

Neutral Citation Number: [2013] EWHC 2409 (COP)

MENTAL CAPACITY ACT 2005

**In the matter of
JOAN TREADWELL, Deceased**

BETWEEN:

THE PUBLIC GUARDIAN

Applicant

- and -

- (1) COLIN LUTZ**
- (2) STUART McNEIL**
- (3) DEREK BROWN**
- (4) JOANNA WILDGOOSE**

Respondents

Joanna Wildgoose, Marion Bowgen and Jill Martin (OPG) for the Public Guardian;

The 1st Respondent attended in person;

The 2nd and 3rd respondents did not attend and were not represented;

Kerry Bretherton of the Bar Pro Bono Unit for the 4th respondent.

Introduction

1. This judgment concerns an application by the Public Guardian to enforce a security bond in respect of unauthorised gifts made by the late Mrs Joan Treadwell's deputy for property and affairs, Colin Lutz.
2. It is the second case involving excessive gifting by deputies to have come before me during the last few months. The first was *Re GM* [2013] COPLR 290, following which there were some misleading comments in the press and on the internet.
3. Several commentators suggested that the system whereby the court appoints deputies is flawed and that the problems encountered in *Re GM* would never have arisen if GM had made a Lasting Power of Attorney ('LPA') appointing someone she trusted to be her attorney.
4. Regrettably, attorneys acting under an LPA do not always behave impeccably and they, too, sometimes contravene their authority. A recent example was *Re Buckley; The Public Guardian v C* [2013] COPLR 39, where the attorney used £87,682 of the donor's funds to set up a reptile breeding business and then helped herself to a further £43,317.
5. The reason why GM's and Mrs Treadwell's cases have been brought to the court is because the Public Guardian has a statutory duty to supervise deputies under section 58(1)(c) of the Mental Capacity Act 2005. In the course of supervising these deputies, he became aware that they had exceeded their authority to make gifts, and he advised them to apply to the court for retrospective approval.
6. The Public Guardian has no equivalent obligation to supervise attorneys acting under an LPA. Consequently, there is greater scope for any misconduct on their part to go unnoticed.
7. The Court of Protection requires most deputies to obtain and maintain security. In GM's case it was set at £275,000, which adequately covers the unauthorised gifts made by the deputies totalling £204,459.74. In Mrs Treadwell's case, where the Public Guardian is seeking to call in the sum of £44,300, the security required by the court was £200,000.
8. When deputies default, the security bond can be called in. This remedy is not currently available when attorneys acting under an LPA cause loss to the donor's estate through their wrongful acts or omissions.

The family background

9. Joan Treadwell was born on 26 January 1926 and died on 17 October 2012.
10. She married three times.
11. Her first husband was Theodore ('Ted') Lutz, whom she married in 1946. They had five children:
 - (1) the first respondent, Colin Lutz, who was born in 1947;
 - (2) Allen Lutz;
 - (3) Kathryn Wright;

- (4) Janice Moore; and
- (5) Tracy Joanne Forristal.

12. Two of her children have issue themselves:

- (1) Colin Lutz and his wife, Linda, have two children, Duncan and Emily. Duncan Lutz is married to Rachel and they have a daughter and son, Ava and Harry. Emily is married to Francesco Grosso, and currently has no children.
- (2) Janice Moore is separated from her husband, by whom she has two sons, Jarad and Ryan. She is in a long-term relationship with Dave Elliott.

13. Mrs Treadwell's first husband died in 1975, and she had a brief, unhappy, second marriage from 1976 to 1979.

14. On 24 September 1984 she married her third husband, William ('Bill') Treadwell, who had been a Major in the Royal Army Educational Corps. He died on 4 January 2007.

15. Bill Treadwell had two daughters from his first marriage, the elder of whom is the fourth respondent, Joanna Wildgoose, who was born in 1961, and the younger daughter is Emma Treadwell.

Earlier proceedings in the Court of Protection

16. In 2005 Mrs Treadwell was diagnosed as having Alzheimer's disease and on 2 November that year she was admitted to Cleeve Court Nursing Home, Cleeve, Bristol BS19 4PE, where eventually she died seven years later.

17. On 16 November 2005 she signed an Enduring Power of Attorney ('EPA'), in which she appointed her husband to be her sole attorney with general authority to act on her behalf in relation to all her property and affairs.

