



Neutral Citation Number: [2019] EWCOP 49

Case No: 12060222

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2019

Before :

THE HONOURABLE MR JUSTICE HAYDEN
THE VICE PRESIDENT OF THE COURT OF PROTECTION

Between :

Richard James Bagguley
- and -
E
(By his litigation friend the Official Solicitor)

Applicant

Respondent

Ms Lucie Wood (instructed by **Baines Bagguley Penhale Solicitors**) for the **Applicant**
Mr David Rees QC (instructed by the **Official Solicitor**) for **E**

Hearing date: 18th October 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
THE HONOURABLE MR JUSTICE HAYDEN

Mr Justice Hayden :

1. On 14th October 2019 I heard an application on behalf of Richard Bagguley, the Property and Affairs Deputy (The Deputy) for E, seeking authority for buccal cell samples to be taken from E for the purposes of DNA testing. The objective is to establish whether or not E is the father of each or any of three individuals D, P and A who are all adults. E is seventy-six years of age suffering from end stage severe dementia.
2. The application, presented by Ms Wood of counsel, was founded largely on the judgment of Sir Nicolas Wall (P) in **LG v DK [2011] EWHC 2453 (COP)**. It is clear from the judgment that the submissions in that case were advanced within very limited parameters and focused, somewhat counter intuitively, on the reach and applicability of the Family Law Act 1969 in the Court of Protection and more generally. Baker LJ also considered a similar application in **DCC v NLH [2019] EWCOP 9**. There the Court authorised the taking of bodily samples from an incapacitous adult to undertake DNA paternity testing. The question of jurisdiction was assumed but not addressed.
3. On 14th October 2019, I was concerned that the facts of the case had not been identified with the basic degree of precision required to take informed decisions. In particular, I was not satisfied that the situation was so urgent that representation of E by the Official Solicitor (OS) could be dispensed with. Nor was I confident that the case law, as it stood, had addressed the question of jurisdiction with sufficient breadth.
4. I gave a short ex tempore judgment on 14th October 2019, one of the objectives of which was to identify the issues and to summarise the available information. I invited Ms Sarah Castle, the Official Solicitor, to consider the transcript of my ex tempore judgment, with a view to enlisting her assistance on both the welfare issues and the jurisdictional framework. Both she and I were unclear as to how urgent the need for the decision was and accordingly, both of us have acted on the basis that time was pressing. Hence, the case returned to me four days later, on my direction. In fact, as more material has become available it is clear that E's life expectancy is greater than first understood. The OS instructed leading counsel, Mr David Rees QC, who has very quickly been able to produce a helpful and erudite summary of the applicable law. Mr Rees's submissions reveal my hesitation in respect of the reach of the Family Law Act 1969 to have been well founded. Ms Wood, who again appears on behalf of the Applicant, accepts and adopts Mr Rees's analysis of the law. She is, in my judgement, correct to do so.

The Jurisdictional Basis to the Application

5. E is suffering from end stage dementia. He is presently on an 'end of life pathway'. He is receiving permanent staff assistance and has significant impairment of multiple cognitive function. The medical evidence is not disputed. E's property and affairs have been protected by a Deputy since the 18th July 2014. I am satisfied, on compelling evidence, that E lacks either the capacity to respond to this application or, more broadly, to participate in litigation. The Court therefore has jurisdiction pursuant to Sec 16 (2) Mental Capacity Act 2005 (MCA) to make a decision on E's behalf as to

whether it is in his best interest for the samples to be taken and subjected to DNA analysis. Sec 16 provides as follows:

‘(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.’

6. Mr Rees recognises that declarations as to P’s best interests and orders facilitating the taking of bodily samples for non-therapeutic purposes fall within the scope of SS15 and 16 MCA 2005. For completeness, S15 provides:

Power to make declarations:

‘(1) The court may make declarations as to (a) whether a person has or lacks capacity to make a decision specified in the declaration; (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration; (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2) “Act” includes an omission and a course of conduct.’

7. In exercising these powers, the Court will have regard to Sec 4 MCA which identifies the relevant criteria as P’s ‘best interests.’ I emphasise the following subsections as particularly significant in the circumstances of this case:

(2) The person making the determination must consider **all the relevant circumstances...** (my emphasis);

(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. (again, my emphasis);

(11) “Relevant circumstances” are those (a) of which the person making the determination is aware, and (b) which it would be reasonable to regard as relevant.

