

ENGLAND AND WALES / JUDGMENT

## ADS v DSM [2017] EWCOP 8 (24 May 2017)

[2017] EWCOP 8

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COURT OF PROTECTION

Royal Courts of Justice

Strand, London, WC2A 2LL

24/05/2017

B e f o r e :

MR JUSTICE CHARLES

Between:

ADS

Appellant

- and -

DSM

JKS (by her litigation friend the Official Solicitor)

W. H. Henderson (instructed by Verdant Solicitors) for the Appellant

Alison Meacher (instructed by Lester Dominic) for the First Respondent

Christopher Tidmarsh QC and Mathew Roper (instructed by the Official Solicitor) for the Second Respondent

Kerry Bornman (instructed by Henry Boustred & Sons) for the Third Respondent

Hearing dates: 30 and 31 March and 3 April 2017

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HTML VERSION OF JUDGMENT  
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See also

Schedule 1

and

Schedule 2

to this judgment.

Charles J :

## Introduction

This is a public document. The hearing of this appeal was in public and I made an anonymity order in standard terms under the Transparency Pilot.

The appeal is against an order made by a Tier 2 Court of Protection Judge (the COP judge) authorising the execution of a will for JKS (P) who is an 86 year old widow. It is clear and common ground that she now lacks capacity to make a will and to litigate. Her husband died in 2009. They had a long marriage and both came to live in this country from India. They had two sons the Appellant (ADS) and the First Respondent (DSM). In her judgment the COP judge referred to them as respectively A and D. I shall do the same. Both sons (A and D) are married and they both have adult or near adult children.

D took no active part in the proceedings before the COP judge but has been represented before me. MH is JKS's property and affairs deputy and was her litigation friend in proceedings in the Chancery Division that were settled. MH made the application for a statutory will dividing JKS's estate 50/50 between A and D. The COP judge did not authorise such a will but authorised one that divided the estate 25/75 between A and D. In doing so the COP judge accepted and closely followed the arguments advanced by the Official Solicitor who had been appointed as JKS's litigation friend in the COP proceedings.

I have concluded that this appeal should be allowed for a number of free standing and complementary reasons. In my view a significant factor leading to what I have concluded are valid grounds of appeal is the failure by the parties to properly prepare the case for hearing by identifying the issues of law and fact that needed to be considered and determined in applying the approach set by the Mental Capacity Act 2005 (the MCA). Naturally, I acknowledge that hindsight is a wonderful thing but in my view some of the failures in preparation relate to very basic steps in the preparation of a case in which there is or may be a factual dispute.

My approach on this appeal

I was reminded and accept that the appeal is a review and not a rehearing and of the approach to be taken that is set out in

Piglowska v Piglowski

[1999] 1 WLR 1360

, at pages 1371H to 1373F. These passages relate to an appeal against the exercise of a discretion and refer to

G v G (Minors Custody Appeal)

[1985] 1 WLR 647

. Both cases are referred to in CPR Part 52.21.5. As also appears from those notes, which cite from AEI Rediffusion Music Ltd v Photographic Performance Ltd

[1999] 1 WLR 1507

at 1523, before an appellate court gets to a consideration of the generous ambit it should allow on the exercise of a discretion it needs to address whether the judge:

- i) has erred in principle, or
- ii) has left out of account or has taken into account some feature that he should, or should not, have considered.

Generally, if either of these two grounds of appeal is established, the appeal court does not have to address the generous ambit allowed to a judge on the application of a discretion. That is the case on this appeal.

The weight given to features or relevant factors that were taken into account falls to be considered under the generous ambit approach. Also, the appeal court should acknowledge that the judge is likely to have had a familiar statutory test, and so the relevant factors, in mind and that he need not mention every part of that test or all those factors in his judgment.

In my view, procedural unfairness / breach of natural justice is included within an error or principle in the above formulation of grounds of appeal. But, in any event it is a well-established ground of appeal.

CPR 52.21.3 refers to the admission of new evidence. I was not invited to and have not approached the review part of this appeal on the basis of evidence that was not put before the COP judge but was put before me as a result of directions I made when giving permission. It seemed and still seems to me that those directions are directed to obvious gaps in the information contained in the evidence before the COP judge and so a failure to make similar directions and so obtain the additional evidence is relevant to the review part of the appeal. The product of those directions becomes relevant in respect of the relief to be granted if the appeal

succeeds.

The approach to be taken by the Court (and the parties) to the making of a statutory will

The COP judge refers to the main authorities namely

In re P (Statutory Will)

[2010] Ch 33

(in which Lewison J refers with approval to

In re S (Protected Persons)

[2009] WTLR 315

and

[2010] 1 WLR 1082

),

In re M (Statutory Will)

[2011] 1 WLR 344

and

Re G(TJ)

[2010] 3005 (Fam) in which these cases were cited from and applied.

In

**P**

, Lewison J at paragraph 39 refers to the need for the decision maker after he has gone through the steps required by the statute to form a value judgment giving effect to the paramount statutory instruction that any decision must be in P's best interests. This is endorsed by Munby J in

M

and applied by Morgan J in

G(TJ).

It also accords with my approach in a very different area in

Briggs v Briggs

[2016] EWCOP 53

and so in my judgment with the approach taken by the Supreme Court in

Aintree University Hospitals NHS Trust v James

[2014] AC 509. At paragraphs 57 and 58 of

Briggs

I said:

"57. Pausing there, it is clear and important to stress that a conclusion on what P would have done is not determinative of the MCA best interests test and so, by stating that the MCA enables the court to do for the patient what he could do for himself if of full capacity, the Supreme Court is not saying that a conclusion on what the patient would have done is decisive. The test is not a "what P would have done test", it is a best interests test and so a test that requires the decision maker to perform a weighing or balancing exercise between a range of divergent and competing factors.

58. In that exercise the force, clarity or certainty of conclusions that found competing factors will affect the weight to be given to them and that weighing exercise is not a linear or binary exercise."

I went on to also approve paragraphs 55 and 56 of the judgment of HHJ Marshall in

S.

My reference to the weighing exercise not being linear or binary accords with the comments on the approach taken by Lewison J in

P

(in which he broadly agrees with the approach taken by HHJ Marshall in

S

) set out by Munby J in

M

at paragraphs 34 to 38 of his judgment. He emphasises the fact and issue sensitive nature of the approach that a decision maker applying the best interests test set by the MCA must take. As he points out, and as the cases show:

- i) in some cases, P's wishes and feelings when he or she had capacity can have great weight in determining what would be in P's best interests, and
- ii) in other cases, P's expressed wishes and feelings after he or she has lost capacity to make the relevant decision can have great weight.

Cases in which the reaction of P to a proposed solution are likely to affect its successful implementation are examples of situations in which P's wishes and feelings (and so preferences) after he or she has lost capacity may well carry great weight.

However, the approach taken in the cases of

P,

and

S

and confirmed in

**M**

(with the comments I have referred to) means that an approach to the weight to be given to expressions of the wishes and feelings of P that fails to take account of P's capacity when they were made and so of P's ability to take account of relevant past and present circumstances would not comply with the approach dictated by the MCA.

When a decision falls to be made under the MCA for P, by definition, P does not have capacity to weigh all the factors that are relevant to that decision. This inability is a circumstance that must be taken into account in determining the weight, and so respective weight, to be given to P's wishes and feelings expressed before and after P loses the relevant capacity.

So, in my judgment an approach to the respective weight to be given to expressions of P's testamentary wishes that failed to take account of P's capacity when they were made and so, amongst other things:

- i) P's ability at the relevant times to take account of relevant past and present circumstances,
- ii) the factual accuracy of reasons expressed by P at the relevant times,
- iii) any influences to which P may be subject at the relevant times, and
- iv) the way in which P's wishes and feelings had been obtained

would not comply with the approach dictated by the MCA.

So, for example, an approach that placed weight on the number of times P has expressed conflicting wishes without also taking into account other factors that may affect their weight would not comply with the approach dictated by the MCA.

At paragraph 35 of his judgment in

**M**

, Munby J mentions the extent to which P's wishes and feelings are or are not rational sensible and responsible. He does not define what he meant by "rational", but in

S

at paragraph 57 (which was cited by Lewison J in

**P**

) HHJ Marshall does so by reference to it being a wish which a person of full capacity might reasonably have held. In my judgment, if Munby J had disagreed with that definition he would have said so.

Munby J at paragraphs 37 and 38 endorses the conclusion reached by Lewison J that a decision maker is entitled to take into account how P will be remembered after his or her death and so whether P will be remembered for having done the right thing. In the particular circumstances of

**G(TJ)**

Morgan J did not attach weight to this factor but this does not mean that in other cases it will not be a factor that the decision maker is entitled to and should take into account.

Accordingly, in my view the COP judge was wrong to conclude, in the general way that she did, that not much, if any, weight should be given to this factor because some members of a family will think that the court has done the right thing and others that it has done the wrong thing. No doubt when there is a contest between members of a family this is likely and in some cases it may mean that "doing the right thing" is too subjective to carry weight but in others it may not.

The perception of others and so how P will be remembered links back to the need to consider whether wishes expressed by P are rational (and so could be reasonably held by P if he or she had capacity), sensible and responsible and to the point made by Munby J that the fact that a circumstance is not expressly mentioned in s.4 of the MCA does not mean that it is not relevant or should not be given weight.

Paragraphs 37 and 38 of the decision of Munby J in

**M**

also provide confirmation of the importance of adult autonomy. This is not expressly mentioned in s. 4 of the MCA but underlies the need to examine P's wishes and feelings and could lead to a view, in line with the approach in the

**Aintree**

case, that as P has made it clear when he or she had capacity that he or she wanted to make a will that many would regard as being irrational, unconscionable or unfair and so which many would regard as the wrong thing to do, a will in those terms was in P's best interests.

But the approach in cases shows that this approach to doing for P what he or she would be able to do for themselves is necessarily founded on P's intentions when he or she had capacity and that such views are not necessarily the determinative factor (see for example

Briggs

at, for example, paragraphs 43 and 57).

In the context of this case, the approach dictated by the MCA discussed above means that the following factors must be considered:

- i) how JKS's capacity at the times she made relevant statements is to be taken into account in assessing their weight,
- ii) whether assertions made by JKS in connection with her expressions of her testamentary intentions have a sound factual base and so could be said to be rational (reasonably held), sensible and responsible,
- iii) whether JKS was the victim of any inappropriate influence when expressing her testamentary wishes and feelings,
- iv) how the terms of, the reasoning behind, and any statements of testamentary wishes or feelings or representations made by or on behalf of JKS either (a) at the time of or (b) by, with court approval, entering into a settlement of litigation in the Chancery Division of the High Court between her and A (and his wife) and approved by that court as being in JKS's best interests should be taken into account, and
- v) what disputes of fact have to be resolved to enable the COP to properly assess these factors.

The settlement of the Chancery proceedings provided that an application was to be made to the COP for a will in terms that divided JKS's estate 50/50 between A and D and so the factors set out above raise the need to consider whether the making of a will in different terms would:

- i) run counter to any expressions of JKS's testamentary wishes and feelings (and so preferences or intentions made by or on behalf of JKS at the time of or by entering into the settlement),
- ii) be a breach by JKS of her express or implied contractual obligations under the settlement approved on her behalf,
- iii) be a breach of any representations made by or on behalf of JKS, or
- iv) be generally regarded as an inequitable, unconscionable or capricious result (or as put in argument on behalf of A – "tricksy").

These questions mean that a thorough investigation of the circumstances relating to the making and approach to the settlement needs to be carried out. Such an investigation would cover what, if any, statements JKS made at that time about her testamentary wishes and feelings and so her intentions.

All of the points in paragraph 24 are circumstances of this case. In particular, the fourth one relates to whether the expressed view and its implementation is rational (in the sense described above) and whether JKS (and so the COP and her litigation friend) would be remembered or perceived as having done the right thing. In that context, I consider that, like the Court of Bankruptcy, the COP (and so P and P's litigation friend), when making or advancing a decision under s. 16 MCA on behalf of P, ought to be as honest as other people (see

Re Condon, ex parte James

(1874) 9 Ch App 609

at 614), and so should take into account whether giving weight or effect to any statements of wishes and intentions would found an unconscionable result.

### **The short answer to this appeal**

This is that the approach described in paragraphs 23 to 25 was not carried out and so the COP judge erred in principle and further or alternatively failed to take relevant features of the case into account.

Relevant background circumstances in this case

(1)

### **The earlier Chancery proceedings**

Serious allegations were made by JKS against her son A and his wife in proceedings issued in the Chancery Division in August 2012 (the Chancery proceedings). In those proceedings JKS sought relief in respect of (a) a transfer to A by his father in 2003 for no consideration of his parents' matrimonial home (at which JKS and her husband continued to live) (JKS's matrimonial home), and (b) a transfer to A and his wife by his father in 2009 of a piece of land adjoining another property. The allegations included allegations of undue influence by A over his father. (The transfer of the other piece of land founded a provision in the will in favour of another person that is not disputed).

