Neutral Citation Number: [2024] EWCOP 22

Case No: COP13290314

IN THE COURT OF PROTECTION
ON AN APPEAL FROM HHJ PORTER—BRYANT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2024

Before :

MRS JUSTICE THEIS DBE

- -

Between :

	CL	**Applicant**
	- and -	
	1. SWANSEA BAY UNIVERSITY HEALTH BOARD **2. LL (by his litigation friend, AB)** **3. VL** **4. SWANSEA CITY COUNCIL**	**Respondents**

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Mr John McKendrick KC and Ms Anna Bicarregui
(instructed by **Miles and Partners Solicitors**) for the **Applicant**
Mr Parishil Patel KC and Ms Rosie Scott (instructed by **NHS Wales Shared Services Partnership – Legal and Risk Services)** for the **1st Respondent**
Ms Nia Gowman (instructed by **Reeds Solicitors)** for the **2nd Respondent**
Ms Kriti Upadhyay (instructed by **Red Kite Law LLP**)
for the **3rd Respondent**

Hearing date: 21st March 2024
Judgment date: 17th April 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17th April 20204 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE THEIS DBE

This judgment was delivered in public but a Transparency Order dated 28th July 2023 is in force. 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 LL must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Theis DBE :

Introduction

1. The court is concerned with the appeal by CL from the order of HHJ Porter-Bryant dated 6 December 2023 (*Swansea Bay University Health Board v P & Ors* [2023] EWCOP 67) that discharged a previous order appointing CL as LL's deputy for personal welfare. CL is LL's mother. The respondents to the appeal are the Swansea Bay University Health Board ('Health Board'), LL by his litigation friend AB, VL (LL's father) and Swansea City Council ('local authority'). The local authority took no active part in this appeal. CL seeks permission to appeal, if that is granted, and the appeal is successful for the matter to be remitted for re-hearing. The first and second respondents opposed the appeal. The third respondent opposed the appeal save for a limited aspect of Ground 3.

2. At the time the order was made CL sought permission to appeal and a stay, which were refused by the Judge. On 22 December 2023 CL filed a COP35 appellant's notice, followed by grounds of appeal and a skeleton argument on 30 January 2024. On 14 February 2024 I made directions, listed the application for permission to appeal with appeal to follow if permission is granted on 6 March 2024. That order was varied by agreement on 1 March 2024 and the appeal was listed on 21 March 2024 when the hearing took place. Judgment was reserved.

3. The court is very grateful to all parties for the comprehensive written skeleton arguments and the excellent oral submissions during the appeal hearing. The central issue in this appeal is the inter-relationship between s16(7) and (8) MCA.

Relevant background

4. LL is 22 years with a number of diagnoses including significant learning disability, atypical autism, attention deficit hyperactivity disorder, hypermobility/low muscle tone, bowel problems, neuralgia and hydrocephalus with 2.5 shunts in place for 5 arachnoid cysts in the brain.

5. The Health Board are responsible for funding LL's care and support and the local authority is the responsible local authority.

6. LL lived with his mother CL until July 2021. LL required 2:1 support at home, difficulties were encountered in finding a care agency to provide this support. LL was moved to a care home and an application was made in July 2021 to the Court of Protection to authorise the move. The care home was intended as a temporary placement, although to date no other placement has been found and the proceedings continue.

7. In July 2018 CL applied for an order appointing her as a personal welfare deputy for LL. Both the Health Board and local authority were notified of the application, they did not object or attend the hearing.

8. On 2 April 2019 , the Court of Protection made an order under s.16(2)(b) Mental Capacity Act 2005 ("MCA") appointing CL as LL's deputy *"to make personal welfare decisions…that he is unable to make for himself, subject to the conditions and*

restrictions set out in the Act and in this order". The appointment was to *"last until further order"*. The deputyship order identified that CL may make decisions on LL's behalf in relation to:

a. where he should live;

b. with whom he should live;

c. decisions on day-to-day care, including diet and dress;

d. consenting to routine medical or dental examination and treatment on his behalf;

e. making arrangements for the provision of care services;

f. whether he should take part in particular leisure or social activities; and

g. complaints about his care or treatment.

