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**This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of his family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.**

**Court of Protection**

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

**DESCRIPTION**

*This judgement was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 12:07 on 11<sup>th</sup> April 2023.*

**Heard on 28<sup>th</sup> & 29<sup>th</sup> March 2022**

**Judgement given on 10<sup>th</sup> April 2023**

**Before**

**HER HONOUR JUDGE HILDER**

**Between**

**POTTER REES DOLAN TRUST CORPORATION LIMITED  
(as property and affairs deputy for ML)**

**Appellants**

**and**

**(1) WL**

**(2) ML**

**(by his Litigation Friend the Official Solicitor)**

**Respondents**



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Hearing: 28<sup>th</sup> & 29<sup>th</sup> March 2022  
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Mr. S. Karim KC (instructed by Potter Rees Dolan Solicitors) for the Applicant  
Ms. G. Bedworth (instructed by Kingsley Napley Solicitors) for the First Respondent  
Mr. D. Rees KC (instructed by the Official Solicitor) for the Second Respondent

The hearing was conducted in public subject to a transparency order made on 29<sup>th</sup> September 2021. The written judgment in this form was handed down to the parties by e-mail on 11<sup>th</sup> April 2023. It consists of 18 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. Where the number is preceded by SB, it refers to pages in the supplementary bundle.

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## JUDGMENT

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1. These proceedings concern the management of funds awarded in a damages claim in England to a person now habitually resident in Poland.
2. ML has a property and affairs deputy appointed by the English Court of Protection and a guardian appointed by the Polish District Court in Gdynia. For the hearing, the issues to be determined were defined [**B385**] as:
  - a. An application for recognition and enforcement of two orders of the Polish court, respectively declaring ML to be “totally incapacitated” and appointing WL as his guardian;
  - b. if necessary, whether it is in ML’s best interests
    - i. for his English funds to be transferred to the Polish guardian;
    - ii. for Potter Rees Dolan Trust Corporation Limited to continue as his deputy; or
    - iii. for a new professional deputy to be appointed in place of Potter Rees Dolan Trust Corporation Limited; and
  - c. appropriate costs orders.
3. After the hearing, with the encouragement of the Court, the parties continued constructive discussions. Ultimately, a substantial degree of agreement was reached. Accordingly, the issues to be addressed in this judgment are significantly narrowed. They are now:
  - a. whether the necessary orders should be made to give effect to the agreement reached; and

- b. what provision should be made for the costs of these proceedings.

A. Factual background

4. ML is a Polish national. He was living in the UK in 2013 when, at the age of 27, he suffered a severe traumatic brain injury when he was knocked off his bicycle whilst not wearing a helmet. He returned to Poland the following year and is now habitually resident there.
5. Capacity is not in dispute in these proceedings. ML has a long-standing diagnosis of schizophrenia but it is common ground that he lacks capacity to manage his property and affairs as a result of his acquired brain injury.
6. By order made on 9<sup>th</sup> May 2019 Potter Rees Dolan Trust Corporation (“the English Deputy”) was appointed as property and affairs deputy for ML [B21].
7. On 16<sup>th</sup> December 2019 the Regional Court in Gdansk, Poland made an order [B116] which declared ML to be “an incapacitated person.” The order records that it was made at a hearing “with the participation of” ML.
8. On 29<sup>th</sup> April 2020 the District Court in Gdynia, Poland made an order [B118] appointing WL (“the Polish Guardian”) as ML’s guardian. The Certificate of Guardianship [B118] is dated the following day and states on its face that the Polish Guardian should “seek the court’s permission in all major matters.”
9. In respect of the injuries ML suffered in the accident, a claim for damages was brought on behalf of ML with his mother, WL, acting as his litigation friend. The claim was concluded by order made on 9<sup>th</sup> July 2020 [B120] with an award, after a 10% reduction for contributory negligence, of £3 305 950.
10. The bulk of the damages award is presently held in a NS&I Direct Savings account, pending determination of the current issues. Meanwhile, as set out in a document recording the best interest decision making process [A15], the English Deputy has set up a working arrangement whereby £700 per month is paid to WL from ML’s funds in respect of care provided by her. Additionally a ‘float’ is provided periodically to meet costs of therapy, rent and items of need. In October 2020 the float provided was £10 000, with the English Deputy informing the Polish Guardian that a ‘top up’ could be added on production of receipts.
11. By e-mail dated 9<sup>th</sup> October 2020 [B124] Tomasz Kurek of Kurek & Partners Law Office in Warsaw informed Ruth Wright of Potter Rees Dolan Trust Corporation that ML is “subject to the exclusive jurisdiction of Polish law and the Polish courts.” A letter of instructions from the Polish Guardian was attached, which forcefully asserts that “your firm’s role in this matter is now drawing to a close” and “neither you nor Potter Rees Dolan Trust Corporation Limited ... are entitled to dictate what is or is not in [ML’s] best interests.” The letter goes on to “require” the payment into WL’s account of sums totalling

£810 000, with a warning that if there is failure so to do, “I shall be forced to have my Guardianship order recognised in the UK and have you and your firm removed from your Deputyship.” The letter also provides the information that the Polish Guardian has “approached Mr. Roman Poplawski who is a UK Barrister and registered attorney at the Polish Bar for help and advice.”

