Neutral Citation Number: [2022] EWCOP 49

IN THE COURT OF PROTECTION

Case No: 13825720

Before: HER HONOUR JUDGE HILDER

B E T W E E N:

F

and

R
(acting by his litigation friend THE OFFICIAL SOLICITOR)

HEARING: 1st August 2022

MR J MCKEAN (instructed by Druces Solicitors) appeared on behalf of the Applicant
MR D REES QC (instructed by the Official Solicitor) appeared on behalf of the First Respondent

APPROVED TRANSCRIPT OF JUDGMENT
on 17.11.2022

The hearing was conducted in public subject to a transparency order made on 29th July 2022. The judge has given leave for this version of the judgment to be published on condition that the anonymity of the children 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 numbers in square brackets and bold typeface refer to pages in the hearing bundle.

HHJ HILDER:

1. The Court is today concerned with the best interest of R, now in his 30s. He has a life-long, very significant disability. Capacity in this matter is not in issue. A capacity assessment has been filed [**20**]. The parties agree, and I accept, that R lacks all relevant capacity.

2. The application before the Court is for authority to execute a deed of settlement so that an inheritance which R has been left in the will of a relative (T) absolutely, is instead held for him in a disabled person's trust.

3. Both parties agree that there are no time limits here that the Court needs to be considering.

4. I have considered a bundle for this hearing and an authorities bundle. The hearing bundle contains in particular statements by R's parents, F and M, both dated 25 August 2021. I have read a position statement on behalf of the Applicant, dated 27 July; and two position statements on behalf of R himself, who is represented by the Official Solicitor acting as litigation friend, those position statements being dated 27 July and 1 August. I have also had the considerable benefit of submissions by counsel for the Applicant and for R, for which I am very grateful.

5. R's estate, at the moment, comprises income which is derived from state benefits. He receives direct payments for care and support, which are means tested. He receives employment support allowance, which is also means tested; and he receives disability living allowance at the higher rate. Therefore, of the total of £60,293.48 per year of state benefits which he receives, some £52,381.60 is means tested.

6. I pause here to acknowledge that means tested benefits are by definition not a universal entitlement, rather they are a safety net. Parliament has decided that they are payable only to those whose other means fall below a certain threshold.

7. R's mother had a cousin, T, who died near enough three years ago. In his will, T left one third of his residuary estate to R absolutely. We are not yet at the point where that is crystallised, but it is thought that, with interest, the bequest will be something in the region of £400,000-600,000.

8. These proceedings began by COP1 application dated 25 August 2021, brought by R's father, who is also his property and affairs deputy, both parents having been so appointed on 24 January 2022.

9. By order made on 6 October 2021, R was joined as a party and the Official Solicitor was invited to act as his litigation friend. Standard directions were given for the parties to communicate and notify the Court of agreement or further orders sought.

10. The period of discussion and notification was subsequently extended but then, by an order made on 28 February 2022 by District Judge Beckley, this matter was listed before me. Paragraph three of that order provided that no oral evidence would be received at the hearing and that is how we have proceeded.

The Law

11. Happily, the parties are almost entirely agreed as to the law in this matter. I have in front of me, both physically and metaphorically in the front of my mind, sections 1 and 4 of the Mental Capacity Act 2005.

12. In respect of deprivation of capital principles, I adopt paragraph 31 of the Applicant's position statement, which makes reference to an Upper Tribunal decision in *WR v Secretary of State for Work & Pensions* [2012] UKUT 127 (AAC), identifying five different possibilities in respect of capital sum in the context of benefits entitlement. The fourth of those possibilities is the one that is relevant here: where the claimant has transferred money to someone else for the purpose of securing entitlement to income support. In such a case, as determined by Judge Rowland, the money is taken into account for income support purposes as notional capital.

