

IMPORTANT NOTICE

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. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number:[2019] EWCOP 15

Case No: 11994733

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF MBR

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

Before :

Her Honour Judge Hilder

(1) NKR
(2) USHA SOOD

Applicants

and

THE THOMSON SNELL AND PASSMORE TRUST CORPORATION LIMITED
Respondent

No hearing: application dealt with on paper

A. The application

1. The application before the Court is for the discharge of the appointment of an existing professional property and affairs deputy, and the appointment of another instead. The discharge of the current deputy is agreed but there is an issue as to who should be appointed instead.
2. In accordance with directions given at a Dispute Resolution Hearing, the outstanding issues have been referred to me for determination on the papers.

B. Matters considered

3. Documents submitted for the Dispute Resolution Hearing have been retained on the court file but in a sealed envelope, and I have not read them.

4. I have considered all other documents filed to date, comprising:

(a) On behalf of NKR:

- a statement by NKR dated 26th November 2018
- a position statement by Rebecca Stickler of Counsel, dated 3rd December 2018

(b) On behalf of Usha Sood:

- a COP24 statement by Ms. Sood, dated 23rd November 2018
- an updating position statement, dated 2nd January 2019
- a letter dated 8th February 2019
- a further position statement dated 8th March 2019

(c) On behalf of the current deputy:

- a COP24 statement by Brian Bacon, dated 4th May 2018
- a position statement dated 3rd December 2018

(d) Additional

A letter from AR (MBR's father), dated 17th November 2018

C. Background

5. MBR was born on 1st November 2006 and is therefore now aged 12. He sustained cerebral palsy due to medical negligence shortly after his birth. As a result, he has very limited vision and hearing and cannot communicate verbally. He is described as "completely dependent on others to meet all of his daily needs." A COP3 assessment by his GP confirms that he is unlikely to gain capacity to manage his property and affairs when he reaches adulthood.
6. MBR currently lives with his family (parents NKR and AR, four siblings and paternal grandparents) in a property owned by him. MBR's father has been convicted of conspiracy to defraud, for which he was sentenced in 2010 to a period of imprisonment of 3 years and 4 months. MBR's mother was previously a director of her husband's company, which went into administration in 2008.
7. In 2014, MBR received a significant award of damages. In anticipation of the award, an order was made on 10th February 2012 appointing Wrigleys Trustees Ltd as MBR's property and affairs deputy. Difficulties arose and in 2016 NKR applied for that deputy's discharge and her own appointment instead. The application was resolved by agreement, leading to orders made on 21st November 2017 which discharged the appointment of Wrigleys Trustees Ltd and appointed the Thomson Snell & Passmore Trust Corporation ("the Deputy") instead.
8. The Deputy currently manages on behalf of MBR liquid funds of approximately £320 000. The portfolio is Sharia compliant so it does not generate income. The Deputy also manages periodical payments of approximately £150 000 per year (which will rise over time to approximately £230 000 per year.) MBR's annual expenditure is said to be approximately £278 000 per year, and so there is a sizeable annual deficit.
9. By COP1 application dated 19th February 2018 NKR and Usha Sood, who describes herself as a "Direct Access Barrister," seek the discharge of the appointment of Thomson Snell & Passmore Trust Corporation as deputy, and their joint appointment instead. By order made on 4th September 2018 that application was listed for a Dispute Resolution Hearing. The DRH was conducted by District Judge Batten on 9th October 2018.
10. The Deputy filed a COP5 acknowledgment and a supporting statement which consented to the application but raised various concerns. The Deputy agreed that the relationship with MBR's parents has broken down "to such a degree that we no longer believe that we are able to act in [MBR's] best interests" but contended that "it is in [MBR's] best interest for a suitably qualified and experience professional deputy to be appointed ... in our place." The Deputy raised concerns:

- a. as to the current rate of expenditure of MBR's funds (*"If spending continues at this rate we would expect that [MBR] will need to sell his property to raise funds in around 8 years..."*);
- b. in particular, as to the gratuitous care payment and other allowances paid to the family. (*"... part of the reason that [P]'s family decided to apply for TSPTC's discharge appears to be a letter I wrote to them to state that if they did not provide [evidence regarding how allowances are used] by a deadline that I would reduce the budgets currently being paid to the family to amounts that were in line with similar cases."*); and
- c. about the family's proposals for adaptations to MBR's property and the costs of such proposals.

