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Case No: 12411274

**BAILII Citation Number: [2014] EWCOP B23**  
**COURT OF PROTECTION**

**MENTAL CAPACITY ACT 2005**

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

Date: 9 June 2014

**Before:**

**Senior Judge Lush**

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**In the Matter of GW**

**Between:**

**LONDON BOROUGH OF HARINGEY**  
**- and -**  
**CM**

**Applicant**

**Respondent**

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**Christine Cooper for the applicant**  
**Mark Mullen (instructed by Campbell-Taylor) for the respondent**

**Hearing date: 22 May 2014**

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**JUDGMENT**

## **Senior Judge Lush:**

1. This is an objection by a family member to the London Borough of Haringey's application to be appointed as GW's deputy for property and affairs.

### Family history

2. GW was born in 1923 and is now 91.
3. He had two sisters:
  - Eileen, who died in 1995; and
  - Olive, who has advanced dementia.
4. When he was four months old his father died, and two years later his mother died. He was brought up in a children's home, whereas his sisters were cared for by an aunt.
5. He served in the Royal Air Force during the Second World War, following which he became a bricklayer.
6. He was married briefly and had two sons, but he has no contact with them and has no idea of their present whereabouts, other than that they live somewhere in Australia.
7. The only relative with whom he does have regular contact is his sister Eileen's daughter, CM, who was born in 1949, lives in London, and was formerly a primary school teacher.
8. GW used to live in Wood Green, London N8 and still owns his house, which is currently unoccupied.
9. Since 10 June 2013 he has been a resident in a residential care home in Muswell Hill, London N10.
10. He was diagnosed as having Alzheimer's dementia with late onset in March 2009 and has a history of persistent delusional disorder. In particular, his delusions focussed on his neighbours, though they seem to have abated since he moved into residential care.
11. In January 2009 his neighbour reported to the police that she and her daughter had been subjected to a string of threats and racial abuse and that GW had thrown a bucket of urine over her. And in January 2013 he was sectioned after smashing the neighbour's window for no apparent reason.
12. He has been sectioned under section 2 of the Mental Health Act 1983 on three occasions:
  - 16 January 2009 to 26 January 2009;
  - 19 October 2011 to 7 November 2011; and
  - 27 January 2013 to 22 February 2013, when he was admitted to Chase Farm Hospital, Enfield, where he remained as an informal patient until he was discharged to his current care home.

### The safeguarding alert

13. While he was still in Chase Farm Hospital, waiting to be discharged, there was a Safeguarding of Vulnerable Adults (SOVA) alert. In a report dated 12 April 2013, Hannah Cole, a social

worker and approved mental health professional based at St Ann's Hospital, London N15, said as follows:

“A safeguarding alert was raised on the 13th of March 2013 for financial exploitation. GW disclosed on the ward that he was concerned about his finances. He had a bank account with him that indicated 3 withdrawals from it: 3/9/2012 amount of £500, 2/1/2013 amount of £500 and on 31/1/2013 whilst GW was in hospital a third amount of £500. He also stated that that he did not trust his niece and that she was always asking him for money. GW's niece had escorted him to the bank to make these withdrawals. GW stated to staff (Ian Morton and Katie Walsh) that he did not want his niece CM to deal with his money. CM stated that she had drawn money to pay bills and for her uncle to have money. It was disclosed that there is another bank book which his niece has in her possession. She was asked to bring it to the ward for safekeeping. GW's niece became very abusive and rude on the telephone to staff. Since GW has been admitted to the hospital £2000 has been withdrawn from his bank account. The safeguarding investigation is still at the screening stage. It has not yet been decided as to the outcome of the investigation to determine whether there is evidence that financial abuse has been taking place.”

