Mr A v H Ltd as trustee of the G Trust

Jurisdiction:	Jersey
Judge:	Jurats Blampied, J. A. Clyde-Smith OBE., Pitman
Judgment Date:	08 October 2019
Neutral Citation:	[2019] JRC 200
Date:	08 October 2019
Court:	Royal Court

Text

[2019] JRC 200

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith OBE., **Commissioner, and** Jurats Blampied **and** Pitman

In the Matter of the Capacity and Self-Determination (Jersey) Law 2016

Between
Mr A
Representor
and
H Limited as trustee of the G Trust
First Respondent

and

C
Second Respondent

and

D
Third Respondent

and

E
Fourth Respondent

and

P Foundation
Fifth Respondent

and

E Limited
Sixth Respondent

Advocate J Speck **for the Representor**

Authorities

Capacity and Self-Determination (Jersey) Law 2016

Mental Capacity Act 2005

2005 Mental Capacity Act

PBC v JMA [2018] EWCOP 19

In the matter of P [2019] JRC 002

NHS Trust v MB and another [2006] EWHC 507 (Fam)

Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67

In the matter of P [2009] EWHC 163 (Ch)

Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67

Morgan J in *Re G* (TJ) [2010] EWHC 3005 (Cop)

Watt v ABC and the Official Solicitor [2016] EWHC 2532 (Cop)

KGS v JDS [2012] EWCOP 302

Watt v ABC and another [2016] EWCOP 2532

PBC v JMA and others [2018] EWCOP 19

Ross v A [2015] EWCOP 46

Capacity — representation of Mr A to make 2 gifts out of the assets of B.

THE COMMISSIONER:

1 The Court sat on 27 th August, 2019, to hear an application by the representor ("Mr A") for authority under the Capacity and Self-Determination (Jersey) Law 2016 ("the 2016 Capacity Law") to make two substantial gifts out of the assets of B to or for the benefit of B's children and remoter issue.

Background

2 B, who is aged 89 and a widower, suffers from advanced dementia and is now completely incapacitated both mentally and physically. The report of the specialist geriatrician shows that in 2008 he had mild features of dementia, which were not limiting. By 2009, he had become moderately impaired and at a review carried out in January 2011, he was found to be severely impaired and incapable of managing his affairs. By 2012, his language function had declined, and he is now unable to communicate. His condition is irreversible. B is a dual citizen of Country 1 and Country 2 and now lives in Country 2, where he receives 24 hour medical care.

3 B had established, *inter alia*, a major property business in Country 1 known as ("X Co"), which was split into two in 2010, and now comprises ("Y Co") and ("Z Co"), which are listed in both Country 2 and Country 1. These companies are considered to be the "core assets" of the family. B has a long history of generous charitable donations in both Country 2 and Country 1.

4 On 6 th July, 2009, B appointed Mr A, together with another, as an attorney of his property and financial affairs under a Lasting Power of Attorney drawn up under English law, which was registered by the England office of the Public Guardian on 4 th September, 2009. The co-appointee retired, and Mr A is now the sole attorney under the Lasting Power of Attorney which was registered before this Court on 13 th June, 2019. At the same time as executing the Lasting Power of Attorney, B signed a Letter of Guidance asking the attorneys that in exercising their authority, they should consult with his children in respect of any decision which related to the core assets. B also has a health and welfare Lasting Power of Attorney appointing his three children as his attorneys.

5 In his supporting affidavit of 31 st July, 2019, Mr A explains that he has known B for 17 years as his financial adviser. Mr A is a partner in the family advisory business of the R Group in Country 1, an international family office and wealth advisory business.

Wills and Estate Planning

6 Whilst he still had mental capacity, B made provision for his three children (the second to fourth respondents all of whom are adult) and their issue by making various outright gifts and gifts into discretionary trusts over a number of years, which included shares in X Co. He was keen for the family interest and influence in the core assets to be retained and to this end, the N Council was created in June 2009, the purpose of which was to establish a mechanism through which the family would be able to represent their collective interests in the core assets. The N Council comprised B and one member of each of the family lines of his three children.

7 On 19 th October, 2007, B executed an English law will governing his property outside of Country 2 (amended by codicil dated 23 rd June 2009) and on 30 th June, 2009, he executed a Country 2 law will governing his property not dealt with by the English law will.

