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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 his family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Citation: : **[2024]** EWCOP 57 (T2)

Case No: 12712261

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF SBB

Before: Her Honour Judge Hilder

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

Date: 11th October 2024

DANIEL LUMB
as property and affairs deputy for SBB

Applicant

and

(1) NHS HUMBER AND NORTH YORKSHIRE ICB
(2) PSG TRUST CORPORATION LIMITED

Respondents

Hearings: 26th January 2023 & 15th June 2023

Ms. Collinson (instructed by Stonegate Legal Limited) for the Applicant
Ms. Twist and, at the later hearing, Mr. Gomer (instructed by the ICB) for the First Respondent
Attendance of the Second Respondent was excused

The hearings were conducted in public subject to a transparency order made on 27th October 2022. This judgment was handed down on 16th October 2024 at a hearing where attendance had been excused. It consists of 28 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. Where the number is preceded by 'Au', the reference is to the page in the authorities bundle.

JUDGMENT

A. The Issue

1. At its most simple, the application to be determined is for discharge of the appointment of Daniel Lumb ("the Deputy") as property and affairs deputy for SBB.

2. The real issue in dispute, however, relates to what involvement a property and affairs deputy can/should have in the management of a Personal Health Budget under the National Health Service (Direct Payments) Regulations 2013:

    a. is management of a Personal Health Budget within the standard authorisations of a property and affairs deputyship?

    b. can a property and affairs deputy be a 'representative'?

    c. can a property and affairs deputy act as 'nominee'?

    d. is the appointment of a 'representative' or a 'nominee' a best interests decision that the Court of Protection can make on behalf of SBB?

    e. in the light of the conclusions to these questions, what steps should be taken in respect of deputyship for SBB?

3. Mr. Lumb has previously been involved in proceedings concerning local authority social care direct payments, a consent order from which is published at [2021] EWCOP 56. It is important to be clear from the outset that this judgment is concerned with a *different* direct payments scheme, in respect of health bodies rather than local authorities, to which *different* regulations apply.

4. The positions of the parties, and of the First Respondent ("the ICB") in particular, have developed over the course of these proceedings but at the point of this judgment they are as follows:

    a. the Deputy invites the Court to discharge his appointment as deputy for SBB's property and affairs because SBB does not require a deputy, on the basis that acting as a 'representative' for the purposes of a Personal Health Budget is not within the scope of a property and affairs deputy's general authority;

    b. the ICB maintains that SBB requires a property and affairs deputy to act as SBB's representative or nominee, and that acting as such falls within the general authority of a property and affairs deputy appointed under the standard order. It is prepared to commit to meeting the costs incurred by a property and affairs deputy in managing the Personal Health Budget [**A093**]. It invites the Court to appoint the Second Respondent trust corporation in the Deputy's place;

    c. two case management companies have confirmed that they would be able and willing to act as representative: Positive Case Management and A Chance For Life. If a property and affairs deputy cannot or is not authorised to act as representative for the purposes of a Personal Health Budget, the ICB is satisfied that either of these companies could be a suitable alternative.

5. The hearing on 15th June 2023 was 'adjourned part heard' with directions for:

    a. the Deputy and ICB to file an agreed written summary of SBB's care arrangements;

    b. the ICB to file the continuing healthcare review document of the latest review;

    c. a statement from Chris Wall, a case management/social work expert;

    d. skeleton arguments addressing the issue of whether funds paid by the ICB by way of direct payment for healthcare [are] SBB's property.

6. This judgment is handed down without any subsequent oral submissions being required.

B. Matters Considered

7. I have considered all the documents in the bundle for the hearings, consisting of 4 lever arch files in total, including:

    a. for the Applicant deputy:
        i. statements dated 31st March 2021 [**D024**], 25th May 2023 [**G127**]
        ii. position statements dated 16th February 2022 [**A005**], 19th December 2022 [**A030**], 8th June 2024 [**A045**]

    b. for the First Respondent ICB:

i. statement by Jane Leason dated 20th September 2021 [**G001**]
ii. statements by Adelle Marshall dated 10th February 2022 [**D057**], 22nd December 2022 [**G039**], 28th February 2023 [**G071**], 30th May 2023 [**G232**]
iii. position statements dated 19th October 2022 [**A007**], 30th November 2022 [**A017**], 8th June 2023 [**A067**]

c. from the Care Quality Commission: a statement by Patrick Wright dated 17th May 2023 [**G104**]

d. from The Professional Deputies Forum Ltd: a statement by Alexander Wright dated 18th May 2023 [**G110**]

8. I have also considered documents filed after the hearings, including

a. written submissions on behalf of the Deputy, dated 30th June 2023

b. written submissions on behalf of the ICB, dated 29th June 2023

c. an e-mail from Chris Wall timed at 11.58 on 22nd June 2023.

C. The Background Facts

9. SBB is now 31 years old. He has complex needs associated with learning disability and autistic spectrum disorder. It is common ground that SBB lacks mental capacity to make decisions about his property and affairs and about his care and support arrangements.

10. Since he reached the age of transition to adult services, SBB has had an unhappy history of failed placements. In November 2015 he returned to live with his parents in their family home. After protracted welfare proceedings in a regional court centre, that is where he presently remains. The situation is not straightforward. Its long-term resilience is a matter of ongoing consideration. However, for present purposes, the undisputed information before the Court is that SBB is much more settled in his present arrangements. Mr. Lumb has carefully explained that the concerns of his which are addressed in this judgment are in no way a reflection on Mr and Mrs B's contribution to SBB's wellbeing [**G129**]. For the purposes of this judgment only, I accept the ICB's position [**A026**] that the only effective option for the delivery of SBB's care is at the family home via a Personal Health Budget.

11. At the time of the final welfare order, it was provided that a property and affairs deputy would be appointed for SBB. By order made on 22nd November 2017 [**D006**], Alex Guy of Switalskis Solicitors was appointed to that role. The deputyship order does not contain any of the standard provisions as to deputyship costs. Instead, the following provision is set out, at paragraph 4:

> "(a) The CCG will be responsible for the deputy's costs for this application and the general annual management as agreed between the CCG and the Deputy in relation to [SBB]'s Personal Health

> Budget. In the absence of an agreement then the deputy may elect to have the costs assessed and paid by the CCG."

12. The ICB is the successor body to the CCG referred to in that deputyship order.

13. As a result of safeguarding issues, all deputyships held by Alex Guy have now been discharged. As part of that process, Daniel Lumb was appointed as replacement deputy for SBB, in an order made by me on 4th August 2020 [**D011**]. There is nothing in the order appointing Mr. Lumb as deputy for SBB which mentions any arrangements with the CCG/ICB. He was authorised, in entirely standard terms, to receive fixed costs at the solicitor's rates, and to obtain SCCO assessment if preferred. He was directed to file a report into the earlier deputyship and any further authorisations sought, and the security requirement was set at £10 000.

14. In the course of his investigations, Mr. Lumb came to the view that deputyship was not required - on the basis that SBB's income is limited to state benefits - but an application to call in the security bond in respect of Alex Guy's deputyship was appropriate.

15. By order made on 2nd February 2021 [**D015**], I determined that Mr. Lumb's deputyship appointment should stand but that he may apply for discharge if/when the outstanding issues relating to the Alex Guy deputyship were resolved. In that same order directions were given in respect of a call-in application, and for a further report from the Deputy.

