COURT OF PROTECTION **No. 11639140**

MENTAL CAPACITY ACT 2005

In the matter of
RC, Deceased

BETWEEN:

SC

Appellant

- and -

LONDON BOROUGH OF HACKNEY

Respondent

Introduction

This is an appeal against District Judge Marin's order that the appellant, SC, should pay the London Borough of Hackney's costs in respect of the last three days of a four day hearing which took place before him at the Royal Courts of Justice on 6, 7, 8 and 14 May 2009.

When considering whether to give permission to appeal, a judge must apply rule 173(1) of the Court of Protection Rules 2007, which says that permission should only be granted where:
(a) the court considers that the appeal would have a real prospect of success; or
(b) there is some other compelling reason why the appeal should be heard.

It would be fanciful to suggest that, at the permission stage, I thought there was a real prospect that this appeal would succeed. Nevertheless, there were several procedural points, which I felt warranted investigation by the court, namely:
(a) whether the appellant had been warned in advance that costs might be awarded against her;
(b) how much she had to pay;
(c) whether she was in a position to pay; and
(d) whether she should pay the respondent's costs of attending on the day on which the judge handed down his judgment.

As for any other compelling reason why the appeal should be heard, it struck me that there was at least one issue on which it might be helpful for the court to give judgment. This is whether the general rule on costs in personal welfare proceedings (rule 157) necessarily applies to proceedings in which the applicant is asking the court to direct the Public Guardian to cancel the registration of a Lasting Power of Attorney for health and welfare.

Several abbreviations appeared in District Judge Marin's judgment and in the submissions of the parties, and I shall repeat them here. Those that occur most commonly are:

RC	The person to whom these proceedings related
SC	RC's niece
LBH	London Borough of Hackney
JC	Jewish Care

The background

RC, was born in 1915, and died on 25 June 2009.

From May 2003 until 6 March 2009, she lived at Ella & Ridley Jacobs House in Hendon, London NW4: a residential care home run by Jewish Care. Her placement was funded by the London Borough of Hackney.

On 3 January 2008 she executed a Lasting Power of Attorney ("LPA") for personal welfare, in which she appointed her niece, SC, to be her attorney, and another niece, EF, to be a replacement attorney in case SC was unable to act. On 6 January 2008 RC's capacity to execute the LPA was assessed by Dr Cyril Brazil, and he duly completed the certificate in Part B of the prescribed form. On 7 April 2008 the Public Guardian registered the LPA.

On 8 October 2008 SC applied for an injunction against Jewish Care for denying her full access to visit her aunt. Due to a breakdown in the relationship between her and the management and staff at the care home, Jewish Care had curtailed her visits to one hour at a time, twice a week. The application was made in Barnet County Court, and on 10 October 2008 District Judge Stephenson there transferred the case to the Court of Protection.

On 6 November 2008, Jewish Care served a notice terminating RC's placement at Ella & Ridley Jacobs House, which in effect would have rendered her homeless.

On 18 December 2008 the London Borough of Hackney applied to the Court of Protection for the following orders and declarations:

(1) Leave for the local authority's application to be dealt with as a matter of urgency.

(2) RC lacks the capacity to decide on issues on her residence, care and contact.

(3) It is lawful being in RC's best interests for her to be taken to an identified care home and remain there.

(4) It is lawful being in RC's best interests for contact to take place with her niece SC in accordance with restrictions applied to contact.

(5) For the Lasting Power of Attorney signed by RC to be made invalid.

On 19 December 2008, the court made a directions order granting Hackney permission to apply for a personal welfare order, joining RC as a party, and inviting the Official Solicitor to act as her litigation friend. There were several subsequent directions orders, including one made by District Judge Marin on 7 January 2009, which provided that:

> The final hearing shall be on 6, 7 and 8 May with a time estimate of 3 days reserved to District Judge Marin if available at a venue to be notified to the parties.

On 6 March 2009, RC was admitted to the Royal Free Hospital with a fractured humerus. Jewish Care would not allow her to return to Ella & Ridley Jacobs House, because it is a residential home, and her care needs had changed, but offered to accommodate her in one of its nursing homes, instead. SC was reluctant to accept this placement because of the strained relationship between her and Jewish Care, and her overall lack of confidence in that organisation.

By mid-April 2009 the Royal Free Hospital was eager to discharge RC, and two other nursing homes were considered as potentially suitable placements for her:
(a) Sage Nursing Home in Golders Green, London NW11; and
(b) Nightingale House, in Clapham, London SW12, which provides both residential care and nursing care for older members of the Jewish community. SC herself had initiated contact with Nightingale House in a letter dated 30 March 2009.

It should be noted that, while RC was an in-patient at the Royal Free Hospital, there were no restrictions on SC's contact with her, other than the usual requirements relating to hospital visiting hours. During the whole of this time - roughly three months - SC was able freely to visit her aunt for several hours each day, and spent much time helping to feed her. RC had particular problems with swallowing. SC was keen that RC should remain in hospital for as long as possible, not only so that she could continue to visit and attend to her, but also because she believed that RC was receiving a higher standard of care and treatment than she would in a nursing home environment.

In April 2009 Nightingale House offered to accommodate RC, subject to the outcome of a meeting with SC. The meeting took place on 28 April 2009 between the chief executive and clinician director, on the one hand, and SC and her McKenzie friend, on the other. Also present were a social worker and solicitor.

It soon became apparent that Nightingale House intended to impose similar restrictions on SC's contact with her aunt to those which had been imposed by JC at Ella & Ridley Jacobs House. SC objected to the restrictions, and is alleged to have threatened that, if anything happened to her aunt, she would sue them for negligence. As a result, Nightingale House withdrew its offer of a placement.