13. The first position statement filed by Mr Rees QC for the Respondent goes into a little more detail. I adopt in its entirety the following extract from his paragraph 13:

> "…. Parliament has put in place rules that are intended to prevent a person from sheltering their assets from an assessment of resources when their entitlement to means tested benefits is being considered. Thus:
>
> 1. In relation to employment and support allowance:
>
> *"A claimant is to be treated as possessing income of which the claimant has deprived himself or herself, for*

> *the purpose of securing entitlement to employment and support allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to or increasing the amount of, income support or a jobseeker's allowance"*. (Employment and Support Allowance Regulations 2008 (SI2008/74) Rule 106 (1))
>
> and
>
> *"A claimant is to be treated as possessing capital of which the claimant has deprived himself or herself for the purpose of securing entitlement to an employment and support allowance or increasing the amount of that allowance, or for the purpose of securing entitlement to, or increasing the amount of, income support or a jobseeker's allowance"*. (Employment and Support Allowance Regulations 2008 (SI2008/74) Rule 115 (1)).
>
> 2. In relation to payments under the Care Act 2014:
>
> *"The adult is to be treated as possessing income of which the adult has deprived themselves for the purpose of decreasing the amount they may be liable to pay towards the cost of meeting their needs for care and support, or their needs for support"*. (The Care and Support (Charging and Assessment of Resources) Regulations 2014 Rule 17(1))
>
> and
>
> *"The adult is to be treated as possessing capital of whi ch the adult has dprived themselves for the purpose of decreasing the amount that they may be liable to pay towards the cost of meeting their needs for care and support, or their needs for support"*. (The Care and Support (Charging and Assessment of Resources) Regulations 2014 Rule 22(1))

14. The parties before me agree that securing the entitlement to benefits need not be the sole operating purpose for the purposes of these regulations; it needs only to be *a significant operative purpose. (*See Social Security Commissioners Decision R(H) 1/06 at [20] and [21])

15. The parties also agree that, the application now being before the Court, it is the intention of the Court that counts.

16. They disagree as to the weight which should be attached to authorities which have previously considered this type of issue. The Official Solicitor emphasises that there is a very limited role for precedent. The Applicant accepts that every decision by this Court is a best interests decision and therefore fact-sensitive, but asserts that the Court should put greater weight on previously decided cases. On the other hand, the Applicant does accept that previous authorities to which he refers are not binding on me.

17. To be clear, those previous authorities are:
    a. *Re LMS* [2020] WTLR 1345, a first-tier decision of this Court; and
    b. *Re The Will Trusts of Sarah McCullagh* [2018] NICh 15, which is a Northern Ireland decision by McBride J.

18. I approach this matter on the basis that neither of those authorities are binding on me and the decision that I take must be in accordance with Sections 1 and 4 of the Mental Capacity Act.

19. More positively, the parties also agree the law in respect of the benefits and disadvantages of trust and/or deputyship. I have been referred to *SM v HM* [2012] COPLR 187 and *Watt v ABC* [2016] EWHC 2532. In particular, it has been identified that deputyship is subject to supervision of the OPG and a security bond, which are generally regarded as protective, but trustees operate outside that supervision and subject only to the more limited powers of the High Court.

The parties' positions

20. The Applicant says the purpose of this application is to better effect the intentions of T. The Applicant points out that R's benefits income is fully used up for paying for his needs. His parents currently provide a lot of the care and support which R requires but they are reaching a time in their lives where they see that they may not be able to keep this up much longer, and they have identified an intention at some point for R to move into his own accommodation with 24-hour care. They are concerned that his current funds are not themselves sufficient for that.

21. The application proceeds on the basis that T was keen to provide for R. F specifically recalls [**69**] telling T about the possibility of a trust. It was F's understanding that T would instruct

his solicitors to leave any provision for R under just such a trust. Then [**70 paragraph 32**] F sets out quite clearly his thinking:

> "Should R receive this amount outright it would jeopardise the state benefits he is in receipt of and ultimately not implement the desired intentions of T who was keen to leave provision to ensure R's lifestyle could be enhanced".

22. On behalf of the Applicant, Mr McKean has taken me to documents in the will file of T's solicitor, asserting that those documents demonstrate the importance to T of the structure by which he gave an inheritance to R. I have in particular considered an attendance note dated 24 July 2018 [**197**] and a handwritten accompaniment to that [**199**]. I will just read out the relevant parts. At **197**, there is a record that T:

> "also wishes to ensure that [R], the disabled 30 year old son of his friend *M,* …. ought to be remembered in his Will but he was not quite sure as to the level of the cash gift to be made."

