Neutral citation number: [2024] EWCOP 12

Case Numbers: 97401156

Court of Protection

First Avenue House

42-49 High Holborn,

London, WC1V 6NP

DESCRIPTION

Heard on 6 November 2023

Judgment given on 19 February 2024

Before

DEPUTY DISTRICT JUDGE WEERERATNE

Between

BH

Appellant

and

JH

(acting by his litigation friend, the Official Solicitor)

Respondent

Representation:

For the Appellant:	Ms Elissa Dacosta-Waldman, Counsel, instructed by New Court Chambers
For the Respondent:	Ms Georgia Bedworth, Counsel, instructed by Tenold Square

IN THE COURT OF PROTECTION **Case no. 97401156**

RE P (Statutory Will)

Before Deputy District Judge Weereratne sitting at First Avenue House, High Holborn, London on

6 November 2023

Issued on 19 February 2024

For the applicant: Elissa Dacosta-Waldman of counsel instructed by Laytons solicitors

For the Respondent: Georgia Bedworth of counsel instructed by the Official Solicitor as litigation friend for P.

A Transparency Order was made on 9 October 2023

Introduction

1. This hearing arose in the context of an application dated 6 August 2022 for a variation to a statutory will made in 2008 on behalf of P ('current statutory will'). The application was made by his deputy, who is also his brother. P is represented by the Official Solicitor (OS), as his litigation friend. The parties are agreed that there is no dispute as to the substantive terms of the proposed statutory will and that it is in P's best interests ('new will'). The OS made suggested amendments to the new will which have been accepted by the deputy.
2. The court is not required, therefore, to deal with the merits of the variations to the statutory will of 2008. The background will be set out below. This judgment also does not concern the investment strategy adopted by the deputy or any other issues around the management of P's funds.
3. The only issue for the court is a procedural one: must the beneficiaries be served with the application to vary the current statutory will in accordance with the requirements of paragraph 9 of Practice Direction 9E of the Court of Protection Rules 2017 ("Rules") in order to make representations to the court. The deputy seeks to dispense with the notice requirements on largely pragmatic grounds, but has made no application for that purpose. This hearing was requested by the OS.
4. There are essentially two questions for the court:
    a. Is a beneficiary or potential beneficiary likely to be materially or adversely affected by the proposed application, such that paragraph 9 of PD 9E is engaged?
    b. If so, are there 'exceptional circumstances' which justify dispensing with service?
5. The notification dispute arises in relation to two categories of proposed beneficiaries under the current and new statutory wills. They are: P's carers who benefit under a discretionary trust, and unspecified charities who are to benefit from a residuary gift.
6. The dispute centres, in particular, on the residuary bequest made to unidentified charities ('charity'). In summary, the OS's position is that the changes agreed mean that charity is adversely affected so that the Attorney-General (A-G) must be served to allow representations to be made, as appropriate, in relation to those charitable interests. This is a matter of procedural fairness and mandatory procedural requirements set out in the Rules cannot be ignored.
7. The deputy argues that the charities are not identified, there may be nothing left in the estate by way of residue to satisfy the charitable bequest at the time of P's death in view of the fact that the estate is diminishing (see below). Further, the cost of notification would in those circumstances be disproportionate. He raises also an issue an issue of trust in him as

the brother and longstanding deputy of P submitting that to require notification would be a paternalistic act on the part of the court.

8. In relation to the carers, the parties reach a common position by different routes. In essence the position is that there is a compelling reason to dispense with notification to the carers because, inter alia, it is in P's best interests not to take any steps likely to disrupt his care.

Background

9. P is aged 71 and has suffered from a life-long learning disability. There is no dispute that the presumption of capacity has been displaced.
10. P has played no part in the drawing up of a letter of wishes which has been drafted by his deputy. It is stated that P does not have the mental capacity to understand the concepts involved, and the decisions reflect the deputy's interpretation of what he considers P would wish for himself. This is not in contention.
11. P's estate is presently worth in the region of £12 million which includes his home. The evidence supporting the application is not in dispute. It forms the backdrop to the application to vary the current statutory will which is that a combination of the economy and an increase in P's living and care needs mean there is now a substantial shortfall between income from investments, and expenditure on P's living and care arrangements. This shortfall is in the region of £250K per annum.
12. The shortfall is estimated to increase year on year because it will have to be met by progressively liquidating capital, and as the bulk of his income is generated from investments, P's assets will be exhausted by the time he is 88 years old. Evidence from JM Finn, which manages P's portfolio of investments indicates that his liquid assets will fall below £2 million in the next 10 years so that by the time he is 80 it will be reduced to approximately £1.4 million, and even if some growth is assumed, his liquid assets will be exhausted by time he reaches 84.
13. Changes to the current statutory will are therefore sought in recognition of P's changed financial and living and care circumstances. There was expressly no intention to make changes to the overall structure of the current statutory will.
14. Until now P's testamentary provision was by way of a statutory will created on 27 December 2008. It provided for the creation of a discretionary trust for a period of 2 years less one day, of £1million plus his home (£600K) and chattels, in favour of four categories of beneficiaries including carers, and for a residuary gift to be held on charitable trusts. The trustees have power to benefit any charity but there is particular reference in the schedule to the current will to charities for the relief of those suffering from mental impairment.
15. The material changes are, in summary, an increase in the discretionary trust legacy to £2 million. The residuary estate is amended to include a specific reference to charities for the relief of those suffering from any form of physical disability or disease in addition to mental impairment.