8. This approach was taken by Williams J in: **Secretary of State for Home Department v Skripal [2018] EWCOP 6** and with which I agree. Mr Rees respectfully submits that, to the extent that **LG v DK [2011] EWHC 245 (COP)** might appear to suggest that SS 20 and 21 FLRA 1969 provide the only jurisdictional route to direct scientific testing in respect of a non-capacitous individual, *‘that may not be correct’*. Again, I agree. Indeed, I would go further to suggest that the FLRA

1969 will rarely, if ever, provide the appropriate route for such testing of a non capacitous adult.

9. It perhaps requires to be mentioned that the MCA had only been in force for four years by 2011. The caselaw and the underpinning philosophy of the Act had both to evolve and to be better understood. Argument before Sir Nicholas Wall did not anticipate the flexibility and scope of the MCA. In the cases that followed, the Courts have re-emphasised, with greater clarity, the importance and ambit of the Court's declaratory jurisdiction under Sec 15 MCA 2005 but also its more extensive decision-making powers, conferred by Sec 16 MCA. Sir James Munby (P) made the following, to my mind, highly pertinent observations in **Re: N (An Adult) (Court of Protection: Jurisdiction) [2016] Fam 87**:

'The use of declaratory orders

87. There was a certain amount of debate before us as to the use of declaratory orders in the Court of Protection. This is not the occasion for any definitive pronouncement but three observations are, I think, in order.

*88. First, the still inveterate use of orders in the form of declaratory relief might be thought to be in significant part both anachronistic and inappropriate. It originated at a time when, following the decision of the House of Lords in *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, it was believed that the inherent jurisdiction of the Family Division in relation to incapacitated adults was confined to a jurisdiction to declare something either lawful or unlawful. Even before the Mental Capacity Act 2005 was brought into force, that view of the inherent jurisdiction had been shown to be unduly narrow: see *St Helens Borough Council v PE* [2007] 2 FLR 1115. Moreover, the Court of Protection has, in addition to the declaratory jurisdiction referred to in section 15 of the 2005 Act, the more extensive powers conferred by section 16.*

*89. Secondly, the Court of Protection is a creature of statute, having the powers conferred on it by the 2005 Act. Section 15 is very precise as to the power of the Court of Protection to grant declarations. Section 15(1)(a)(b) empowers the Court of Protection to make declarations that "a person has or lacks capacity" to make certain decisions. Section 15(1)(c) empowers the Court of Protection to make declarations as to "the lawfulness or otherwise of any act done, or yet to be done". Given the very precise terms in which section 15 is drafted, it is not at all clear that the general powers conferred on the Court of Protection by section 47(1) of the 2005 Act extend to the granting of declarations in a form not provided for by section 15. Indeed, the better view is that probably they do not: consider *XCC v AA* [2013] 2 All ER 988, para 48. Moreover, it is to*

*be noted that section 15(1)(c) does not confer any general power to make bare declarations as to best interests; it is very precise in defining the power in terms of declarations as to “lawfulness”. The distinction is important: see the analysis in *St Helens Borough Council v PE* [2007] 2 FLR 1115 , paras 11–18.*

*90. Thirdly, a declaration has no coercive effect and cannot be enforced by committal: see *A v A Health Authority* [2002] Fam 213 , paras 118–128 and most recently *In re M (Incapacitated Adult) (Best Interests Declaration: Potential Contempt)* [2015] Fam 239 .*

10. Sir James Munby concluded by identifying the desirability of using Sec 16 where issues of non-compliance or interference may arise. This requires reiteration:

91. All in all, it might be thought that, unless the desired order clearly falls within the ambit of section 15 of the Mental Capacity Act 2005 , orders are better framed in terms of relief under section 16 and that, if non-compliance or interference with the arrangements put in place by the Court of Protection is thought to be a risk, that risk should be met by extracting appropriate undertakings or, if suitable undertakings are not forthcoming, granting an injunction.’