On the death of A's father a significant sum of IHT was demanded from A in respect of JKS's matrimonial home because his father had retained an interest in it.

The Chancery proceedings were settled in June 2014. By that time MH had been appointed as JKS's litigation friend on the basis that she lacked capacity to litigate.

As JKS was a protected party, the settlement negotiated and agreed on her behalf by the counsel and solicitors representing her (through her litigation friend, MH) and now instructed by MH as JKS's deputy had to be put before the Chancery court for its approval on the basis that it was in JKS's best interests. The settlement was so approved and the schedule setting out what was agreed is annexed to an order dated 16 June 2014 (the Chancery Order) which is set out in Schedule 1 to this judgment. I shall refer to it as the Chancery Settlement Agreement.

The judgment given in the Chancery proceedings was directed to the grant of the declarations in the Chancery Order. It has only one paragraph approving the settlement which simply says that the proposed order is for the benefit of JKS and so should be approved. The reasoning relating to the making of the declarations shows clearly that they were directed to the IHT issues and to ensuring that the title of JKS's matrimonial home was clearly vested in her. These passages also show that JKS got what she was claiming in the Chancery proceedings on the basis that she paid 45% of her costs (approx. £50,000).

The evidence before the COP judge contained JKS's statement in the Chancery proceedings and so, by that means, the allegations made by JKS against and about A in them. But, it did not contain the pleadings or the witness statements of the defendants in those proceedings and so, for example, any third party witness statements or any indications as to whether any third parties would be the subject of a witness summons and what advice, if any, it was alleged had been given to A's father at the time of the transfers.

I acknowledge that on its face JKS's witness statement provides a strong case in support of undue influence by A. But it does no more than that and the COP judge was not in a position to even make an assessment of the rival cases on the papers.

It was accepted, as asserted by JKS in her witness statement in the Chancery proceedings, that A had served a notice to quit on her in September 2011 but since then had not started any proceedings to remove her from her matrimonial home. On the face of it this was a hostile act but the Defendants' stance on it in the Chancery proceedings was not known to the COP judge.

Absent findings of fact by the COP the disputed allegations and counter allegations in the Chancery proceedings (the Chancery Allegations) must be treated as allegations and not as facts.

It may be that the declarations made in the Chancery Order caused confusion and led some to mistakenly think that facts had been found against A in the Chancery proceedings. Read alone paragraph 10 of that judgment seems to indicate that the judge was going further than the approach set out in

Hayim v Couch

[2009] EWHC 1040 (Ch)

. But, in my view, read as a whole his judgment shows that he was not (see, for example, paragraphs 15, 20 to 22) and so he was not making, and was not purporting to make, findings of fact against A.

(2)

## Other background family disputes

The background family disputes are not confined to the issues raised in the Chancery proceedings. In the COP proceedings, A made a number of allegations against D (the Allegations against D). They include assertions that:

- i) JKS instituted the Chancery proceedings at D's instigation and, although she was clearly angry with him at the time, she subsequently insisted that the proceedings be withdrawn referring to a meeting at her solicitor's office where she demanded that the proceedings be withdrawn as D had forced her to issue them,
- ii) there are or have been proceedings in India relating to alleged transfers of all of his parents' assets in India into D's name, a power of attorney in favour of D's wife and a will in India of his father that D is alleged by A to have forged,
- iii) D and his family divert rental income from JKS, and
- iv) D wrongly obtained the sum of £275,000 from his parents.

These allegations relate to or have a resonance with the issues in the Chancery proceedings. The COP judge was told no more about them and thus, for example, whether the Official Solicitor had made any investigation into them or what the assets in India are and how their value compares with the assets in the UK (which is considerable – about £3 million as at August 2015 – JKS's matrimonial home being valued in 2015 at between £1.75 and £2 million).

Accordingly, on the limited written and oral evidence before her the COP judge was aware that A was making serious allegations against D but she was not in a position to make any findings about any of those allegations without further written and oral evidence.

A also put in written evidence:

- i) relating to his relationship (and that of his wife and children) with JKS which was supported by photographs and that she does not remember interviews (the Visiting / Relationship Allegations about A)

,

and

- ii) on each occasion he and his wife saw her she complained about D in an equivalent way to the complaints she is recorded to have made about him and that she usually does this about those who are not present (the Relationship Allegations about D).

Both aspects of this evidence were unparticularised. But no-one sought further information about them.

D was not directed to and did not put in any evidence about the allegations made by A about him or about JKS's relationship with A, his wife and children or in response to the evidence of the Deputy.

### **The relevance of the background family disputes**

Before and after she lost capacity to litigate and to make a will JKS was aware of, had a role in and took steps and/or made statements because of these disputes:

These disputes divide into four categories namely:

- i) the Chancery Allegations,
- ii) the Allegations against D,
- iii) the Visiting / Relationship Allegations about A, and
- iv) the Relationship Allegations about D.

The Chancery Allegations may be a cause of the Visiting / Relationship Allegations about A but they may not.

The existence of this wide range of disputed background facts raising issues of dishonesty and inappropriate behaviour that is relevant to what JKS has said about her testamentary preferences or intentions found the basic litigation need to identify what facts need to be proved and so to recognise in the context of an evidence based decision making process the difference between (a) agreed and established fact, and (b) allegations. This identification underlies the decisions that all litigators must take on whether they need to establish that something is proved to the relevant standard before they can rely on it as a fact in their reasoning or whether, and if so how, they can reason from the base that it is an allegation or what someone thought or wanted at the relevant time (and so an intention).

The nature of the wide ranging family disputes together with JKS's history and age provide clear warning of the need to assess whether views expressed by JKS:

- i) are properly informed and have been appropriately obtained (particularly those made after she lost capacity), and
- ii) are free of inappropriate outside influence as a result of them being made in the presence of or in proximity to members of her family (or others) or as a result of more active influence by members of her family (or others).

It is obvious that:

- i) I am

not

in a position to reach conclusions on the rival and serious disputed allegations,

ii) save to the extent that she heard oral evidence on them, neither was the COP judge, and she correctly recognised in her judgment that A disputed the allegations made against him in the Chancery proceedings that he was abusive and aggressive to JKS and had made no express admissions in respect to the allegations of undue influence (paragraphs 33 and 44 of her judgment), and

iii) unless and until findings are made by a court, it and the parties must found their reasoning on (a) agreed or established facts, and (b) allegations.

However, and provided that they represented her uninfluenced and true belief at the times they were made, JKS's assertions about disputed matters (and so allegations made by her) represented her views, wishes or feelings at the time they were made even if a court was to find that they were not soundly based. The proviso is important because of JKS's vulnerability to influence.

Also, for the reasons set out earlier points that an assertion was based on a false or a disputed premise would be relevant to the court making an evidence based best interests decision albeit that a testator with capacity can act capriciously, or on the basis of views that are false or unfair.

### **Findings of fact made by the COP judge**

Very late in the hearing the COP judge heard oral evidence from A and MH about a meeting on 25 May 2016. She made the following finding in trenchant terms in paragraph 44:

"[ A ] alleged that his mother made accusations against each brother in turn depending upon who was there. No such accusations against [ D ] are contained in the attendance note dated 25 May 2016 when [ A ] was present. He alleges it was said but not recorded. I heard him give evidence on this point but I did not consider him to be an honest or credible witness. The allegations that had previously been made against [ A ] had been reported by the Interpreter and I have no reason to consider that any such allegation would not have been recorded if made against [ D ]. Plainly such an allegation is an important matter in the context of this case and in seeking to ascertain the wishes of JKS and whether they are rational beliefs "

The relevant paragraph of A's statement was referred to in the questioning but this finding was made without anyone asking A what he asserted his mother did say about D at that meeting and when in the meeting he asserted she said it. A should have been given the opportunity to provide this information. MH's oral evidence was to the effect that during that meeting he did not hear names being mentioned by JKS, who spoke in Punjabi and A's description of what he asserted was said may have shown that this evidence was not particularly helpful. But, in any event, MH'

s

evidence was of little help because he does not speak the relevant language and the issue was not raised with the interpreter.

In a later judgment refusing permission to appeal, the COP judge confirmed that this finding was limited to the meeting on 25 May 2016 and so that she was not concluding that anything else stated by A in his witness statement was untrue. If she had done so this would clearly have been an error of principle. This limitation of the extent of this finding on the Relationship Allegations about D raises questions as to why oral evidence about this meeting was given and why if, as she says, the COP judge thought the allegation was important she only made such a limited finding. But, in any event, this clarification of the extent of the finding in paragraph 44 means that it is not

a finding that JKS did not make critical comments about D on other occasions, or that any other parts of A's statement in the COP proceedings, or his allegations in the Chancery proceedings were untrue.

This is the only finding after oral evidence on the wide ranging family disputes.

Also, the evidence before the COP judge contains nothing to gainsay the Visiting / Relationship allegations about A. As to them, in paragraph 15 of A's witness statement dated March 2016 he said:

" My family and I do visit my mother, and she also visits us. I exhibit herewith photographs which we have taken with her on one of such visits when she came over for lunch with us. My wife is in full-time employment and visits my mother before and after work. She is therefore unable to be at my mother's as much as [ D's ] wife who is unemployed. This gives the false impression that [ D's ] wife cares more about my mother than my wife does. I visit our mother during the day when I am free. My mother also comes over to our home for dinner and to spend some quality time with us."

He supported this by photographs.

A's wife filed a witness statement dated November 2016 saying that she and her family visited JKS regularly staying overnight or for the weekend on occasion and that A visits his mother when he is free once or twice a week most of the time with a friend of his father who is a neighbour of A. She also exhibited a set of photographs to support those assertions.

The COP judge accepted that this written evidence established that A and his family visited JKS from time to time but she was satisfied that D and his wife spend a much greater time with her.

So, although there were no detailed findings on Visiting / Relationship Allegations about A:

- i) the unparticularised written and photographic evidence about them, and
- ii) the finding made by the COP judge in respect of them

provide strong prima facie support for the conclusion that what JKS said on a number of occasions about why she did not want A to inherit are simply and seriously wrong and were not corrected (or commented on) by D, his wife or children (who were present when some of them were made).

#### Preliminary discussion

The grounds of appeal divide into two broad categories, namely:

- i) the COP judge erred in principle and further or alternatively failed to take relevant features of the case into account in her approach to the Chancery Settlement Agreement, and its impact on the decision-making process under the MCA, and further or alternatively
- ii) the COP judge erred in principle and further or alternatively failed to take relevant features of the case into account, in a number of other ways.

An aspect of the first category is that the COP judge failed to ascertain and/or take account of JKS's wishes and feelings (and so her testamentary intentions) at the time that she entered into the Chancery Settlement Agreement. This has an overlap with the second category because of the focus of the COP judge on JKS's wishes and feelings (a) in 2010 when she made her earlier will in favour of D and then (b) after the Chancery Settlement Agreement.

In my judgment correctly no-one asserted that by the Chancery Settlement Agreement A and his wife accepted the truth of the allegations being made against them in the Chancery proceedings as a result of their agreement to the recitals in the schedule or otherwise. Indeed, the common approach in the COP proceedings has been that as recorded in a redacted note of conference held on 2 June 2014 (that was before the COP judge) all that A and his wife were agreeing to was not to defend the Chancery proceedings.

Naturally, no-one has suggested that by the Chancery Settlement Agreement JKS was agreeing to abandon or not pursue her allegations in those proceedings. Indeed, she maintained and relied on them in what became the undefended Chancery proceedings.

So, in short, it was common ground before me and I agree that the Chancery Settlement Agreement did

not

resolve or purport to resolve the disputed Chancery Allegations.

Rather, the rival submissions before me were directed to the issues:

- i) whether by its express and implied terms the Chancery Settlement Agreement only required MH to make an application for a statutory will to the COP in the terms set out in it, and more generally

ii) what impact the terms of, representations made in respect of, the reasons for the Chancery Settlement Agreement and the reasons why it was approved by the Chancery court should have on the approach taken under the MCA in determining what the terms of JKS's will should be.

The second limb of those submissions was directed to the approach to be taken to, and so the weight to be given to, JKS's expressions of wishes and feelings before and after the Chancery Settlement Agreement that A should not inherit any part of her estate (which had been greatly increased as a result of the Chancery Settlement Agreement by the return of JKS's matrimonial home to her) by reference to or which are based on the Chancery Allegations. And so, for example the issues shown by notes taken by JKS's solicitors on 9 June 2010 of the reasons why JKS made a will in 2010 leaving her estate to D and a letter confirming her instructions dated 10 June 2010 (cited by the COP judge at paragraph 8 of her judgment).