Evidence

16. There are two bundles of agreed documents amounting to over 500 pages submitted for a hearing listed for one hour. I have read what I consider to be relevant to the issue in view of the agreement over the terms of the statutory will. I had the benefit in addition of helpful position statements on behalf of both parties, and of oral submissions.

Parties' submissions

The applicant's submissions

17. For the applicant it is argued in relation to the carers, firstly, that PD9E paragraph 9 does not apply because they are not materially or adversely affected by the proposed changes to the statutory will, and indeed are advantaged by the proposed changes.
18. While 'materially affected' is not defined and jurisprudence is limited the applicant submits that it connotes something significant that is negative not positive. The applicant's position was revised in response to judicial questioning to submit that material could be significant or of an impact while either negative or positive. Furthermore, I understood it to be submitted that while there is no firm prospect of benefitting at present, particularly in light of the dwindling estate, paragraph 9 does not apply.
19. Alternatively, the applicant agrees with the OS that it is right to avoid discord between carers. There is one main carer who has been with P for about 25 years and also several others who potentially stand to benefit. It would be wrong to have one carer representing the class of carers. It is agreed that notification gives rise to a risk of conflict between carers that potentially impacts on P's care and this would not be in his best interests. In these circumstances, there is reason to dispense with notification to the carers.
20. In relation to notification of the A-G the applicant submits that notification would be 'otiose' and 'disproportionate' because there are no identified charities to lose out in the event that there is no residuary bequest. P's estate should not have to bear the costs of representation by the A-G. Further by reference to Civil Procedure Rules ("CPR") 19, that such joinder would be premature as the parties are not in contentious litigation. It is argued that this course would also be 'heavy handed' at this stage. Reference was also made to P's best interests being to maintain his welfare needs while he is still alive rather than assuring the interests of those who will survive and charities that might hypothetically benefit under the will. It would not be in JH's best interests to join the A-G. The court is invited to take a 'pragmatic' approach to the notice provision in PD9E with regard to the A-G.
21. The applicant's oral submissions underlined the point in relation to the annual shortfall in the funds, and that as residuary beneficiary there may be insufficient left in the estate once discretionary beneficiaries are dealt with. The absence of identified charities to be aware of the potential disadvantage to them was emphasised. The cited case law (*Re AB* [2014] COPLR 381*; I v D* [2016] COPLR 432) was distinguished on the basis that the classes of beneficiaries in those cases knew what they stood to lose.
22. It was argued in addition that the discretion to dispense with notification to the A-G was exercisable on grounds that the deputy has taken care of his brother for 35 years. The deputy and their siblings are all executors of P's will and none stand to inherit. For the deputy it is was submitted that it was a personal issue of trust, and the court would be taking a paternalistic approach to notify the A-G in the circumstances of this case.

The OS's submissions

23. The OS on behalf of P submits that PD9E is in mandatory terms. The rule specifies notification of those 'likely' to be affected materially or adversely. Reference was made to *Re AB* (above) and *I v D* (above) and reliance placed on the guidance provided in those cases on dispensing with service in exceptional circumstances.
24. The proposed changes to the statutory will mean that the carers as discretionary beneficiaries who were due to receive £1.6 million now stand to receive £2 million. This means a reduction to the residuary beneficiary ('charity') of £400,000 which is an adverse effect on the charities, and this is not in dispute. The prospect on diminution of the liquid assets is that charity will receive nothing.

