

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

9 February 2009

B e f o r e :

THE HONOURABLE MR. JUSTICE LEWISON

IN THE MATTER OF P

**Mr David Rees (instructed by Farrer & Co.) for the Applicant.
Mr Michael O'Sullivan (instructed by Thomson Snell & Passmore) for P.
Mr Alan Boyle QC and Miss Barbara Rich (instructed by Russell-Cooke Solicitors) for an
interested party.
Hearing dates: 27, 28 January 2009**

Mr. Justice Lewison :

Introduction

1. The entail was once the standard method by which the English aristocracy and landed gentry kept land in the family, as any reader of Jane Austen will know well. In *Pride and Prejudice* one reason for the desperate attempt to marry off the Bennet girls was that Mr Collins would inherit the estate under an entail. Even then the entail was not widely understood:

“Jane and Elizabeth tried to explain to her the nature of an entail. They had often attempted to do it before, but it was a subject on which Mrs. Bennet was beyond the reach of reason.”
2. Unfortunately, as this history of this case reveals, an entail remains a subject on which some people are beyond the reach of reason.
3. The essence of an entail is that it creates an estate in land (called a “fee tail” or “entail”) which lasts for so long as the original grantee or any of his lineal descendants are alive. The original grantee takes a life interest and his descendants also each take successive life interests in land. The instrument creating the entail sometimes limited the gender of the grantee’s descendants entitled to a life interest (usually to males). The person entitled to the life interest is called the tenant in tail in possession, and the next person in line is called the tenant in remainder (or the remainderman). The common law was hostile to what were effectively inalienable interests in land and by the end of the fifteenth century allowed the legal process to be (ab)used in a collusive action (called a recovery) and a collusive compromise (called a fine) which cumulatively had the effect of barring the entail. Once the entail was barred it was converted into a fee simple. These judge made rules were confirmed in substance but simplified by Parliament. Under the present law a tenant in tail in possession may bar the entail by a disentailing assurance (which must be made by deed) made during his lifetime under the Fines and Recoveries Act 1833; or by will under section 176 of the Law of Property Act 1925. Thus all it takes to bar an entail is the

execution of a simple deed by the tenant in tail in possession, or the inclusion of a suitable clause in his will. Accordingly the position of the remainderman is very precarious.

4. The present case concerns an entailed estate. The current tenant in tail in possession lacks mental capacity. The court is asked to make a will on his behalf. The court is also asked to appoint a deputy and to determine what powers the deputy will have. I am told that this is one of the first cases about dealings with property under the Mental Capacity Act 2005, which came into force on 1 October 2007, to have come before a High Court judge (although I am of course sitting as a judge of the Court of Protection).

The facts

5. [The judge stated the facts prior to 2008 and continued].
6. In February 2008, A, who is P's niece, applied to the courts of California to be appointed as Conservator of P's person and property (effectively equivalent to a welfare and property and affairs deputyship in England). The Californian Court has in fact appointed the Bank of America as Conservator of P's person and property. The Bank now applies to the Court of Protection for the making of a will on behalf of P.
7. Mr Rees appeared on behalf of the Conservator; Mr O'Sullivan appeared on behalf of P's litigation friend; and Mr Boyle QC and Miss Rich appeared on behalf of an interested party. I am indebted to all of them for their careful arguments; but I would like to thank Miss Rich especially for her erudite note on the former jurisdiction of the Court of Protection; and for the very detailed narrative, which I have shamelessly plundered.

P's present condition

8. [The judge considered P's present condition and continued]. There is no doubt that he now lacks mental capacity.

The court's former jurisdiction

9. The case began on the footing that the principles laid down by the Court of Protection in exercise of its previous jurisdiction to deal with the property of a patient continue to apply to the exercise of powers under the Mental Capacity Act 2005. To see whether that is so, I should examine those principles and their rationale.

