

IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of their families must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Neutral Citation Number: [2019] EWCOP 61

Case No: 13504087

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

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

Date: 20th December 2019

Before :

Her Honour Judge Hilder

THE LONDON BOROUGH OF HILLINGDON

Applicant

and

**(1)JV
(through her litigation friend the Official Solicitor)**

**(2) RV
(3) PY**

Respondents

Hearing: 18th October 2019
with subsequent written submissions

Mr. Boden of London Borough of Hillingdon appeared for the Applicant
Ms. Jagadeshram (instructed by Burke Niazi Solicitors), on behalf of the First Respondent
Mr O'Brien QC (instructed by Campbell Law Solicitors), on behalf of the Second and Third
Respondents

The hearing was conducted in public subject to a transparency order made on 27th September 2019. The judgment was handed down to the parties by e-mail on 20th December 2019. It consists of 19 pages, and has been signed and dated by the judge.

The numbers in square brackets and bold typeface refer to pages of the hearing bundle.

The Issue

1. JV is currently subject to a Standard Authorisation for deprivation of liberty in her living arrangements at Care Home A. The London Borough of Hillingdon has made an application on form DLA dated 25th September 2019 for review of that authorisation. Hearings in respect of that application have been held on 2nd and 18th October 2019, and the matter is listed for further hearing on 17th January 2020.
2. Within these proceedings, the Second and Third Respondents (who are JV's son and daughter respectively) have made a COP9 application dated 10th October 2019 that the Court "consider the issue of reinstatement of [RV] as relevant person's representative (RPR) for [JV]."
3. At the hearing on 18th October, JV's representatives took a neutral position in respect of the RPR issue. After hearing oral submissions, a direction was made that the Applicant and the Second and Third Respondents file written submissions. On receipt of those submissions, I made an order providing for JV's representatives to be given a copy, and providing an opportunity for filing a response if so wished. It has been confirmed (by e-mail timed at 13.17 on 28th November 2019) that JV's representatives do not wish to make any submissions on this issue.
4. This judgment addresses only the issue raised about appointment of an RPR for JV. The substantive issues in respect of JV's living arrangements are ongoing.
5. For the purposes of this judgment I have read:
 - a. on behalf of the Applicant, written submissions dated 17th October 2019 and further unsigned, undated submissions; and
 - b. on behalf of the Second and Third Respondents, a position statement dated 18th October 2019 and a skeleton argument date 31st October 2018 by Mr. M. O'Brien QC.
6. I acknowledge, with thanks, that Mr. O'Brien's skeleton argument was prepared on a pro bono basis to assist the court.
7. The Court has now received from Campbell Law Solicitors a COP30 Notice confirming that they are no longer instructed.

The factual background

8. JV is 73 years old. She has two children, the Second and Third Respondents. Her husband died more than ten years ago. It is not disputed that she has dementia, generalised anxiety disorder and obsessive compulsive disorder but she is fully mobile and able to communicate. The extent of her care needs is presently a matter of dispute.

9. On 21st January 2016 JV executed Lasting Powers of Attorney for property and for welfare, in which she appointed RV and PY jointly and severally as her attorneys. The instruments were registered by the Public Guardian on 29th March 2016.
10. The extent of JV's assets is currently a matter of dispute but it is accepted by RV and PY that a property at 21 LH "can be considered part of [her] estate" for the purpose of care fees liability. An order has been made which records their agreement that this property may not be sold in the present circumstances and also suspends (on an interim basis) the LPA in so far as it otherwise gives the attorneys authority to sell that property. Whether JV may be able to return to live at that property is presently a live issue before the Court.
11. JV first moved into residential care, at Care Home R, in May 2018. Whilst she lived there, three Standard Authorisations were granted in respect of her living arrangements:
 - a. On 4th June 2018 Gemma Seymour (Best Interests Assessor) completed Form 3 to indicate that JV has an attorney with authority to select a representative for her, the person selected was PY, and PY was eligible to be appointed. The Form 5 Standard Authorisation was signed on behalf of the Supervisory Body on 11th June 2018, with PY appointed as Relevant Person's Representative "for the same period as the Standard Authorisation to which it relates", which was until 3rd September 2018;
 - b. On 5th November 2018 Jenna Cowling (Best Interests Assessor) completed a form similar to Form 3, again indicating that JV has an attorney with authority to select a representative for her but that the person selected on this occasion was LV (JV's daughter-in-law), and LV was eligible to be appointed. The Form 5 Standard Authorisation was signed on behalf of the Supervisory Body on 3rd January 2019, with LV appointed as Relevant Person's Representative "for the same period as the Standard Authorisation to which it relates", which was until 17th March 2019;
 - c. The third Bests Interests Assessor's form is not signed or dated, and does not identify the Assessor who completed it. However, it is recorded in this form that "the existing representative is no longer eligible to act." The selection of a new representative is said to have been made on the basis that JV herself does not wish to make a selection and her donee does not object to the BIA's recommendation of RV. The reason for the selection is said to be that RV "is able to visit his mother regularly and wishes to undertake the role of RPR." The Form 5 Standard Authorisation was signed on behalf of the Supervisory Body on 23rd April 2019, with RV appointed as Relevant Person's Representative "for the same period as the Standard Authorisation to which it relates", which is until 15th April 2020.
12. The attorneys supported JV's placement at Care Home R but failed to pay the fees due. (They have 'explanations' for this decision which may be material to the substantive issues yet to be determined but it is not necessary to consider them at this point.) As a result, the placement was terminated. The Applicant local authority arranged for JV to receive 24 hour care in a Travelodge for a period of 4 days to avoid her being 'street homeless.' Thereafter, on 17th September 2019 she was placed at Care Home A as an emergency placement.
13. An Urgent Authorisation for deprivation of her liberty in JV's living arrangements at Care Home A was granted on 18th September [F15], and extended on 25th September [F16].
14. The Applicant local authority made the application to the court on form DLA dated 25th September 2019[D1]. By order made on 27th September the Urgent Business Judge listed the matter for attended hearing before me on 2nd October. On that occasion JV was unrepresented, the Official