16. In his statement of 31st March 2021 the Deputy set out his view as follows [**D026**]:

> "…the costs arrangements of [Alex Guy] are unorthodox. As noted in my prior submissions, I do not consider it to have been appropriate for the court's jurisdiction to have been engaged and a financial deputy appointed solely to manage a Personal Health Budget. I do not consider it appropriate for a professional financial deputy to be directing an unregulated care package of this complexity and size and, to the extent that he was, I would submit that [Alex Guy] was not doing so in his capacity as deputy."

17. As a result of the Deputy taking this view, the working arrangements for SBB's healthcare funding at present are, as set out in Adelle Marshall's second [**G042**] and third [**G072**] statements, as follows:

> "The ICB are (*sic*) currently funding a 'Managed Account' provider called Omega to facilitate the payments from the Continuing Healthcare team to Mr. and Mrs. [B], both are self-employed, and this system ensures that there is an appropriate level of audit and scrutiny available when invoices are submitted and paid each month. … The East Riding of Yorkshire Council (ERYC), facilitate all commissioned care and PHB/Direct Care payments on behalf of the ICB under a section 75 partnership agreement, on this occasion EYRC recognised the exceptional circumstances of [SBB]'s case and on that basis agreed to support the set up of a Managed Account with Omega in order to ensure that [SBB]'s care arrangements could continue…."

> "The ERYC have a specialist 'Direct Payments Support service', who offer a range of support to recipients of Direct Payments/PHBs and this includes assistance with recruitment, advertisement of PA posts and interviews, DBS and reference checks, provision of insurances, advice on employment responsibilities and access to independent HR advice. The ERYC Direct Payments team also ensures that a suitable Representative is identified in those circumstances when the recipient is unable to act as an employer themselves. They issue a 'direct payments' agreement to the Representative which summarises their general responsibilities and obtains a signature from them to confirm receipt and understanding….. "

18. Subsequently, it has been clarified [**G238**] that "ERYC's involvement in the PHB is limited to the provision of a Direct Payments Support Service…., the payment of funds into the PHB account and auditing of PHB accounts." Specifically, "ERYC does not have any role in the management of PHBs including decisions regarding the care provision etc."

19. The ICB says that these arrangements cannot continue because they do not allow for the development of a care package including paid carers [**A027 para 35**].

20. By order made on 5th August 2021 [**D044**], I directed the Deputy to provide to the East Riding of Yorkshire NHS CCG and to SBB's parents a written summary of his concerns about the financial arrangements for SBB's care, with provision for them each to file a written response. The order expressly encourages all of them to communicate directly with a view to reaching agreement as to financial arrangements for SBB's care going forwards.

21. The position reached after the required communications was set out in an order which I made (without a hearing) on 13th January 2022 [**D050**]:

> "6. It appears to the Court that:
>
> a. contrary to the assertion at paragraph 12 of Jane Leason's statement, there has not been any order made by the Court of Protection approving the method by which payment is made to [SBB]'s parents in respect of care provided to him;
>
> b. it is now accepted by the CCG that a Personal Health Budget, and not "gratuitous care payments", is appropriate and needs to be managed by someone other than [SBB]'s parents;
>
> c. Daniel Lumb is not willing to remain as deputy solely for the purpose of managing a Personal Health Budget for [SBB], and has informed the Court that he has no other income or assets which justify his continued appointment;
>
> d. East Riding of Yorkshire Council is apparently willing to be appointed as replacement deputy for the purposes of managing a Personal Health

Budget for [SBB] but has to date made no application for its appointment."

22. Directions were given for the provision of documents to all relevant persons and bodies; and for co-operation between them to ensure that an appropriate application was made to resolve the deputyship position.

23. By COP9 application dated 11th February 2022 [**D052**], the CCG applied for the discharge of Daniel Lumb's appointment as deputy, and for the appointment of PSG Trust Corporation Ltd as replacement deputy for SBB. The local authority had apparently withdrawn its offer to act as replacement deputy.

24. I was concerned that PSG Trust Corporation may not have been given a full explanation of the background to this matter. So, by order made on 20th September 2022 [**D077**], I required the CCG or its successor ICB, East Riding of Yorkshire Council, the Deputy and PSG Trust Corporation, following further direct communications, each to confirm in writing their position as to how direct payments for SBB may properly be managed. It transpired that there was no agreement, and so the matter was listed for hearing on 14th December 2022.

25. The December hearing date was vacated because of counsel's non-availability [**D094**].

26. PSG Trust Corporation was subsequently excused from attending the relisted hearing [**D096**] on the basis that it now "wishes to take a neutral stance in respect of the direct payments issues, does not wish to make submissions and confirms its agreement to be appointed as replacement deputy should the Court determine that a replacement deputy is required."

27. The hearing commenced on 26th January 2023 but no determination could be reached: [**D101**] "given the significance of the issues raised, the Court concluded that it needs to consider further evidence … from the First Respondent as to the management of PHBs generally, and as to the role they require a financial deputy / representative / nominee to undertake in SBB's case, and from the Care Quality Commission and the directors of the Professional Deputies' Forum…"

28. The additional evidence took significantly longer to obtain than had been originally envisaged. The hearing resumed on 15th June 2023.

D. <u>The scope of the dispute</u>

29. The simplicity of the Deputy's position - seeking discharge of his appointment as property and affairs deputy for SBB – rests on complex reasoning. In summary, he contends that:

    a. SBB has no assets of his own, and so there is no role for a property and affairs deputy;

    b. monies of a Personal Health Budget remain the property of the ICB;

c. the ICB's proposed arrangements for SBB's Personal Health Budget are contrary to the intentions of the NHS (Direct Payment) Regulations 2013 and associated guidance;

d. the ICB's proposed arrangements for SBB's Personal Health Budget are not adequately set out in a PHB agreement;

e. previous arrangements have generated significant complexity regarding employment rights and taxation for SBB's parents;

f. the ICB's proposal, whereby it controls the care arrangements to be funded by the Personal Health Budget, may restrict SBB's future access to wider private care options;

g. acting as 'representative' for the purpose of a Personal Health Budget is outside the authority of his particular deputyship appointment and also property and affairs deputyships as generally granted, because that role requires health-related decisions to be made (which may also require CQC registration[1]);

h. a solicitor is not an appropriate person to be making the health-related arrangements inherently required for a Personal Health Budget;

i. the requirements of a 'representative' are tremendously risky – the representative bears liability whilst control remains with the ICB – and may be uninsurable by a solicitor deputy;

j. SBB's Personal Health Budget should be managed by a case manager.