18. In February 2006 Mr Treadwell applied to the Court of Protection to register the EPA.

19. Colin Lutz objected to its registration on the grounds that (1) it was not valid as an EPA, and (2) having regard to all the circumstances, the attorney was unsuitable to be the donor's attorney.

20. The court dismissed his objections and the EPA was registered on 23 May 2006.

21. On 22 October 2006 Colin Lutz made a fresh application to the court to revoke the EPA, and made various allegations of financial impropriety against his stepfather, Bill Treadwell.

22. The application was listed for hearing on 19 January 2007, but on 6 December 2006, Bill Treadwell, who by then was a very sick man, disclaimed his appointment as attorney. He died a few weeks later.

23. On 10 April 2007 Colin Lutz was appointed as Mrs Treadwell's receiver under the Mental Health Act 1983.

24. On 24 January 2008, a few months after the Mental Capacity Act 2005 came into force, Mr Lutz was appointed as her deputy for property and affairs.

25. Paragraph 2(c) of the order appointing him as deputy conferred on him the following authority to make gifts, which is basically the same authority as the Mental Capacity Act 2005 confers on attorneys acting under an EPA or LPA:

“The deputy may (without obtaining any further authority from the court) dispose of money or property of Joan Treadwell by way of gift to any charity to which she made or might have been expected to make gifts and on customary occasions to persons who are related to or connected with her, provided that the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of her estate.”

26. Paragraph 5 of the order required Colin Lutz to obtain and maintain security in the sum of £200,000.

Testamentary history

27. The factor of magnetic importance in this case is Joan Treadwell’s will.

28. On 28 June 1990 she made a will in which she left her entire estate to her husband and appointed him to be her sole executor.

29. In the event that her husband predeceased her, she:

- (1) appointed Colin Lutz and her two stepdaughters to be her executors;
- (2) gave £1,000 to each of her five children; and
- (3) gave her residuary estate to her stepdaughters, Joanna Wildgoose and Emma Treadwell, in equal shares.

30. At that time she had a modest amount of savings, but by far the most valuable asset she possessed was her half share of the matrimonial home at 35 Whitehouse Road, Claverham, Bristol BS49 4LJ.

31. Bill Treadwell had originally bought the house in June 1978 with his first wife, Rita, who died of cancer six months after they moved in.

32. On 24 September 1984 Bill married Joan, who had been his housekeeper following Rita’s death, and on 3 February 1988 he transferred the property into their joint names as beneficial joint tenants.

33. Eighteen years later, on 3 February 2006, the joint tenancy was severed. The house was sold in January 2008 for £305,000 and the net proceeds of sale came to £276,000.

34. On 28 June 2007 Colin Lutz applied to the court for an order authorising him to execute a statutory will on his mother’s behalf. At that time her income was roughly £10,000 a year and she had capital of about £150,000.

35. Colin Lutz’s application was for authority to execute a will in which Mrs Treadwell would disinherit her stepdaughters and leave her estate to her own children in equal shares.

36. His principal arguments were that:

- (1) when she made her will in 1990 she was ‘entirely under the thumb’ of her husband;
- (2) although in 1990 Mr and Mrs Treadwell had made mirror image wills, on 3 February 2006, after severing the joint tenancy in the matrimonial home, Bill Treadwell had made

a new will in which, instead of leaving Joan an absolute interest, he gave her only a life interest in his estate, which on her death would pass to his two daughters in equal shares;

- (3) Bill Treadwell had broken his part of the bargain at a time when Joan no longer had the capacity to reciprocate by making a will in similar terms;
- (4) there was mutual dislike and distrust between Mrs Treadwell and her stepdaughters; and
- (5) both of her stepdaughters were financially secure.

