



**IN THE COURT OF PROTECTION  
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005**

**Case No: 10370284**

[2012] EWHC 2256 (COP)

Manchester Civil Justice Centre

Date: 31 July 2012

Before :

**THE HONOURABLE MR JUSTICE PETER JACKSON**

**IN THE MATTER OF**

**MRS ANN CLARKE**

Mr Michael Clarke and Mrs Ann Clarke appeared in person  
Ms Angela Wild and Mr Kevin Clarke were represented by Mr Simon Heapy  
Mr Hugh Jones represented himself

**Hearing date: 6 July 2012  
Judgment date: 31 July 2012**

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**JUDGMENT**  
**(Approved for Publication)**  
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**This judgment consists of 43 paragraphs. Pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken and copies of this version as handed down may be treated as authentic.**

## **Mr Justice Peter Jackson:**

### **The facts**

1. This is an application to discharge a deputyship that has been in existence since January 2010 in relation to the management of the property and affairs of Mrs Ann Clarke. The deputyship succeeded a receivership dating back to 2001.
2. Mrs Clarke is aged 72. Mr Michael Clarke (53), who brings the application, is her eldest child. The application is opposed by Mrs Clarke's other children, Mrs Angela Wilde (50) and Mr Kevin Clarke (49). It is also opposed by the Deputy, Mr Hugh Jones of the firm Pannone, who has acted on behalf of Mrs Clarke since being appointed her Receiver in March 2001.
3. The background is that in 1995, Mrs Clarke suffered serious injuries, including brain injuries, in a road traffic accident. She later received damages of £775,000, calculated on the basis of a life expectancy of 70. Mr Jones was appointed as receiver because Mrs Clarke's children could not agree who should be appointed to administer this fund.
4. For some years Mrs Clarke has lived with her son Michael and his partner. She owns a property in Blackpool, bought from her damages and now worth in the order of £200,000-£250,000. Since 2008, Mrs Clarke has in fact spent almost all of her time with Michael Clarke in rented accommodation in Spain. Michael Clarke says that this was intended to be a permanent move.
5. The Blackpool property is now Mrs Clarke's only substantial asset. Her remaining free capital now amounts to no more than £5,000. It has in effect run out.
6. Mrs Clarke's income consists of the state pension and Disability Living Allowance, amounting together to about £8,500 p.a. This has been supplemented by payment of a household allowance and living expenses from her capital fund. In addition, Michael Clarke has been paid for the care that he provides to his mother. By 2010 and 2011, the global amount being paid from the fund had risen to £60,000 p.a.
7. Since the beginning of 2010, Michael Clarke has carried on an online campaign against the Deputy, the Office of the Public Guardian and the Court of Protection. He has routinely placed copies of confidential documents and expressions of his strong opinions on a website.
8. In October 2010, following Mrs Clarke's move to Spain, the Deputy was authorised to sell the Blackpool property so as to release further funds for Mrs Clarke to live on. This was not put into effect because of a disagreement with Michael Clarke about the sale price.

9. In April 2011, Michael Clarke proposed that he and Mrs Clarke should move back into the Blackpool property. He would care for her there “*regardless of the diminishing funds drying up*” and he said that his mother was “*insistent that the property be vested in joint names as beneficial joint tenants*” in exchange for his unpaid future care of her and so that he would not be homeless on her death. Despite this proposal, Michael Clarke and Mrs Clarke in fact continued to live in Spain.
10. In late 2011, the Deputy informed Michael Clarke that the current level of expenditure was unsustainable and he reduced the payments to an annual rate of about £17,000. This led to an escalation in Michael Clarke’s internet campaign.
11. Capacity assessments of Mrs Clarke have been performed by Dr Donna Schelewa, Consultant Clinical Psychologist. She examined Mrs Clarke in December 2010 and found her to have neurological deficits predominantly characterised by very poor verbal expressive skills (dysphasia). She nonetheless concluded that Mrs Clarke had the capacity
  - to decide where and with whom to live
  - to manage a small income
  - to make a will
  - to appoint Michael Clarke to act as her deputy
  - to give her house to Michael Clarke
12. Dr Schelewa reported again in November 2011. In the previous summer, Mrs Clarke may have had a minor stroke in August 2011. Dr Schelewa confirmed her opinions and emphasised that Mrs Clarke’s dysphasia may give the wrong impression, and that it is crucial that care is taken to give her all opportunities to express herself.
13. On 16 November 2011, the present application was issued and directions were given by the court. Michael Clarke immediately objected to the lawfulness of the proceedings on the basis that they have no legal authority. It is his fixed view that “*statute law*” has no effect and that the matter must be decided under “*common law*”.
14. Mrs Clarke’s other children have filed evidence opposing the discharge of the deputyship on the basis that if she were not protected, Michael Clarke would spend her money on himself. In response, Michael Clarke has filed evidence disputing this and making allegations against his siblings and the Deputy.
15. In January 2012, Michael Clarke’s activities (which included picketing Pannone’s offices with Mrs Clarke in a wheelchair) resulted in Mrs Justice