The final hearing took place before District Judge Marin at the Royal Courts of Justice on Wednesday 6, Thursday 7, and Friday 8 May 2009. His judgment is dated 12 May 2009, and he formally handed it down at the Royal Courts of Justice on Thursday 14 May 2009. I am setting out paragraph 136 of his judgment because he referred to it in paragraph 11 of his separate judgment on costs. At paragraph 136 he said:

> "Much was said at the hearing about the meeting with the Chief Executive of Nightingale. Having heard the evidence, I am clear that SC sabotaged this meeting by making threats and generally behaving badly. She was opposed to Nightingale for the spurious reason that the home was in south London and as far as she was concerned, the placement was not to be. The complaint about distance of course ignores the fact that prior to RC's entering ERJ, RC lived in Hammersmith and SC visited regularly. But whatever the position, RC ruined a placement in a care home described by Mr Sinclair as being very good and instead allowed RC to remain in hospital."

His order on the substantive issues, which is also dated 14 May 2009, is summarised below.

District Judge Marin's order on the substantive issues

On 14 May 2009 District Judge Marin made an order in the following terms.

First, he declared that RC lacked the capacity:
(a) to litigate;
(b) to decide where she wished to live; and
(c) to manage her financial affairs.

Paragraph 2 contained declarations that:

(a) RC had lacked the capacity to created the LPA when she purported to execute it on 3 January 2008;
(b) the instrument did not constitute a valid LPA because RC had lacked capacity; and
(c) SC had behaved in a way that was not in RC's best interests and was proposing to behave in such a way in the future, and "if contrary to paragraph 2(b) above RC had capacity, the Lasting Power of Attorney falls to be revoked pursuant to section 22."

Paragraph 3 of the order dealt with RC's future placement. The London Borough of Hackney and Barnet Primary Care Trust were directed to find a placement for her, preferably in a Jewish home in North West London, failing which a Jewish home elsewhere. SC was to be excluded from all negotiations relating to the placement, and was forbidden from making any contact with the new home pending her aunt's transfer and arrival there. There were further provisions allowing her limited, unsupervised contact, "but if the home detects any change in RC's demeanour, behaviour or mood, which they believe is a direct result of SC's visit, they may impose supervision in the form of a member of staff being present. Paragraph 3 (xiv) prohibited SC from intimidating or harassing the staff at the new care home, and a penal notice was attached to this particular provision pursuant to rule 192 of the Court of Protection Rules 2007.

The order went on to provide that a personal welfare deputy was to be appointed forthwith, either from the court's panel of deputies or by nomination of the London Borough of Hackney and Barnet Primary Care Trust ("BPCT"), and that SC was to have "no say in the appointment of the personal welfare deputy."

Paragraph 3(xx) stated that the functions of the personal welfare deputy would be as follows:

(i) to undertake all dealings with the care home;
(ii) to act as a liaison for SC to address concerns and issues raised by SC, save that there be permission to the deputy to refuse to accept communications from SC or to deal with her generally if the deputy believes that her communications and/or behaviour are disproportionate, offensive or unreasonable;
(iii) upon SC raising a valid issue or complaint, to undertake an investigation and discuss the same with the care home; and
(iv) the deputy must prepare a protocol to set out how a complaint from SC will be dealt with and include time scales where appropriate.

There were several other provisions which I need not itemise here, and the order then went on to make the following provisions as to costs:

6. JC shall be joined as a party for the purposes of implementing and enforcing the order for costs in its favour.

7. BPCT are joined as the Fourth Respondent in this case.

8. SC is ordered to pay LBH's costs of 7, 8 and 14 May 2009, such costs to be determined by detailed assessment on the standard basis in default of agreement.

9. SC is ordered to pay 50% of JC's costs from 18th December 2008, such costs to be determined by detailed assessment on the standard basis in default of agreement and for the purposes of assessment, the Costs Judge shall treat JC as if it was a full party at all times.

10. All costs assessments shall be carried out at the Supreme Court Costs Office.

11. With the concurrence of the Senior Judge of the Court of Protection, any appeal from this order shall be heard by a High Court Judge.

12. Time for any appeal runs from 14 May 2009.

13. It is recorded that no application for permission to appeal was made on 14 May 2009.

14. …

15. SC shall be debarred from making any further application (save for an application for permission to appeal) without permission of a nominated district judge of the Court of Protection and in the first instance any application shall be referred to District Judge Marin.

District Judge Marin's judgment on costs

In his judgment on costs, dated 14 May 2009, District Judge Marin held as follows:

1. This judgment concerns costs, and follows my judgment in this case.

2. LBH seeks an order that SC pay the costs of the second and third day of the hearing before me, and of today.

3. JC seeks its costs of this case.

4. SC also makes an application that she receives costs.

5. Rule 157 of the Court of Protection Rules 2007 provides that in personal welfare cases. The general rule is that there will be no order for costs on the part of proceedings that concern RC's welfare.

6. Of course, there were two parts to this case; the issues regarding RC's residence and also the validity of the Lasting Power of Attorney.

7. However, the Lasting Power of Attorney was a personal welfare LPA, and therefore its general rule would, in my opinion, fall within Rule 157.

8. However, Rule 157 is only a general presumption. Rule 159 allows the Court to depart from that rule if circumstances so justify. It provides that:

   '(1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including–
   (a) the conduct of the parties;
   (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
   (c) the role of any public body involved in the proceedings.'

9. Conduct is also further defined in Rule 159(2).

10. LBH says that this is an exceptional case, and that it should be awarded costs. However, it limits costs to the second and third days of the hearing, that is 7th and 8th May, and of today.

11. They refer, in particular, to paragraph 136 of my judgment and my conclusions about the Nightingale placement. LBH says that, had that placement been retained, the hearing would have been limited to one day only; however, due to the placement failing, the parties and thus the Court were forced into a prolonged trial, entirely as a result of SC. Accordingly, LBH seeks these limited costs.

12. JC says that it needed to be involved in the case as its dealings with SC were raised, and it had to respond. There were also a number of applications directed inter alia against JC and that is why they seek a costs order from SC.

13. For her part SC says that if anything, LBH and JC should pay her costs. LBH brought this case and JC chose to assist. She disputes my finding on the placement at Nightingale, and if anything, SC says that she was forced to get involved and thus she should receive her costs.