9. The restrictions on the deputyship are those set out in s.20 MCA. The order specifies that CL "*must apply the principles set out in section 1 of the Act and have regard to the guidance in the Code of Practice to the Act"*. Secondly, the Order specifies that CL does not have authority to make decisions on LL's behalf if she *"knows or has reasonable grounds for believing that he has capacity in relation to the matter"*. Thirdly, the order specifies the restrictions in s.20(2), (5), and (7) MCA: CL does not have authority to:

"(i) to prohibit any person from having contact with him;

(ii) to direct a person responsible for his health care to allow a different person to take over that responsibility; ...

(v) to refuse consent to the carrying out or continuation of life sustaining treatment in relation to him; and

(vi) to do an act that is intended to restrain him otherwise than in accordance with the conditions specified in the Act."

10. It is the discharge of this order that is the subject of the appeal.

11. Court of Protection proceedings were commenced in July 2021 and the Judge has case managed the case since then.

12. In October 2022 the Health Board made an application pursuant to s16(8) MCA to revoke the deputyship order, supported by a statement of facts and grounds. The application was founded on allegations about CL's behaviour, including

a. Inappropriate management of finances, including withholding LL's access to his funds;

b. Incorrectly claiming benefits on behalf of LL;

c. Withholding of LL's mobility vehicle from August 2021 to April 2022;

d. Posting personal, sensitive information about LL online with inappropriate photographs/videos;

e. Failing to acknowledge and respect LL's privacy and taking inappropriate photographs of LL;

f. Continually challenging professionals involved in caring for LL and interfering with that care;

g. Intimidating and threatening staff involved with LL's care;

h. Obstructing the safe delivery of care to LL to the extent that safeguarding referrals have been necessitated;

i. Engaging in protracted and voluminous complaints correspondence with individuals, care providers and public bodies which inhibits their ability to meet the needs of LL and other service users;

j. Engaging in behaviours which have jeopardised LL's placement (as well as care packages commissioned in the community);

k. Arranging and engaging LL in activities which are inappropriate;

l. Failing to accept and acknowledge LL's wishes and feelings;

m. Pursuing a return home for LL notwithstanding the lack of available support;

n. Failing to adhere to court directions to enable proceedings to be expediently progressed and decisions made in LL's best interests.

13. Directions were made on 2 December 2022 that included for the Health Board to file a 'threshold' document setting out the allegations made against CL. The next hearing was listed on 15 May 2023 and the 'threshold' document was due 7 days before then. After liaison with the other parties the Health Board submitted a finalised fact-finding document on 24 April 2023. Following further representations from the other parties, a further document was promised prior to the hearing on 15 May 2023.

14. In the Health Board's position statement for that hearing they questioned whether a fact finding hearing would be necessary in order to reach a decision on the deputyship issue given that a return of LL to CL's home was not an option. Directions made on 15 May 2023 required the Health Board to file a revised document with responses timetabled with a composite document due by 26 June 2023.

15. At the next hearing on 18 July 2023 directions were made for a further document to be filed by the Health Board, with responses, which was done by 9 October 2023.

16. The order dated 26 October 2023 recited the following in respect of a fact finding hearing:

"i. The court expressed sympathy for the Health Board's approach to and rationale for the welfare findings sought but considered it necessary to refocus and refine the findings sought;

ii. In relation to residence, the court considered that there would be little difficulty in concluding that it would be in LL's best interests to live in an otherwise suitable placement, where the provider has identified rules and/or restrictions (in relation to contact with LL, communication with staff, or the way staff and visitors interact) in order to ensure that the placement can continue to care for LL. On that basis, it was not necessary to engage in a five-day fact-finding hearing in order to enable a placement to implement such rules or restrictions;

iii. In relation to the Health Board's application to revoke CL's Health and Welfare Deputyship for LL, the court considered that this could be dealt with by way of written submissions in advance of the December hearing, and did not require findings of fact;

iv. The court indicated that the fact-finding should be focussed on unlocking the issue of contact by addressing the practical difficulties to CL's contact with LL in the community (outside any restrictions or rules imposed by a residential provider) and issues surrounding the implementation of LL's care plan. The fact-find will therefore focus on: i) LL's contact with CL in the community, whether supported by CL and one other or by two professional carers; ii) CL's attendance at medical appointments; and iii) CL's engagement in care planning and broader decision-making about LL;

v. The Health Board will amend the Welfare Findings sought to address those three issues and reframe the accompanying schedule of evidence, adding as little as possible by way of additional references to the existing bundle and no references to anything outside that bundle."