Sharp making an injunction restraining him from further harassment of the Deputy or his firm.

16. The matter came before me for directions on 12 March 2012. Using the provisions of s.49 Mental Capacity Act 2005 ('the MCA'), I ordered an assessment of Mrs Clarke's capacity by a psychiatrist acting as a Court of Protection Visitor who is a Special Visitor, with a report to be filed by 23 April 2012. The allocated psychiatrist was Dr Jonathan Waite, a consultant in the Psychiatry of Old Age.
17. The issues to be assessed were whether Mrs Clarke has the capacity, within the meaning of the MCA, to:
  - manage her property and financial affairs generally
  - manage her day to day financial affairs
  - appoint Michael Clarke to manage her property and financial affairs
  - transfer her property at Blackpool to Michael Clarke
  - make decisions about her financial affairs free from the undue influence of others
18. Michael Clarke was directed to make Mrs Clarke available for this assessment. Initially, he did not co-operate, and on 6 June a report was filed by Dr Waite, describing his unsuccessful efforts to examine Mrs Clarke and making some comments on Dr Schelewa's assessment.
19. On 20 June, I listed a hearing for 6 July, directing Mr Clarke to co-operate with the examination and directing that if this did not happen, a final order (including one dismissing the application) might be made.
20. On 2 July, Dr Waite assessed Mrs Clarke and wrote a report. He diagnoses cognitive impairment following brain injury and ischaemic brain damage (ICD 10 F07.8). He advises that
  - Mrs Clarke has severely limited abilities to manage her finances and that she cannot manage her financial affairs generally
  - She cannot manage her day to day financial affairs
  - She cannot understand and use information about transferring her property to Michael Clarke during her lifetime
21. Dr Waite further concludes that
  - While there is no doubt that Mrs Clarke trusts Michael Clarke and wants him to act on her behalf in the management of her financial affairs, it is

not possible to assess the level of influence that Mr Clarke has over his mother on a single visit: this would require an extended period of separation that is not in her best interests.

- Similarly, the possibility of undue influence upon Mrs Clarke cannot be confirmed or excluded on the basis of his assessment.

22. Dr Waite also says that

- Mrs Clarke clearly wishes to bequeath her Blackpool property to Michael Clarke, understanding that, by doing so, she will not leave anything to her other children or her grandchildren. He believes that she would have the capacity to make a will for this purpose.

23. As between Dr Schelewa and Dr Waite, there is therefore agreement that Mrs Clarke has the capacity to make a will, but apparent divergence about other matters.

24. At the hearing on 6 July, I heard submissions from the family members and the Deputy.

25. Michael Clarke argues that Mrs Clarke has capacity generally and that in relation to her day to day affairs "*we are talking about managing benefits*". In relation to undue influence, he noted that he and his partner would like to live in Thailand, but his mother would not, so they compromised on Spain.

26. Mrs Wilde and Kevin Clarke believe that the property should be sold and the money spent on Mrs Clarke's care and wellbeing during her lifetime, rather than being tied up for Michael Clarke's ultimate benefit.

27. The Deputy said that the question now is whether the property should be sold. If it is not, there is no purpose in the deputyship. If it is, he would be prepared to continue to act at a proportionate fixed cost.