14. SC also referred to the pain and suffering and general difficulties that she has endured through this case which she says has had an effect on her life.

15. One purpose of the 'no costs' rule is that it allows welfare disputes to be brought before the courts without fear that if a party fails to succeed, he will be liable for his opponent's costs. However, this purpose falls away in my judgment when a party behaves so badly and fails to see reason and commonsense that it would be offensive to allow that party to rely upon the protection of Rule 157. Obviously, it should be reserved for use in exceptional cases, and in my judgment this is such a case.

16. I have regard to Rule 159(2) and its guidance on conduct. Before the proceedings, SC's behaviour left LBH with no option but to apply to the Court and JC with no option but to become involved in the proceedings.

17. SC failed on all the issues she provoked in this case. The LPA was declared invalid, her position on RC's capacity was not accepted, and her objection to restrictions being placed on her failed. She also caused immense problems with regard to RC's placement.

18. Rule 159(1)(c) also refers to the role of any public body involved in the proceedings.

19. As a result of SC's behaviour and conduct, LBH had to use tax-payers' money to bring this matter to court. I am not sure if JC is included within the definition of a 'public body', but in its widest sense JC is a charity which has had to waste money on legal representation to represent its position at court.

20. So far as LBH is concerned therefore, I accede to their restrained request for an order that SC pay the costs for the second and third day of the trial and of this hearing today.

21. With regard to JC, I accept that SC should pay their costs, but not all of their costs.

22. Any order has to reflect that I made it clear that JC did not have to attend the final hearing as I proposed to look only at the global picture between JC and SC and make no findings and thus Miss Carson's evidence could have been offered by LBH but also that JC offered placements and had to come to court. I therefore have to recognise that JC had to become involved in the court process to some degree and that was caused by SC.

23. Accordingly, doing the best I can and using my discretion, having regard to my knowledge of the case and its litigation history, I award JC 50% of its costs from the date it was served with notice of these proceedings, presumably some time shortly after 18th December 2008, to be paid by SC.

24. I make no award of costs on behalf of SC as in my view that application is devoid of any merit given what I say about SC and the conclusions I made about her in my judgment.

Subsequent proceedings

On 27 May 2009 District Judge Marin made two further orders; one appointing Julia Lomas, of Irwin Mitchell, Solicitors, as RC's deputy for personal welfare decisions, and the other appointing her to be RC's deputy for property and financial affairs.

On 4 June 2009 SC filed an appellant's notice (form COP35), in which she sought to appeal District Judge Marin's order of 14 May 2009 with regard to:
(1) costs;
(2) the appointment of a professional deputy (SC suggested that her sister, EF, whom RC had appointed as a replacement attorney, should be preferred to a stranger);
(3) the penal notice; and
(4) the restrictions on contact.

On 12 June 2009 RC was discharged from the Royal Free Hospital and admitted to Sage Nursing Home. Almost a fortnight later, on 25 June 2009, she died there.

On 26 June 2009 Sir Christopher Sumner dismissed SC's application to appeal but granted liberty to apply, which I understand is the usual order made in civil appeals on the death of the person to whom the proceedings relate.

On 6 September 2009 SC renewed her application for permission to appeal.

Pursuant to paragraphs 11 and 15 of his order of 14 May 2009, and with my concurrence, District Judge Marin referred the matter to a High Court judge, and on 24 November 2009 Mr Justice Charles intimated that, in accordance with the Rules, the appeal had to be heard by a circuit judge, and that there was no power to direct that it be heard by a High Court judge.

Article 4 of the Mental Capacity Act 2005 (Transitional and Consequential Provisions) Order 2007 provides that the Senior Judge of the Court of Protection is to be treated as being a circuit judge. Accordingly, I agreed to hear this appeal myself.

On 26 November 2009 I made an order directing SC, at her own expense, to obtain a transcript of District Judge Marin's judgment on costs and to file a copy of it with the court and serve a copy on the respondents by 28 February 2010 at the latest.

On 24 March 2010 I granted SC permission to appeal for the reasons stated in the introduction to this judgment, and directed that the hearing would take place on Wednesday 30 June 2010 with an estimated duration of two hours.

On 15 June 2010 JC and SC reached an out-of-court settlement, whereby the part of the appeal relating to JC was dismissed.

The hearing took place on Wednesday, 30 June 2010 and was attended by SC and her McKenzie friend, DC, and Bryan McGuire QC on behalf of the London Borough of Hackney.

SC's skeleton argument

On 4 June 2009 SC filed an appellant's notice appealing District Judge Marin's decision both on the substantive issues and on costs. In relation to costs, she put forward the following grounds, numbered 1(a), (b) and (c):

> (a) LBH, in asking for costs of days 2 and 3 of the trial, claimed that my conduct re the Nightingale placement is what had caused the trial to last three days instead of one. This is not supported by the evidence. Moreover, the Court considered my conduct in this case, but seems to have overlooked certain inappropriate conduct of LBH and JC which ought to be considered.

(b) As I recall, at the hearing of 14 May LBH had not asked for its costs of 14 May 09, but this was added to the order.

(c) The evidence does not support the finding that my conduct is what caused JC to incur its costs in this case. JC had other, less costly and more expeditious, options for dealing with the problems that they perceived.

SC also appealed against the appointment of a deputy; the imposition of a penal notice, and her rights of contact during the first four weeks of RC's placement. She concluded her grounds of appeal, at paragraph 5, with the following statement:

> Throughout this case I represented myself, as I could not afford legal fees. I was a lay person, completely inexperienced in such matters, and faced teams of lawyers and other representatives of the parties. The Judge should have, but did not, make sufficient allowance for these factors and the difficulties I faced, and even, with the other parties, prevented me from having a McKenzie friend to assist me at all hearings except the actual trial.