23. The handwritten note [**199**], Mr McKean pointed out, records that R is the disabled son, cannot speak and T was asking for guidance about what to give.

24. A short while after that, on 5 September 2018, there is a further attendance note [**187**], which Mr McKean again relied on as demonstrating the importance to T of the structure by which R is to benefit. I will read out the relevant provision:

> "There was a lengthy conversation about the provision [T] wishes to make to his cousin, [R]. Indeed [T] clearly found it hard to evaluate what amount might be suitable given the considerable disabilities [R] is burdened with and the circumstances in which [R]'s parents have to care for him. [T] asked [the solicitor] to suggest an appropriate figure, to which [the solicitor] declined. [The solicitor] pointed out that [R] is incapable of administering his own affairs, so presumably one or both of his parents have been appointed as his Deputy. Any funds [T] leaves to [R] will therefore be administered by the parents".

25. It goes on a little bit and then there is an explanation by the solicitor. He anticipated that T's estate, after the payment of inheritance tax and other liabilities, would not be negligible; and even allowing for the greater amount he had now decided to gift by way of pecuniary legacies,

there would be a substantial pot in the residue. T agreed that this was the way he wanted to proceed. The Applicant contrasts that specifically with the provision made for R's sibling, which is a pecuniary legacy. Therefore, the Applicant says, it is clear that T intended to benefit R substantially.

26. We go back to the Applicant's witness statement [**72 paragraphs 47 and 53**]. The Applicant is clearly informing the Court that refusing his application means that the inheritance precludes R from receiving means tested benefits.

27. The Applicant accepts that if in fact his proposal would not protect R's eligibility to benefits, then the proposal is not in R's best interests. However, F says that if there is *any possibility* that the proposal will protect eligibility for benefits, then this potential outweighs the disadvantage of the trust structure. In oral submissions, Mr McKean asserted that the disadvantages of the trust structure should be seen as mitigated by the practical reality that the proposed trustees are the very same people who are the deputies; and they have shown to date a devotion to R and to the promotion of his interests.

28. In contrast, the Applicant portrays a refusal to accede to this application as endorsing a status quo of no practical benefit to R. In the balancing exercise of trust against deputyship, Mr McKean reminded the Court that there is no presumption either way; and any structural advantage of deputyship was only slight because the trustees would be the same people. Moreover the Applicant has put his own money on the line by offering an indemnity in respect of any tax disadvantage; and any limits of the effectiveness of that indemnity are not significant because the situation of the trust would not be likely to last long. (The reasoning behind this last point is that, if the DWP or the local authority challenge the realisation of the Applicant's proposal, they would be likely to do that fairly quickly.)

29. As to the Official Solicitor's second position statement, the import of which I will explain in a moment, the Applicant's position is, well, that is secondary to the application as it was made but it is better than nothing, so it is the Applicant's option B.

30. The Official Solicitor takes a different position. She does not dispute [**para 18 of first position statement**] that there would have been a considerable advantage to R **if** T had **not** given him a share of his residuary estate absolutely but had instead placed that share upon

trust so ensuring that the funds were disregarded for the purposes of means tested benefits. However, that is **not** what occurred. Under the will, R was given a one-third share of the residual estate absolutely.

31. The OS goes on to say that **if** it were now possible for R, acting through the Court, to place this one-third share into trust without it in any way jeopardising his entitlement to benefits, then the OS would agree that that would be likely to be in his best interests. However, this is not the situation either. The difficulty is, in the OS's view, that there is a clear risk that if the proposed settlement is authorised by the Court, the relevant authorities will take the view that the preservation of R's means tested benefits was a significant operative purpose behind the creation of the settlement, just as it would be likely to take that view if a capacitous individual took a similar step.

32. Insofar as it may be said that the proposed arrangement can be justified on the basis that it would better effect T's wish to benefit R [**para 20, first position statement**], the OS says that suggestion is specious. Few capacitous individuals, it was pointed out, would put property that they inherited absolutely into a trust simply because doing so would better reflect the testator's intentions. The reality, it is asserted, is that the *only* reason to settle R's inheritance upon trust is a wish to avoid the inheritance affecting his benefits.

