Court of Protection
Property and Affairs Update:
PSG Trust Corporation Ltd v CK [2024] EWCOP 14
Re: P (Statutory Will) [2024] EWCOP 12

By Matthew Wyard
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Introduction

1. Hot on the heels of *TA v the Public Guardian* [2023] EWCOP 63 (a discussion of which can be found here) two further property and affairs decisions have been published by the Court of Protection: PSG Trust Corporation Ltd v CK [2024] EWCOP 14 and Re: P (Statutory Will) [2024] EWCOP 12.

2. Each decision is discussed below in turn, followed by a consideration of their impact on private client and Court of Protection practitioners.

PSG Trust Corporation Ltd v CK [2024] EWCOP 14 ("PSG Trust Corporation")

3. The question before the Court was how a property and affairs deputy should approach the issue of whether to inform P of the value of their civil litigation settlement?

4. Having considered the three authorities that had previously dealt with the issue (*EXB v FDZ* [2018] EWHC 3456 (QB), *PBM v TGT* [2019] EWCOP 6 and *DXW v PXL* [2019] EWHC 2579) the Court identified at [21] that there were three central questions to consider:

    a. Should disclosure to P be regarded as automatic and of right?

b. Is disclosure a facet of management of P's property and affairs already determined to be a sphere in which P lacks capacity, hence the appointment of a deputy?; and

c. How should the capacity test be framed where the focus of concern is on P's vulnerability?

5. At [24]-[26] the Court reminded us that although P may lack capacity across the breadth of property and affairs decisions, she may still have capacity to take decisions such as this. Further, that vulnerability to exploitation is a key concern that is not solely addressed through a best interest analysis, it is also a facet of the decision itself. Vulnerability is not incapacity; in this context incapacity is the inability to recognise vulnerability.

6. In addressing these three issues, the Court considered that, in accordance with *Local Authority v JB* it needed to identify the correct formulation of the matter in respect of which it must evaluate whether P can make a decision for herself. It held that the specific matter to be determined is "*whether P wishes to request the value of her funds". The factors relevant to that decision are "likely to include her understanding of (i) the nature of the information in question; (ii) the risks of obtaining it; (iii) the risks of not obtaining it; (iv) the benefits of obtaining it; (v) the benefits of not obtaining it*." [28]

7. When "*assessing P's capacity to take the decision, her ability, or the extent of her ability, to recognise, retain, and weigh the above questions and specifically to recognise, retain and weigh her own vulnerability and its potential consequences, will frame the scope of the decision. It follows that if she does recognise, retain and weigh these problems and vulnerabilities, it is likely that the presumption that her decision is capacitous has not been rebutted."* [29]

8. Where P lacks capacity then a best interest decision must be taken. The Court was clear that it does "*not consider it is necessary for a deputy to make an application in every case. Sometimes the decision will be clear, perhaps even common sense*." [30]

9. For those immediately concerned by whether, following Re: ACC, such an application (if required) is within the remit of a property and affairs deputy (notification of the sum of a damages award arguably being a welfare issue) the Court concluded that it was not a

welfare issue: "*what is in issue is communication of the exact sum of a damages award. That strikes me as a property and affairs matter. The fact that welfare considerations flow from it does not change the nature of the matter. Many financial decisions have welfare implications*" [31]

10. What about attorneys appointed under a Lasting Power of Attorney? It was put to the Court by counsel for the Official Solicitor acting as advocate to the court that "*a conflict of interest or perceived conflict of interest might arise if the agent were to decide that the amount of P's funds under his control should not be disclosed*". The Court agreed, finding that the distinction between an attorney and a deputy in that instance is that deputies are court appointed, required to account to the Public Guardian and are supervised, unlike attorneys. [32]

11. Of note was the comment by Hayden J that: "*eliciting the views of the claimant/protected party should ordinarily be regarded as necessary when resolving this issue. This will serve to promote and protect P's personal autonomy…however…given the highly fact and person specific nature of the work of the Court of Protection, there may be some cases when such an enquiry would…be counterproductive and 'undermine the very protections which are being sought for the Claimant's longer-term benefit'* "