Accompanying the appellant's notice was a skeleton argument (COP37), in which SC expanded on her grounds of appeal in the following manner:

> GROUNDS 1(a) RE COSTS AWARD TO LBH FOR DAYS 2 AND 3 OF THE TRIAL: INVALID BASIS FOR CLAIMING ITS COSTS
>
> 1. The judgment found that by my conduct I had sabotaged the prospective placement at Nightingale House ("NH"). LBH claimed this is what caused the trial to last three instead of only one day, and on that basis the Judge awarded their costs. However, this is not supported by the evidence.
>
> 2. I did not sabotage that meeting.
>
> 3. Evidence and records before the Court were overlooked.
>
> 4. I had gone to considerable effort to have the meeting with NH be a successful one.
>
> 5. It was they, not I, who were largely responsible for the outcome.
>
> 6. I have a witness to that meeting – the person who later served as my McKenzie friend at the trial – who attended and participated with me in the meeting.
>
> 7. I had raised valid concerns, in RC's best interests, about a placement at NH. However, LBH and the OS, in pressing for RC to be placed as a matter of urgency, preferred to ignore or minimise these concerns.
>
> 8. I had also expressed concerns about the format of the meeting. These were not taken into account but turned out to be valid.
>
> 9. I had also made the argument before the meeting took place that the short term risk to RC of staying in hospital a little longer was far less than the long term risk of a wrong placement. RC was generally well cared for in the hospital.
>
> 10. RC's eventual placement in Sage Home supports, with hindsight, the validity of my concerns at that time and indicates that it was a wiser decision to wait a little longer in order to maintain a more suitable placement.
>
> 11. At the very first hearing on 7 Jan '09, the trial had been set for three days.

12. In the days leading up to the trial the Judge had asked the parties to submit their lists of issues to be addressed at trial, in order to see whether the three days were required. After receiving these submissions, including my own, the Judge kept the trial at three days. If by the time of trial RC had had a placement, at NH or elsewhere, these issues would still not have been resolved without the full trial.

13. Three days were needed not only to address the issues but to accommodate the schedules of the expert witnesses. For example, Dr Jefferys was available to testify only on Day 2, and I could not testify until after all the others.

14. Even if the issues could have been compacted into less time (and it is difficult to see how that could have been accomplished) the trial took three days for other reasons, too, such as:
    (i) LBH's failure to comply with the court order requiring it to prepare and submit a full bundle no less than 10 days before trial. LBH was several days late in delivering the trial bundle, and even then it transpired the bundle they provided was missing important evidence and documents of mine.
    (ii) I was hampered by LBH's delays and omissions.
    (iii) When I brought these matters to the attention of the Judge days before the trial, he insisted on the trial proceeding as planned and said the matter would be dealt with at the trial itself. Later he even criticised me for asking the court to intervene.
    (iv) The omission of evidence from the bundle and the Judge's directions to wait until the trial to address this problem caused delays in aspects of the trial, such as the testimonies of Ms Carson and myself.

15. The Court seems not to have taken into account LBH's non compliance regarding the bundle.

16. If there was any fault for the trial taking longer than it needed, this should be ascribed to LBH and not to me, and there is no cause and effect relationship between the success or failure of the NH placement and the length of the trial.

GROUNDS 1(b) – RE COSTS AWARD TO LBH FOR 14 MAY '09

1. Item 8 of the orders of 14 May '09 awarded LBH its costs against me not only for days 2 and 3 of the trial, but also for the hearing of 14 May '09. But that hearing was scheduled for the judge to make his formal presentation of the judgment, and there was no justification for making me pay for LBH's cost of that day. Moreover, LBH in its oral submission on 14 May '09 made no such request, yet it appeared in the order. On the other hand, I recall that it was LBH who had suggested to the judge at the hearing that it, LBH, draft the actual orders, to which I believe the judge agreed. It appears LBH then included this extra day in its draft and the judge signed off on it.

2. The award to LBH of its costs on the 14 May '09 should be retracted.

(*I have not set out SC's skeleton argument on ground 1(c), because that related to the costs awarded to JC, which, in view of the out-of-court settlement between SC and JC, is no longer relevant to this appeal. SC concluded her skeleton argument with the following general comments.*)

GROUNDS 1(a), (b), (c) – GENERAL COMMENT ON THE AWARDING OF COSTS

1. I have argued above against the justice of costs being awarded against me with respect to LBH and JC respectively. I now make the following argument.

2. The judgment criticises me severely, even impugning my credibility and giving little credit to me for my support of RC for many years, support which, despite the problems that arose with JC, was an invaluable help to her and for which I have earned wide respect.

3. The judge found against my position on all the issues, but appears intent also on punishing me, through the award of costs and the imposition of other constraints. As to punishment, the impact of the court's findings on the issues, the restrictions, and the hurt and embarrassment for me associated with this case are in and of themselves harsh punishments (even though I believe them to be unfair).

4. LBH seems to have spared no expense in bringing this case, yet I contend they had recourse to less costly and more expeditious remedies. The same applies to JC who, the judge pointed out at the trial, has some $40 million in assets and also seems to have spared no effort or expense in this case.

5. By contrast with these publicly-funded institutions, I am a hard-working individual of very modest means who has devoted herself to my aunt's welfare for many years and in good faith have done my best for her. This fact is supported by the evidence. I have always been a law-abiding citizen and have never been in any sort of trouble. This case has already cost me a lot, financially as well as emotionally, and continues to do so. The costs awarded, if implemented and enforced, would destroy me financially: I would be rendered almost destitute, after having struggled painstakingly for many years just to reach my present modest circumstances. The court's awards of costs are questionable on their merits, and in addition constitute cruel, unusual, inhuman and disproportionate punishment.

6. The costs awards against me in favour of LBH and JC should be revoked.

London Borough of Hackney's skeleton argument

In his skeleton argument dated 7 June 2010, Bryan McGuire QC made the following submissions on behalf of the London Borough of Hackney:

1. The plain intention of Senior Judge Lush in making his order of 24th March 2010 was that the full hearing of the appeal should take place in the Court of Protection and not (as originally ordered by District Judge Marin) by a High Court Judge. As to who may hear an appeal see section 53 of the MCA 2005 and paragraphs 7.114-5 of the Court of Protection Practice.