30. In respect of SBB's particular situation, the Deputy points out that:

a. "from our review of this matter, it is apparent that Mr. and Mrs B have variously been considered to be self-employed, directly employed, employee through companies of their own creation and paid under a purported gratuitous care arrangements." [**G129**]

b. "it is unclear upon what basis Mr and Mrs [B] are currently considered to be self-employed and yet the distinction is extremely important for tax, compliance, regulation and establishing the rights and responsibilities of the parties (including but not limited to minimum wage, sick leave, annual leave and auto enrolment for pensions etc.)" [**G129**]

[1] I make no determination of this question of CQC registration requirement. In summary, the Deputy referred to Care Quality Commission (Registration) Regulations 2009 regulations 3-4 and Health and Social Care Act 2008 section 8 – an individual who provides healthcare to a person or *employs others to provide that healthcare* [emphasis added] is required to register with CQC as a care provider. Contravention of the 2009 Regulations is a punishable offence. The provision of personal care is exempt from these Regulations by The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014. In these proceedings, the evidence of Patrick Wright of the CQC was that he was unable to say definitely whether a property and affairs deputy acting as representative for direct payments of a Personal Health Budget would be exempt from registration requirements. [**G109**]

c. the tax position for SBB's parents has been problematic. The Deputy has identified that the arrangement in place under the previous deputyship "was not lawful under the relevant HMRC regulations" but [**G150**] "the ICB, which asserts that it has strong controls over this care package, failed to identify those issues… As a result, SBB's parents … now find themselves in the position where HMRC may be seeking a back payment of tax". The ICB has confirmed [**G238**] that it will "consider reimbursement", whilst asserting that it "has no responsibility for the misinformation or maladministration of [SBB]'s PHB funds since Alex Guy was appointed as Deputy at the time, specifically to take on this role."

d. "it is further unclear why Mr and Mrs [B] are receiving payment for only 48 hours of support work when it is apparently accepted that the care plan requires them to provide additional "informal" hours to supplement those 48 paid hours." [**G130**]

e. the ICB is using ERYC's Direct Payment Agreement for Personal Health Budgets but accepts that an adapted form is required "to reflect those individual differences in terminology used by the differing commissioning bodies". In fact the difference is far more than terminology, and the lack of appropriate paperwork leaves concerns (raised with the ICB as early as November 2020) unaddressed. There is a substantive gap between the role described in the statement filed and the agreement exhibited. [**G132**]

31. More widely, the Court was made aware that the Deputy is not the only one grappling with issues of the type which he raises [**G147 para 60**]. The ICB's position statement put it starkly [**A073**]: "If the Deputy is correct that the ICB is operating under a misapprehension as to the meaning and effect of the 2013 Regulations, it is a misapprehension which stretches the length and breadth of the entire sector." I considered it appropriate to direct the filing of some evidence to inform the Court of the wider picture.

32. Unfortunately, the evidence from the Professional Deputies Forum provided less insight than had been hoped. The questions posed did not appear to have been fully understood, and the number of responses was small. There were in all 21 responses, from members together managing the affairs of 2 127 individuals (1 287 where the deputy is a trust corporation and 840 where a named individual acts as deputy), so about 6% of all deputyships [**G147**].

33. Of the limited responses:

- 71% of the respondents said that they receive or manage direct payments for healthcare [**G115**];
- although all 21 said that they did this in their capacity as deputy, 7 *also* said they act "in their personal capacity" [**G116**];
- 7 said that they act as 'nominee' [**G116**];
- 14 said they act as direct employer for P's care package, for a total of 100 Ps (but this may be an underestimate, given that 3 respondents did not give the number of their cases) [**G117**];

- 6 respondents said they receive a Personal Healthcare Budget as deputy in circumstances where there is no other nominated professional or family member who makes decisions about the care package;
- 5 said that they received payment from P for acting as representative or nominee under the regulations [**G118**];
- 4 said that they receive payment from someone other than P for acting as representative or nominee [**G118**].

E. General observations

34. Section 16(1) of the Mental Capacity Act 2005 ("the Act") defines the powers of the Court of Protection by two specific categories: powers arise if a person ('P') lacks capacity in relation to a matter or matters concerning their "personal welfare" or their "property and affairs".

35. There is further elaboration of the Court's powers in respect of 'property and affairs' at section 18 of the Act:

> "18(1) The powers under section 16 as respects P's property and affairs extend in particular to –
> (a) the control and management of P's property;
> (b) the sale, exchange, charging, gift or other disposition of P's property;
> (c) the acquisition of property in P's name or on P's behalf;
> (d) the carrying on, on P's behalf, of any profession, trade or business;
> (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member ;
> (f) the carrying out of any contract entered into by P;
> (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;
> (h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
> (i) the execution for P of a will;
> (j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;
> (k) the conduct of legal proceedings in P's name or on P's behalf."

36. Section 18(1) is clearly not exhaustive: it sets out matters "in particular" to which the section 16 powers extend. At least three of the eleven particularisations – (c), (g) and (k) – do not concern management of 'assets' which 'belong' to P. From this it may be inferred that 'ownership' is not the key defining feature of a person's "property and affairs" - "…and affairs" has a wider meaning. On the other hand (and noting that SBB does not have a profession, trade or business), it seems to me that only (g) could be understood as possibly contemplating dealings with money belonging to a third party, such as an obligation to pay it back.

37. It would clearly be unworkable for the Court of Protection to give full effect to this broad scope of powers directly. Section 16(2) of the Act sets out the 'general' provision that the Court may exercise its powers by appointing a person ('a deputy') to make decisions on P's behalf; and section 16(5) provides that:

"The court may…confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2)."

38. However, section 16(5) is to be understood as qualified by other provisions of the Act. Specifically:

    a. section 19(8)(a) provides that the Court "may confer on a deputy powers to (a) take possession or control of all or any specified part of P's property; (b) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine."

       (This strikes me as a puzzling provision, in the context of section 16(5) and section 18. The circle seems best squared by interpreting section 19(8)(a) as non-exhaustive – a specific example of what a deputy may be authorised to do with P's "property", rather than an exclusion of granting authorisation to do anything with P's "affairs".)

    b. express limits on the powers of the Court which may be conferred on a deputy are set out at section 20:

       "20 Restrictions on deputies

       ….

       (3) A deputy may not be given powers with respect to –

       (a) the settlement of any of P's property, whether for P's benefit or for the benefit of others,

       (b) the execution for P of a will, or

       (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise."

       (I do not consider that any of these express restrictions prevent the Court from conferring on a deputy its powers under section 18(g).)

39. In the standard wording of a property and affairs deputyship appointment, and in Mr. Lumb's appointment for SBB, the Court confers on the deputy "general authority…to take possession or control of the property and affairs of [the protected person] and to exercise the same powers of management and investment as he has as beneficial owner, subject to terms and conditions set out" in the deputyship order. Notably, the wording adopts the phraseology of section 16 (1)(b) ("property *and affairs*"), rather than the phraseology of section 19(8)(a) ("P's *property*"). This longstanding approach is supportive of my observations in parentheses in paragraph 38(a) above.

40. I have previously determined, in *Re ACC & Ors* [2020] EWCOP 9 at paragraph 53.7(c), that the general authority of a property and affairs deputy *does not* encompass determination of the care needs of P but *does* encompass the application of P's funds to meet the costs of P's care arrangements including, if those arrangements involve direct employment of carers, preparation of employment contracts.

41. Before leaving general observations, I digress briefly into matters of statutory interpretation:

    a. the ICB reminds me [**A075 para 21**] that "[i]t is axiomatic that the process of statutory interpretation aims to arrive at the legal meaning of legislation, or in other words, the meaning that conveys the legislative intention. The primary indication of legislative intent is the legislative text, read in context and having regard to its purposes. Accordingly, the court should aim to give effect to the purpose of legislation by interpreting its language, so far as possible, in a way which best gives effect to that purpose. Put another way, the Court's basic approach to interpretation is purposive, and every enactment is to be given a purposive construction."

    b. the Deputy refers me to caselaw:

        i. **[A033]** *Pinner v. Everett* [1969] 1 WLR 1266 per Lord Reid at paragraph 1273D: "In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase. We have been warned again and again that it is wrong and dangerous to proceed by substituting some other words for the words of the statute."

        ii. **[A034]** *R (on the application of Spathe Holme Ltd v. Sec of State for the Environment, Transport and the Regions* [2001] 2 AC 349: It is open to the Court to consider other parts of the same statute in order to assist in the interpretation of one particular provision.

        iii. **[A034]** *Flora v. Wakom (Heathrow) Limited* [2007] WLR 482 at para 16: "the text of an Act does not have to be ambiguous before a court may be permitted to take into account explanatory notes in order to understand the contextual scene in which the Act is set."