That note sets out:

"Children of A - two daughters and one son. She has no relationship with A's children.

The reason for the fallout is that just before her husband died she ascertained that their home [ JKS's matrimonial home ] valued at around £1 million was transferred into her son A's name. She states her husband would not have understood what he was signing as could not speak English properly. He has been very abusive and aggressive towards her and tried to hit her with a stick - she does not wish him to inherit anything from her estate as he already has the family home of herself and her late husband - [address] registered in his name worth £1 million. She wants everything to go to her other son D and if he dies before her then to D's son RSM"

The letter sets out that JKS's estate would total £950,558 and that inheritance tax would be payable on that estate and any other assets in India but a calculation in respect of the Indian assets was not included because JKS was uncertain of the value. It goes on to state:

"I confirm you having instructed me that you wish to leave your entire estate to your son D and nothing to your other son A due to the fact that A already has the family home [address] valued at around £1 million transferred into his own name. In addition your late husband bought a shop for A during his lifetime and you purchased a house for him many years ago so that he now owns two properties. Furthermore you instructed me that since your husband's death, A has been very aggressive and abusive towards you and tried to physically attack you when you sought to enquire about how he managed to get [ JKS's matrimonial home ] transferred into his sole name. You also instructed me that you have a close relationship with D and his children but no relationship with A's children"

This explanation has two parts. The first is directly linked to the subject matter of the Chancery proceedings. The second (the Chancery Behaviour Allegations) relates to behaviour before the Chancery proceedings and may well have an overlap with their subject matter but also may have a free-standing base.

In turn the Chancery Behaviour Allegations may have a link to but are not expressly mentioned in the Visiting / Relationship Allegations about A made by JKS after the Chancery Settlement Agreement as reasons why A should not inherit.

The stance of the Official Solicitor was that all that the Chancery Settlement Agreement required was that MH should apply to be JKS's deputy and after his appointment should apply for a statutory will in the terms set out therein, and that, as that had been done, all of the obligations of JKS (and MH) were satisfied with the consequences that the Chancery Settlement Agreement;

- i) was a factor but not a magnetic factor, and importantly
- ii) did not preclude JKS (through her litigation friend in the COP proceedings):
  - (a) from relying, without any change in circumstances or outside intervention (e.g. from D) on expressions of JKS's wishes and feelings based on the Chancery Allegations and the Chancery Behaviour Allegations, and
  - (b) from that base arguing that it was not in JKS's best interests for her will to make the provisions set out in the Chancery Settlement Agreement and so one that provided for equal division between A and D and that A should have an option to purchase JKS's matrimonial home.

In my judgment, if that approach is right it introduces into the COP proceedings the need to consider whether, and if so which, of the wide ranging disputed allegations need to be resolved as a matter of fact and so triggers the basic litigation need to:

- i) distinguish between agreed and established facts and allegations, and
- ii) consider what if any influence the background disputes and further or alternatively her family were having over JKS's expressions of her wishes and feelings from time to time.

There has been a continuing failure by the Official Solicitor as JKS's litigation friend to recognise or sufficiently recognise both of these points (and see the postscript to this judgment).

An example of this continuing failure is found in the skeleton argument put in on this appeal by counsel instructed by the Official Solicitor in which it is stated under the heading "Background" and so as a fact and not a disputed fact or allegation that JKS discovered shortly before her husband's death that their matrimonial home had been transferred by her husband to A. This assertion (which is found in the notes taken on 9 June 2010 concerning JKS's will (cited above) and in JKS's witness statement in the Chancery proceedings) was not qualified by any reference to whether it was or was not in dispute in the Chancery proceedings. Unsurprisingly, in submissions I was told without contradiction that it was in dispute in the Chancery proceedings.

An earlier example is found in a letter dated 11 August 2016, and so before the hearing before the COP judge, to A's solicitors when the Official Solicitor asserted that A had agreed to "transfer the misappropriated property back" and that A had "dishonestly misappropriated" assets from his mother and father.

Leading counsel instructed by the Official Solicitor before me properly accepted that the author of that letter should not have made that assertion of dishonesty in those terms.

In many situations, a qualification can be implied that when making an allegation of misappropriation or dishonesty a solicitor is advancing the case of his client and so something his client will be seeking to prove. But the way in which the COP proceedings were conducted on behalf of JKS does not support this implication. Rather, the approach taken demonstrates a failure to appreciate or to properly make clear the distinction between and so the impact of (a) reliance being placed on an allegation by JKS in the Chancery proceedings of "misappropriation" or "dishonest misappropriation", and (b) reliance being placed on the existence of "misappropriation" or "dishonest misappropriation" and so the need to revisit and prove the Chancery Allegations, which the Official Solicitor did not seek to do.

The more recent statements of testamentary intentions or wishes and feelings about her sons made by JKS after she made her will in 2010

These are described in the COP judge's judgment.

Save for a reference to the intentions of the parties to the Chancery Settlement Agreement, to which I will return, the COP judge does not address what JKS's testamentary wishes and feelings were at the time or in the context of the settlement of the Chancery proceedings.

It would generally be expected that the settlement had been discussed with her. But if this was not the case, as silence on this from MH in his statements to the COP might indicate, the reasons why it was submitted to the Chancery judge and why he approved the settlement would explain why those advising and acting for JKS and the Chancery court concluded that it was in JKS's best interests for her (not MH) to enter into, and be bound by, the Chancery Settlement Agreement.

The statements of JKS's wishes and feelings, with the citations from them made by the COP judge in her judgment in italics, were made at the meetings set out in Part 1 of Schedule 2 to this judgment below. Although an issue arose as to whether the notes recorded all that was said at the meeting on 25 May 2016, there was no dispute about the accuracy of what was recorded at these meetings some of which pre-date the issue of the proceedings in the COP.

### **The capacity assessment**

A capacity assessment was carried out by a consultant in old age psychiatry (the Psychiatrist) in June 2015. The COP judge cited from the assessment of capacity in the COP3 completed by the Psychiatrist in paragraph 20 of her judgement where she says:

" ---- [ the Psychiatrist ] says that because of her dementia [ JKS ] has poor judgement and cannot weigh information as part of the process of making a decision and in conclusion that:

[JKS] has a moderate severity dementia which has caused a deterioration in her short-term memory so that she cannot retain information such as the worth of her assets, the names of her grandchildren and whether she has been visited. Her judgment is poor causing her to react in a over-reactive manner and be unable to weigh information. It is my opinion that she lacks capacity therefore to make a will or manage what was her wish the complex task of transfer of land

[ The Psychiatrist ] states that dementia is a neuro degenerative disorder for which there is no cure and that there is therefore no prospect that [JKS] will regain capacity in the future but that she believes she can manage her own finances and that she does not want to leave anything to her son A or her (sic) children -----"

In the COP3 dated 7 July 2015, the Psychiatrist also says that JKS has been suffering from dementia of moderate severity since at least 2014 which from her report dated 6 July 2015 is based on a diagnosis in February 2014 (and so before the settlement of the Chancery proceedings) by another doctor. In that report the Psychiatrist records that JKS was able to tell her the names of her two sons but could not tell her the names of her grandchildren especially the children of A and that she required considerable prompting but, as I read her report, she could after considerable prompting name D's children and the Psychiatrist went on to say this:

"She was however aware of the meaning and purpose of a Will. She was very clear in saying that she wanted all of her estate to go to her son D though has been inconsistent over time in saying this as I am aware that she has on other occasions stated that she wanted all of her estate to go to the family, not making specifically on these occasions an effort to exclude A. [JKS] may also be influenced adversely by previous events where A had by undue influence [over JKS's husband] got him to sign the properties over to himself. She claims that he has not visited in 10 years which is possibly not true although it is likely that he has not visited recently."

The source of the background information referred to and that is so commented on in this passage of her report is not clear from the information before the COP judge.

The Psychiatrist confirms the well known and not uncommon point that JKS's dementia has a significant impact on her short-term memory and renders her vulnerable to prompting. The reports in 2015 and 2016 of JKS's testamentary wishes and feelings also show this because for example:

- i) JKS makes unlikely and as found by the COP judge inaccurate assertions about when she saw A,
- ii) JKS expresses very different views when respectively D (or his wife) is present or close by and when A (and his wife) are present,
- iii) JKS does not volunteer information about the Chancery Settlement Agreement, became upset when it and a court were mentioned and does not link the reasons for or the result of the Chancery proceedings to the things she says about A, and

iv) some of her statements (e.g. at the meeting on 27 January 2016) have the character of things that others may be saying to her.

### **The impact of the wide ranging disputes on the obtaining of JKS's testamentary wishes and feelings**

The existence of the wide ranging disputes of fact and the need to take care to try to ensure that JKS was not being influenced by members of her family have an impact on the approach taken to the instructions given to and the approach to be taken by anyone recording the wishes and feelings of JKS about her will or her family. Accordingly, MH (as JKS's deputy and the applicant), a doctor assessing JKS's capacity and passing on what JKS said about her testamentary wishes, a Court of Protection visitor and anyone instructing that doctor and visitor needed to consider and take steps to try to ensure that so far as was practicable:

- i) JKS was seen in circumstances that would reduce family influences,
- ii) the history they took and were given were balanced, applied with care and in a way that recognised the difference between fact and assertion, and
- iii) the explanations, questions and prompts given to JKS were appropriately framed (e.g. as to why she was expressing the views that she was and what she remembered about relevant parts of her family history).

JKS has been able to travel to India over the last few years and so it would seem that it may well have been possible to arrange for her to be seen at a neutral venue, to which she had been brought by someone not involved in the family disputes.

The fact that this did not happen is a factor that should be taken into account in assessing the weight to be given to what she said to independent professionals when either a member or members of D's immediate family was present at the meeting or remained in the house during the meeting (albeit in a different room).

No good explanation was provided to me of why it was appropriate for:

- i) MH to discuss JKS's wishes and feelings about her will in the presence of A or D or members of their immediate family or when they were in the house, or
- ii) the Court of Protection visitor to proceed with her interview with JKS after she had been greeted at her home by D, his wife and one of their children on the basis that they went to another room but remained in the house, or
- iii) the meetings to take place at JKS's matrimonial home.

I acknowledge that in many cases a P will be more comfortable at home and can be seen there at a time when a family member is present. But these and other general points do not provide a good reason for the failures in this case to seek to avoid or minimise (or indeed it seems to address) the possibilities that JKS was being influenced by the presence or proximity of family members or more actively by them or was confused and so was making assertions that were incorrect.

Also, the records of the meetings indicate that little thought was given to identifying the relevant history and the parts of it that were common ground and the parts that were disputed and so, for example, how the following should be addressed and approached with JKS:

- i) the Chancery Settlement Agreement (which is not listed by the visitor as one of the exhibits to MH's first witness statement – although it was one of those exhibits – and so as one of her sources of information),
- ii) A's statement (which is listed by the visitor as one of her sources of information) and so the allegations he had made against D and about seeing his mother,
- iii) the lack of any evidence from D about the family disputes, and
- iv) the presence of D, his wife and son at the meetings on 4 February and 3 June 2015 (the records of which were exhibited to MH's first witness statement and were listed by the visitor as sources of her information).

A history of the COP proceedings with some comments and the lack of directions identifying the issues

I deal with this in some detail in Parts 2 and 3 of Schedule 2 hereto, because of the view I have expressed in paragraph 4 of this judgment about the preparation of this case for hearing.

### **The evidential base of agreed or established fact before the COP judge**

Notwithstanding the range of disputes there was evidence before the COP judge that provided a sound evidential base for factors that the COP has to take into account under s. 4 MCA when reaching a conclusion on the terms of a will that would be in JKS's best interests. Namely:

- i) The approach of JKS and her husband before the disputes we know about started. As I understand it, it was common ground that their approach to bringing up their two sons and helping them start in their adult lives was to treat them equally. For example, they bought them properties on this basis. This shows that before the disputes and events that gave rise to JKS making a will in favour of D in 2010 arose that the beliefs, values and wishes of JKS and her husband were that on the death of the survivor their estates should be divided equally between their sons.

ii) The existence of disputes. It is clearly common ground and so a s. 4 MCA factor that there are disputes between the two brothers which raise serious allegations relating to their honesty, their relationships with their mother and each other and whether they are motivated by a desire to promote the best interests of JKS or their own interests.

iii) JKS's will made on 16 June 2010.

I have already referred to the attendance note and letter relating to this setting out her instructions and the reasons for them. A capacity assessment was made at the time and the 2010 will was explained to JKS.

iv) The Chancery Settlement Agreement.

v) The capacity assessment made by the Psychiatrist.