B. These proceedings

12. In accordance with a requirement at paragraph 3(b) of the deputyship order, by COP9 application dated 18<sup>th</sup> December 2020 [B27] the English Deputy applied for a review of the security bond after settlement of the damages claim. In the same application a direction was also sought as to “whether it is in [ML’s] best interests for the Deputy to be discharged.” The document of grounds filed in support of the application [B36] spells out an invitation to the Court to consider whether the deputyship should be discharged “in favour of” the Polish guardianship.
13. By COP1 application dated 18<sup>th</sup> February 2021 [B248], the Polish Guardian applied for discharge of the English deputyship appointment, for full accounting by the Deputy within 14 days, and for an immediate payment of £1 million from ML’s funds to enable the purchase of a property in Poland and meeting ML’s expenses generally. Notably, the application does *not* include any request for recognition of any order by a Polish court. At section 2.3 of the form, Mr. Poplawski is named and his chambers address given for official documentation to be sent to WL.
14. On 9<sup>th</sup> April 2021 I made an order [B273] which consolidated the two applications, providing for the English Deputy to be applicant and the Polish Guardian to be respondent, and invited the Official Solicitor to act as Litigation Friend for ML. I listed the matter for a directions hearing on 8<sup>th</sup> June 2021.
15. At that hearing [B291], the Polish Guardian made an oral application for recognition and enforcement of the guardianship order which I refused as made prematurely, instead giving directions for properly making and then responding to such application.
16. At the hearing it was said by Mr. Poplawski then appearing on behalf of WL that she intended to make an application to the Polish court “confirming that she should take control of ML’s property in England and seek recognition and enforcement of the same.”
17. I indicated (as confirmed in a recital) that the Court would be assisted by the Official Solicitor being provided with an opportunity to obtain ML’s wishes and feelings in relation to issues before the Court and I invited the Polish Guardian to co-operate with that process.
18. Additionally:
  - a. the difficult state of communications between the English Deputy and the Polish Guardian was addressed by directions for the English Deputy to provide a one-

page summary of ML's assets; for the Polish Guardian to provide details of expenditure; and then for the English Deputy to make a best interests decision in respect of expenditure allowance including payments in respect of family care. The property purchase decision was reserved to the Court.

- b. the Official Solicitor was directed to set down in writing a summary of the discussions which ML's representatives wished to have with him. By recital, the Polish Guardian was encouraged to co-operate with such efforts to obtain information about ML's wishes and feelings. Provision was made for a meeting between ML and his representatives to take place remotely in late June.
  - c. the matter was listed for further hearing to determine any recognition application by the Polish Guardian and otherwise for directions.
  - d. a request was made to the Polish court [B303] for further information. That request was sent with the assistance of the International Family Justice Office.
19. The Polish Guardian's formal application for recognition of the guardianship order as a protective measure was duly made by COP9 dated 16<sup>th</sup> September 2021 [B319]. The application also sought discharge of the English Deputy's appointment and an order for payment of all of ML's funds to the Polish Guardian, with full accounting. The application was supported by a COP24 statement by Mr. Poplawski himself.
20. The Polish Guardian did not provide the required or any information about expenditure so no best interest decision about an expenditure allowance, including in respect of family care, was or could be made by the English Deputy.
21. At the next hearing, on 5<sup>th</sup> October 2021:
- a. the Court first considered with Mr. Poplawski whether he wished to be WL's representative or a witness. He elected to continue as representative and so his statement in support of the recognition application was struck out [B335 & 336]. The recognition application therefore had to be adjourned with direction for the filing of a statement in support.
  - b. meanwhile, it was expressly recorded that Mr. Poplawski "on behalf of WL, accepts that this Court has jurisdiction over ML's property and affairs in England and Wales pursuant to paragraph 7(1)(b) of Schedule 3 of the Mental Capacity Act 2005 concurrent with the Polish Court." [B335]
  - c. directions were also given for the Polish Guardian to file a statement setting out the information required to enable the best interests decision as to interim day to day funding arrangements to be taken by the English Deputy.
  - d. the parties were broadly optimistic that a compromise of all issues would be possible, to be put to the Court for consideration at a further hearing listed on 16<sup>th</sup> December 2021.
22. Unfortunately, that optimism proved to be misplaced. Instead, by COP9 application dated 21<sup>st</sup> October 2021 [B347] WL made an application for a payment from ML's funds to meet her "existing and anticipated legal costs.... without which I will not be in a position

to protect [ML's] interests and continue with the litigation." The costs "so far" were said to "have exceeded £60 000."

