

20th March 2001

In the matter of ANN CLARKE, a patient

This is a contested application for the appointment of a receiver for ANN CLARKE

BACKGROUND

Mrs Clarke was born on the 9th August 1940.

She comes from Royton Oldham and was a house keeper in a small hotel.

She has three children

- Michael Raymond Clarke, who was born on the 2nd March 1959 and lives at Riverbank Tower Manchester
- Angela Wild, who was born on 4th March 1962 and lives at 53 Kensington Avenue, Royton, Oldham and
- Kevin Clarke who was born on the 7th April 1963 and lives at 56 Kensington Avenue Royton Oldham.

In 1993 her marriage broke down and she was subsequently divorced.

In 1994 she subsequently developed a psychotic depressive disorder and made several suicide attempts.

On the 21st June 1995 she tried to throw herself under a bus, but was prevented from doing so by her daughter, Angela.

She was taken to the psychiatric outpatients department of the Royal Oldham Hospital but there was no bed available at that time and she was sent to her son Michaels home.

On the 23rd June 1995 she ran into the road in the path of a lorry and sustained orthopaedic injuries and brain damage.

Proceedings for medical negligence were brought against Oldham NHS Trust for failing to establish whether a bed was available elsewhere and for failing to establish and implement suitable, safe care plan arrangement for her at home.

Lindsay Wise of Alexander Harris Solicitors Altringham initially dealt with the claim on her behalf and Mrs Clarke son, Michael was also appointed as her litigation friend.

Angela Wild and Kevin Clarke expressed concerns to Lindsay Wise about their brothers involvement in their mothers financial affairs, and, at a conference attended by family, solicitors and counsel on the 17th April 2000, Michael agreed to stand down as litigation friend. Mrs Clarke's sister, Lorna Moorhouse was appointed as in his place.

On 22nd June 2000 Alexander Harris submitted an application for the appointment of Mrs Moorhouse as Mrs Clarke's receiver.

Mrs Clarke, Angela Wild and Michael Clarke all objected to the appointment of Mrs Moorhouse as receiver.

Michael Clarke reported Lindsay Wise to the Office for the Supervision of Solicitors Ms Wise felt that, in the circumstances, Alexander Harris could no longer act in the medical negligence proceedings, and so conduct of the case was transferred to Helen Dolan of Hugh Potter and Company Solicitors Manchester.

Helen Dolan asked Hugh Jones of Pannone & Partners, Solicitors Manchester to apply to be appointed as Mrs Clarke's receiver.

Angela Wild and Michael Clarke made separate counter applications for their own appointment as receiver.

The three applications were considered by me at a hearing on Friday the 9th March 2001 which was attended by Mrs Clarke, Michael Clarke, Angela Wild and her husband Peter, Kevin Clarke and his wife Tracy, and Hugh Jones.

Mrs Clarke's claim has not yet been finalised, but the defendant health authority has made a payment into court of £775,000.

In an opinion dated 8th March 2001 leading counsel, Caroline Swift QC, recommended that the High Court and Court of Protection approve the settlement of Mrs Clarke's claim in this sum.

So far as it is material to the decision on the appointment of the receiver, Miss Swift's opinion states as follows:

- The claimants family are somewhat chaotic, a fact which is borne out by the history of the claimants care since sustaining her injuries. Since her discharge from residential nursing care, almost 2 years after her accident, she has moved between her daughters, her son, her daughter's former husband and friend, and has lived at about a dozen different addresses, often completely unsuitable for her needs. It has not been possible to institute any proper regime of professional care. This was nearly achieved last year but failed when Michael Clarke took his mother to live with him in a one bedroomed 11th floor council flat in a poor area of Salford Manchester without notice and in the face of opposition from the litigation friend and his sister Angela Wild.
- Matters have not been assisted by two other factors. First, members of the family – particularly Angela Wild and Michael Clarke are frequently at loggerheads so that it is impossible to discuss their mother's care with them on a sensible basis. Secondly, there have been considerable concerns about the dealings of Michael Clarke – and to a lesser extent Angela Wild – with the claimant's monies. This led to pressure being put on him to agree to cease acting as litigation friend and the appointment instead of the claimants sister, Lorna Moorhouse, to act in that capacity. Mrs Moorhouse has also experienced considerable difficulty in her dealings with other members of the family and in ensuring that the claimants interests are properly protected and her damages applied for her benefit. She was to have been the receiver but it was appreciated that this would provide an inadequate safeguard so that a professional receiver would be necessary. She approves of this course but a contested hearing is to take place shortly with Michael Clarke contending that he should be receiver.
- There is no doubt that Angela Wild and Michael Clarke have considerable affection for their mother (and she for them – especially Michael Clarke) but they have not proved willing or able to provide the claimant with the stable home and settled routine which she requires. It has been the aim of her legal team, Mrs Moorhouse and the case manager to do so by achieving a settlement which would enable the claimant to have her own accommodation

