**IMPORTANT NOTICE**

**This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.**

Case No: 12515008

**Neutral Citation Number: [2015] EWCOP 49**

**COURT OF PROTECTION**

**MENTAL CAPACITY ACT 2005**

**IN THE MATTER OF FT**

First Avenue House
42-49 High Holborn
London WC1V 6NP

Date: 29 July 2015

**Before:**

**SENIOR JUDGE LUSH**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | | |
|---|---|---|
| | **DC, TT and ST** | **Applicants** |
| | **- and -** | |
| | **MA and PB** | **Respondents** |

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**The applicants neither attended nor were represented**
**Damian Stuart instructed by Quality Solicitors Talbots for the respondents**

Hearing date: 24 July 2015

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# JUDGMENT**Senior Judge Lush:**

1. This is an application for reconsideration of an order made by an authorised court

officer appointing two of FT's daughters as his deputies for property and affairs.

The background

2. FT was born on 28 September 1932.

3. He formerly lived in Hook, Hampshire, but since March 2015 he has been a resident in a care home in Worcestershire. He is self-funding and the fees are about £1,800 a month.

4. He used to run an electrical engineering and power tools business in Basingstoke, Hampshire, which ceased trading in December 2013.

5. His assets amount to just under £700,000 and consist of:
   (a) the net proceeds of sale of his house in Hook, which was sold on 1 May 2015 for £300,000;
   (b) his shop premises, which are worth roughly £200,000;
   (c) the flat above his shop, which is worth about £190,000; and
   (d) approximately £10,000 in savings.

6. FT married twice. He and his first wife divorced in about 1975 and his second wife, Sheelah, died in 1996.

7. He has five children, namely his:
   (a) elder son, TT, who is 59, lives in a village near Basingstoke and used to work in FT's electrical engineering business;
   (b) eldest daughter, MA, who is 58, lives in Kidderminster, Worcestershire, and is a self-employed gardener;
   (c) middle daughter, PB, who is 56, lives in Kidderminster and is an office administrator;
   (d) younger son, ST, who is 55 and lives in the flat above FT's business premises in Basingstoke; and
   (e) youngest daughter, DC, who is 53 and also lives in Basingstoke.

8. FT has had dementia since 2012. According Dr V R Badrakalimuthu, a consultant psychiatrist at Parklands Hospital, Basingstoke:

   > "FT has written cheques whilst having no understanding of transactions through his bank account. He lacks capacity to manage his finances and property due to retrograde amnesia and impaired judgment from his dementia. He also has limited insight into his cognitive impairment and lacks capacity regarding health and welfare."

9. On 4 June 2014 MA and PB applied to be appointed as their father's deputies for property and financial affairs. Quality Solicitors Talbots of 30 Church Street,

Kidderminster, acted for them in connection with the application.

10. Contrary to what the applicants suggest in paragraph 12 below, MA and PB never applied to be appointed as personal welfare deputies. Talbots advised them that there was no need for such an appointment.

11. There were no objections to the application and on 2 September 2014 Nigel Davies, an authorised officer of the court, made an order appointing MA and PB jointly and severally to be FT's deputies for property and affairs and required them to obtain and maintain security in the sum of £400,000.

<u>The application</u>

12. On 27 January 2015 FT's youngest daughter, DC, wrote to the court enclosing an appellant's notice (COP 35) in which she wished to appeal the decision. She said:

> "The original Court of Protection which was for three components (i.e. property, affairs and personal welfare) was made in June 2014 by my sisters MA and PB via Talbots Quality Solicitors. All three parties above failed to inform the remaining siblings (three) of the outcome/change of application.
>
> In December 2014 my brothers and I received correspondence from Talbots Quality Solicitors stating proposed sale of [FT's shop premises and the flat above it]. This letter was meant to contain the Court of Protection order but it was not attached.
>
> We all obtained a copy via email from the solicitor on the 8 January 2015 after contacting him. However it only showed Court of Protection for property and affairs and not for our father's personal welfare.
>
> The Court of Protection is only for two siblings who live a two hour drive away whereas it should be for all siblings as my brothers and I live locally to our father. And the two said siblings are reluctant to pass on any details or information to do with our father's affairs to all concerned."

13. She named TT as the second appellant and ST as the third appellant and asked to court to:

> "Vary the existing Court of Protection so all five siblings are included and change existing Court of Protection to involve personal welfare not just property and affairs."

14. All three appellants filed communications containing various allegations against MA and PB, though they were not sworn witness statements.