17. Pursuant to that order the revised findings and responses were filed. At the Pre-Trial review hearing on 24 November 2023, the Health Board indicated that instead of pursuing fact finding it would seek to put in place a protocol for community contact and medical appointments. As the Judge records in his judgment at [23] there followed ten days of negotiation between the parties and four protocols were put forward: a medical clinical appointments protocol; a protocol governing contact in the community; a Christmas contact protocol; and a care planning and best interests meeting protocol. At [23] – [27] of the December judgment the Judge summarised the protocols, describing them as *'detailed, they are regimented and they provide a clear basis upon which the parties can move forward'*.

18. The Health Board filed and served a skeleton argument on 1 December 2023, which changed the basis of the application from a revocation under s16(8) to a discharge under s16(7). CL's skeleton, filed the day before, resisted the application but if the court was minded to grant it consideration should be given to varying the deputyship order so certain elements were retained, in particular the authority to consent to routine medical or dental examination and treatment on behalf of LL.

19. At the hearing the first day was reserved for judicial reading. The parties met and continued their discussions regarding the protocols. The Judge heard oral submissions

on the second day, gave a judgment on the third day and approved orders, the protocols and made further case management direction on day four of the hearing.

Legal framework

20. Section 16 MCA 2005 provides as follows:

(1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning– (a) P's personal welfare, or (b) P's property and affairs.

(2) The court may– (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or (b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).

(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that– 4 (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

(5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

(6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.

(7) An order of the court may be varied or discharged by a subsequent order.

(8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy– (a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or (b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

21. A number of cases have considered these provisions, although none that specifically deal with the inter-relation between s 16(7) and (8). For example, in *EXB v FDZ* [2018] EWHC 3456 the issue before the court was the direction sought by the property and affairs deputy not to inform ETB of the value of a settlement award. Foskett J stated in that case that any order or direction made under s 16 could be varied or discharged by a subsequent order under s16(7), particularly if there had been a change in circumstances.

22. In *YH v Kent County Council & Ors* [2021] EWCOP 43 YH applied to be made a personal welfare deputy for her sister, CB. YH was already CB's property and affairs deputy. Keehan J rejected YH's application to become a personal welfare deputy

stating at [29] that YH *'"seeks the deputyship in real terms so that she has a label, so that she has status, and so that she will be listened to and consulted'.* When YH identified decisions that she wanted to make for her sister (such as leisure and social activities and GP appointments) Keehan J noted at [30] that YH would not actually be making those decisions *"on the ground",* if she was not physically present at the time and, if she was present, she could take action *"whether or not she was a deputy".*

23. As set out in *Bennion, Bailey and Norbury on Statutory Interpretation* (7th edition) the starting point for consideration of s16(7) and (8) is the legislative text, read in context and having regard to its underlying purpose. This approach was approved in *R v Williams* [2021] EWCA Crim 745 at [53] following Leggatt LJ (as he then was) in *R (CXF) v Central Bedfordshire Council and Another* [2018] EWCA Civ 2852 [21] when he stated '*The relevant context of a statutory provision is both internal and external to the statute. The internal context requires the interpreter to consider how the provision in question relates to other provisions of the same statute and to construe the statute as a whole. The external context includes other relevant legislation and common law rules, as well as any policy documents such as Law Commission Reports, reports of Parliamentary committees, or Green and White Papers, which form part of the background to the enactment of the statute. When the strict conditions specified by the House of Lords in* Pepper v hart *[1993] AC 593 are satisfied, reference may also be made to Parliamentary debates as reported in Hansard'.*

24. In his skeleton argument Mr McKendrick KC also relies on the following additional matters regarding statutory interpretation.