near her family with a team of paid carers, so that she was not dependant on her children for her care and quality of life. Whether this will eventually be achieved remains to be seen.

Hugh Jones's application

Hugh Jones made a statement which was sent to the court by Pannone & Partners on the 6th March 2001. In it he said:

- I believe the value of the personal injury claim is substantial, being in the region of £775,000 which includes a sum to cover the costs of a professional receiver. This will require careful management in order to ensure that all Ann's needs are properly and sensibly met throughout the remainder of her life. I believe that an independent professional receiver would be the best person to make the necessary financial decisions on Ann's behalf. On the basis of the evidence. I believe that Ann is in no way able to manage her own financial affairs and the appointment of a professional receiver is the best option not only for Ann herself but also for her family.
- I understand that in this case there are family tensions and disagreements and I wish to stress to the court that, if appointed as receiver, I would hope to work in cooperation with family members and ease the tensions rather than exacerbate existing confrontations and disagreements. I have considerable experience in dealing with situations where there are family disagreements and competing family interests in relation to the patient and would draw on that experience to assist me in this case.
- As the schedule to the personal injury claim includes a figure for the on-going costs for the professional receiver, the family should rest assured that my costs will not be eroding the capital settlement agreed for their mothers care and other specific needs. The aim would be to relieve the family of the burden of dealing with their mothers financial affairs and allow them to continue with their own lives. I would hope to meet with all family members in due course and discuss constructive ways forward.

Michael Clarke's application

- Michael Clarke produced a statement explaining why he believes he should be his mother's receiver. He claims that before her accident he was a successful businessman but because of the nervous shock he suffered on account of the accident his businesses failed. He moved to Tenerife temporarily in 1999.
- He says he has a "very deep loving bond" with his mother, but "unfortunately jealousy of other family members has surfaced in an ugly manner". Because he is GAY and does not have the burden of a family of his own, he is adequately placed to take on the responsibility of being his mother's receiver.
- He feels that his mother should have nothing but the best. She is of borderline capacity and is able to make choices of her own affairs, but claims that "parts of my family don't want her choices restored". He has approached various consultants in order to obtain medical evidence of her capacity to manage her own finances.
- He says his mother's top priority is to find a man and remarry. She has human rights that need to be respected, and he is prepared to respect his mother's wishes to the maximum extent. If he is appointed receiver, there will be no expenses as there would if there were a professional receiver. He alleges that his brother and sister are more concerned about not spending their mother's money in order to keep their inheritance intact.

Angela Wild's application

- On the 25th February 2001 Angela Wild wrote to Noel McDonnell, her mother's caseworker at the Public Trust Office. She summarised her reasons for applying to be appointed receiver as follows:
- I am very concerned that if Hugh Jones is made receiver Michael might end up having the same influence over him as he has had over others when constantly harassing them or on the other hand, the costs incurred if Michael sends 4-5 faxes a day to the receiver will be very expensive. I would therefore like to ask to be appointed receiver myself and oppose Hugh Jones and Michael Clarke on the basis that:
 1. The first solicitors have given up the case through constant harassment from Michael.
 2. The second solicitors charges have been seriously increased through Michaels harassment and they don't speak to him anymore.
 3. The charges of the next solicitor will be the same and the harassment from Michael won't stop if it goes to another solicitor.
 4. Given the authority I can stop Michael he is more able of being told from me because he knows I have mum's best interests at heart and won't argue with that.
 5. I won't let Michael bombard me with faxes and phone calls
 6. I am the one person to stop him with only my mums interests at heart.
 7. I don't want to move into my mums home and I don't want to be a carer. I only wish my mum back so I can visit as a daughter and my children see their nanna.
 8. I am financially stable and starting a new career as a therapist; my husband has started his own manufacturing business.
 9. I don't want to have to keep asking people what is happening and finding out after the event that more money is being spent by Michael.
 10. Michael is not a fit and proper person to deal with my mums affairs and never has been.
 11. I know my mum better than anybody.
 12. I have lost confidence in solicitors.