23. I gave directions in respect of that application, without a hearing, by order made on 10<sup>th</sup> November 2021 [B356]. In response statements were filed by each party. In essence, the English Deputy was willing to transfer £7000 to WL without prejudice as to any applications later to depart from normal costs arrangements; and ML's representatives proposed an interest free loan of £20 000 to WL from ML's funds, again without prejudice to the Court's powers to make costs orders at the conclusion of proceedings. On 24<sup>th</sup> November 2021 I made an order [B363] which required the parties to confirm whether the loan proposal was agreed and, if so, to file a draft agreement.
24. ML's representatives also sought a further request to the Polish court for assistance in arranging a meeting with ML. Separately [B367], such request was made and again communicated through the IFJO.
25. By letter, WL sought reconsideration of my order of 24<sup>th</sup> November. By order made on 9<sup>th</sup> December 2021 [B377] I dispensed with any requirement for a formal COP9 application and provided that the reconsideration would be undertaken at the hearing already listed on 16<sup>th</sup> December 2021.
26. That hearing was somewhat fractious. It was recorded by way of recital to the order made [B382] that "the English Deputy and the Official Solicitor indicat[ed] concerns about the position adopted by the Polish Guardian particularly in respect of the unfounded and unjustified allegations about the position taken by, and the conduct of, the English Deputy, the Official Solicitor and the Court." It was also recorded [B383] that Mr. Poplawski confirmed to the Court that he had previously (on 5<sup>th</sup> October 2021) accepted the Court's jurisdiction and did so again, it being noted that he and WL had in the meantime sought to resile from such acceptance in *five* specified documents: "a witness statement dated 21<sup>st</sup> October 2021, e-mail correspondence dated 22<sup>nd</sup> October 2021 and 11<sup>th</sup> November 2021, a COP9 dated 21<sup>st</sup> October 2021 and a Position Statement dated 14<sup>th</sup> December 2021."
27. In respect of the costs reconsideration, directions were given [B398] for the Polish Guardian to file and serve a costs budget up to and including final hearing, and for written responses from the English Deputy and the Official Solicitor.
28. It was necessary again to give directions for the filing of evidence by WL as to monthly expenditure so that a best interests decision could be made by the English Deputy. The matter was listed for final hearing, at which the Polish Guardian was to attend to give evidence remotely by video. In respect of such evidence it was expressly set out as follows:

"[WL's] representatives must be in a position at the start of the hearing to inform the court that:

1. enquiries have been made as to whether the government of the country from where she is giving her evidence raises objection at a diplomatic level to the taking of video-evidence from that country;
2. what those inquiries were;
3. that no such objection is taken.

If the Polish Guardian's legal representative is unable to provide the court with this information, the court will not receive the evidence of the Polish Guardian."

29. In respect of the costs reconsideration, directions were given [B398] for the Polish Guardian to file and serve a costs budget up to and including final hearing, and for written responses from the English Deputy and the Official Solicitor. On 17<sup>th</sup> January 2022 I made a further order without a hearing [B399]. I noted by way of recital that the costs budget filed "is so poorly specified that the Applicant deputy and ML's representatives have reached different conclusions as to what is being sought" but whichever interpretation was correct "the Court considers that the amount sought is excessive." I authorised the English Deputy to make available to WL £15 000 of ML's funds to meet legal costs up to and including the final hearing, without prejudice to powers to make costs orders at the conclusion of proceedings.
30. Following a change in WL's representation, ML's representatives were finally able to meet him on 23<sup>rd</sup> March 2022. The meeting was conducted remotely by MS Teams, with WL and an interpreter present. ML said "he would like his money to be transferred to Poland so that it is at hand." When asked if he had a message for the English judge he said he "would like a full transfer of all remaining money, not a partial transfer which would mean he would still have to deal with an English lawyer."
31. At the hearing, WL gave evidence by MS Teams link from Poland.

C. Matters considered

32. I have considered all the documents in the bundle prepared for this hearing, contained in two lever arch files and a supplementary file, and additional documents filed separately, including:
  - a. on behalf of the Applicant:
    - i. statements by Ruth Wright dated 15<sup>th</sup> October 2018 [C1], 27<sup>th</sup> March 2019 [C29], 18<sup>th</sup> December 2020 [C33/41], 17<sup>th</sup> November 2021 [C359], 7<sup>th</sup> December 2021 [C371] and 7<sup>th</sup> February 2022 [SB10];
    - ii. position statements by Mr. Karim KC dated 24<sup>th</sup> March 2022.
  - b. on behalf of WL:
    - i. a position statement by Ms. Bedworth dated 23<sup>rd</sup> March 2022;
    - ii. statements by WL dated 18<sup>th</sup> February 2021 [C148], 21<sup>st</sup> October 2021 [C246], 9<sup>th</sup> November 2021 [C317], 25<sup>th</sup> January 2022 [SB24] and 26<sup>th</sup> January 2022 [SB 5]
  - c. on behalf of ML:
    - i. a position statement by Mr. Rees KC dated 25<sup>th</sup> March 2022, which exhibits an attendance note in respect of a meeting between ML and his representatives;

- ii. a statement by Dominic Potier de la Morandière dated 17<sup>th</sup> November 2021 [C285].