25. The reduction in the legacy to charity is further emphasised by the removal of a pre-existing uncertainty in the identity of the discretionary beneficiaries in clause 5.2(b) of the current statutory will so as to avoid any argument that the bequest to the carers is invalid. Had clause 5.2(b) of the 2008 will remained it is submitted that there is an argument that the discretionary trust does not take effect and so that the entire estate would pass to the charitable trust.
26. In relation to carers PD9E applies and requires service not only on those likely to be adversely affected but those 'likely' to be 'materially' affected. The use of 'materially' marks it out as different and separate to 'adversely'. It could connote a significant change in the nature of the property demised, or an increase in benefit i.e an advantage. One way or other a discretionary beneficiary will be likely to be materially affected by the alteration of the size of the fund, whether it means they are more likely to receive something, or that they are likely to receive more. The possibility of a reduction of the estate to £600K at the date of death is not relevant to this where the question is one of 'likely to be materially affected' which recognises that circumstances may change. CPR 19 can be properly applied to an application for a statutory will to ensure that a class of potential beneficiaries is represented before the court. Representation orders are frequently made in non-contentious trusts proceedings.
27. There is no issue as to certainty and the identity of the carers. The potential benefit to carers is significantly increased by the proposed changes to the current statutory will.
28. Furthermore, the removal of clause 5.2(b) above is also to the carers advantage.
29. The OS accepts that the argument as to procedural fairness is less strong in relation to the carers because of the advantage to them, and because P's best interests are relevant to tip the balance away from notification so as to avoid conflict between his carers and any disruption to his care provision.
30. In relation to charity, it is not in dispute that that legacy is diminished so that charity stands to receive nothing. Furthermore, it is submitted that although no particular charities have been identified, charity is not a discretionary beneficiary so that under the 2008 will the residuary estate will be held on charitable trust. The OS submits that this results in an unfairness arising now and relying on *Re AB* (above), charities are entitled to procedural fairness.
31. The A-G is the correct body to represent interests of charity where no specific charity has been identified, and may or may not make representations to address the unfairness, but the court needs to know that now before finalising the statutory will. Once P passes away the will takes effect and it will be too late to amend the statutory will or make representations on behalf of charity and indeed the Court of Protection will no longer have jurisdiction. Notification is therefore not premature at this stage.
32. Finally, there are no exceptional circumstances justifying the dispensation of service on the A-G on behalf of charity:
    a. No particular urgency has been identified and the applicant's point that the assets may be completed depleted at the date of P's death are predicated on JH living for at least another 12 years,
    b. So far as the increased level of costs is concerned in *I v D* (above) a four figure sum was approved. The OS says it would be 'penny wise and pound foolish' not to notify on grounds of costs. The likely costs cannot be properly described as disproportionate given the current value of the estate, and that charity stands to lose £400K as a result of this application,
    c. There is no practical difficulty in serving the A-G,

d. There is no prejudice to P by ensuring that all relevant parties are before the court,
e. Ensuring that the application is properly constituted and any statutory will made by the court is secure and not liable to be set aside is in JH's interests.

33. The OS confirmed, and there is nothing to contradict, that the fact that charities are not identified now is not unusual in a will. It is a mechanism intended to avoid a situation where an identified charity has ceased to exist by the time P is deceased. Whether identified or not there can, therefore, be a detriment to a putative class of beneficiary even on a residuary basis.
34. In reply, the applicant submitted that PD 9E applies to individuals not charities. The estate is being depleted. It was asked rhetorically in relation to charity, 'who will challenge the will?'

Procedural requirements under the COP Rules Practice Direction 9E Paragraph 9

35. Practice Direction 9E supplements Part 9 of the Rules and deals with 'Applications relating to statutory wills, codicils, settlements and other dealings with P's property.'
36. Paragraph 9 of PD 9E provides that:
"The applicant must name as a respondent – (a) any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application; (b) any beneficiary under a proposed will or codicil who is likely to be materially or adversely affected by the application; and (c) any prospective beneficiary under P's intestacy where P has no existing will."
37. I also take note of rule 3.1(1) and (2) of the Rules:
"(1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.
(2) The court may -……(n) take any step or give any direction for the purpose of managing the case and furthering the overriding objective."
38. By Rule 1.1 the overriding objective enables the court to deal with a case justly and at proportionate cost having regard to the principles in the MCA.

Relevant case law

39. The relevant case law setting out guidance on dispensing with service under paragraph 9 PD 9E is available in *Re AB* [2014] COPLR 381 and *I v D* [2016] COPLR 432 . From these cases the following principles can be drawn with regard to service requirements:
    a. The court's decision regarding service is not one 'on behalf of P' within the meaning of the MCA 2005. It is not only to be determined by reference to P's best interests: *AB* at [63]; *I v D* at [40] and [44],
    b. Service requirements are mandatory. The court has a discretion to dispense with service. This discretion is in general only to be exercised in exceptional circumstances where there is a compelling reason to do so: *AB* at [69] and [84]; *I v D* at [40][44] and [56],
    c. The principle that those materially or adversely affected by an order of the court should be notified of or served with proceedings and given an opportunity to be heard is underpinned by the Article 6 of the European Convention on Human Rights (ECHR): *AB* at [69],
    d. The underlying purpose of the notification requirement is to ensure that the interests of justice are served and, that the court is acting fairly towards all parties. Even if European Convention rights were not engaged, the issue of procedural fairness to those affected by an application arises: *I v D* at [40][44] and [56],

e. This derives from the principles of natural justice and not solely from the ECHR: *I v D* at [55],
f. Matters of procedural fairness should be given high regard: *I v D* at [40][44]
g. Relevant considerations in the exercise of the court's discretion may include the conduct of the proposed beneficiary, the value of the financial benefit to the proposed beneficiary, whether the cost to P's estate or the parties, or the delay caused in concluding the application is disproportionate relative to the value of the benefit lost by a final order.
h. Different considerations may apply where there is genuine urgency. [40]