33. On behalf of R it is pointed out that the proposal under consideration is not a neutral act. There are real and potentially disadvantageous consequences, namely the inability of R, through the Court, to control and protect his assets; and potentially tax consequences if it all had to be undone. Insofar as an indemnity is offered by F, that is not a complete answer because F may die first.

34. Insofar as reference is made to the authorities of *Re LMS* or the *Sarah McCullagh Wills Trust*, the OS points out that neither is binding here. Moreover it is difficult to say what, in substance, is the difference between a wish to better effect a testator's intention and a wish to protect benefits.

35. Addressing the position in case the Court was not with the OS, Mr. Rees suggested some safeguards to moderate the Applicant's proposal. Firstly, he submitted, there should be different trustees, not just R's parents but perhaps F and a professional. Secondly, there should be a final default trust, which is not there at the moment. Thirdly, the power to appoint

new trustees should be vested in R, and therefore exercisable by the Court. Fourthly, the Applicant should be directed to provide a copy of this judgement to the local authority and the DWP so that they are aware of the Court's reasons.

36. In a second position statement, filed this morning, on behalf of R an alternative idea has been put to the Court. It is not an idea which is positively advocated by the OS as being in R's best interests. Rather it is a suggestion of a better mechanism for achieving the Applicant's goal if that is what the Court is minded to do. It is a fairly technical approach, depending on section 32(1) of the Trustee Act 1925, which provides that:

> "Trustees may at any time or times pay or apply any capital money subject to a trust, or transfer or apply any other property forming part of the capital of the trust property, for the advancement or benefit, in such manner as they may, in their absolute discretion, think fit, of any person entitled to the capital of the trust property or of any share thereof, whether absolutely or contingently on his attaining any specified age or on the occurrence of any other event…"

37. The second position statement helpfully goes on to point out that this is a fairly clear power in respect of minors. Arguably it is destroyed when a beneficiary becomes an adult but may it may potentially still be capable of exercise with that person's consent. There is a lack of authority as to whether the power is exercisable over an absolute interest held for a person who is an adult but unable to call for the transfer of the trust property because they lack capacity to do so.

38. Without advocating this as the best interest decision, the position statement sets out that the Court *could*, by reference to paragraph 18.2 of the STEP Guidance, *both refuse* the application before it now *and also* authorise the deputies <u>not</u> to require the trustees of the will to give the inheritance absolutely to R. It would then be left to the will trustees to decide what they want to do and whether they should pay R's inheritance directly to his deputies absolutely or whether they should exercise their powers of advancement to advance R's inheritance on some form of trust for his benefit..

<u>Discussion</u>

39. Turning to some conclusions. I remind myself that I am considering the best interests of R, a particular, unique person.

40. I am not persuaded by the Applicant's submissions that the purpose of this application is to give better effect to T's intentions.

41. As a matter of fact, I am not satisfied that the evidence supports the Applicant's assertion of what T's intentions were. On the contrary, it is clear to me, on the Applicant's own account, that T was informed about the possibility of a trust, and nonetheless in his will gave R the inheritance by absolute entitlement. I accept that there is nothing in the documents provided from the will file which indicates that T's advisors expressly raised with him the possibility of a trust. However, I do not accept that anything in those documents demonstrates any concern on the part of T, with the protection of eligibility of benefits. Rather he was quite happy with the prospect that management of any bequest would be by R's parents as deputies (although I note that that was incorrect at the time as the deputyship appointment postdates the will file.) I am not satisfied that T's intention was in fact to benefit R by preservation of benefits. (I note in passing that another third of the residue goes to a publicly funded hospital.)

42. I do not regard a gift which has the effect of taking a person out of dependence on means tested benefits as 'a waste of time.' In my judgment such a gift still deserves the word 'generous' as the Applicant applies it to the purpose of the application.

43. In any event, as the OS points out, the only obstacle in the way of benefiting R absolutely, as the Applicant wishes, is the rules about entitlement to means tested benefits. Therefore, I agree with the OS that the suggestion of any difference between a wish to better effect the intention that the Applicant asserts, and a wish to protect benefits, is specious.