8 The residuary beneficiary of his estate outside Country 2 is the P Foundation and the residuary beneficiary of his Country 2 estate is the Q Foundation; both established under English law 2007, and both registered as charities in Country 1 and Country 2. The P Foundation has as its main objects the advancement of medical research in Country 1, the relief of poverty among the public in Country 1 and the promotion of the arts in Country 1, as well as any other purposes which are charitable under the laws of England and Wales. The Q Foundation has the same objects, save that the beneficiaries are Country 2 entities rather than Country 1 entities. Their main objects are consistent with B's philanthropy both in Country 1 and Country 2. We will refer to them together as “the Foundations”. The Foundations are intended to be family legacy charitable vehicles following B's passing and they do not yet have significant assets or activity, other than having made small donations in order to maintain their charitable status.

B's financial position

9 B currently has assets of some £159 million, of which some £26 million is in Country 2, and the balance outside Country 2. Comprised within this are cash resources of some £10 million in Country 2 and £55 million outside Country 2 and shares in Y Co and Z Co. His annual net income after tax is approximately £2.5 million, and his annual expenditure, including all of his medical expenses, is approximately £780,000. Subject to bequests, his net assets will pass on his death to the Foundations.

Re-balancing

10 Mr A explained in his affidavit how the family assets had declined significantly since 2006, a decline which had a disproportionate effect upon the assets held by or for the benefit of the children, as compared to what the Foundations will receive on B's death, and he proposed that gifts be made out of B's personal assets to or for the benefit of his children, to help address that imbalance. He stressed that this was his proposal and not that of the children.

11 R Group plays a central role in the financial affairs of the family, and accordingly, Mr A was in a position to prepare a high level analysis of the consolidated family interests illustrating the decline in the family wealth and its effect upon the children and the Foundations respectively. This showed that as at December 2006, the consolidated family wealth was £943 million. As at February 2018, this had declined to £625 million, of which £455 million (73% of the total) was held to or for the benefit of the children and their issue and £170 million (27% of the total), essentially B's personal assets, was earmarked for the Foundations pursuant to his two wills.

12 Following the need for regulatory purposes to separate out the interests of the three children in Y Co and Z Co, it was no longer possible for the R Group to produce consolidated figures for the family wealth in 2019, but he said there would have been a further decline, illustrated by the personal assets of B now being £159 million.

13 Mr A produced more refined tables showing that whilst the current family and ultimate charitable elements had both fallen in absolute terms, the ultimate charitable element had fallen by much less in relative terms than the family element.

The proposed gifts

14 B holds all the shares in a Jersey incorporated company, E Limited which, in turn, holds shares in Y Co and Z Co and cash valued at 30 th June, 2019, at approximately £37.1 million. It was proposed that these shares should be gifted to a newly established discretionary trust, the F Trust, for the benefit of B's children and remoter issue.

15 The second gift concerns the G Trust, which requires further background to place it in context. It was established by B on 14 th October, 2002, under Jersey law, with the first Respondent H Limited as the trustee. H Limited is part of the R Group group of companies. B is entitled to the income of the trust fund during his lifetime, and as originally constituted, on his death the trust fund was to be held for the benefit of such of his grandchildren who attained the age of 25 years and if more than one in equal shares. A number of variations followed, but relevant for these purposes was a revocation and appointment executed on 18 th February, 2008, under which, after B's death, the trust fund was to be paid to the P Foundation. The date of this change indicates to the Court that this formed part of B's estate

planning at a time when he still had capacity.

16 On 11 th June, 2019, shortly before the hearing, the G Trust was further varied by H Limited so that on the death of B, the trust fund will now be held upon discretionary trusts for his children and remoter issue.

17 From what the Court has been told about the financial history of the G Trust, it would seem that at some point, H Limited in its capacity as trustee took on a substantial borrowing from UBS for the purpose of acquiring shares in one or both of the core assets and on 23 rd February, 2015, Mr A, in his capacity as attorney under the Lasting Power of Attorney, lent H Limited £30 million from the assets of B to enable that borrowing to be repaid. The loan from B is interest free and repayable on 12 months' notice. The trust currently has assets of approximately £14.8 million, so that if that loan were called in, the value of the trust would fall to nil. In other words and using non-technical language, the trust is insolvent on the balance sheet test. Mr A proposes that the loan be transferred to the F Trust, so that the children and remoter issue can benefit from those assets of some £14.8 million.

18 The current value of both proposed gifts from B to or for the benefit of his children and remoter issue when combined totals approximately £47.9 million. The proposed gifts will also give rise to an immediate Country 2 donations tax liability of approximately £12 million, and so the total cost of the proposed gifts amounts to approximately £60 million. A gift subject to Country 2's donations tax made during B's lifetime will reduce the overall tax payable on his death, although it is anticipated there will be a full exemption from Country 2 estate tax and capital gains tax on assets which will pass to the Foundations.

19 Mr A also produced an opinion from a Country 2 Attorney confirming that no forced heirship rules operate in Country 2 and that there is therefore no restriction upon those gifts being made.