Re: P (Statutory Will) [2024] EWCOP 12

12. This case concerned an application to amend a statutory will. There was no dispute over the substantive terms of the will which was agreed to be in P's best interests. The issue for the Court was a procedural one – "*must the beneficiaries be served with the application to vary the current statutory will in accordance with the requirements of paragraph 9 of Practice Direction 9E…in order to make representations to the court*". [3]

13. The beneficiaries in this case were "*P's carers who benefitted under a discretionary trust and unspecified charities who are to benefit from a residuary gift*" [5].

14. Although both the carers and the charities are dealt with in the decision, the crux of the dispute centred around the unidentified charities:

    a. The Official Solicitor said that the "*changes agreed [to the statutory will meant] that [the charities would be] adversely affected so that the Attorney-General (A-G) must*

be served to allow representations to be made, as appropriate, in relation to those charitable interests [as]…a matter of procedural fairness and mandatory procedural requirements set out in the Rules" [6], [24]-[25], [30]-[31], [33]-[34].

b. The deputy broadly argued two things: (i) that the cost of notification would be disproportionate in light of the fact that the charities were not identified and there may be nothing left in the estate by way of residuary to satisfy the charitable bequest at the time of P's death due to the estate diminishing and (ii) that requiring notification would be a paternalistic act on the part of the court [7].

15. In so far as the carers were concerned, it was agreed by the parties that it was not in P's best interests to notify them of the amendments to the statutory will "*because, inter alia, it is in P's best interests not to take any steps likely to disrupt his care*" [8].

16. The Court outlined the contents of paragraph 9 of Practice Direction 9E:

"The applicant must name as a respondent - (a) any beneficiary under an existing will or codicil who is likely to be materially or adversely affected by the application; (b) any beneficiary under a proposed will or codicil who is likely to be materially or adversely affected by the application; and (c) any prospective beneficiary under P's intestacy where P has no existing will."

17. It then provided the relevant case law setting out the guidance on dispensing with service under that enactment: *Re: AB* [2014] COPLR 381 and *I v D* [2016] COPLR 432. From these authorities the Court at [39] distilled 9 key principles (references in sub paras relate to the relevant authorities):

a. The court's decision regarding service is not one 'on behalf of P' within the meaning of the MCA 2005. It is not only to be determined by reference to P's best interests: AB at [63]; I v D at [40] and [44];

b. Service requirements are mandatory. The court has a discretion to dispense with service. This discretion is in general only to be exercised in exceptional circumstances where there is a compelling reason to do so: AB at [69] and [84]; I v D at [40][44] and [56];

c. The principle that those materially or adversely affected by an order of the court should be notified of or served with proceedings and given an opportunity to be heard is underpinned by the Article 6 of the European Convention on Human Rights (ECHR): AB at [69];

d. The underlying purpose of the notification requirement is to ensure that the interests of justice are served and, that the court is acting fairly towards all parties.

e. Even if European Convention rights were not engaged, the issue of procedural fairness to those affected by an application arises: I v D at [40][44] and [56];

f. This derives from the principles of natural justice and not solely from the ECHR: I v D at [55];

g. Matters of procedural fairness should be given high regard: I v D at [40][44];

h. Relevant considerations in the exercise of the court's discretion may include the conduct of the proposed beneficiary, the value of the financial benefit to the proposed beneficiary, whether the cost to P's estate or the parties, or the delay caused in concluding the application is disproportionate relative to the value of the benefit lost by a final order;

i. Different considerations may apply where there is genuine urgency. [40]

18. Applying the principles to the case at hand, the Court held that the unidentified charites were beneficiaries to which paragraph 9 of Practice Direction 9E applied and that the legacy to the charity was likely to be adversely affected by the amendment to the statutory will [41] & [43].