Solicitor notifying the Court by e-mail on 30th September that “she is unable to determine the court’s invitation to act in time for this hearing.” RV and JY confirmed their agreement to the placement at Care Home A until the next hearing. Directions were given for them to file a statement setting out their position and for the Public Guardian to file a report as to management of JV’s affairs by the attorneys, and the matter was relisted for hearing again on 18th October.

15. A Standard Authorisation in respect of JV’s living arrangements at Care Home A was granted on 7th October 2019 [F18]. The Best Interest Assessor’s form [J29] in respect of that authorisation identifies the assessor as Charlene Pinto but the document is not signed. The BIA confirmed [J42] that:

“[JV] is unable to select a representative herself due to her cognitive impairment.... Her son [RV] and daughter [PY] have joint LPA for her Health and Welfare. [RV] nominated himself to take on the role. However in the light of the concerns raised in relation to non-payment of fees and [JV] being evicted from her previous placement, I am of the view that a paid representative would be more appropriate at this stage or at least until the courts make a decision.”

16. The standard authorisation document itself states that:

- a. *“The Best Interests Assessor indicated that they were not able to select an eligible person as representative. It is therefore necessary for the Supervisory Body to select a representative for this person” [F23]; and*
- b. *“The Supervisory Body has decided to appoint a paid Relevant Person’s Representative until the Court of Protection has made a final decision” [F19].*

17. RV and PY filed the COP9 application raising the RPR issue, and an order was made on 15th October 2019 providing for the application to be considered at the hearing three days later.

The parties’ positions

18. RV and PY approach the issue on the basis that *“the local authority have (sic) sought to remove RV as the RPR.”* They submit that *“the LPA is entitled to designate the Relevant Person’s Representative...[and] RV should remain as the RPR.”* In particular, they assert that

“RV maintains contact and sees his mother regularly. He provides support and makes decisions as her LPA, if needed. Now that the OS is involved in the litigation, there is no conflict of interest in relation to RV remaining as the RPR. There is also a substantial additional issue which is that as RPR, RV can apply for legal aid. Removal of the RPR would mean that he would be unable to apply for legal aid.”

and

“[The local authority] seeks to remove RV as RPR for reasons that this court is about to consider and decide upon. The court awaits an OPG report on the issues. Depending on the outcome of that OPG report (and any other evidence presented), this court will take a view on whether the LPAs acted in the best interests of JV/P. It follows that, if the local authority remove the RPR, they are prejudging the issue and indeed usurping the authority of the court to decide it.”

19. As to the role of an RPR in circumstances where there is an active challenge to the Standard Authorisation before the court and an independent litigation friend in those proceedings, the position of RV and PY is not entirely consistent. In his position statement, Mr. O'Brien stated that *"The role of the RPR is therefore limited, but it does matter in relation to legal aid."* In his skeleton argument, he seems to assert a greater continued importance to the RPR role:
- a. *"whilst it changes when a litigation friend is appointed, [the role of a RPR] remains important"* (paragraph 6); but
 - b. *"making an application to the Court of Protection is clearly a key role for an RPR. In the instant case, proceedings have already begun, so, that obligation has become otiose."* (paragraph 12); but nonetheless
 - c. *"The role of the RPR is much wider than that of the litigation friend and in practical terms the RPR remains an important check on the care home and any matters outside the ambit of the litigation"* (paragraph 42).
20. As to the role of the Court of Protection, it is contended on behalf of RV and PY that *"The removal of an RPR requires a decision about best interests ...so the court can determine this, if the matter is put before the court. In the instant cases, the court is already seized of this issue in the sense that it has been asked to determine best interests."* It is said that the local authority has *"failed to comply with the requirements to set out their reasons for removal of the RPR"* and what should happen now is that the local authority *"formally identify their reasons and make an application to the court. The court can...make a s16 decision on whether the RPR has acted in the best interests of P and ...should be removed."*
21. The Applicant Local Authority approaches the issue differently – not as a 'termination' of an existing appointment but rather as a 'selection' on the granting of a new Standard Authorisation. The Applicant submits that *"the appropriate course was not to appoint RV in the first place"* because he fails the statutory test for eligibility for appointment as an RPR in that he is
- "not in a position to properly represent and support JV. This is particularly true given the possibility of a financial conflict of interest between JV and RV that has yet to be properly resolved"* (paragraph 21 of position statement)
- and
- "The RPR has to represent P's opinions and the Local Authority does not have confidence that RV will do this. It has been suggested by RV that JV is objecting to her current placement. However, all other evidence from professionals and care workers that has been made available to the Local Authority suggests that JV is content in her placement and is not objecting... set against the other concerns in this case there is a real risk and likelihood that the LPA's and close family may represent their own views rather than those of JV."*(paragraphs 19 and 20 of further submissions).
22. As to the role of an RPR where there is an independent litigation friend, the Applicant contends that *"As the matter has been brought to Court by the Local Authority, the primary function of the RPR has already been fulfilled"* and there is *"no ongoing role for a family member RPR now that the Official Solicitor has become involved to represent JV."* The Applicant asserts that *"questions of legal aid are for the legal aid agency"* and not relevant to the appointment of an RPR.

