COURT OF PROTECTION **No. 11757467**

MENTAL CAPACITY ACT 2005

In the matter of
JC

BETWEEN:

D

Applicant

- and -

(1) JC (by his litigation friend, the Official Solicitor)
(2) JG (his deputy)
(3) A
(4) B
(5) C

Respondents

The background

1. This is an application for an order authorising the execution of a new statutory will on behalf of JC. There is an existing statutory will, which the court approved on 4 January 2011.

2. JC was born in 1922.

3. His estate is worth approximately £3,500,000 and consists mainly of a portfolio of twelve rental properties.

4. He has mixed dementia and lives in a residential care home.

5. In 2009 Reading Borough Council applied to the court for the appointment of a panel deputy to manage JC's property and financial affairs, and on 27 January 2010 Jonathan Gater, a partner in Blandy & Blandy, Solicitors, Reading, was appointed as his deputy.

The four children

6. JC is the biological father of one son and three daughters, two of whom were born during his marriage, which lasted from 1953 to 1957. I shall refer to the four children as A, B, C and D in order of seniority.

7. His only son, A, was born in 1942. A's mother was fifteen when she gave birth to him. When he was eight years old A was put into a children's home and he was subsequently fostered. Throughout his life, he has always understood that JC is his father, though JC has consistently denied it. When this matter came before me on 4 January 2011, I made an order authorising a DNA paternity test to be carried out. The test was conducted and the report concluded that, without a shadow of doubt, JC is A's biological father. A has no children of his own, and this

has triggered a supplementary application to the court, which is referred to in paragraph 31 below.

8. B is the eldest of JC's three daughters. She was born in wedlock in 1953, and has two children of her own: a son who was born in 1971, and a daughter, Q, who was born in 1988.

9. JC's middle daughter, C, was also born in wedlock in 1955, and is a single woman with no children. Geographically, she lives about 150 miles away from the other parties to these proceedings.

10. JC's youngest daughter, D, was born in 1958 almost a year after he and his wife divorced. She has two daughters, both of whom are in their twenties.

11. The following extract comes from a character reference completed on 14 July 1958, two days after D's birth. The reference was in support of an application made by JC's former wife, Mrs C, to the Homeless Children's Aid and Adoption Society giving D up for adoption. As with all the primary sources to which I have referred in this judgment, I have edited the text slightly to respect the parties' privacy.

> "Mrs C has been known to me for a number of years. She was brought up in the Foundling Hospital, now known as the Thomas Coram Foundation for Children. She first married a man named M by whom she had one child, MM, who is now about 10 years old and is in the care of Dr Barnardo's Homes. That marriage was dissolved on the grounds of her husband's desertion on 25.1.52. She met JC, became friendly with him, he promised her a home for herself and MM. She was pregnant by JC when I first met her in February 1953 and she married him before the birth of B, born 14.5.53. Subsequently JC so ill-treated MM that the NSPCC inspector was called in and MM placed in the care of Dr Barnardo's Homes. A second child was born to JC and his wife, C, on 27.3.55. This marriage was not a happy one. JC consistently ill-treated his wife and she left him. She came to me again in December 1956 asking for help in finding accommodation for herself and the little girls, and a suitable job. Divorce proceedings were brought against JC on grounds of cruelty and the decree absolute was made on 22.8.57. Under a court order JC was supposed to maintain the two girls and I am not sure if he is supposed to pay alimony for Mrs C or not, but he is in arrears and owes well over £90. On the pretext of discussing the girls' maintenance he forced his way into Mrs C's room, and then said that, if he had to pay money to her, he was going to get his money's worth, and assaulted her. The result was that she became pregnant. This was after the decree absolute had been made.
>
> Mrs C is an excellent mother and looks after the two little girls very well indeed. She works hard to maintain them, and keeps the room she has spotless, although the rest of the house occupied by an old lady is in very poor shape. Mrs C says there are mice and fleas, and that she could not bring D back there. She does not feel she could keep D, she feels she would be depriving her, as well as the other two, and that D will have a much better chance in life if she is adopted.
>
> Mrs C has dark brown hair, grey eyes, fresh complexion is 5'1" in height, slim. She is fond of music, reading, dancing and needlework. She had an elementary education, and has done domestic work, and more recently has worked in an engineering firm as a drill operator.
>
> JC, Mrs C's ex-husband, is 5'8", medium build, ruddy complexion, has fair hair and blue eyes. Elementary school education. Has served in the Royal Navy, was trained as a motor mechanic, but is now self-employed. He works with a syndicate in Reading who buy up houses, furnish the same meagrely and rent them at high rentals to coloured people for the most part. JC collects the rents.

Contact between JC and his children

12. A says that he has been in contact with JC for over forty years. He also has a portfolio of rented properties and started collecting rents for JC in about 1998. Subsequently he assisted JC by renovating and refurbishing properties that were in a dilapidated and semi-derelict state. He claims that he has spent more than £150,000 of his own money on repairing and maintaining JC's rented properties on the understanding that JC would make a will in his favour. However, JC never got round to doing so.

13. JC's eldest daughter, B, says that she had no contact with her father until December 2006, when she phoned to inform him that his sister had died. They did not meet in person until August 2007. Since November 2009 she has been trying to find accommodation for him closer to her, and he has stayed with her on a few occasions, including ten days in October 2010, when he was between care homes.

14. JC's second daughter, C, has taken no active part in these proceedings. In about 2007 her father contacted her because he had learned that she had cancer. JC stayed at C's home for a week following his discharge from hospital in August 2009. C did not attend the hearing on 4 January 2011 because, apparently, she had visited JC the day before and had been upset by some offensive remarks he had made about her appearance, sexuality and lifestyle.

15. D was adopted and renamed by her adoptive parents. She later changed her name by deed poll and assumed the surname of her daughters' father. In 1991 she took steps to locate her biological family and made contact with her mother and sisters, B and C. They told her that her biological father was violent and aggressive and had physically abused them when they were very young children and, as a result, neither of them had had any contact with him for decades. They told her they had no contact details for him. D has never met JC and according to B:

> "When I last saw D several years ago, I asked if she would like to make contact with my father but she was not at all interested. Indeed, she has not kept in touch with our mother either since she first contacted us in 1992. My father has always said to me that he doubted if D was his daughter because she was born three years after his relationship with my mother broke down and that he did not wish to contact D."

The original application for a statutory will

16. On 26 August 2010 JC's deputy, Jonathan Gater, applied for an order authorising the execution of a statutory will, in which it was proposed that JC would:
    (1) appoint the partners in Blandy & Blandy to be his executors and trustees;
    (2) give £50,000 to the Jehovah's Witnesses;
    (3) divide his residuary estate into three equal shares;
    (4) give one share to A;
    (5) give one share to B; and
    (6) give the remaining share to C.