2. The judgment and order are not open to criticism:

    a) Express reference was made to the correct principles to be applied: see paragraphs 5 to 9 of the costs judgment.

    b) Specific consideration was given as to whether all the circumstances justified departure from the general rule that there should be no order (see paragraph 16).

    c) Specific regard was had to each of the factors listed in Rule 159(1)(a) to (c): see paragraphs 16 to 20. LBH had been forced to commence and proceed with the claim as a result of SC's conduct. She had lengthened the proceedings by her misbehaviour. She took and lost a string of bad points. Public money had to be expended by a public body. This was an exceptional case where departure from the general rule was warranted. Indeed the application for part only of LBH's costs was "restrained" (see paragraph 20).

    d) SC's own application for costs was "devoid of any merit" given the findings set out in the judgment (see paragraph 24).

3. The Skeleton Argument served in support of the Grounds of Appeal does not raise any good basis of challenge to the costs order made.

4. Ground 1(a) fails because, as explained above, no appeal is brought against adverse findings of fact made in the judgment or recorded in the order. Nor does any appeal lie, as there was ample evidence available to the District Judge to justify the findings and orders made. LBH maintains that had the residence issue been resolved before the final hearing one day would have sufficed.

5. Ground 1(b) is wrong. See paragraph 10 of the costs judgment, where the District Judge records LBH's submission as including an application for costs of 14th May 2009. The suggestion that the application was only somehow slipped in later is refuted.

6. As to the general comments listed under the heading Grounds 1(a), (b) and (c), these are refuted where they are inconsistent with the District Judge's findings of fact and conclusions.

7. More generally, the findings of the District Judge on costs were neither wrong nor unjust because of a serious procedural or other irregularity in the proceedings before him. (See Rule 179).

The law relating to costs in Court of Protection proceedings

The primary source of law on costs in Court of Protection proceedings is the Mental Capacity Act 2005, sections 55 and 56 of which provide as follows:

55. Costs

(1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the court are at its discretion.

(2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.

(3) The court has full power to determine by whom and to what extent the costs are to be paid.

(4) The court may, in any proceedings –
(a) disallow, or
(b) order the legal or other representatives concerned to meet,
the whole of any wasted costs or such part of them as may be determined in accordance with the rules.

(5) "Legal or other representative", in relation to a party to proceedings, means any person exercising a right of audience to conduct litigation on his behalf.

(6) "Wasted costs" means any costs incurred by a party -
(a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
(b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

56. Fees and costs: supplementary

(1) Court of Protection Rules may make provision -.
(a) as to the way in which, and funds from which, fees and costs are to be paid;
(b) for charging fees and costs upon the estate of the person to whom the proceedings relate;

(c) for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings.

(2) A charge on the estate of a person created by virtue of subsection (1)(b) does not cause any interest of the person in any property to fail or determine or to be prevented from recommencing.

The secondary sources of law relating to costs in the Court of Protection are:

- Part 19 (rules 155 to 168) of the Court of Protection Rules 2007 (Statutory Instrument 2007 No. 1744 (L. 12)); and
- the two practice directions – 19A and 19B – which supplement Part 19 of the Court of Protection Rules.

Five rules need to be considered in this case: namely, rules 156, 157, 158, 159, and 165, and they provide as follows. "P", incidentally, is the reference used in both the primary and secondary legislation to the person to whom the proceedings relate.

Property and affairs – the general rule

156. Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to his estate.

Personal welfare – the general rule

157. Where the proceedings concern P's personal welfare the general rule is that there will be no order as to the costs of the proceedings or that part of the proceedings that concerns P's personal welfare.

Apportioning costs – the general rule

158. Where the proceedings concern both property and affairs and personal welfare the court, insofar as practicable, will apportion the costs as between the respective issues.

Departing from the general rule

159. – (1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including:

(a) the conduct of the parties;
(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
(c) the role of any public body involved in the proceedings.

(2) The conduct of the parties includes:

(a) conduct before, as well as during, the proceedings;
(b) whether it was reasonable for a party to raise, pursue or contest a particular issue;
(c) the manner in which a party has made or responded to an application or a particular issue; and
(d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.

(3) Without prejudice to rules 156 to 158 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.

Costs following P's death

> **165.** An order or direction that costs incurred during P's lifetime be paid out of or charged on his estate may be made within 6 years after P's death.

The practice directions are not of any assistance on this occasion. Practice Direction 19A is concerned primarily with modifications to the Civil Procedure Rules 1998, and Practice Direction 19B deals with solicitors' fixed costs and the remuneration of local authority deputies.

Before the implementation of the Mental Capacity Act 2005, the leading case on Court of Protection costs was a very old one, *Re Cathcart* [1892] 1 Ch 549. Mrs Cathcart was a woman in her mid forties who came from a landed family. She presented paranoid symptoms, and was an in-patient at The Priory, Roehampton. Her husband petitioned for an inquiry into her state of mind. Mrs Cathcart opposed the application, and the inquiry took place before Mr J. R. Bulwer QC, one of the Masters in Lunacy, and a special jury of twenty three persons, over seventeen days in June and July 1891. On 23 July 1891 the jury found (by a majority of 13 to 10) that she was capable of managing and administering her property and affairs.

The costs of the inquiry were enormous. Mr Cathcart's alone exceeded £5,000, which he was not in a position to pay. He applied to the court to exercise its discretion under the Lunacy Act 1890 by directing that all the costs of the proceedings be paid by his wife. Mrs Cathcart made a counter-application that her costs should be paid by her husband. The Lords Justices in Lunacy (Lords Justices Lindley, Bowen and Kay) heard the applications on 9, 16 and 23 November and 16 December 1891, and held upon the evidence that there were sufficient grounds to justify the petitioner instituting the inquiry; and that, in the circumstances, Mrs Cathcart should pay her own costs and the petitioner ought to receive two-thirds of his costs for all the proceedings (to be taxed as between party and party) out of the property belonging to his wife.