25. First, in the absence of any contrary intention, the general gives way to the specific. Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision (section 21.4 *Bennion*; see Flaux LJ (as he then was) in *Secretary of State for the Home Department v JM (Zimbabwe)* [2017] EWCA Civ 1669 at [74]).

26. Second, the principle of statutory construction described as the 'principle against doubtful penalisation' is engaged (section 26.4 *Bennion – 'The rationale is that the legislature is presumed to intend that a person on whom a hardship is inflicted should be given a fair warning'*). In *R (Good Law Project) v Electoral Commission and Others* [2018] EWHC 2414 (Admin) the court approved the way the principle has been stated by Sales J in *Bogdanic v Secretary of State for the Home Department* [2014] EWHC 2872 (QB) when he stated at [48] *'The principle of strict interpretation of penal legislation is one among many indicators of the meaning to be given to a legislative provision. It is capable of being outweighed by other objective indications of legislative intention, albeit it is itself an indicator of great weight'.*

27. Thirdly, whilst the court will principally consider the language of legislation to determine the purpose, external aids to construction may play a 'secondary role' (see *De Smith's Judicial Review 9th Edition* paragraph 5.026).

28. Fourthly, regard should be had to the correct approach to how statutory codes of practice relate to statutory interpretation relying on what Leggat LJ stated in *CFX* at [24] *'Both in principle and on authority, it cannot be used for this purpose. Its*

position is analogous in this respect (and certainly not superior) to that of statutory regulations or other delegated legislation made under the Act of Parliament. Such regulations can only be used as an aid to the interpretation of the Act under which they are made if they were contemporaneously prepared, so that the draft regulations formed part of the background against which Parliament was legislating'.

The judgment

29. Having set out the background in some detail the Judge considered some of the cases he was referred to concluding at [46] that *"the case law is not such as to lead me to determine that s16(7) is not an appropriate mechanism or means by which a deputyship can be discharged".*

30. He noted in [47] that if he accepted CL's submissions it would lead to a curious position where the court would have to be satisfied as to the conduct before making an order discharging the deputyship *'even if such continued appointment were no longer appropriate or necessary for reasons other than the conduct of the deputy'.*

31. At [49] he rejected CL's case and states that it is wrong to draw a distinction between 'appointment' and 'order' in s16 and if there is a distinction, it is a "*distinction without a difference".* In [50] the Judge rejected the submission that if the court proceeds on the basis that s16(7) is a mechanism by which a deputyship can be discharged then s16(8) is rendered superfluous.

32. At [51] the Judge concluded that the question for the court is whether it is in P's best interests for the deputyship to continue, either in its current form or in an alternative form.

33. After referring to the MCA and Code of Practice the Judge deals with the submissions made by the parties between [57] - [71].

34. The Judge then concludes:

"*74. In my judgment, it is appropriate to discharge the deputyship in its entirety. Many of the decisions in respect of which authority is provided under the deputyship are now matters that are firmly before the Court of Protection or are otherwise matters in respect of which C is no longer the decision-maker, in particular residence, with whom P should live, the day-to-day diet and dress, leisure and social activities, provision of care, services and future care. To retain a deputyship in respect of those matters would be disproportionate and unnecessary and would represent an unjustifiable intrusion into P's life and decision-making. Such an order would be contrary to the principles of section 16(4) and the guidance thereto and the principles echoed through the case law.*

75. Likewise in respect of medical treatment, the circumstances are now such that the current deputyship seems to me to amount to a request for a deputyship to enable C to continue to be informed. That is provided for by the section 4(7) duty. Indeed, should any party be unaware or mistaken as to the extent of their duty under 4(7), it is now fortified by the protocols that I have proved.