11. Substantial progress was made at the Dispute Resolution Hearing. In particular it was agreed that:

- a. The discharge of the Deputy was in MBR's best interests, and NKR no longer sought her own appointment, so the options before the Court are to appoint Ms. Sood or to appoint a panel deputy;
- b. No more than £190 000 would be spent on specified adaptation works to MBR's property;
- c. Pending further order the Deputy would pay to MBR's parents £4 382.17 per month for care and £1 784.27 for P's personal expenses, with £833.33 pm maximum for holiday expenditure;
- d. The court would be invited to include in the next deputyship order specific provisions as to future agreement of an expenditure budget.

12. However, there was no agreement reached as to who should be appointed as replacement deputy. Accordingly, directions were made for further evidence from each applicant, and further position statements. The matter was then referred to me "for consideration on the papers."

13. On 10th January 2019 I made an order requiring Ms. Sood to file further information, essentially to clarify how she proposed to deal with the costs of insurance for acting as deputy, and the extent to which her discharge of deputyship functions would be the subject of regulation by the Bar Council. Ms. Sood subsequently requested an extension of time for providing that information and a further order was made on 28th February 2019 granting that request.

D. The parties' positions

14. In a statement Usha Sood describes her suitability for appointment as deputy in the following terms:

“... I have extensive experience of Court of Protection work, in relation to vulnerable children and adults in the context of welfare litigation and settlements as property and affairs. I was a non-executive director of the Nottinghamshire Mental Health Trust for 7 years from the late 90’s (incorporating a huge number of mentally and physically challenged minors), which included being Chair of the Manager’s Panel and dealing with their accommodation and living needs. I conducted training for the Trust on the role and work of the Court of Protection, including the safeguarding of the income and assets of vulnerable persons.

3. My experience of managing financial estates has extended to being the trustee appointed within wills for children in administering their inheritance as minors, after the death of one or both parents. This has included having responsibility and oversight of investment portfolios, and building projects (at least one such child was disabled and required the adaptation of an existing home. Whilst acting as a barrister, in regard to one disabled adult in an ancillary relief dispute, the Applicant’s particular social and cultural needs were explored with the Official Solicitor and appropriate building and social needs identified, and budgeted for.

...

5. I have had written confirmation from the Bar Council that there are no ethical professional issues arising from my being appointed by the Court of Protection as a deputy for property and financial affairs for a protected person. The BMIF provides me with professional indemnity insurance but does not see the proposed work as being legal services. They have suggested that I rely on a security bond, but can seek top-up insurance for my liability as a trustee if such is required. I have been in discussions with two companies that they have suggested in this regard, and am awaiting a formal response.

6. My proposed hourly rate is £150, and the hourly rate that will be applied for one or two paralegals assisting with the general management of [P’s] financial affairs is costed at £50 an hour.”

15. In her January position statement, Ms Sood informed the Court that she has “*had a positive response from Castleacre Insurance Services Ltd*” as to the provision of a professional indemnity insurance policy, indicating “*a figure of between £5-£8 000.*” In her March position statement, Ms. Sood has confirmed the figures of cost but failed to confirm whether that is an annual or a one-off cost and also failed to address the specific direction to clarify whether she is proposing that the costs of insurance are paid from the estate of MBR.
16. In respect of Bar Council regulation, Ms. Sood’s March position statement exhibits an e-mail from the Bar Council which confirms that, in the context of discharge of the functions of deputyship, regulatory powers extend to “*only behaviour which diminishes trust and confidence in you or the profession (CD5) or insufficient cooperation with the BSB (CD9)...*”
17. NKR’s position is that it is in MBR’s best interests for Ms Sood to be appointed. She contends that, in the light of Ms. Sood’s evidence, the Court can be satisfied that she is capable,

reliable and trustworthy to carry out the functions of deputyship with an appropriate level of skill and competence. She asserts that Ms Sood “understands [MBR]’s cultural and religious beliefs (Islam) and can ensure that his faith and religion are properly taken into account when making best interests decisions on his behalf.” Pointing to the statutory requirement on a deputy to take into account the views of anyone engaged in caring for the person or interested in his welfare, pursuant to section 4(7)(b) of the Mental Capacity Act 2005, NKR says that it will be “easier” for the deputy to consult with MBR’s grandparents, who do not speak English, if the deputy can speak and understand their languages (which Ms. Sood can and does.) She explains that she and AR have already established a positive working relationship with Ms. Sood, who has also met MBR and other family members.

18. NKR’s second choice would be the appointment of a particular deputy from the Public Guardian’s panel whom she has identified and met, Mr. Sunil Kambli. In particular she considers that he too “has a good understanding of MBR’s cultural and religious beliefs ...”
19. The Deputy’s position is that the appointment of Mr. Kambli would be preferable to the appointment of Ms. Sood, on the grounds of relative deputyship experience.
20. Although not a party to the proceedings, since the DRH the Court has received from AR a letter requesting that the Court consider the appointment of NKR. A copy of that letter has been provided to the parties. The position set out in his letter does not represent any party’s current position in these proceedings, and I do not find any basis to construe AR’s letter as an application to be joined (albeit very late in the day) as party. Accordingly, I place no weight on the letter in the determination of the issues currently before me.