The first category of the grounds of appeal – the approach to the Chancery Settlement Agreement, and its impact on the decision-making process under the MCA

The construction and effect of the Chancery Settlement Agreement was a central argument on this appeal.

Before me it was accepted by leading counsel for the Official Solicitor that by the settlement of the Chancery proceedings JKS could, with the approval of the Chancery court, have entered into a binding contract to make a will in the terms set out in the Chancery Settlement Agreement and, as such an agreement would have had the effect explained in

Schaefer v Schuhmann

[1972] AC 572

, it would have been determinative of the application to the COP because a statutory will in different terms would have been a breach of that contract and rendered JKS's estate liable in damages.

The COP judge had no evidence or information on whether this solution to the problems presented by JKS's lack of capacity was contemplated. Further, if it had been put to the Chancery judge that this was intended it would have given rise to problems in the determination by the Chancery court of whether such a contract was in JKS's best interests because of the absence of information from others, in particular from D the beneficiary under the 2010 will. The approach mandated by s. 4 of the MCA applies to decisions made for the purposes of that Act and as a binding contract to make a will would dictate, or effectively dictate, a decision to authorise the making of a statutory will which can only be given by the COP there are powerful arguments that a Chancery judge should at least apply s. 4 when approving such a contract for P, or approve it as a COP judge (if he is nominated as such), or make arrangements for that part of a settlement to be approved by the COP making it clear whether or not his approval of the settlement was dependent on such a contract to make a will (and a will in accordance with it) being approved and authorised by the COP.

There are more general problems relating to the application of the MCA directly or by analogy to the approval of a settlement of litigation on behalf of a protected party (e.g. when the litigation friend is P's deputy or when the decision is not clearly dictated by the issues in the civil litigation as would generally be the case in, for example, the quantification of damages in negligence proceedings).

But these problems and the points made about the approval of a contract to make a will do not arise because in my view JKS did not enter into a contract to make a will by the Chancery Settlement Agreement.

I agree with the Official Solicitor, who before me accepted that the relevant contracting party is JKS (and not MH as her litigation friend or proposed deputy) that the language of the Chancery Settlement Agreement cannot be construed as an agreement by JKS to make a will in the terms set out.

Also the language of the Chancery Settlement Agreement and the approach taken to the transfers of the land referred to in it show that its implementation was not dependent on the COP authorising a statutory will in the terms set out. Rather, it leaves the authorisation of a statutory will to the COP on the application by MH (after he has been appointed as JKS's deputy).

Pausing there, I agree with the Official Solicitor and MH that the Chancery Settlement Agreement:

- i) is not a contract by JKS to make a will, and
- ii) does not bind the COP who must apply the approach dictated by the MCA in determining the terms of JKS's statutory will.

I add that it follows that the parties to the Chancery Settlement Agreement were entering into a contract that rendered them liable to the risk that another party to the COP proceedings (e.g. D) would argue that the will should be in different terms. Accordingly, they were leaving it to the COP to determine how the settlement of the Chancery proceedings should be taken into account under the MCA.

But this does not mean that:

- i) JKS's only obligation under or arising because of the Chancery Settlement Agreement ends when MH made the application to the COP referred to in it, or
- ii) the best interests reasoning and so the deal underlying the settlement of the Chancery proceedings is not a factor to be taken into account by the COP,
- iii) by implication, or as a result of representations or expressions of wishes made in respect of the Chancery Settlement Agreement JKS did not restrict her ability to act in certain ways in connection with the COP proceedings, or

iv) the underlying intentions of the parties to or representations made in respect of the Chancery Settlement Agreement are not factors to be taken into account under the decision making process dictated by the MCA.

It also does not mean that in connection with discussing, or by the Chancery Settlement Agreement, JKS has not expressed that her testamentary wishes and so intentions or preferences at that time were for a will to be made in the terms set out therein.

On any view, the Chancery Settlement Agreement was in JKS's best interests. This is because:

- i) it returns her matrimonial home to her and so provided what she wanted,
- ii) the likelihood that it would lead to the IHT not being payable means that it is unlikely that it would be funded by a charge over and sale of the property, and
- iii) she recovered a significant proportion of her costs.

Also on all rival arguments on its effect the Chancery Settlement Agreement has benefits for A because:

- i) it is likely that it would lead to the IHT not being payable, and the repayment of the IHT that had been paid,
- ii) it may remove or reduce the difficulties between him and his mother and his family more generally, and
- iii) his mother's estate was increased and he had at the least the prospect that he would benefit under his mother's will as a result of the application referred to in it, or on any later application to the COP for a change (it being clear that JKS would not regain testamentary capacity).

For both sides the settlement removed the risks and upset involved in advancing and leaving it to a court to decide issues of credibility (the Chancery Allegations and the Chancery Behaviour Allegations) and created a result in which they could both put those allegations behind them and get on with their lives. This together with certainty are obvious and important aspects of the settlement (and of most settlements).

For A, the necessity of the approval of the Chancery court was that it bound JKS to the terms of the agreement (see CPR Part 21.10 and

Dunhill v Burgin (Nos 1 and 2)

[2014] UKSC 18

,

[2014] 1 WLR 933

at paragraphs 20 to 34).

The absence of any indication before the Chancery judge or the COP judge that JKS was expressing wishes and feelings to the effect that she was not content with the compromise put forward and approved on her behalf founds the inference that it accorded with her wishes and feelings, or at least did not conflict with them, because if she was expressing views against it her litigation friend should have drawn those to the attention of the Chancery judge and the COP judge (see

RP v Nottingham CC

[2008] 2 FLR 1516,

RP (and others) v UK

[2012] ECHR 1796

, [2013] 2 FCR 77 and

YA v Central and NW London NHS Trust and Others

[2015] UKUT 0037 (AAC).

The points made in the last two paragraphs mean that on the evidence before the COP judge it was the reasoning and conduct of MH as JKS's litigation friend that founds the following propositions:

- i) the protection given to A by the approval of the Chancery Settlement Agreement by the Chancery judge on JKS's behalf is based on the reasoning and conduct advanced or performed on her behalf by MH that was accepted by the Chancery court,
- ii) JKS is a party to and bound by the Chancery Settlement Agreement,
- iii) the reasoning and conduct of MH in negotiating and advancing and of the Chancery judge in approving that agreement is attributable to JKS as a party to it, and
- iv) the reasoning and conduct of MH in negotiating and advancing that agreement can found representations made by her as a contracting party, can give rise to implied terms and can found allegations of inequitable or unconscionable conduct against JKS.

It follows from the above analysis that MH's reasoning and conduct in respect of the Chancery Settlement Agreement is relevant and important and should be taken into account under s. 4 of the MCA.

The approach of the COP judge.

In line with the argument advanced by the Official Solicitor, the COP judge confined herself to an analysis based on the language of the Chancery Settlement Agreement and said this about it (at paragraph 16):

"The applicant [MH] has complied with his obligations under the terms of the schedule attached to the order setting out the terms of the compromise by making the application for a statutory will in terms that the estate be given to D and A in equal shares. As has been acknowledged, the applicant could not bind the Court of Protection with respect to whether a statutory will would be made on the terms of that statutory will. The most he could do was that which he has done, and that is make the application to the Court of Protection. It is then for the Court of Protection to determine whether it is appropriate for a statutory will to be made and, if so, the terms of that statutory will. I am acting on the assumption that both A and [ his wife], who were represented by Counsel for the purposes of entering into the compromise and the Order in the Chancery proceedings, were being advised that it (sic) was not possible to bind the Court of Protection and while the schedule set out what the intentions were at the time it could only be evidence of that intention was and not binding. "

It was common ground before me that the COP judge did not give A an opportunity to make submissions or give evidence about that assumption although there were some exchanges that indicated that this was her thinking.

The first part of the assumption is and was uncontroversial, but the second part is not save that it is uncontroversial that an intention as such is not contractually binding. One of the controversies is that intentions (and so wishes and feelings) are plainly relevant under the MCA.

The COP judge does not identify who had the intentions she refers to and it is unclear from this paragraph, or elsewhere in her judgment, that she addressed the point that the party to the Chancery Settlement Agreement was JKS and not MH (whether or not by entering into it as JKS's litigation friend and so, in effect, her agent he took on some personal responsibility). As I have said, before me it was accepted that the relevant party to the Chancery Settlement Agreement was JKS and so, for example, if for any reason MH had not been appointed her deputy or made the application to the COP A could have required someone else to do so on behalf of JKS.

Accordingly, it was JKS who was agreeing that an application for the approval by the COP of the execution on her behalf of a statutory will in agreed terms was to be made. And, even if contrary to my view that is wrong, she was agreeing that various things would be done which affected her and led to an application being made to the COP on the basis that it would be in her best interests for a will to be executed for her in the terms set out in the Chancery Settlement Agreement.

That analysis means that the argument advanced by the Official Solicitor was and is to the effect that:

- i) all that the Chancery Settlement Agreement obliged JKS to do as a party was to ensure that the application it referred to was made or to not oppose it being made, and that absent any change in circumstances
- ii) she (and so her litigation friend in the COP proceedings – who could have been MH but would normally be the Official Solicitor) could express wishes and advance arguments based on issues in dispute in the Chancery proceedings that the COP should not authorise a will in those terms.

In my view, on the evidence before her, the COP judge was right when she concluded that the intentions, and so the wishes and objectives, of those who entered into the Chancery Settlement Agreement and so of both A and JKS (acting through her litigation friend) were that a will should be executed for JKS that revoked the 2010 will and made the provisions set out in the Chancery Settlement Agreement.

MH's written evidence does not address in any detail what the intentions, wishes and objectives of those advancing the settlement on behalf of JKS were but the conclusion of the COP judge on those intentions is supported by the submissions made by counsel for MH to her about the reasons for the settlement.

I am not suggesting that further evidence could not change or qualify that conclusion on those intentions. But no such evidence was put before the COP judge and so if, as I agree, that is the inference to be drawn on the evidence before the COP judge on what were the intentions of those recommending and approving the Chancery Settlement Agreement, that inference supports the conclusions that:

- i) A and the Chancery judge understood that MH had those intentions when recommending that the settlement was in JKS's best interests, and that
- ii) MH was aware of this.

That base founds the arguments that, if at the time MH negotiated and recommended the Chancery Settlement Agreement he was doing so on the basis that after the application for the statutory will had been made he, as JKS's deputy or litigation friend in the COP proceedings, intended to (or thought that he could) without any change in circumstances assert on behalf of JKS that such a will was not in her best interests because it did not accord with her wishes for reasons based on the Chancery Allegations and the Chancery Behaviour Allegations that undisclosed intention and approach:

- i) would run counter to the spirit of the offer made on JKS's behalf to settle the Chancery proceedings and the terms of the Chancery Settlement Agreement as they would have been reasonably understood by A and the Chancery judge,
- ii) give rise to a need for MH to explain to the Chancery judge why it would be in JKS's best interests to rely on the Chancery Allegations and the Chancery Behaviour allegation to the COP proceedings as reasons for disinheriting A (or giving him less than 50%) now that JKS had got her matrimonial home back as a result of the settlement, and
- iii) give rise to a need to inform A that this was MH's, and so JKS's, intention to avoid an allegation of unconscionable conduct or misrepresentation and/or arguments that it was an implied term that JKS could not do this without a change in circumstances.

A made an application to cross examine MH on the reasoning behind why it was thought that the settlement of the Chancery proceedings was in JKS's best interests but the COP judge refused to allow MH to be questioned on this. This refusal by the COP judge shows that she regarded the reasoning and conduct of MH in respect of the Chancery Settlement Agreement as irrelevant and so confirms that in my judgment her approach to the impact of the Chancery Settlement Agreement and the reasoning behind it was flawed because it runs counter to:

- i) the approach to s. 4 MCA I have set out in paragraphs 9 to 25 above, and
- ii) the approach to relevance of the reasoning and conduct of MH set out in paragraphs 102 to 105 above.

What approach should be taken to the consideration of the impact of the Chancery Settlement Agreement?

Firstly, and in line with the directions I gave when giving permission to appeal, more information about it and what was explained to and said by JKS about it should be sought. The failure to do that was an error of principle because it meant (amongst other things) that the COP judge did not consider whether JKS personally expressed testamentary wishes at the time the settlement was discussed with her and reached.

Subject to what further investigation provides and so for present purposes on the evidence before the COP judge further errors of principle in her approach can be founded on three approaches that she failed to take.

The first is that she failed to consider whether:

- i) the intentions she identified provide an expression of the testamentary wishes and intentions of JKS at a time when, and as part of the arrangements by which, she recovered her matrimonial home and so greatly increased the value of her estate, or
- ii) JKS did this by entering into the Chancery Settlement Agreement with the approval of the Chancery court.