## **The law**

28. The key provisions of the MCA 2005 in this context are Sections 1-4.

### **1 *The principles***

*(1) The following principles apply for the purposes of this Act.*

*(2) A person must be assumed to have capacity unless it is established that he lacks capacity.*

- (3) *A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*
- (4) *A person is not to be treated as unable to make a decision merely because he makes an unwise decision.*
- (5) *An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.*
- (6) *Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.*

## **2 People who lack capacity**

- (1) *For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.*
- (2) *It does not matter whether the impairment or disturbance is permanent or temporary.*
- (3) *A lack of capacity cannot be established merely by reference to—*
  - (a) *a person's age or appearance, or*
  - (b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.*
- (4) *In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*
- (5,6) ...

## **3 Inability to make decisions**

- (1) *For the purposes of section 2, a person is unable to make a decision for himself if he is unable—*
  - (a) *to understand the information relevant to the decision,*
  - (b) *to retain that information,*
  - (c) *to use or weigh that information as part of the process of making the decision, or*
  - (d) *to communicate his decision (whether by talking, using sign language or any other means).*

- (2) *A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).*
- (3) *The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.*
- (4) *The information relevant to a decision includes information about the reasonably foreseeable consequences of—*
  - (a) *deciding one way or another, or*
  - (b) *failing to make the decision.*

#### **4 Best interests**

- (1) *In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*
  - (a) *the person's age or appearance, or*
  - (b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*
- (2) *The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*
- (3) *...*
- (4) *He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*
- (5) *...*
- (6) *He must consider, so far as is reasonably ascertainable—*
  - (a) *the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*
  - (b) *the beliefs and values that would be likely to influence his decision if he had capacity, and*
  - (c) *the other factors that he would be likely to consider if he were able to do so.*
- (7) *He must take into account, if it is practicable and appropriate to consult them, the views of—*

- (a) *anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*
- (b) *anyone engaged in caring for the person or interested in his welfare,*
- (c) *any donee of a lasting power of attorney granted by the person, and*
- (d) *any deputy appointed for the person by the court,*

*as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).*

*(8)-(11)...*

- 29. By s.19 MCA 2005, a deputy can be appointed to make decisions on behalf of a person who lacks capacity. Paragraph 8.26 of the MCA Code of Practice records two further principles: that where possible the court should make a decision itself rather than appointing a deputy to take it; and that the appointment of a deputy should be as limited in scope and for as short a time as possible.
- 30. Rule 3 of the Court of Protection Rules 2007 provides that court should exercise its powers under the rules with the overriding objective of dealing with a case justly. This includes dealing with it expeditiously and fairly, in a way that ensures that the protected person's interests are properly considered, and in a way that is proportionate to the issues, and by saving expense.

## **Discussion**

- 31. This situation calls for a firm application of the overriding objective. A wide-ranging investigation of the issues between the family members or between Michael Clarke and the Deputy would be disproportionate and impractical, and contrary to Mrs Clarke's interests. Any further medical or legal costs would have to be paid for from her funds, now locked up in her Blackpool property.
- 32. I have considered and rejected the possibility of pursuing a direction that I made in March, under which Dr Waite and Dr Schelewa were to discuss their assessments with a view to producing a schedule of agreement and disagreement. This would itself cause further expense, which would rise further if the doctors were required to attend court, and I think it unlikely that such a process would produce an agreed position. The same applies to any course that led to the court submitting further questions to the doctors.
- 33. Dr Waite and Dr Schelewa agree that Mrs Clarke has a permanent impairment of the brain as a result of her injury (MCA s.2(1)). They do not agree about

whether she can use or weigh information relevant to certain decisions (MCA s. 3(1)(c)).

