IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C-Transparency. It may be published on condition that the anonymity of the incapacitated person and members of their family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

COURT OF PROTECTION **Case No.: 1156678**

MENTAL CAPACITY ACT 2005 **[2019]EWCOP31**

IN THE MATTER OF MJL

FL

Applicant

and

MJL (By his Litigation Friend, the Official Solicitor)

Respondent

David Rees QC (instructed by Withers LLP) for the Applicant

William East (instructed by the Official Solicitor) for the First Respondent

Hearing date: 19 June 2019

The hearing was conducted in public subject to a transparency order made on 9 April 2019. The judgment was handed down to the parties by e-mail on 10 July 2019. It consists of 16 pages and has been signed and dated by the judge. The numbers in brackets refer to pages in the hearing bundle.

JUDGMENT

The issue for determination

1. This is an application for
   (i) ratification of gifts previously made on behalf of MJL; and
   (ii) authority to make prospective gifts on behalf of MJL, pursuant to section 18 (1) (b) of the Mental Capacity Act 2005 ('MCA 2005').

2. FL the brother of MJL was appointed as his sole deputy for property and affairs by orders dated 21 July 2008 and 23 January 2012.

3. The Official Solicitor is MJL's Litigation Friend. The parties have not reached an agreement between themselves.

Documents considered

4. I have read and considered carefully the following documents, which were helpfully contained in a hearing bundle:

For the Applicant:

The Applicant relies on the following witness statements, which have not been confirmed in sworn evidence, but each statement contains a Statement of Truth. The Official Solicitor for the Respondent has decided not to cross examine the witnesses and accepts the beliefs expressed are held by the witnesses, but not that they should lead the court to make the order sought by the Applicant. There is no contrary evidence to the facts asserted in the witness statements.

FL dated 7 May 2018 and 29 March 2019

AR dated 14 May 2019

RL dated 17 May 2019

BL dated 15 May 2019

Position statement by Mr David Rees QC dated 17 June 2019

For MJL:

Official Solicitor submissions in a previous statutory will application by letter dated 11 December 2009

Position statement by Mr William East dated 14 June 2019

The Proceedings

5. The current application was received by the court on 10 May 2018. It was supported by a witness statement from FL dated 7 May 2018. A statutory will was approved by this court previously by order of 5 January 2010. MJL was intestate prior to that.

6. In the current application, the Official Solicitor was invited to be appointed as Litigation Friend for MJL, which invitation was accepted. The parties then explored whether they could reach agreement in the application pursuant to directions orders dated 12 June 2018, 5 September 2018, 19 October 2018, 31 October 2018, 23 November 2018, 30 January 2019 and 12 March 2019. The order of 12 March 2019 was my first involvement in the case and, given the time which had elapsed since the application was made, it included directions for the matter to be listed for a hearing of directions on 13 May 2019. In the event, that hearing was vacated and the matter was listed for final hearing on 19 June 2019.

7. At the hearing I had the benefit of oral submissions from Mr. Rees QC and Mr East. Their submissions and position statements have been of considerable assistance.

Factual Background

8. MJL is in his sixties. He is unmarried and has no children. His four siblings are the Applicant, FL, RL, BL and AR, each of whom have children of their own. MJL's parents have died.

9. MJL fell into a persistent vegetative state from which he has not recovered following a cardiac arrest in November 2007 and now lives in a hospital. The tragedy his family has suffered needs to be recognised. His siblings each visit once or twice a year. Each sibling is acknowledged to be wealthy, which appears to be principally as a result of money passed to them by one or both parents. They do not need to work but some of them do.

10. MJL was 54 years old when he lost capacity.

11. MJL has the benefit of NHS funding. As noted, the Applicant was appointed as MJL's sole Deputy for Property and Affairs by orders dated 21 July 2008 and 23 January 2012.

12. MJL has an estate valued in excess of £17 million

13. Capacity: The Applicant has filed an assessment of capacity on form COP3 dated 17 January 2018 completed by an occupational therapist and clinical lead for cognitive assessment and capacity assessments at the hospital where MJL lives. It confirms that MJL suffered a hypoxic event in 2007 which resulted in a disorder of consciousness, which remains to this day. As a result, the assessment advises that:

"[MJL] is unable to communicate his needs or wants in any way. He requires all his needs to be anticipated and provided for in his best interests. All his responses remain at reflex level with no evidence of a volitional response"

14. The assessment holds out no prospect of MJL ever making a recovery from his injuries. It is clear (and is accepted by the parties) that MJL lacks capacity within the meaning of section 2 of the Mental Capacity Act 2005 to make the gifts proposed.