As to the role of the Court, the Applicant contends that:

- a. there is “no scope” in regulations for the court to decide debates about RPR appointment;
- b. there is no power to make declarations under section 15 of the Act because the Applicant’s appointment decision is not an act done in relation to [P];
- c. even if there is power under section 15, it would extend only to declaring if the Applicant had acted lawfully or not, and would not extend to the court being able to substitute its own appointment;
- d. there is no jurisdiction under section 16 of the Act because the appointment of an RPR is not “a decision that JV could have taken were she capacitated, as if she were capacitated there would never be an RPR and only the supervisory body has the power to appoint an RPR.”

23. JV’s litigation friend takes a neutral position.

The law

24. Schedule A1 of the Mental Capacity Act 2005 was inserted by the Mental Health Act 2007 and came into effect on 1st April 2009. The implementation of Schedule A1 has been somewhat troubled, and it is likely that it will soon be replaced by a scheme of Liberty Protection Safeguards pursuant to the Mental Capacity (Amendment) Act 2019. However, for now it remains in effect and governs the RPR issues before the Court in this matter.
25. Schedule A1 makes provision for the administrative authorisation of deprivation of liberty of persons in a hospital or care home. Paragraph 7 provides that the person whose liberty is deprived in such circumstances is the “relevant person;” and Part 10 of the Schedule makes provision for a “representative” for that person. Pursuant to paragraph 139 of Schedule A1 the appointment of a relevant person’s representative (“RPR”) is a mandatory requirement of the supervisory body:

139 (1) The supervisory body must appoint a person to be the relevant person’s representative as soon as practicable after a standard authorisation is given.
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26. It is expressly provided in paragraph 141 of Schedule A1 that the appointment of an RPR does not affect any appointment of a deputy for the relevant person, any appointment of an attorney by the relevant person, or any powers of the court:

141 (1) Any appointment of a representative for a relevant person is in addition to, and does not affect, any appointment of a donee or deputy. (2) The functions of any representative are in addition to, and do not affect – (a) the authority of any donee, (b) the powers of any deputy, or (c) any powers of the court.
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27. The *role* of the RPR is considered in the Deprivation of Liberty Safeguards Code of Practice (“the Code”), which supplements the main Mental Capacity Act 2005 Code of Practice. The Code is not a primary source of law but rather, an aid to the interpretation of the law. Pursuant to section 42(5)

of the Mental Capacity Act 2005, where a provision of the Code is considered by the court to be relevant to a question arising in proceedings, the court must take such provision into account.

42 Codes of Practice

....

- (1) If it appears to a court or tribunal conducting any criminal or civil proceedings that –
- (a) a provision of a code, or
 - (b) a failure to comply with a code,
- is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question.

28. The Code sets out the role of the RPR in succinct terms, at paragraph 7.2:

7.2 The role of the relevant person's representative, once appointed, is:

- to maintain contact with the relevant person, and
- to represent and support the relevant person in all matters relating to the deprivation of liberty safeguards, including, if appropriate, triggering a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection.

This is a crucial role in the deprivation of liberty process, providing the relevant person with representation and support that is independent of the commissioners and providers of the services they are receiving.

7.3 The best interests principle of the Act applies to the relevant person's representative in the same way that it applies to other people acting or making decisions for people who lack capacity.

29. The *identification* of the person whom the supervisory body should appoint is more convoluted:

a. Firstly, there are some limitations as to who may be selected in the Schedule itself:

140 (1) The selection of a person for appointment under paragraph 139 must not be made unless it appears to the person making the selection that the prospective representative would, if appointed –

- (a) maintain contact with the relevant person,
- (b) represent the relevant person in matters relating to or connected with this Schedule, and
- (c) support the relevant person in matters relating to or connected with this Schedule.

b. Secondly, the Schedule provides for the making of Regulations to govern the selection and appointment of RPRs, and stipulates some limitations to the scope of those Regulations:

138 (1) Regulations may make provision about the selection and appointment of representatives.

(2) In this Part such regulations are referred to as ‘appointment regulations’.

143 (1) Appointment regulations may make provision about who is to select a person for appointment as a representative.

(2) But regulations under this paragraph may only provide for the following to make a selection –

- (a) the relevant person, if he has capacity in relation to the question of which person should be his representative;
- (b) a donee of a lasting power of attorney granted by the relevant person, if it is within the scope of his authority to select a person;
- (c) a deputy, if it is within the scope of his authority to select a person;
- (d) a best interests assessor;
- (e) the supervisory body.

(3) Regulations...may provide that a selection by the relevant person, a donee or a deputy is subject to approval by a best interests assessor or the supervisory body.

(4) Regulations... may provide that, if more than one selection is necessary in connection with the appointment of a particular representative –

- (a) the same person may make more than one selection;
- (b) different persons may make different selections.

30. Regulations have indeed been made – the **Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representatives) Regulations 2008**, SI 2008/1315. There is no suggestion before me that these Regulations depart in any way from the limits permitted by Schedule A1 to the Act.

31. Regulation 3 provides that a person can only be selected to be a representative if they meet all of eight specified characteristics.