17. The application was accompanied by an assessment of capacity completed on 18 August 2010 by Dr Julian Mason, a consultant psychiatrist for older adults, who said as follows:

> *Testamentary Capacity*
>
> JC does not understand the relevant information for testamentary capacity.
>
> *Does JC understand the nature of the act of making a will and its effects?*

His view of a will was "I'll pass this one, it's childish." He was unable to tell me whether there was or was not an up to date will. JC did not comprehend the act of making a will and did not understand the need to make an up to date will taking into consideration his worth and those who would have a claim upon him.

Is JC aware of the extent of the property being disposed of?

When asked about what properties he owned and money he may have in bank accounts or building societies he responded: "I'll take it with me. I haven't got one penny in my pocket. I don't know what my estate is worth." JC was unable to give any indication of the extent of his estate that would be included in a will. He did not understand the extent of his property being disposed of.

Does JC understand the nature and extent of the claims upon him both of those whom he is including in his will and those whom he is excluding?

When I asked JC about who could be included in his will he responded: "Nobody. I'm a single man. Bugger daughters that have not done me any good. Why should I bother? It would be a private matter. My assets, if any, are likely to be donated to one or more various charities." When I explored these issues with him he could not name his family members nor could he discuss which charities he would like his money donated to. He could not discuss in any relevant detail those who had a claim upon him.

18. In his witness statement in support of the application, Mr Gater said:

"I have made enquiries with a number of local firms of solicitors with whom JC has had previous dealings. None of these firms has records of ever making a will for JC and I have been unable to locate any evidence that he has ever made a will.

I understand that the Deputy Team at Reading Borough Council were informed by A that he thought that JC did have a will that left everything to the Jehovah's Witnesses. However, no further reference or evidence to substantiate this conversation has ever been found.

The Deputy Team did find books issued by The Jehovah's Witnesses in JC's property and they inform me that they believe him to be a Jehovah's Witness.

I have subsequently confirmed with staff at the care home that JC indicated to them on his admission to the care home that he was a follower of The Jehovah's Witnesses. Staff have confirmed that JC is visited by The Jehovah's Witnesses at least once a month."

The will dated 16 December 2008

19. It is not unusual for an application of this kind to have the effect of flushing out an earlier will, and this is what happened in this case. On 14 November 2010 B completed an acknowledgement of service (COP5) in which she objected to the deputy's application and said that "My father has a current will."

20. It transpired that on 16 December 2008 JC had executed a will in which he:
    (a) appointed B and her daughter Q to be his executors and trustees;
    (b) gave a third of his estate to B, but provided that, if she predeceased him, her share was to go to Q;
    (c) gave a third of his estate to C, but if she predeceased him, her share was to go to B and Q in equal shares.

(d) gave a third of his estate to Q, but if she failed to survive him, her share would go to B and C in equal shares.

21. B described the circumstances leading to the execution of this will in the following terms:

> "My father's will was prepared in December 2008 at a time when he was glad to be reunited with his family after decades of living alone and he was anxious to put his affairs in order due to his advancing years. He had talked about writing a will ever since I met him in 2007 but would not go to a solicitor and I ended up writing a will for him. He discussed the content over a period of several weeks. I prepared a draft with myself and my sister C as beneficiaries, but he asked for my daughter Q to be added as a third beneficiary and joint executor with me. I made the amendments and visited approximately a week later. He approved the contents and we visited the local library for him to sign, with the library manager and a member of staff acting as witnesses. The will expresses my father's wishes. It is entirely natural that a father should wish to benefit his family in his will. I disagree with the deputy's evidence that, when I was asked about the will, no earlier will was produced. I was not asked and if I had been I would have given him the will."

22. In a report dated 29 November 2010, Dr Julian Mason, the consultant psycho-geriatrician, gave the following description of a meeting he had had with JC three days earlier:

> "He recalled B made a will with him. He said that the beneficiaries would be his two daughters B and C and B's daughter. It would be an equal three way split with a small amount of money going to a neighbour. He says that he signed it like an idiot and added that he wanted to retract that will. JC made it clear that he did not believe that A was his son. He described this as a rumour put about by A's mother. JC is confident that he does not have any offspring apart from B and C. JC blamed his two daughters that there was no contact between him and them and did not want them to benefit from his wealth, either now or in the future. His explanation why his daughters should not benefit from his money was as follows: B had stolen from him and C was a lesbian. He is not sure if his ex wife (B and C's mother) is alive, but should she be, he does not want her to benefit from his money. My view remains that he does not have testamentary capacity for the reasons set out in my original report, but this additional information should be added for completeness."

23. The statutory will application also brought to the surface another document: an incomplete draft of a will that had been professionally drawn up in 1999, in which JC proposed to give his entire residuary estate to the Watchtower Bible and Tract Society of Pennsylvania. There is no evidence that JC ever executed this will.

Judith Bartram's attendance note

24. As is customary in applications of this kind, the court invited the Official Solicitor to act as JC's litigation friend, and on 8 December 2010 Judith Bartram, a solicitor member of the Official Solicitor's staff, visited JC in his residential care home. The purpose of her visit was in order to comply with the provisions of section 4(4) and (6) of the Mental Capacity Act 2005, by encouraging JC to participate in the decision-making process, and attempting to ascertain his present wishes and feelings. Her attendance note stated as follows:

> 1. Before meeting with JC, I met with DT (ward sister) who gave me some background information. DT confirmed that JC had moved to [the residential care home] around one month ago. She said he has settled fairly well, although there have been problems with aggression. She explained that other residents often wander into JC's room and he hates this. He has a very strong sense of privacy and his own space is important to him. He has hit other

residents on occasion. He believes he has the right to hit them as they are invading his home. JC has a one to one carer in the afternoons and this is helping with his aggression.

2. I asked about visitors and DT confirmed that his daughter B visits regularly and she telephones at least once a week. She said that his daughter C had also telephoned, she thinks only once. DT said that A is a regular visitor, although sometimes JC has refused to see him. A now telephones before visiting and JC sometimes agrees to see him and sometimes not. He visits around once a week.

3. DT said that she spends a lot of time with JC and he often verbalises feelings about his family. Although he is often negative about his daughters, he sometimes verbalises that he loves them and also that he loves them equally.

4. DT said that JC always says that A is not his son. He sometimes says that A is only after his money. He says that he was friends with A's mother and as a courtesy to her was friendly with A.

5. I then met with JC and we met in his room. His one-to-one carer sat in the meeting but did not participate. JC was hard of hearing. He seemed happy to speak to me.