37. On receiving the application, the court joined Mrs Treadwell as a respondent, and invited the Official Solicitor to act as her litigation friend. Her stepdaughters were also joined as respondents.
38. As often happens in statutory will proceedings, a compromise was reached among the parties, who invited the court to make an order authorising the execution of a will, in which Mrs Treadwell:
 - (1) revoked her former wills;
 - (2) appointed the second and third respondents, Stuart Andrew McNeil, Solicitor, Swindon, and Derek Francis Brown, Solicitor, Wootton Bassett, to be her executors and trustees;
 - (3) gave her personal chattels to her children in equal shares;
 - (4) gave pecuniary legacies of £5,000 to each of her five children and her two stepdaughters; and
 - (5) gave her residuary estate to her stepdaughters in equal shares.
39. The court duly approved the consent order and the statutory will was executed on 21 June 2008.
40. When the will was made, Mrs Treadwell was funding her own care and accommodation at Cleeve Court and, according to Colin Lutz, her assets were diminishing so rapidly that it was anticipated that in two or three years' time there would be no residuary estate at all.
41. Subsequently, she became eligible for NHS Continuing Health Care and her care was funded by Avon & Somerset Primary Care Trust until her death. On 29 June 2009 the NHS repaid £47,435 in respect of overpayments she had made towards her care.
42. Mrs Treadwell died on 17 October 2012 and probate of the statutory will was granted to the second and third respondents at the District Probate Registry at Winchester on 11 January 2013. Her estate for probate purposes was £50,524 gross, and £49,857 net. The estate has not been administered yet because the executors have been awaiting the outcome of these proceedings.

Gifts made by the deputy

43. The court generally requires deputies to account to the OPG, and the accounting year begins on the date of the order appointing them as receiver or deputy. In Colin Lutz's case it was 10 April 2007.
44. During the accounting year from 10 April 2009 to 9 April 2010 he made the following gifts on his mother's behalf:

Birthday gift to Allen Lutz	300
Housewarming gift Duncan Lutz	1,800
Birthday gift Linda Lutz	300
Birthday gift Colin Lutz	300
Birth of first great-grandchild, Ava Lutz	2,500

Birthday gift Janice Moore	300
Birthday gift Emily Lutz	300
Birthday gift Dave Forristal	300
Birthday gift Ryan Moore	250
Birthday gift Kathy Wright	300
Two birthday one Christmas Rachel Lutz	800
Birthday gift Jarad Moore	250
Child trust fund Emily Grosso	9,000
Child trust fund Duncan Lutz	9,000
Graduation gift Emily Lutz	2,500
Housewarming gift Emily Grosso	2,500
Birthday gift Francesco Grosso	800
Birthday and Christmas Jo Forristal	500
Birthday gift Duncan Lutz	300
Birthday gift Rachel Lutz	300
Birthday gift Ava Lutz	300
Christmas gift Jarad Moore	200
Christmas gift Francesco Grosso	200
Christmas gift Dave Forristal	300
Christmas gift Ryan Moore	200
Christmas gift Colin Lutz	200
Christmas gift Linda Lutz	200
Christmas gift Kathy Wright	200
Christmas gift Dave Elliott	200
Christmas gift Emily Grosso	<u>200</u>
	<u>£34,800</u>

45. During the reporting year from 10 April 2010 to 9 April 2011 the deputy made the following gifts totalling £9,450 on his mother's behalf:

Christmas gift to Ryan Moore 2009	200
Christmas gift to Allen Lutz 2009	200
Christmas gift Jo Forristal 2009	300
Birthday gift to Duncan Lutz	333
Birthday gift to Rachel Lutz	333
Birthday gift to Ava Lutz	334
Birthday gift to Jo Forristal	200
Birthday gift to Janice Moore	300
Birthday gift to Emily Grosso	300
Birthday gift to Francesco Grosso	300
Birthday gift to Colin Lutz	300
Birthday gift to Linda Lutz	300
Birthday gift to Kathy Wright	300
Birthday gift to Dave Forristal	300
Birthday gift to Dave Elliott	300
Birthday gift to Jarad Moore	300
Birthday gift to Ryan Moore	300
Birthday gift to Allen Lutz	300
Christmas gift to Duncan Lutz	250
Christmas gift to Ava Lutz	250
Christmas gift to Rachel Lutz	250
Christmas gift to Colin Lutz	250

Christmas gift to Linda Lutz	250
Christmas gift to Emily Grosso	250
Christmas gift to Francesco Grosso	250
Christmas gift to Janice Moore	250
Christmas gift to Jarad Moore	250
Christmas gift to Ryan Moore	250
Christmas gift to Dave Elliott	250
Christmas gift to Tracy Jo Forristal	250
Christmas gift to Dave Forristal	250
Christmas gift to Allen Lutz	250
Christmas gift to Kathy Wright	250
Christmas and birthday gift early payment to Tracy Jo Forristal due to hardship	<u>500</u>
	<u>£9,450</u>