F. <u>What is a Personal Heath Budget?</u>

42. The "Guidance on direct payments for healthcare: Understanding the regulations" (published by NHS England, reference PR1363, version 2, dated 5 December 2022 [**Au69**]) – which I shall refer to hereafter as "The Guidance" - explains on page 5 that "… personal health budgets are part of the wider drive to give people more choice and control."

43. The "Explanatory Memorandum to the National Health Service (Direct Payments) Regulations 2013", SI No. 1617 [**Au1**] explains that:

"7.3 The aim of personal health budgets is to enable greater personalisation of healthcare services, give people more choice and control, improve patient satisfaction and quality of life.

7.4 A personal health budget is an amount of money that is provided to a patient in lieu of their regular NHS care. The patient and their healthcare professional agree the desired health outcome and the individual, with support, is able to plan how to use the money available to meet those needs.

7.5 There are three methods of having a personal heath budget:

(i) notional, where the money is managed by the NHS;
(ii) third-party, where a person or organisation independent of the NHS and the patient manages the budget; or
(iii) a direct payment, which is managed by the individual themselves."

44. It is clear from this explanation that a Personal Health Budget ('PHB') is conceived as a vehicle for facilitating personal choice in healthcare arrangements. Whichever of the three methods of 'having' one is adopted, the concept of PHB is **not** simple delegation of financial management according to the instructions of the paying health body, because that would leave no room for 'choice' and so abrogate the stated aim.

G. <u>What are 'direct payments' of a Personal Health Budget?</u>

45. The Guidance sets out [**Au69**] the following explanation:

(Page 3): "Any inconsistency between this guidance and the legislation is to be interpreted in favour of the legislation."

(Page 4): "The following groups have a legal right to have a personal health budget – adults in receipt of NHS Continuing Healthcare…."

(Page 5-6): "1. Direct payments for healthcare are monetary payments in lieu of services – made by ICBs to people (or to a representative or nominee on their behalf) to allow them to purchase the care and support they need.

2. Direct payments are one way of providing for all or part of a personal health budget – where money is transferred to the person, their representatives or nominee…who contracts for the necessary services."

46. SBB's Personal Health Budget amounts to £1 368.06 per week [**G072**], made up of 96 hours per week of care at an hourly rate of £14.26. Presently, SBB's parents are the carers, and they are paid from this budget for 48 hours per week each, on a self-employed basis [**G237**].

H. Do direct payments form part of the patient's "property and affairs"?

47. I am acutely conscious of the limits of the Court of Protection's jurisdiction. I am equally conscious that the practical problem in SBB's situation requires determination of the extent of deputyship authority – an issue which falls entirely within the jurisdiction of the Court of Protection. Accordingly, I do not seek to make a definitive conclusion on the legal basis on which direct payment monies move from the bank balance of the health body to the bank balance of the person whose care plan they are intended to facilitate. Rather, I limit myself to considering whether direct payment monies form part of SBB's "property and affairs" for the purposes of sections 16 and 18 of the Mental Capacity Act 2005.

48. There are some provisions in The National Health Service (Direct Payments) Regulations 2013 SI 1617 which are pertinent to this question:

    a. regulation 10(1),(3) & (5): a health body must only make direct payments into an account which is approved by the health body, used only to hold the direct payments, and susceptible to the health body ensuring that it is subject to arrangements and procedures which the health body considers adequate;

    b. regulation 10(5): direct payments must only be used for services set out in the care plan;

    c. regulation 11(7): the person managing the direct payments must, on request or at intervals specified by the health body, provide information or evidence relating to the account and the use of direct payments;

    d. regulation 15: **Repayment of direct payments –**

        "(1) A health body may require that part or all of a direct payment must be repaid to the health body, if satisfied that it is appropriate to require repayment having regard in particular to whether –
        (a) the care plan has changed substantially;
        (b) the patient's circumstances have changed substantially;
        (c) a substantial proportion of the direct payments received by a patient, representative or nominee have not been used to secure services specified in the care plan and have accumulated;
        (d) the direct payments have been used otherwise than for a service specified in the care plan;
        (e) theft, fraud or another offence may have occurred in connection with the direct payments; or
        (f) the patient has died."

    e. regulation 16: **Recovery of amounts due as a civil debt** - where a sum must be repaid to a health body pursuant to regulation 15 and the reasons for that is theft, fraud or another offence, that sum may be recovered summarily as a civil debt.

49. The combined effect of these regulations is that the patient receiving direct payments does not have a right of free disposal of those monies. They must be applied for a specific purpose. The paying body exercises significant control over how funds are

held, and some rights to recover payments made. None of these characteristics sits comfortably with the common understanding of "property and affairs" as managed by a deputy.

i. The Deputy's position

50. Throughout these proceedings the Deputy's view has been that direct payments do not form part of SBB's property and affairs. At the first hearing on his behalf the suggestion was ventured that direct payments are held on a *Quistclose* trust. (I understood that suggestion to have been withdrawn by the time of the second hearing but the Deputy has confirmed that it stands.) In very detailed, closely argued post-hearing written submissions, Ms. Collinson contends on behalf of the Deputy that:

    a. direct payment monies do not and cannot form part of P's property, and therefore they do not fall to be managed by a property and affairs deputy; and

    b. instead, the management of direct payments, and the authority to manage them, are dictated by the self-contained code set out in the 2013 Regulations.

51. In support of this position the Deputy has:

    a. provided [**G164**] an example of a "Personal Health Budget Agreement" by a different public health body which states expressly at page 9 "For the avoidance of doubt, in the event the patient passes away, any monies left in the designated bank account is not to be included in the deceased's estate. *This is public money and is not an asset of the individual*." [emphasis added]

    b. referred [**A039**] to an e-mail from the ICB's predecessor body dated 21 March 2021 reminding him that "*the funds held by you are public funds* and the CCG does not consent to the entirety of the funds being transferred" [to SBB's parents]. [emphasis added]

52. The Deputy has also expressed concerns that, if direct payments are to be considered as part of a protected person's estate for the purposes of deputyship, then:

    a. their value ought to be considered in determination of the security requirement;

    b. they could be subject to income tax (because he has found no exclusion of direct payments from income tax regulations, in stark contrast to periodical payments which are exempt as provided by section 148 Income Tax (Trading and Other Income) Act 2005 and HMRC Manual IPTM5020);

    c. they could affect entitlement to means tested benefits such as Universal Credit (because otherwise he would expect there to be an express disregard, payments for care being ordinarily excluded from assessment);

    d. payments to family carers could and would be paid as gratuitous care payments, thereby avoiding the administration and bureaucracy of employment contracts.