6. I explained I was here to ask him some questions about his finances and also his family. He asked if I was from Blandy & Blandy and said he had never asked Blandy & Blandy to do anything. He did not consider they were his solicitors. I explained I was not from Blandy & Blandy, I was from the Official Solicitor's office. I said Blandy & Blandy were trying to clarify matters about his will and the court had appointed the Official Solicitor as someone independent, and I was here to find out JC's views.

7. I asked if he had made a will. JC replied that he had two daughters and the really rascally one, B, had asked him to sign a bit of paper and she had said it was for some other purpose. But it was a will naming her and her daughter who JC said he hated and he wouldn't leave a penny to them. He said there were a couple of other names on the will but he could not remember.

8. He said this was not his will and it should be destroyed. He said he does not know one person who he would leave a penny to. He said that he was all by himself and none of his family can be trusted. He said they are all tricky. He told me again that B had been through all his paperwork, prepared a will and presented it to him falsely for some other purposes and he signed it. He said any will in existence is rubbish and should be destroyed.

9. I asked if he was making a will now what would he want to put in it. He said that was the problem; there wasn't anyone who he would want to give one penny to. He said he would stay in control and not one person would get one penny. I asked about after his death, who would receive the money then? He said he was not going to die anytime soon so if people were sat around waiting for that, they were fools. He said he wished he could always control it but if he was dead what did he care. He said he just wanted to make sure none of his family got a penny. He said he might leave it to the Cats Home and laughed. I said people often left things to charity and was that what he would want to do? He said that charities were no good either; they were out for their own ends.

10. I asked if he could tell me more about his family. He said he had two daughters. He said they were both no good. He said C was a lesbian and he has no time for her. He said B was tricky. I asked if he had any other daughters and he said no. I asked if he had any sons and he said no. I asked if his daughters were adopted and he said no, they were his. I asked if he had ever given up a child for adoption and he said no. He did not react in any way to this question and just answered no.

11. I moved on to ask who visited him at the home. JC said no one.

12. I said I understood he had properties which he rented out. JC said he did and then went on to say there was a crook named A. He said it's complicated. After a silence, he then went on to say that A claimed he was his son but is not his son. He said he did not know who A's father is. He said he was friendly with his mother but that was as far as it went. He was not A's father.

13. I said I understood that A helped him with his properties. JC says he helps himself more than me. He said he has not been receiving the rent he should but he is stuck in the home and cannot do anything about it.

14. I asked if there had been an agreement that he would help with the properties and be paid. JC said that there was not an actual agreement. There was work wanted doing in his rent controlled houses and A was involved with the building trade and so A did some minor repair work once or twice. JC said the repair work was very little and very poor quality. He said nothing went on paper. I asked if there was a verbal agreement. JC said that there was a verbal agreement that he would get some of the rent but this was only to pay him back for the work he had done. I asked if it had been intended to be a long term agreement and if he wanted it to continue. JC said it was not intended to be a long term agreement and said it had been going on too long. He said he couldn't do anything about it as he was stuck in the home. I asked if A was to get anything more for what he had done with the properties. JC said A had had enough for what he has done, enough over and over again.

15. JC said he couldn't do anything about it and said he was stuck in here and there was nothing he could do. I said Blandy & Blandy were looking into matters. JC said Blandy & Blandy were not instructed by him. I said the court had appointed them to look after his finances whilst he was in the home and they were looking at everything including his will. I said the court would want to know JC's views about the agreement with A and about his previous wills and any changes that were necessary.

16. He said the will prepared by B was rubbish, but he had done nothing about it. He said he would need to get around to this. I asked what he would put in if he made a new will.

17. He said he didn't want to leave anything to anyone; they were all out for their own ends. I said if he didn't want to leave it to his family, who should have his money? After a silence he said when it comes to it he would probably leave it to the buggers, B and C. He said not A, he has tried to pass himself off as his son, he doesn't even like the man. He said he is only after his money and has more than enough already.

18. I asked about anyone else and he said no. I asked JC if he was a religious man. He said yes, he was a religious man; a Christian. He said he does not make a big thing of it but he believes in God and that God is his God. I asked if he would classify himself as a Christian or something more specific. He asked what I meant. I said I knew there were various branches of Christianity and I wondered if he was part of one of those and I said for example Catholic, Methodist, Evangelical. He said, no none of these. I gave the list again and added Jehovah's Witnesses. JC did not react at all to this and said he was a Christian. He said that he believed that this world was shortly coming to an end and that all non-Christians will die – there will be God's war. He said he believes and prays that he shall be one of those who survive in God's new Kingdom. He said it did not matter whether he had died before God's war; if he had died before he would be alive again when the new Kingdom arrived.

19. I thanked him for speaking to me.

The hearing on 4 January 2011

25. There was a hearing before me on 4 January 2011, which was attended by:
    (a) Michael O'Sullivan (counsel) and Jonathan Gater;
    (b) Barbara Rich (counsel for the Official Solicitor) and Judith Bartam of the Official Solicitor's office as litigation friend for JC;
    (c) Shaiba Ilyas (counsel), David Bradbury (solicitor), and their client A;
    (d) Christopher Jones (counsel) and Bonita Walters (solicitor), their client B and her daughter Q; and
    (e) D in person.

26. There was no need for me to impose a solution, because the parties presented me with the following consent order:

> WHEREAS an application has been made by Jonathan Brian Gater ('the applicant') deputy for property and affairs for JC for an order under the Mental Capacity Act 2005 to execute a statutory will
>
> UPON HEARING counsel for the applicant, counsel for the Official Solicitor acting as litigation friend for JC, counsel for A, counsel for B, Q in person and D in person
>
> AND UPON A undertaking to waive any separate claim or claims he might have to a beneficial interest in the properties forming part of the estate of JC in the event that it is established that he is the son of JC
>
> IT IS ORDERED that:
>
> 1. The applicant is authorised to execute a statutory will for and on behalf of JC in the terms set out in the draft initialled by Senior Judge Lush for the purposes of identification.
>
> 2. The statutory will when executed shall be held by Blandy and Blandy Solicitors subject to further direction of the court (during the lifetime of JC).
>
> 3. Q is joined as a respondent. Service of form COP1, COP1A, all witness statements filed prior to 4 January 2011 and all orders made prior to 4 January 2011 be dispensed with.
>
> 4. Dr Mason to report to the court and to the applicant as soon as reasonably practicable on whether in his opinion JC has capacity to give appropriate consent within the meaning of the Human Tissue Act 2004 to the taking of any sample for the purpose of DNA analysis.
>
> 5. In the event that JC is found to lack capacity to give appropriate consent as aforesaid then the court declares that it considers that it is in JC's best interests for a sample to be taken and subjected to DNA analysis in order to establish whether or not A is the son of JC.
>
> 6. All parties have permission to apply to the court for further directions.
>
> 7. Costs reserved.