Before 1959

10. In *Re L (WJG)* [1966] Ch 135 Cross J traced the history of the court's jurisdiction before the passing of the Mental Health Act 1959. Before 1926 the judges who exercised the Lord Chancellor's jurisdiction in lunacy had no statutory power to direct any settlement (even a revocable settlement) of any part of the patient's property. They were accustomed, in exercising the prerogative to manage the patient's affairs, to direct voluntary payments out of his income which they considered that he would have made if he had been sane, but in those days the court would never direct a payment simply because it was the sort of payment which the patient might well have made but only if it was a payment which he would undoubtedly have made unless he was a very oddly constituted person. The typical examples were subscriptions to local charities which any sane landowner would make as a matter of course and the expenses of educating the heir to the property in a suitable manner. Section 171 of the Law of Property Act 1925 conferred on the court power to direct settlements of the patient's property; but what Parliament had primarily in mind in conferring the power to direct settlements of the patient's property, was not the execution of irrevocable settlements divesting him of any interest in the property settled, but the execution of revocable settlements, with reservation of a life interest in order to fill the gap caused by the inability of the patient to make a will. If he had made a will, the legatees under it

might have died, and, if he had made no will, those who were presumptive next-of-kin when he lost his reason might themselves have died. This last consideration had become particularly important owing to the changes in the law of intestacy made by the 1925 legislation which gave intestates' estates to the Crown as *bona vacantia* if there were no surviving relatives within the degrees of descendants of the same grandparents.

11. The statutory powers which the court exercised were limited powers to deal with a patient's property. These powers were replaced by the Mental Health Act 1959 and after that by the Mental Health Act 1983. These powers did not include powers to make decisions about a person's personal welfare: *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.

The Mental Health Act 1959

12. Section 102 (1) of the Mental Health Act 1959 provided:

"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."

13. Section 103 empowered the court to direct the making of a settlement; and the Administration of Justice Act 1969 introduced a power to direct the making of a will. In *Re L (WJG)* Cross J was considering the power to direct the making of a settlement. He held that the particular provisions under consideration were not for the benefit of the patient or his family. Thus the only power he had was the power given by section 102 (1) (c). It follows that the question he was considering was what "the patient might be expected to provide if he were not mentally disordered". Accordingly the Act itself required the court to make the counter-factual assumption that the patient was not mentally disordered, and then to ask itself what, on that hypothesis, the patient might be expected to do. Cross J made it clear that the conclusions that he reached were conclusions reached as a matter of construction of section 102 (1) (c). In essence, the question was: given the counter-factual assumption that the Act required to be made, were there any further assumptions that were necessarily inherent in that assumption? Cross J held (in effect) that there were not and that apart from assuming that the patient was not mentally disordered, he had to be taken as he was. In that case the patient was friendless and cared for at the expense of the state with no opportunity to spend his money, and no prospect of marrying and having a family. Cross J said:

"It seems to me, therefore, that I must assume that the patient becomes a sane man for a sufficient time to review the situation but knows that after a brief interval of sanity he will once more be as he was before."

14. The phrase "be as he was before" in the context of that case meant that he would continue to have the same material needs and the same lack of human intercourse as he in fact had in his mentally disordered state.
15. But the important point for present purposes is that the statutory direction to the court was to direct the making of a settlement that the patient himself (if not mentally disordered) would himself have made. This approach has sometimes been called the "substituted judgment" approach.
16. In *Re D (J)* [1982] Ch 237 Megarry V-C built upon Cross J's decision and laid down a number of general principles upon which the court should act in considering whether to make a will for a patient, which, he said, required the same approach as directing the making of a settlement.

Megarry V-C held that the power should be exercised in accordance with the following principles:

- i) it is to be assumed that the patient is having a brief lucid interval at the time when the will is made;
- ii) it is assumed that during the lucid interval the patient has a full knowledge of the past, and a full realisation that as soon as the will is executed he or she will relapse into the actual mental state that previously existed, with the prognosis as it actually is;
- iii) it is the actual patient who has to be considered and not a hypothetical patient. Before losing testamentary capacity the patient may have been a person with strong antipathies or deep affections for particular persons or causes, or with vigorous religious or political views; and of course the patient was then able to give effect to those views when making a will. The court must take the patient as he or she was before losing testamentary capacity. Allowance may be made for the passage of years since the patient was last of full capacity, for sometimes strong feelings mellow into indifference, and even family feuds evaporate. The court should not give effect to antipathies or affections of the patient which are beyond reason. But subject to all due allowances, the court must seek to make the will which the actual patient, acting reasonably, would have made if notionally restored to full mental capacity, memory and foresight.
- iv) during the hypothetical lucid interval the patient is to be envisaged as being advised by competent solicitors. The court will in fact be making the will, of course, and the court should not make a will on the assumption that the terms of the will are to be framed by someone who, for instance, knows nothing about lapse and ademption. Furthermore, as the court will be surveying the past and the future, the hypothetically lucid patient should be assumed to have a skilled solicitor to draw his or her attention to matters which a testator should bear in mind.
- v) in all normal cases the patient is to be envisaged as taking a broad brush to the claims on his bounty, rather than an accountant's pen.