Jurisdiction

20 B is resident in Country 2, and the assets which are the subject of the proposed gifts are situated in Jersey in that:-

(i) E Limited is a Jersey incorporated company and

(ii) The agreement by which the loan of £30 million to the G Trust was made by B is governed by Jersey law, the courts of which have non-exclusive jurisdiction. The G Trust is itself governed by Jersey law, and although H Limited is incorporated in the BVI, the trust is administered here.

21 The question that arises is why this application is being brought before this Court, and not

either the Country 2 courts or the Country 1 courts.

22 Country 2 does not have the equivalent of a Lasting Power of Attorney, but although it might be possible for an application to be made in Country 2 for the appointment of a curator, the opinion obtained by Mr A from the Country 2 Attorney indicated that there were a number of real practical difficulties and deficiencies in doing so, and in any event, any appointment made would then have to be recognised before the Jersey court. Given the age and poor health of B, Mr A did not consider this a practical way forward.

23 Whilst the Lasting Power of Attorney was drawn up under English law and is registered there, Mr Justin Holmes, English counsel, explained in his opinion of 31 st July, 2019, that the jurisdiction of the English Court of Protection is governed by the Mental Capacity Act 2005 ("the 2005 Mental Capacity Act") which provides in substance that the English court can only exercise its functions in relation to:-

(i) an adult habitually resident in England and Wales; or

(ii) an adult's property in England and Wales.

24 B is not habitually resident in England and Wales and the assets which are the subject of the application are not situated in England and Wales. Accordingly, in his opinion, the English Court of Protection would not have jurisdiction to entertain this application.

25 The 2016 Capacity Law, which is very much modelled on the 2005 Mental Capacity Act, does not have any equivalent provision dealing with the jurisdiction of this Court, but Article 13(2) provides as follows:-

> ***"(2) Where a power of attorney is first registered (by 'original registration') in a jurisdiction of the British Islands other than Jersey, it may have effect in Jersey –***
>
> > ***(a) If such evidence as to the original registration as the States may by Regulations require is provided to the Judicial Greffe; and***
> >
> > ***(b) For so long as the original registration validly subsists*** ,
>
> ***as though it were a lasting power of attorney created and registered in Jersey under paragraph (1), and for this purpose the Judicial Greffe shall register and deal with such a power of attorney in accordance with Part 2 of the Schedule subject to such modifications as the States may by Regulations make to the Schedule for this purpose."***

26 The Lasting Power of Attorney executed by B was first registered in Country 1 (where it is still registered), and it has been registered here under Article 13(2). It therefore takes effect

in this jurisdiction. Furthermore, the assets which are the subject of the application are situated in Jersey, and we accept, therefore that the Court has jurisdiction to entertain it.

The applicable Law

27 There are no restrictions upon Mr A's powers contained within the Lasting Power of Attorney itself, and so it takes effect here as if created here, and is subject, therefore, to the provisions of the 2016 Capacity Law.

28 Under Article 15(1) and (2) of the 2016 Capacity Law there are restrictions upon the authority that may be conferred under a Lasting Power of Attorney (referred to as an LPA) for an attorney (referred to as A) to make gifts out of the property of the person who lacks capacity (referred to as P):-

> ***"15 Scope of LPA: property and affairs***
>
> ***(1) he authority conferred by a property and affairs LPA may include –***
>
> ***(a) to the extent provided by paragraph (2) and not otherwise, a right to dispose of P's property by making gifts; and***
>
> ***(b) power to do, or secure the doing of, anything necessary or expedient –***
>
> ***(i) for the maintenance or other benefit of P, P's family or dependents, and***
>
> ***(ii) for the payment of P's debts, whether legally enforceable or not*** .
>
> ***(2) Subject to any conditions or restrictions in the instrument, A may make gifts of P's property –***
>
> ***(a) on customary occasions to persons (including A) who are related to or connected with P; and***
>
> ***(b) to any charity to which P made gifts or might have been expected to make gifts*** ,
>
> ***if the value of each such gift is not unreasonable having regard to all the circumstances and in particular to the size of P's estate*** .
>
> ***(3) For the purposes of paragraph (2), a 'customary occasion' means –***
>
> ***(a) the occasion or anniversary of a birth or marriage or***

formation of a civil partnership; and

(b) any other occasion on which presents are customarily given within families or among friends and associates."

29 Advocate Speck agreed that the authority given to Mr A under the Lasting Power of Attorney does not extend to the gifts he proposes, none of which come within the exceptions contained in Article 15(2).