27. On 6 January 2011 Jonathan Gater executed a statutory will:
    (a) appointing the members of Blandy & Blandy LLP as Mr Clark's executors and trustees; and
    (b) directing that his residuary estate be divided amongst the persons who would be entitled if he had died intestate.

28. Incidentally, as regards the DNA test, this was the order to which the President, Sir Nicholas Wall, referred in his judgment in *LG v DK* [2012], COPLR 80; [2011] EWHC 2453 (COP), handed down on 5 October 2011. At paragraph 35 he said:

> "During the course of his argument, Mr. Ruck Keene advised me that the Official Solicitor was aware of one case in January 2011 in which Senior Judge Lush (in the context of an application for an order to execute a statutory will) made an order that, in the event that the medical evidence to the effect that P lacked capacity to give appropriate consent within the meaning of the Human Tissue Act 2004 to the taking of any sample for the purpose of DNA analysis, it was in P's best interests for a sample to be taken and subjected to analysis in order to establish whether or not a particular individual was P's son. For the avoidance of doubt, the issues of law canvassed before me were not before Senior Judge Lush, albeit that the Official Solicitor submitted that the decision of Senior Judge Lush was one to which he was entirely entitled to come."

D's application and submissions

29. On 22 September 2011 D applied to the court for an order authorising the execution of a further statutory will on the basis that the will authorised by the order of the court on 4 January 2011 had made no provision for her. The proposed draft will that accompanied the application divided JC's residuary estate equally between A, B, C and D.

30. D stated in her application that:

> "The order dated 4 January 2011 is inappropriate as I was not legally represented during the hearing. Furthermore, my adoption at birth should not be a reason to exclude me from my biological father's will given the unusual and extenuating circumstances, namely that my birth was the result of the violent rape of my mother, the abandonment of me and my biological siblings and the fact that neither of JC's other daughters were in contact with him for a number of decades either. C is in agreement that I should benefit equally from our father's estate and encouraged me to make this application. The estate is large enough to make provision for all of JC's biological children. I believe that if he did have capacity to make this decision himself, JC would want all of his biological children to benefit from his estate."

A's application

31. On 19 December 2011 A's solicitors filed an acknowledgement of service on his behalf, in which he opposed D's application, but sought an amendment to the existing statutory will, namely that, if he were to predecease JC, the one third share of residue to which he is entitled will fall into and form part of his estate and will pass under the terms of his own will or intestacy. They requested that A's application be heard by the court at the same time as it heard D's application.

The hearing on 25 January 2012

32. There was a hearing before me on 25 January 2011, which was attended by:
    (a) Katherine McQuail (counsel) and her client D;
    (b) Michael O'Sullivan (counsel) and Jonathan Gater;
    (c) Barbara Rich (counsel for the Official Solicitor) and Janet Ilett of the Official Solicitor's office;

(d) David Bradbury (solicitor) and his client A; and
(e) Christopher Jones (counsel), his client B and her daughter Q.

D's submissions

33. In her skeleton argument dated 20 January 2012 filed on behalf of D, Katherine McQuail of counsel stated as follows:

> "Public policy decrees and adoption law provides that an adopted child ceases to be the child of its biological parents and becomes the child of its adoptive parents. The rules of succession now follow adoption law in determining who are "children" for the purposes of intestacy. Since the enactment of section 51 of the Adoption Act 1976, adopted children have been entitled to information to enable them to seek out their biological families. Not all adopted children choose to follow this course. For those who do the outcome of the process may or may not lead to reconciliation or ongoing future relationships. Where an adopted child has sought out his or her biological family, it will be a decision for the (competent) biological parent whether to make provision for that child by will.
>
> In 1991 D did choose to seek out her biological sisters, who were not then in contact with their father themselves. By the time JC made contact with C and then resumed contact with B, it was D's assessment of the situation that to make contact herself would be disruptive to a man of declining capacity. It is acknowledged that she has no present relationship with him and that, according to B, he does not acknowledge his paternity.
>
> D's account of her adoptive family life is not one of a happy, loving family and she has not benefited financially to any significant degree by inheritance from her adoptive parents. She has also suffered emotional distress as a result of learning of the circumstances of her conception.
>
> In considering all the relevant circumstances, including those JC would be likely to consider if he were able to do so, the court must have regard to the following:
> (i) JC is the biological father of four children.
> (ii) At an early stage in the life of each of those children JC abandoned responsibility for them.
> (iii) JC has had different but in each case unusually distant and non-fatherly relationships with each of the children throughout most of their lives.
> (iv) Default to the provisions applicable on intestacy gives undue and decisive weight to the legal accident that it was D's adoption, at the instigation of her mother, that legally severed the parental relationship between her and JC, notwithstanding that JC had already, in effect, himself severed the connection just as he did with his other children.
> (v) And (while noting Morgan J's comments on the difficulties of doing the "right thing" test), an objective bystander not himself benefited or disadvantaged by the sharing of the estate into four rather than three would consider that equal division was "the right thing".
>
> Accordingly, the court should reach the judgment that equal division of JC's estate between all four of his children is in JC's best interests. The applicant has no difficulty in principle with the alternative form of substitutionary clause suggested by A. However, if the court does not reach the conclusion that the applicant contends it should, consideration will need to be given to the form of the undertaking given by A and recorded in the order of 4 January 2011."

The deputy's submissions

34. In his skeleton argument on behalf of the deputy, dated 19 January 2012, Michael O'Sullivan of counsel stated as follows:

> "The existing will benefited the persons entitled on intestacy as a sensible default position. On an actual intestacy D would not benefit as a result of the operation of the law. To alter the status quo and the effect of Section 39 of the Adoption Act 1976 there needs to be a valid justification.
>
> The deputy's view is that D's application faces difficulties because there is a lack of evidence justifying a new will that benefits her. Her case is essentially that she has a moral claim to be treated on an equal footing with JC's other children. However, they are his children in the eyes of the law while she is not. A substituted judgment approach does not help her if one considers JC as a subjective testator. The doing the right thing test does not really help her either because the court is charged with making the decision. Her application should only be granted if the court accepts that it is entitled to rewrite the existing will because it is unfair to exclude her. It is questionable whether this is the correct approach. Query whether the court is entitled to exercise a form of objective substituted judgment and to make a will that a fair and reasonable testator would make?
>
> The deputy is not therefore persuaded that D can in practice discharge the burden of proof that she bears.
>
> A argues that any new will should include a provision that enables beneficiaries of his own choice to benefit in the event that he predeceases JC. The deputy is neutral as to this but simply makes the point that such a result would not occur under the intestacy provisions and that the court may need to be satisfied that there is a positive justification for departing from the intestacy provisions that are deliberately replicated under the existing will.
>
> A and B would oppose D getting costs from the estate. The deputy's position on this is neutral."