14. On 6 June 2013 GW made a will in which he appointed CM and a solicitor, John Bays, of 240A High Road, Wood Green, London N22 8HH, to be his executors and trustees, and gave his entire estate to CM.
15. When he gave these will instructions to Mr Bays, GW was unaware that he had previously made a will with Craigen Wilders & Sorrell, Solicitors, 23 Turnpike Lane, London N8, on 17 April 2009, shortly after receiving a formal diagnosis that he had Alzheimer's disease. In that will he had appointed his nieces, CM and AM, as his executrices and had left his estate to all his nephews and nieces in equal shares.
16. GW's estate is worth approximately £750,000, and consists of:

His house	290,000
A Santander account	242,409
A Lloyds TSB account	<u>214,371</u>
	<u>£746,780</u>

17. On 22 October 2013 the London Borough of Haringey applied to the Court of Protection to be appointed as his deputy for property and affairs.

#### The objection

18. On 20 December 2013 CM filed an acknowledgment of service, in which she objected to Haringey's application. She said:

“I am the niece of GW. I live close to his home and have been looking after him and helping him with his finances for the last few years. GW was estranged from my mother for many years but we managed to make contact approximately 10 years ago. GW has expressed the wish that I should look after his affairs. I accept that a deputy needs to be appointed but believe it is in GW's best interests that I continue to assist with his financial affairs. I believe that if the Council are appointed it may have a harmful effect on his mental health.”

19. The acknowledgment of service was accompanied by a witness statement, in which CM gave additional reasons in support of her objection:

“I make this statement in support of my application to become a deputy for my uncle GW. My mother was Eileen, GW’s sister. My mother had her father’s name and GW had his mother’s name. Their parents were not married and sadly both died when my mother and GW were very young. My mother kept in touch with him until her twenties but then lost contact. I traced him after my mother had died by going through the telephone directory. This was about ten years ago and I have kept in touch with him ever since.

Over the last ten years GW’s mental health has started to deteriorate and I have started to help him at his home two or three times a week and we would go out and sort out his bills. He would withdraw cash from his bank accounts so we could go shopping for clothes. GW always liked to have money in his wallet which he carried all the time together with the two passbooks for his bank accounts with Santander and Lloyds which have substantial deposits.

During the last year his condition has deteriorated and he finds it difficult to communicate. His memory is failing and he does not seem to understand what is happening re the application to the Court of Protection. He recently attended with me at John Bays & Co Solicitors and Mr Bays explained the situation to him but I do not think he understood the implications of a deputyship order although he appeared to express the wish that he wanted me to look after him. It also appeared that he was content with the care being provided at his new home in Muswell Hill.

I am continuing to visit GW and he now likes to go back to his house. I make sure the house is kept in order, pay bills and organise any repairs that need doing. He has lived in the house since 1970 and loves to go back to his familiar surroundings. I would propose to continue making these visits with him as long as possible.

I am aware of the guidelines of the Mental Capacity Act and the responsibilities of a deputy. I am prepared to give an appropriate undertaking to the court to comply with these requirements.

GW made a will in June 2013 and I am the executrix and the sole beneficiary. At the recent meeting at John Bays & Co Solicitors this week he managed to confirm that when he went he wanted me to have everything.

I believe it is in GW’s best interests for me to be appointed his deputy so we can continue with the arrangements we have at present particularly to return to his house on a regular basis and with me to have access to his bank accounts, deal with payment of bills, repairs and general maintenance of his house. I believe that if all his finances were looked after by Haringey Council, GW would feel bereft and he would find it difficult to comprehend. I am happy to comply with any direction or condition the court would seek to impose.”

20. On 3 January 2013 I made an order setting out a timetable for filing and serving evidence and listing the application for an attended hearing on Thursday, 6 March 2014.

21. At the hearing on 6 March 2014:

- (a) the London Borough of Haringey was represented by Christine Cooper of counsel and CM was represented by Matthew Feldman of counsel;
- (b) the matter was adjourned until 22 May 2014;
- (c) the London Borough of Haringey was appointed interim deputy with instructions to investigate all dealings with GW's assets since 1 January 2011 and to report to the court by 8 May 2014; and
- (d) arrangements were made for a Court of Protection Special Visitor to examine GW and report to the court by 30 April 2014. The Visitor was asked, in particular, to respond to seven questions, the responses to which appear below.