15. Life expectancy: The Applicant has also provided a letter dated 04 April 2018 from a consultant in Rehabilitation Medicine, who advises:

    'It is not possible to give any accurate estimation of life expectancy. [MJL] has been medically stable over the last year. In his care plan we have it written that should he have a cardiac arrest he is not to be resuscitated. Nor is he to have further antibiotic intervention or transfer to hospital should he have infection/sepsis. He would receive palliative care in those circumstances. I would expect he would not have a normal life expectancy, but that he could go on living for some more years yet.'

16. Assets, income and expenditure. The position statements of both parties draw upon the Deputyship accounts of the year ending 20 July 2017. The figures will have changed but neither party submits that there is a material change. The estate at that time was put as approximately £17,342,061, which comprised the following:
    Pension scheme: £66,000
    Debtors: £53,215
    ISA account: £167,595
    Cash at bank: £173,036
    Cash with investment manager: £59,099
    Investment portfolio: £16,823,116.

17. As the Applicant submits, MJL's annual income is £123,219 and his annual expenditure is £16,079, resulting in an annual surplus of £107,140. The Applicant states that the private cost of MJL's care, as currently provided by NHS Continuing Healthcare, would be in the region of £175,000 [page F98, paragraph 29].

18. The parties also relied on the financial position when the statutory will was authorised by the court on 5 January 2010. The Official Solicitor's submissions by letter dated 11 December 2009 was filed shortly before the hearing. At that time MJL was described as having assets:
    'valued at in the region of £10.23 million, comprising a number of bank accounts, investments, and life assurance policies. He is also entitled to a substantial inheritance (in excess of £1million) from the estate of his late father [name provided] who died in 2001.
    As regards net annual income, this is put at approximately £74,000 per annum comprising occupational pension and the income earned from [MJL]'s investments. Annual expenditure is put at £26,000. There is therefore a substantial surplus of approximately £48,00 per year.'

19. It was confirmed at the hearing that the inheritance referred to was in fact £2.78 million [page H254]

20. Testamentary position: As mentioned, the court has previously authorised the execution of a statutory will on behalf of MJL, which is dated 05 January 2010. The parties agree that this provides that the Applicant and RL are appointed as executors and the estate is divided as follows:
    60% to the Siblings in equal shares (with a gift over to their issue in substitution);
    9.75% to Amnesty International;
    9.75% to Oxfam;
    9.75% to The Medical Foundation for the Care of Victims;
    9.75% to War on Want;
    1% to the League of Friends of the hospital where MJL lives.

21. The only papers which I have relating to the statutory will application are the Official Solicitor's submissions by letter dated 11 December 2009.

22. MJL's lifetime gifting: When MJL had capacity, he set up standing orders to three political organisations, The Labour Party, The Red Banner and Charter 88, none of which are registered charities. Gifts to these organisations since 2009 now total £2,016, £321 and £525 respectively. In the current application the Applicant seeks ratification of the gifts made.

23. In 1988, MJL gave £20,000 or £25,000 to a charitable organisation set up by the family which is now named in memory of both MJL's parents [page H254]. Whether it was £20,000 or £25,000 is not material, given the size of MJL's estate at the time.

24. RL gives evidence that MJL felt passionate about giving money to charity [page F195, paragraph 12]. MJL and RL were both trustees of a charitable foundation [x and y Memorial Foundation] set up after their mother's death, to which their father's name was added on his death. This appears to be the same charitable foundation to which MJL gave in 1988. RL recalls a conversation in 2004 with MJL about this as follows:

    'In 2004, [MJL] approached me about making a distribution from the foundation to four charities totalling £80,000 (i.e. £20,000 to each charity). The charities were Amnesty International Charity Limited, Oxfam, Medical Foundation for the Care of Victims of Torture and War on Want. [MJL] was unusually prickly about this – I remember he was really quite cross. I got the sense that he [MJL] was impatient with what he perceived to be the over-cautious approach we/I took towards making grants to charities.' [paragraph 12, page F195]

25. In 2008/2009, after MJL had lost capacity, a distribution of £2,445,000 was made to the family's charitable foundation from one of the family trusts to which MJL would have had entitlement. This was money which MJL had expressed a wish should be given to charity. The reasoning is found in a redacted letter from Mrs FJ Stephens of Rawlinson & Hunter accountants dated 30 March 2009 exhibited to FL's second witness statement dated 29 March 2019 [pages F224 and see page H260]. Mrs Stephens writes that:

'..[MJL] told me clearly that he did not have any need for the funds in either [trust fund] and that it was his intention to ask the Trustees to give the value of his share to charity. He was particularly interested in charities helping the elderly and those with mental illness.'