FT's move to Worcestershire

15. At the beginning of February 2015 FT was admitted to Basingstoke and North Hampshire Hospital following a seizure or episode of abnormal electrical activity in the brain. A best interests meeting was held on 4 March 2015 and it was decided that he was unable to return to his own home in Hook because the risks were too great, and that ideally what he required was a residential care placement. MA and PB found a suitable care home close to them in Worcestershire and he moved there later in March. MA visits him twice a week and PB visits him two or three times a week. In addition, his sons-in-law and grandchildren visit quite often.

Orders

16. DC used the wrong form when she made her application to the court. She filed an appellant's notice (COP35), which would have been appropriate if the court's decision to appoint MA and PB as FT's deputies had been made at an attended hearing. However, this was originally a non-contentious property and affairs application and the order was made on 2 September 2014 on the papers by an authorised court officer. Paragraph 6 of the order expressly states that "any person who is affected by this order may apply to the court for reconsideration of the order within 21 days of the order being served on them by filing an application notice (COP9) in accordance with Part 10 of the Court of Protection Rules 2007."

17. On 19 May 2015 I made an order stating that "the appellant's notice (COP35) completed by DC on 27 January 2015 shall be treated as an application for reconsideration of the order pursuant to rule 89 of the Court of Protection Rules 2007 rather than an appeal." I also set out a timetable for filing and serving evidence.

18. On 4 June 2015 I made a further order in which I:
    (a) extended the deadline to 26 June for the two deputies to respond to the application;
    (b) invited the applicants to file any further evidence or submissions by 17 July; and
    (c) listed the matter for an attended hearing on Friday 24 July 2015.

Witness statements

19. On 24 June 2015 PB filed a witness statement, in which she said, amongst other things:

    1. I, along with MA, was shocked and astounded that TT, who was employed by our father, continued to take a weekly wage from our father knowing it was actually coming out of his own personal pension due to the fact that

there was no income coming into the business.

2. It took some time to get our father to understand that there were no longer any funds and in December 2013 the company ceased trading. It was at that point that TT walked away from the business and abandoned our father. I therefore understand from information received in communication from ST that TT only visited our father twice yearly, on Father's Day and his birthday.

3. I, alone, have spent the past 7-8 months in constant contact with HMRC to try and clear my father's tax affairs due to TT ignoring all incoming mail from them. I spent over an hour on a fortnightly basis on the phone trying to close down his tax affairs. Fortunately, this has now been dealt with after a long battle with HMRC. However, due to the stubbornness of ST there are still ongoing bills for the shop premises which need to be resolved. A suggestion to 'let' the shop premises was made to him in order to cover these costs, however ST did not want strangers below his flat. This therefore remains an on-going issue which is costing our father money.

4. My sister MA and I had discussed the process of a deputyship with our siblings and, although at first it was suggested that we all apply to become deputies, upon taking my solicitor's advice, it became clear that it would be very complicated on a practical level, because it would either be joint or joint and several, and it simply would not have worked. This was communicated to the applicants and no objection was raised when it was suggested and agreed that my sister MA and I would seek the appointment on the basis that we would consult with our siblings, the applicants, on decisions that needed to be made.

5. Our father insisted that he wanted to remain in his own home and, although we strived to meet his wishes, it was clear he needed care. However, there was insufficient capital to be able to provide a long term carer for him and, as his only other asset was a shop with a flat above in Basingstoke, MA and I felt that the property had to be sold to pay for our father's care. However, my brother, ST, was living, and continues to live, in the flat above the shop premises and my solicitors wrote to ST on 19 December 2014 advising him of our intentions and asking for his proposals to vacate the property. A similar letter was sent to the other applicants, TT and DC, on the same day, so that they were aware of our intentions. I have to assume that the applicants' application to this court has been made as a result of our solicitor's letter of intention regarding the disposal of the property.

6. Since the applicants' witness statements were made, events have moved on, and our father is now in a care home, where he is receiving the appropriate care and treatment. As a result, we have sold his home [in Hook] and the net proceeds of sale are being used to fund his care for the foreseeable future.

7. Finally, so far as the questions regarding expenditure and allocation of funds are concerned, as deputies, we have an obligation to account to the court for all expenditure on an annual basis and so there is no question of any funds being utilised for anything other than our father's benefit.

20. On 24 June 2015 MA also filed a short witness statement confirming that she had read PB's witness statement, and that she agreed with it.