The Mental Health Act 1983

17. Section 95 of the Mental Health Act 1983 was in very similar terms to section 102 (1) of the Mental Health Act 1959. In particular, the power conferred on the court by section 95 (1) (c) was a power:

“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.”
18. In *Re C (A Patient)* [1992] 1 FLR 51 Hoffmann J considered the scope of the power in a case in which the patient had never had mental capacity. As Hoffmann J pointed out Cross J had decided that:

“the only statutory counter-factual assumption is that the patient has full mental capacity and awareness of her situation for the sole purpose of making a gift or will. It does not mean that the patient's mental capacity and circumstances must be assumed to be in any other respect, or for any other purposes, different from what they are.”
19. Hoffmann J said that the record of the patient's individual preferences and personality in that particular case was a blank on which nothing had been written. Accordingly, there was no material on which to construct a subjective assessment of what the patient would have wanted to do. In those circumstances he held that:

“the court must assume that she would have been a normal decent person, acting in accordance with contemporary standards of morality. In the absence of actual evidence to the contrary, no

less should be assumed of any person and in this case there is nothing to displace such an assumption.”

20. In *G v Official Solicitor* [2006] WTLR 1201 the Court of Appeal approved the principles laid down by Megarry V-C in the context of the making of a statutory will under the Mental Health Act 1983. Mummery LJ summarised the approach by saying that:

“The important point for present purposes is that it is the actual individual patient who has to be considered, the function of the court being to do for the patient what the patient would fairly do for herself, if she could and acting with the benefit of advice from a competent solicitor.”

21. I do not (and could not) question any of this learning. But in my judgment it all stems from the statutory instruction that the court must do what the patient himself might be expected to do if he had not been mentally disordered. The Acts thus required the substituted judgment approach. The Mental Capacity Act 2005 does not contain this statutory instruction, and adopts a different, and structured, decision making process.

Inherent jurisdiction

22. However, in parallel with these statutory powers under the Mental Health Acts the court had an inherent jurisdiction over vulnerable persons including adults. It would make a decision (typically about invasive medical treatment) where it was satisfied that an adult was not capable of making the decision for himself. In *Re C (An Adult: Refusal of Treatment)* [1994] 2 FCR 151 Thorpe J said that he found it helpful to consider the decision-making process in three stages:

“first, comprehending and retaining treatment information, second, believing it and, third, weighing it in the balance to arrive at choice.”

23. In exercising this jurisdiction the court acted in what it perceived as the vulnerable person’s “best interests”. In deciding what was in a person’s best interest, the court drew up a balance sheet in the way described by Thorpe LJ in *Re A. (Male Sterilisation)* [2000] 1 FLR 549:

“I turn from the outcome in the present case to some more general observations. There can be no doubt in my mind that the evaluation of best interests is akin to a welfare appraisal pending the enactment of a check-list or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw up a balance sheet. The first entry should be of any factor or factors of actual benefit. In the present case the instance would be the acquisition of fool-proof contraception. Then on the other sheet the judge should write any counter-balancing dis-benefits to the applicant. An obvious instance in this case would be the apprehension, the risk and the discomfort inherent in the operation. Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously, only if the account is in relatively significant credit will the judge conclude that the applicant is likely to advance the best interests of the claimant.”

24. Plainly this exercise was not directed to investigating what the vulnerable person would have done if he or she had had mental capacity; not least because in many cases it was the mental incapacity itself which was the trigger for the decision (e.g. whether a physically healthy adult should be sterilised, or whether such a person should or should not live with his or her family). In such cases it was for the court itself to arrive at a value judgment about what was in a person’s best interests after weighing all relevant factors in the balance. In the same case Butler-Sloss P said that:

“best interests encompasses medical, emotional and all other welfare issues.”

The Mental Capacity Act 2005

25. The Mental Capacity Act 2005 introduced a new legislative framework dealing with loss of mental capacity, following a number of consultation documents and reports of the Law Commission. Section 1 (the principles) provides:

“(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.”

26. Section 2 (1) provides that:

“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.”

