

**IMPORTANT NOTICE**

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

**Neutral Citation Number [2014] EWCOP 39**

Case No: 11815682

**COURT OF PROTECTION**

**MENTAL CAPACITY ACT 2005**

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

Date: 30 October 2014

**Before:**

**Senior Judge Lush**

-----  
**Re BIM**

**Between:**

**DM and AM  
- and -  
MD**

**Applicants**

**Respondent**

-----  
**The applicants neither appeared nor were represented  
Christine Cooper, instructed by Prettys, for the respondent**

**Hearing date: 9 October 2014**  
-----

**JUDGMENT**

### **Senior Judge Lush:**

1. This is a contested application for the appointment of a new deputy for property and affairs.
2. The President's guidance on the publication of judgments, [2014] COPLR 78, requires me to publish a judgment in "any case where there is a dispute as to who should act as an attorney or a deputy."
3. The guidance also provides that "anonymity in the judgment as published should not normally extend beyond protecting the privacy of adults who are the subject of the proceedings and other members of their families, unless there are compelling reasons to do so."
4. In this judgment anonymity extends to:
  - (a) the person who is the subject of the proceedings, BIM;
  - (b) her husband, RM;
  - (c) her husband's brother and sister in law, DM and AM, who are the applicants; and
  - (d) her sons, one of whom is the respondent, MD.

### The family background

5. BIM was born in 1936 and lives in a residential care home in Essex.
6. She married twice. Her first husband left her in 1963 and she married her second husband, RM, in 1977.
7. BIM has two sons from her first marriage, both of whom live in Essex:
  - (a) AD, who was born in 1958 and is a mechanical design engineer; and
  - (b) MD, who was born in 1959 and works for a company which specialises in providing financial advice.
8. On 14 September 1994 she made her last will and testament, in which she:
  - (a) appointed her husband and sons to be her executors and trustees;
  - (b) gave her share of her principal residence at the time of her death to her sons in equal shares subject to occupation rights for her husband during his lifetime; and
  - (c) gave her residuary estate to her husband; failing whom, to her sons.
9. BIM has Alzheimer's disease, which was first diagnosed on 11 March 2007.
10. In 2010 her husband applied to be appointed as her deputy for property and affairs, but did not give notice of the application to BIM's sons. The court asked him why, and on 23 July 2010 RM replied:

"I need to explain that neither I, nor as far as I am aware, my wife have seen or heard from her sons from her previous marriage, MD and AD, for many years. I cannot be sure when the last occasions were but I would think some seventeen years ago. ... Both MD and AD moved from the last

addresses we had for them many years ago and I have no idea of their present addresses.”

11. On 10 August 2010 a district judge made an order appointing RM as BIM’s deputy for property and affairs and required him to obtain and maintain security in the sum of £35,000.

#### The application

12. RM suffered a stroke on New Year’s Eve 2013/2014 and is now in a residential care home. He is no longer capable of performing his duties as his wife’s deputy.
13. It is understood that he has executed Lasting Powers of Attorney for property and financial affairs and for health and welfare, appointing his brother, AM, and his sister-in-law, DM, to be his attorneys and that these have been registered by the Office of the Public Guardian.
14. On 12 December 2013 AM and DM applied to be appointed as BIM’s deputies in place of RM.
15. Affinity Wills Limited of Chelmsford assisted them in making the application, and the applicants named RM and their own son as the only respondents. They did not name BIM’s sons as respondents or give them notice of the application.

#### The objection

16. However, BIM’s son, MD, found out about the application in a roundabout manner and on 30 April 2014 he filed an acknowledgment of service in which he objected to it for the following reasons:
  1. I am the son of BIM.
  2. Neither my brother nor myself were notified of the fact that RM was appointed deputy to my mother on the 16/8/2010 under case no 11815682 as required by the court. I believe that this was a deliberate act designed to prevent an objection to the appointment.
  3. It is my belief that the person who is applying to the court to replace RM is his brother who is not related to my mother and does not have her interests at heart.
17. The matter subsequently escalated into a full-scale row. MD discovered that on 25 June 2015 a removal van had been seen outside the home owned jointly by his mother and stepfather and that various items had been removed from the property.
18. Three days later he gained entry to the house by changing the locks, and discovered that it had been stripped of all of its contents, including his mother’s furniture, jewellery and photographs.