26. By any measure, MJL's indication to Mrs Stephens was a substantial redirection of monies which were otherwise destined to go to MJL.

27. There is no evidence that MJL made any significant financial gifts to his family before he lost capacity. Gifts to the children of his sibling (s) are mentioned in the context of having been carefully and well-chosen by MJL [page F200, statement of BL], not for their lavish or generous character.

28. MJL's tax affairs: HMRC were in contact with MJL about his tax affairs in 2007. Exhibited to FL's statement dated 29 March 2019 is a copy of a letter from Rawlinson & Hunter accountants to HMRC dated 26 November 2007 [page F219 -F222]. From the contents of the letter, it was written after MJL did not attend a meeting which had been scheduled with Rawlinson & Hunter for 21 November 2007. MJL did not attend because he had been taken to hospital. That is around the time MJL lost capacity. The letter documents a tax liability, inclusive of interest and penalties, of £1,021,150.

29. The accountant at Rawlinson & Hunter had advised MJL's parents and siblings on financial planning previously, including at different accountancy firms. However, this was MJL's first contact with the accountants. Given HMRC's contact with MJL, the advice from Rawlinson & Hunter was focussed on HMRC's concerns.

30. There is evidence from all of MJL's siblings about their own attitude to tax planning and what they feel MJL would have done had he not lost capacity:

31. *FL's statement of 7 May 2018.* FL [para 35 onwards, F99] references MJL's historic gifting of small Christmas gifts to his nephews and nieces and standing orders to 3 political organisations, The Labour Party, The Red Banner and Charter 88. He references the advice he himself has received about Inheritance Tax planning in respect of surplus income and capital. He does not anticipate any significant reduction in MJL's surplus income and capital resources if the application were granted. [para 33 onwards, F99]. He does not mention any tax planning undertaken by MJL before he lost capacity in this first witness statement.

32. *FL's statement of 29 March 2019.* FL gives a great deal more evidence in this comprehensive statement. He describes a loving and close family dynamic between his parents, when alive, and siblings. He details the wealth of his father in particular and the fact that he had no discussions about financial planning [paragraph 14, F207]. He continues:
'I don't remember my father explaining in detail why he was making large transfers of money to us, but I think there was an understanding that a process of wealth transfer in advance of his death was going on'[paragraph 15, page F207].
FL was aware from a young age that he would not financially need to work. However, MJL worked from 1979 to 1996, primarily in the wine industry for a brewery (and it appears from the

letter of Rawlinson & Hunter of 26 November 2007 that MJL lived from his wages between 1979 and May 1996). FL says that:

'It was around this time that I think he realised, or perhaps accepted that, in fact, he did not need to work for a living and he would be far happier if he gave up this job and simply lived off the money he had inherited, pursuing his hobbies and interests, such as playing squash and cycling' (paragraph 21, page F208)

FL says that none of his siblings are hugely enthusiastic financial planners and MJL in particular: 'seemed to bury his head in the sand about financial planning' [paragraph 30, page F209]. However, importantly, FL never spoke to MJL about his [MJL's] financial affairs. [paragraph 33, page F209]. It is important to note that from his role as deputy, FL notes various investments which MJL made before losing capacity, including an off-shore account worth £174,511. FL thinks that the HMRC queries raised in 2007 would have been the trigger for MJL to undertake estate planning. FL describes himself and his siblings as being triggered to undertake estate planning with the arrival of children. MJL had no children.