ii. The ICB's position

53. The ICB has made various statements about the basis on which direct payments are made, as follows:

a. [**A025**, **ps para 27**]: "The stark reality, however, is that the funds from a [Personal Health Budget] fall within the control of the person to whom they are made. A capacitous person would receive such funds directly to distribute as he or she saw fit in accordance with their care plan. Mr. Lumb does not provide any explanation as to why the same principle does not apply to an individual lacking capacity. Those funds would form part of SBB's property and affairs until his death, similar to the state benefits to which he is entitled, and as such require management".

b. [**A089 ps**] refuting the suggestion of a *Quistclose* trust:

i. **para 63**: "it is not suggested that a Direct Payment is a loan, nor that it is not at the free disposal of the payee (within certain constraints ie that it must be used for the purposes in the PHB), merely that it can become repayable if certain vitiating circumstances arise."

ii. **para 64**: other means of achieving the same result include "an escrow agreement, a retention of title (or *Romalpa*) clause, or other statutory clawback provisions… In particular, the 2013 Regulations do not assert any proprietary interest in the funds advanced under a PHB. Whilst an ICB can demand repayment of such sums in certain circumstances, it is submitted that this cannot, on any realistic reading of the said Regulations, amount to the assertion of a proprietary interest in the funds advanced; instead, it would simply create a debt obligation."

c. [**A090 ps**] making alternative suggestions:

iii. **para 69**: "Whilst it remains the case that the [direct payment] must be used for the purposes set out in the [Personal Health Budget], and the ICB can, in certain circumstances, demand its repayment, this does not alter the basic position that somebody still has to hold and manage the [direct payment] on [SBB]'s behalf until it has either been expended or until it is returned to the ICB (and it is, in legal terms, 'in SBB's estate' until that happens). A representative or nominee is still receiving the PD <u>for SB's benefit</u> unless one of the vitiating events identified in regulation 15 applies, and thus the funds are 'in SB's estate' in those circumstances; it is simply not possible to use the funds for any purpose besides those specified in the PHB."

iv. **para 72**: "… the funds from a [Personal Health Budget] fall within the control of the person to whom they are made. A capacitous person would receive such funds directly to distribute as he or she saw fit in accordance with their care plan. The Deputy does not provide any explanation as to why the same principle does not apply

to an individual lacking capacity. Those funds would form part of [SSB]'s property and affairs until his death, similar to the state benefits to which he is entitled, and as such require management."

d. In **post-hearing written submissions:** "a Direct Payment is held by its recipient and is therefore the recipient's property."

iii. Determination

54. In my judgment the ICB's attempt to equate direct payments of a Personal Health Budget with payments of state benefits is misconceived. State benefits can be used as the payee pleases, and when the payee dies whatever remains (as long as it was not erroneously paid post-death) forms part of his estate. In contrast, it is not permissible for anyone to expend direct payments of Personal Health Budget in any way other than to give effect to an agreed care plan and, even where properly paid during the patient's lifetime, repayment obligations can arise. From this I conclude that the patient does not 'own' the direct payments in the sense considered at paragraph 36 above and the majority of the eleven particularisations at paragraph 18 of the Mental Capacity Act 2005. In that sense, we may say that direct payments are not P's "property."

55. However, direct payments are intended to be an advancement of a patient's wellbeing and to maximise their freedoms, so their availability to the incapacitous as well as the capacitous is consistent with a general intention to avoid discrimination. Management and repayment obligations may be readily understood as a desirable safeguard on the use of public funds. Once paid for the healthcare of a person who lacks capacity to make decisions about what to do with them, that person (P) incurs obligations in respect of them; and discharge of a person's obligations, whether legally enforceable or not, is explicitly within the powers of the Court at section 18(1)(g) of the Act. So, I conclude that direct payments do fall within the meaning of "… and affairs" as envisaged in section 16(1)(b) of the Act.

56. The question then becomes whether the management of direct payments comes within the standard authorisations of a deputyship appointment; or, if it does not, could such authorisation be specifically granted? In order to answer those questions, more detailed understanding of the direct payments scheme is required.

I. How are direct payments made?

57. In so far as is pertinent, The National Health Service (Direct Payments) Regulations 2013 [**A10**] – hereafter, "the Regulations" - provide as follows:

> "3 (1) A direct payment may be made to a person who –
> (a) is a person for whose benefit anything may or must be provided or arranged by a health body –
> (i) under the 2006 Act, or
> (ii) in the case of a CCG or the Board, under any other enactment; and
> (b) consents to the making of a direct payment to them.
> …

(3) A direct payment may only be made to a person falling within paragraph (1) if the person –
(a) is aged 16 or over;
(b) has capacity to consent to the making of a direct payment to them; and
(c) is not a person described in the Schedule (persons excluded from direct payments.)

58. SBB does not fall within the Schedule of excluded persons but it is common ground that he lacks capacity to consent to the making of a direct payment, so we must next look to Regulation 5:

> "5 (1) A direct payment may be made in respect of a person, other than a child, who lacks capacity to consent to the making of a direct payment to them, if that person –
> (a) is a person for whose benefit anything may or must be provided or arranged by a health body –
> (i) under the 2006 Act, or
> (ii) in the case of a CCG or the Board, under any other enactment;
> (b) is not a person described in the Schedule (person excluded from direct payments); and
> (c) has a representative who consents to the making of direct payments in respect of that person."

59. It is common ground that SBB satisfies regulation 5(1)(a) and (b). So, for direct payments to be made for his healthcare needs, the only sticking point is the requirement that he has a 'representative'.

60. Leaving aside for a moment the requirement that a representative must actually consent to the making of direct payments (which the Deputy does not), this bring us to the question of whether Mr. Lumb's deputyship appointment for SBB, and indeed property and affairs deputyships in standard terms more generally, fall within the meaning of 'representative'. In other words, does a property and affairs deputyship order in standard terms confer sufficient authorisation from the Court for the deputy to give valid consent to the making of direct payments?

J. Are the standard authorisations of property and affairs deputyship sufficient to discharge the functions of 'representative'?

61. 'Representative' is defined at regulation 2(1)(a): "in the case of a person in respect of whom any deputy has been appointed by the Court of Protection under section 16(2)(b) of the 2005 Act (powers to appoint deputies) *to make decisions on that person's behalf in relation to matters in respect of which direct payments may be made*" [emphasis added], representative means "any such deputy".

62. What is the range of decision-making "in relation to matters in respect of which direct payments may be made". In other words, what is a 'representative' actually required to do?

i. <u>The ICB's initial position</u>

63. In the October 2022 position statement [**A007**], the ICB's position was as follows:

    a. [**para 9]** the decisions required of a representative "will be limited to being within the remit of decisions regarding the financial elements of the PHB, to include giving receipt for and holding the PHB funds, acting as employer for PA's recruited to support SBB and paying them accordingly";

    b. [**para 13**] a property and affairs deputy is able to comply with each part of regulation 5(5);

    c. [**para 14 & 15**] "the responsibility for reviewing SBB's support plan/care arrangements will rest with the ICB … The Financial Deputy would be responsible for receiving the PHB funds on [SBB]'s behalf and acting as the employer for any PA's recruited to support [SBB]'s package of care. The Financial Deputy will be limited to making payments from the PHB in accordance with [SBB]'s care plan; the Financial Deputy will be provided with a list of authorised costs/payments by the ICB".