30 Article 16 sets out the general scope of the authority that may be conferred by a Lasting Power of Attorney, an authority which pursuant to Article 15(1) cannot include the making of gifts beyond those permitted under Article 15(2), and is in these terms:-

"16 Scope of LPA: general

(1) A person on whom authority is conferred by lasting power of attorney is to be treated as P's agent in relation to anything done in accordance with the instrument and in the exercise of that authority .

(2) In the absence of any condition or provision to the contrary in the instrument, a person on whom authority is conferred by lasting power of attorney –

(a) may, in the exercise of that power, do, or secure the doing of, anything which appears to the person to be necessary or expedient to be done to be in P's best interests;

(b) may be reimbursed (subject to such limit as may be prescribed, whether by reference to a proportion of P's property or to an amount or otherwise) out of P's property for reasonable expenses in the discharge of functions when acting in the exercise of that power."

31 However, Article 20(3) permits the Court to give such authority:-

"(3) The Court may give any consent or authorization to act which A would otherwise have had to obtain from P if P had capacity to give it, and in particular may authorize the making of gifts which are not permitted by Article 16."

32 It might be thought that the reference in Article 20(3) to Article 16 might better refer to Article 15 which contains the express restriction on the making of gifts, but the restriction is clearly implied within Article 16 and so we conclude that:-

(i) Subject to any further restrictions in the instrument, an attorney under a Lasting

Power of Attorney has no authority to make gifts beyond those permitted by Article 15(2);

(ii) Under Article 20(3) the Court can authorise the attorney to make gifts not permitted by Article 15(2).

33 The 2005 Mental Capacity Act has the same restrictions upon the making of gifts by an attorney (section 12) but there is no equivalent to Article 20(3) under the section dealing with Lasting Powers of Attorney. It would seem that under English law if an attorney wishes to make a gift beyond those permitted, an application is made to the English Court of Protection under sections 16 and 18 for the English court to make the decision (see *PBC v JMA* [2018] EWCOP 19 at paragraph 42). Similarly in this jurisdiction, and quite separate from Article 20(3), an attorney under a Lasting Power of Attorney can always apply for a decision of the Court pursuant to Article 24(2) and 25(1)(i). The test to be applied by the Court is the same.

34 Turning to the role of the Court in an application under Article 20(3), it is not being asked to bless or approve a decision of the attorney to make a gift beyond that permitted by Article 15. This is not analogous to the position where a trustee, who has the requisite power, seeks the Court's blessing as to its exercise. In that situation, the Court's role is limited to considerations of rationality. Under the 2016 Capacity Law the attorney does not have the authority to make gifts beyond those permitted by Article 15 and it is therefore for the Court to decide whether the making of the proposed gifts is in P's best interests.

35 Under Article 3(1)(c) of the 2016 Capacity Law any act done or decision made on behalf of a person lacking capacity must be done or made in the person's best interests. Under Article 1(1), ***"best interests"*** is to be interpreted in accordance with Article 6, which is in these terms:-

> ***"6 Best interests***
>
> ***(1) For the purposes of this Law, a determination as to what is in the best interests of a person lacking capacity –***
>
> ***(a) must not be made merely on the basis of –***
>
> ***(i) the person's age or appearance, or***
>
> ***(ii) any other aspect of his or her condition or behaviour;***
>
> ***(b) must not be made unless, so far as reasonably practicable, the person lacking capacity has been permitted, encouraged and supported to participate as fully as possible in any act done for or any decision affecting that person; and***
>
> ***(c) must consider all relevant circumstances, including in particular the matters set out in paragraphs (2) to (4)*** .

(2) Such a determination must include consideration of whether it is likely that the person lacking capacity will at some time have capacity in relation to the matter in question, and if so, when that is likely to be .

(3) Such a determination must include consideration, so far as the following matters are reasonably ascertainable, of –

(a) the past and present wishes and feelings of the person lacking capacity as to the matter in question (including in particular any advance decision to refuse treatment or other written statement made by that person at a time when that person did not lack capacity);

(b) the beliefs and values of that person which would be likely to influence that person's decision if that person did not lack capacity;

(c) any other factors which that person would be likely to consider if that person did not lack capacity .

(4) Such a determination must take into account, if it is practicable and appropriate to consult the following persons, the views of –

(a) anyone named by the person lacking capacity as someone to be consulted on the matter in question or matters of that kind;

(b) anyone engaged in caring for that person or interested in that person's welfare;

(c) any person on whom authority is conferred under a lasting power of attorney granted by that person and applicable to the matter in question; and

(d) any delegate appointed by the Court under Part 4.”

36 A number of immediate points can be made in the context of this case:-

(i) It is not possible for B to participate in any way with the decision.

(ii) It is not likely that B will ever regain capacity.

(iii) Whilst B executed a Letter of Guidance, it was limited to decisions relating to the core assets.