D. Law and Procedure

33. In the interests of brevity, I set out the position only in so far as is relevant and necessary for the determination of the remaining issues as identified in paragraph 3 above.
34. Through the intermediary of the International Family Justice Office, the Polish court has provided the following information about the legal position in Poland [E1]:
  - a. The Polish Guardian has custody of the person and property of ML, no matter where the property is located.
  - b. ML was not given the opportunity to address the Polish court when the guardianship order was made, and there was no legal obligation for the Polish court to have done so.
  - c. If the Polish Guardian applies for a further order capable of recognition, the Polish court has no obligation to provide ML with an opportunity to be heard.
  - d. The Polish Guardian has not informed the Polish court of any difficulties exercising her powers apart from difficulties resulting from ML's state of health.
  - e. Guardianship powers are subject to supervision by the Polish court. If the English court has requests about frequency or content of reports, please let us know.
35. The scope of the jurisdiction of the English Court of Protection is set out at paragraph 7 of Schedule 3 of the Mental Capacity Act 2005 ("the Act"). It is now fully accepted between the parties that paragraph 7(b) applies in this matter: the Court of Protection has jurisdiction over ML's property in England and Wales, and therefore his damages award but since ML is habitually resident in Poland (and not physically present in England and Wales or in need of urgent protection), the Court of Protection does *not* have jurisdiction in respect of his welfare.
36. It is common ground that the Polish orders in respect of ML are "protective measures" for the purposes of Schedule 3 of the Act, International Protection of Adults. The recognition and enforcement in England and Wales of such measures are governed by Part 4 of Schedule 3 of the Act. A recognition decision is not a "best interests" decision: *Re MN* [2010] EWHC 1926 (Fam). The limited circumstances in which recognition may be refused are set out at paragraph 19(3) and (4) of the Schedule. In this matter, particular reference has been made to:
  - a. paragraph 3(b) and (c) – omission of an opportunity to be heard amounting to a breach of natural justice; and
  - b. paragraph 4I – inconsistency of the measure with one subsequently taken by or recognised in England and Wales.



37. Pursuant to Rule 13.2 of the Court of Protection Rules 2017, proceedings may only be withdrawn with the permission of the Court. The decision whether or not to allow withdrawal will be a ‘best interests’ decision for the Court.
38. The rules as to costs are set out in Part 19 of the Court of Protection Rules 2017. The ‘general rule’ for proceedings such as these, which concern property and affairs, is set out at Rule 19.2: “... the general rule is that the costs of the proceedings ... shall be paid by P or charged to P’s estate.”
39. However, pursuant to Rule 19.5, the Court may depart from the general rule “if the circumstances so justify”. In deciding whether departure is justified the Court will have regard to all the circumstances, including the conduct of the parties, and

(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 responded 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.

E. The parties’ positions at the hearing

40. The English Deputy has striven to remain neutral in the recognition application but was willing to make observations on it for the assistance of the Court, pointing out that the application by which these proceedings started includes a request for direction in this regard. For the purposes of recognition considerations, the English Deputy accepts that ML is an “adult” and habitually resident in Poland. The English Deputy also accepted the possibility of cogent argument that the discretionary power to refuse recognition arises because of the absence of procedural safeguards resulting in a breach of natural justice. ML was not heard when he does in fact have the ability to express wishes and feelings.
41. The English Deputy considers that the tone of correspondence from the Polish Guardian’s former representative (Mr. Poplawski) has been antagonistic, giving rise to real concerns about WL’s conduct and impeding progress to resolve issues. WL has refused to allow the Official Solicitor’s solicitor to speak to ML on the basis that he is “totally incapacitated” but the English Deputy has met ML on at least four occasions and considers that ML can express views: “he is one of the more able clients I have worked with”. In particular, ML was involved in discussions about appointment of the English Deputy. Concerns have been expressed (Exh RSW1) about WL trying to “shush” ML even in 2018. The Polish Guardian has failed to provide information as requested and directed, made repeated

observations that directions/orders are illegal (but has made no appeal), and makes unjustified allegations against the English deputy. If ML's funds are to remain in England, a new panel deputy should be appointed in place of Potter Rees Dolan TC, in the interests of a fresh start. On the other hand, if the Court considered it undesirable to have the additional costs and upheaval of a change in deputyship, Mr. Karim thought it likely (subject to taking instructions) that the English Deputy would be willing to continue.