64. In the November 2022 position statement [**A017**], the ICB

    a. [**para 21**] pointed out that paragraph 89 of the Guidance refers to 'discussions' including the representative, and so "it is not intended that the representative is a decision-maker" but is "a person to be consulted in line with the provisions of s4(7)";

    b. [**para 36**] reiterated that "[t]here is no requirement for the deputy to make decisions about [SBB]'s health and welfare."

65. I note that regulation 5(5) stipulates that a representative

> "must –
> (a) agree to act on the patient's behalf in relation to the direct payment;
> (b) act in the best interests of the patient when securing the provision of services in respect of which the direct payment is made;
> (c) be responsible as a principal for all contractual arrangements entered into for the benefit of the patient and secured by means of the direct payment;
> (d) use the direct payment in accordance with the care plan; and
> (e) comply with the relevant provisions of these Regulations."

I agree that none of that looks alien to the standard authorisations of property and affairs deputyship.

ii. The Deputy's position

66. However, from the outset the Deputy took a wider view of the Regulations. On his behalf it was said [**A034, para 21]** that '*matters in respect of which direct payments may be made'* "clearly means the things which the Direct Payment is used to pay for. … These 'matters' will always concern P's health because, as the explanatory memoranda states, the purpose of the Regulations is '*to enable direct payments **for healthcare** to be made available across England*.'" So the representative's role is not just to give good receipt of funds. It requires agreement that the direct payment, rather than an alternative way of managing the Personal Health Budget, is made in the first place. In doing so "the representative makes a decision about the manner in which P's healthcare is delivered." [**A035 para 23**]

67. In support, various other regulations were identified as relevant:

    a. I note in particular regulation 8(7), which requires that a representative

    "must agree –
    (a) that the patient's specified health needs can be met by the services specified in the care plan;
    (b) that the amount of the direct payments is sufficient to provide for the full cost of each of the services specified in the care plan; and
    (c) that the patient's requirements may be reviewed in accordance with regulation 14(2)."

    b. in addition, the Deputy identified [**A035 para 24**] others:

        i. regulation 8(1)(c) – the requirement to agree with the health body the procedure for managing any significant risk;
        ii. regulation 8(6) – the ability to request that the health body provide reasons why it decided not to include a particular service in the care plan, and the obligation on the health body to give such reasons;
        iii. regulation 11(2)(a) and (b) – the requirement, before securing services from a provider, to ensure that the provider complies with CQC requirements and has sufficient insurance or indemnity cover;
        iv. regulation 11(4) – the requirement, when requested by the health body, to provide information or evidence relating to the health or condition of the patient or the health outcomes expected from the provision of any service;
        v. regulation 11(5) – the requirement to inform the health body when the patient's state of health or circumstances change substantially;
        vi. regulation 11(8) – the prohibition on procuring services from a particular person if the health body imposes that condition.

iii. Determination

68. Even at a straightforward non-technical level, it is hard to see how the ICB could consider that its initial position was consistent with a scheme designed to promote choice of healthcare provision. There would be no recognisable 'choice' at all. The

whole scheme is reduced to little more than an exercise in delegated financial administration. The paying body is never going to challenge its own decisions about a care package. SBB would not have any independent input into his healthcare arrangements.

69. Looking back to paragraph 7.4 of the Explanatory Memorandum (paragraph 43 above), it is clear that the representative, standing in the shoes of an incapacitous recipient of a Personal Health Budget, must be able to 'plan' care arrangements - as in 'devise' them, not simply make administrative arrangements to pay for them. Such 'planning' of care arrangements is **not** within the standard authorisations of a property and affairs deputy.

70. To check this conclusion, I return to The Guidance [**Au94**]:

> "73. A representative is someone who agrees to act on behalf of someone who is otherwise eligible to receive direct payments but cannot do so because they do not have capacity to consent to receiving one, or because they are a child. Representatives are responsible for consent to a direct payment and fulfilling all the responsibilities of someone receiving direct payments. This is similar to the appointment of an 'authorised person' in social care.
>
> ….
>
> [(77)(b) then replicates regulation 2(a)]
>
> (78) When considering whether a representative is suitable, the ICB should be aware of the terms under which someone has been appointed …. by the Court of Protection as the person's deputy. The…deputy may only make decisions *about the person's healthcare and securing services on the persons' behalf to meet their care needs* if they have been appointed to deal with these matters." [emphasis added]
>
> "(79) A representative is responsible for managing direct payments on behalf of the person receiving care. They, or their nominee, must:
>
> - *act on behalf of the person, eg to help develop personalised care and support plans and to hold the direct payment…* [emphasis added]
> - act in the best interests of the person when securing the provision of services
> - be the principal person for all contracts and agreements, eg as an employer
> - use the direct payment in line with the agreed personalised care and support plan
> - comply with any other requirement that would normally be undertaken by the person as set out in this guidance (eg review, providing information)."

71. I am satisfied that The Guidance confirms my conclusion that the standard authorisations of a property and affairs deputy do **not** include what is required of a representative by Regulation 2(1)(a).

72. By the time of its June 2023 position statement, the ICB accepted [**A079 para 32**] that the regulations require some authority of a welfare type.

73. Unfortunately, although the intention of the Regulations seems to have been to open the door to Court of Protection appointed deputies, it seems to me that the vision of deputyship held in the Regulations and Guidance is at odds with the reality of deputyship appointments as they are actually made by the Court:

    a. in accordance with the specific categories of section 16(1) the Act, the Court of Protection invariably confers *property and affairs* deputyship authorities separately to *welfare* deputyship authorities, and comparatively rarely confers the latter;

    b. decisions "about a person's healthcare" and "help[ing to] develop personalised care and support plans" fall within the remit of a *welfare* deputy, but "securing services" falls within the remit of a *property and affairs* deputy;

    c. acting as a 'representative' requires *both* types of authorisation.

74. The conclusion that meeting the regulatory requirements involves *welfare* authorisations has implications for the ICB's proposal that PSG Trust Corporation Limited be appointed as replacement deputy. Pursuant to section 19(1)(b), a trust corporation can *only* be appointed as deputy "as respects powers in relation to property and affairs."

K. Can a property and affairs deputy be 'appointed' by the health body as 'representative' pursuant to regulation 5(4)?

75. Even if a property and affairs deputyship in standard terms does not automatically qualify the deputy to be a representative for the purpose of direct payments of a Personal Health Budget within the definition of regulation 2(1)(a), the ICB contends that such a deputy *could be appointed* by the health body as 'representative' pursuant to the (f) part of Regulation 2(1), which includes within the definition of representative a person who "has been appointed under regulation 5(4) (appointment of person in respect of persons who lack capacity)…"

76. Regulation 5(4) has to be read with regulation 5(3). Together, they provide that, where a person who is not a child lacks capacity to consent to the making of direct payments but has no representative, then the health body may appoint another person it considers appropriate to receive and manage the direct payments for them.

77. The ICB points out [**A077 para 27**] that this power of appointment is not circumscribed or qualified in any way (although I note that there is some steer given at paragraph 76 of The Guidance as to how an ICB should exercise its power of appointment.) So, if a health body has appointed a person "to receive and manage a direct payment", that person simply is - per regulation 5(4) - a 'representative' in

accordance with regulation 2(1)(f). And, says the ICB [**ps A083 para 39(b)**], that could include a property and affairs deputy with only standard authorisations.