11. The Supreme Court explicitly endorses the correctness of this approach in **NVA Clinical Commissioning Group and Others [2017] UKSC 22**, per Baroness Hale:

26. In the Court of Appeal in this case, Sir James Munby P pointed out that “the still inveterate use of orders in the form of declaratory relief might be thought to be in significant part both anachronistic and inappropriate”: [2016] Fam 87, para 88. *The scope of the declarations which may be made by the Court of Protection under section 15 may be narrower than the scope of those which may be made in the High Court: see XCC v AA [2013] 2 All ER 988 . But the Court of Protection has the much wider powers of making decisions and appointing deputies under section 16 : para 88. And declarations have no coercive effect: para 90. “All in all”, he concluded “it might be thought that, unless the desired order clearly falls within the ambit of section 15 ... orders are better framed in terms of relief under section 16 ”: para 91. With respect, this is a view that I share.*

12. All this establishes clear jurisdiction for this application. Indeed, as Mr Rees observed during the course of submissions, it is now well trodden forensic territory, as for example in cases involving deprivation of liberty, serious or other medical treatment etc.
13. As I have indicated above and as has been so plainly demonstrated in the caselaw of the last few years, identifying the best interests of an incapacitous adult requires a

broad and often subtle evaluation of a wide canvas of factors (**Briggs v Briggs [2016] EWCOP 53; Re: D [2012] EWHC 885 (COP) 18; Salford Royal NHS Foundation Trust v Mrs P [2017] EWHC EWCOP 23**). Here the establishment of paternity by buccal cell samples will plainly not have any medical or therapeutic benefit to E. Nor will E be able to comprehend the results of any such tests.

14. In **LG v DK (Supra)** Sir Nicholas Wall made the following observation:

'It would, in my judgment, require unusual facts for DK's best interests to depart from the ascertainment of the truth or the interests of justice. (para 55)'

In my earlier ex tempore judgment, I queried whether E's 'best interests' and '*the ascertainment of the truth or the interests of justice*' are quite as intrinsically connected as that passage suggests. It is not difficult to imagine circumstances where the capacitous might elect to take their secrets to the grave, the incapacitous should be afforded no lesser opportunity.

15. In considering 'best interests' in the context of a statutory will (In **Re: P (Statutory Will) [2009] EWHC 163 (Ch)**, Lewison J confronted the importance of promoting adult autonomy and the significance of recognising that an assessment of P's best interests does not involve drawing a line at his death but may require consideration beyond that. The passage below, which strikes me as profoundly powerful, must be stated in full:

'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.'

16. The clarity with which Lewison J captures the important concepts of '*doing the right thing*' and being '*remembered with affection by their family*' belies the complexity of the evidential challenge that may sometimes arise. His Honour Judge Hodge QC followed Lewison J's approach in **Re: D (Statutory Will) (Court of Protection) [2012] EWHC 2159 (Ch)**, also emphasising that when evaluating a protected person's best interests, that person's past and present wishes and feelings should be considered as a facet of 'all the relevant circumstances' rather than regarded as a presumption of the outcome or determinative of the issue. I agree. The following passage must also be highlighted:

'A previous will is obviously a relevant written statement which falls to be taken into account by the court. But the weight to be given to it will depend upon the circumstances under which it was prepared; and if it were clearly to be demonstrated that it was made at a time when the protected person lacked capacity, no weight at all should be accorded to it. Moreover, Parliament has rejected the "substituted judgment" test in favour of the objective test as to what would be in the protected person's best interests. Given the importance attached by the court to the protected person being remembered for having done the "right thing" by his will, it is open to the court, in an appropriate case, to decide that the "right thing" to do, in the protected person's best interests, is to order the execution of a statutory will, rather than to leave him to be remembered for having bequeathed a contentious probate dispute to his relatives and the beneficiaries named in a disputed will. I therefore hold that the Court of Protection should not refrain, as a matter of principle, from directing the execution of a statutory will in any case where the validity of an earlier will is in dispute. However, the existence and nature of the dispute, and the ability of the Court of Protection to investigate the issues which underlie it, are clearly relevant factors to be taken into account when deciding whether, overall, it is in the protected person's best interests to order the execution of a statutory will. (para 16)'

17. In **Re: M; ITW v Z [2009] EWHC 2525 (Fam)**, Munby J (as he then was) both endorses Lewison J and further illustrates the proposition that the obligations to protect and promote P's best interests are not confined to his lifetime. Evaluating 'best interests' may sometimes have to contemplate issues that go beyond P's death:

*'Best interests do not cease at the moment of death. We have an interest in how our bodies are disposed of after death, whether by burial, cremation or donation for medical research. We have, as Lewison J rightly observed, an interest in how we will be remembered, whether on a tombstone or through the medium of a will or in any other way. In particular, as he points out, we have an interest in being remembered as having done the "right thing", either in life or, post mortem, by will. Lewison J's analysis accords entirely with the powerful analysis of Hoffmann LJ in *Airedale NHS Trust v Bland* [1993] AC 789 , 829. I respectfully agree with both of them.'*

18. Finally, when considering the correct approach to the applicable legal framework, it is important that I highlight one of the potentially significant consequences of following the path I have described above. Mr Rees submits that the advantage of adopting this approach is that any decision made by the Court, on E's behalf, pursuant to Sec 16 MCA 2005, should be capable of taking effect as 'qualifying consent' for the

purposes of para 2, Schedule 4, Human Tissue Act 2004 (HTA) or as ‘appropriate consent’ for the purposes of Sec 1 HTA. This engages after E’s death, if the testing has not already been undertaken or sampling has not yet taken place. The jurisdiction of the Court of Protection to make substantive orders ceases on P’s death (see **Re: A patient (now deceased) [2018] EWCOP 17**), save for a residual, as opposed to substantive, control over issues of costs, reporting restrictions and generally to ‘tie up loose ends.’

19. I am grateful to Mr Rees both for raising and analysing this point. I had made the too ready assumption that the HTA could only have any application here in the event of E’s death but I am persuaded that an order pursuant to Sec 16 MCA, can here, be both immediate and anticipatory in its impact. Mr Rees has envisaged a factual scenario in which a court may make a Sec 16 order which cannot be implemented because P has died in the intervening period. Whilst that may be unlikely here, for reasons I shall address below, it will be a very real possibility in some of the cases this court hears. Thus, it is useful to address it in principle.
20. If P dies before a sample of cells is taken then “appropriate consent” is required, lawfully to take a post death sample. This arises in the application of: Section 1(1)(c) HTA, which provides that it is lawful, if done with ‘*appropriate consent*’ to remove from the body of a deceased person, for use for a purpose specified in Schedule 1, any ‘*relevant material*’ of which the body consists or which it contains;
21. The purpose specified in Schedule 1 which is apposite to the current facts of this case is ‘*Obtaining scientific or medical information about a living or deceased person which may be relevant to any other person, ‘including a future person’*’ Sch. 1 para 4. Thus, ‘*relevant material*’ which is defined as meaning ‘*material, other than gametes, which consists of or includes human cells*’, HTA s53.
22. I agree that a Sec 16 order, properly construed, is apt to constitute ‘*appropriate consent*’ for the purposes of Sec 3 (6) HTA. This provides:

‘(6) Where the person concerned has died and the activity is not one to which subsection (4) applies, “appropriate consent” means—

(a) if a decision of his to consent to the activity, or a decision of his not to consent to it, was in force immediately before he died, his consent;

(b) if— (i) paragraph (a) does not apply, and (ii) he has appointed a person or persons under section 4 to deal after his death with the issue of consent in relation to the activity, consent given under the appointment;

(c) if neither paragraph (a) nor paragraph (b) applies, the consent of a person who stood in a qualifying relationship to him immediately before he died.’
23. This seems to me clearly to contemplate a decision made prior to death and thus to embrace a direction made by the Court in the language of Sec 16 MCA.

24. Mr Rees also makes the point that a similar issue may arise if P dies after sampling has taken place, but before that sample has been tested. Sec 45 HTA provides that it is unlawful to hold ‘*bodily material*’ intending that any human DNA in the material be analysed without ‘*qualifying consent*’. For these purposes and in simple terms, ‘*bodily material*’ means ‘*material which (a) has come from a human body, and (b) consists of or includes human cells*’ see s 45(5). HTA Sch 4 para 2 defines ‘*qualifying consent*’ for these purposes and requires to be set out in full:

‘2 Qualifying consent

(1) In relation to analysis of DNA manufactured by the body of a person who is alive, “qualifying consent” means his consent, except where sub-paragraph (2) applies.

(2) Where—

(a) the person is a child,

(b) neither a decision of his to consent, nor a decision of his not to consent, is in force, and

(c) either he is not competent to deal with the issue of consent or, though he is competent to deal with that issue, he fails to do so, “qualifying consent” means the consent of a person who has parental responsibility for him.