3 Selection of a person to be a representative – general

(1) In addition to any requirements in regulations 6 to 9 and 11, a person can only be selected to be a representative if they are –

- (a) 18 years of age or over;
- (b) Able to keep in contact with the relevant person;
- (c) Willing to be the relevant person’s representative;
- (d) Not financially interested in the relevant person’s managing authority;
- (e) Not a relative of a person who is financially interested in the managing authority;

- (f) Not employed by, or providing services to, the relevant person's managing authority, where the relevant person's managing authority is a care home;
- (g) Not employed to work in the relevant person's managing authority in a role that is, or could be, related to the relevant person's case, where the relevant person's managing authority is a hospital; and
- (h) Not employed to work in the supervisory body that is appointing the representative in a role that is, or could be, related to the relevant person's care.

(2)

32. Above this 'bottom line', the Regulations provide for a hierarchy of RPR selection as follows:

- a. The relevant person: Pursuant to Regulation 4, the Best Interests Assessor ("BIA") must determine whether the relevant person has capacity to select a representative for themselves. If the determination is that the relevant person does have such capacity, pursuant to Regulation 5 they may make the selection. There is fallback provision if the relevant person has the requisite capacity but does not wish to make the selection.

4 Determination of capacity

The best interests assessor must determine whether the relevant person has capacity to select a representative.

5 Selection by the relevant person

- (2) Where the best interests assessor determines that the relevant person has capacity, the relevant person may select a family member, friend or carer.
- (3) Where the relevant person does not wish to make a selection under paragraph (1), regulation 8 applies.

- b. Deputy or attorney: If the BIA determines that the relevant person does not have capacity to select the RPR but has either a deputy or an attorney with authority to do so, pursuant to Regulation 6 that attorney or deputy may select the RPR, including potentially him/herself. There is fallback provision if the attorney or deputy does not wish to make the selection.

6 Selection by a donee or deputy

- (1) Where –
 - (a) The best interests assessor determines that the relevant person lacks capacity to select a representative; and
 - (b) The relevant person has a donee or deputy and the donee's or deputy's scope of authority permits the selection of a family member, friend or carer of the relevant person, the donee or deputy may select such a person.
- (2) A donee or deputy may select himself or herself to be the relevant person's representative.
- (3) Where a donee or deputy does not wish to make a selection under paragraph (1) or (2), regulation 8 applies.

- c. Selections (a) or (b) above are subject to a requirement that the best interest assessor confirm that the person selected meets the eligibility requirements, pursuant to Regulation 7. If the best interest assessor is unable to give that confirmation, then the person who made the selection must be informed and invited to make a further selection.

7 Confirmation of eligibility of family member, friend or carer and recommendation to the supervisory body

- (4) The best interests assessor must confirm that a person selected under regulation 5(1) or 6(1) or (2) is eligible to be a representative.
- (5) Where the best interests assessor confirms the selected person's eligibility under paragraph (1), the assessor must recommend the appointment of that person as a representative to the supervisory body.
- (6) Where the best interests assessor is unable to confirm the selected person's eligibility under paragraph (1), the assessor must –
- (a) advise the person who made the selection of that decision and give the reasons for it; and
 - (b) invite them to make a further selection.

- d. Best Interests Assessor: If neither (a) nor (b) above resolves the selection, then pursuant to Regulation 8 the BIA may make the selection. The BIA cannot, however, select someone to whom the relevant person, their donee or their deputy objects.

8. Selection by the best interests assessor

- (1) The best interests assessor may select a family member, friend or carer as a representative where paragraph (2) applies.
- (2) The best interests assessor may make a selection where –
- (a) the relevant person has the capacity to make a selection under regulation 5(1) but does not wish to do so;
 - (b) the relevant person's donee or deputy does not wish to make a selection under regulation 6(1) or (2); or
 - (c) the relevant person lacks the capacity to make a selection and –
 - (i) does not have a donee or deputy, or
 - (ii) has a donee or deputy but the donee's or deputy's scope of authority does not permit the selection of a representative.
- (3) Where the best interests assessor selects a person in accordance with paragraph (2), the assessor must recommend that person for appointment as a representative to the supervisory body.
- (4) But the best interests assessor must not select a person under paragraph (2) where the relevant person, donee or deputy objects to that selection.
- (5) The best interests assessor must notify the supervisory body if they do not select a person who is eligible to be a representative.

- e. Supervisory Body: If (a), (b) and (c) properly applied fail to resolve the selection, then the supervisory body may select an appropriate professional RPR (who may be paid to discharge the RPR functions.)

9 Selection by the supervisory body

- (7) Where a supervisory body is given notice under regulation 8(5), it may select a person to be the representative, who –
- (a) would be performing the role in a professional capacity;
 - (b) has satisfactory skills and experience to perform the role;
 - (c) is not employed by, or providing services to, the relevant person’s managing authority, where the relevant person’s managing authority is a care home;
 - (d) is not employed to work in the relevant person’s managing authority in a role that is, or could be, related to the relevant person’s case, where the relevant person’s managing authority is a hospital; and
 - (e) is not employed by the supervisory body.
- (8) The supervisory body must be satisfied that there is in respect of the person –
- (a) an enhanced criminal record certificate issued pursuant to section 113B of the Police Act 1997 (enhanced criminal record certificates); or
 - (b) if the purpose for which the certificate is required is not one prescribed under subsection (2) of that section, a criminal record certificate issued pursuant to section 113A of the Act (criminal record certificates).

.....

11 Appointment of representative

Except where regulation 9 applies, a supervisory body may not appoint a representative unless the person is recommended to it under regulations 7 or 8.

.....

15 Payment to a representative

A supervisory body may make payments to a representative appointed following a selection under regulation 9.