76. Further, the current deputyship and proposed variation in those circumstances would, in my judgment, run contrary to the guidance provided by Keehan J in YH v Kent County Council & Ors [2021] EWCOP 43. The relevant paragraph is helpfully set out at paragraph 41 of the Health Board's position statement, where Keehan J said that YH's position in that case was one where, in effect, the applicant seeks the deputyship so that she has a label, a status and so that she would be listened to and consulted. That, in the view of Keehan J, was not an appropriate basis upon which to found an application for deputyship. He went on to say this at paragraph 32 of his judgment:

"I would be content for this order and/or the care plan to set out clear indications of the importance of the role of YH in being involved in decision making about the care and life of her sister, CB, but welfare deputyship is about making decisions for an incapacitous person. They are to be limited in time. The reality of the application is it is not to seek authority to make decisions, it is in relation to status and a desire to be taken seriously and listened to by professionals ..."

77. Paragraph 33:

"That is not, as the Official Solicitor submits, an appropriate use of deputyship. In any event, were this application based on making decisions for CB ... deputyship would be required for years to come and not, as decided by Baker J in G v E, on a very time limited basis and restricted scope ... if there was the collaborative and cooperative approach taken by all involved in making decisions about CB ... such an order and remedy would not be required. I also take account of the fact that there has been a very substantial change in circumstances in recent times."

78. Paragraph 35:

"Accordingly, I am not persuaded that it is appropriate for me to appoint YH ... The reasons for it being sought do not fall within the framework of section 16 of the 2005 Act, and it would be for an inappropriate and impermissible use of section 16 ..."

79. I also note and adopt the observations of the Health Board at paragraph 60 of the skeleton argument submitted, where they say this:

"Mark Caulfield the independent social worker's observations in his first addendum report are relevant here, at paragraph 1.37.3 of Mr Caulfield's report:

'Whoever is responsible for providing day-to-day care to P will be responsible for undertaking MCA assessments surrounding decisions which arise and subsequently best interest decisions where P may lack the capacity to make decisions. It would be impractical for C to be consulted about every decision and those supporting P will be responsible for maintaining his overall safety. They therefore must be empowered to take responsibility for his overall care as they will undoubtedly be held accountable to ensure his safety and promote his autonomy.'"

80. It seems to me that a deputyship as contended for by both C and supported by V would run contrary to those principles and indeed would amount to that impermissible use identified by Keehan J. The appropriate approach is for

consultation to be pursuant to section 4(7), supplemented by the protocols that I have approved and for that collaborative approach that Keehan J highlighted.

81. I reject the contention there is nothing before the court on which the court can make a best interests assessment. It is clear that best interests requires consideration of all the circumstances, an assessment of matters including the extent to which an order or decision intrudes into P's life. I accept the Health Board's assessment of the actual circumstances surrounding the provision of P's needs in relation to P. The fact that this order is not limited in time is one factor that the court can consider. The order provides for decision making to be vested in C when she is not in a position to make those decisions. That is a factor that the court can weigh. The effect that an order or the continuation of the deputyship would not enhance the collaborative approach required in this case with clinicians and indeed might, at worst, be detrimental to it, are relevant factors to the section 4 assessment.

82. In arriving at the conclusion that it is in P's best interests for this deputyship to be discharged, I have had regard, as Mr McKendrick encourages me to do, to the fact there is no analysis of wishes and feelings in this case, with wishes and feelings, of course, being an important factor. But, in my judgment, the submission by the Health Board and the litigation friend is a sound one in this regard: wishes and feelings on a conceptually complex matter such as this deputyship is difficult, if not impossible. One cannot extrapolate from the love that P has for his mother that he would wish for her to be deputy.

83. While the decision to discharge the deputyship may well infringe upon rights held by C, in so far as it does, it is an appropriate infringement. In arriving at the decision that I have, I have also had regard to the United Nations Convention on the Rights of Persons with Disabilities, article 12.4. But ultimately I conclude that the deputyship should be discharged since the overwhelming majority of the matters in respect of which C has authority under the deputyship are matters in respect of which she is not the decision maker, and those matters that remain are such that the role that is proposed by C under the deputyship falls foul of the guidance given in, in particular, YH v Kent by Keehan J and represent an order that is not the least restrictive that the court can make or decision the court can arrive at in this case."

Submissions

35. As regards permission to appeal, Mr McKendrick submits there is a compelling reason under rule 20.8 (1)(b) Court of Protection Rules 2017 ("COPR") to consider s 16(7) and (8) and how they relate to each other. There has been, he submits, no consistency of approach in the cases as to which provision applies on an application for discharge of a deputyship order, with the provisions being used interchangeably.