The second is an approach supported by the approach taken to agreements relating to financial arrangements on a divorce. The support or analogy is founded on the need for the court to make the relevant award and so approve any agreement reached by the spouses before it becomes effective through an order. A difference is that on a divorce it is less likely that another family member has an interest that could lead to it being unfair to enforce the agreement made by the spouses.

In

Edgar v Edgar

[1980] 1 WLR 1410

at 1417 Ormrod LJ points out that in determining what is just it is not necessary to think in formal terms such as misrepresentation or estoppel when determining the weight to be given in all the circumstances to an agreement that does not bind the court. More recently in

### **Granatino v Radmacher**

[2010] 1 AC 534 the Supreme Court endorses a non-contractual approach and discusses the issues to be taken into account on an "in all the circumstances approach" to determining what weight should be given to the agreement (see paragraph 67).

This approach has regard to all the relevant circumstances without giving them labels in the application of the relevant statutory test and so in the application of the MCA on the approach and so the issues set out in paragraphs 9 to 25 hereof.

It also has the advantage that the impact of the settlement of the Chancery proceedings could be factored into any future applications for a statutory will for JKS without considering the contractual effect of the Chancery Settlement Agreement.

JKS had independent advice and the Chancery Settlement Agreement was approved as being in her best interests and so, in that sense, it was fully informed which is an important factor on this approach in the matrimonial context.

The analysis and application of this approach has clear overlaps with that taken by A in argument based on implication, representation and "trickery". It is however broader and means that the underlying rationale of the Chancery Settlement Agreement is relevant to the weight to be given to later expressions of wishes by JKS and so to rationality, doing the right thing and unconscionability (see paragraphs 23 to 25 above).

The COP judge did not take this approach.

The third approach is founded on a contractual analysis and was the focus of argument before me.

The terms of the Chancery Settlement Agreement are not that the COP application will simply be for a will (which would carry the implication of a will in different terms to the 2010 will but gives more freedom of choice on the terms of the application) but for a will in defined terms.

For the purposes of analysis I shall consider what the language of the agreement tells us about how the settlement would have been implemented if JKS had had capacity to enter into it and to make a will. The language founds the conclusion that on that assumption the Chancery proceedings would have been settled on the basis that either:

- i) JKS executed a will in the terms included in the Chancery Settlement Agreement or a will annexed to it, at the same time as she signed up to the settlement, or that
- ii) she was to execute a will in agreed terms as a condition to the settlement taking effect.

It also likely that the agreement would have contained terms about the circumstances in which JKS could change her will because of the ability of a testator with capacity to do so.

From that starting point, if JKS had had capacity she would have executed a will in the defined terms and, in my view, if (a) no terms had been included about the circumstances in which she could change that will, and (b) her undisclosed intention had been that she would execute that will to make the settlement effective (and so to get her matrimonial home back), and then revoke it and make a will in different terms (on the basis of the allegations she was making against A in the Chancery proceedings and without a change in circumstances) she:

- i) would have been making a misrepresentation by not disclosing that intention (see Chitty on Contracts 6-009 to 014 and 018 to 020), and
- ii) if and when she made such a further will on that basis she would have been acting in breach of an implied term of the agreement not to do so without a change in circumstances on the basis of the allegations she was making against A in the Chancery proceedings (see Chitty 13-005 to 010).

That analysis based on the terms of the agreement points strongly to the conclusion that the parties to the Chancery Settlement Agreement (and so JKS (through her litigation friend) with the approval of the Chancery court) did not intend the application to the COP for a statutory will in defined terms:

- i) to be nothing or little more than a piece of paper to initiate a decision making process by the COP in which absent a change in circumstances JKS could rely on the Chancery Allegations and Chancery Behaviour Allegations as reasons for excluding A from her will, and so
- ii) to be a solution that effectively transferred those disputes of fact to the COP or introduced an argument in the COP that JKS's views based on them should carry weight because, if she had capacity, she could put weight on views founded on allegations that were disputed by A and which a court may find were untrue or incorrect (or partly untrue or incorrect).

I prefer the second approach. On that approach the involvement of the COP makes it unnecessary to imply a term in the Chancery Settlement Agreement because the ability of the COP to take an "in all the circumstances" approach like that taken in ancillary relief cases means that it is not necessary to do so to give efficacy to the contract or to enable the obvious intentions of the parties to be met or under the broader approach (see Chitty 13-001 to 008).

But if I am wrong and the second approach does not apply, on the information before the COP judge I consider that a term that JKS could not without a change of circumstances rely on the Chancery Allegations and the Chancery Behaviour Allegations as reasons for not including A in her will should be implied into the agreement because:

- i) the arguments set out in paragraph 115 above would succeed, and

ii) the conclusion stated in paragraph 130 above means that the Chancery Settlement Agreement would operate in accordance with the agreement JKS would have made if she had had the capacity to enter into it.

On the approach I prefer, my conclusions in paragraphs 130(i) and 131 above mean that on:

- i) the evidence before the COP judge,
- ii) her conclusion on the intentions of the parties to the Chancery Settlement Agreement, and
- iii) my analysis of the role of MH and the impact of his reasoning and conduct and the approval of the Chancery court of the settlement

a decision on the terms of JKS's will that was founded or placed weight on expressions of testamentary wishes that A should not inherit for reasons based on the Chancery Allegations or the Chancery Behaviour Allegations would be unconscionable.

### Further comment

I have not defined what would or would not be a relevant change of circumstances to trigger the ability of JKS to rely on the Chancery Allegations and the Chancery Behaviour Allegations. This would be fact sensitive and fall to be assessed against what was relied on. For example, further problems in the relationship between A and his mother might be a trigger to a return to this history. As might the intervention of a third party and so D.

The assertions made by JKS about her relationship with A after the Chancery Settlement Agreement might be a trigger. But the COP judge's finding that they were not correct removes or would support the lack of a sufficient connection or bridge between them and the Chancery Allegations and the Chancery Behaviour Allegations.

The COP judge made such a connection or bridge in paragraph 47 of her judgment by concluding that the breakdown in the relationship between JKS and A at the time of the Chancery proceedings is consistent with them. But she did this without taking the impact of the Chancery Settlement Agreement into account, and

- i) without anyone seeking details from A as to the frequency and nature of these visits and his relationship with JKS during and after the Chancery proceedings,
- ii) without assessing the impact her finding that A did see his mother and so reasons given by JKS as to why she did not want A to inherit anything were wrong had on her conclusion that a breakdown in the relationship between A and his mother still existed and if it did why this was the case and so how the link with the earlier breakdown (and so the Chancery Allegations) was established,

iii) without recognising that her finding that A did see his mother, A's evidence and the fact that a meeting was arranged on 25 May 2016 at which A attended (it seems without difficulty or surprise to his mother although she had said to others that she regarded A and his family as being dead to her) demonstrate that JKS was confused and further or alternatively that she may have been influenced to say what she did about A, and

iv) without assessing why the fact that JKS saw more of D (and his wife and children) than she did of A (and his wife and children) founded a rational or conscionable view that after the Chancery Settlement Agreement D should inherit all her estate.

D did not put in evidence before the COP judge and so before her his stance could not have provided a sound platform for giving weight to testamentary wishes and feelings based on the Chancery Allegations or the Chancery Behaviour Allegations. I add that it seems to me that a point that merits investigation is why D (and his wife and son) who were present at two of the meetings when JKS asserted that she did not want A to inherit because she did not see him did not correct this if (as the COP judge found) it was untrue. The absence of any such investigation is another example of the theme of the COP judge's judgment referred to in paragraph 140 below.

The second category – the COP judge made a number of other errors of principle and further or alternatively failed to take features of the case into account

If I am right and the COP judge erred in principle in her approach to the Chancery Settlement Agreement a consideration of these further grounds is unnecessary. But in my judgment, if her approach to that agreement was correct the COP judge still erred in principle and further or alternatively failed to take features of the case into account.

In my judgment a central theme of a number of those errors is the failure of the parties and the COP judge to properly recognise that there was a wide range of family disputes that could not be resolved on written evidence and that the Chancery Allegations and the Chancery Behaviour Allegations were amongst them. I acknowledge that in places in her judgment the COP judge noted that A disputed allegations but at crucial stages of her reasoning this was not taken into or properly taken into account.

In paragraph 49 of her judgment the COP judge says:

"--- I consider that [JKS] would have taken into account the fact that [A] had taken both the family home and the land adjoining Y Road, either by exercise of undue influence or because [his father] was lacking capacity, even though they are now restored to [JKS] after the court proceedings. I consider that she would have considered these as important matters and that they would have influenced her decision. I further consider that [JKS] would have taken into account the fact that she was required to take proceedings against A, and incurred substantial costs in doing so, in order to recover the properties even though it is to his credit that he did not fight the case but came to a compromise settlement. I also consider that she would have taken into account the breakdown of her relationship with A even if that breakdown did not go so far as him being aggressive and abusive towards her. She would also have taken into account the fact that A

attempted to evict [JKS] from the family home after the death of her (sic) father. All of these matters could support a conclusion that any will should exclude A"

This is one of a number of passages in the judgment that bear a close resemblance to points made by the Official Solicitor in the correspondence. It includes what I have concluded are errors of principle in her approach to the Chancery Settlement Agreement but, in my view, it also shows that the COP judge did not have proper regard to the points that:

- i) the Chancery Allegations and the Chancery Behaviour Allegations were disputed, and
- ii) there were serious and disputed allegations against D.

In this paragraph of the judgment the COP judge treats JKS's disputed case in the Chancery proceedings that A had misappropriated JKS's matrimonial home as a fact and not as a disputed fact, and so as an allegation, without any explanation of her reasons for doing so (e.g. because it was her uninfluenced and so true belief and as such should be given weight). The COP judge also does not address A's case on the giving of the notice to quit.

This error of principle is also shown by the approach taken by the COP judge to the dispute relating to the £275,000 in the Nationwide (in the COP judgment referred to as a sum of £250,000). In paragraphs 19 and 36 of her judgment the COP judge either accepted or effectively accepted the account given by D at the meeting on 3 June 2015 about how this sum had been used. The sum was also mentioned by D's son at the meeting on 4 February 2015. I accept the submission on behalf of A that there was evidence before the COP judge that supported a conclusion that the account given by D was not correct and, of course, D did not give any evidence.

Also in paragraph 19 of her judgment the COP judge proceeded on the basis or effectively on the basis that the dispute about property in India could be ignored by saying:

"---- There are some submissions before me, particularly on behalf of A, that there are properties in India but there was no evidence put before me with respect to what those properties might be, their potential value and who is likely to inherit --"

There were deficiencies in the evidence about the Indian property and the disputes relating to it (and I add the collection of rent in this country) but in my view the existence of those disputes and, so these serious allegations against D, relating to Indian property and the sum of £250,00 or £275,000 cannot fairly and so properly be effectively ignored in this way.

A also complains that he was not asked or permitted to give oral evidence on his serious allegations against D. To my mind if he had been this would have highlighted that on the evidence before the COP judge:

- i) they could not be resolved,
- ii) they (together with the allegation that D caused JKS to bring the Chancery proceedings) raised issues relating to whether JKS was being inappropriately influenced by D, and so

iii) the hearing could not continue on a fair basis unless the parties (including D) agreed and the COP (exercising its investigatory jurisdiction) accepted that it would be fair to do so on the basis of disputed allegations.

I consider that these examples of the approach taken by the COP judge to the wide-ranging disputes read alone, and in the context of her judgment as a whole, found the conclusion that her approach to the wide ranging and serious family disputes resulted in unfairness to A and was so an error of principle because:

- i) it failed to recognise or sufficiently recognise that the Chancery Allegations and the Chancery Behaviour Allegations were disputed,
- ii) it failed to carry forward into the reasoning in the judgment the impact of the points that JKS's assertions to the effect that she did not see or have a relationship with A and his wife and children were disputed by written evidence that the COP judge found convincing, and which D had not corrected at the time they were made, and
- iii) it failed to recognise, or to properly recognise, that there were serious allegations against D that were relevant to the assessment of the weight to be given to expressions by JKS of her wishes and feelings.

The last of those failures led to a further error of principle or failure by the COP judge to take relevant features into account in her assessment of the weight to be given to JKS's wishes and feelings that D should inherit her estate and in particular those made by her after she had lost capacity.