Angela Wild's application is supported by her ***brother, Kevin Clarke, who has stated.***

- I would like to object to Michael Clarke being receiver on the grounds he is not fit and competent to do the job. He has not been financially stable for many years and I am aware that he still owes a lot of money to people.
- I don't believe in my knowledge of knowing him as my brother that his intentions are good.
- I would like to object to Hugh Jones being receiver on the grounds that he is not fully aware of the situation with family and I have grave concerns about the costs that are going to be incurred with a solicitor involved will greatly reduce my mothers investments. Everybody who has been involved with this case has know that the problems that my brother Michael has caused has put the costs up greatly for all legal departments and I feel that it will be no different for Mr Jones.
- It is with all of this and with great thought over the last few weeks that I have decided I would like my sister Angela Wild to be receiver and I fully support her application. I am well aware that she understands the problems from all sides and is

capable of putting a stop to Michael without further upset and financial depreciation of my mother's funds.

The Statutory Framework

Section 95(1) of the Mental Health Act 1983 provides that;

The judge may, with respect to the property and affairs of a patient, do or secure the doing of all such things as appear necessary or expedient –

- a. For the maintenance or other benefit of the patient,
- b. For the maintenance or other benefit of members of the patient's family,
- c. For making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered or
- d. Otherwise for administering the patient's affairs,

Section 99 provides that:

1. The judge may by order appoint as receiver for a patient a person specified in the order or the holder for the time being of an office so specified.
2. A person appointed as receiver for a patient shall do all such things as in relation to the property and affairs of the patient as the judge, in the exercise of the powers conferred on him by sections 95 and 96 above, orders or directs him to do and may do any such thing in relation to the property and affairs of the patient as the judge in the exercise of those powers, authorises him to do so.

Principles governing the appointment of a receiver

An application for the appointment of a receiver invites the Court of Protection to exercise discretion. This discretion can be found in section 99 of the Mental Health Act 1983. It must be exercised judicially and it must be exercised in the patient's best interests.

The authorities – principally *Heywood & Massey's Court of Protection Practice* (12th edition 1992) and the older, but never the less authorities, *laws relating to lunacy*, written by Sir Henry Theobald in 1924 – generally acknowledge that there is an order of preference of persons who might be considered suitable appointment as a receiver.

I have called it an order of preference rather than an order of priority to avoid giving an erroneous impression that certain persons are entitled to automatic rights of precedence. They are not. The Court of Protection has an almost unfettered discretion as to whom it appoints as receiver for the patient. However, where exercising that discretion, it has traditionally preferred relatives to strangers.

Generally speaking there is an order:

- The patient's spouse or partner
- Any other relative whom takes personal interest in the patient's affairs
- A friend
- A professional advisor, such as a solicitor or accountant
- A local authority or
- The Public Trustee, as receiver as a last resort.

Adherence to any order of preference, however, would have the effect of negating the court's discretion in deciding whom or whom not to appoint as receiver for a patient. Accordingly the court

takes into account a very wide range of other relevant considerations for example, the patient's wishes, the age, health, experience, financial history and or criminal record, if any, of the proposed receiver: the size of the estate, whether there are any conflicts of interest or matters that need to be investigated and the expense involved.

The order of preference is not set out in any statute, but is simply a general reflection of the way in which the court has exercised its discretion in the past to some extent this is borne out by the statistics. In 1992 (60 Medico-Legal Journal page 30) my predecessor, Mrs A B McFarlane gave the following breakdown of types of receiver: relatives 62.6%; solicitors 13.6%; the public trust 9.2%; authorities 8.3%; others 6.3%.

The order of preference is not immutable. It changes from time to time to reflect present-day conditions and contemporary standards of society. The court is not necessarily bound by previous decisions, and the doctrine of judicial precedence in this area need not be adhered to slavishly.

For example Theobald, in the law relating to lunacy (1924), page 398, said;

- The clerk or other officer of guardians of the poor who are maintaining the lunatic should not be appointed. Such person naturally looks to the interests of the guardian and not the lunatic.

This principle was confirmed in *Re TRM* [1939] 1 CH. 261 although this decision has never been overruled, for many years the court has been content to appoint as a receiver for a patient the director of the local authority's social services departments; in effect they are successors of the poor law guardians.