42. The English Deputy has provided a summary of assets and liabilities [D7]. ML's liquid assets are presently approximately £2.9 million, held mostly in NS&I bonds and account. His annual income in England [D3] is approximately £4 000 and his annual outgoings are approximately £150 000. He receives benefits in Poland additionally.
43. The Polish Guardian acknowledged that recognition does not require a best interest decision but "ensuring that ML's needs can be met and dealt with in a practical manner and in his best interests is at the centre of these proceedings." WL is trying to do her best for her son and needs access to his funds to do this. All her actions will be subject to the oversight of the Polish court. ML has no continuing connection with England so practically it makes sense for his award to be administered in Poland, where expenses of management will be lower.
44. WL does accept that the English court has jurisdiction for so long as ML's property remains in England but that jurisdiction is limited to such property. In reality it is difficult to compartmentalise ML's needs into 'property' and 'welfare.' In particular this matter raises a practical issue as to how the limited property jurisdiction interacts with the implementation of welfare decisions which are beyond its powers.
45. All in all, the Court *should* recognise the Polish Guardianship order. Poland is a signatory to the European Convention on Human Rights. The Court of Protection should be slow to assume that provisions of the Polish court are in breach of Article 6. In consideration of 'natural justice,' the Polish process should be looked at as a whole, rather than in its constituent parts. In particular, ML was visited by a Probation Officer in December 2021, which gave him an opportunity to express wishes and feelings. None of the exceptions to the mandatory recognition requirements in fact apply in this matter. The fact that another country may not apply a best interests test does not mean that the measure it imposes would be inconsistent with a mandatory provision on the law of England and Wales.
46. Following from recognition, ML's funds should be paid to the Polish Guardian subject to the supervision of the Polish court. In any event, this is in ML's best interest because his life is in Poland, without any enduring connection to England. ML's wishes are an important aspect of his best interests and he has expressed a wish for his mother to manage his money.
47. If ML's funds are to remain in England, there should be a change of deputy, in the interests of a fresh start for everyone.
48. The Official Solicitor says that the lack of progress between the June and October 2021 hearings was due to "wholly unnecessary hostility and aggression on the part of the Polish Guardian's representative" including apparent recantation of his agreement that the Court of Protection *has* jurisdiction in respect of ML's property in England and Wales. What should have been a fairly straightforward matter has been made difficult.

49. When ML's representatives were finally able to talk to him directly, he expressed a wish for his funds to be managed in Poland – “full ... not partial” transfer. The Official Solicitor considers that ML is capable of expressing coherent wishes and feelings.
50. There are positive factors suggesting that Poland is the appropriate forum for management of ML's financial award but WL's conduct means that there is no confidence that it would be in ML's best interests for her to manage the funds. However recognition is not a best interests decision. The Polish orders are protective measures and ML is an adult. There are only limited exceptions to the obligation to recognise. The Official Solicitor's final position was *not* suggesting that recognition of the Polish guardianship order would be manifestly contrary to public policy or inconsistent with a mandatory provision of English law. Rather, discretion arises either pursuant to paragraph 19(3), the breach of natural justice being the absence of opportunity for ML to be heard; or pursuant to paragraph 19(4)(c), a subsequent inconsistent decision of the English court.
51. In respect of paragraph 19(3), Mr. Rees' submission was that it is possible that one protective measure may be capable of recognition whilst another measure derived from the same proceedings is not. So, the first Polish order (by the court in Gdansk, declaring ML incapacitated) may be recognised whilst the second Polish order (by the court in Gdynia, appointing WL as guardian) may not be because it was not urgently required, ML had no opportunity to be heard, and there was no obligation to provide him with such opportunity. In respect of the second order there is a breach of natural justice because there is no evidence that any consideration was given to whether or not ML should be invited to participate or whether his interest or position could be properly secured without providing for his participation.
52. In respect of paragraph 19(4), Mr. Rees accepted that the position is “less clear” but two possibilities arose, either:
  - a. the settlement order of the High Court Queen's Bench Division made on 9<sup>th</sup> July 2020 [B120] directed payment of the damages award to the English Deputy *after* the Polish appointment of WL as guardian; or
  - b. the exercise of substantive jurisdiction now on the basis that the Polish guardian's conduct makes it appropriate for the English court to embark on a best interest assessment of who should manage ML's English property.

F. The parties' positions after further negotiations

53. After the hearing, the parties continued discussions. Under cover of an e-mail timed at 11.52 on 11<sup>th</sup> April 2022, and subsequently updated by e-mail timed at 15.38 on 10<sup>th</sup> May 2022, a document was filed setting out an open position agreed between the Official Solicitor and the Polish Guardian. After a request from the Court for clarification, the English Deputy confirmed in an e-mail timed at 08.49 on 14<sup>th</sup> April 2022 that “the areas in dispute relate to the property purchase and costs.” A written judgment was requested.
54. In summary, WL and ML's representatives agree that:

- a. the application for recognition be withdrawn;
- b. the English Deputy will release £600 000 (“the Property fund”) of ML’s funds to a specific account identified by the Polish Guardian.
  - i. The Polish Guardian undertakes to use those funds:
    - to purchase a property for ML;
    - to meet other incidental expenses associated with the property purchase or otherwise in accordance with directions of the Polish court;
    - thereafter, if there is surplus, to meet ordinary expenditure and income tax liability.
  - ii. Before the transfer is effected, the Court of Protection is invited to communicate with the Polish court to inform that court of the proposed arrangements and seek confirmation that it is content with them.
  - iii. Once the transfer has been effected, the Polish Guardian will keep the English Deputy informed and updated as to the progress and details of the property purchase.
- c. in respect of ordinary annual expenditure, the English Deputy will release to the Polish Guardian £100 000.
  - i. The Polish Guardian will provide to the English Deputy a copy (in Polish, to be translated by the English Deputy) of the account which she provides to the Polish court, with all accompanying documents.
  - ii. The English Deputy may raise queries on the Polish account in respect of any individual item over 1100 PLN.
  - iii. The English Deputy and the Polish Guardian will seek to agree an annual budget for expenditure. (The budget will not include income tax liability, which is separately provided for below.)
  - iv. By 30<sup>th</sup> September each year, the English Deputy will release to the Polish Guardian a sum equal to the budgeted amount for the forthcoming year, or the approved expenditure from the previous year, whichever is greater, to top up the existing “float”.
  - v. The annual top-up of the “float” will only be made after any surplus of the Property Fund has been applied to ordinary expenditure and income tax liabilities.

- d. The remaining English funds shall continue to be managed in England by a deputy.
  - i. The deputy will take financial advice as to investment of the remaining funds.
  - ii. The deputy will consult with the Polish Guardian as to the proposed investment but ultimately the investment decision will be the deputy's.
  - iii. The deputy will inform the Polish Guardian of income received on funds managed in England so that the Polish Guardian can file returns and pay income tax in Poland.
  - iv. The Polish Guardian will notify the deputy of Polish income tax payable and paid.
  - v. Once the surplus of the Property Fund has been used, the deputy will transfer to the Polish Guardian the sum necessary to meet the Polish income tax liability.
  
- e. In respect of gratuitous care provided by WL, £700 per month will be paid from ML's funds to WL's personal account. WL need not account to the deputy, in either a personal or a guardianship capacity, for the use of these sums.
  
- f. The English Deputy should be replaced by Alexandra Knipe of Anthony Gold Solicitors (who speaks Polish fluently).
  - i. The (standard) authority to use ML's funds to make charitable donation should be varied so as to require prior court approval of any such payment.
  - ii. A security requirement of £1 million would be appropriate.
  - iii. There should be mutual communication including that
    - the Polish Guardian provides to the deputy, in Polish, a copy of any report to the Polish court and details of any investment of ML's funds in Poland.
    - the deputy provides to the Polish Guardian, in Polish, a copy of the annual report to the Office of the Public Guardian and details of any income on the assets managed in England.
  
- g. After 3 years the deputy and the Polish Guardian shall review whether it is in ML's best interests for the assets managed in England to be transferred for

management in Poland. Thereafter the transfer issue will be reviewed every 5 years.

- i. The Polish Guardian will undertake to the Court of Protection not to apply during the lifetime of ML to the Polish Court for any order having the effect of requiring the transfer of the assets managed in England or to the Court of Protection for recognition of any such order. (Nothing in such undertaking would prevent ML's personal representatives from seeking transfer of ML's funds after his death.)
  - ii. Any proposal for transfer will be supported by advice as to investment of the funds in Poland and safeguards for the funds.
  - iii. If the deputy and the Polish Guardian agree that funds should in the best interest of ML be transferred, they will make a joint application to the Court of Protection.
  
- h. The Polish Guardian will undertake to the Court of Protection:
  - i. to withdraw any complaint she has made in Poland against the English Deputy, the Official Solicitor and any legal representative in these proceedings.
  - ii. not to pursue or voluntarily support any criminal proceedings in England or Poland against the English Deputy, any other deputy appointed, the Official Solicitor and any legal representative in proceedings relating to ML.
  
- i. In respect of costs:
  - i. the open position of the Polish Guardian and the Official Solicitor is that
    - the English Deputy's and the Official Solicitor's costs be assessed on the standard basis and the assessed sum paid from ML's funds;
    - the Polish Guardian's costs be assessed on the standard basis and
      - up to the date of Kingsley Napsley's instruction, 50% of the assessed sum be paid from ML's funds;
      - from the date of Kingsley Napsley's instruction, 100% of the assessed sum be paid from ML's funds;
    - the Polish Guardian will undertake not to apply to the Polish Court to recover from ML's funds any part of her costs in these proceedings which she has not been allowed by the Court of Protection.

- ii. The position of the English Deputy appears to be that the issue of costs be dealt with by written submissions following judgment.