34. The MCA requires consideration to be given to a person's capacity to make a particular decision at a particular time. I identify the key decisions that arise at this stage in relation to Mrs Clarke's capacity as being:
  - (1) Capacity to manage her benefits
  - (2) Capacity to make a will
  - (3) Capacity to decide whether to retain or sell her Blackpool property.
35. It is unnecessary to decide whether Mrs Clarke has capacity to manage her benefits, as I am clear that it is anyhow in her best interests for these to be managed on her behalf by her carer(s), who happens to be Michael Clarke. As Michael Clarke and the Deputy both say, there is no need for a deputyship for this purpose.
36. As to making a will, based on the views of the doctors I find that Mrs Clarke is able to reach a capacitous decision. The concept of leaving her estate to Michael Clarke, or anyone else, on her death is not a complex one. Like Dr Waite, I cannot exclude the possibility that Michael Clarke exerts influence on Mrs Clarke, but I do not find that this currently invalidates her general testamentary capacity. Whether any particular will that she may make could subsequently be challenged is not a matter for this court at this time.
37. The position in relation to the Blackpool property is, in my view, different. The decision here requires an understanding by Mrs Clarke of the interplay between several factors:
  - Whether she should live in England in Spain
  - The consequences of retaining the property and reducing her standard of living to state benefit levels
  - The consequences of selling the property and maintaining a higher standard of living until the funds are exhausted
  - The impact upon her decision of Michael Clarke's strong view that she wants him to inherit her property on her death, and that this should rightly happen.
38. A decision of this kind would be a difficult one for someone of undoubted capacity. It requires a quite sophisticated ability to understand and weigh the competing factors. On the basis of the overall assessments of Dr Schelewa and Dr Waite, I am clear that Mrs Clarke lacks that capacity, even if she were

given careful assistance. She cannot weigh up the financial and welfare risks involved in each course of action. In 2010, Dr Schelewa reported that *“With regard to financial judgments, Mrs Clarke was not able to select the correct explanation of financial risk associated with investments.”* and her wider assessment showed no evidence of Mrs Clarke having the capacity to weigh up advantages and disadvantages of this kind. In my view an inability to assess risk is inconsistent with any conclusion that Mrs Clarke has the capacity to decide whether to retain or sell her Blackpool property. I find the assertion that she lacks capacity in this respect to be made out.

39. The court will now decide whether or not the Blackpool property should be sold. It does not at this point have sufficient information. I will therefore direct the parties to file concise statements of evidence setting out their cases on
  - Whether or not it is in Mrs Clarke’s interests for the property to be sold
  - How Mrs Clarke’s future income and housing needs are to be met.
40. Each party will have the right to file a statement in reply to the other party’s evidence and must in any event notify the court as to whether a further hearing is requested, or whether the court is invited to make its decision on the basis of the statements. All evidence should be filed with the court and copied to my clerk. Having read it, I will determine whether there should be a further hearing.
41. In the meantime, I will make declarations about the issues that I have decided, namely management of Mrs Clarke’s benefits by her carer and her capacity to make a will.
42. The deputyship will remain in existence, though largely in abeyance until the decision about the property has been taken. In fairness to the Deputy, I record that during my dealings with this matter I have seen nothing to justify the vitriolic attacks that have been made upon him and his firm by Michael Clarke.
43. My order is attached.

**IN THE COURT OF PROTECTION  
MENTAL CAPACITY ACT 2005**

**Case No. 10370284**

Before Mr Justice Peter Jackson  
Sitting at Manchester Civil Justice Centre  
On 6 and 31 July 2012

**IN THE MATTER OF  
ANN CLARKE**

Upon hearing Mr Michael Clarke (accompanying Mrs Ann Clarke), Ms Angela Wilde and Mr Kevin Clarke, and Mr Hugh Jones (Deputy) on 6 July 2012;

And upon handing down judgment on 31 July 2012 in relation to the application to discharge the deputyship in relation to Mrs Ann Clarke's property and affairs;

**IT IS DECLARED THAT**

1. Mrs Ann Clarke has the mental capacity to make a will.
2. Whether or not Mrs Ann Clarke has the mental capacity to manage her income from her state pension and other state benefits (such as Disability Living Allowance) it is lawful and in her best interests for these to be paid to her carer(s) to be applied for her benefit.
3. Mrs Ann Clarke does not have the mental capacity to decide whether or not her Blackpool property should be sold.

**AND IT IS ORDERED THAT**

4. The application to discharge the deputyship is adjourned to await the Court's decision on whether or not it is in Mrs Ann Clarke's interests for her Blackpool property to be sold.

5. The parties shall no later than 28 August 2012 file concise statements of evidence setting out their cases on the following matters:
  - a. Whether or not it is in Mrs Clarke's interests for the property to be sold
  - b. How Mrs Clarke's future income and housing needs are to be met.
6. Any party who wishes to file a concise reply to the statements of evidence of the other parties may do so, and shall in any event inform the court whether a further hearing is requested, or whether the court is invited to make its decision on the basis of the statements filed, in each case no later than 11 September 2012.

**Ordered on 31 July 2012**

**Mr Justice Peter Jackson**