It is also important to note FL's views that:

'[MJL] was an intelligent and sensible man and had a strong sense of right and wrong. But he would have realised that his failure to address his tax affairs had caused him a significant amount of stress and I think this would have influenced his attitude towards being much more amenable to professional tax advice going forward' [paragraph 36, page F210]

33. *AR witness statement dated 11 March 20119*

AR provides a short statement. She agrees FL's statement. AR feels the family wealth became more secure with the passage of time whilst she was a child and that there were precarious times. She has become comfortable with her wealth in a way which she was not in her 20s and 30s and she feels:

'it may be that [MJL] came to this realisation [to acknowledge wealth and enjoy it, if I can paraphrase] at a much later date'

34. *RL witness statement 11 March 2019*

RL provides a short statement. He agrees FL's statement. He never had any conversations with MJL about financial planning or the family wealth [paragraph 11, page F195]. However, he considers that following the contact with the family accountant in 2007:

'I think it is inevitable that he [MJL] would have been advised to consider inheritance tax planning….so I think he would have gone down this road' [paragraph 11, F195]

35. *BL witness statement 15 March 2019*

RL provides a short statement. He agrees FL's statement. BL's view is that his parents met in the post war period and were enthused with the reforms of the then Labour Government. However, MJL's father also had a strong belief, possibly on cultural grounds:

'in the family as an object of concern'.

BL is a member of the Labour Party, and has followed professional advice on tax mitigation. He comments that:

'For most of his adult life, [MJL] simply did not address his mind to his wealth. I never heard him express a view pro or contra with respect to inherited wealth/family provision/financial planning'.

BL feels MJL would have taken advice from the family accountant on financial planning once the 2007 issues raised by HMRC were addressed. However, BL acknowledges that:
'I can only speculate on how [MJL] would have reacted to that advice'

36. MJL's political leanings: It was common ground that MJL was a Labour Party supporter. It is not clear whether he was a Labour Party member, which is immaterial. All MJL's siblings give evidence of a left leaning family generally, including MJL's parents, who were inspired by the post war Labour government of the time, reference BL statement 15 March 2019 [paragraph 5, page F199].

The position of the parties

37. Both parties have provided most helpful skeleton arguments.

38. In the first limb of the application, the Applicant seeks:
(1) Retrospective authorisation (to the extent that the same is required) of various modest gifts made by FL as deputy of:
(a) Christmas gifts to family members totalling some £2,575 from 2009 to the date of the application.
(b) Gifts to the Labour Party totalling some £1,764.50 from 2009 to the date of the application.
(c) Gifts to The Red Banner totalling some £282 from 2009 to the date of the application.
(d) Gifts to Charter 88 totalling some £465 from 2009 to the date of the application.

39. It is submitted that the Christmas gifts are within the scope of the deputy's authority in any event. The political organisations identified at (b) to (d) above are not charitable (and as such technically fall outside the scope of FL's authority). However, they represent the continuation of payments that MJL made when he had capacity to do so, and the Court is asked to authorise the same. The court is also asked to authorise FL to continue making such payments in the future.

40. In response to this first limb, the Official Solicitor for the Respondent submits that it is in MJL's best interests for these payments to be ratified, and that there be authority to continue making the standing order donations (subject to one query about Red Banner, which was resolved by the hearing).

41. In the second limb of the application, the Applicant seeks:
(2) Authority to make gifts totalling some £1,184,387 to the taxable beneficiaries under MJL's will (that is to say his four siblings), such gifts to be borne by the accumulated surplus from MJL's income that arose between July 2009 and July 2017.
(3) Authority to make gifts totalling some £789,591 to the charitable beneficiaries under MJL's will (and in the same proportions as each of them receive under that will); such gifts to be paid out capital.
The proposed gifts to the taxable beneficiaries under (2) and the proposed gifts to the charitable beneficiaries under (3) are in the ratio 6:4; which reflects their respective shares under the statutory will.
(4) Authority to make ongoing gifts to the taxable beneficiaries from MJL's future surplus income (from year end 2018 onwards), subject to an annual reserve of £20,000;

(5) Authority to make ongoing gifts to the charitable beneficiaries from MJL's capital (in a total amount equal to 2/3 of the ongoing gifts made from surplus income under (4)). These gifts are to be shared between the charitable beneficiaries in the same proportions as each of them receive under MJL's will.

42. Here, the Official Solicitor as MJL's Litigation Friend does not agree that the Applicant's Proposal is in MJL's best interests. Instead, she has proposed the following ('the OS Proposal'):

    (2) A gift of £1,184,387 be made and divided as follows:
    60% to the Siblings in equal shares;
    40% to the Charitable Beneficiaries in the same proportions as in the Will.