33. The interrelation of the statutory provision (paragraph 140 of Schedule 1A of the Act) and the regulations was considered in the decision of Baker J (as he then was) in *AJ v. A Local Authority* [2015] EWCOP 5:

- a. In that matter an RPR (“Mr. C”) was appointed on the recommendation of the BIA but he failed to challenge a Standard Authorisation, notwithstanding the clear objections voiced by the protected person (“AJ”) to her living arrangements. Eventually, her IMCA (“Mr. R”) agreed to act as her litigation friend and instruct solicitors to make an application to the court on her behalf. In due course, the Official Solicitor took over the role of litigation friend. By the time the matter got to final hearing, AJ’s condition had deteriorated to the point where it was conceded that the substantive application under s21A of the Act could not be pursued, so the principal issue before the court was the claim for damages under s7 of the Human Rights Act 1998. The second limb of the Official Solicitor’s claim on behalf of AJ was that the local authority as supervisory body ought not to have appointed Mr. C as RPR at all, or

should have replaced him when it became apparent that he was not going to facilitate speedy review of her detention.

- b. The local authority's contention (set out at paragraphs 72 and 79 of the judgment) was that it was not open to the supervisory body to refuse to appoint Mr C, because its power to select the RPR is confined to the circumstances defined in Regulation 9.
- c. The Official Solicitor's contention (set out at paragraph 74 of the judgment) was that,
 - i. in order for a person to be selected and appointed as RPR, that person must fulfil not just the eligibility criteria of Regulation 3 but also the requirements of paragraph 140 of Schedule A1 ie "Whoever is making the selection of the RPR...is bound by paragraph 140" (paragraph 75); and
 - ii. the local authority ought not to have appointed MR C "notwithstanding the fact that" he was selected by the BIA (paragraph 76).
- d. Baker J concluded that:
 - i. (paragraph 80) on the facts of the matter, it was the BIA who had made the selection of Mr C as RPR (without informing him that, as donee of AJ's LPA, he could select the RPR and notwithstanding that the paperwork was filled out as if he had made the selection);
 - ii. (paragraph 81) even if the BIA had been entitled to select the RPR or if Mr C had in fact selected himself, the BIA ought to have refused to confirm that Mr. C was eligible because 'eligibility' includes satisfaction of the provisions of paragraph 140 of Schedule A1:

"I accept the Official Solicitor's submissions as to the meaning of 'eligible' and 'eligibility' in the regulations. In my judgment they encompass the requirements not only of regulation 3 but also of paragraph 140 of Schedule A1..... The selection must not be made unless it appears to the person making it that the prospective RPR would maintain contact with P and would represent and support P in matters relating to the Schedule;"
 - iii. (paragraph 86) the supervisory body has an obligation to scrutinise the selection made under regulations 5 to 8 before making the appointment:

"The fact that, under regulation 11, a supervisory body may not (except where regulation 9 applies) appoint a RPR unless the person is recommended by a BIA under regulation 7 or 8 does not mean that it is obliged to appoint a person who is so recommended. Where a supervisory body has reason to believe that the person selected as RPR will not comply with the obligations under paragraph 140 of the Schedule, its duties under Article 5 compel it to refer the matter back to the BIA."
 - iv. (paragraph 90) having wrongly appointed Mr. C, the local authority as supervisory body ought to have taken steps to replace him as RPR when it became apparent that he was not intending to facilitate a speedy review of AJ's living arrangements.

- v. (paragraph 126) as a last resort, the local authority should have considered bringing proceedings before the court itself.

34. The *process* of selection and appointment of an RPR is an early part of the Standard Authorisation procedure. Pursuant to regulation 10, it must begin as soon as the best interests assessor is chosen or, where there has been an appointment but it comes to an end whilst the relevant person remains subject to a Standard Authorisation, as soon as the appointment ends.

10 Commencement of appointment procedure

The procedure for appointing a representative must begin as soon as –

- (a) a best interests assessor is selected by the supervisory body for the purposes of a request for a standard authorisation; or
- (b) a relevant person's representative's appointment terminates, or is to be terminated, under regulation 14 and the relevant person remains subject to a standard authorisation.

35. Regulation 13 sets out eight specific events which operate to bring the appointment of an RPR to an end.

13 Termination of representative's appointment

A person ceases to be a representative if –

- (a) the person dies;
- (b) the person informs the supervisory body that they are no longer willing to continue as representative;
- (c) the period of the appointment ends;
- (d) a relevant person who has selected a family member, friend or carer under regulation 5(1) who has been appointed as their representative informs the supervisory body that they object to the person continuing to be a representative;
- (e) A donee or deputy who has selected a family member, friend or carer of the relevant person under regulation 6(1) who has been appointed as a representative informs the supervisory body that they object to the person continuing to be a representative;
- (f) The supervisory body terminates the appointment because it is satisfied that the representative is not maintaining sufficient contact with the relevant person in order to support and represent them;
- (g) The supervisory body terminates the appointment because it is satisfied that the representative is not acting in the best interests of the relevant person; or
- (h) The supervisory body terminates the appointment because it is satisfied that the person is no longer eligible or was not eligible at the time of appointment, to be a representative.

36. The Code puts it somewhat differently, at paragraph 7.29.

When can the appointment of the relevant person's representatives be terminated?

7.29 The appointment of the relevant person’s representative will be terminated in any of the following circumstances:

- The standard authorisation comes to an end and a new authorisation is not applied for or, if applied for, is not given.
- The relevant person, if they have capacity to do so, objects to the representative continuing in their role and a different person is selected to be their representative instead.
- A donee or deputy, if it is within their authority to do so and the relevant person lacks the capacity to decide, objects to the representative continuing in their role and a different person is selected to be the representative instead.
- The supervisory body becomes aware that the representative is no longer willing or eligible to continue in the role.
- The supervisory body become aware that the relevant person’s representative is not keeping in touch with the person, is not representing and supporting them effectively or is not acting in the person’s best interests.
- The relevant person’s representative dies.