### The Special Visitor's report

22. The Special Visitor, Dr Leonard Fagin, is a consultant general psychiatrist. He saw GW on 1 April 2014 and his conclusions were as follows:

*"1. Does P have testamentary capacity at the time of the visit?"*

GW did not have testamentary capacity at the time of my visit. He was unable to have an appreciation of the extent of his assets, affected by his incapacity to recall. He is unlikely to regain testamentary capacity as he has a progressive condition which is unresponsive to medical treatment.

Despite this he was able to give an opinion to me in a consistent manner during the interview as to whom he would not bequeath his estate on death. However, this view communicated to me was different to the one expressed to others at different times, so it is difficult to come to a firm decision whether his opinion is inconsistent or just simply influenced by the people who happen to be around him at the time.

*2. Whether it is likely, on the balance of probabilities, that he had testamentary capacity on the 6th June 2013, when he made his last will.*

Based on reports written at the time when GW executed his will I believe that on balance of probabilities he did not have capacity on the 6th June 2013. Reports indicate he already had significant symptoms of dementia, possibly coupled with a paranoid delusional disorder, which would have affected the balance of his mind and his ability to arrive at a considered opinion about whom would benefit from his will.

*3. Whether he lacks capacity to manage his property and financial affairs completely or only partially.*

GW does not have the capacity to manage his property and financial affairs completely. He is unaware of the extent of his assets, he appears not to understand how he is currently being financially supported in his Home, has no comprehension of what is required to maintain his property or to make appropriate decisions regarding his savings.

*4. If he is only partially incapable of managing his property and financial affairs, please specify the extent to which he has capacity.*

GW may even have difficulties in managing day to day finances, as I witnessed when he counted up his money, and gave me a totally inappropriate response to how much money was in his wallet. He requires supervision even with minor purchases.

*5. Whether he has any present wishes or feelings as to who should manage his property and financial affairs in the event that the court considers it necessary to appoint a deputy to make decisions on his behalf.*

GW made it very clear to me that he wished nobody to make decisions on his behalf. He has the unrealistic assumption that he would be able to manage without any appreciation of the cognitive deficits he is suffering from, which would make it difficult, if not impossible, for him to arrive at decisions uninfluenced by others and in his own interests. He told me that he does not wish his niece, CM, to act as his deputy, as he does not trust her, but he was also opposed to the idea of the Court of Protection appointing an independent deputy. Basically he trusts no one with his affairs.

*6. Whether he wishes to make small gifts to his niece, CM.*

GW expressed no wish to make small gifts to his niece. He considers that she has taken enough money from him already.

*7. Any other information or views the Special Visitor considers may assist the court in disposing of this matter.*

Despite GW's opposition to handing over responsibilities to an independent deputy, it is my opinion that his current disposition would allow him gradually to come to terms with an independent deputy should the court decide this course of action, especially if matters are explained to him clearly and where he is given the assurance that he can have ready cash at his disposal. Regarding his wishes to leave his assets to an orphanage or old age pensioners, a deputy, should one be appointed, may have to see if this view is sustained over time sufficient for it to be incorporated as his request."

23. Further comments and observations, which arose during the Visitor's interview with GW, are mentioned in paragraph 41 below.

#### Christine Cooper's submissions

24. In accordance with my order of 6 March 2014, the London Borough of Haringey prepared a report of its findings with regard to dealings with GW's assets and in a position statement, filed in anticipation of the hearing on 22 May 2014, Christine Cooper of counsel said as follows:

"9. Haringey maintains its position that it should be appointed deputy for property and affairs. However, it does so on the basis that it considers it in GW's best interest to retain some day to day control over his expenditure. Haringey does not wish to prevent GW from continuing the outings that he has with CM and proposes that the court should set a weekly amount to be paid into an account under his control from which he can withdraw money as and when he chooses. From the analysis of the receipts submitted by CM a sum, of £200 per week appears more than adequate. The remainder of GW's assets would be managed by the deputy and invested in accordance with professional advice.

10. There is no immediate need to sell GW's property provided that his other assets are safe. If appointed deputy, Haringey would insure the property and engage an appropriate managing agent. It would engage an Independent Mental Capacity Advocate ('IMCA') to ascertain GW's view about the property to verify that this expenditure remained in his best interests.