78. The ICB asserts [**A084 para 44**] that such appointment

> "is no different in practical terms to a situation where a property and affairs deputy is appointed to manage an award of damages. The deputy does not make decisions about the protected person's needs but does give effect to the care plans developed by others with their own authority and expertise."
>
> and still [**A084 para 46**]
>
> "In reality, where a p&a deputy is appointed to manage a PHB, a deputy would not be required to exceed the authority in the court order which appoints them. The decision-making regarding care planning and wider welfare issues will be done by the various professionals involved in a protected party's care, in consultation with any interested person… The deputy will merely be making the financial and contractual arrangements to give effect to the decisions made via that process."

79. It seems to me that this position of the ICB is both internally inconsistent and too cavalier. It is right that property and affairs deputies often manage an award of damages, applying it to meet the costs of a care package, but they act *within* their standard authority *if* in doing so they are "giv[ing] effect to care plans developed by others." In contrast, as set out above, the Personal Health Budget representative is required to *make decisions about healthcare* and *help develop* care plans. This is an important aspect of extending the objective of 'choice' to those who, because of incapacity, need someone (other than the public body) to have determinative input into their care arrangements.

80. So, subject to consent, within the regulations the health body *could* appoint a standard terms property and affairs deputy ('D') to act as representative but that appointment would not alter the terms of the deputyship. If D agreed to act as representative, it would be *outside* the deputyship (leaving the oversight provisions within the Regulations themselves, without the extra supervision by the OPG.) Notably, the fees authorisation in the deputyship appointment would not extend to fees from P's funds for acting as appointed representative[2]. Neither could the direct payments themselves be used to pay such fees. Since it is a reality of life that those who act as professional deputies would be likely to expect to be paid for their work, it seems unlikely that any such deputy would consent to such appointment unless the health body agrees to pay fees in respect of it. The health body would then presumably need to consider whether D – as opposed to, say, a case manager – represented the most appropriate appointment, in terms of best value for money and otherwise.

81. It seems to me that regulation 5(4) does not take this matter any further.

[2] A capacitous person receiving direct payments would not ordinarily incur fees for management of those monies. As a starting point, it is therefore difficult to see why an incapacitous person should be expected to bear such costs.

L. Do the 'nominee' provisions assist?

82. The ICB's answer to concerns about the functions of a representative being beyond the standard authorities of property and affairs deputyship appears to be that a 'representative' could 'nominate' a person as set out in regulation 6.

83. The ICB's proposals in this respect have varied:

    a. in its November 2022 position statement [**A028 para 37**], the proposal is expressed as follows: "the deputy can act as 'nominee' with [SBB]'s father as 'representative'."

       This proposal clearly envisages the deputy/nominee doing the administrative management of direct payments, but neither representative nor nominee would have any kind of standing for addressing the welfare requirements of the representative role. Complicatedly, this proposal expressly expects that *both* the representative and the nominee would be "joint employer" under any contract of employment [**A025 para 25]**.

       I have seen no evidence as to whether SBB's father would in fact be willing both to act as representative and, as such, to nominate the Deputy, an alternative deputy or any other third party nominee to manage the direct payments.

    b. subsequently, in its June 2023 position statement [**A084 para 45**], the proposal seems to have been refined so that the representative does have some sort of welfare standing: "… the representative can nominate a person to receive the Direct Payment in circumstances where the protected party's health needs would benefit from that arrangement. This could, if necessary, be someone who is registered with the CQC as a care provider, if it is considered that the representative would otherwise need to be registered in that way to administer the care plan correctly..."

       I have seen no suggestion as to who would be the representative in this arrangement.

84. Who could nominate a nominee for SBB?:

    a. the starting point is regulation 6(1), which lists as possible persons to make the nomination (a) an adult patient with capacity to do so, (b) a representative, or (c) where regulation 5(7) applies, the health body itself;

    b. it is agreed that SBB lacks relevant capacity;

    c. regulation 5(7) concerns a situation where direct payments were being made on the basis of the patient's capacitous consent but the health body is reasonably satisfied that the patient now has a temporary lack of capacity. This is not SBB's situation;

d. that seems to leave only nomination by a representative.

85. I have considered whether the Court could 'stand in the shoes of SBB' for the purposes of regulation 6(1) and make a nomination for him, in his best interests. I have concluded that it cannot, because of the specific provision in regulation 5 as to when direct payments may be made in respect of persons who lack capacity. In circumstances where an administrative scheme itself makes provision for putting in place arrangements for management of direct payments where the recipient cannot make those arrangements themselves, it is unlikely to be appropriate for the Court to step in and make the nomination. The scheme stands self-contained. Here, regulation 5(1) makes provisions for direct payments to be made in respect of otherwise eligible persons who lack capacity through a representative; and regulation 5(3) and (4) makes provision for where there is no representative - a health body may appoint another person it considers appropriate to receive and manage the direct payment.

86. So, as long as SBB does **not** have a representative and notwithstanding the apparently exhaustive framing of Regulation 6(1), the health body may "appoint" a person to "receive and manage" direct payments for him. What is that if not appointing a nominee? It seems that the healthcare body may nominate someone to receive direct payments for SBB after all.

87. What are the expectations of a nominee? Regulation 6(3) provides as follows:

> "A nominee to whom a direct payment is made in respect of a patient must -
> (a) be responsible as a principal for all contractual arrangements entered into or the benefit of the patient and secured by means of the direct payment;
> (b) use the direct payment in accordance with the care plan; and
> (c) comply with the relevant provisions of these Regulations."

88. So, where there is a nominee, it is the nominee (rather than the representative) who has the administrative responsibility in respect of the PHB funds. Both a representative and a nominee need to consent (regulations 5(5) and 6(4) respectively) but otherwise the requirements of a nominee are more limited than those of a representative:

    a. a representative must agree "to act on the patient's behalf in relation to the direct payment" [regulation 5(5)(a)] but a nominee need only "agree to receive the direct payment in respect of the patient" [regulation 6(4)(a)];

    b. a representative must act in the best interest of the patient [regulation 5(5)(b)], but there is no equivalent stipulation in Regulation 6 for a nominee.

i. <u>The Deputy's position</u>

89. The Deputy agrees [**ps para 37**] that in principle, the Regulations do not prevent his appointment as nominee. He reframes the question back to whether he is authorised by the deputyship appointment to act as nominee. He answers that question in the negative, for the same reasons as he says exclude a property and affairs deputy being representative: the responsibilities imposed by regulations 8 – 11 are also imposed on a nominee, and the right of recovery under regulations 10 – 16 also apply to a nominee. So this role too is grounded in matters concerning SBB's healthcare.

ii. Determination

90. I note that:

a. regulation 8 (1)(b), (2)(a) and (1)(c) together require the paying health body to advise a nominee of significant potential risks arising in relation to the making of direct payments, including risks as to the patient's health, and agree with the nominee the procedure for managing such risk;

b. regulation 8(7) does not expressly include a nominee in the requirement to agree that the patient's health needs can be met by the services specified in the care plan, but if the nominee is not to be considered as included in the use of the word 'representative' in that context, it would mean that there is no requirement for someone in SBB's position to have anyone other than the paying body agreeing to the sufficiency of the care arrangements – which both abandons any notion of choice and seems itself inherently risky;

c. regulation 9(2)(f) requires a health body to make arrangements for a nominee to obtain information, advice and support about "advocacy services, whereby a third party assists a … nominee in relation to the terms of a care plan…";

d. regulation 11(4) requires a nominee, on request or at intervals specified by the health body, to provide the health body with information or evidence relating to the state of health of the person for whom direct payment are made, and the health outcomes expected from the provision of any service;

e. regulation 11(5) requires a nominee if the nominee considers it reasonable to do so, to notify the health body when the patient's health or other circumstances change substantially.