    (3) Ongoing gifts of MJL's surplus income be made and divided as follows:
    60% to the Siblings in equal shares;
    40% to the Charitable Beneficiaries in the same proportions as in the Will.

43. The tax effect of the proposed gifts is unclear. I have heard lengthy submissions, on which I am urged not to decide, on the likely operation of Section 21 of the Inheritance Tax Act 1984. Subsection 21(1) provides as follows:
    "(1) A transfer of value is an exempt transfer if, or to the extent that, it is shown—
    (a) that it was made as part of the normal expenditure of the transferor, and
    (b) that (taking one year with another) it was made out of his income, and
    (c) that, after allowing for all transfers of value forming part of his normal expenditure, the transferor was left with sufficient income to maintain his usual standard of living."

44. The dispute between the parties is whether, and if so, the degree to which, HMRC would consider the proposal to fall within Section 21 (1) as a gift of income. There are arguments about whether the accrued surplus of income should still be treated as income, with submissions that MJL could not himself have gifted it after losing capacity and FL as his deputy would have needed the permission of this court to do so. However, that is something I am not asked to decide and it is mere background to this application and not material to my decision. What is material is that, in respect of the proposed gifts to the siblings, there will be a reduction in the tax payable on MJL's death if HMRC accepts that the payments are being made from surplus income or, even if they do not, there may still be potential advantages if MJL survives at least 3 years from the gift. The Applicant accepts that a reason for making the proposed gifts is that they will reduce the IHT payable on MJL's death [paragraph 23, position statement].

45. The position on affordability is that primarily MJL can afford to make the gifts proposed. The Official Solicitor submits that under the Applicant's proposal, the size of the proposed gift each year to the Charitable Beneficiaries is uncertain and could lead to the erosion of MJL's capital without court oversight. The Applicant submits that such difficulty can easily be avoided by 'imposing certain limitations on the general authority to make future gifts given to the deputy.
    (1) A cap could be placed on the total amount of gifts that could be made in any one year - for example £250,000 from surplus income and a corresponding gift of £166,666 from capital;

(2) Alternatively, the deputy could be required to return to court for the matter to be reviewed if MJL's total assets fell below a certain level (say £12M);
(3) In any event, the deputy could be required to return to court for the matter to be reviewed should MJL no longer qualify for NHS Continuing Health Care Funding (or equivalent)'. I accept the Applicant's submissions on this. Even if the NHS funding did for any reason stop (which I accept on the balance of probabilities it is not likely to), the gifts, with some safeguard as now proposed by the Applicant, are affordable.

46. Given MJL's condition, there is no suggestion that he would have any understanding of the proposed arrangements such as might either give him pleasure or cause anxiety.

The Law

47. Where a person lacks capacity to make a decision in respect of their property and affairs, the powers of the court are set out generally in section 16 of the Mental Capacity Act 2005, and more specifically in section 18. The power to make a gift is set out in section 18(1)(b).

48. The exercise of those powers is subject to principles set out in section 1 of the Act, including the requirement at section 1(5) that "An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests."

49. The meaning of 'best interests': The concept of 'best interests' is not defined within the Mental Capacity Act. Instead, at section 4 of the Act, a series of requirements of the decision-maker are set out: the person making the determination (in this case the court)

> *(1)… must not make it merely on the basis of*
>
> *(a) a 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) … must consider all the relevant circumstances;*
>
> *(3) … must consider*
>
> *(a) whether it is likely that that the person will at some time have capacity in relation to the matter in question and*
>
> *(b) if it appears likely that he will, when that is likely to be.*
>
> *(4)… must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.*
>
> *(5) …*

(6) … 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) …must take into account, if it is practicable and appropriate to consult them, the views of –

(a) …

(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

as to what would be in the person's best interests and, in particular as to the matters mentioned in subsection (6) ….