27. Section 3 elaborates the meaning of inability to make a decision. It provides, so far as relevant:

“(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).

(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.”

28. Section 4 expands on the concept of “best interests” referred to in section 1 (5). It provides (so far as relevant):

“(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) He must consider—

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(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) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(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)."

29. Section 16 gives the court the power to appoint a deputy or to make decisions on behalf a person who lacks mental capacity. It provides so far as relevant:

"(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning—

(a) P's personal welfare, or

(b) P's property and affairs.

(2) The court may—

- (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
 - (b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.
 - (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).
 - (4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—
 - (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
 - (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances."
30. The powers conferred by section 16 include the execution for P of a will: section 18 (1) (i). The execution of a will for P is a decision which must be made by the court itself, and cannot be entrusted to a deputy: section 20 (3) (b). The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it: Sched 2 para 2.
31. Schedule 2 paragraph 4 deals with the effect of executing a will on behalf of P. It provides, so far as relevant:
- "(3) The will has the same effect for all purposes as if—
- (a) P had had the capacity to make a valid will, and
 - (b) the will had been executed by him in the manner required by the 1837 Act.
- (4) But sub-paragraph (3) does not have effect in relation to the will—
- (a) in so far as it disposes of immovable property outside England and Wales, or
 - (b) in so far as it relates to any other property or matter if, when the will is executed—
 - (i) P is domiciled outside England and Wales, and
 - (ii) the condition in sub-paragraph (5) is met.
- (5) The condition is that, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales."
32. In the present case P is domiciled in California, so he is domiciled outside England and Wales. A question arises: what is the effect of a will which the court orders to be executed on behalf of a person domiciled outside England and Wales, where that will relates only to immovable property in England and Wales? This depends on whether "any other property" in paragraph 4 (4) (b) means property of any description (movable or immovable) or is restricted to movable property, on the basis that immovable property has already been dealt with in paragraph 4 (4) (a).
33. Although this was originally presented as a jurisdictional question, I think that Mr Rees was right in submitting that it is not really a jurisdictional question at all. Paragraph 4 is not framed as a bar

on the exercise by the court of its general power under section 16 and section 18 (1) (i) to order the execution of a will. It does not purport to prevent the court from exercising that power. Rather it deals with the legal effect of such a will and assumes that the court has ordered a will to be executed.

34. Under the previous legislation (section 97 (4) of the Mental Health Act 1983) it was clear that the court did have power to order the execution of a will dealing with immovable property situated within England and Wales irrespective of the patient's domicile. Nothing in the travaux préparatoires leading to the passing of the Act, including the debates in Parliament, suggest that Parliament had any intention to change the law in this respect. Moreover, there is a general principle that in case of ambiguity in an Act of Parliament, it is to be assumed that Parliament intended the most continuity with the pre-existing law: Halsbury's Laws of England vol. 44 (1) para 1436. It is common ground in this case that that principle applies and that any will which the court orders to be executed will have effect to the extent that it deals with immovable property within the jurisdiction. This is also the view expressed in Heywood & Massey's Court of Protection Practice para 20-014. I am content to proceed on that basis.
35. I should also mention that section 42 of the Act requires the Lord Chancellor to issue codes of practice. Although section 42 does not provide that the court itself must follow the code, it is clearly relevant to an understanding of what the Act was designed to achieve and how it was intended to work.

The general philosophy of the 2005 Act

36. The 2005 Act marks a radical change in the treatment of persons lacking capacity. First it brings together under one common framework the former powers of the court to make decisions both about a person's property and his personal welfare. It thus applies to all manner of decisions from the relatively minor to the most important. Second, it applies not only to decisions that the court might make, but also to decisions that others (carers, doctors, deputies) might make. Third, the test of incapacity is finely calibrated. The Act recognises that the test of capacity is issue specific. A person ("P") may well have capacity in relation to some matters (e.g. what to wear or what to eat), while lacking capacity as regards others (e.g. what to do with his savings or whether to undergo an operation). A person's capacity may also vary from time to time. At this point I should comment on one aspect of the statutory test of incapacity. One of the ingredients in the test is to ask whether P is able to "use or weigh" information in making a decision (section 3 (1) (c)). In their report the Law Commission explained the thinking behind this (§ 3.17). They said:

"There are cases where the person concerned can understand information but where the effects of a mental disability prevent him or her from using that information in the decision-making process. We explained in Consultation Paper No 128 that certain compulsive conditions cause people who are quite able to absorb information to arrive, inevitably, at decisions which are unconnected to the information or their understanding of it. An example is the anorexic who decides not to eat. ... We originally suggested that such cases could be described as cases where incapacity resulted from inability to make a true choice. Common to all these cases is the fact that the person's eventual decision is divorced from his or her ability to understand the relevant information. Emphasising that the person must be able to use the information which he or she has successfully understood in the decision-making process deflects the complications of asking whether a person needs to "appreciate" information as well as understand it. A decision based on compulsion, the overpowering will of a third party or any other inability to act on relevant information as a result of mental disability is not a decision made by a person with decision-making capacity."

37. Fourth, the overarching principle is that any decision made on behalf of P must be made in P's best interests. This is not (necessarily) the same as inquiring what P would have decided if he or she had had capacity. As the explanatory notes to the Mental Capacity Bill explained:

“Best interests is not a test of “substituted judgement” (what the person would have wanted), but rather it requires a determination to be made by applying an objective test as to what would be in the person’s best interests.”

38. I agree. It follows from this, in my judgment, that the guidance given under the Mental Health Acts 1959 and 1983 about the making of settlements or wills can no longer be directly applied to a decision being made under the 2005 Act. I say this for a number of reasons:

i) The 2005 Act does not require the counter-factual assumption that P is not mentally disordered. The facts must be taken as they are. It is not therefore necessary to go through the mental gymnastics of imagining that P has a brief lucid interval and then relapses into his former state.

ii) The goal of the enquiry is not what P “might be expected” to have done; but what is in P’s best interests. This is more akin to the “balance sheet” approach than to the “substituted judgment” approach. The code of practice makes this clear in that it points out that the test of best interests was one that was worked out by the courts mainly in decisions relating to the provision of medical care (para 5.1);

iii) The previous guidance was concerned with deciding what P would have wanted if he were not mentally disordered. But the 2005 Act requires the decision maker to consider P’s *present* wishes and feelings, which *ex hypothesi* are wishes and feelings entertained by a person who lacks mental capacity in relation to the decision being made on his behalf;

iv) The same structured decision making process applies to all decisions to be made on P’s behalf, whether great or small, whereas the previous guidance was specific to the making of a will, gift or settlement. Moreover, it is a decision making process which must be followed, not only by the court, but by anyone who takes decisions on P’s behalf.

v) In making his decision the decision maker must consider “all relevant circumstances”.

vi) The Act expressly directs the decision maker to take a number of steps before reaching a decision. These include encouraging P to participate in the decision. He must also “consider” P’s past and present wishes, and his beliefs and values and must “take into account” the views of third parties as to what would be in P’s best interests.

39. Having gone through these steps, the decision maker must then form a value judgment of his own giving effect to the paramount statutory instruction that any decision must be made in P’s best interests. In my judgment this process is quite different to that which applied under the former Mental Health Acts.

40. That is not to say that P’s expressed wishes should be lightly overridden. On the contrary, the Act expressly requires them to be considered; and for particular consideration to be given to wishes expressed by P when he had capacity. In *Re S and S (Protected Persons)* (unreported 25 November 2008) HH Judge Marshall QC considered the Act in a most impressive and sensitive judgment. She pointed out the stress that the Act lays on the ascertainment of P’s wishes and feelings and on involving him in the decision making process. She concluded:

“55. In my judgment it is the inescapable conclusion from the stress laid on these matters in the Act that the views and wishes of P in regard to decisions made on his behalf are to carry great weight. What, after all, is the point of taking great trouble to ascertain or deduce P’s views, and to encourage P to be involved in the decision making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?

56. The Act does not of course say that P’s wishes are to be paramount, nor does it lay down any express presumption in favour of implementing them if they can be ascertained. Indeed the

paramount objective is that of P's best interests. However, by giving such prominence to the above matters, the Act does in my judgment recognise that having his views and wishes taken into account and respected is a very significant aspect of P's best interests. Due regard should therefore be paid when doing the weighing exercise of determining what is in P's best interests in all the circumstances of the case.

57. As to how this will work in practice, in my judgment, where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person of full capacity might reasonably have), is not impractical as far as its physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources (i.e. whether a responsible person of full capacity who had such resources might reasonably consider it worth using the necessary resources to implement his wish) then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of doing so which outweighs this.