36. Three grounds of appeal are advanced: (i) the court erred in law by relying on s 16(7) MCA to discharge the deputyship order; (ii) the court erred in its approach to the discharge of the deputyship, failing to recognise the difference between granting a deputyship and discharging a validly appointed one; (iii) the court failed to carry out a detailed and comprehensive best interests analysis in respect of the evidence available as to the best interests in respect of the discharge of the deputyship order.

37. Dealing with the first ground of appeal, Mr McKendrick submits the Judge was wrong to discharge the deputyship order purely as a question of LL's best interests, without the need to apply the s16(8) test.

38. He summarised the Judge's reasoning in his skeleton argument as follows:

    i) *The case law did not support CL's section 16 (8) argument (see paragraphs 43 to 46);*

    ii) *The Court of Protection is 'agile and responsive' and s. 16 (8) does not encompass the scenario where the appointment was no longer appropriate or necessary for reasons other than the conduct of the deputy (para 47);*

    iii) *Reliance on commentary in the leading textbook Heywood and Massey (para 48);*

    iv) *It was wrong to draw a distinction between the term 'order' and 'appointment' and that this was a distinction without a difference (para 49);*

    v) *Section 16 (8) was not rendered 'superfluous' and whilst it was "odd" to have the section 16 (8) specification that oddity was not enough (para 50);*

39. In that analysis he submits the Judge overlooked the need to focus on the language and purpose of s16 and the MCA as a whole and erred because he failed to have regard to (i) a number of external guides to construction; (ii) placed too much weight on the case law which was of limited assistance; (iii) ignored Parliament's clear distinction between 'order' and 'appointment'; (iv) although there might be situations when a deputyship order may be discharged for reasons other than the deputy's conduct, where the application both initially and at the hearing was predicated on CL's conduct this could not be ignored, as Parliament had set out the test for removal in such circumstances and however agile the court is, it must follow the statutory language.

40. In his submissions Mr McKendrick focusses on five main points to support his position regarding the statutory purpose of these provisions.

41. First, the underlying purpose of these provisions is to permit deputies to make wide ranging best interest decisions on behalf of P where P lacks capacity in respect of the particular matter under consideration, whether the matter is property and affairs or welfare.

42. The MCA provides a comprehensive and robust scheme to regulate deputies to protect P. S16(2)-(4) sets out a framework for the court to be able to exercise it's discretion to appoint a deputy, namely, P lacks capacity in relation to the matter; the appointment is made in respect of a matter or matters (so can be precisely defined); the appointment is in P's best interests (s16(3)); the court is satisfied the appointment is necessary (s16(4)(a), and the powers conferred on the deputy should be limited in scope and duration as is reasonably practicable (s16(4)(b)). He submits this heightened test in s16(4)(b) underscores his submissions that Parliament did not intend the revocation of the appointment to be limited to best interests due to this additional test on appointment, supported by the provisions in s20(6) that a deputy does not have

authority to act contrary to P's best interests. In s 19 the requirements for those who satisfy the test for appointment of a deputy are set out (18 years or over; to require security be provided, and to require the deputy to submit such reports to the Public Guardian at such times or intervals as the court directs). S 58 created the office of the Public Guardian, specifying the functions of the Public Guardian, which includes to supervise deputies appointed by the court (s58(1)(c)), that can be done in a number of ways as set out in s58. These provisions include the power given to the Public Guardian to deal with representations and complaints about the way a deputy appointed by the court is exercising his powers (s58(1)(h)). For the purposes of enabling the Public Guardian to exercise his functions he is given powers under s58(5) and (6) which enable him to inspect certain records (i.e. health records) and may interview P in private. Finally, s19 sets out the restrictions on deputies, for example they must exercise their authority in accordance with ss1-4 MCA, they cannot decide issues of capacity and s20 listed other limitations.

43. In support of this statutory regime the MCA Code of practice sets out further detailed duties imposed on deputies at paragraph 8.47-8.68 (which includes a duty of care; a fiduciary duty; duty not to delegate; duty of good faith; duty of confidentiality and duty to keep accounts).