Discussion

37. Schedule A1 and the regulations appear to conceive of the appointment of an RPR as specific to a particular standard authorisation, not as a general status such as may ‘roll over’ from one authorisation to the next. The wording of paragraph 139(1) of the Schedule envisages a fresh appointment with each granting of a standard authorisation, and regulation 12 provides that appointment “must be for the period of the standard authorisation.” The explanation of the RPR role set out at paragraph 7.2 of the Code¹ seems to follow this approach, and so too did the Applicant Local Authority and the Second and Third Respondents in the series of three selections of RPR for JV whilst she was living at Care Home R.
38. It follows that the appointment of a paid RPR upon granting the current standard authorisation in respect of JV’s living arrangements at Care Home A was not a ‘termination’ of RV’s appointment under the third authorisation in respect of Care Home R, but rather a fresh selection. RV had previously been appointed as RPR, but in respect of a completely different placement. Whilst JV was in the Travelodge, her living arrangements were not susceptible to authorisation under the Deprivation of Liberty safeguards. JV’s subsequent placement at Care Home A required a new authorisation and, pursuant to paragraph 139(1), a new appointment of an RPR. So, it is the regulations which provide for selection which the court must now consider, not the regulations which provide for termination. To that extent, I agree with Mr. Boden.

1. I have considered whether the first bullet point of paragraph 7.29 of the Code could be interpreted as suggesting that appointment in respect of one standard authorisation ‘rolls over’ into another authorisation granted immediately afterwards but am not persuaded by that proposition. Rather, I interpret that explanation as confirming the link between appointment as RPR and a particular authorisation by making clear that the ‘status’ does not continue when the authorisation ends.

39. In respect of the authorisation under consideration, it is acknowledged in the BIA's assessment document that JV lacks capacity to select a representative for herself, and that RV and PY as attorneys have authority to make the selection for her. It is stated that they were given that opportunity and "[RV] nominated himself."
40. Pursuant to regulation 7(1), the next required step is that the BIA consider whether the person selected is eligible for the role of RPR. Given that Regulation 7(2) would require her to recommend RV's appointment if she did confirm his eligibility, it must be inferred that the BIA considered herself "unable to confirm" his eligibility. (The Applicant as Supervisory Body clearly interpreted the BIA's statement that way, and so do I.)
41. As determined in *AJ v. A Local Authority*, the eligibility requirements are comprised of those matters set out in regulation 3 and in paragraph 140 of Schedule A1. A difficulty of language arises in this combination. Applying the regulations up to this point, the 'person making the selection' is RV; and the BIA is the person required to 'confirm the selected person's eligibility.' However paragraph 140 of the Schedule requires that it appears 'to the person making the selection' that the prospective representative would, if appointed, discharge the functions specified at (a) – (c). Does paragraph 140 therefore only require RV be satisfied that he would discharge the said functions?
42. In my judgment that cannot have been the intention of Baker J in *AJ v. A Local Authority*. He clearly envisaged (at paragraph 86 of his judgment) that the Supervisory Body would consider whether the person selected would comply with the obligations under paragraph 140. In order to make sense of paragraph 140 of Schedule A1 being encompassed within the eligibility requirements, it must be that reference in that paragraph to 'the person making the selection' is understood to include the person confirming the selection (as in the current circumstances), and the body making the appointment (as in the circumstances of *AJ*.)
43. The BIA explained her decision not to confirm RV's selection [J42] on the basis of "*concerns raised in relation to non-payment of fees and [JV] being evicted from her previous placement.*" These concerns clearly do not relate to ineligibility under regulation 3 or paragraph 140(a). Whilst it is not entirely clear that the BIA actually thought in these terms, it is possible to interpret her words as the expression of a conclusion that RV would not 'represent' or 'support' JV 'in matters relating to or connected with this Schedule.' The Applicant certainly seems to have understood the BIA's assessment form that way, and shares her view².
44. Whether or not the BIA confirms the eligibility of the selected person, the Regulations provide for what happens next. If the BIA had concluded that RV was eligible, pursuant to Regulation 7(2) she would be obliged to recommend his appointment. On the other hand, if the BIA is unable to confirm RV's eligibility, pursuant to Regulation 7(3) she must advise him of that decision and invite him to make a further selection.
45. There is no indication in the information available to me that RV was invited to make an alternative selection. The implication of the BIA's comment at [J42] is that he was not.
46. The regulations do not provide for what is to happen in these circumstances (ie when the person who may select the RPR is not given the required further opportunity to do so.) Nor do they provide for how many opportunities to make a selection must be given if the person selecting chooses an ineligible candidate on more than one occasion. It is however clear that selection of a person whom

² As made clear in *AJ* at paragraph 86, even if the BIA had been satisfied of the selected person's eligibility, the supervisory body has obligation to scrutinise the selection and satisfy itself that the requirements of paragraph 140 are met.

the BIA considers to be ineligible is not a circumstance specified in Regulation 8(2) so as to enable the BIA to make the selection.