58. That might be some extraneous consequence, or some other unforeseen, unknown or unappreciated factor. Whether this further consideration actually should justify overriding P's wishes might then be tested by asking whether, had he known of this further consideration, it appears (from what is known of P) that he would have changed his wishes. It might further be tested by asking whether the seriousness of this countervailing factor in terms of detriment to P is such that it must outweigh the detriment to an adult of having one's wishes overruled, and the sense of impotence, and the frustration and anger, which living with that awareness (insofar as P appreciates it) will cause to P. Given the policy of the Act to empower people to make their own decisions wherever possible, justification for overruling P and "saving him from himself" must, in my judgment, be strong and cogent. Otherwise, taking a different course from that which P wishes would be likely to infringe the statutory direction in s [1(6)] of the Act, that one must achieve any desired objective by the route which least restricts P's own rights and freedom of actions."

41. I agree with the broad thrust of this, although I think that HH Judge Marshall QC may have slightly overstated the importance to be given to P's wishes. First, section 1 (6) is not a statutory direction that one "must achieve" any desired objective by the least restrictive route. Section 1 (6) only requires that before a decision is made "*regard must be had*" to that question. It is an important question, to be sure, but it is not determinative. The only imperative is that the decision must be made in P's best interests. Second, although P's wishes must be given weight, if, as I think, Parliament has endorsed the "balance sheet" approach, they are only one part of the balance. I agree that those wishes are to be given great weight, but I would prefer not to speak in terms of presumptions. Third, any attempt to test a decision by reference to what P would hypothetically have done or wanted runs the risk of amounting to a "substituted judgment" rather than a decision of what would be in P's best interests. But despite this risk, the Act itself requires some hypothesising. The decision maker must consider the beliefs and values that would be likely to influence P's decision if he had capacity and also the other factors that P would be likely to consider if he were able to do so. This does not, I think, necessarily require those to be given effect. As the Code of Practice explains (§ 5.38):

"In setting out the requirements for working out a person's 'best interests', section 4 of the Act puts the person who lacks capacity at the centre of the decision to be made. Even if they cannot make the decision, their wishes and feelings, beliefs and values should be taken fully into account – whether expressed in the past or now. But their wishes and feelings, beliefs and values will not necessarily be the deciding factor in working out their best interests. Any such assessment must consider past and current wishes and feelings, beliefs and values alongside all other factors, but the final decision must be based entirely on what is in the person's best interests."

42. I would add that although the fact that P makes an unwise decision does not on its own give rise to any inference of incapacity (section 1 (4)), once the decision making power shifts to a third party (whether carer, deputy or the court) I cannot see that it would be a proper exercise for a

third party decision maker consciously to make an unwise decision merely because P would have done so. A consciously unwise decision will rarely if ever be made in P's best interests.

43. In reaching a decision a third party decision maker will, if appropriate, take legal or other advice. The other advice may be medical, financial, or advice of any other kind. The court will, of course, act according to the law, and be assumed to have sufficient knowledge of the law (either before or after assistance from advocates) to make whatever decision it is called upon to make. But there is, in my judgment, no need (as envisaged by *D (J)*) to assume (a) that P has taken legal advice (which he has not) and then (b) to attempt to decide what P would have done with that advice if he had had capacity (which he does not). If P's wishes have been formed without having taken legal advice in circumstances where a person with capacity would have taken legal advice, that may be a reason for giving them less weight than might otherwise have been the case.
44. There is one other aspect of the "best interests" test that I must consider. In deciding what provision should be made in a will to be executed on P's behalf and which, *ex hypothesi*, will only have effect after he is dead, what are P's best interests? Mr Boyle stressed the principle of adult autonomy; and said that P's best interests would be served simply by giving effect to his wishes. That is, I think, part of the overall picture, and an important one at that. But what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done "the right thing" by their will. In my judgment the decision maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered after his death.
45. For these reasons I do not consider that the guidance given by *D (J)* can be directly applied to the structured decision making process required by the 2005 Act, although it contains a good deal of wisdom, and wisdom can always be applied. I must now proceed to follow the structure laid down by the 2005 Act.

Application to the facts

46. [The judge then applied the law to the facts, following the structured decision making process, and directed that a statutory will be executed on behalf of P and the appointment of a deputy].