46. During the reporting year from 10 April 2011 to 9 April 2012 he made the following gifts:

Birthday and Christmas gifts to Duncan Lutz	500
Birthday and Christmas gifts to Rachel Lutz	500
Birthday and Christmas gifts to Ava Lutz	500
Birthday and Christmas gifts to Colin Lutz	500
Birthday and Christmas gifts to Linda Lutz	500
Birthday and Christmas gifts to Allen Lutz	500
Birthday and Christmas gifts to Emily Grosso	500
Birthday and Christmas gifts to Francesco Grosso	500
Trust fund for second great-grandchild, Harry	6,000
Birthday and Christmas gifts to Tracy Jo Forristal	500
Birthday and Christmas gifts to Dave Forristal	500
Birthday and Christmas gifts to Dave Elliott	500
Birthday and Christmas gifts to Jan Moore	500
Birthday and Christmas gifts to Kathy Wright	500
Christening gift for Harry Lutz	1,500
Birthday and Christmas gifts to Ryan Moore	500
Birthday and Christmas gifts to Jarad Moore	500
Christmas gift to care home staff	<u>125</u>
	<u>£15,125</u>

47. Altogether, these gifts came to a grand total of £59,375.

Colin Lutz's application for retrospective approval

48. The Office of the Public Guardian ('OPG') was concerned about this level of gifting and advised Colin Lutz to apply to the Court of Protection for retrospective approval of the gifts.

49. He made the application on 7 May 2012 and set out the following grounds for seeking the order:

"In 2009 Mrs Treadwell's first great-grandchild was born. Following discussions with my siblings it was decided that Mrs Treadwell would wish to gift a reasonable sum of money to her great-grandchildren. This was based on our knowledge that our mother, Joan, had often said that she wished she had been able to give us a better start in life. This desire of hers was exacerbated by her step-daughters, who would comment on their private education and our lack of university education.

A review of the funds available gave a total of £103,970. Mrs Treadwell is fully funded by the local PCT, and has no outgoings other than chiropody, hairdressing, toiletries and a small amount of clothing. She is bed bound and immobile. £9,000 represented just over 8.6% of the available funds, and seemed an appropriate amount for a trust fund for each great grandchild.

We did not take this decision in isolation. I emailed the COP visitor and took into consideration earlier responses I had had from the COP regarding gifts, all indicating that it was acceptable to give these gifts.”

50. In the application form Colin Lutz named his siblings as the respondents, though not his stepsisters, and the application was accompanied by witness statements from Mrs Treadwell’s four other children, all of whom - unsurprisingly - expressed contentment at the way in which Colin Lutz had been handling their mother’s finances.
51. On 2 August 2012 I made an order setting out a timetable for the filing of evidence and listed the application for hearing on 30 October 2012.
52. Mrs Treadwell died on 17 October 2012, two weeks before the hearing was due to take place.

The Public Guardian’s application

53. On 19 December 2012 the Public Guardian applied to the court for the following order:

“An application is made under Practice Direction B to Part 23 of the Court of Protection Rules 2007 to enforce the security bond in the sum of £44,300 or such other sum the court directs, on the ground of unauthorised gifting by the deputy during the accounting years 10 April 2009 to 9 April 2010, 10 April 2010 to 9 April 2011, and 10 April 2011 to 9 April 2012.”

54. The application was accompanied by witness statements made on 14 December 2012 by Deepak Patel, an investigations officer with the OPG, and Jill Martin, the senior legal adviser to the OPG.
55. In her witness statement Jill Martin summarised the facts of this case and set out the law regarding the making of gifts by deputies, and from paragraph 37 onwards she said as follows:

The authorised gifts

37. The terms of the deputy order were set out above. If one accepts that all of the gifts other than the child trust funds were made on “customary occasions”, then they would have been authorised only if or to the extent that they were “not unreasonable having regard to all the circumstances and, in particular, the size of her estate.” It is not possible to lay down any general rule as to the amounts a deputy may give away, as each case will turn on its own facts. Mrs Treadwell’s income was approximately £10,000 a year. As she was fully funded, it is submitted that the deputy could have made gifts to close family members each year in the total sum, of £1,000 within the terms of the deputy order. The fact that she did not need her income would not have justified gifting all or most of it. The court will note that in 2011/12 the gifts exceeded Mrs Treadwell’s income and the gifts in 2010/11 were only slightly less than her income. In 2009/10 her regular income was £9,000.12 but she also received a refund of care fees in the sum of £47,435. It is submitted that this did not justify the making of gifts totalling £34,800 in that year. It appears that Mrs Treadwell’s share of the proceeds of sale of the house in 2008/09 must have been used to pay the fees in question, and so the refund should be viewed as a restoration of Mrs Treadwell’s capital which, on the assumption that it derived from her late husband, was intended to pass under the residuary gift in her will so far as not required to meet her needs.