G. Discussion

55. The process for recognition of foreign protective measures is intended to be summary, and such applications should be determined rapidly. Unfortunately, until very shortly before the hearing date and coincidentally with a change in WL's representation, as Mr Rees puts it "what should have been a relatively simple matter of determining where (and by whom) ML's property should be administered has become an unnecessarily heated and complex dispute." The more constructive engagement between the parties of late is very much to be welcomed. I have no doubt that constructive engagement is in the best interests of ML, and repeated retraction from previously confirmed positions was not.
56. WL has now agreed with her son's representatives a detailed approach to management of ML's damages award for the future which combines continuation of an English deputyship with Polish guardianship, and therefore includes withdrawal of the recognition application. The very fact of agreement is in my judgment an important foundation for more efficient, cost-effective management of ML's assets in the future. If key persons in the management of ML's estate are agreed on the mechanism of management, the practical issues which almost inevitably will arise have a much better chance of being resolved quickly and without undue cost. Accordingly, when considering whether the agreement, including withdrawal of the recognition application, is in the best interests of ML, I give significant weight to the very fact of agreement. There is a degree of complexity inherent in maintaining dual management systems but, in this matter specifically, I am satisfied that any disadvantages in that complexity are outweighed by the advantages of addressing 'best interests' concerns which have arisen.
57. Turning to the *substance* of the agreement, I note that WL and (independently) ML himself have had the benefit of legal advice in reaching this agreed position. The proposals are detailed and have clearly been carefully considered on both sides. On a broad overview, they seem to me properly to address the practical realities of ML's habitual residence in Poland, WL's natural love and affection for him, and her real caring responsibilities for him. They also seem to me to contain proper safeguards for ML in the light of concerns raised and communication difficulties experienced to date and aired in these proceedings. Some individual parts of the agreement however require more specific consideration.
58. The English Deputy does not expressly join in the agreement. I acknowledge good reasons for the largely 'neutral' position adopted by the English Deputy throughout these proceedings but also that there is departure from this now specifically in respect of the property purchase proposal and costs. The basis of the disagreement with the property purchase proposal has not been explained other than in the evidence filed. In respect of costs, the request is that written submissions be allowed after written judgment is given.
59. In a statement by Ruth Wright [C371] the English Deputy accepted that ML's current living arrangements, in his parents' flat, are "not ideal" and [C372] that purchase of a property for him would be in his best interests. On the basis of evidence in the damages proceedings, the English Deputy considers that a three-bedroom apartment would be

sufficient to meet ML's needs, including for an overnight carer at least initially. The concern seems to be that property details provided by WL were priced at "approximately £242 200," so it is unclear why the considerably larger sum of £600 000 should be allocated for property purchase, "even allowing for notary fees and budget for furnishing and the like." The English Deputy would be content with a maximum budget of "£300 000 which is the equivalent of 10% of the net damages award."

60. At the current rate of expenditure, ML's resources would be exhausted in less than 20 years. ML is yet a young man so, in my judgment, the English Deputy is right to be cautious about unnecessary expenditure on property.
61. I note that there has been repeated suggestion that ML's funds be used to purchase a property for his whole family to share or to purchase two apartments very close to each other, one for occupation by ML and the other by family members, for convenience of them providing care to him. Both these suggestions were explicitly expressed by ML himself when his representatives were able to speak to him. Mathematically, the two-apartment proposal seems to explain why the sum sought is roughly twice as much as the property details provided.
62. I note also that WL has previously been adamant that the flat where she and ML presently live would not be available for sale if the family moved to alternative accommodation because she regards it as "a future inheritance for [ML] and his sister..." [SB5].
63. If the approach to management of ML's estate ceases to be contentious, his expenditure on legal matters should reduce significantly, allowing a longer period before his capital would be exhausted. Purchase of property renders funds more difficult to realise but it should not remove capital from ML's estate if it is properly secured. If a property is purchased which is in excess of ML's current needs, there is some prospect of later realising capital by 'downsizing' if necessary. There is no evidence before me to suggest that capital investment in property in Poland is any less secure than property investment in England. The Polish Guardian will be subject to the supervision of the Polish court as to how she applies the funds transferred to her for property purchase. Moreover, the terms of the proposed agreement additionally include undertakings by WL to the English court and seeking confirmation of the position of the Polish court in advance. In my judgment, that confirmation could and should specifically address how the property purchased would be secured for ML.
64. The disadvantages of purchasing property beyond ML's needs include the reality that 'downsizing' to release liquid funds if needed later would itself incur costs. That additional burden needs to be weighed against possible advantages of facilitating family care arrangements where ML is presently dependent on such. More pressing is the need to be clear about financial arrangements in respect of the running costs of the property. If other family members will be living there, what will be their contribution to household costs? If two apartments in close proximity are purchased, will the family occupants pay rent to ML? Both of these matters are important in considering the merits of the property purchase part of the proposal, not least because they will impact on the sustainability of arrangements because they will impact on how long ML has funds to meet his needs.
65. All things considered, and subject to consideration of a response from the Polish court, I am willing to consider that the property purchase part of the agreement *may* be in ML's



best interests but further detail of the proposal is necessary before I can be satisfied that transfer of the full sum of £600 000 is appropriate.