Decision

40. Applying the rules and the case law set out above to the questions identified at the outset I find as follows:
41. On the first question, I accept that paragraph 9 PD 9E applies to this case and to each class of beneficiary under consideration.
42. It is not in dispute that under the proposed statutory will the class of carers are intended to benefit through an increase in the legacy and the removal of clause 5.2(b) as described above. I accept for the reasons given by the OS that this means they are likely to be materially affected by the changes so that the notification obligation arises. I cannot see that there is a cogent rationale for construing 'materially' as being negative in nature when 'adversely' is also a negative concept.
43. I also accept that the proposals regarding the charitable legacy are likely to adversely affect charity even if they do not fall to be identified until P passes away. The applicant did not dispute that any residuary beneficiary is likely to be adversely affected by the proposed changes to the statutory will. Case law demonstrates the applicability of PD 9E to charities and not just to individuals and its terms do not indicate any such restriction. I have already noted that the fact that there are no identified charities in the will is not an unusual mechanism by which testators leave charitable bequests.
44. Turning to the second question: are there exceptional circumstances justifying dispensing with service? The court's discretion may be exercised in exceptional circumstances where there is a compelling reason to do so.
45. Firstly, I cannot accept that there is any personal issue of trust relating to the deputy that arises in this case, or that if it does, it provides a compelling reason to depart from the notification requirement. Paragraph 9 PD 9E is a mandatory procedural requirement that cannot be ignored by the court and focuses on procedural fairness.
46. Secondly, there is no suggestion in the submissions made that this is an urgent case.
47. So far as the carers are concerned I accept that there are compelling reasons to dispense with service. This is because they are advantaged by the proposed amendments, and moreover, it is in P's best interests that his care is not disrupted or that his carers unsettled by the prospect of an increased inheritance under his will, or that if a conflict should arise between carers.
48. In relation to the A-G I do not accept that there are exceptional circumstances for dispensing with notification and I accept the reasons given by the OS.
49. The applicant has in my view fundamentally misunderstood the purpose of notification. The requirements of procedural fairness whether underpinned by the ECHR or the principles of natural justice must be given high regard. The rhetorical question posed by the applicant, and the objection that the hypothetical nature of charity makes notification otiose misses

the point that the court is seized with the matter now and once the statutory will takes effect the Court of Protection will no longer have jurisdiction in relation to it. This also means that notification now is not premature.

50. The lack of identification of specific charities does not provide a compelling reason to avoid notification and an opportunity for representation on the diminution of provision to charity. There is an identified and practical mechanism for achieving the same via the A-G. The fact that to date case law to date has dealt only with identifiable beneficiaries does not preclude this conclusion.
51. Procedural fairness demands that they are represented now to address the disadvantages that will bite once P passes away and the will takes effect. The A-G may or may not make representations on the proposed changes but must be given the opportunity to do so. This also highlights, in my view, the protective nature of paragraph 9 PD 9E to proposed beneficiaries. As a matter of fairness it is does not elevate the interests of beneficiaries above those of P.
52. I agree that it is appropriate to consider the impact on the estate of the costs that may be incurred by the A-G. However, in the circumstances I find that the balance is in favour of notification due to the current size of the estate, and the potential significant adverse effect on charity of the proposed changes. It is far better that the will is dealt with on a proper footing as envisaged by the Rules. There is no prejudice to P in taking this approach. I do not find notification to the A-G to be disproportionate.
53. I have not found it necessary to deal specifically with the points referred to in the written submission on CPR 19 in coming to my conclusion.
54. I invite the parties to file an order accordingly by no later than 4.pm on 17 November 2023, providing for service to the A-G by no later than 4 p.m. on 21 November 2023. The matter should be re-listed for a remote hearing before any district judge sitting in the Court of Protection at First Avenue House for further directions, as necessary.

Costs

55. On the issue of costs the OS has invited the court to depart from the usual order in Rule 19.2, and to exercise powers in rule 19.5. I make no observations on that application in this judgment.
56. The court may deal with this application on the papers and I direct that the OS file and serve written submissions within 14 days of the date of this judgment, and the applicant files written submissions in response 7 days thereafter, including details of the costs of attending this hearing. The OS may make brief written submission in reply within 3 days thereafter. The matter will be determined by any district judge sitting in the Court of Protection at First Avenue House.

10 November 2023