(3) In relation to analysis of DNA manufactured by the body of a person who has died an adult, “qualifying consent” means—

(a) if a decision of his to consent, or a decision of his not to consent, was in force immediately before he died, his consent;

(b) if paragraph (a) does not apply, the consent of a person who stood in a qualifying relationship to him immediately before he died.

(4) In relation to analysis of DNA manufactured by the body of a person who has died a child, “qualifying consent” means—

(a) if a decision of his to consent, or a decision of his not to consent, was in force immediately before he died, his consent;

(b) if paragraph (a) does not apply—

(i) the consent of a person who had parental responsibility for him immediately before he died, or

(ii) where no person had parental responsibility for him immediately before he died, the consent of a person who stood in a qualifying relationship to him at that time.'

25. Thus, 'Appropriate Consent' and 'Qualifying Consent' are, to my mind, mirror concepts in the HTA, defined by section 3(6) and Sch. 4 para 2 respectively. Their applicability will depend upon the extent to which the court's order has effectively been complied with at the moment of P's death.
26. This interpretation of these relevant provisions strikes me as entirely concordant with the fundamental principles of both the MCA and the Human Rights Act 1998. Respectively and at their centre these pieces of legislation emphasise the protection of the vulnerable and the preservation of the bodily integrity of the deceased. The construction that Mr Rees has advanced and with which I agree, does not strain the language of either legal framework in any way. Its consequence is to promote E's autonomy and, more widely, to equate the rights and best interests of the incapacitous, in these circumstances, with those of the capacitous. As such, I note that this construction complies entirely with the interpretive obligations embodied in section 3, Human Rights Act 1998.

Ascertaining E's best interests.

27. It is, I hope, clear from all that I have said above that this application should not have been placed before the Court as a 'paper exercise', as initially occurred. That was manifestly misconceived. The impression created, as is clear from my *ex tempore* judgment, was that E's situation was grave and that he was near to death. Whilst I am very conscious of the burdens placed upon Deputies, I do consider that some rudimentary facts ought to and could have been established prior to the first hearing. The situation was helpfully remedied in Mr Bagguley's statement of 16th October 2019. He contacted the nursing home, spoke to one of the nursing care assistants who told him that whilst there had been some deterioration in E's condition, since Mr Bagguley's last visit in June 2018, it was not dramatic. He is cared for in a special facility in the lower ground of a Nursing Home. It is reported as spacious and open with natural light. E has 'minimal interaction'. All his care is anticipated and he requires full assistance from his carers. E is incontinent and has a diet of puréed food only. Notwithstanding this his appetite is good, though he is losing weight. I am told that a referral has been made to a dietician.
28. 'End of life pathway' was reportedly introduced because it was concluded that E lacked any quality of life rather than in anticipation of the end of his life. E is said to be stable and **not** (my emphasis) in a critical condition. The General Practitioner is called only when there is infection, such as chest infections. E has been taken off all previously prescribed medication (which included a drug regime structured to counter psychotic episodes, aggressive behaviour and high blood pressure). Present medication incorporates analgesics, low level antibiotics when required, laxatives etc.
29. The Official Solicitor's representative has also spoken with a member of staff at the Nursing Home. With respect to life expectancy, the OS records that whilst E is '*deteriorating*', all that could be said is '*they would expect his death within a year*'.

30. The second line of enquiry that I indicated to be necessary was to discover precisely what is involved in collecting the sample. Ms Diana Springett-Grey, Anglia DNA, confirmed that *'buccal is taken from the inside cheeks of the mouth using a long cotton bud style swab'*. This is probably no more intrusive than assisting E to clean his teeth.
31. In my earlier judgment I have chronicled the efforts that had been made historically, to resolve the DNA questions in this case. The first tests were undertaken on the instruction of E in 1991. The OS, in her investigations, requested further details of these matters and, in response to this request the Deputy filed a further witness statement dated 16th October 2019. There are three putative children who seek confirmation of paternity.
32. The conclusions of the 1991 paternity tests are summarised in a letter to E from his solicitors at the time. The letter is dated 17th December 1991:

'We enclose herewith the results of the blood and dna test from which you will see on page 2 Dr Lee states that there is a relative chance of paternity of over 99.9 percent in each case, such figure being considered to offer virtual proof of paternity in each case... provided a close relative of yours is not a possible father'