A's submissions

35. In his skeleton argument A's solicitor, David Bradbury, stated as follows:

> "I contend that the applicant cannot be considered part of the patient's family. The applicant was adopted shortly after her birth. From that moment she was a member of her adoptive family, and was no longer a member of the patient's family. From the moment of adoption, the patient owed no legal obligation towards the applicant, and she had no rights in law to claim from him (and, indeed, vice versa). Had the patient died intestate, the applicant would not have had any claim under intestacy, nor would she be able to launch a claim under the Inheritance (Provision for Family and Dependants) Act. I would submit that the applicant's upbringing, and current financial circumstances, as set out in her statement are not relevant. She has never known the patient, and has not been involved in caring for him or been interested in his welfare. There is no evidence that the patient has ever expressed any views about the applicant, and certainly no evidence about what his views about this application are, nor any evidence of what his views might be were he in a position to be made aware of the application and have sufficient mental capacity to consider its merit. I submit that it cannot be in the best interests of the patient to make provision for the applicant. A and B, by opposing this application, give a clear indication that they would not remember their father more fondly were provision to be made for the applicant is his statutory will. Notwithstanding what the applicant says in her statement about the views of C, C has not felt sufficiently strongly to acknowledge service of the application nor file any evidence in relation to it.
>
> I now turn to A's application that the statutory will be amended so that, in the event of A predeceasing the patient, the share in the patient's estate which A respondent would have

received had he survived, shall form part of A's estate, rather than passing to his surviving half-sisters.

As mentioned previously, over the years A has expended substantial funds from his own money, as well as time and effort, in preserving and improving the patient's property portfolio, and in maximising the income from it. Had the A not done so, then his money, time and effort would have been devoted to building up his own property portfolio. A acted as he did on the strength of promises made to him by the patient that A would be the sole beneficiary of the patient's will on his death. In giving the undertaking he made to the court at the time of the court order made on 4th January 2011 (exhibit (b) in bundle B) A acknowledged the status of his half-sisters and their entitlement to a share in the patient's estate.

A is childless. Those closest to him are his half-brother, K, and his partner. Both are known to the patient from the days when he used to visit A. K also did work with the patient's properties, and A is aware that the patient views K with some affection. K even spent a day in the police cells when endeavouring to protect the patient's wish for privacy. Even now, when A visits the patient, the patient often enquires as to K's health and wellbeing.

In the circumstances, I submit that it would be in the best interests of the patient to make the suggested amendment to the statutory will."

B's submissions

36. In his skeleton argument on behalf of A, Christopher Jones of counsel stated as follows:

"D has adduced no evidence to show that JC had any wish to make provision for her on his death, any beliefs or values which would suggest that he would wish to make provision for her. Her case appears to be brought ion the basis that she is a blood relative of JC and has limited means, and as such JC would provide for her.

Sadly in this case it would appear that JC has been unable to express any recent testamentary wishes. Moreover, there is no evidence of JC's "historic" wishes, save that there was no contact between him and D whatsoever. D was adopted at birth and thereafter had no contact with her blood relatives. She has made no effort to contact or visit JC.

A has also made an application that the statutory will approved on 4 January 2011 be amended so that if he predeceases JC, "his share" should pass to his estate in any event and be distributed along the lines set out in his will. This is resisted. B contends that A was present and legally represented at the January 2011 hearing, and consented to the will in the form drawn. There is no evidence before the court to say that it serves JC's best interests that his will be amended so that in the event that his son predeceases him his "share" of his estate should pass to whomsoever his son appoints in his own will.

In the premises the court is invited to dismiss the applications of both D and A, as both are groundless and without any apparent link to what may or may not be in Mr Clark's best interests."

The Official Solicitor's submissions

37. In a position statement dated 19 January 2012, Barbara Rich, counsel for the Official Solicitor, stated as follows:

"The Official Solicitor's position at the hearing on 4 January 2011 was that he considered that this was a difficult case in which to formulate a clear view of what testamentary provision would be in JC's best interests. All of the evidence of his past wishes was either questionable or incomplete, and the evidence of his present wishes was unreliable and incomplete – note in particular Dr Mason's observation that JC "could not name his family members nor could he discuss which charities he would like his money donated to. He could not discuss in any relevant detail those who had a claim on him." There is no other material from which to consider what his present wishes might be if he were capable of formulating them. Indeed the most relevant and persuasive material is of his reluctance during the period between 2007 and 2009 to seek professional legal advice in relation to his will, as described in B's statement, from which can be inferred a degree of indifference to succession or even a positive intention to die intestate. For what it is worth, this is consistent with the views expressed to the Official Solicitor's representative that "there wasn't anyone who he would want to give one penny to," but that "when it comes to it he would probably leave it to B and C."

Although arguably entirely inconsistent with JC's presumed present wishes (there is evidence to suggest reluctance to pay professional fees) it was clearly in his best interests that a statutory will should be made so that professional executors with some continuity of professional conduct from the present deputyship should be appointed to deal with his estate. There were foreseeable tasks of asset realisation which should be professionally supervised, in addition to the possibility that the estate might have to defend hostile litigation from A. It is apparent from B's first witness statement and will be apparent from the court's own file, that a professional deputy was appointed in preference to her for precisely these reasons.

Beyond this, however, the Official Solicitor considered that the only appropriate statutory will was one which replicated the provisions of intestacy i.e. it prima facie divided the estate between B and C, but included A if he could establish his paternity, with stirpital substitution provisions as on intestacy. The Official Solicitor recognised that a statutory will in this form would exclude the step-child of JC's marriage, about whom there was little or no evidence in January 2011, and who is not a party to or who has been notified of either the deputy's or D's applications; and that it would also exclude D, following her adoption and the severance of the parental relationship with her.