19. The applicants reported MD to the police for having unlawfully entered the premises, and told the police that BIM had no interest in the property, of which they, the applicants, were now the owners.
20. MD also discovered that the applicants had granted an assured shorthold tenancy of the property to their son and daughter-in-law at a rent significantly below the open market rent.
21. On 16 July 2014 Prettys Solicitors, Elm House, 25 Elm Street, Ipswich, Suffolk IP1 2AD informed the court that they were acting for MD and on 19 August 2014 I made an order:
  - (a) joining MD to the proceedings as the respondent;
  - (b) directing the applicants and the respondent to file and serve witness statements setting out any evidence they wished the court to consider by 19 September and 3 October respectively; and
  - (c) listing the matter for an attended hearing on 9 October 2014.
22. The applicants filed no evidence with the court and made no contact with either MD or his solicitors.

#### Christine Cooper's position statement

23. Prettys instructed Christine Cooper, a barrister at Field Court Chambers, to represent MD, and in anticipation of the hearing she filed a position statement. From paragraph 5 onwards she said as follows:
  5. The respondent firmly believes that it would be positively contrary to his mother's best interest for the applicants to be appointed as her deputy. Not giving her sons notice of this application (as required) appears underhand and calculating. At best, it shows a carelessness as to their responsibilities to her. At worst, it indicates an intention to strip her of any valuable assets behind the backs of her blood relatives.
  6. Since joining these proceedings, the respondent and his brother have both reflected on their request to be appointed deputy for their mother. They now request that the court appoints Peter Blake and Paul Dickie as joint and several deputies. Both are partners at Prettys Solicitors and that firm has written to the court to confirm that it would consent to their appointment. In the alternative, the court should appoint a panel deputy. Although there will be costs to BIM as a result of the appointment of a panel deputy, this is justified given the behaviour of the applicants and the remoteness of their connection to her.
  7. There are a number of matters that the deputy appointed will urgently need to investigate and resolve. These include:
    - (a) confirming that BIM still owns a 50% share in the property and, if not, why and how it has been disposed of.
    - (b) whether the tenancy agreement is legally binding upon BIM and when it can be ended.
    - (c) what has happened to her share of the rent money paid to date.

(d) what has happened to her other possessions, such as her furniture, jewellery and photographs.

8. It appears likely that proceedings will be needed to obtain vacant possession and an order for sale (BIM needs to realise her share of the property to pay for her care) and/or to recover assets that have been improperly disposed of. The order appointing the deputy should authorise the deputy to bring proceedings in her name for these purposes.

#### The hearing

24. The hearing took place on Thursday 9 October 2014 and lasted forty-five minutes. The applicants did not turn up. Nor were they represented. The only persons who attended were Christine Cooper and her client, MD.

#### The law relating to the appointment of a deputy

25. The Mental Capacity Act 2005 refers to a person who lacks capacity to make a particular decision as a particular time as 'P' and section 16(2) of the Act provides that the Court of Protection may appoint a deputy to make decisions on P's behalf.
26. No one has an automatic right to be appointed as deputy. The court has a discretion as to whom it appoints and, as I have said elsewhere, traditionally the court has preferred to appoint a relative or friend as deputy (if it is satisfied that it is in P's best interests to do so), rather than someone who is a complete stranger.
27. However, there are some circumstances in which the court would not contemplate appointing a family member as a deputy. These include following situations, though the list is not exhaustive:
  - (a) the proposed deputy has physically, emotionally or financially abused P;
  - (b) there is a need to investigate dealings with P's assets prior to the matter being brought to the court's attention, and the proposed deputy's conduct is the subject of that investigation;
  - (c) there is a conflict of interests;
  - (d) P is being subjected to undue influence;
  - (e) the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs; and
  - (f) there is ongoing friction between various family members, which is likely to interfere with the proper administration of P's affairs.