33. The Deputy spoke to A, the youngest of the putative children. A reported that her own 1991 blood test was undertaken at E's request, following the tragic death of her mother by suicide. A was fourteen at the time. The two brothers D and P were aged twenty-two and twenty respectively. A told the Deputy that E and her mother *'were in a relationship for quite some time'*. A said that her brothers lived in Kendal until she was four but she recalls that E *'was always in their lives'* and that she has a photograph of E holding her in his arms at her Christening. A said that E took over the parenting role following her mother's death and lived with them. Her brothers *'came and went as they had relationships and moved out to live with girlfriends'* D and P confirmed that E lived with them intermittently, *'they all used to help out on the farm, hay making during school holidays'* A said that E kept ponies on his land and looked after them on a day to day basis with her. She was five when E bought her first pony. D said that whilst living together, after his mother's death, he started buying cattle and raising them on the land. He stated that he sold the cattle to rent the field out and use the money for E's care.
34. The Deputy considered that Mrs Shirley Pollard, the first Deputy, initiated further tests in 2012 in order to seek to resolve any uncertainty which may have been perceived to have arisen in the 1991 tests. The 2012 tests did not involve E's participation in any way. These were inter-sibling tests. Anglia DNA provided a detailed report, in July 2012. The conclusions of that report were set out in summary format for Ms. Pollard in a letter, dated 19th December 2012. The following paragraphs are pertinent:

'We also performed sibling tests to establish whether ... [C, D and E] were related as Full or Half Siblings. The test

established that ... [C and D] are Full Siblings. The test between ... [D and E] was inconclusive, even after the inclusion of additional genetic markers. The test between ... [C and E] revealed that the data were 174 times more likely if they were related as Half Siblings rather than as Full Siblings.

There are several possible explanations for this result. It may be that ... [E] has a different biological mother than ... [C and D]. It may also be that another individual related to Mr B is the biological father of ... [E]. If this is a possibility then the results of the sibling test are invalid as the relationships between these individuals may be different to those assumed by the test.'

35. To this, Anglia DNA add two important caveats. It is possible that there has been an unusual pattern of DNA inheritance within the family. Additionally, and to my mind, very significantly, they emphasise that sibling tests are not as powerful as paternity and maternity tests, which directly identify DNA passed from parent to child. The significance of this observation is reflected in one of my own judgments: **Re: F (Children) (DNA Evidence) [2007] EWHC 3235.**
36. Though it strikes me that the 1991 results and the 2012 conclusions may, properly analysed, establish paternity, at least on the balance of probabilities, I cannot be sure. Accordingly, I consider that re-testing E is most likely to determine the question conclusively. The consideration arises therefore, as to whether it is in E's best interests for the tests to be conducted. No individual feature of the evidence strikes me as determinative here but there are a number of key considerations which weigh heavily.
37. It seems to me that two clear inferences can be drawn from the 1991 report. Firstly, as E commissioned the tests, he can reasonably be taken to have wanted to know whether he was the father of these children. Secondly, given the terms in which the conclusions of that test are set out, E is likely to have considered that the matter had been conclusively answered and that it established that each of the three children were his. As far as I am aware the .1 % alternative, canvassed in the report, is predicated on a hypothesis only. From this I am entitled to draw what I consider to be a compelling inference i.e. that E himself would, if he were in a position to do so, want the tests to be undertaken. There is nothing at all in the history, as provided to me, which identifies or even hints at any factor that might have led E to change his approach.
38. There are frequently challenges for Deputies in achieving an accurate history of a protected person's background. The primary and obvious obstacle is that the incapacitous are, often and inevitably, unable to provide a reliable narrative. There are one or two indicators within the papers that E may not always have lived an irreproachable life but the investigations by the Deputy reveal that when his partner died he, without any hesitation, took on the responsibility for his fourteen-year-old daughter. It is clear that he had affection for her and that they spent happy times together with the ponies that he bought for her. Whilst he may well have been a man who could be irresponsible at times, it is clear that he *'did the right thing'* to protect his daughter when her mother died. I use that phrase because it resonates with

Lewison J's use of language in **Re P (Supra)**. E has shown that, at least in extremis, he was able to act responsibly and maturely. It seems reasonable to me to infer that he would wish to do so in these circumstances.