The Official Solicitor has carefully reconsidered his position in the light of D's application and the evidence filed in support of it and responses to it. The evidence includes some further evidence about JC's step-son, MM, who was ill-treated by him and was placed in the care of Barnardo's when he was about ten years old. D's evidence shows (1) that her conception was the consequence of a sexual assault after her parents' separation and divorce and that (2) she was accordingly born after her parents' marriage had been ended by decree absolute on 22 August 1957 and that (3) her mother's application to the Homeless Children's Aid and Adoption Society for her to be adopted was made two days after D's birth on 12 July 1958. Her birth certificate did not show her father's name. The evidence does not show the actual date of D's adoption, but it appears to have been very soon after her birth. The "Full Particulars of Case" which formed part of the adoption application form stated that:

> "Mrs C is an excellent mother and looks after the two little girls [B and C] very well indeed; she works hard to maintain them, and keeps the room she has spotless, although the rest of the house occupied by an old lady is in very poor shape, Mrs C says there are mice and fleas, and that she could not bring D back there. She does not feel she could keep D, she feels she would be depriving her, as well as the other two, and that D will have a much better chance in life if she is adopted."

This evidence shows that Mrs C's stated reason for giving D up for adoption was her hope that she could have a "much better chance in life", and is consistent with the legal effect of adoption as effecting a total transfer of parental rights and responsibilities, including succession rights (see section 67 of the Adoption and Children Act 2002).

D has never had any contact or relationship with her father and the evidence if his capacity strongly suggests that it would be impossible for him to initiate meaningful contact now. In her second witness statement, B refers to an occasion on which she invited D to make contact with her father, but "she was not at all interested". She also refers to her father questioning his paternity of D. Although D's evidence from the adoption application shows that he appears to have been incorrect in doing so, there is no evidence from which any safe inference can be drawn as to whether he genuinely believed he was not D's father or whether he was being untruthful with B.

Although D's circumstances as set out in her two witness statements are bound to evoke sympathy for her, there is an insufficient legal basis for such sympathy to lead to her inclusion as a beneficiary of a statutory will made in JC's best interests. The inference that he would wish to make amends for the past and build a relationship with all his children is simply unsupported by the evidence in its entirety. JC had no legal obligation to provide for D following her adoption, so such obligation cannot form the basis of any argument that it would be the "right thing" for a statutory will to do.

As regards A's application for modification of the substitutionary provisions of the statutory will, the Official Solicitor recognises that it can be particularly difficult to ascertain best interests when considering the provisions of a will other than its primary dispositive provisions, and in this case the evidence is in any event exiguous as discussed above. The Official Solicitor is of course entirely disinterested in the position as between the prospective substitutionary beneficiaries. The Official Solicitor notes that A's position differs from that of any of JC's children in that it appears that he has made some contribution towards the value of his father's estate. The court may consider that this justifies a departure from the substitutionary provisions which would take effect on intestacy and which are included in the existing statutory will.

The Official Solicitor notes that both A and B seek costs orders in relation to D's application which depart from the general rule under Court of Protection Rules 2007 r 156. The Official Solicitor does not support these costs applications and considers that r 156 should apply. D was judicially invited to reconsider her position with the benefit of legal advice and representation, and it was reasonable for her to bring her application and put her evidence and legal arguments before the court."

The law relating to statutory wills

38. Section 18(1)(i) of the Mental Capacity Act 2005 ("the Act") confers on the Court of Protection the jurisdiction to order the execution of a will on behalf of a person who lacks capacity to make a will personally.

39. Section 1(5) of the Act states as a general principle that any act done or decision made for or on behalf of a person who lacks capacity must be done or made in his best interests.

40. The Act does not expressly define best interests, but section 4 provides the following checklist of factors that anyone making a decision must consider when deciding what is in an incapacitated person's best interests.

> (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of -
>
> (a) the person's age or appearance or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider -

(a) whether it is likely that the person will at some time have the capacity in relation to the mater in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable -

(a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),

(b) the beliefs and values that would be likely to influence his decision if he had capacity, and

(c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of -

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed by the court.

(11) "Relevant circumstances" are those:

(a) of which the person making the determination is aware, and

(b) which it would be reasonable to regard as relevant.

41. In *Re P* [2009] WTLR 651, Mr Justice Lewison held that the law regarding the making of statutory wills before the Mental Capacity Act 2005 came into force, including the landmark decision of Sir Robert Megarry V-C in *Re D(J)* [1982] 2 All ER 37, was no longer good law because it applied a substituted judgment test, rather than a best interests test.

42. At paragraph 44 of his judgment in *Re P*, Mr Justice Lewison said as follows:

> "There is one other aspect of the "best interests" test that I must consider. In deciding what provision should be made in a will to be executed on P's behalf and which, *ex hypothesi*, will only have effect after he is dead, what are P's best interests? [Counsel] stressed the principle of adult autonomy; and said that P's best interests would be served simply by giving effect to his wishes. That is, I think, part of the overall picture, and an important one at that. But what will live on after P's death is his memory; and for many people it is in their best interests that they be remembered with affection by their family and as having done "the right thing" by their will. In my judgment the decision maker is entitled to take into account, in assessing what is in P's best interests, how he will be remembered after his death."

43. In *Re M, ITW v Z and others* [2009] WTLR 1791, Mr Justice Munby considered a statutory will application in a case in which an elderly woman had been the victim of financial abuse by a neighbour. At paragraph 29, he said:

"It seems to me that, not least for all the reasons given by Lewison J, such well-known authorities as *In re L (WJG)* [1966] Ch 135; *In re D(J)* [1982] Ch 237; *In re C (A Patient)* [1991] 3 All ER 866 and *G v Official Solicitor* [2006] WTLR 1201, are best consigned to history. The starting point now must be what Lewison J aptly described, at para 38 as the "structured decision-making processes" prescribed by the 2005 Act, a process which requires the decision-maker – here the Court of Protection – to take a number of steps before reaching a decision, including, as Lewison J described it, encouraging P to participate in the decision, "considering" P's past and present wishes, and her beliefs and values, and "taking into account" the views of third parties as to what would be in P's best interests. And there is, in my judgment, no place in that process for any reference to – any harking back to – judicial decisions under the earlier and very different statutory scheme."

44. At paragraph 32, Mr Justice Munby commented on the checklist of factors in section 4 of the Mental Capacity Act 2005 in the following terms:

"Deriving from that experience it may be useful to make three points, very familiar in the context of those other jurisdictions, which, allowing for the somewhat different context with which I am here concerned, seem to me to be of equal application to the statutory scheme under sections 1 and 4 of the 2005 Act:

i) The first is that the statute lays down no hierarchy as between the various factors which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's "best interests".

ii) The second is that the weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case. A feature or factor which in one case may carry great, possibly even preponderant, weight may in another, superficially similar, case carry much less, or even very little, weight.

iii) The third, following on from the others, is that there may, in the particular case, be one or more features or factors which, as Thorpe LJ has frequently put it, are of "magnetic importance" in influencing or even determining the outcome: see, for example, *Crossley v Crossley* [2007] EWCA Civ 1491, [2008] 1 FLR 1467, at para [15] (contrasting "the peripheral factors in the case" with the "factor of magnetic importance") and *White v White* [1999] Fam 304 (affirmed, [2001] 1 AC 596) where at page 314 he said "Although there is no ranking of the criteria to be found in the statute, there is as it were a magnetism that draws the individual case to attach to one, two, or several factors as having decisive influence on its determination." Now that was said in the context of section 25 of the Matrimonial Causes Act 1973 but the principle, as it seems to me, is of more general application."