11. In setting out this position, Haringey is mindful that Dr Leonard Fagin, the court special visitor, concluded that GW did not have the capacity to manage even his day to day expenditure. If the court takes the view that the deputy would need to manage all of GW's expenditure, Haringey does not consider it to be practicable for it to be appointed deputy. The amount of work would be too great and would take a disproportionate amount of the deputyship officer's time. In that case, Haringey contends that a panel deputy should be appointed.

12. Haringey does not consider CM to be suitable to be appointed deputy. The interim deputy's analysis shows the amount of money withdrawn from GW's accounts. CM said in December 2013 that she had been assisting her uncle with his finances for 21 months, so since approximately the spring of 2012. In a later statement it is said to have been shortly after his release from section in November 2011. This suggests her involvement started in early 2012. In the seven months from May to December 2011, Mr Williams withdrew a total of £3,500 from his account. This increased almost from the start of 2012 with the frequency of withdrawals and amounts withdrawn increasing steadily from then onwards. The total withdrawn in 2012 was £22,198 and the total in 2013 was £28,000.

13. In her initial statements, CM maintained that all of the money withdrawn had been spent on her uncle and his utility bills or their outings. The more recent statements accept that her uncle gave her more money than was needed and she kept the difference, albeit that she now says that was what GW intended.

14. CM has known since early 2013 that GW said that she took more money than she should. CM was advised on 27th February 2013 that the best way to protect herself if the allegations were unfounded was to keep a receipt book of all monies being spent. She chose not to do so for almost a year. Now she has kept receipts for a period it is clear that she cannot account for all the money withdrawn, she has finally accepted that she has kept some for herself.

15. It is also clear that CM is unable to distinguish between what GW wants and what is in his best interest. She maintains that it was in her uncle's interest to help him sell his shares because he would have been aggressive if she did not. This is completely misguided. There will be many times when the deputy will have to decline requests from GW because what he wants to do is not in his best interests.

16. Further, CM is asking the court to cherry pick from the information before it the occasions when GW has said that he wishes CM to assist him and to draw the conclusion that those are his wishes and feelings. There are just as many occasions when he has been very clear that he did not want CM to assist him. The IMCA's report reports GW's view about CM as having varied from meeting to meeting but that he was always wary about her and his money. The view expressed to Dr Fagin was that he did not want her to look after his money. Overall, the weight is that GW does not want CM to manage his money.

17. Finally, the will made on 6th June 2013 raises further concerns as to CM's ability to ascertain what is in GW's best interest. Given his mental state, it is almost inevitable that her cousins and siblings would challenge a will leaving everything to her made in such questionable circumstances. It ought to have been obvious to all concerned that a contemporaneous medical opinion of testamentary capacity would be needed. Haringey

considers the opinion of Dr Fagin to carry more weight than that of Mr Bays but does not press for any particular action in respect of the will.”

### The hearing

25. The hearing took place on Thursday 22 May 2014 and lasted three hours. It was attended by:
- (a) Christine Cooper of counsel, Stephen Turner of Haringey’s corporate legal services team, and Hannah Cole (social worker); and
  - (b) Mark Mullen of counsel, Alice Livermore of Campbell-Taylor Solicitors, and CM.

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

26. I considered the law regarding the appointment of a deputy in some detail in a recent judgment in *Re BM*, which was published on the BAILII website on 20 May 2014, and there is no need for me to cover the same ground here.
27. Suffice it to say that nobody has an automatic right to be appointed as a deputy. The Court of Protection has discretion as to whom it appoints, and it must exercise that discretion judicially and in the best interests of the person who lacks capacity (who is referred to as ‘P’ in the Mental Capacity Act 2005).
28. Although traditionally the court has preferred to appoint a relative or friend as deputy (provided it is satisfied that it is in P’s best interests to do so), rather than appoint a complete stranger, there are circumstances in which the court would not envisage appointing a family member as a deputy. These include situations where:
- (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) the proposed deputy has an unsatisfactory track record in managing his or her own financial affairs; and
  - (e) there is ongoing friction between various family members, which is likely to interfere with the proper administration of P’s affairs.
29. There is, however, one matter I did not mention in *Re BM*, and this regards the need to ensure that P is not subjected to undue influence.
30. On 13 December 2006 the United Nations General Assembly adopted the Convention on the Rights of Persons with Disabilities (‘CRPD’). This convention came into force on 3 May 2008 and it was ratified by the United Kingdom on 8 June 2009. Although it does not form part of our domestic law, it may have an interpretative influence, particularly in cases affecting the rights of a person with a disability. Any application for the appointment of a deputy affects P’s rights.
31. Article 12.4 of the CRPD requires that:
- “States Parties ... shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, [and] are free of conflict of interest and undue influence.”
32. In its General Comment No 1 (2014), published on 11 April 2014, the Committee on the Rights of Persons with Disabilities stated, at paragraph 18, that:



“All people risk being subject to ‘undue influence’ yet this may be exacerbated for those who rely on the supports of others to make decisions. Undue influence is characterized where the quality of the interaction between the support person and the person being supported includes signs of fear, aggression, threat, deception or manipulation. Safeguards for the exercise of legal capacity must include protection against undue influence – however the protection must also respect the rights, will and preferences of the person, including the right to take risks and make mistakes.”

## Discussion

33. At the hearing on 22 May 2014, Christine Cooper, counsel for the London Borough of Haringey, submitted that there were four key factors for the court to consider:
- (a) the weight of evidence shows that CM is unable to put GW’s interests first;
  - (b) CM has also been unable to recognise when her actions have not been in his best interests;
  - (c) CM has exaggerated her involvement in his life prior to 2012; and
  - (d) CM’s attitude, both in the sense of her reaction to being challenged and in the sense that she knows best.
34. I do not propose to consider the suggestion that CM had exaggerated her involvement in GW’s life prior to 2012, because it has not been fully substantiated and I am not sure that it is even relevant, other than, maybe, in assessing whether the gifts she has received, including her entitlement under GW’s will, are commensurate with the length and quality of their relationship.
35. I agree that the weight of evidence demonstrates that CM has not always been willing to let GW’s interests have priority over her own. A good example is her insistence that his house should not be sold. There is a hint of a conflict of interests and undue influence here, as currently she is the sole residuary beneficiary under his will. Whereas it may be in her interests to retain the house whilst property prices in London continue to rise, it may be in GW’s best interests to sell the house, particularly in view of the negative associations surrounding his relationship with his neighbours and the detrimental effect it had on his mental health.
36. As regards CM’s attitude, her outbursts of ill-temper from time to time are well documented. In the report to which I referred in paragraph 13 above, the social worker, Hannah Cole, referred to CM becoming ‘very abusive and rude on the telephone to staff’ when she was asked to bring GW’s bank book to the ward for safekeeping.
37. In her witness statement of 31 January 2014, Hannah Cole described another of CM’s tantrums:
- “On 6th June 2013 I attended a Care Programme Approach Discharge Meeting (CPA Meeting) at Chase Farm Hospital to review the arrangements in place for GW’s discharge to the care home. At this meeting the IMCA mentioned the fact of the financial abuse allegations that GW had made about CM. I believe that this may have been the first time that CM became aware of specific allegations against her (although she had been informed in February 2013 about our concerns). Her reaction was alarming. She started shouting at GW. GW was visibly distressed by this. When she left the room GW followed her out and she continued to berate him in the corridor. Hospital staff had to take GW away because he was so distressed at her behaviour. Even if the allegations are untrue, CM’s violent reaction towards him causes me considerable concerns about how she might react to him in the future if she becomes his deputy and he or anyone else questions her use of his money.”