50. The parties also rely on case law. They have helpfully confirmed that the principles outlined in the Applicant's skeleton are agreed:
(1) The court is not confined to acting only in those cases where a direct benefit to P can be demonstrated; its evaluation includes every consideration that might bear on what is in their best interests (**Secretary of State for the Home Department v Sergei Skripal [2018] EWCOP 6; [2018] COPLR 220 per Williams J at paras [24] to [26**]).
(2) In considering P's best interests at a particular time, the decision-maker must take a holistic approach and consider his welfare in the widest sense, not just financial, but social and emotional (**Re A [2015] EWCOP 46 per SJ Lush at para [35]**).
(3) The test is a "best interests" test not a "substituted judgment" test. However, it does require the court to consider P's preferences and likely preferences (**Re G(TJ) [2010] EWHC 3005 (Ch); [2011] COPLR Con Vol 403; Aintree University Hospitals NHS Foundation Trust v James [2013] UKSC 67 [2014] 1 AC 591 at [24]**).
(4) The test requires the decision maker to perform a weighing or balancing exercise between a range of divergent and competing factors. In that exercise the force, clarity or certainty of conclusions that found competing factors will affect the weight to be given to them and that weighing exercise is not a linear or binary exercise (**Briggs v Briggs [2016] EWCOP 53 per Charles J at [57] to [58]; Re M (Statutory Will) [2009] EWHC 2525 (Fam); [2011] 1 WLR 344 per Munby J at [32]**).
(5) An approach based on a presumption, or a starting point that must be displaced, as to the result that is in P's best interests runs counter to the underlying rationale and purpose of the MCA and, in particular, of its decision and fact-sensitive approach to the application of its best interests test in all the circumstances of a given case (**Watt v ABC & Another [2016] EWCOP 2532; [2017]**

4 WLR 24 per Charles J at [71]; PBC v JMA & Others [2018] EWCOP 19; [2018] COPLR 428 per HHJ Hilder at [65]).

(6) The court must decide the application on nothing more and nothing less than a case-specific application of section 4 MCA 2005 (**PBC v JMA & Others per HHJ Hilder at [66]**).

(8) Ultimately the Court is seeking to make the choice that is right for P as an individual human being in his current situation (**Aintree v James at [45]; PW v Chelsea & Westminster NHS Trust [2018] EWCA Civ 1067; [2018] COPLR 346**).

51. I am assisted by the summary of principles adopted by Senior Judge Hilder on review of the relevant case law in in **PBC v JMA & Others [2018] EWCOP 19** [paragraphs 45 - 50], namely that:

- the concept of "best interests" is a broad one
- the concept of "best interests" is not restricted to "self-interest."
- the determination of 'best interests' requires a holistic approach is to be taken
- a holistic approach to determining "best interests" is not, however, a "substituted judgment" test and should be fact sensitive

52. The making of gifts: The parties have relied in particular on:

    a. **Re G(TJ) [2010] EWHC 3005 (COP**
    b. **Re JMA [2018] EWCOP 19**

The Parties' Submissions

53. On behalf of the **Applicant**, Mr Rees' position statement, the whole of which I have considered carefully, includes the following:

'25 Structuring one's affairs in a manner that enhances the provision that can ultimately be made under one's will for family and other beneficiaries clearly affects how a person in remembered and is capable of being in that person's best interests.

26 Taking all of the matters set out above into account and in particular the family source of [MJL]'s wealth; his failure to properly account for the tax that he did in fact owe to HMRC as it fell due; his investment in offshore assets; his decision to finally seek financial advice shortly before his loss of capacity; his relationship with his family and his wish to benefit charities and the views of those who knew him best, the court can properly conclude that the proposed gifts are in [MJL]'s best interests.

27 The evidence demonstrates that the factors which [MJL] would have taken into account if he had capacity would have included the ability that he now has, by making the proposed gifts, to enhance the provision that he is ultimately able to make for his family and chosen charities. The court can also take into account when determining [MJL]'s best interests, how he will be remembered after his death. It is clearly in his best interests to be remembered for organising his

affairs in a manner that enhances the provision that he is able to make for his family and his selected charities.

28 It is submitted that the court should be careful before placing too much weight on [MJL]'s political views when seeking to determine where his best interests lie'

54. On behalf of MJL, the Official Solicitor for the **Respondent** makes six main submissions

1) There can be no assumption that MJL would have embarked on tax planning and/or lifetime gifting or tax planning. The only assumption under the Mental Capacity Act 2005 is the assumption of capacity. Everything else requires an analysis of best interests under the principles of Section 4.
2) In this case, there is no evidence of high value gifts of MJL's own assets, apart from the £20,000 or £25,000 gift to the family charity in 1988. The evidence of foregoing or giving up future benefits was also in favour of charity.
3) In this case, there is no evidence that MJL had any desire for tax planning
4) In this case the tax liabilities of MJL's estate in fact have been significantly mitigated by a number of means, including testamentary charitable gifts and the manner of investment.
5) Such evidence as is available suggests that MJL's social conscience might have led him not to do embark on any estate planning.
6) In terms of the original proposal, the court needs sufficient certainty of any gifts it is authorising, which the original proposals fails to provide.