(iv) The Court must take into account the views of Mr A as the attorney appointed

under the Lasting Power of Attorney.

37 The Court has considered ***"best interests"*** in the recent case of *In the matter of P* [2019] JRC 002, which was concerned with an application for authority to execute a will on behalf of P, pursuant to Article 30 of the 2016 Capacity Law. As the Court noted at paragraph 17, the provisions of the 2016 Capacity Law are very similar to the 2005 Mental Capacity Act and accordingly, the approach taken by the English courts is helpful by way of guidance. We extract the following principles from the English case law cited to us:-

(i) The concept of ***"best interests"*** is a broad one. As Holman J said in *NHS Trust v MB and another* [2006] EWHC 507 (Fam) at paragraph 16(v)):-

"Best interests are used in the widest sense and include every kind of consideration capable of impacting on the decision."

(ii) A holistic approach is to be taken to the application of the best interests test as made clear by the Supreme Court in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 at paragraph 26, but a holistic approach to determining ***"best interests"*** is not a ***"substituted judgment"*** test. As Lewison J said *In the matter of P* [2009] EWHC 163 (Ch):-

"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 enquiring 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 judgment' (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 1963 about the making of settlements or wills can no longer be directly applied to a decision being made under the 2005 Act …"

(iii) Whilst the test is not a substituted judgment, it does require the Court to consider P's preferences and likely preferences (see *Aintree v James* at paragraph 24).

(iv) Sir William Bailhache referred in *Re P* to this extract from the judgment of Morgan J in *Re G* (TJ) [2010] EWHC 3005 (Cop):-

"The best interests test involves identifying a number of relevant factors. The actual wishes of P can be a relevant factor; Section 4(6)(a) says so. The beliefs and values which would be likely to influence P's decision, if he had capacity to make the relevant decision, are a relevant factor; Section 4(6)(b) says so. The other factors which P would be likely to consider, if he had the capacity to consider them, are a relevant factor: Section 4(6)(c) says so. Accordingly, the

balance sheet of factors which P would draw up, if he had capacity to make the decision, is a relevant factor for the Court's decision. Further, in most cases, the court will be able to determine what decision it is likely that P would have made, if he had capacity. In such a case, in my judgment P's balance sheet of factors and P's likely decision can be taken into account by the court. This involves an element of substituted judgment being taken into account, together with anything else which is relevant. However it is absolutely clear that the ultimate test for the court is the test of best interests and not the test of substituted judgment. Nonetheless, the substituted judgment can be relevant and is not excluded from consideration. As Hoffmann LJ said in the Bland case, the substituted judgment can be subsumed within the concept of best interests. That appeared to be the view of the Law Commission also (at para 55).”

Sir William Bailhache agreed with these comments, saying this at paragraph 28 of his judgment:-

“28 However, we agree with the comments of Morgan J in Re G, namely that the statutory directions, in our case contained at Article 6(2)-(4) of the 2016 Law – may well have the practical effect that the outcome of the Court's consideration of best interests will not be far away from the outcome of a substituted judgment test. It will not inevitably be so, but in many circumstances this will be the outcome because the past and present wishes and feelings are likely to align themselves with the beliefs and values of that person, which would be likely to influence that person's decision if he or she did not lack capacity.”

(v) As Charles J said in *Watt v ABC and the Official Solicitor* [2016] EWHC 2532 (Cop) at paragraph 75:-

“In short, the weighing or balancing of competing factors is at the heart of decision making under the MCA, and it does not fit with presumptions, starting points or bias that have to be displaced.”

However, as Lush J said in *KGS v JDS* [2012] EWCOP 302 at paragraph 33 “The fact that there are more entries on one side of the balance sheet than on the other is not necessarily conclusive.” There may be a factor of magnetic importance which will be decisive.

(vi) As Morgan J said in *Re GT* at para 35:-

“.. the word ‘interests’ in the phrase ‘best interests’ is not confined to matters of self-interest, or, putting it another way, a court could conclude in an appropriate case that it is in the best interests of P for P to act altruistically.”

(vii) As Charles J said in *Watt v ABC and another* [2016] EWCOP 2532 at paragraph 71:-

“In my view, an approach based on a presumption, where a starting point must be displaced, as to the result that is in P's best interests runs counter to the underlying rationale and purpose of the [Mental Capacity Act] and, in particular,

of its decision and fact sensitive approach to the application of its best interest test in all the circumstances of a given case."