#### Decision on the appointment of deputies

28. Essentially, I agree with Christine Cooper's submission that the applicants' conduct needs to be investigated, and they cannot possibly be appointed to investigate the regularity of their own dealings with BIM's property and financial affairs.
29. Miss Cooper described the applicants' connection with BIM as 'remote'. Because they failed to file any evidence in response to the objection, I am unable to

comment on the nature of their relationship with BIM, though I doubt whether it is as close as her relationship with her sons.

30. There was friction between BIM's sons and their stepfather for many years, and I suspect that RM was not entirely candid when he said he had no idea of his stepsons' whereabouts. They had maintained contact with their mother and, in any event, live locally and their contact details could have been discovered quite easily.
31. Rule 70 of the Court of Protection Rules 2007 requires an applicant to notify certain persons of the application in accordance with the relevant practice direction. Practice Direction 9B states that:

“Members of P's close family are, by virtue of their relationship to P, likely to have an interest in being notified that an application has been made to the court concerning P. It should be presumed, for example, that a spouse or civil partner, any other partner, parents and children are likely to have an interest in the application.

This presumption may be displaced where the applicant is aware of circumstances which reasonably indicate that P's family should not be notified. ....

Where the applicant chooses not to notify a person ... because the presumption has been displaced, the evidence in support of the application must also set out why that person was not notified.”

32. In this case the applicants gave no explanation why they did not give BIM's sons notice of their application.
33. I must commend MD and his brother for concluding that this is an appropriate case for the appointment of a professional deputy.
34. A professional deputy would be in a better position to carry out a forensic investigation into any misconduct on the part of the applicants or the current deputy and to take the steps that may be necessary or expedient to restore BIM's estate to its correct level.
35. The involvement of a professional deputy will also elevate the case from what would otherwise have been perceived as a domestic dispute between BIM's sons and her second husband and in-laws, and thereby facilitate more meaningful communications with social services, the police, financial institutions and other third parties.
36. Having regard to all the circumstances, I consider it would be in BIM's best interests for me to dismiss the applicants' application and to appoint the two partners in Prettys Solicitors, Peter Blake and Paul Dickie, jointly and severally to be her deputies for property and affairs.

37. Christine Cooper did not address the question of costs in her position statement, but she did so at the hearing. Before summarising her submissions, I shall briefly set out the law relating to costs in property and affairs cases.

#### The law relating to costs in the Court of Protection

38. Two rules need to be considered, namely rules 156 and 159 of the Court of Protection Rules 2007, which also refer to the person to whom the proceedings relate as 'P'. These provide as follows:

##### **Property and affairs – the general rule**

**156.** 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.

##### **Departing from the general rule**

**159.** – (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.

(3) Without prejudice to rules 156 to 158 and the foregoing provisions of this rule, the court may permit a party to recover their fixed costs in accordance with the relevant practice direction.

#### Christine Cooper's submission on costs

39. At the hearing on 9 October 2014 Christine Cooper submitted that this was a case in which departure from the general rule in property and affairs cases would be justified and that the applicants should pay their own costs for the following reasons:

- (a) The applicants' conduct before the proceedings. Notification is one of the principal safeguards and the notes are clear that any potential applicant must try and find anyone who is likely to have an interest in being notified. In this case no effort was made to find BIM's sons and inform them of the application; and

- (b) The applicants' conduct during the proceedings. They failed to comply with the court's order and it is telling that nobody attended the hearing on their behalf.

Decision on costs

- 40. I agree with Miss Cooper. The applicants should pay their own costs in view of:
  - (a) the fact that they have not succeeded in their application;
  - (b) their failure to respond to the objection and to the court's order; and
  - (c) their conduct both before and during the proceedings.
  
- 41. If they had withdrawn their application after receiving the court's order of 19 August 2014, or even after receiving Christine Cooper's position statement, there would have been no need for an attended hearing.
  
- 42. The respondent's costs are to be assessed on the standard basis and paid from BIM's estate.