55. The parties agree that although they jointly propose some gifting to be permitted, the court is not bound to permit any.

Conclusions

56. Affordability: Where the court is considering the authorisation of gifts, affordability is a "necessary but not sufficient" consideration. As I have said, with some amendment, I am satisfied that, the proposed gifting would be affordable to MJL.

57. Default position/assumption: If it is suggested by either party that there is a default position in favour of or against tax planning, I reject this. In any event, I am not sure by the end of the hearing that either party did suggest this.

58. The Mental Capacity Act 2005 does not permit the Court to rely on default positions, assumptions or generalisations in making a decision about whether gifts which result in any tax mitigation are in the best interests of a particular protected person.

59. The balancing exercise: In my judgment, the factors weighing in favour and against the making of the proposed gifts from MJL's estate may be summarised thus:

60. None of MJL's siblings give evidence that they spoke directly to MJL about his own financial affairs, other than to try (for the most part unsuccessfully, apart from directing him to Rawlinson & Hunter when HMRC started their enquiries in 2007) to take financial advice. The position as to whether he would have undertaken tax planning starts at neutral.

61. MJL's siblings were loved by him and he would want them to remember him kindly and be in a better position through actions by him or taken on his behalf. However, the evidence from MJL's siblings is that, apart from FL, they have all had some difficulty adjusting to their level of wealth. MJL is described as a man of simple tastes who lived a modest lifestyle. It is not clear MJL would have considered further substantial gifting to his siblings to be a benefit to them. MJL had said he wished to decline further assets from family trust(s), but this was not in favour of his family, but in favour of charitable causes. It does not appear to be in his best interests to add significantly to the wealth of his siblings.

62. I have no evidence that prior to the execution of the statutory will MJL knew the intestacy rules and wished to benefit his siblings by not making a will. On the contrary, given MJL's failure to regularise his tax affairs historically, I do not find that the failure to make a will was a considered decision in favour of his siblings.

63. All MJL's siblings are wealthy in their own right, they have no dire financial circumstances from which MJL may wish to rescue them. Nor is there any evidence that any additional money from MJL would enhance their lives. It is not clear that they would think of him any differently if the application were allowed in full to if it were dismissed in its entirety. The additional money may well be just another source of income on a spreadsheet of various family trusts and investments to them, the whole of which goes up and down. They give no evidence that the success or failure of this application would have any effect on their regard for MJL.

64. It follows that I do not accept the proposition of the Applicant (if this is proposed as necessarily true) that structuring one's affairs in a manner which enhances the provision that can ultimately be made under one's will for family and other beneficiaries clearly affects how a person is remembered.

65. MJL had reached the age of 54 before he lost capacity and, given the size of his estate then, had done no significant tax planning (the sole example being the one off-shore investment of £174,511). It is likely, once the 2007 HMRC queries had been resolved, that MJL would have been offered financial advice by Rawlinson & Hunter accountants and would have received it. However, it is not clear what MJL would have done (see in particular BL paragraph 13, F200).

66. I find that the proposal put forward by the Applicant does represent substantial tax planning, as well as enhanced gifting to MJL's will beneficiaries. MJL considered gifts of £20,000 and £25,000 to be significant in the sense that they were worth making.

67. Although I note the background information provided from the Office of Tax Simplification 'Inheritance Tax Review – first report: Overview of the tax and dealing with administration' this does not assist me other than by way of background with this decision. The lower rates of taxes said to be paid on estates in excess of £10million represent tax on estates which are far less than MJL's likely estate at death.

68. MJL had no children. There was not the same 'lightbulb moment' as is described by his other siblings as the reason they embarked on financial planning. It is said by the Applicant [paragraph 36, page F210] that MJL would not have ever considered aggressive tax planning or schemes and it cannot be in his best interests now for substantial tax planning to be undertaken.