44. Secondly, I conclude that the structure of the proposal does have real disadvantages to R when compared to a deputyship. I have in mind the *Watt v ABC* case. It would take R's only capital outside the oversight of the OPG. There would be no security bond as a step of protection in case of default. And there is at least some potential for adverse tax consequences if the public authorities do not accept the proposal as being legitimate.

45. I do not overlook R's parents' promotion of his welfare to date. However, when I consider their strivings to date, I cannot be satisfied that they amount to "a track record" in respect of managing capital, for the simple reason that R has never had capital before. I am concerned that the proposed trust, as formulated for this application, has no or insufficient mechanism

to ensure that sums would actually be applied for R, as opposed, for example, to accruing for ultimate beneficiaries. Insofar as the Applicant was asked to agree to a professional trustee which might mitigate that concern, I think he did agree, but reluctantly, pointing out, to use his words, "the insertion of a stranger charging fees" is really to be outweighed by what he claims as "a track record."

46. Would granting the application actually work? There is no guarantee at all. This Court cannot bind the local authority or the DWP as respects the benefits implications of the proposal. I am concerned that the application has been pursued on a basis of positively declining to inform the local authority or the DWP of the step having been taken. I accept protestations made by Mr McKean that there was never any intention to be other than transparent. Nonetheless, the response to the OS's suggestion of 'why do we not ask the local authority what they think?' suggests some reason for caution.

47. I am also concerned that if the proposal were to be allowed, the trust would not be as short lived as Mr McKean suggests. This concern is not however decisive of anything because I am going to make a direction that a copy of this judgment is to be provided to the local authority and the DWP.

48. I agree with the Official Solicitor that there is a clear risk (and I borrow that phrase from paragraph 19 of Mr Rees's first position statement) that if the proposed settlement is authorised by the Court of Protection, the relevant authorities will nonetheless take the view that preservation of means-tested benefits was a significant operative purpose, just as they would if a capacitous person took the same step. Frankly, I cannot see how any other interpretation can be sustained. The Applicant's own statement and position statement use words of causation to link the application with the effect of preserving benefits (for example, "as a result" at paragraph six of the position statement.)

49. In my judgment, it is verbal gymnastics to rely on the proposal being 'to give effect to the testator's intention'. If that perceived intention is to protect R's means tested benefits, then giving effect to that preservation is a significant operative purpose of approving the application. As Mr Rees puts it, they are the same side of the same coin.

50. I have not been referred by either party, but I invited their attention to the decision of the Court of Appeal in *The Secretary of State for Justice v A Local Authority & Ors* [2021]

EWCA Civ 1527, where both King LJ and Baker LJ, at paragraphs 70, 73 and 74 respectively, emphasised that the Court of Protection is a part of a wider system of the administration of justice.

51. The Court cannot endorse a proposal whose purpose is to preserve an eligibility for benefits which Parliament has decided does not exist. At this point, it is the Court's purpose that matters, and the only purpose of the application is to preserve R's means tested benefits, whether that is directly or indirectly by giving effect to a supposed intention of T.

52. I understand, as does the Official Solicitor, why R's father has made this application. It would have been different if T himself had made testamentary provision for the funds which he wanted to give to R to be put into a trust. However, the Court has to make its decisions on the basis of what is known actually to have happened, rather than what might have happened. In my judgment, there is significant risk that this proposal will not be effective in its own terms. Such possibility as exists that it could be effective is not sufficient to outweigh the other disadvantages of the proposal, as compared to absolute entitlement and management under the general usual rules of deputyship.

53. Finally I turn to deal specifically with Mr. Rees's proposal in his second position statement, that the court could decline to act in relation to R's inheritance and that T's will trustees could be left to consider exercising their power of advancement under paragraph 18.2 of the Step Standard Provisions (2nd edition). I am not satisfied that this proposal is in R's best interests, for essentially the same reasons that I have rejected the Applicant's application. The purpose is essentially the same and I consider that it is unattractive to try to achieve by omission what cannot be achieved by a positive act. I am no more confident that a proposal along these lines would be successful.

54. That is the judgment of the Court.

End of Judgment

Transcript from a recording by Ubiqus

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