38. Although it appears that Judge Rogers considered a gift of £2,500 to be covered by the deputy order in 2008, I have not seen the application and do not know what information was given to the court. It is submitted that this should not be treated as evidence that the deputy could make annual gifts of £2,500 or more within the terms of his order in the three subsequent years, bearing in mind Mrs Treadwell's modest income and the terms of her will. It does not detract from the proposition that gifts up to £1,000 in total could be considered as authorised by the deputy order in the three accounting years in question.

39. It appears that on several occasions the deputy contacted OPG supervision staff and Court of Protection Visitors to ask whether a proposed gift would be authorised. One example is exhibited (Exhibit JM8). On 23 June 2011 the deputy enquired whether he could make a gift on the birth of Mrs Treadwell's great-grandchild. A letter dated 1 July 2011 from Rosie Sajid gave a bland reply. It will be noted that Ms Sajid had not been informed of the amount of the proposed gift, and no doubt she was not aware at the time of writing of the spectacular scale of the previous gifting. Nor is it likely that she appreciated the possible significance of the terms of Mrs Treadwell's statutory will. The amount of the intended gift was in fact £6,000, and the total of gifts for that accounting year was approximately £15,000, while Mrs Treadwell's income for the year was only £10,431.

Gifts which may have been ratified

40. If the court accepts that gifts up to a total of £3,000 over the three years were authorised by the deputy order, it is then necessary to consider whether the court would have ratified any gifts over that sum, when it had jurisdiction to do so. It is submitted that, applying the principles set out above, the court would not have ratified the child trust funds set up in 2009/10 (two gifts of £9,000 each) and 2011/12 (one gift of £6,000). The other gifts in those three accounting years amounted to approximately £35,300. It is submitted that the court would not analyse each of the many gifts but would take a "broad brush" approach. The gifts were made on "customary occasions" within the terms of the deputy order, but in total they exceeded by far what could have been considered reasonable. It is submitted that the court would have been prepared to ratify these gifts in the sum of £12,000 on the basis that, if the deputy had applied in each of the three years for authority to make gifts to family members of £4,000 (in addition to the £1,000 a year which arguably fell within the terms of the deputy order), the court would have granted the application for the following reasons:

- (i) Mrs Treadwell's needs were being met;
- (ii) she would be left with an income of about £5,000 a year to cover unforeseen expenses;
and
- (iii) the intention behind the statutory will was to preserve funds deriving from Bill Treadwell for his daughters, not to preserve Mrs Treadwell's own unspent income.

The loss to the estate

41. From the total of £59,300 over the three years, the child trust funds of £24,000 and the excess gifting on customary occasions of £20,300 (being the sum of £35,300 less the £15,000 which was arguably authorised or capable of being ratified) represent a loss to the estate of £44,300.

42. The Public Guardian asks the court to call in the bond in the sum of £44,300 and to direct that sum to be paid by the bond providers to the executors on production of a grant of representation.

56. Jill Martin made a second witness statement on 24 May 2013, which essentially dealt with the decision in the case of *Re GM*, the judgment in which had been handed down on 22 April 2013.

The deputy's response

57. In his most recent witness statement, dated 17 June 2013, Colin Lutz said:

“I refer to a copy of the OPG’s newsletter for deputies, summer 2009. This reports Lewison J. referring to the “best interests” test, explaining that an important factor was that “what will live on after the person’s death is his memory; and for many people it is in their best interests that they be remembered with affection by their family as having done “the right thing” in their will.” Although the judge was referring to a will in the quotation, the article goes on to say that the principles apply to other situations in which the court is asked to make a decision on behalf of someone who lacks capacity.

Joan Treadwell will be remembered with affection in any case, but the long term benefit of providing a financial foundation for her great-grandchildren will enable her memory to be held in even greater regard in the future. This is of greater importance due to the fact that Joan will not have the chance to interact with her great grandchildren as they grow up. They will only have tales and photographs of her.