47. In this matter, the BIA did not actually name a recommended RPR. She did however express “the view” that “a paid representative would be more appropriate.” This, in my judgment, amounts to selection by the BIA, in circumstances where she was not permitted by the regulations to make the selection.
48. Pursuant to Regulation 9, a paid representative may be selected by a supervisory body where that body “is given notice under regulation 8(5).” Does the BIA’s completion of the form [J42], including her view that a paid representative would be more appropriate than the attorney’s self-selection, amount to a notice pursuant to regulation 8(5)?
49. The difficulty here is that regulation 8(5) appears to address the situation where a BIA is permitted to make a selection but does not do so, whereas in the circumstances currently being considered the BIA did ‘select’ the RPR when it was not open to her to do so.
50. In my judgment, it is not possible to construe regulation 8(5) as encompassing the current circumstances. Regulation 8(5) is better understood as the ‘fallback’ provision where selection by the BIA has not been achieved, ie the equivalent of regulations 5(2) and 6(3) where selections by the relevant person themselves or their attorney/deputy have not been achieved. If regulation 8(5) encompassed the situation where a BIA makes a selection when not entitled to do so, regulation 7(3)(b) would be circumvented. Looking at regulations 7 and 8 together, and in the context of the overall hierarchy of selectors, I conclude that regulation 8(5) is properly limited to circumstances where the BIA is permitted to make the selection but does not do so.
51. It follows that, in the current circumstances, the supervisory body cannot be said to have been ‘given notice under regulation 8(5)’; and so, pursuant to regulations 9 and 11, the power to select a paid representative does not arise. RV’s self-selection having been rejected on the basis of ineligibility, he (and/or PY) should in accordance with the regulations have been invited to make a further selection pursuant to regulation 7(3)(b).
52. In reality, it is likely that RV would wish to select PY next, and the BIA would take the same view of her eligibility as was taken of RV’s. Assuming that the attorneys continue to accept the previous conclusion that LV is ineligible, then the options thereafter would be to make a third selection (although there is no indication in the information available to me as to who that may be), or to decline to make a selection. The former seems unlikely to meet the attorneys’ apparent objective in raising this issue (namely restoration to them of an entitlement to public funding). The latter would mean that BIA could choose to make no selection, thereby opening the door to the appointment of a paid representative by the supervisory body.
53. On behalf of the Second and Third Respondents it is submitted that there is another approach to be taken, namely that the court determines the identity of the RPR. That suggestion rests on the contention that the supervisory body has terminated RV’s appointment as RPR on the basis of ‘best interests’ considerations pursuant to regulation 13(g).
54. As explained above, I do not accept the characterisation of the situation under consideration as a “termination” of RV’s appointment as RPR but rather as an issue of RPR selection. The BIA’s refusal to confirm RV’s self-selection was her determination of non-eligibility. That determination may be by reference to factors which could also inform a ‘best interests’ decision under regulation 13(g) but in my judgment that does not detract from the requirement to follow the process of selection set out in the regulations.

55. Mr. Boden's submission that there is 'no scope' within the regulations for the court to determine the selection of the RPR is clearly right: the purpose of Schedule A1 and the regulations which derive their authority therefrom was to create an administrative system for authorisation of deprivation of liberty. The regulations do not make any reference to the court.
56. However, I do not agree with Mr. Boden's submission that selection of the RPR is outside the jurisdiction of the court, on the following reasoning:
- a. Pursuant to regulation 5, if the relevant person has capacity to do so, she may select the RPR for herself;
 - b. Where a person lacks capacity in relation to a matter concerning her personal welfare or her property and affairs, pursuant to section 16(2)(a) of the Mental Capacity Act 2005, the court may "by making an order, make the decision or decisions on [her] behalf;"
 - c. Mr. Boden's contention that "only the supervisory body has the power to appoint an RPR" focuses too narrowly on *appointment* and fails to consider the necessarily preceding process of *selection*;
 - d. It is clear from regulation 11 that the supervisory body's power/obligation of *appointment* is contingent on the process of *selection*;
 - e. It is clear from regulation 5, that appointment of an RPR *may* be required where the relevant person is assessed as having capacity to choose her own representative. (Capacity is always issue specific, and there is no necessary contradiction in a BIA concluding that a relevant person lacks capacity to determine her residence and care arrangements in a care home or hospital but has capacity to choose her own RPR.);
 - f. If JV could select her own representative if she had capacity to do so, it follows from s16(2)(a) that the court has jurisdiction to make that decision on her behalf.
 - g. Support for this conclusion can also be drawn from regulation 6, which explicitly provides that a deputy may select the representative where the scope of the deputy's authority permits. The scope of the deputy's authority is of course determined by the court; and the appointment of the deputy is the court's alternative option under section 16(2)(b). It cannot be right – as Mr. Boden's position implies - that the court could grant a deputy sufficient powers to select an RPR but not be able to make the selection itself.
57. However, the conclusion that selection of the RPR is within the jurisdiction of the court does not imply that the court should exercise its jurisdiction in the current circumstances. Regard must be had to the fact that the standard authorisation process, including the selection of an RPR, is intended to be an administrative exercise. Regulations provide for a selection procedure, and that procedure has not yet been followed properly. The BIA and/or the supervisory body having concluded that RV is not eligible to be appointed, as attorney pursuant to regulation 7(3), RV should be invited to make a further selection.
58. RV may select a person whom the BIA and the supervisory body each consider to meet the eligibility requirements, in which case pursuant to regulation 11 the supervisory body should appoint that person as RPR. Alternatively, if RB declines to make a selection, regulations 8, 9 and 11 take effect: either the BIA makes a selection, or notifies the supervisory body that she is not making a selection, whereupon the supervisory body may appoint a paid RPR.