This ground of appeal is not avoided, as argued by the Official Solicitor, by paragraph 46 of her judgment. As accepted by A's counsel the error about no family member being present when the Psychiatrist saw JKS probably arises from the presence of D's wife not being mentioned in the COP 3, but if that was the case it shows that the reference to D's wife being there for part of the assessment did not sound any warning bells in the mind of the COP judge. Leaving this error to one side, the reliance by the COP judge on the expertise of professionals who she considered would be alert to any indication that JKS was being unduly pressured to say things against A and her conclusion that it was unrealistic to suppose that a pressured view could be held by JKS until such time as she spoke to the Psychiatrist and the Court of Protection visitor are built on sand. Firstly, as I have set out above there is no evidence that either of them addressed this issue and if they, or those instructing them, did I was not given a good reason why it was thought appropriate to interview JKS when D and/or his wife remained in the house. Secondly, there was no evidence that the relevance of (a) the existence of serious allegations against D, (b) the point that the Chancery Allegations and the Chancery Behaviour Allegations were disputed or (c) the point that what JKS was saying about her existing relationship with A, his wife and children was or may be more significantly inaccurate than for example the Psychiatrist's comment on what JKS was saying about it (see paragraph 79 above) was appreciated or properly appreciated by either of them when they conducted their interviews.

A small but further point is that the apparent acceptance by the COP judge at paragraph 42 of her judgment of the argument advanced by the Official Solicitor that on the six more recent occasions on which JKS expressed a wish about who should inherit under her will on five of them it was that D should inherit her entire estate and the only occasion when she said she wanted her estate split between A and D was when A was present is another example of the failure to take account of the allegations against D, and

i) overlooks the occasion referred to in paragraph 21 of A'

s

witness statement,

ii) is a numerical approach that, without qualification, does not reflect an approach to the weighing exercise that is not linear or binary, and

iii) is clear confirmation that the COP judge failed to take account of any wishes and feelings of JKS expressed at the time of or through the Chancery Settlement Agreement.

The adverse finding of fact made in paragraph 44 of the judgment of the COP judge.

I cite this and comment on it at paragraphs 48 and 49 above.

In view of the limited extent of that finding A's counsel did not press his argument that this finding had been made unfairly. I acknowledge that the COP judge saw A give his evidence but having regard to the points made in paragraph 49 above and the way in which this issue was isolated and dealt with by calling A very late in the hearing to deal with submissions made by counsel for the Official Solicitor I record that in my judgment it would have been better if the COP judge had made this very limited finding in different terms having regard to the wide range of allegations relating to the credibility of A and D (and indeed JKS) that were in issue.

Interim and final relief on the appeal against the order for a statutory will

For the reasons I have given I allow this appeal.

As indicated at the hearing, I will deal with interim relief when handing down this judgment. So that it is not forgotten I mention that care must be taken not to adversely affect the unchallenged provisions in the will authorised by the COP judge which relate to the other piece of land that was the subject to the Chancery proceedings.

I was urged by some of the parties not to remit this case but to decide it myself having regard to the additional information supplied as a result of the directions I gave when giving permission to appeal and the evidence before the COP judge. I cannot address this in the absence of further submissions made by reference to my conclusions set out in this judgment.

In particular, I cannot do this without the parties addressing what facts they are seeking to prove and what matters they argue can be left as allegations and so addressing the basic litigation need to distinguish between agreed and established facts and allegations and so the facts that each

litigant seeks to prove. Further, before I do so consideration needs to be given to the point whether all relevant persons have been notified of this and given the opportunity to advance argument (e.g. on the default trusts which are not the same under the 2010 will, under the will sought by MH's application and under the will approved by the COP judge).

I repeat that no judge is in a position to decide the wide ranging family disputes on the present evidence and so I am not implying that any of the serious allegations against D are correct. Indeed, I acknowledge that the underlying theme of the COP judge's judgment may be right. But absent more written and oral evidence a court must treat them as allegations.

### **The costs appeal**

I acknowledge the wide discretion of the COP judge on costs. Also, as is apparent from what I have said I am of the view that meetings with members of the family present or in the same house to ascertain JKS's wishes and feeling were not appropriate or sensible. But this approach was adopted by all parties and in my judgment the isolation of the costs of attendance of A's solicitors at the meeting on 25 May 2016 was unjustified and, in any event, this order for costs should not survive because it cannot be fairly isolated from the errors of principle and the failure to take into account relevant factors that I have found to exist in respect of the approach of the COP judge to the application for a statutory will.

### **Final comments**

In my view there are a number of lessons to be learnt from this case they include:

- i) the need to identify the issues of fact and law,
- ii) the need to carefully consider how professionals who are asked to ascertain the wishes and feelings of P should be instructed and approach their task,
- iii) when a settlement of civil proceedings is approved on behalf of a protected party who will or may become the subject of proceedings before the COP, the need to consider carefully what should be explained to a civil court asked to approve the settlement on behalf of P, what that court should be invited to consider and explain about its approach to the approval of the settlement, how that is to be recorded, whether the settlement is dependent on a particular outcome in the COP and more generally how the COP will be invited to approach the settlement that P has entered into with court approval, how P's wishes and feelings (as a protected party) about the settlement should be sought and recorded, and who the likely parties to the COP proceedings will be, and

iv) although I understand that the approach taken in this case of joining P as a respondent and inviting the Official Solicitor to act as P's litigation friend works well in a great number of applications for a statutory will, there may be a need in some cases for the COP when making that invitation to the Official Solicitor and for the Official Solicitor when deciding whether or not to accept it to consider whether a professional deputy should make the application for P or act for P at least until it is made clear whether there is or is not a dispute.

## Postscript

In addition to pointing out typographical and other obvious errors Leading and Junior Counsel for the Official Solicitor invited me to reconsider paragraphs 69 to 71 and 143 of this judgment because they submitted that they were unfair for two reasons namely:

- i) no allegation of dishonesty was made by the Official Solicitor at the hearing or in his position statement and his stance was set out at an identified place in the transcript (cited below), and
- ii) the appeal was not argued in writing or orally on the basis that the date of discovery of the transfer had any significance.

I have made some changes. However, I do not accept that these points made or make the thrust of my comments unfair if what I say elsewhere in the judgment is correct (see, in particular, paragraphs 4, 44, 46 and 47, 58, 60, 68 and 140 thereof, paragraphs 26 and 27 of Part 2 of Schedule 2 and paragraphs 3 to 5 of Part 3 of Schedule 2).

The passage relied on in the transcript is part of the exchanges early in the hearing on whether and, if so, on what MH should give oral evidence and so be cross examined. It provides clear confirmation of the lack of proper preparation and so, for example, how the points made by Counsel for MH that both sides (i.e. A and D):

"have accused the other throughout of exerting undue influence on their Mum, a push-me pull me situation ----- So we have competing allegations of undue influence. How much of what JKS says about A is based in reality is something that is going to be very difficult to assess ----- "

were to be addressed.

The limited cross examination of MH, like the absence of any mention in his written evidence of discussions between him and JKS at the time that the Chancery proceedings were settled, are factors that underlie the need for the further information sought by directions given when permission was granted to bring this appeal.

The position of the Official Solicitor particularly relied on by his Counsel is:

"--- I ought to say I don't really see how cross-examining MH goes to the issues of the statutory will, certainly so far as the Court's jurisdiction is concerned doesn't extend [inaudible – but it seems - to the Indian property]. In terms of the recent structure of the settlement, certainly so far as the Official Solicitor is concerned we're not asking the Court to make a determination that A

did unduly influence his father. The only relevance of that is, is the fact that that was transferred back, and the fact that [JKS] had to bring those proceedings to recover the land and I say that she will take that into account when considering the testamentary disposition. But other than that I have nothing to add ---- "

That passage shows that the Official Solicitor was not seeking to prove undue influence or dishonesty against A in his dealings with his father and so, without expressly saying so, was accepting that the facts asserted by JKS in the Chancery proceedings had to be treated as allegations. But this statement of his position does not recognise or sufficiently recognise the points made in paragraphs 44, 46 and 47 or in paragraph 68 (i) and (ii) of this judgment (see paragraph 69) and in my view this is likely to be one of the reasons why the points made in paragraphs 97 and 98 hereof were not addressed (see paragraph 4).

Also, it does not address the comments made by the COP judge a little earlier during the submissions about MH giving oral evidence in response to points being made by counsel for MH that both brothers were making allegations of undue influence:

"Judge: Yes although the allegations by D, they have been looked at, they have been considered and declarations made –

Counsel for MH: The transfers

Judge: - by a court?

Counsel for MH: Yes

Judge: The allegations that come back, they are allegations and we do not know ----- "

The allegations "that come back" are allegations by A and, so far as I have found, the COP judge was not told of the common ground before me that the Chancery Settlement Agreement did not resolve or purport to resolve the Chancery Allegations (see paragraph 60 of this judgment).

As stated, the references to the skeleton argument and the letter of 11 August 2016 are to provide examples of an approach that does not recognise or sufficiently recognise the points made in paragraph 68 of this judgment and they are not included because of their significance to arguments advanced in the appeal. Another example, which has a more direct impact on the approach taken to obtaining and assessing expressions of JKS's wishes and feelings (and so to the inter-relationship of the two points in paragraph 68 of this judgment) is addressed in paragraphs 26 and 27 of Part 2 of Schedule 2 to this judgment.

Finally, as stated in paragraph 4 of this judgment and paragraph 5 of Part 3 of Schedule 2 to it my comments about the lack of proper preparation are directed to all of the represented parties.

## SCHEDULE 1

### The Chancery Order

UPON the Claimant's Claim Form dated 21 August 2017 and the Amended Particulars of Claim dated 9 May 2014

AND UPON hearing Counsel for the Claimant and Counsel for the Defendants, both stating that they have agreed to the terms of compromise set forth in the Schedule hereto

**AND UPON the Defendants not defending the Claim**

AND UPON reading the evidence including: Claimant's skeleton argument, the Amended Particulars of Claim, the Amended Defence, the witness statements filed for the Claimant and the witness statements filed for the Defendants

AND UPON the Court forming the clear view that this Order is justified on the facts

AND UPON the Court being satisfied that this Order is for the benefit of the Claimant who is a protected party

**IT IS DECLARED**

1. The transfer dated 11 April 2003 of [JKS's matrimonial home] from [A's father] to A was procured by undue influence
2. The transfer dated 20 August 2009 of land on the south side of [ address ] from [A's father] to A and his wife was procured by undue influence and further was invalid for want of capacity

**AND IT IS FURTHER ORDERED AND DECLARED that**

3. The conveyances of [ JKS's matrimonial home and the other piece of land ] be set aside and cancelled with effect from the dates which they bear
4. Title to [ JKS's matrimonial home and the other piece of land ] do vest in the Claimant in her sole name
5. The terms in the Schedule to this order be carried out
6. The parties have permission to apply as to the implementation of this order
7. There be no order as to costs

**SCHEDULE**

THIS AGREEMENT IS MADE BETWEEN (1) JKS (by her litigation friend, MH) (and approved by the Court pursuant to CPR 21) and (2) A and his wife

**WHEREAS**

- (1) The transfer dated 11 April 2003 of [ JKS's matrimonial home ] from [A's father] to A ("the First Disputed Transfer" ) and the transfer dated 20 August 2009 [ of other land ] ----- ("the Land") from [A's father] to A and his wife (" the Second Disputed Transfer") were void and of no effect, or alternatively they would have been voidable and avoided and therefore of no effect.
- (2) A was wrongly registered as the legal owner of JKS's matrimonial home.
- (3) A and his wife were wrongly registered as the legal owners of the Land
- (4) JKS issued a claim on 21 August 2012 to set aside the First and Second Disputed Transfers in the High Court, Chancery Division ----- ("the Claim")
- (5) The parties to this agreement have now agreed (subject to the Court's approval on behalf of the Claimant, JKS, as a protected party) to compromise the Claim on the terms herein contained and to ask the Court to make an order in terms of the draft order to which this agreement is appended

**THE PARTIES AGREE**

1. (a) The parties agree Recitals (1), (2) and (3) above
- (b) The parties agree that they will do all things and sign such documents as may be required to give effect to the court order and for which purpose they appoint their legal representatives as attorneys on their behalf
2. MH will apply to the Court of Protection to be appointed Deputy for the Claimant to manage her property and affairs.
3. MH will apply once the deputyship order is made, for a Statutory Will for all her estate in the UK to be made for the Claimant on the following terms:
  - (a) that MH will be named executor -----
  - (b) that the Claimant's estate in the UK be given to her two sons D and A in equal shares absolutely
  - (c) that A be given an option to purchase [JKS's matrimonial home] at the market price payable for the property at the date when the option is exercised such option to be:
    - (i) exercised in writing within six weeks from the date of issue of the grant of representation to the estate by notice in writing to the personal representative or earlier at the election of A; and

(ii) completed by payment of the purchase price in full by A by no later than six months from the date on which the option is exercised pursuant to 3(c)(i) above unless 1) a grant has not been issued by that date, in which case completion must take place within six months of the date of issue of the grant, and 2) A's share of the estate is sufficient to pay the purchase price, in which case his share of the estate will be utilised first in paying for the property;