(viii) In the context of the gifts, the Court must be satisfied that they will come out of funds which are surplus to the funds which P would properly wish to have available to spend on him or herself for the remainder of his or her days (see In the matter of G(TJ) at paragraph 22). As Hilda J put it in *PBC v JMA* at paragraph 64:-

"Affordability is a 'necessary but not sufficient' consideration and the future needs of the protected person must be considered on a cautious basis and the level of gifting not such as may put in doubt the donor's ability to meet those needs… [Affordability] in itself is not however a sufficient basis to conclude that the making of the proposed gifts would be in the protected person's best interests. There is no expectation on people who retain capacity to make gifts of their surplus wealth during their lifetime, and nor should there be any expectation that it is in the best interests of the persons who lack capacity to do so."

(ix) Ultimately, the Court is seeking to make the choice that is right for P as an individual human being in his current situation (see *Aintree v James* at paragraph 45).

38 There have been a number of English cases involving gifts which give some illustration of the approach of the English courts:-

(i) In *PBC v JMA and others* [2018] EWCOP 19, the attorney under a Lasting Power of Attorney was given authority to make gifts exceeding £7 million from the estate of his mother for the purpose of reducing Inheritance Tax liabilities on her death. The affordability test had been met, and the mother's own capacitous decisions showed that she wished in the past to make gifts to her son and charities and wished to benefit them in due course. Furthermore, it was clear that she was open to tax planning measures.

(ii) By way of contrast, in the case of *KGS v JDS* referred to above, proposed gifts by a young man, who had been awarded damages for clinical negligence, to his parents to reduce Inheritance Tax they would pay on his death was not considered to be in his best interests. As Lush J said at paragraph 34:-

"…. In most cases where an individual's assets derive exclusively from a damages award for personal injury, when determining whether making an inter vivos gift is in his or her best interests, the factor of magnetic importance is likely to be the purpose for which the compensation was awarded and the assumptions upon which it was based."

(iii) In *Ross v A* [2015] EWCOP 46 orders authorising a professional deputy (equivalent to a delegate under the 2016 Capacity Law) to apply £17,000 a year from a damages award for clinical negligence of £5 million towards the payment of a brother's school fees was approved. Reliance in that case was based upon the views

of the deputy, who knew the family and their circumstances better than anyone else, and in whose opinion, it was necessary to promote the stability and harmony in the family and their ability to care for A in circumstances in which many families would have buckled under the pressure.

Evidence of B's wishes and feelings

39 In his affidavit, Mr A gives evidence as to what B said to him in the past when he had capacity as follows:-

> *"7.2 I remember him telling me prior to doing his 2007 and 2009 wills that he considered that he had provided sufficiently for his children and that from then onwards he was going to concentrate on adding to his philanthropic giving."*
>
> *"8.1 Although B was satisfied that he had made adequate provision for his children and their issue (directly and in respect of assets held in trusts for their benefit) during his lifetime and at the time that he signed the English law will in 2007 and the Country 2 will in 2009,… it was always his intention that the two Foundations he established in 2007 would receive the residue of his estate on his death (and nothing before then) provided that his family was suitably provided for."*

40 This decision to concentrate on his philanthropic giving is very much supported by what B actually did in terms of estate planning, namely:-

> (i) In executing his English law will and Country 2 will, in which, (barring bequests) the rest or residue was left to the Foundations, and not to the children.
>
> (ii) The G Trust was varied, so that on his death, the trust fund went to the P Foundation.

Views and beliefs of Mr A

41 The proposal to rebalance the interests of the children and the Foundations is that of Mr A alone, but it is his belief that if B had capacity today, that is what he would do. Mr A expresses his belief in this way:-

> *"7.3 I do, however, believe that B would – if he had capacity – now think that such a rebalancing is appropriate and fair – in my experience he did always seek fairness, for example, as between what he had provided for each of his children's lines.* Since B lost his capacity to manage his property and affairs, the market value of Y Co and Z Co has decreased very significantly, such that I firmly believe that B would wish to make additional provision for his children and their issue if he still had mental capacity and was aware of the decline in value of the family's wealth."

> *"8.1 I firmly believe that, in light of the significant decline in the value of the provision made and the change in the financial circumstances of the underlying businesses which make up a large portion of the family wealth, B would, if he were able to do so, make additional provision for his family now."*

42 Mr A makes the point in paragraph 7.3 of his affidavit that it was very much B's wish that the family interest in the core assets should be maintained, and it was the consequence of his great belief in and focus on these core assets that, as it transpired, the family wealth had suffered, calling for some adjustment now. He also makes the point at paragraph 7.2 that what he is proposing is not more generous to the children than would have been the case in the period 2007 – 9.

43 Advocate Speck also produced a letter from Mr J, who was Mr A's predecessor at R Group who agreed that if B was aware of the change in circumstances, he would wish to make additional gifts to the benefit of his family, similar to those proposed by Mr A, in order to rebalance the total amount passing to the family and the amount passing to charity.