The decision of the Lord Justices in Lunacy can be broadly summarised as follows:

1. Unlike proceedings in other civil courts, costs in the Court of Protection do not necessarily follow the event.

2. Where an application is made in good faith, supported by medical evidence (where appropriate), in the best interests of the person to whom the proceedings relate ("P"), and without any personal motive, the applicant is generally entitled to their costs from the P's estate, even if they are unsuccessful.

3. The court has an unlimited discretion to make whatever order for costs it considers that the justice of the case requires.

4. In exercising its discretion the court must have regard to all the circumstances of the case, including, though not confined to, the relationship between the parties, their conduct, their respective means, and the amount of costs involved.

5. Where parties place themselves in a hostile position to P, or where their conduct results in the costs of the proceedings being more expensive than they might otherwise have been, the court may consider it appropriate to penalise them as to costs.

Although one can see clearly in *Cathcart* the origins of the general rule in property and affairs cases (rule 156), I should add that proceedings by way of an inquisition, as was the case in *Cathcart* – also extended to personal welfare matters and, had Mrs Cathcart been "a lunatic so found by inquisition", it would have been possible for the judge to appoint a committee of her person as well as her estate. "Committee" was the term used in those days for the person whose functions were broadly similar to those of a "deputy" under the Mental Capacity Act 2005.

Before the implementation of that Act, the order most commonly made by the court in property and affairs cases was that the costs of the parties be subject to detailed assessment on the standard basis and paid from P's estate. This usual order was approved by the former President of the Family Division, Dame Elizabeth Butler-Sloss, in *Re Livesey* (Unreported, 19 December 2002), by Mr Justice Neuberger (as he then was) in *Re Jefferson* (Unreported, 17 February 2003), and by the late Mr Justice Hart in *Re Turner* (Unreported, 24 May 2004), all of which related to objections to the registration of enduring powers of attorney.

I regret that I am unaware of the origins of and philosophical basis for the general rule for costs in personal welfare cases, but I understand that in cases heard under the inherent jurisdiction of the High Court the judges traditionally made no order for costs, and this became the general rule for personal welfare proceedings in the Court of Protection under the 2007 Rules.

The jurisdiction of the Court of Protection after the death of the person to whom the proceedings relate

In *Re Walker* [1907] 2 Ch. 120 the Master of the Rolls, Sir Herbert Cozens-Hardy, considered an application similar to this one, where the person to whom the proceedings related had died, and he commented: "This appeal raises a curious and important point, and one upon which, possibly, it is rather strange that there is no direct authority; but, looking at it as a matter of principle, apart from authority … it seems to me that the matter is reasonably clear." He went on to hold that the main jurisdiction of the Court of Protection is dependent on the continued incapacity of the person to whom the proceedings relate ("P") and that it ceases on his or her death.

However, even after P's death, the court continues to have a residual jurisdiction over matters such as:

- costs (Practice Direction 23B, para.10, and COP Rules 2007, rule 165);
- the remuneration of a deputy, donee, or attorney (rule 167);
- fees;
- the discharge of security (The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007 (SI 2007 No. 1253), reg. 37);
- the deputy's final report on the termination of his appointment (LPA, EPA & PG Regulations 2007, reg. 40); and
- the transfer and delivery of funds (Practice Direction 23B, para.11).

Although the Mental Capacity Act 2005 does not expressly say anything about the court's jurisdiction after P's death, section 56(1)(c) by implication acknowledges that a residual jurisdiction exists when it states that "Court of Protection Rules may make provision … for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings."

The only rule made under that provision is rule 165, which states that "an order or direction that costs incurred during P's lifetime be paid out of or charged to P's estate may be made within 6 years after P's death." However, I do not believe that it was Parliament's intention that the circumstances envisaged by rule 165 should be the only situation in which the court may make an order for costs after P's death.

When she lodged her appeal, SC appealed against:

- the decision to award costs against her;
- the appointment of a panel deputy;

- the imposition of a penal notice, and
- the restrictions on her rights of contact during the first four weeks of RC's placement.

Although the court can hear this appeal on costs by virtue of its residual jurisdiction, it is unable to consider the other grounds of appeal because its main jurisdiction terminated when RC died.

The application of rule 157 to Lasting Powers of Attorney

Rule 179(3) of the Court of Protection Rules 2007 provides that "the appeal judge will allow an appeal where the decision of the first instance judge was – (a) wrong; or (b) unjust, because of a serious procedural or other irregularity in the proceedings before the first instance judge."

In my judgment, District Judge Marin was wrong to hold – as he did in paragraph 7 of his judgment on costs - that "the Lasting Power of Attorney was a personal welfare LPA, and therefore its general rule would fall within rule 157."

In contents and appearance, there is little difference between the prescribed forms of LPA for property and financial affairs and for health and welfare. The procedural formalities for creating both types of LPA are almost indistinguishable. The notice of intention to apply for registration and the application form for registering an LPA with the Public Guardian are identical for both kinds of instrument.

The grounds of objection are exactly the same, whether the LPA is for property and financial affairs or for health and welfare, namely:
- that the power purported to be created by the instrument is not valid as an LPA: e.g. the person objecting does not believe that the donor had the capacity to make an LPA.
- that the power created by the instrument no longer exists: e.g. the donor revoked it at a time when he or she had capacity to do so.
- that fraud or undue pressure was used to induce the donor to make the power.
- that the attorney proposes to behave in a way that would contravene his authority or would not be in the donor's best interests.

The classic objection to the registration of any power of attorney involves inter-sibling rivalry where a mother, in her eighties, has created an LPA in favour of one or more of her children to the exclusion of at least one other. It would be counterintuitive to suggest that, in such circumstances, a different costs regime should apply depending on whether the LPA was for:
- property and financial affairs, where the general rule (rule 156) would be that the costs of the parties "shall be paid by P or charged to his estate" – P being the donor; and
- health and welfare, where the general rule (rule 157) would be that "there will be no order as to the costs of the proceedings."