4. A and his wife will not defend the Claim and JKS (by her litigation friend) is at liberty to enter judgment for declarations that the First Disputed Transfer was procured by undue influence and the Second Disputed Transfer is void for want of capacity and that both Disputed Transfers are set aside and cancelled with effect from the date they bear
5. as to costs:
  - (a) A and his wife will pay 55% of the Claimant, JKS's costs agreed at £61,674 .88 within 14 days of receipt of the Order appointing the deputy
  - (b) A and his wife will bear their own costs

## SCHEDULE 2

### PART 1

The statements of JKS's more recent wishes and feelings, with the citations from them made by the COP judge in her judgment in italics, were made at the meetings set out below. They were:

Before the issue of the COP proceedings:

- i) A meeting on 4 February 2015 at which MH met with JKS for the purpose of identifying her wishes and feelings. The meeting lasted one hour 45 minutes and took place at JKS's matrimonial home. In addition to MH his solicitor (the same solicitor who took instructions for the 2010 will), an interpreter, D his wife and his eldest son were present at that meeting. MH referred to the Chancery proceedings and is recorded as having told JKS that because of changes in the circumstances which arose out of the court case it had been agreed by her barrister and the barrister representing the other parties that a new will should be made. JKS is recorded as becoming upset and saying that she didn't need any help. In answer to a question about whether there were any assets abroad she replied that there was no property abroad and when asked about any disputes about any land in India she replied that there was no land abroad. However, D's son indicated that there is a dispute about land in India. In answer to MH saying that he understood that the remainder of the estate is to be split equally between HER two sons JKS responded as cited by the COP judge "

no need to give to my younger son because he never comes to visit me

" and in response to a question as to when she last saw A, JKS replied 10 years ago. The record of the meeting ends with a note that D's son mentioned that JKS gave money to D which was held in a Nationwide Bank account and that D said he used some of that money to pay solicitors in India for the court case for JKS.

ii) A meeting held on 3 June 2015 at JKS's matrimonial home attended by a different interpreter but otherwise attended by the same people with the addition of D's son's wife. At that meeting JKS is recorded as saying: "

she said many times that she wished for all her estate to go to D as A doesn't visit her and became upset when we explained the terms of the settlement reached that MH would make application for a statutory will for all of her estate to be divided between A and D in equal shares. We did say that we would record her wishes and a letter of wishes (or record them in the witness statement). We would discuss this with Counsel. We asked about the £250,000 which she gave to D which money originated from her late husband. She said she wanted D to have this money. D says that there is £100,000 left. £50,000 was used for repairs on

[address] and £100,000 on legal fees (some to us and some to India)"

.

iii) A meeting on 19 June 2015 at which a capacity assessment was made for the purposes of the application for a statutory will by a consultant old age psychiatrist (the Psychiatrist). This meeting took place at JKS's matrimonial home and was carried out with an interpreter. D's wife was present for an unspecified part of the meeting. The presence of D's wife is recorded in the report sent by the Psychiatrist to MH dated 6 July 2015 but not in the COP 3. (A's counsel accepted that this probably accounted for the error made by the COP judge in paragraph 46 of her judgement when she stated that no family member was present at JKS's meeting with the Psychiatrist). The Psychiatrist recorded that: "

--- she has repeated that she does not want to leave anything to her son A or his children

".

### After the issue of the COP proceedings

i) A meeting on 27 January 2016 again at JKS's matrimonial home attended by MH, his solicitor and an interpreter. D's wife was at the property but on this occasion MH asked her to leave the room because the judge will wish to ensure that JKS had not been influenced. JKS was at first very angry about this but eventually accepted that her daughter-in-law should leave the room which she did. After she had gone JKS is recorded as stating that no one has influenced her. MH stated that the last time they had met they had discussed that her whole estate should be divided between A and D, she responded that she had not seen A since he was born and when told that his lawyer has said that A had been to see her she responded that that was not true. She said that: "

whoever is looking after me should get my estate

" and then in response to a question that if both sons are looking after her they should get 50/50 she responded no because A did not come to his father's funeral.

ii) A meeting on 23 April 2016 between JKS and a Court of Protection visitor and an interpreter. The visitor's report is dated 26 April 2016. This meeting was also at JKS's matrimonial home and when the visitor arrived D, his wife and their eldest son were present. The COP judge summarised this report as follows:

" The Report provided that JKS said, and repeated a number of times throughout the meeting, that her younger son never came to visit her. He never sees her or helps her, , especially after her husband died and she did not want to give anything to him , not a single penny. The Visitor described her as being "adamant" and "quite animated" when discussing this. She further said that A never came to see her whereas D and his wife and son came to look after her and that she thought of A and his wife As dead. She also referred to D being her eldest son and that he looked after her and that was why she wants to leave things to him and his family. "

iii) A meeting on 25 May 2016 again at JKS's matrimonial home attended by MH, his solicitor and an interpreter and on this occasion by the other

side

of the family, namely A, his wife and their two daughters This meeting had been convened at the request of A's solicitors because JKS had said that she doesn't want their client (A) to share in her estate. MH set out: "

JKS has declared to me that she prefers one son against the other because the one son does not visit her as much as the other one and has little contact with her. Notwithstanding that, in accordance with the court order we have proceeded to draw a document recognising the agreement. When the Court visitor came to see JKS she expressed her wishes that one son should be preferred against the other

[A's solicitor]

has pointed out to me that that is not necessarily the case as there have been occasions when she has expressed the view of equal division between her sons. If that is the case, could she confirm what her instructions are. If she feels under pressure then only the lawyers should be present and the family should leave."

JKS's response was that; "

What is this about. There is no dispute between us (looking at A) . There is no problem I want my two sons to have an equal share. Everything is clear they must get 50/50 between them. They are my children, I will look after them. I will do what I want."

She was asked to explain what she had said to the Court visitor and it is noted that she became very angry at the mention of the word "court" and when asked to explain why she had told the court visitor something different she became very angry shouting that she wanted them all to leave the house. However she continued that she did not need any help and that no one came to visit her. The note records in brackets that she did not remember the court visitor coming to visit. Towards the end of the meeting MH asked, to get things clear, whether it was correct that she wanted an equal division of her assets between her two sons and her reply was yes. This meeting lasted 40 minutes.

## PART 2

### A history of the COP Proceedings with some comment

MH made the application in August 2015 and supported it by a witness statement dated 18 August 2015 to which he exhibited (amongst other things) JKS's witness statement in the Chancery proceedings, the Chancery Order, a draft statutory will reflecting the terms of the will referred to in the schedule to the Chancery Order, the reports referred to in paragraph 1 of Part 1 of this Schedule and an email sent on 11 August 2015 indicating that D, his wife and his son (R) consented to the application and which was sent by his daughter in law.

That email shows that MH's witness statement had been read with care because it picks up a point on it. That consent was also given by D with full knowledge of what had been said by JKS about her testamentary wishes at the meetings held on 4 February 2015 and 3 June 2015 because of their presence at those meetings. D would also have seen the COP3 capacity assessment and his wife would have known about it because she was present for part of the meeting at which it was carried out. The Chancery Settlement Agreement was also exhibited to MH's witness statement so D (and his wife and son) knew of its terms through that route even if they were not aware of it before.

In the application MH described himself as JKS's deputy and in paragraph 4.2 thereof JKS is included as one of the respondents. A District Judge at the COP made what I understand to be a fairly standard order dated 26 October 2015 joining JKS as a party to the proceedings and, subject to his consent, appointing the Official Solicitor to act as her litigation friend. That order contains standard recitals relating to the overriding objective to resolve matters as quickly as possible and with the minimum of expense to JKS, that the court expects the parties to adopt a co-operative approach and reminding them of the position as to costs.

With the benefit of hindsight, a consideration before the joinder of JKS as a respondent or immediately after the Official Solicitor agreed to act as her litigation friend of whether the application could, with the support of both sons, proceed on an uncontested basis would have been sensible and have accorded with the recitals to the order of the District Judge.

It seems to me that one of the inevitable steps for the Official Solicitor as JKS's litigation friend in assessing what would be in JKS's best interests should have been to ask both D and A for their views (see s. 4(7)(b) MCA). It is unclear whether this was done.

If on enquiry by the Official Solicitor or MH D's support for the application had continued it is difficult to see why contested COP proceedings and the re-opening of family disputes would have been needed. No explanation was given to me as to why such an enquiry was not made with a view to D filing an acknowledgment of service, becoming a party and consenting to the application.

By a letter dated 16 December 2015, the Official Solicitor as JKS's litigation friend objected to the application. Before doing so the Official Solicitor had indicated his view that the COP cannot be bound by any order made by the Chancery Court and must therefore be satisfied that any statutory will made for JKS is in her best interests and had asked the applicant (MH) to expand on why he considered the proposed statutory will represented JKS's best interests particularly given the wishes she appears to have expressed on more than one occasion that A should not benefit from her estate.

There is no indication whether the Official Solicitor sought D's views on this given D's consent to the application when he was aware of the expressions of wishes that he should inherit all the estate.

By an acknowledgment of service dated 19 January 2016 A consented to the application. At this stage D had not filed an acknowledgment of service and so had not become a party to the proceedings (see Rule 73 of the COP Rules).

Also on 19 January 2016 MH's solicitors replied to the Official Solicitor stating that the Chancery proceedings were settled on the strong advice of counsel that it was in JKS's best interests to settle on the agreed terms and then (with my emphasis):

"We are aware that JKS has expressed the wish on more than one occasion that her entire estate be given to her son D,

but we are concerned that she may not be expressing her real wishes concerning her sons.

Before the litigation in the Chancery Division, JKS and her late husband always treated their sons equally. ----- She also expressed the wish at the start of our meeting on 4 February 2015 that her estate was to be given to her family. She may of course have formed a different view following what A had done concerning the property.

Furthermore bearing in mind that she lacks testamentary capacity, we are not satisfied that she fully understands or is able to weigh up the importance of carrying out the terms of the settlement so that A and D each inherit half of her estate.

---- If the terms of the settlement are not carried out, this will no doubt result in A reopening the Chancery proceedings with substantial cost to JKS

"

So by this letter MH's solicitors raise issues relating to:

- i) inappropriate influence of JKS,
- ii) JKS's capacity to express her true wishes on a properly informed basis, and
- iii) the re-opening of the Chancery proceedings (and so of the Chancery Allegations in or in respect of the COP proceedings).

On 1 February 2016, a redacted copy of a note of a conference with Counsel acting for JKS regarding the settlement proposals in respect of the Chancery proceedings (which was in the bundle before the COP judge) was sent to the Official Solicitor. It included the following:

"It was agreed that we should put forward the following proposal:

That the defendant should not defend the action and will allow the Court to set aside the Transfer (as a result the inheritance tax liability would disappear). We could indicate that once appointed Deputy for JKS, MH would be willing to apply to the Court of Protection for a Statutory Will dividing her estate equally between the two sons and to investigate the Nationwide Account, on the basis that the defendant should pay 75% of the claimant's costs, which currently amount to about hundred £120,000"

MH provided a further witness statement dated 4 February 2016 to which he exhibited the note of the meeting with JKS on 27 January 2016 at which MH had asked D's wife to leave the room and she had done so.

By a letter dated 2 March 2016 the Official Solicitor stated (with my emphasis):

"The agreement reached in the Chancery proceedings

are undoubtedly a factor that JKS would consider if she were able to do so.

However, the agreement is not the overriding factor or one of magnetic importance in determining JKS's best interests.

You have indicated your concern that if a statutory will is not made on the terms proposed, then AFS will reinstate the Chancery proceedings at potentially significant cost to JKS. It is your assertion that this is a significant factor that JKS would take into consideration if she had capacity to do so.

Whilst the Official Solicitor agrees that the threat of further legal proceedings in the Chancery Court is a factor that JKS would take into consideration, it is the Official Solicitor's view, on advice from Counsel, that A would be unable to reinstate those proceedings.

It is the Official Solicitor's view that the Order dated 16 June 2014 made in the Chancery proceedings has been complied with and there will be no redress for A to reinstate.

The Order vests the property transfers unconditionally in JKS,

but there is no specific provision within the Order which consents to the terms of the Schedule or makes it binding.

Therefore, the only remedies available to A, as far as the Official Solicitor can determine, would be breach of contract of the Schedule or specific performance of the Schedule. This would then be a matter of construction of the Schedule itself.

It is the Official Solicitor's view that a true construction of paragraph 3 of the Schedule

only

requires

JKS's deputy

to apply (

emphasis in original

) for a statutory will in the terms set out therein.

The Official Solicitor does not, therefore, consider the threat of A reinstating the Chancery proceedings to be a real issue and certainly not one which would be a significant factor in any assessment of JKS's best interests.