Views and beliefs of the children

44 The three children had been convened to Mr A's application, and given a copy of his affidavit and exhibits in support. They all responded briefly in identical terms:-

> *"I am in agreement with the application made by Mr A, and fully supportive of the steps he proposes to take."*

Views of the trustees of the P Foundation

45 The trustees comprise B's daughter D, her husband K, B's son C, Mr A and a Mr L and a Mr M. At the meeting to discuss the application to which the P Foundation had been convened, Mr A and the family members recused themselves because of their conflict of interest, leaving Mr M and Mr L to consider the application. We note that Mr M is a Country 2 lawyer employed within the R Group and that Mr L is an accountant, who carries out work for the family. The financial implications to the P Foundation of these gifts being made is substantial in that it would deplete the amount it could receive under the English law will by some £47.9 million, the gifts being made of Jersey based assets which will fall to devolve to the P Foundation under the English law will. However, in the minutes the trustees stated that the P Foundation had no expectations as to the amount it would receive under the English law will, and agreed that:-

> *"If the Court is prepared to approve the Proposed Gifts to effect the rebalancing of the provision made for the benefit of B's family against the provision made to charity, that the Foundation is not in a position to object to the Proposed Gifts."*

The trustees resolved not to raise any objections in relation to the proposed gifts.

46 The Court noted that K was one of the original trustees in 2007 when the P Foundation was created. He was convened to the application as a trustee and in his response of the 7th August, 2019, having made clear his conflict of interest and recusal from the meeting of the trustees, he stated that he had a deep and full understanding of B's philosophy and approach to charity and philanthropy, and understood his relationship with his children and approach to their financial security and wellbeing. Having been fundamentally immersed in his philanthropic thinking, as he put it, he was in agreement with and supportive of the application.

47 The Court had been told that there was no issue as to the financial security and wellbeing of the children, and it was not clear to the Court why, in his view, it would have been B's wish to make such a substantial reduction in the amounts that would go on his death to the P Foundation.

Decision

48 The proposed gifts comfortably pass the affordability test in that after they have been made and the tax of £12 million paid out of his cash resources, B will be still left with very substantial cash resources, which on the most cautious basis are more than sufficient to meet his conceivable needs for the rest of his life.

49 However, the Court had a number of concerns with the proposed gifts:-

(i) The chart showing the historic share price of X Co and Y Co and Z Co, showed that the dramatic fall in value took place during the financial crisis in 2008. The shares in X Co reached a peak of over 900p in December 2006, and fell to just under 200p by December 2008, a fall of nearly 80%. The share price recovered to between 300p and 400p until the split in 2010. Thereafter, the share price of Y Co rose steadily from 100p to over 450p in November 2015 and is currently down to just over 200p. The Z Co share price was steady between 300p and 400p until June 2016 and it is now reduced to around 100p if not lower. However, it is clear that the family and their associated trusts have been steadily reducing the shareholding in Z Co, so that it now seems to be a small proportion compared to the shares in Y Co. We were told that the value of the wider family's total interest in Z Co is now £11 million and as against £100 million plus in Y Co.

The significance of this to the Court is that the major loss in value of the core assets took place well before B lost his capacity, and yet, no rebalancing exercise was undertaken by him.

(ii) Mr A's overview compared the position between December 2006 and February 2018/19.

The Court asked for an overview as to the position towards the end of 2010, when B was assessed as no longer having capacity, and that exercise put the consolidated family wealth at £600 million, split as to 73% (£438 million) to the family and their associated trusts and 27% (£162 million) representing B's personal assets earmarked for charity under his wills, the same percentages as applied at February 2018. The Court acknowledges that B's decline would have been gradual, but even so, the major loss to the family wealth took place in 2008, before and during the time that his estate planning was put into place by him. It is the case that having the larger share, the family would suffer proportionately more from the decline in the value of the core assets, but it would seem that B would have been aware of this before he lost his capacity and took no action to rebalance the interests of the family and the Foundations under his estate planning arrangements.

(iii) B has an extensive history of very substantial charitable donations. We will not detail the philanthropic work that he has done, but by way of illustration, the geriatrician who assessed his capacity works in a hospital that bears B's name. With that extensive history of charitable work by way of background, we then take into account:-

> (a) his statement to Mr A prior to executing his 2007 and 2009 wills that he had provided sufficiently for his children and that from then onwards, he was going to concentrate on adding to his philanthropic giving;
>
> (b) the estate planning arrangements that he put in place at a time when he would have been aware of the substantial fall in the value of the core assets.

This does not support the suggestion that he would regard the current position as unfair.

