. If she was present and she formed a contrary view to the carers about the need to take CB to the GP, whether or not she was a deputy, she would be perfectly entitled to take her sister and drive her to the general practitioner for a medical consultation. In relation to everyday activities, YH accepted that those matters would be addressed in the care plan, setting out the parameters of what would or would not be in CB's best interests. Once again, if she was not present and not on the scene, she would not be in a position to make a decision but would merely give advice.

31. I have been referred to a number of authorities. Of note, all three counsel tell me that they know of no reported case where a welfare deputy has been appointed in the circumstances, and on the basis that are advanced in this case. I have particular regard to the decision of Baker J as he then was, in *G v E* [2010] EWCOP 2512. In the case of *Re Lawson, Mottram and Hopton* [2019] EWCOP 22, the Vice President of the Court of Protection, Hayden J, agreed with that analysis by Baker J, and he added in his own observations in relation to the principles that have emerged in this area from recent case law.

32. I would be content for this order and/or the care plan, to set out clear indications of the importance of the role of YH in being involved in decision making about the care and life of her sister, CB, but welfare deputyship is about making decisions for an incapacitous person. They are to be limited in time. The reality of this application is it is not to seek authority to make decisions, it is in relation to status and a desire to be taken seriously, and listened to by professionals who care for or are involved in the care of, or the treatment of, CB.

33. That is not, as the Official Solicitor submits, an appropriate use of deputyship. In any event, were this application based on making decisions for CB, on the cases presented by YH, deputyship would be required for years to come, and not, as decided by Baker J in G v E, on a very time limited basis and a restricted scope. Accordingly, whilst I also take account of the fact that if there was the collaborative and cooperative approach taken by all involved in making decisions about CB, whether that is by the Local Authority, by the carers, or by medical professionals, it is accepted that such an order and remedy would not be required. I also take account of the fact that there has been a very substantial change in circumstances in recent times.

34. First, albeit at the instigation of the Official Solicitor, multidisciplinary meetings and assessments are taking place and have been taking place since September of last year, as YH and her family have long wished for, CB is now living within the family and, in the future, will be living within her former family home. There has been what appears to be a substantial improvement in the relationship between YH and the Local Authority. All those are new factors which point to a different course being taken in this case from that which, on YH's case, has occurred in the past.

35. Accordingly, I am not persuaded that it is appropriate for me to appoint YH as CB's welfare deputy. The reasons for it being sought do not fall within the framework of s.16 of the 2005 Act, and it would be for an inappropriate and impermissible use of s.16, that I would be asked and to which I would accede, if I were to grant the application for deputyship as made on the facts of this case. Accordingly, the application for YH to be appointed welfare deputy for CB is refused.

Submissions on Costs

36. As I have mentioned above, neither in these proceedings nor in the two previous sets of proceedings have findings of fact been made by the court. In the previous set of proceedings, the local authority filed and served a lengthy schedule of allegations against AB and YH. YH responded to the same which, in broad terms, denied the case advanced against her by the local authority. A fact-finding hearing was contemplated by the court but, by consent, it was never listed, and the parties pursued mediation instead.

37. During the course of the hearing I observed that they were obvious difficulties in pursuing a costs application in the absence of:

    i) findings of fact made by the court; or

    ii) an agreed factual matrix which arguably demonstrated unreasonable conduct on the part of the local authority. Ms Kirby QC, leading counsel for YH, submitted that the application for costs was pursued on the basis of the agreed statement of facts, the agreed chronology and excerpts from witness statements filed by the local authority and/or other disclosed documents.

38. In summary it was submitted on behalf of YH that the local authority had conducted this litigation unreasonably which merited a departure from the usual rule of no order as to costs for the following reasons:

i) the local authority maintained reliance on the previously filed Schedule of Allegations against AB and YH;

ii) it had not agreed with YH's concerns, expressed from time to time, about the standard and quality of the care provided to CB;

iii) it had ignored these concerns;

iv) it had not taken any action to address the same;

v) it had refuted YH's concerns that CB suffered from a number of conditions which were later established by the medical professionals;

vi) the social workers had on occasions provided the court with incomplete or in accurate information (e.g. the quality of the relationship between CB and a fellow resident at her care home);

vii) the fact that CB had sustained two spiral fractures in her care home in circumstances which were unknown; and

viii) its initial decision in March 2021 not to support CB living with YH upon her discharge from hospital which only changed on the morning of the hearing fixed to determine the issue of residence.

39. Mr. Bailey, counsel for the local authority, submitted that either:

i) the matters relied on by YH in support of her costs application were denied or challenged by the local authority; and/or

ii) the facts relied on by YH could not or did not amount to unreasonable conduct.

Discussion

40. At the conclusion of oral submissions my earlier expressed concerns about the absence of a fact-finding judgment or an agreed factual matrix which demonstrated unreasonable conduct on the part of the local authority, remained unaddressed.

41. The facts and evidence relied on by YH required me to:

i) infer unreasonable conduct on the part of the local authority; or

ii) assume the local authority had acted unreasonably.

By way of example only I refer to two of YH's principal submissions. It was submitted that the fact that CB had sustained two fractures in unexplained circumstances was evidence of unreasonable conduct on the part of the local authority. I do not agree. The fact that CB sustained these injuries may (I emphasise may) indicate negligent care on the part of the care home but without more evidence it cannot lead to a conclusion which impugns the actions of conduct of the local authority.

42. Second, it was submitted that the fact that the local authority only agreed to the discharge of CB from hospital to the care of YH on the morning of the court hearing

was in and of itself evidence of unreasonable conduct. Again, I disagree. It may be evidence of unreasonable conduct. It may be evidence of a considered decision being made about the short-term residence of CB in the light of the available range of alternative care options. I am not in a position to determine the issue.

43. There were undoubtedly real tensions and difficulties in the relationship between YH and the local authority. On occasions YH's concerns which had not been shared by the local authority had been demonstrated to be valid and on other occasions the local authority (arguably) made some decisions which on reflection should not have been made. I am not persuaded that the case advanced on behalf of YH has established that the conduct of the local authority was unreasonable or that there are other cogent reasons why I should depart from the general rule and make an order for costs in favour of YH against the local authority.

Conclusion

44. I was satisfied that YH had applied to be appointed CB's personal welfare deputy not, in reality, to make decisions on her behalf but simply to obtain the status of being a court appointed deputy. YH had hoped this would ensure her views were listened to and acted upon by social care and/or medical professionals involved in the care of CB. I do not consider this to be an appropriate ground to support an application for deputyship within the meaning of s.16 of the 2005 Act.

45. Accordingly, I refused the application.

46. I was not persuaded that KCC had conducted this litigation in such a manner which could properly be characterised as unreasonable or otherwise came within the ambit of conduct as defined in s.16(2) of the Act.

47. Accordingly, I refused the application to order the local authority to pay YH's costs of these proceedings and made no order as to costs.