19. The Court could not find any exceptional circumstances justifying dispensation and explained at [50]-[52]:

"50. The lack of identification of specific charities does not provide a compelling reason to avoid notification and an opportunity for representation on the diminution of provision to charity. There is an identified and practical mechanism for achieving the same via

the A-G. The fact that to date case law to date has dealt only with identifiable beneficiaries does not preclude this conclusion.

51. Procedural fairness demands that they are represented now to address the disadvantages that will bite once P passes away and the will takes effect. The A-G may or may not make representations on the proposed changes but must be given the opportunity to do so. This also highlights, in my view, the protective nature of paragraph 9 PD 9E to proposed beneficiaries. As a matter of fairness it does not elevate the interests of beneficiaries above those of P.

52. I agree that it is appropriate to consider the impact on the estate of the costs that may be incurred by the A-G. However, in the circumstances I find that the balance is in favour of notification due to the current size of the estate, and the potential significant adverse effect on charity of the proposed changes. It is far better that the will is dealt with on a proper footing as envisaged by the Rules. There is no prejudice to P in taking this approach. I do not find notification to the A-G to be disproportionate."

The impact of the decisions on practitioners

20. The impact of PSG Trust Corporation on practitioners is relatively straightforward. It:

a. has clarified the question to be considered by deputies when deciding whether to inform P of their civil litigation settlement;

b. confirms that deputies do not automatically need to make an application to the court to approve withholding the information from P, although confirms that attorneys will – private client solicitors will need to advise their clients of this in relevant circumstances;

c. confirms the type of relevant information to be considered for the relevant capacity test;

d. confirms that P's wishes and feelings will need to be obtained in future when this decision falls to be considered.

21. Re: P (Statutory Will) is unlikely to have much of a wider impact on practitioners. It confirms that unidentified charities do fall to be notified under paragraph 9 of Practice Direction 9E where amendments to a statutory will are proposed. It may be a useful reference tool when practitioners want reminding of the key authorities and principles of seeking to dispense with notification of an amendment to a statutory will.

22. Although not discussed in detail here, practitioners may also wish to have regard to the separate cost judgment in Re: P (Statutory Will) (Costs application) [2024] EWCOP 9 in which the Official Solicitor successfully recovered her costs directly from the deputy. The Court found, that the deputy had fundamentally misunderstood the purpose of notification and took the view that the matter should not have given rise to a full, contested hearing:

"*the deputy had fundamentally misunderstood the purpose of notification indicat[ing] his lack of understanding of PD9E, the case law, and the points raised prior to the hearing by the OS in correspondence, as demonstrated throughout the hearing and before. The words of PD9E are plain and do not require sophisticated judicial analysis, and had the deputy understood the purpose of PD9E he would have accepted the need for notification of carers and the AG. I regret that I did not consider that it was reasonable for the deputy to raise the arguments and contest the matter, as he did. In my judgment, an agreed position could have been adopted on dispensing of notification to the carers prior to the hearing. An agreed order could have been filed at court setting out the rationale for the orders sought and basis for the agreement, thus avoiding a hearing altogether, subject only to the agreement of the court. Any hearing called for would have been limited and uncontested. Indeed, I did question why a hearing was taking place at the outset. I consider it more likely that the matter would have been dealt with on the papers*." [27]-[29]

23. That cost decision serves as a stark warning to deputies to get it right and, if at all possible, try to reach an agreed position in respect of issues arising from statutory wills. This is, in the author's experience, the usual scenario with it only being a very rare application indeed giving rise to a contested hearing. No doubt it is evidenced by the rarity of reported or published decisions in the Court of Protection concerning statutory wills.

Matthew Wyard is a specialist Court of Protection barrister and described in the directories as "an excellent advocate". Much of his practice falls within the property and affairs jurisdiction where he regularly advises and represents individuals, the Public Guardian, local authorities,

professional deputies and trustees. He is experienced in the breadth of issues in the jurisdiction including elder abuse, inheritance tax, statutory wills, gifting, deputyships, personal injury trusts and capital gains tax to name a few.

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Matthew Wyard

Barrister
3PB

020 7583 8055
matthew.wyard@3pb.co.uk

3pb.co.uk