(iv) The Court noted the lack of any assistance from the children as to the wishes and feelings of B. Mr A confirmed that no rift had taken place between the children and their father. Advocate Speck rightly pointed out that they have a conflict of interest as the potential recipients of the proposed gifts which the Court understands. However, two of his sons were until recently on the boards of Y Co and Z Co, and his daughter and her husband are trustees of the P Foundation. Notwithstanding their conflict, their input as to their father's wishes and feelings would have been helpful.

(v) There was no suggestion from the children that they were not adequately provided for and the figures produced by Mr A showed that they all enjoyed considerable wealth. There was no suggestion of any material change in their circumstances between 2007/9, when the estate planning was put in place, and today. Apart from the formal notification of the proceedings communicated to them by Advocate Speck by letters dated 5 th August, 2019, we were not shown any communications that may have taken place between them and Mr A in relation to the making of the proposed gifts. It would be surprising if there were no such communications.

(vi) B had procured the variation of the G Trust so that the P Foundation would benefit from the trust fund after his death, but we were given no explanation as to why the

trust was varied in June 2019, shortly before this application, turning it into a vehicle by which the children and remoter issue would benefit from the loan made by B being written off. It would seem probable that the children would have been involved in communications with H Limited over this variation, but any such communications were not disclosed to us.

(vii) Whilst there are examples under English case law of gifts being made for the purpose of reducing Inheritance Tax, this proposal would actually incur a tax liability of £12 million. We were told that B was a person who liked to minimise tax, but would pay tax if it was necessary.

50 In terms of a balance sheet of factors, those in favour of the proposed gifts being made seemed to us to be as follows:-

(i) The proposed gifts are affordable.

(ii) The proposed gifts are for the benefit of B's own children and remoter issue.

(iii) The proposed gifts will compensate the children and remoter issue for the fact that B's personal estate (which will pass to the Foundations) has not suffered to the same extent from the fall in the value of the core assets.

(iv) It was Mr A's view that it was fair for the proposed gifts to be made.

51 Those factors against the making of the proposed gifts seemed to the Court to be as follows:-

(i) It was B's view, expressed when he had capacity that he had adequately provided for his children and remoter issue and his wish was to concentrate on adding to his philanthropic giving, wishes put into effect through his estate planning arrangements.

(ii) The proposed gifts would give rise to an immediate tax liability of £12 million.

(iii) The proposed gifts would lead to a substantial reduction in the amounts being added to his philanthropic giving. The amounts devolving upon the P Foundation would be reduced by some £47.9 million, and there would be a further reduction of £12 million in the assets by which the P or Q Foundation would benefit, depending on whether the tax payable on the proposed gifts were paid out of his Country 2 assets (depleting amounts devolving upon the Q Foundation) or out of his non Country 2 assets (depleting the amounts which would devolve upon the P Foundation).

(iv) It was accepted that the children had been adequately provided for and there had been no adverse change in their circumstances.

(v) The major loss in the value of the core assets took place in 2008, during the financial crash and before B lost capacity and yet he effected no re-balancing

exercise in favour of his children.

(vi) There had been no request by the children for the making of these substantial gifts to them or for their benefit.

(vii) Whilst the Court did not have an overview of the consolidated family wealth in 2009, when he was moderately impaired by dementia and engaged in estate planning, it would be fair to assume that his personal assets (and the amount therefore earmarked for charity) were worth at least £160 million (the value of his personal estate today) and so the proposed gifts constitute a reduction in the assets going to charity of at least one third, a very major change in what he would have anticipated.

(viii) The proposed gifts are based on a percentage calculation at a certain point in time, but that percentage may fluctuate and indeed the value of the core assets may go up again.

52 Referring back to Article 6 of the 2016 Capacity Law and the considerations we have to take into account, we have addressed the wishes and feelings of B (Article 6(3)(a)) and we are not aware that there is any person whose beliefs and values would have influenced the decision under consideration (Article 6(3)(b)). As to other factors which B would be likely to consider if he did not lack capacity (Article 6(3)(c)), we have considered those in the manner set out above and to the extent that the evidence permitted us to do so. We have taken into account the views of Mr A (Article 6(4)(c)). Having done so, and applying the principles set out above, we find the magnetic factor of importance to be his wish to provide for charity through the careful estate planning arrangements he put in place at a time when he had capacity and before the fall in the value of the core assets, a fall which did not lead him to seek any kind of rebalancing in favour of the children.

53 Whether effected by way of gift out of his assets during his lifetime (as here) or by a variation to his wills, what is proposed constitutes a major change to the estate planning he has put in place, when there has been no adverse change in the circumstances of his family who remain well provided for. We are not, therefore, persuaded that the proposed gifts are in his best interests, and decline to give Mr A authority to make them.