39. The comments that have been made to the Deputy strongly suggest that for A, D and P there are memories punctuated with affection for E. What will live on after E's death is the memory others have of him; and for him, it is in his best interests that he is remembered with affection by his family. The resolution of the DNA analysis is, I think, likely to promote an affectionate memory of him. That is in his best interests.
40. For the reasons I have set out above, I am entirely satisfied that the mechanism for testing here is minimally intrusive and no more.
41. Finally, the establishing of a relationship between E and the three adults will reduce and, one hopes, eliminate, the need for a contentious dispute after E's death in relation to his estate.
42. In his succinct written submissions Mr Rees highlights the Article 8 Rights of each of the adults contending paternity. I do not understand him to be suggesting that this is a facet of E's 'best interests', nor does he associate himself with earlier dicta which emphasise the general desirability of the truth being known. I do however see this as a further perspective on those matters that I have sought to analyse at paragraph 33 above. I consider that E would have wished to protect the basic human rights, protected by Article 8, of each of these adults to know of their paternity if this is possible. I infer this from the pattern of his actions that I have isolated in the summary above.

Post Script

43. Initially, as I have endeavoured to make clear, it appeared that this case required an urgent decision. Had the facts been as presented, it would have created a challenge in securing representation for E. This same dilemma can occur when an urgent application e.g. relating to urgent medical procedure, is made to the out of hours emergency judge. In those circumstances there may not be time to contact the Official Solicitor. Certainly, she will not have the opportunity to conduct independent investigations. Thus, she will not be able to contribute to the decision anything that is not already available to a judge. Nonetheless, the experience, the unique professional obligations to P and the accumulated welfare and legal knowledge of the Official Solicitor may provide an important contribution even where the OS has no greater, possibly even a lesser factual knowledge of the available evidence. The problem has not arisen here, nor do I think I should go further than to say that in situations which are a true emergency it will have to be a matter of judicial discretion as to whether it is necessary or whether time is available to contact the Official Solicitor. It is quite impossible to be prescriptive.
44. What does, however, require to be signalled, in clear and entirely unambiguous terms, is that where an application is brought before the Court of Protection, on what is said to be 'an urgent basis', evidence of urgency must be presented which is both clear and cogent. This is to be regarded as a professional obligation on all the professionals involved but most particularly on the lawyers who bring the application. To this I would add the obvious and related point, an application which becomes urgent in

consequence of professional delay in decision making is, equally, a professional failure which always militates against the interests of the protected person. An urgent hearing puts everybody concerned under very great pressure. Where such hearings are capable of being listed in circumstances which enable the parties to be appropriately represented and permit all involved the opportunity to consider and reflect upon the issues, they must be. This I emphasise is a facet of the Article 6 Rights of all involved but most particularly P's rights.

45. There is no absolute requirement that P should be joined as a party in every case. Indeed, the imposition of such a requirement would be unworkable. It is a fact, for example, that P will not be made a party in the vast majority of Property and Affairs applications. Even where the Court is considering a deprivation of liberty it may not be possible to join P as a party where a crisis situation has developed. This is notwithstanding the obiter dicta comments in **Re: X (Court of Protection Practice) [2015] EWCA Civ 599**. In an emergency the judge will have to evaluate the proportionality of the arrangements in the context of the crisis and, if an order is made, it is likely to be tightly time limited with an expeditious return to Court.
46. Court of Protection Rules 2017 rule 1.2 and Practice Direction 1A place a duty on the Court to consider the participation of P and as to whether or not to join P as a party to the proceedings. In doing so the Court is directed to have regard to a number of matters including the nature and extent of the information before the Court; the issues raised by the case; whether a matter is contentious; and whether P has been notified. Where P is joined as a party, the joinder will only have effect once a litigation friend has been appointed (r1.2(4)). Where the Official Solicitor is appointed to act as litigation friend for P it is her usual practice to ensure that her criteria for accepting appointment are met and that arrangements are in place to meet her costs before she will act.
47. I am aware that the OS is investigating the possibility of providing an out of hours service in the kind of circumstances I have highlighted. This has not been available in the past or at least not for the last decade. If it does become possible it will require to be used sparingly and probably regarded as 'exceptional'. That, in any event, is for the future.