59. RV may suggest that this approach effectively hands to the BIA a veto over his selection of the RPR on the basis of the BIA's own view of JV's best interests. After careful consideration, I am satisfied that such an interpretation would be to overstate the position. In the first place, regulation 7(2) gives the attorney an opportunity for further selection. Furthermore, it must be remembered that the BIA's assessment is of the selected person's *eligibility*, where eligibility includes being satisfied that the selected person would represent and support the relevant person [JV] in connection with the deprivation of liberty authorisation. Ultimately, as Baker J made clear in *AJ* (paragraph 126), if the attorney's selection and the BIA's/supervisory body's assessment of eligibility do not resolve the appointment of an RPR, the requirement is that the local authority brings proceedings before the court itself. The London Borough of Hillingdon has done that, making this application to court even before the standard authorisation was granted; and the court (not the supervisory body/local authority) has appointed the Official Solicitor as JV's litigation friend. I am satisfied that, in the circumstances of this case, the local authority/supervisory body has not effectively operated a veto but has properly ensured that the primary function of the RPR has been achieved.
60. I am not persuaded by Mr. O'Brien's submissions of the wider significance of the RPR role in circumstances where there is an active challenge to the authorisation before the court. In my view he was more correct when he acknowledged that the continuing import of the role in those circumstances is "limited." In so far as a family-member RPR may be expected to undertake tasks which a litigation friend may not, I am satisfied that RV is in a position to fulfil those tasks as her son and with such authority under her LPAs as is not presently suspended.
61. In reality, the selection of the RPR for JV is "a substantial additional issue" in this matter because of its possible implications for public funding for RV in these proceedings.
62. JV, as the person who is deprived of her liberty, is entitled to public funding of legal representation without means assessment (and, in my view, rightly so.) That entitlement funds the representatives appointed by JV's litigation friend, the Official Solicitor.
63. For the avoidance of doubt, I am satisfied that the appointment of the Official Solicitor as litigation friend for JV is appropriate. RV and PY properly have a position of their own in respect of the issues before the court, and they should be free to advance that position as they see fit. However, that means that they could not appropriately act as litigation friend for JV³. Quite properly, they have not suggested otherwise.
64. Effectively therefore, in pointing out that "*Removal of the RPR would mean that he would be unable to apply for legal aid*" the suggestion is that, if RV was the appointed RPR, he would be entitled to public funding for representing his own position, not for representing JV (whose litigation friend, presently at least, takes a different position.) None of the parties before me has made any detailed submissions as to whether this suggestion is in fact the correct interpretation of the Civil Legal Aid Regulations. I make no assumptions on that point. Mr. Boden asserts simply that funding issues are irrelevant to the approach to be taken to the selection of the RPR.
65. Of course the court recognises the importance of access to legal representation for all litigants, and is slow to reach any conclusion which closes a possible avenue of funding such representation.

³ Per Charles J in *Re UF* [2013] EWHC 4289 at paragraphs 23- 24: "I agree that members of a family, even if there is a family dispute concerning P's best interests could, albeit I think rarely, appropriately act as P's litigation friend in proceedings relating to that dispute. However, it seems to me that he or she would need to demonstrate that he or she can, as P's litigation friend, take a balanced and even-handed approach to the relevant issues. That is a difficult task for a member of the family who is emotionally involved in the issues that are disputed within the family and it seems to me an impossible task for AF to carry out in this case. One only has to look at her statements to see that she is clearly wedded to a particular answer. You do not see within her statements a balanced approach or anything approaching it, such as: "This is the problem. These are the relevant factors for and against"...."

However, in so far as there may be an issue about whether an RPR who is not acting as the litigation friend of the person deprived of their liberty is nonetheless entitled to public funding for his own representation in s21A proceedings, that issue is clearly not within the jurisdiction of the Court of Protection. More immediately, I can find no basis for disagreeing with Mr. Boden's submission that access to funding is not a relevant consideration for selection of an RPR.

Conclusions

66. The COP9 application of 10th October 2019 invited the court to “consider the issue of reinstatement of [RV] as relevant person's representative (RPR) for [JV].” In my judgment, there is no issue of ‘reinstatement’ to be considered. RV was previously appointed as RPR in respect of the third standard authorisation of deprivation of liberty in JV's living arrangements at Care Home R. He was not selected as RPR in respect of a new standard authorisation of deprivation of liberty in JV's living arrangements at Care Home A. The question to be determined is whether the selection process has been followed properly.
67. Having come to the view that she could not confirm RV's selection of himself as RPR because he did not appear to her to meet the eligibility requirements, the Bests Interests Assessor should have invited RV to make another selection. That did not happen. It was not open to the BIA either to choose the RPR, or to notify the supervisory body that she had made no selection. Therefore the circumstances of regulation 8(5) have not arisen, and it was not open to the supervisory body to select for appointment a paid RPR.
68. RV should now be invited to make a further selection of RPR if he so wishes. His selection will again be subject to confirmation by the BIA and the supervisory body of the eligibility of the person selected.
69. The primary function of the RPR in this matter has been discharged already, in that proceedings are already before the court in respect of the standard authorisation. In so far as an RPR has a wider remit than that, it seems to me to fall within the range of tasks which RV can anyway discharge as JV's son and within the active authorisations of also being her welfare attorney.
70. JV's position is appropriately secured by being party to these proceedings in her own right, and the appointment of the Official Solicitor as litigation friend for her. Wider issues of entitlement to public funding are outside the jurisdiction of this court, and not relevant to selection of an RPR in accordance with the regulations.

HHJ Hilder

20th December 2019