E. The law

21. The Court’s powers in respect of the appointment of deputies are set out in section 16 of the Mental Capacity Act 2005. I have particular regard to subsection 16(3) which provides that “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).
22. As a ‘best interests’ decision, the appointment of a deputy is to be made by reference to the facts of the particular case. The Court must be satisfied that the person whose appointment is under consideration is capable of discharging the responsibility properly. As is set out in paragraph 8.32 of the Code to the Mental Capacity Act 2005, “The court will decide whether the proposed deputy is reliable and trustworthy and has an appropriate level of skill and competence to carry out the necessary tasks.”
23. In the matter of *Re AS* [2013] COPLR 29 at paragraph 22 Senior Judge Lush set out “generally speaking” an order for preference of various candidates for appointment as deputy. A panel

deputy is included “as deputy of last resort,” after “a professional adviser, such as the family’s solicitor or accountant.”

F. Determination

24. I am not aware of any previous appointments of a barrister as professional deputy (as distinct from a family member who just happens to be a barrister by profession but is appointed on the usual non-remunerated basis of a family member). Not being considered by the Bar Council as ‘a legal service’, discharge of the functions of deputyship is apparently not subject to the Bar Council’s full regulatory force. However, the risk of property and affairs deputyship lies chiefly in misappropriation of funds. It seems to me beyond debate that misappropriation of MBR’s funds whilst acting as deputy would count as “*behaviour which diminishes trust and confidence*” in Ms. Sood individually and her profession generally, and so Ms. Sood’s holding of deputyship appointment would be subject to some professional regulation.
25. As I have said before,¹ professional regulation is not a guarantee of anything but the court can derive from it assurance of the likelihood that a potential deputy will behave in an appropriate fashion to meet the interests of P; and that if she does not, other agencies are likely to step in.
26. On the information presently available to me, I am willing to accept that Ms. Sood is personally and professionally a suitable person to hold a deputyship appointment.
27. Her appointment is however not the only option before the Court. A panel deputy has also been identified as willing to act:
- a. In her November statement NKR states a preference for Ms Sood, and gives as her reasons for this Ms. Sood’s perceived ability to respect and promote MBR’s cultural and religious beliefs, her ability to speak the family languages and the constructive relationship already begun with the family. However, she also indicates that Mr. Kambli would be a suitable appointment, for all the same reasons.
 - b. The order of preference for the existing deputy is the reverse of NKR’s. The reasons given in Mr. Bacon’s position statement are essentially to do with experience. He acknowledges that Ms. Sood has “transferable skills” but is concerned that more experience is required “to manage such a challenging professional deputyship case.” He acknowledges that Ms. Sood’s proposed hourly rates “are lower than the guideline rates for a Nottingham firm” but points out that the cost of professional insurance “should be considered as an

¹ *Various Incapacitated Persons and the Appointment of Trust Corporations as Deputies* [2018] EWCOP 3 at paragraph 47

overhead and should not be met from [MBR's] funds", as would be a panel deputy's insurance costs.

28. Ms. Sood has not confirmed her approach to the costs of insurance, despite direction to do so. The failure to comply with the direction is itself not a matter of insignificance. I infer from the failure to confirm otherwise, that Ms. Sood accepts that professional insurance is an 'overhead' cost, rather than an expense of deputyship. If payable from MBR's funds, these costs would be a significant extra burden; as an overhead, it will clearly impact on the net professional fees of deputyship. Given that this would appear to be the only matter in which Ms. Sood presently seeks deputyship appointment, it may be that the anticipated size of the overhead makes the prospect of appointment less attractive.
29. Experience to date demonstrates that Mr. Bacon's assessment of this matter as a particularly challenging case is well-founded: there have already been two deputyship appointments break down, and AR's letter – sent to the court late in proceedings and without direction – suggests that different viewpoints are not going to be resolved overnight. Given that NKR accepts that both of the available candidates for appointment can offer the cultural understanding and language which she identifies as important, and both have already met the family, in my judgment the current deputy's concerns weigh more heavily in the balance than NKR's preference for one candidate over the other.
30. Taking all matters into consideration, I conclude that it is in the best interests of MBR for Mr. Kambli to be appointed as replacement deputy upon discharge of the appointment of TSPTC.

HHJ Hilder

21st March 2019