91. I agree with the Deputy that these regulatory requirements on a nominee do not fit within the standard authorisations of a property and affairs deputy. In my judgment, the nominee provisions do not take this matter any further.

M. Can the Court of Protection specifically authorise a deputy to manage direct payments of a Personal Health Budget?

92. If, as I have concluded, the standard authorisation of a property and affairs deputy is not sufficient either to make the deputy a 'representative' or to meet the requirements of a representative or nominee, could the Court specifically authorise a person to receive and manage direct payments of a Personal Health Budget? Such a person would be a 'deputy' within the meaning of section 16(2) of the Mental Capacity Act 2005, albeit that the substance of the authorities granted would need to be understood as stemming from both of the specific categories of the Court's powers.

93. Such an appointment would give effect to what the ICB seeks to achieve.

94. The Deputy's position is that the Court *could* make such an appointment, but it *should not*. He points out that by training and experience he is a solicitor, simply not qualified

to develop a personalised care and support plan for SBB. He would usually engage the services of a case manager to undertake this role. It cannot be in SBB's, or any P's, best interests to authorise a person to do what they are not qualified to do. Practically, he is concerned that there is a real risk that such a deputy would need to be CQC registered in order to comply with relevant regulations. Moreover, such appointment would lead to the bizarre and artificial situation [**A062 para 56**] where the deputy is authorised to make welfare decisions but not expected actually to make them because this ICB intends to carry out the health aspects of the representative's role.

95. I would be reluctant to conclude that the Court could not, in one appointment, confer authorities from each of the two categories of its powers as framed by the Act. In my view, the categorisation of powers is a reflection of legal history and development, rather than an immutable aspect of the Court's jurisdiction. Where it assists practical administration (including supervision of deputies), it has merit; but it should not be an impediment to advancing the best interests of a protected person. If the scope of the authorisation is made clear, I do not see that the categorisation of the Court's powers under the Act should prevent an appointment with specific authority to manage direct payments. In my judgment, the Court *could* appoint a deputy with specific authorisation to manage direct payments in accordance with the Regulations.

96. The question then becomes whether the Court *should* make such appointment, and that will always depend on there being someone willing to be so appointed. Mr. Lumb is not so willing. PSG Trust Corporation Limited should be given an opportunity to consider its position in the light of this judgment but section 19(1)(b) appears to be an impediment.

97. It will also depend of course on whether a deputyship appointment is required at all, having regard to all the circumstances and the principle set out at section 1(6) of the Act that regard must be had to whether the purpose for which an act or decision is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

N. Alternative option

98. The ICB was initially quite fixed in its view that deputyship was required, and resistant to the idea of a case manager. The evidence of Ms. Marshall [**G078**] sets outs the view that a case manager could not be appointed as representative - "what is required for [SBB] falls outside of their routine work" – and that none of the eight case management companies contacted were willing to take on the required work. Even after the Deputy's letter of 30th March 2023 [**G222**] setting out positive responses from case managers, the ICB strongly disagreed.

99. However, I note from correspondence between the parties (referring to the Deputy's discovery from documents received from Switalskis when he took over the deputyship) that the health body originally provided a lump sum of £26 880 to fund the cost of a case manager [**G144 para 53**], based on expert recommendation made at the time. The expert was Chris Wall, who subsequently *offered* to act as representative for SBB when he learned of the Deputy's application to be discharged as deputy.

100. The ICB now accepts that either of two case management companies could become 'representative' for SBB.

101. I agree that a case manager would be a suitably experienced and qualified professional to take on the role of SBB's representative for the purposes of a Personal Healthcare Budget, particularly well placed to challenge, where necessary, any decisions about the care plan so as to give meaning to the notion of 'choice' on which such Budgets are based.

102. I am not presently satisfied that a deputy is required, as asserted by the ICB, to enter into a tenancy on behalf of SBB, for the employment of carers, or to absorb what is currently done by SBB's parents through appointeeship [**A027 ps para 33**]. A tenancy agreement is hypothetical at this point, and in any event there does not need to be a deputy in place for the Court to authorise *someone* to enter into a tenancy on SBB's behalf. It seems unlikely that any additional expense or delay would be caused by any need for a future application for such authority, given that SBB's living arrangements are likely always to amount to a deprivation of his liberty and that, if a tenancy is required, such authorisation is likely to have to come from the Court. Both the authorisation and the tenancy could be considered together. I have already addressed the assistance available to a representative in respect of employment contracts. There is no suggestion that SBB's estate is outside the scope of appointeeship.

103. Accordingly, I conclude that no appointment by the Court is required at all to facilitate a Personal Health Budget for SBB. It is therefore appropriate to discharge the appointment of Mr. Lumb as property and affairs deputy, without making any replacement appointment.

O. Costs

104. It is regrettable that these proceedings have engendered quite such bitterness in the tone of communications between professionals. Mr. Lumb has been accused of showing "fundamental misunderstanding of the circumstances of this particular case and [SBB]'s needs" [**A026 ps para 32**]. The ICB has been accused of "misunderstanding or ignorance of the true scope of the representative's role" [**A035 ps para 22**]. It is my clear impression that this unedifying tone was driven by the ICB.

105. The ICB and the Deputy both seek costs from the other. It would be still more regrettable if this stance now leads to more costs being incurred. I encourage the parties to seek to reach agreement as to costs in the light of this judgment. If that is not possible, they may each file written submissions as to costs, limited to 5 sides of A4, no later than 21 days after formal handing down of this judgment.

P. Summary of Conclusions

106. The simple application for discharge of a deputyship appointment rests on a much more complicated understanding of regulatory requirements, which I have found time-consuming to navigate. I acknowledge that those at the coal face of meeting the needs of persons eligible for a Personal Health Budget are wrestling with complexities which may seem to 'get in the way' of need for swift action.

107. After careful consideration, in my judgment:

a. the management of direct payments of a Personal Health Budget as 'representative' in accordance with the requirements of National Health Service (Direct Payments) Regulations 2013 does not fall within the standard authorisations of a property and affairs deputyship, or of the Deputy's specific appointment for SBB;

b. a property and affairs deputy *could* be appointed by the health body as 'representative' pursuant to regulation 5(4) but such appointment would be outside the powers of the standard deputyship appointment, and the possibility takes this matter no further;

c. the requirements of a 'nominee' do not fall within the standard authorisations of a property and affairs deputyship, or of Mr. Lumb's specific appointment for SBB either, and for substantially the same reasons;

d. the Court of Protection *could* specifically appoint a deputy with authority to manage direct payments under the National Health Service (Direct Payments) Regulations 2013 but in respect of SBB there is no need for such appointment (nor seemingly, at present, anyone willing and eligible to be so appointed);

e. a case manager is an appropriate kind of professional to be appointed as 'representative' for the purpose of direct payments. Two case managers have been identified as willing to be appointed for SBB, and no order from the Court is required for such appointment.

108. Accordingly, I will grant Mr. Lumb's application for discharge of his deputyship appointment for SBB, in the terms of an order which I invite the parties to draft for my approval.

HHJ Hilder
11th October 2024