It would also be counterintuitive to suggest that where the donor has created both types of LPA, appointing the same attorneys, and where there are objections to the registration of both instruments, the court will apportion the costs - possibly on a 50:50 basis - as between the respective issues pursuant to rule 158. In most cases, the issues will be identical, regardless of whether the LPA is for property and affairs or for health and welfare.

From a policy perspective, it would be undesirable if the application of rule 157 to a health and welfare LPA meant that an attorney would be expected to pay his or her own costs relating to any contested application to register the LPA. This could even deter suitable candidates from accepting

an appointment to become a health and welfare attorney, especially in cases where there is discord within the donor's family.

In my judgment, because the format, the procedures for both execution and registration, and the grounds of objection are identical in relation to both types of instrument, as a general rule, the incidence of costs in cases where there is an LPA for health and welfare should not necessarily differ from the general rule in property and affairs cases, subject of course to the provisions of rule 159, which allows the court to depart from the general rule if the circumstances so justify.

District Judge Marin chose to depart from rule 157, and to apply rule 159 instead. There is, of course, a far greater quantum leap from rule 156 (where, as a general rule the costs are borne by P's estate), than from rule 157 (where the general rule is no order for costs) to an order, as was made in this case, that the attorney should pay the objectors' costs.

In addition, I have one or two reservations about the manner in which the LPA was declared to be invalid. In his judgment on the substantive issues, at paragraphs 150 and 151, District Judge Marin said:

> "I have to decide if RC has capacity now and whether she had it in 2008 when the LPA was signed.
>
> Having regard to the legal provisions and test that I have set out, I find that RC lacks mental capacity now and did so in January 2008."

In reaching his conclusion, the judge relied entirely on the report, dated 16 February 2009, of Dr Peter Jefferys, an eminent consultant in old age psychiatry, who appears frequently as an expert witness in health and welfare proceedings in the Court of Protection. This was a retrospective report on RC's capacity, made more than twelve months after the creation of the LPA. The judge went on to state, at paragraph 157:

> "Dr Brazil did not give evidence. His contemporaneous notes were also not available. I found it strange that SC asked a dentist to witness the LPA. Dr Jefferys said that he would expect a doctor or mental health nurse to be used as a professional health witness to such a document which begs the question why Dr Stein was not asked. It is also unknown how many times over the two years preceding the execution of the LPA Dr Brazil had seen RC. SC's answer to this in cross-examination was not clear. It is also not known what training Dr Brazil had in making mental capacity assessments. I therefore give no weight to the fact that Dr Brazil signed the LPA."

Dr Brazil is not the average High Street dental practitioner. He has a Master's degree in special needs dentistry, and practical experience of treating geriatric patients in residential care homes and nursing homes. He expressly stated this of the face of the instrument, in Part B of the LPA, where the certificate provider is invited to describe his relevant professional skills and expertise. His evidence as to RC's capacity to execute the LPA should have been obtained - one of the directions orders in these proceedings could easily have required it (although SC alleges that Judge Marin refused to allow her to call him as a witness) - because it is likely to have been "the best evidence", and almost certainly the only evidence that was both time specific and issue specific in relation to the creation of the LPA.

Incidentally, the district judge was mistaken about the application of the two-year rule. There are two categories of certificate provider who can certify a donor's capacity to create an LPA: category A, "Knowledge certification", where the certificate provider is required to have known the donor personally for a period of at least two years immediately before the date on which he or she signs the LPA certificate (LPA, EPA & PG regulations 2007, regulation 8(1)(a)), and category B, "Skills certification", where the certificate provider is "a person chosen by the donor who, on account of

his professional skills and expertise, reasonably considers that he is competent to make the judgments necessary to certify" the donor's capacity (regulation 8(1)(b)). Dr Brazil was a category B certificate provider. Accordingly, there was no need for him to have known RC for a period of at least two years prior to his assessing her capacity.

In paragraph 17 of his judgment on costs, Judge Marin commented, "SC failed on all the issues she provoked in this case. The LPA was declared invalid; her position on RC's capacity was not accepted." In my judgment, SC did not provoke any argument about the validity of the LPA – the London Borough of Hackney did this in its originating application dated 18 December 2008 when it sought an order "for the Lasting Power of Attorney signed by RC to be made invalid" – and, even though SC was unsuccessful on the issue of its validity, having regard to the status of the Part B certificate provider, it was entirely reasonable for her to take the position that she did. One senses that, despite the confidence with which he declared the LPA to be invalid, even Judge Marin harboured doubts and hedged his bets. Paragraph 2(c) of his order of 14 May 2009 is prefaced with a caveat that, "if contrary to paragraph 2(b) above RC had capacity, the Lasting Power of Attorney falls to be revoked pursuant to section 22."

Procedural issues

Rule 179(3) of the Court of Protection Rules requires an appeal judge to allow an appeal, not only if the decision of the first instance judge was wrong, but also if it was unjust because of a serious procedural or other irregularity in the proceedings. I have already said why I believe the original decision was wrong. Now I shall explain why I think it was unjust.

Regardless of who was to blame for the withdrawal of the placement at Nightingale House, I consider that the issues raised in these proceedings would not have been adequately disposed of in just one day. In addition to the question of residence, the issues included the validity of the LPA, whether to direct the Public Guardian to cancel the registration of the LPA on the grounds that SC proposed to behave in a way that would contravene her authority or would not be in RC's best interests, and the terms and conditions on which SC was allowed to have contact with RC.

It is patently clear that Judge Marin and almost everyone else involved in these proceedings were exasperated by SC. In his report of 27 February 2009, Stewart Sinclair, the independent social work expert, described her in the following terms:

> "I have no doubt that SC is devoted to her aunt, and it is also my opinion that SC is one of a small but growing number of people who is unwilling to accept anything other than perfect or near perfect residential care of the elderly. This 'group' has featured significantly in the many cases that I have undertaken with dynamics that have a resonance with this sad dispute. The individuals that drive these cases to the court, who might perhaps be called 'extreme product champions', may well be empowered by all sorts of other practical and psychological factors that impact upon their 'campaigns' and essentially they do have a very significant point, but in SC's case it seems to have overwhelmed her sense of reason and proportionate response to faults in the care system, to the extent that her own attempts at improving her aunt's care have had perverse results, from SC's position, that contact is now severely restricted and the placement itself may be terminated."