Similarly, back in the 1950's it was unusual to appoint a solicitor as receiver Heywood & Massey (7th Edition, 1954) said;

- It is not the usual practice to appoint the solicitor (or his clerk) in the matter, though occasionally a solicitor has been appointed on his undertaking not to charge profit costs for work not usually requiring professional assistance.

Heywood & Massey quoted as the authority for this proposition two very old cases *Ex Parte Pincke* (1817) 2 Mer 453 and *Re Lloyd* (1879) 12 Ch D 447. Although these have never been overruled as far as I am aware, the practice of not appointing solicitors as receivers has long been obsolete.

This brings us to the question of how in contemporary society the court should approach the appointment of a receiver in cases where a patient has been awarded damages for personal injury.

In 1997 BABICM (the British association of Brain Injury Case Managers) presented a paper questioning the courts policy of appointing family members in cases where the patient has an acquired brain injury. It recommended that, in all but exceptional cases, professionals rather than members of family should be appointed as receivers for people with an acquired brain injury.

It also recommended that the receiver – whoever is appointed – should have some basic training in the issues relevant to the long term effects of brain injury.

The following reasons were given:

- **Quantum.** The amount of damages awarded can be very substantial, and in some cases comparable to a lottery jackpot. The families of the individual concerned almost always have no experience of handling such large sums of money, and may be incapable of managing their own finances prudently, let alone those of a person under a disability.
- **Burden.** Studies carried out by the neuropsychologist, Dr Neil Brooks, back in the 1980s revealed that the burden on families of people with an acquired brain injury increases, rather than decreases, over time, the administrative tasks of receivership often increase that burden on families and adds to the stress levels already experienced by the family.
- **Dependency.** There is a danger of mutual dependency in any family that has a disabled member. The involvement of a relative as a receiver increases this risk, making it harder for the family to let go and allow the person with a head injury to begin to lead a life that is as independent as possible.
- **Inability to refuse.** Some people with a head injury have behavioural problems and can be intimidating and difficult to reason with. Family members often have problems in saying no to demands, even though these may be clearly unreasonable and not in the best interests of the injured person. Similarly, some families feel sorry for the injured person and find it difficult to say no because they do not wish to disappoint him or her.
- **Moral Conflict.** People with a brain injury have the normal desires of other persons in their peer group. They may wish to spend some of their money on activities that could cause conflict with their parents or family; for example, pornography, prostitutes, alcohol, or illegal drugs. People who have not suffered a head injury may choose to indulge in these activities, but are able to do so not only without their parent's knowledge, but also without the need for family consent or financial support.
- **Financial conflict.** Families may be reluctant to spend money on appropriate items such as care, equipment, adaptations and case management, for fear of running out of money. Other families may regard a compensation award as a source of income or as a family fund to use for their benefit of the whole family as they see fit. This often leads to the family providing substandard care against the advice of experienced professionals and against the interests of the injured person. The view of the fund as a family resource may also lead to the conservation of capital for the future beneficiaries of any will.
- **Personal conflict.** People with brain damage may be inhibited in expressing their own wishes and feelings, especially if they perceive these to conflict with those of their family. It may be much easier for them to express their wishes to an independent receiver.

Recoverability from the defendant of the costs of a professional receiver

The reasonable fees and expenses of a professional receiver are recoverable from the defendant in the personal injury action as a head of damage. **They do not simply fall on the patient's fund.**

In *Cassel v Riverside Health Authority* [1992] PIQR Q168, CA, the trial judge allowed the sum of £2650 per year as the appropriate sum for employing the claimants solicitor to undertake the tasks of a professional receiver. To this multiple and a full life multiplier of 18 was added. No reduction to the multiplier in respect of the legal fees was made because there was no reason to believe that the receiver's responsibilities and activities would diminish over the years. There was no appeal against the award of the damages that represented the future fees of the professional receiver.

In her opinion of the 8th March 2001, Caroline Swift QC states, at paragraph 16.1:

- At the time the schedule was drafted, it was anticipated that the litigation friend would act as receiver with assistance. The cost claimed was £1800 per annum. By the time the part 36 payment was being considered, it was clear that a professional receiver was going to be necessary. No costing's were then available but I assumed a cost of £2500 per annum.