66. The other aspect of the proposal which requires further consideration is the undertaking set out at paragraph 54 (h)(ii) above. I emphasise that there is *nothing* in the material which I have seen and heard which leads me to consider that there is any realistic prospect of criminal proceedings being brought in England against the English Deputy or any replacement deputy or the Official Solicitor or any legal representative in these proceedings. I am of course not familiar with the workings of the Polish criminal law but again, there is nothing in the information available to me which suggests any plausible prospect of criminal proceedings elsewhere either. Moreover, I was concerned that such an undertaking may not be appropriate as a matter of public policy,

67. In response to these concerns, the parties have clarified their positions as follows:

- a. ML's representatives identify no fewer than 6 occasions [C263, E33, E36, E55, E77 and E78] when Mr. Poplawski has made express reference to pursuing criminal sanctions. It is an understatement to describe the tone of these communications as 'robust.' They are often insulting and generally threatening. A letter of 6<sup>th</sup> August 2021 tells the English Deputy "I am informed that this matter is now formally the subject of criminal investigation at the Public Prosecutors Office in Poland". However unrealistic the prospect of criminal sanctions seems to me, I accept that the concerns which underlie the proposed undertaking are not fanciful.

In respect of my public policy concerns, Mr. Rees explains that the proposed undertaking is "adapted from a form that is regularly provided to the High Court in cases brought under the 1980 Hague Convention on the Civil Aspects of International Child Abduction"; and that "such an undertaking is usually required in order that the Court can be satisfied (when ordering a return) that there will not be reprisals in the country of habitual residence against the parent who has abducted the children." The analogy is sufficient to address the public policy concern.

- b. The English Deputy "wholeheartedly supports" the Official Solicitor's position about the proposed undertaking.
- c. WL has confirmed "for the avoidance of doubt, [she] has absolutely no intention of bringing a criminal prosecution." On that basis, the proposed undertaking is of no burden to her whilst offering significant reassurance as to her good faith in the agreement as a whole.

68. Accordingly, I am willing to take the undertaking which is offered to the Court.

69. I acknowledge that the agreement does not fully accord with ML's wishes as he expressed them to his representatives. I take on board fully that ML finds it easier to communicate with his mother than with English lawyers, and that is an important consideration.

However, the agreement includes a change of deputy to one who speaks Polish, offering the practical possibility of improving direct communications for ML. That possibility (together with the promise of a 'fresh start' after significant difficulties), in my judgment, justifies the otherwise avoidable expense of changing the appointed deputy.

70. Moreover, the agreement includes a mechanism for review which ensures that ML's wishes will be considered again in the light of further experience and, importantly, WL herself agrees to the proposal, which was reached *after* the attendance on ML in which is reported wishes were expressed. Her agreement is likely to be a matter of significance to ML.
71. All things considered, I am satisfied that ML's wishes and feelings have been appropriately weighed and reflected in the terms of the proposals now made by WL and his representatives.
72. There remains the question of costs of these proceedings. The proposal agreed by WL and ML's representatives includes departure from the general rule in respect of 50% of WL's costs (as assessed) up to the point when she changed representatives. This is some acknowledgment that avoidable costs were caused by WL and/or her representatives at that time, but it does not recognise that avoidable costs were incurred *in response*. ML's funds will need to meet his needs for the rest of his lifetime and so it is right that there is caution before accepting that the general rule - by which his funds would be depleted - should apply in respect of costs *other than WL's* which should not have had to be incurred.
73. Accordingly, and whilst urging the English Deputy to take a proportionate approach to this issue, I am satisfied that the English Deputy should be permitted to make written representations as to costs of proceedings to date in the light of this judgment. Such representations should be filed and served first, with time for other parties to consider whether further agreement can be reached; and only if not, should written responses be filed by WL and ML's representatives.

#### H. Next steps

74. I am presently unable to finalise matters. The next steps should be as follows:

##### Re. costs to date:

- a. the English Deputy files written submissions as to costs with 3 weeks;
- b. WL and ML's representatives file responses to the English Deputy's costs submissions if necessary, or otherwise confirm the agreed position, within 3 weeks of receiving the written submissions;
- c. the court determines costs to date on consideration of the papers, within 3 weeks of (b).

##### Re. substantive issues:

- d. the parties (with ML's representatives taking the lead) file a draft communication to the Polish court. The communication should be agreed as far as possible, should outline the proposed approach for management of ML's funds, and should request confirmation of the Polish court's position on the proposed approach. The draft communication should be filed for the Court of Protection to send via the FJLO within 3 weeks;
- e. the Court of Protection forwards the response from the Polish court on receipt;
- f. within 28 days of receiving the response of the Polish court, the parties file *either* agreed draft orders to give effect to the proposals for future management *or* a COP9 application with an agreed draft order setting out further directions (which may include the listing of a directions hearing.)

HHJ Hilder

10th April 2023