Taking this money back would be in effect giving it to two already well-off recipients of the totality of their father’s will. During the statutory will application Bill Treadwell’s daughters have been deeply insulting to all members of Joan’s family. By their own father’s admission they did not have a friendly relationship with Joan. This diversion of Joan’s funds would be so offensive to Joan’s memory that a more grievous insult could hardly be imagined, and directly contrary to Joan’s best interests.”

The hearing

58. The hearing took place on Wednesday 10 July 2013 and was attended by:

- (1) Marion Bowgen and Jill Martin on behalf of the OPG;
- (2) Colin Lutz, who was accompanied by Helen Sarkney of the Personal Support Unit; and
- (3) Joanna Wildgoose, who appeared by video-link from Shetland, and was represented in court by Kerry Bretherton of the Bar Pro Bono Unit.

59. The second and third respondents, Stuart McNeil and Derek Brown, both filed acknowledgments of service stating that, although they wished to be joined as parties, as executors of the late Mrs Treadwell’s will they preferred to take a neutral stance, and they did not attend the hearing.

The law regarding the making of gifts by a deputy

60. A detailed discussion of the law regarding the making of gifts by deputies can be found in *Re GM* [2013] COPLR 290, and there is no need for me to cover the same ground here.

61. What I shall do, however, is approve on behalf of the court various aspects of the current practice of the OPG, which were referred to in Jill Martin’s witness statement, as set out in paragraph [55] above.

62. I approve the OPG’s general approach to quantifying loss to the estate by identifying, first, the gifts that the deputy was authorised to make and, secondly, any additional gifts that, having regard to all the circumstances, might reasonably have been ratified by the court.

63. In paragraph 27 of her witness statement Jill Martin said:

“If one accepts that all of the gifts other than the child trust funds were made on ‘customary occasions’, then they would have been authorised only if or to the extent that they were ‘not unreasonable having regard to all the circumstances and, in particular, the size of her estate.’”

64. I agree that, apart from the child trust funds, all of the gifts were made on customary occasions. Accordingly, gifts made at a christening, housewarming and graduation may be regarded as gifts that are made on customary occasions, along with birthday and Christmas presents.

65. As Jill Martin suggested, like any other gifts made on customary occasions, christening, housewarming and graduation gifts made on Mrs Treadwell’s behalf are subject to the proviso that they are “not unreasonable having regard to all the circumstances and, in particular, the size of her estate.”

66. In this case, these gifts were:

Housewarming gift Duncan Lutz	£1,800
Graduation gift Emily Lutz	£2,500
Housewarming gift Emily Grosso (<i>nee</i> Lutz)	£2,500
Christening gift for Harry Lutz	£1,500

67. Jill Martin said that “it is not possible to lay down any general rule as to the amounts a deputy may give away, as each case will turn on its own facts.” I agree, and in my judgment, on the facts of this case, all of these gifts were excessive.

68. For someone in Mrs Treadwell’s financial position, anything over, say, £100 for a christening or graduation gift, was unreasonable having regard to all the circumstances, and in particular the size of her estate.

69. In the case of the housewarming gifts, anything over about £50 was unreasonable. One would normally expect such a gift to be either a specific item for use or ornament in the home or garden or vouchers from a high street department store that offers a wide selection of household goods.

70. In so far as it reflects on Colin Lutz’s motive and credibility, it should be noted that his daughter, Emily Lutz, graduated on 1 August 2005, but the graduation gift was made four years later during the accounting year 2009/10.

71. In her witness statement Jill Martin went on to say:

“Mrs Treadwell’s income was approximately £10,000 a year. As she was fully funded, it is submitted that the deputy could have made gifts to close family members each year in the total sum of £1,000 within the terms of the deputy order.”

72. I agree with this submission, and I also concur with her observations regarding the extent to which the court may have ratified gifts in excess of £1,000 over the three accounting years in question. In paragraph 40 of her witness statement Jill Martin said that, in the particular circumstances of this case:

“... the court would have been prepared to ratify these [customary] gifts in the sum of £12,000 on the basis that, if the deputy had applied in each of the three years for authority to make gifts to family members of £4,000 (in addition to the £1,000 a year which arguably fell within the

terms of the deputy order), the court would have granted the application for the following reasons:

- (i) Mrs Treadwell's needs were being met;
- (ii) she would be left with an income of about £5,000 a year to cover unforeseen expenses; and
- (iii) the intention behind the statutory will was to preserve funds deriving from Bill Treadwell for his daughters, not to preserve Mrs Treadwell's own unspent income."