Because SC was so infuriating to deal with, it is possible that the judge may have been less courteous and considerate than he would normally have been with a litigant in person (without, of course, forfeiting his impartiality), in allowing her to present her arguments either with or without the assistance of her McKenzie friend.

I am not satisfied, for instance, that SC understood, or was properly forewarned, that there was a possibility that the other sides' costs could be awarded against her. When I asked him, at the hearing on 30 June 2010, whether SC had received any warning, Bryan McGuire QC said that he had felt constrained by the decision in *Orchard v. South Eastern Electricity Board* [1987] 2 W.L.R 102, [1987] 1 All E.R. 95, in which the Court of Appeal suggested that it is improper to threaten to seek an order for costs against someone in order to browbeat them into dropping a case or pursuing a particular line of argument. Of course, the threat of an adverse costs order should never be used as a means of intimidation. However, if the London Borough of Hackney and Jewish Care genuinely believed that SC's conduct was improper or unreasonable, and that it was likely to result in a waste of costs, it may very well have saved time if they had alerted her to the risk that there was a possibility that the judge could award costs against her.

I am concerned that the judge did not consider SC's ability to pay the costs he awarded against her. In *Cathcart* [1892] 1 Ch 549, at page 561, Lord Justice Lindley held as follows:

> "The respective means of the parties and the amount of the costs cannot, in my opinion, be disregarded. If the Petitioner could well afford to pay the costs, and the alleged lunatic would be ruined if ordered to pay them, the Court would not, I apprehend, order him to pay them, whilst there might be no such reluctance if the reverse were the case. The Court ought to endeavour to do what is fair and just in each particular case. Even the amount of costs is not immaterial. Moreover, in considering these matters regard must be paid not only to the expenses incurred, but to the necessity for them, which will very often depend on the course taken by the Petitioner or by the alleged lunatic. Either party may by his conduct render an inquiry much more expensive than it might otherwise have been."

I am not satisfied that, when awarding costs against SC, the judge fully considered the nature of the relationship between her and her aunt, and whether she was acting in RC's best interests. Again, in *Cathcart*, at page 560, Lord Justice Lindley made the following comments, in which he emphasised the importance of acting in good faith, *bona fide*, as well as in P's best interests, in cases of this kind:

> "The relation in which the Petitioner stands to the alleged lunatic and the Petitioner's objects and conduct are the last matters to which I will refer. It is plain that these matters, although not relevant to the inquiry into the state of mind of the alleged lunatic, are very important in considering the question of costs. An unsuccessful inquiry promoted by a stranger for purposes of his own, perhaps mainly in the hope of getting costs, ought to be regarded very differently from an unsuccessful inquiry promoted, perhaps most reluctantly, by a husband or wife or some kind relative or intimate friend acting *bona fide* in the interest of the alleged lunatic and for the protection of himself and his property. Between these extremes there is room for many differences of degree; but it would be hopeless for the promoter of an inquiry which resulted in a verdict of sanity to ask the Court to order his costs to be paid by the alleged lunatic, unless there were reasonable grounds for the inquiry; that the inquiry was really desirable; that the Petitioner was under the circumstances a proper person to ask for it; and that he acted *bona fide* in the interest of the alleged lunatic."

It is clear not only from Stewart Sinclair's description of SC, but also from other evidence in these proceedings, that she was devoted to her aunt and to improving her care, and was fanatical about what she believed to be in RC's best interests. Others thought differently, of course, and although her actions may have had perverse outcomes, she never acted in bad faith towards her aunt: far from it.

I must return to Mr Sinclair's description of SC, and consider it in a wider context. He referred to her as one of "a small but growing number of people who are unwilling to accept anything other than perfect or near perfect residential care of the elderly." He labelled such people as "extreme product champions", and added that they have "featured significantly in the many cases that I have

undertaken with dynamics that have a resonance with this sad dispute." I agree. Many of the health and welfare proceedings, in which I have adjudicated since the Court of Protection acquired this jurisdiction in October 2007, have involved litigants who are very similar to SC in their attitude, demeanour and disregard for authority. One or two have mental health issues of their own, and almost all of them could try the patience of a saint. Naturally, it is tempting to punish them, but in my judgment this is a temptation that should be resisted wherever possible.

The purpose of a general rule is that it should apply in a typical case. SC is not untypical of many of the litigants in person who appear on a regular basis in health and welfare proceedings in the Court of Protection and, despite what District Judge Marin and Bryan McGuire QC have said about this being an exceptional case, it is not. It could almost be said that this aspect of the court's jurisdiction was created to deal with situations of this kind, where a local authority, NHS Trust or private care home is experiencing problems with a particularly difficult and vociferous relative.

Accordingly, the general rule (rule 157) should apply, and the court should only depart from the general rule where the circumstances so justify. Without being prescriptive, such circumstances would include conduct where the person against whom it is proposed to award costs is clearly acting in bad faith. Even then, there should be a carefully worded warning that costs could be awarded against them, and a consideration of their ability to pay. If one were to depart from rule 157 in all the cases involving litigants whom Mr Sinclair has described as "extreme product champions", the court would be overwhelmed by satellite litigation on costs, enforcement orders, and committal proceedings.

I have an advantage over District Judge Marin. I can reflect on this case quietly and calmly, with the benefit of hindsight, and without the pressure and overwhelming sense of urgency with which he had to adjudicate at first instance. However, for the reasons given above, I consider that his decision to award costs against SC was partly wrong and partly unjust. Accordingly, I allow this appeal and set aside the original order insofar as it related to the London Borough of Hackney's costs, and in its place I make no order for costs.

DENZIL LUSH
Senior Judge
5 August 2010