38. Later that day GW signed a will in which he left his entire estate to CM.
39. CM's counsel, Mark Mullen, drew the court's attention to the official report of that meeting, which, he said, contained no reference to her 'berating' her uncle. That report said:
- "CM was very negative during the meeting. She did not agree that her uncle should move into a home. Dr Naveenan explained to her the legal process that the decision was made in her uncle's best interest and that an IMCA was involved. She made derogatory comments about the IMCA. She presented as angry."
40. There is no inconsistency between the official report, which says that CM 'presented as angry,' and Hannah Cole's witness statement. Her account is merely a more detailed description of the way in which CM vented her wrath, and I have no reason to doubt its veracity.
41. In my judgment, the factor of magnetic importance in this case is GW's statement that he does not want CM to manage his property and financial affairs. In his interview with the Court of Protection Special Visitor, he said:
- "She is like a witch to me. I don't want her to look after my money. I have no relatives. I have not signed a will. I asked him whether "that woman" was CM, and he said that it was. "That is her. She comes to see me. She goes into my house while I am not there."
- I asked him again if he had set out a Will. He said that he definitely had not. I pointed out that I had read that he had set out a Will, and that he had bequeathed all his assets to his niece after his death. "I do not agree to leave my worldly goods to her. I would sooner give it to somebody else. I would give it to old age pensioners or an orphanage."
- I detected no paranoid delusions at present. "Nobody is bothering me, other than that girl. I've ceased to like that girl." I asked him whether she was taking money from his bank. He was unaware of how much money he used to draw from the bank, although he remembers she took half.
- He was consistent in his negative views about his niece, as well as his desire not to allow her to control his money. He is of the opinion that she is taking money from his account for her own needs, but did not seem able to do anything to prevent this from happening if it were true.
- His presentation is consistent with a diagnosis of Alzheimer's disease with late onset (ICD10 F 00.01). I have not elicited symptoms of a Paranoid Delusional Disorder in his current mental state."
42. I acknowledge that GW's views are neither reliable nor consistent, but having regard to the strength of feeling he displayed in his interview with Dr Fagin, I would be reluctant, unless it were absolutely necessary (which it is not), to override his rights and his expressed will and preference that CM should not be appointed as his deputy.
43. Quite apart from GW's present wishes and feelings, or his rights, will and preferences, I would be wary of appointing CM as his deputy in circumstances which by no stretch of the imagination can be described as free of conflict of interest and undue influence, whereas I have no such reservations about appointing Haringey Council.

44. I realise that GW is opposed to the idea of the court appointing anyone as his deputy, though I accept that this may be due to what Dr Fagin described as “the unrealistic assumption that he would be able to manage without any appreciation of the cognitive deficits he is suffering from, for him to arrive at decisions uninfluenced by others and in his own interests.”

45. I am also inclined to agree with Dr Fagin’s view that:

“Despite GW’s opposition to handing over responsibilities to an independent deputy it is my opinion that his current disposition would allow him gradually to come to terms with an independent deputy, should the court decide this course of action, especially if matters are explained to him clearly and where he is given the assurance that he can have ready cash at his disposal.”

46. In paragraph 9 of her position statement, which I set out at the beginning of paragraph 24 above, Christine Cooper suggested a solution, which would still enable GW to handle cash even though a deputy was overseeing the management of his finances generally. She said:

“Haringey maintains its position that it should be appointed deputy for property and affairs. However, it does so on the basis that it considers it in GW’s best interest to retain some day to day control over his expenditure. Haringey does not wish to prevent GW from continuing the outings that he has with CM and proposes that the court should set a weekly amount to be paid into an account under his control from which he can withdraw money as and when he chooses. From the analysis of the receipts submitted by CM a sum, of £200 per week appears more than adequate. The remainder of GW’s assets would be managed by the deputy and invested in accordance with professional advice.”

47. This is a sensible suggestion, and it takes into account to the fundamental principle enunciated in section 1(6) of the Mental Capacity Act 2005 that:

“Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”

### Order

48. Accordingly, I allow Haringey’s application and dismiss CM’s objection, and shall make an order appointing the authorised officer of Haringey Council as GW’s deputy for property and affairs on the understanding that it is in GW’s best interests, and less restrictive of his rights and freedom of action, for him to retain control over his own expenditure to a limit of £200 a week.

49. I am surprised that CM persisted with her application to manage her uncle’s property and finances after he had expressed such trenchant opposition to her in his interview with the Special Visitor. Most people would have thrown in the towel at that stage. Nevertheless, GW’s views have not always been consistent and this matter was listed for an attended hearing on 22 May 2014, anyway, and in the circumstances I see no reason to depart from the usual order for costs as set out in rule 156 of the Court of Protection Rules 2007, which says 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.”