45. At paragraph 35 of his judgment in *Re M, ITW v Z and others*, Mr Justice Munby made the following observations:

"i) First, P's wishes and feelings will always be a significant factor to which the court must pay close regard: see *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at paras [121]-[124].

ii) Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular *a priori* weight or importance to P's wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P's wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic. Just as the

test of incapacity under the 2005 Act is, as under the common law, 'issue specific', so in a similar way the weight to be attached to P's wishes and feelings will likewise be issue specific.

iii) Thirdly, in considering the weight and importance to be attached to P's wishes and feelings the court must of course, and as required by section 4(2) of the 2005 Act, have regard to *all* the relevant circumstances. In this context the relevant circumstances will include, though I emphasise that they are by no means limited to, such matters as:

(a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings: *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];

(b) the strength and consistency of the views being expressed by P;

(c) the possible impact on P of knowledge that her wishes and feelings are not being given effect to: see again *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];

(d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and

(e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests."

46. At paragraph 37 of his judgment in *Re M*, Mr Justice Munby set out the passage from Mr Justice Lewison's judgment in *Re P* regarding doing 'the right thing' and went on to approve it in the following terms:

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

47. In *Re G (TJ)* [2010] EWHC 3005 (COP), Mr Justice Morgan considered an application for a gift of £3,300 a month to Mrs G's daughter C, rather than an application for a statutory will. However, at paragraphs 64 and 65 of his judgment he said:

"[64]. I have also considered whether I should take into account the possibility that Mrs G might be regarded by C, and by others, during the remainder of Mrs G's life and after her death, as having done "the right thing". I attach no weight to that consideration in this case, principally because Mrs G is not in any way participating in this decision and it seems to me very hard to say that Mrs G is "doing" anything. Further, while C herself will think that the court has done "the right thing", I am less sure as to what N will think about that matter.

[65]. Having identified the factors as best I can, it emerges that the principal justification, so far as Mrs G is concerned, for making the order for maintenance payments in favour of C, is that those payments would be what Mrs G would have wanted if she had capacity to make the decision for herself. I recognise that this consideration is essentially a "substituted judgment" for Mrs G. I am also very aware that the test laid down by the 2005 Act is the test of best interests and not of substituted judgment. However, for the reasons which I have tried to set out earlier, the test of best

interests does not exclude respect for what would have been the wishes of Mrs G. A substituted judgment can be subsumed into the consideration of best interests. Accordingly, in this case, respect for what would have been Mrs G's wishes will define what is in her best interests, in the absence of any countervailing factors. There are no such countervailing factors here. I therefore conclude that an order which provides for the continuation of maintenance payments to C is in the best interests of Mrs G."

Decision

48. It was easier for a judge to approve a statutory will on behalf of a patient before the Mental Capacity Act 2005 came into force. The judge simply stood in the shoes of the testator, so to speak, and made the will that the judge thought the testator would have made at that particular time if he or she had testamentary capacity. As we have seen from the decisions in *Re P* and *Re M*, this approach is no longer good law. The criterion now for making wills on behalf of adults who lack testamentary capacity is what is in their best interests rather than substituted judgment.

49. However, we should take care not to throw the baby out with the bathwater. The Mental Capacity Act 2005 was based principally on the Law Commission's report, *Mental Incapacity*, published in 1995 and, although it has been said that there is no hierarchy of factors in section 4 of the Act, it should be recalled that, at paragraph 3.25 of that report, the Law Commission said it favoured the use of a "best interests criterion which would contain a strong element of substituted judgment" (my emphasis).

50. The Law Commission rejected substituted judgment as the basic criterion for decision-making of behalf of incapacitated adults because:
    (a) "one of the failings of a pure substituted judgment model is the unhelpful idea that a person who cannot make a decision should be treated as if his or her capacity were perfect and unimpaired, and as if present emotions need not also be considered" (*Mental Incapacity*, at paragraph 3.29); and
    (b) where a person never had capacity in the first place, substituted judgment is inappropriate and there is no viable alternative to best interests (*Mental Incapacity*, at paragraph 3.29). Indeed, this failing was identified in a statutory will case: *Re C (A Patient)* [1991] 3 All ER 866, 870.

51. When adjudicating on a statutory will application nowadays, the judge is required to have regard to:
    (a) the checklist of factors for best interests' decision-making, set out in section 4 of the Act, into which substituted judgment has been subsumed;
    (b) the possible application of the "balance sheet approach" and the identification of "factors of magnetic importance", to which Mr Justice Lewison referred in paragraph 23 of his judgment in *Re P*; and
    (c) the jurisprudence on applications of this kind that has developed since the Act came into force, including recognition that "for many people it is in their best interests that they be remembered with affection by their family as having done 'the right thing' by their will."

52. The only observation I shall make on the checklist of factors is that, despite section 4 containing eleven subsections, remarkably few factors are relevant in applications of this kind. Subsection (2), which requires the person who is making the best interests decision to consider "all the relevant circumstances" and take the steps listed in the subsections below, obviously applies. So does subsection (4), which requires the decision-maker to permit and encourage P to participate as fully as possible in the decision-making process. So does subsection (6), which requires a

consideration of P's past and present wishes and feelings, beliefs and values and any other factors that he would be likely to consider if he had capacity. And so does subsection (7), which requires the decision-maker to take into account the views of others, if it is appropriate to consult them, "as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6)." It would seem that the Law Commission has achieved its objective, because the best interests criterion certainly does contain a strong element of substituted judgment.

53. I have doubts about the effectiveness of the balance sheet approach in statutory will applications. I applied that approach recently in *Re JDS* [2012] EWHC 302 (COP), which involved an application for a gift to save inheritance tax on the eventual death of a twenty year old man who had been awarded damages for clinical negligence. The balance sheet approach worked satisfactorily in that case, essentially because the exercise was a risk analysis. However, in the context of making a will on behalf of JC, apart from threats from A that he would no longer consider himself bound by the undertaking he gave in the consent order of 4 January 2011, if he received less than his existing one third share of JC's estate, I have struggled to identify any "factors of actual benefit" or "counterbalancing dis-benefits" or "risks of possibility of loss" or "possibilities of gain." These were all expressions used by Lord Justice Thorpe when he originally advocated the use of the balance sheet approach in *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FLR 549. Notwithstanding my comments about the efficacy of the balance sheet approach, there will usually be at least one factor of magnetic importance – as there is in this case - that will assist the judge in reaching a decision.