21. None of the applicants filed a response to the respondents' witness statements.

The shop and the flat

22. The dispute between the applicants and the respondents originally flared up on 19 December 2014, when Quality Solicitors Talbots wrote to ST stating that, under the terms of the deputyship order dated 2 September 2014, the deputies were required to take possession and control of their father's property and affairs to meet his needs. The letter went on to say that, in order to be able to fund a care package for their father in his own home, the deputies would have to take possession of the shop and flat and sell them.

23. ST replied to this letter by email on 26 December 2014 saying that he had lived rent-free in the flat since 1994 and that he wasn't prepared to leave.

24. He also said that on 24 March 1994 his father had executed an 'Irrevocable Deed of Gift', which, amongst other things, states that:

> "I FT, the owner, have also agreed with my son ST, the donee, the aforementioned property would be handed over to him when the business known as [business name] has ceased trading in which case he will inherit this property and be able to sell as I promised to him he would always have a roof over his head and would never be homeless as he gave up his own property in exchange for this Irrevocable Deed of Gift."

25. The deputies and their legal advisers have grave doubts about the authenticity of this Irrevocable Deed of Gift. For example:
    (a) FT's home address, as stated in the deed dated 24 March 1994, is the house he bought seventeen months later on 22 August 1995.
    (b) When confronted with this inconvenient revelation, ST's response was that, although 24 March 1994 appears in the deed in three places, the date was wrong and the deed was actually executed by FT in 1996, rather than in 1994.
    (c) There are three witnesses to FT's signature, two of whom are dead, and the third witness was ST himself.
    (d) Why were there three witnesses, when deeds usually require only one witness?

(e) FT's late wife Sheelah was one of the purported witnesses, but her signature on the deed bears no resemblance to her signature on various other documents the deputies have produced.
(f) Her name is spelt incorrectly as 'Sheila' in the 'Irrevocable Deed of Gift' and it is surprising that she didn't correct it.

26. ST then brought proceedings against the deputies under the Family Law Act 1996, claiming that he was the victim of their "bullying and relentless harassment which was beginning to affect his health." He also alleged that they had made repeated telephone calls to him threatening to put him "on the street without access to possessions."

27. In May 2015, after they had sold their father's house in Hook, the deputies attempted to resolve the Family Law Act application by giving an undertaking that they would not seek to sell or take possession of the shop and flat whilst their father had other funds available to provide for his reasonable care needs.

28. At a hearing in the Family Court in Basingstoke on 3 July 2015 the District Judge dismissed ST's application on the basis that it was without merit and ordered him to pay the deputies' costs.

The Court of Protection hearing

29. The hearing to reconsider the authorised court officer's order of 2 September 2014 took place on Friday 24 July 2015 and was attended by MA and PB. Mr Damian Stuart of Fourteen, a specialist family law set at 14 Gray's Inn Square, appeared on their behalf.

30. None of the three applicants attended, despite a chain of emails communications from ST to the court enquiry service at the end of June and at the beginning of July asking whether a McKenzie Friend could accompany him to the hearing.

31. I asked Mr Stuart whether he had a copy of FT's will and he produced a copy of the will made with a firm of solicitors in Basingstoke on 7 July 1998, in which FT:
(a) appointed MA and PB to be his executors;
(b) gave his shop and the flat above it to his two sons in equal shares;
(c) gave his house in Hook (which was sold on 1 May 2015) to his three daughters in equal shares; and
(d) divided his residuary estate in unequal shares among all five of his children.

The respondents' position statement

32. On 23 July 2015 Damian Stuart filed a position statement, which, having set out the facts of this case and the provisions of the Mental Capacity Act 2005, he concluded as follows:

> "The application before the court is the wrong application. However, the position of MA and PB shall be set out as though the court has the correct application before it.
>
> MA and PB applied to be deputies for their father as they were concerned about his welfare and considered that his needs were not being met. In doing so, they followed the advice of the relevant medical professionals.
>
> There can be no reasonable argument that MA and PB have acted in anything other than their father's best interests.
>
> They made the application as their siblings did not seek to,
>
> Those bringing the current application have only sought to do so once it became clear that the properties owned by FT would have to be sold to pay for the care that he requires. He is not entitled to state funded care due to the assets that he holds.
>
> The timing of the current application and the conduct of those bringing it must leave the court concerned about their motivation and whether they would act in partnership with the current deputies to further the best interests of FT.
>
> It is submitted that the application is without merit and should be dismissed."

<u>The law relating to the appointment of a deputy</u>

33. Section 16(2) of the Mental Capacity Act 2005 ('the Act') enables the court to appoint a person, known as a 'deputy', to make decisions on behalf of someone who lacks capacity in relation to those matters.