73. I note that, in quantifying the loss to Mrs Treadwell's estate, there is a difference of £75 between my calculation of the grand total of gifts (£59,375) in paragraph 47 above and Jill Martin's calculations in paragraph 41 of her witness statement, where she said:

"From the total of £59,300 over the three years, the child trust funds of £24,000 and the excess gifting on customary occasions of £20,300 (being the sum of £35,300 less the £15,000 which was arguably authorised or capable of being ratified) represent a loss to the estate of £44,300."

74. Having gone through the calculations several times, I am satisfied that my total is correct.

The court's jurisdiction after the death of the person to whom the proceedings related

75. Although the death of the person to whom the proceedings relate terminates the appointment of a deputy, the court continues to have a residual jurisdiction on matters such as:

- (1) costs (Court of Protection Rules 2007, and rule 165 Practice Direction 23B, para.10);
- (2) the remuneration of a deputy, donee, or attorney (rule 167);
- (3) fees;
- (4) the discharge of security (Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, reg.37);
- (5) the deputy's final report on the termination of his appointment (LPA, EPA & PG Regs 2007, reg.40); and
- (6) the transfer and delivery of funds (Practice Direction 23B, para.11).

76. In respect of deaths after 1 May 2010, a security bond taken out by a deputy will remain in force until the end of the period of two years beginning with the date of death or until it is discharged by the court: LPA, EPA & PG Regs 2007, reg 37(3), as amended by the LPA, EPA & PG (Amendment) Regs 2010, reg 4.

77. Normally, the personal representatives would make any application to call in a security bond after the death of the person to whom the proceedings related. However, because the Public Guardian had been actively involved in this matter immediately before Joan Treadwell's death, he considered that it would be appropriate for his office to make the application on this occasion.

78. It will be apparent from the list in paragraph [75] that, after the death of the person to whom the proceedings relate, the court no longer has jurisdiction to ratify any gifts made by their former deputy. However, in her witness statement of 14 December 2012 Jill Martin said that:

"The Public Guardian submits that, if the court decides to call in the bond, it may wish to do so only in respect of any unauthorised gifts which the court would not have ratified had the earlier proceedings not been discontinued. It may be considered harsh to include in the estimation of loss any gifts which would have been ratified but for Mrs Treadwell's death."

79. The circumstances of this case were unusual, and I agree with the Public Guardian's submission.

Non-interference with succession rights

80. Until the Mental Health Act 1959 came into force, this area of legal practice was known as 'lunacy law' and people who lacked capacity were described as 'lunatics'. Although I would prefer not to use these terms, they are part of our legal heritage, and I must use them briefly to describe some principles that have applied in this jurisdiction since the middle ages.

81. Lord Macnaghten summarised the practice of the court in *Attorney-General v The Marquis of Ailesbury* (1887) App Cas 672, at page 688, as follows:

“The principles on which the court acts in dealing with the property of lunatics in its care are not open to question. The leading principle, the paramount consideration, is the interest of the lunatic. Consistently with that principle, it is settled that in the ordinary course of managing a lunatic's estate, the court pays no regard to the interests or expectations of those who may come after, but it is equally well settled that in matters outside the ordinary course of management, it is the duty of the court so far as may be possible not to alter the character of the lunatic's property, or to interfere with any rights of succession.”

82. Lord Macnaghten's statement was considered recently by the Court of Appeal of New South Wales in *RL v NSW Trustee and Guardian* [2012] NSWCA 39, the report of which contains a comprehensive analysis of what happens when a specific devise in a will is adeemed as a result of the action of a court-appointed manager, or deputy.

83. Under section 120 of the Lunacy Act 1890 the court acquired for the first time an unrestricted power to alienate any property belonging to a lunatic. In order to minimise any adverse impact this power might have on the lunatics' heirs or next-of-kin, it was coupled with a provision in section 123 which preserved the succession rights of persons entitled under the lunatic's will or intestacy to the proceeds of sale of any property that had been disposed of in the course of the lunacy proceedings.