Human rights act 1998

Michael Clarke drew attention to the human rights act 1998; article 8 of the European Convention for the protection of human rights and fundamental freedoms (right to respect for private and family life) provides that;

1. Everyone has the right to respect for his private and family life his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this except as is such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Unless I have misunderstood him, Michael Clarke claims, more or less, that as the elder son and next of kin of his mother, the appointment of anyone else as her receiver would be in breach of his article 8 rights, or that the appointment of an outsider would be incompatible with his mother's right to respect for her private and family life.

He cannot however, claim this as a proprietary right. In *Re f (Adult: Courts Jurisdiction)* [2000] 2 FLR 512, Lord Justice Sedley said:

- It should be said now that it is P's welfare which will remain throughout the single issue. The family life for which article 8 requires respect is not a proprietary right vested in either parent or child; it is as much an interest of society as of an individual family members, and its principal purpose, at least where there are children, must be the safety and welfare of the child. It needs to be remembered that the tabulated right is not to family right as such, but to respect for it. The purpose, in my view, is to insure within proper limits the entitlement of individuals to the benefit of what is benign and positive in family life. It is not to allow other individuals, however closely related and well mentioned, to create or perpetuate situations which jeopardise their welfare. As the European court of human rights said in *Marckx v Belgium* (1979) 2 EHRR 330 Article 8(1) "does not merely compel the state to abstain from interference; in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for family life.

Decision

My decision is to appoint Hugh Jones as Mrs Clarke's receiver. My reasons are as follows;

1. I approve in principle, BABICM's recommendation that in all but exceptional cases, a professional rather than a family member should be appointed as the receiver for someone who has an acquired head injury. In my opinion an exceptional case would be one in which there is harmony within the family and consensus as to what may be in the patients best interests; where there are no conflicts of interest; and where there is no question as to the proposed receiver's probity and suitability to act. Mrs Clarke's family circumstances are not an exception that would justify the appointment of a family member as receiver.

2. An effective endorsement of BABICM's proposals can be found in a string of cases since the court of appeal's decision in *Cassel v Riverside Health Authority* in 1992, whereby the courts have allowed claimants to recover the costs of a professional receiver as a separate head of damages in personal injury litigation. In this case provision has been made for the on-going costs of a professional receiver and this considerably weakens the family argument that the employment of a solicitor will involve greater expense than the appointment of a family member as receiver.
3. Given the hostility among Mrs Clarke's children the appointment of any family member as receiver is likely to have an adverse impact on the proper management of her affairs; see the discussion in *Re W (enduring power of attorney)* [2000] 2 WLR 45, at pages 51 and 52. There are some important strategic decisions to be made and, in view of the competing interests within the family, it is preferable that they be made by someone wholly independent whose paramount concern is whatever may be in the patient's best interests.
4. Hugh Jones is already known to me as a receiver in, probably, a dozen or more cases. He has considerable experience of cases in which there are a substantial damages award and family conflict. He is highly respected within both the legal profession (hence Hugh Potter & Company's referral of this matter to him) and the care agencies who specialise in cases involving traumatic brain damage. I have no doubts or reservations what so ever about his fitness to act as Mrs Clarke's receiver.
5. Perhaps in a few years' time, when suitable accommodation has been acquired for Mrs Clarke, when a stable care regime is in place, and when family feuds have evaporated, the court can consider making this an exceptional case and appoint a family member as receiver in place of Mr Jones.

Costs

All costs incurred in relation to proceedings on the court of protection are at the discretion of the court, which may order them to be paid by the patient or charged on or paid out of her estate, or to be paid by an objector or any other person attending or taking part in the proceedings.

The order most commonly made by the court is that the costs of the parties be assessed on the indemnity basis and paid from the patient's estate. However, in cases where the court considers an objection or application to have been frivolous malicious, vexatious or motivated by self interest, the court has discretion to order that the costs of the proceedings be paid by the applicant or objector.

I see no reason, in this case, for departing from the usual order for costs.

Order

I order that;

1. Hugh Adrian Scott Jones be appointed as receiver for the patient.
2. The costs of Hugh Adrian Scott Jones, Michael Raymond Clarke and Angela Wild be assessed on the indemnity basis and paid from the patient's estate.

It is my practice to conclude a written judgement by referring to the provisions of rule 57 of the court of protection rules 1994, which says that any person aggrieved by a decision of the court made on a hearing may, within fourteen days from the date of the decision, appeal to a nominated judge. By referring to this rule I am not encouraging an appeal, but simply informing anyone who is aggrieved of their rights.