34. Section 19(4)(b) enables the court to appoint two or more deputies to act jointly and severally.

35. When it decides who to appoint as a deputy or deputies, section 16(3) requires the court to have regard to the provisions of the Act generally, but in particular sections 1 and 4.

36. Section 1(5) provides that any decision made on behalf of a person who lacks capacity must be made in his best interests.

37. Section 4(2) requires the person determining what is in someone's best interests to consider all the relevant circumstances and, in particular, to take the steps set out in the remainder of section 4.

38. Section 4(6)(a) states that the person determining best interests must consider, so far

as is reasonably ascertainable, "the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity)."

Decision

39. I accept Dr Badrakalimuthu's evidence, part of which appeared in paragraph 8 above, and I am satisfied that FT lacks the capacity to make decisions for himself in relation to matters concerning his property and financial affairs because of an impairment of, or a disturbance in the functioning of his mind or brain, namely dementia. I also accept that the appointment of one or more deputies is necessary in order to make ongoing decisions relating to FT's property and affairs.

40. In my judgment, the factor of magnetic importance in this case is that FT named MA and PB to be the executors of his last will, which he made in 1998. It was a relevant written statement made by him when he had capacity, and it suggests that:
    (a) he trusted them to deal with his affairs;
    (b) he felt they would act fairly towards their siblings, but also stand no nonsense from them;
    (c) he thought they would be business-like and actually get things done, whereas their siblings would be less efficient;
    (d) he considered that they could cope competently with all the paperwork involved;
    (e) he chose to appoint them as executors even though he and his other children were in Basingstoke, whereas MA and PB live 114 miles away - a two-hour drive away - in Kidderminster; and
    (f) he had no reason to change his mind about appointing them as his executors before he lost capacity in about 2013.

41. I realise that the deputies' decision to sell the shop and flat in Basingstoke displeased their siblings. However, at that stage, in December 2014, the deputies were contemplating providing a care package for FT in his own home, which would have been expensive. As FT only had about £10,000 in savings, there was really no alternative other than to sell his shop and flat. The circumstances have changed considerably since then. FT's house has been sold; he is living in residential care, and the deputies have reassured ST that they will not seek to sell the shop and flat whilst there are other funds available to pay for FT's care.

42. The deputies have lived up to their father's expectations when he appointed them as the executors of his will. They have managed his property and financial affairs competently and in his best interests. They have found suitable accommodation for his care needs, and they have conducted these proceedings and the proceedings in Basingstoke County Court efficiently and successfully. They have sought professional advice, where appropriate, and will need to bring a further application to the court for an order authorising them to execute a statutory will to redress any unfairness that may have arisen as a result of the ademption of the specific devise in

FT's will when his house was sold.

43. Accordingly, pursuant to rule 89(5), I affirm the order made on 2 September 2014 appointing the respondents jointly and severally to act as FT's deputies for property and affairs.

Costs

44. Quality Solicitors Talbots estimate that their clients' costs in responding the application come to a grand total of £6,422.40.

45. The general rule for costs in property and affairs proceedings is that they are payable by the person to whom the proceedings relate, or charged to his estate: rule 156 of the Court of Protection Rules 2007.

46. However, rule 159 allows the court to depart from rule 156 if the circumstances so justify. This involves having regard to all the circumstances, including:
    (a) the conduct of the parties; and
    (b) whether a party has succeeded on part of his case, even if he has not been wholly successful.

47. I am singularly unimpressed with the applicants' conduct. Having made the application, they failed to follow it through. They didn't file any responses to the deputies' witness statements. They didn't withdraw the application once the deputies had reassured ST that they would not be seeking possession of the flat as long as there were other fees available to fund FT's care. They didn't bother to turn up to the hearing and, of course, their application was unsuccessful. They lit the fuse and ran away. This is a case in which a departure from the general rule is justified.

48. When she made the application to the court, DC claimed an exemption from the court application fee of £400 and the hearing fee of £500 on the basis that her husband is in receipt of Employment and Support Allowance ('ESA'). This suggests that she may not be in a position to pay her share of the costs of the proceedings or, even if she does have some savings, having to contribute towards the costs could cause her financial embarrassment. However, the fact that her husband is in receipt of ESA and that she has claimed an exemption from the fees, doesn't grant her immunity from an order for costs being made against her.

49. I intend to make an order that the costs are to be assessed on the standard basis and paid by DC, ST and TT in equal shares, and that the deputies are authorised to make an interest-free loan to the applicants from KT's funds to pay the costs, and that the loan will be repayable by the applicants from their respective shares of FT's estate on his death.