84. This provision still applies today in a modified form and it can be found at paragraph 8 of Schedule 2 to the Mental Capacity Act 2005 ('the Act'), under the heading 'Preservation of interest in property disposed of on behalf of a person lacking capacity,' though, to a large extent, the practical application of this provision has been superseded by the court's ability to authorise the execution of a statutory will.

85. In the context of testate succession, at least, the principle that deputies should interfere with succession rights as little as possible is compatible with the principle set out in section 1(5) of the Act, namely, that an act done or decision made for or on behalf of a person who lacks capacity must be done or made in their best interests.

86. Section 4(6)(a) of the Act provides that one of the factors that any substitute decision-maker is required to take into account in determining what is in someone's best interests is:

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

87. Although the Act lays down no hierarchy amongst the various factors that have to be considered, the words 'in particular' in section 4(6)(a) suggest that additional weight should be

given to any relevant written statement, and the Mental Capacity Act 2005 Code of Practice says, at paragraph 5.42, that:

“Section 4(6)(a) places special emphasis on written statements the person might have made before losing capacity. These could provide a lot of information about a person’s wishes.”

88. In the context of someone’s property and financial affairs, I can think of no written statement that is more relevant or more important than a will, and when testators make a will, they have a reasonable expectation that their wishes will be respected.

Decision

89. There are two relevant written statements in this case: Joan Treadwell’s will of 28 June 1990 and her statutory will, which was executed on 21 June 2008. There is relatively little difference between the two documents, other than the identity of the executors and the size of the pecuniary legacies.

90. The 1990 will was made when there was no absolutely doubt that Mrs Treadwell had testamentary capacity.

91. Although the court did not formally adjudicate on the statutory will in 2008 - and was presented with what was, in effect, a consent order - the will was approved by Mrs Treadwell’s litigation friend, the Official Solicitor.

92. Having considered all the relevant circumstances, including the origin of the assets, Mrs Treadwell’s relationship with her late husband, children and stepchildren, and the strengths and weaknesses of Colin Lutz’s arguments summarised in paragraph [36] above, the Official Solicitor was satisfied that the statutory will represented Joan Treadwell’s established wishes and was in her best interests.

93. Although he was a party to it, Colin Lutz resented the compromise reached over the statutory will and subsequently sought to undermine it by dissipating any residuary estate his mother might leave on her death.

94. The figures speak for themselves. Mrs Treadwell’s income was approximately £10,000 a year and over a three year period Mr Lutz made gifts from her estate totalling £59,375. Having disposed of her entire income, he made inroads into her capital.

95. I was unconvinced by his invocation of the comments of Mr Justice Lewison in *Re P (Statutory Will)* [2009] COPLR Con Vol 906, at paragraph 44, that his mother was ‘doing the right thing.’ She played no part in the process and, instead of doing the right thing as her deputy, Mr Lutz was interfering with the succession rights under her will by redirecting his stepsisters’ inheritance in favour of his own family by making excessive gifts to them.

96. In my judgment, Colin Lutz exceeded the authority conferred upon him by the court when making excessive unauthorised gifts on Mrs Treadwell’s behalf, and for the reasons given in paragraphs [73] and [74] above I calculate the loss to her estate to be £44,375. I allow the Public Guardian’s application and order enforcement of the security in that sum.

Publication of this judgment

97. Pursuant to rule 91 of the Court of Protection Rules 2007, I give leave for this judgment to be reported. I have not anonymised it, partly because the considerations regarding the respecting the confidentiality of the affairs of a person who lacks capacity are less compelling after they have died, but mainly for the following reasons.
98. Article 6 of the European Convention on Human Rights requires that justice should be seen to be done and, in general, the judgment of the court should be public unless there is good reason for it not to be published or for the identity of the parties not to be disclosed.
99. Because the focus of the Mental Capacity Act 2005 is on promoting and safeguarding the rights and interests of people who lack capacity, it is important that decisions of the Court of Protection should be open to scrutiny in order to enhance accountability, consistency and predictability.
100. The publication of judgments also plays an educative role in informing the public about what deputies and attorneys can and cannot do, what happens when they misbehave, and how the Office of the Public Guardian and judges of the Court of Protection deal with such cases.
101. When a deputy or attorney exceeds their authority, or behaves in a way that is not in the best interests of a person who lacks capacity, they forfeit any right to confidentiality and there is no good reason why their identity and conduct should not be made public.

DENZIL LUSH
Senior Judge
30 July 2013