### **The Official Solicitor is concerned**

that the proposed statutory will has no regard to JKS's consistently expressed wishes that she does not wish to benefit A under her will. It is the Official Solicitor's view that the statutory will on the terms proposed could not, therefore, be in JKS's best interests as it does not have regard to her past or present wishes and feelings

-----

That is not to say that the Official Solicitor considers a statutory will should be made excluding A absolutely. However,

JKS's express wishes are a significant factor which has been completely overlooked in the proposal which can therefore not be supported.

The Official Solicitor therefore wishes to instruct an independent visitor to act on his behalf to meet with JKS to discuss a statutory will and relationship with her family. Arrangements are being put in place at this office for a visitor and interpreter to visit JKS. However, please advise of the best person to contact to arrange a date for this visit "

By this letter the Official Solicitor does not address how he asserts JKS would have taken the agreement in the Chancery proceedings into account if she had been able to do so and does not address:

- i) the reasoning behind the Chancery Settlement Agreement,
- ii) the impact on JKS as a party to the Chancery Settlement Agreement,
- iii) what testamentary wishes and feelings JKS had expressed or may have expressed (a) at that time of the Chancery Settlement Agreement to MH (her litigation friend) or others, or (b) through that agreement as a party to it,
- iv) what if any representations were being made by or on behalf of JKS as to her testamentary wishes and feelings in connection with the Chancery Settlement Agreement which she entered into with the approval of the Chancery court (see paragraph 5 of the Chancery Order),
- v) the consideration of JKS's expressed wishes and feelings that the Official Solicitor was relying on and was asserting had been "completely overlooked", although it seems they were exhibited to MH's witness statement,
- vi) how the wishes, feelings and intentions relied on by the Official Solicitor compared with those that were made by or on behalf of JKS when the Chancery Settlement Agreement was reached, and made binding on JKS,
- vii) the points made by MH's solicitors about JKS being influenced by others and JKS's capacity to express her true wishes on a properly informed basis which are clearly supported by the capacity assessment made by the Psychiatrist.

In response the solicitors for MH state in a letter dated 8 March 2016:

"We do not agree that there is no provision in the Order which makes the Schedule binding. On page 2, paragraph 5 of the Order, it clearly states "and it is further order and declared that the terms of the schedule to this order be carried out". This is a binding court order for the terms of the schedule to be carried out. We note your view on the construction of the schedule that it only requires JKS's deputy to apply for a Statutory Will in the terms set out and not necessarily to obtain a statutory Will in those terms. We agree with this, however, A might well not agree with this view and seek some further remedy against JKS, resulting in further costs payable out of JKS's assets.

Finally, we note that the official solicitor considers that the Application for a Statutory Will be dealt with at an attended hearing. We agree that an attended hearing is necessary but only deal with the terms of the Statutory Will in JKS's best interests. As we are agreeable to your view on the construction of the Order, we do not feel that the Court needs to consider to what extent a third party can enter into a contract with a person lacking capacity as the schedule to the court order dated 16 June 2014 was approved by the Court under CPR 21.10. Accordingly, we are not in agreement with the draft letter the official solicitor has prepared for the Court of Protection. We intend sending out own letter, as per copy enclosed. "

In that letter they say that the Official Solicitor should contact D's wife to arrange a visit by an independent visitor but do not qualify this with anything relating to their early points about JKs being influenced by others or their presence. Also, that letter does not address a number of the point listed in the last paragraph.

Also on 8 March 2016 MH's solicitors wrote to the COP (and copied this letter to the Official Solicitor) stating (with my emphasis):

"The Official Solicitor is of the view that the terms agreed in the Schedule to the Court Order are not in JKS's best interests. We disagree with this. The agreement was reached in JKS's best interests having the benefit of experienced Counsel for both JKS and the Defendants and a Litigation Friend. Equally the order was approved by an experienced High Court Judge who took some time to pass the Order. The agreement was concluded in JKS's best interests as the property and the land was vested in JKS's name and we obtained a refund of all the inheritance tax paid.

Had the matter proceeded to trial, the outcome might have been quite different with more costs payable by JKS.

Finally, we note that the official solicitor considers that the Application for a Statutory Will be dealt with at an attended hearing to deal with contractual issues of construction with regards to the terms of the Court Order, what a third party is able to Contract P to do and the terms of the Statutory Will. We agree that an attended hearing is necessary but only to deal with the terms of the Statutory Will. As we are in agreement with the Official Solicitor's view on the construction of the order dated 16 June 2014, this matter is not in issue. Furthermore, we note that the official solicitor is requesting the court to consider to what extent a third party can enter into a contract with a person lacking capacity. We do not believe that this is an issue as the schedule for the court order was approved by the court on 16 June 2014 under CPR 21.10

"

On 9 March 2016, the Official Solicitor wrote to the COP setting out the advice received from Counsel on the effect of the Chancery Order and requesting that the matter be listed for an attended hearing with a time estimate of one day asserting that counsel had advised that any such hearing may need to deal with (i) contractual issues of construction with regards the terms of the Chancery Order, (ii) what a third party is able to contract P to do, and (iii) the terms of the statutory will. The Official Solicitor also informed the COP that JKS was out of the country until the end of March, that he then wished his agent to meet with her and so he requested that the matter be listed for an attended hearing for the first available date after 1 May 2016.

A's statement is dated March 2016 and it is not clear whether it was received before the above correspondence in early March. As I have set out in the judgment it raises a number of serious allegations against D and makes assertions about the relationship between JKS and A (and his family) supported by photographs.

MH filed a further witness statement in response dated 15 April 2016 stating that he never intended to make A feel that his side of the family were being excluded and noting that A was asserting and had asserted in the Chancery proceedings that his mother says different things to different members of the family depending on who she is talking to.

So by this stage it was well known that there were wide ranging and serious family disputes that were relevant to the assessment of JKS's expressions of her testamentary wishes.

On 23 April 2016, the Court of Protection visitor accompanied by an interpreter saw JKS at her home for about two hours. A statement exhibiting the report of the visitor was filed by the Official Solicitor on 5 May 2016.

Perhaps unsurprisingly having regard to the developments that had taken place as a result of the stance being taken by the Official Solicitor, by an acknowledgment of service dated 20 May 2016 D changed his position and became a party to the proceedings seeking an order that the will revert to the one his mother originally made and asserting that his interest in the proceedings is "to ensure that my mother's wishes have been fully considered".

However, D was not asked to provide and did not volunteer any evidence or clarification of his position for example on:

- i) whether he was referring to the 2010 will or what wishes he was relying on and so whether he was relying on the instructions, given by his mother for her 2010 will or on them and the statements made since the Chancery Settlement Agreement and why he had originally consented to the application and so changed his mind, or
- ii) A's present relationship with his mother,
- iii) A's allegations against D, or
- iv) A's allegations that JKS says different things to different people including making allegations about D that are similar to those she is recorded as saying about A.

MH filed a further witness statement dated 31 May 2016 exhibiting the attendance note for the meeting held on 25 May 2016. This was sent to the Official Solicitor on 1 July 2016.

By a letter dated 5 July 2016 the Official Solicitor wrote to MH's solicitor's complaining about the visit that had taken place on 25 May 2016 stating:

"--- Given the history of A's influence and the apparent aggression and abusive behaviour towards JKS from A (evidenced in your will file), the Official Solicitor submits that JKS would be unlikely to express any wish to go against A when he is in the room with her challenging her on terms of her will ----- "

This letter is an example of the Official Solicitor treating the Chancery Allegations against A as facts rather than allegations, behaving uncooperatively and it ignores:

- i) the possibility of inappropriate influence by D (by which I mean influence because of his (or his wife's or son's) presence or proximity or by more active steps),
- ii) the serious allegations that A has asserted were made against D in the Indian proceedings,
- iii) A's evidence in the COP proceedings about D's part in the Chancery proceedings,
- iv) A's evidence in the COP proceedings about his relationship with his mother (supported by photographs), and what she says about D, and
- v) the lack of any evidence from D.

On 18 July 2016 MH's solicitors replied disputing the allegations made against them by the Official Solicitor.

On 11 August 2016, the Official Solicitor wrote to A's solicitors making, for the first time in correspondence before the court the suggestion that JKS's estate should be divided 75% for D and 25% for A and advancing a number of arguments in support of that solution. That letter also contains the following:

"The Official Solicitor further submits that JKS's cultural and religious beliefs ----- would usually result in children being treated equally in any will made by a parent. The Official Solicitor does not consider that JKS would wish to cut her son off entirely. However, the fact remains that your client (A) dishonestly misappropriated assets from his mother and father, regardless of the fact that they have now been returned. The Official Solicitor cannot ignore JKS's express views that she does not wish your client to benefit from this date, however unfair this may appear to your client "

In this letter the Official Solicitor relies on the report of the Court of Protection visitor but again does not address the points listed in paragraph 15 above.

On 6 September 2016, the parties were notified that the hearing would take place on 2 November 2016 with a time estimate of one day.

No party sought any further directions in respect of that hearing and the only identification of the issues is that set out in the letters to the COP on 8 and 9 March 2016.

### PART 3

#### **The lack of directions identifying the issues**

A regular message given by the President of the COP and by me is that the overriding objective set out in the COP Rules is promoted by the proper identification of the issues of fact and law. This is reflected in PD 13B and the notes to Rule 5 of the COP Rules in the Court of Protection Practice 2107.

This should be very well known to those who appear regularly in the COP and to any litigator in all types of case.

Sadly, the history of the COP proceedings set out above shows that this is another example of this message being ignored and a case coming to hearing without it being properly prepared. This puts the trial judge in a difficult position which was compounded in this case by the fact that the COP judge had not received a copy of the bundles before the start of the hearing and had to rise to read them.

In my view, the background facts and the wide ranging disputes I have referred to should have alerted the representatives of the parties to the need to consider with care:

- i) what facts are common ground or can be established without oral evidence,
- ii) what facts need to be proved,
- iii) what oral evidence should be given and so how Rule 90 was to be applied,
- iv) what matters can be left as disputed allegations,
- v) the issues listed in paragraph 15 of Part 1 of this Schedule or a number of them,
- vi) what investigation of the reasoning behind the Chancery Settlement Agreement should be obtained including the reasons why the Chancery judge approved it as being in JKS's best interests,
- vii) how should that reasoning and thinking be presented to the COP,
- viii) what further evidence or particulars of his evidence should be sought from A,
- ix) what evidence should be sought from D and what should be done if D decided not to put in any evidence,
- x) what approach should be taken to the assessment of assertions made by JKS (e.g, she does not see A and so her relationship with A after the Chancery Settlement Agreement) which are disputed,
- xi) what approach should be taken to seek to ensure that JKS was asked appropriate questions and so far as possible the relevant factors were explained to her in the most helpful way,
- xii) whether precautions should be taken to avoid or minimise influence (caused by the presence or proximity of others or more active steps by others) of JKS when her testamentary wishes and feelings were sought including (a) where she should be seen, (b) who should take her there, (c) what history should be provided to those who interview her,
- xiii) whether appropriate explanations of the history (e.g. the existence and effect of the Chancery Settlement Agreement, the existence of the proceedings in India and A's evidence that he saw his mother regularly) had been given to JKS when her testamentary wishes and feelings had been sought, and
- xiv) how the allegations and counter allegations of inappropriate influence and improper motives and conduct levelled by the brothers against each other were to be addressed.

There is no indication that this was done by  
any

of the represented parties. If it had been it would have been realised that:

i) any account given by either brother (and their wives and children) should be treated with caution to check whether it can be treated as a fact or has to be proved or assessed as a disputed fact,

ii) the same approach should be taken to statements of JKS particularly after the death of her husband,

iii) consideration needed to be given to the possibility that after she lost capacity JKS was confused and was not taking relevant matters into account,

iv) consideration needed to be given to the possibility that JKS may have been and is vulnerable to influence from the presence or proximity of or more active steps taken by her adult children (and their immediate families) and so from

both

A and D and so to how the impact of any such possible influence was to be avoided or minimised when JKS's views, wishes and feelings were sought and obtained, and so

v) professionals instructed to see JKS ascertain her wishes and feelings needed to be carefully and fully instructed, and

vi) no findings could be properly sought or made on the background disputes including:

a) the present relationship between A and his mother after the Chancery Settlement Agreement and so the existence or continued existence of a breakdown in their relationship, and

b) the existence of or the existence of the possibility of influence over JKS's expressions of testamentary wishes by either A or by D

without oral evidence from A and in the absence of D being given the opportunity to give evidence on the disputed allegations.

If these basic steps in preparation had been carried out it would have been clear that a one day hearing would only be appropriate:

i) if there was no or only very limited oral evidence, and so

ii) if it was accepted by

all

the parties including D that the wide ranging family disputes could be properly taken into account on the basis that the serious allegations and counter allegations were treated as only allegations.

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