69. In terms of gifting to charities, MJL did give evidence of his clear social conscience and need to do the right thing, as well as his passion for charitable giving. Actual giving to charity was in place and was still developing when HMRC started their enquiry in 2007. I am satisfied from the evidence that a clear commitment to charitable giving was part of MJL's being and that it would be in his best interests for this to continue.

70. I accept that MJL's left of centre political views, as evidenced by his lifetime donations and the evidence of his siblings, may have dissuaded him from substantial tax planning, but I find this to be no higher than the evidence of his brother that MJL would not have embarked on aggressive tax planning. It would not have prevented him from some tax planning co-incidental to what he perceived as his family and charitable commitments.

71. I do not find that the family source of MJL's wealth would have affected his treatment of it. He gave instructions to surrender his interest in family trust(s) for charity although that involved a sum of £2.45million.

72. MJL's failure to sort out his financial affairs such that HMRC started their enquiry in 2007, leading to a payment on behalf of MJL of £1,021,150 does not assist me with determining to what extent if at all the current application is in his best interests. It leads me to conclude that he would have put his financial affairs on a better footing, but not that he would have done so to maximise gifting or to embark on substantial tax planning.

73. I am assisted to some extent by the evidence that MJL wanted to do the right thing, that where he is being cared for by the state, he would probably not have wanted to reduce taxes to that state to any great degree. However, other factors weigh more heavily.

74. As the statutory will provides for significant gifting to charities, which will be exempt from tax, I find that it is in MJL's best interests for the proposal put forward by the Official Solicitor as MJL's litigation friend to be approved.

75. This recognises the current circumstances of MJL, his love for his siblings and his clear commitment to charitable giving. Contrary to the Applicant's submissions, I do not accept that the Official Solicitor's proposals represent only a different quantum where they differ from the Applicant's proposal. They represent a point of principle as to whether it is in MJL's best interests for that degree of gifting and tax saving to be achieved before death from capital. I am not satisfied that it is in MJL's best interests for the reasons given.

76. Whilst I find that MJL was committed to charitable giving, I am not persuaded that substantial charitable giving is in his best interests now. The charities which are beneficiaries in the will are

not new start-ups and the need for them is likely to be as great when MJL dies as is the case now. MJL's own long term view for charitable giving is evidenced by his trusteeship of the charitable foundation in memory of his parents.

77. The views of other relevant persons as to MJL's best interests with regard to the Applicant's proposal have been taken into account in the evidence as set out above. It is worth noting that the even-handed way in which they express their suppositions is a credit to MJL's siblings. It is also worth noting that FL, as MJL's deputy, expresses views which are considered under the Act but which, as a matter of common submission, have no greater weight than others by reason of FL's deputyship. There is no hierarchy of factors to be considered under Section 4 of the Act.

78. Taking all things into consideration, I am satisfied that the factors in favour of the proposed gifts supported by the Official Solicitor outweigh the factors against those gifts and the factors in favour of the gifts proposed by the Applicant. I do not agree that gifting in different proportions between the will beneficiaries is in MJL's best interests. The gifting proposed at paragraph 6 of the Official Solicitor's position statement is authorised. Gifting as proposed in part 1 of the application is approved. The family gifts fall within the deputy's authority. The gifts to political organisations continue what MJL set up when he had capacity and are in his best interests. The approval given is as follows:

(A) Ratification of past gifts as follows:

(1) Christmas gifts to MJL's nephews totalling £2,925 and

(2) donations made by standing order of £2,016 to the Labour Party, £321 to the Red Banner and £525 to Charter 88.

(B) A gift of £1,184,387 (which is accrued surplus income) be made and divided as follows:

(1) 60% to the Siblings in equal shares;

(2) 40% to the Charitable Beneficiaries in the same proportions as in the Will.

(C) Ongoing gifts of MJL's surplus income be made and divided as follows:

(1) 60% to the Siblings in equal shares;

(2) 40% to the Charitable Beneficiaries in the same proportions as in the Will.

(D) Ongoing payments to the Labour Party, the Red Banner and Charter 88 in line with the existing payments

79. This judgment is handed down by e mail given commitments in the summer months and the submission by Counsel of an agreed order, which order is made today. Counsel request that no hearing be listed for the handing down of judgment. The Official Solicitor requests publication of the judgment and the Applicant adopts a neutral stance. In the interests of transparency, I permit publication.

District Judge Sarah Ellington

10 July 2019