54. Similarly, I am not sure that the idea of being remembered with affection for having done the right thing is of any assistance in this case. JC has an appalling track record. He has spent his entire lifetime doing precisely "the wrong thing" in his relationships with others, and his malevolence is such that he would probably relish the prospect of thwarting his children's designs on his estate and would rejoice at being remembered by them with disaffection. In any event, it would be unrealistic to expect him now to undergo some sort of Damascus Road experience simply because he lacks capacity. The notion of doing "the right thing" generates some singularly unattractive arguments, and it comes as no surprise that A and B have stated categorically that they would not remember their father more fondly if any provision were made for D in the statutory will.

55. In my judgment, if JC had testamentary capacity, he would choose to do nothing at all. The overwhelming weight of evidence is in favour of his dying intestate, which is what the existing statutory will sought to achieve.

56. In terms of his past wishes and feelings, and in particular any relevant written statement made by him when he had capacity, we heard from A that he had renovated JC's properties in the expectation that JC would make a will in his favour, but that JC never got round to making such a will. In 1999 a draft will was prepared, presumably on JC's instructions, in which he was going to leave his entire estate to the Jehovah's Witnesses, but, as far as we are aware, he had second thoughts and never actually signed it. He seems to have remained resolutely intestate until 16 December 2008, when he executed a will in circumstances that ring alarm bells in terms of undue influence and JC's capacity and vulnerability.

57. As for his present wishes and feelings, so far as they are ascertainable, when asked by Dr Mason what his view were on making a will, JC replied "I'll pass on this one" and, as far as his money is concerned, he said, "I'll take it with me." He expressed a wish to revoke the will that B had tricked him into signing on 16 December 2008. He told Judith Bartram that it "was not his will and it should be destroyed." On several occasions he has stated that "he does not know one

person who he would leave money to" and that "any will in existence is rubbish and should be destroyed." The views of others are not particularly helpful in this case. The views of JC's children are largely motivated by self-interest, though the comments made by DT, the ward sister, to whom Judith Bartram spoke when she visited JC, are helpful, even if they only reinforce JC's ambivalent attitude towards his children.

58. This case presents a combination of substituted judgment and best interests. Applying the substituted judgment approach, as I have said, I believe that JC would choose to die intestate. However, having regard to the nature and extent of his estate and the family dynamics, it is in his best interests to make a will, in order to appoint independent professional executors who are familiar with the background and can provide continuity in the administration of his estate before and after his death.

59. On 14 December 2011 the Law Commission published another report, *Intestacy and Family Provision Claims on Death* (Report Law Com No 331). At paragraph 4.33 on page 75 of the executive summary of that report, the Law Commission summarised the existing law and said:

> "Adoption breaks the legal relationship between a child and his or her biological parents; the child's only legal parents are the adopters. A biological parent's subsequent death intestate has no relevance to the adopted child, who cannot inherit from him or her. We do not contemplate any change to that position."

60. As I have already stated, I believe that JC would choose to die intestate. Accordingly, by operation of law there will be no provision for D. The Law Commission's decision to retain the status quo is significant because Katherine McQuail's submissions on behalf of D seemed to infer that over the last thirty five years there had been gradual change in attitudes towards adoption and that nowadays, depending on the circumstances, children who have been adopted may have a reasonable expectation of inheriting from their biological parents.

61. JC's relationships with A, B and C have been variable in terms of duration and quality, though generally speaking they have been of short duration and poor in terms of quality. However, at least there has been some kind of personal interaction between JC and them. Between JC and D there has been nothing at all and, in my judgment, this is the factor of magnetic importance.

62. Although she was adopted and is therefore unable to inherit on JC's intestacy, if the evidence had been that D had made contact with JC and formed a relationship with him that was even remotely similar in quality to his relationships with A, B, and C, it is likely that I would have authorised the execution of a will on JC's behalf making some kind of provision for her. As it is, however, JC and D have never met. JC denies that he is her father, and D made a conscious decision twenty years ago that she had no wish to meet him.

63. I am going to allow A's application that he should be allowed to decide the devolution of his share of the estate if he predeceases JC, and I shall extend that privilege to the other two residuary beneficiaries.

64. Whereas the intestacy provisions relating to the devolution of the shares of issue who predecease the intestate may be appropriate in the context of traditional families, JC's biological children are not really a family at all or, at best, they can be described as a non-traditional family.

65. I am sure that all three intestate beneficiaries – A, B, and C – have definite views as to who should inherit their share of the estate if they were to predecease JC and, from what I have seen

and heard of them, I would be most surprised if they wished their share to pass to a surviving sibling or half-sibling.

66. And herein lies a glimmer of hope for D. There is a sisterly bond of affection between her and C and, whereas A and B opposed D's application to the court, C actively encouraged it. Maybe C will do 'the right thing' with regard to the ultimate destination of her share of her JC's estate; though that, of course, is entirely a matter for her.

67. Accordingly, I allow A's application and dismiss D's application.

Costs

68. The general rule is rule 156 of the Court of Protection Rules 2007, which states that:

> "Where the proceedings concern P's property and affairs the general rule is that the costs of the proceedings, or of that part of the proceedings that concerns P's property and affairs, shall be paid by P or charged to his estate."

69. The court can depart from the general rule in accordance with rule 159, which says:

> (1) The court may depart from rules 156 to 158 if the circumstances so justify, and in deciding whether departure is justified the court will have regard to all the circumstances, including:
>
> (a) the conduct of the parties;
>
> (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
>
> (c) the role of any public body involved in the proceedings.
>
> (2) The conduct of the parties includes:
>
> (a) conduct before, as well as during, the proceedings;
>
> (b) whether it was reasonable for a party to raise, pursue or contest a particular issue;
>
> (c) the manner in which a party has made or responded to an application or a particular issue; and
>
> (d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.

70. The will I approved on 4 January 2011 was always a temporary measure, and had the DNA test established that A was not in fact JC's son, it would have been necessary to reconsider the terms of that will. D attended the hearing on 4 January 2011, though she was not a party to the proceedings at that time. I invited her to obtain legal advice so she could consider her position. She did so, and her half-sister C urged her to make the application. Having regard to all the circumstances, therefore, including the conduct of all the other parties and the magnitude of JC's estate, I believe it would be unjust to depart from the general rule in this case.

DENZIL LUSH
Senior Judge
26 March 2012