44. Having reviewed all these provisions Mr McKendrick submits *'...Parliament has set out a highly prescriptive regime for the appointment of deputies, for restriction on the authority and powers and for the Public Guardian to regulate, investigate and take action against them. It is also clear that as a matter of law a deputy has no authority to act contrary to P's best interests'.*

45. Second, he submits the language in the MCA makes it clear Parliament has made a deliberate distinction between appointment (as a deputy) and orders more generally. He draws the court's attention to the references in s16 where the sub-section refers to appoint/appointment as compared to order. He submits that distinction is made in other parts of the MCA, for example in s19 with the repeated references to 'appointment', s58(1) uses the term 'appointed' in respect of deputies and s16 (7) uses the term 'discharge an order' whilst s16(8) uses the different term to 'revoke' an appointment. In his oral submissions he accepted the appointment of a deputy is set out in an order of the court.

46. Third, he relies on the principle of construction that general provisions do not override specific ones (*'generalia specialibus non derogant'*) with the consequence that s16(7) cannot override s16(8). He recognises court orders can be varied as best interest decisions under s16(3) however the appointment of a deputy or the variation of the powers conferred he submits *'can only be discharged/varied if the section 16(8) test is met as the deputy has no authority to act contrary to P's best interests and is subject to the significant oversight of the Public Guardian. Therefore, it follows that if the deputy has no authority to act contrary to P's best interest why would Parliament provide the court the power to discharge a validly appointed deputy because the discharge is in P's best interests.'* He submits on a proper reading of s16(7) and (8) the general power in s16(7) cannot be used to undermine the specific power (s16(8)) in the context of revocation of a deputyship appointment. Whilst he acknowledges the purpose of the MCA is to provide a statutory scheme to protect P he submits deputies appointed under the MCA are entitled to protection as to how they carry out their role.

47. Fourth, he submits the rule against doubtful penalisation applies and a deputy is entitled to the protection of s 16(8).

48. Fifthly, he submits the external aids of construction support his submissions. He accepts the reference to the Law Commission was not put before the Judge below. He summarises the external aids in his skeleton as follows:

    i) *First, the Law Commission report (Mental Incapacity Law Com No. 231 dated 28 February 1995) is the report drafted by Professor Brenda Hale which led to the passage of the 2005 Act. First, the report makes clear there is a distinction between "orders and appointments". This is clear from paragraph 8.9 of the Report which is entitled "Orders and Appointments" and which states: "Those of our respondents who commented…there should be no restriction on the making of specific order (as opposed to appointments)….". The Report then recommends that the legislation permit that "the court may make any decision….appoint a manager" (the term deputy came later).*

    ii) *the Report also supports the appellant's interpretation in respect of section 16 (8) as the report states at paragraph 8.44: "The manager's duty will otherwise match that of all those who act under the new legislation, being a duty to act in the best interests of the person concerned, having regard to the statutory factors. The court will have power to vary or discharge the order appointing a manager who fails to do so."*

    iii) *Secondly, the Explanatory Notes also support the appellant's interpretation. It states: "The court can always vary or discharge its orders and subsection 8 provides that it has power to take away or alter a deputy's powers if the deputy is overstepping his powers or not adhering to his best interests obligations."*

    iv) *Furthermore the MCA Code of Practice clearly supports the appellant's interpretation. The 'quick summary' to Chapter 8 states: "The Court of Protection has powers to…remove deputies or attorneys who fail to carry out their duties." Further, the Code states at paragraph 8: 13 that the Court of Protection has power "to remove deputies or attorneys who act inappropriately".*

49. Mr McKendrick submits there may well be other situations where a deputyship order needs to be discharged, for example where they want to stand down. If the deputy did not wish to continue to act they would not be in a position to act in P's best interests so, he submits, the s16(8) test would be met. However, he submits, in the detailed and complex statutory framework that applies to and regulates deputies Parliament clearly set out the test for revocation or varying of the appointment of the authority contained on appointment in s16(8). In this case no breach of the complex duties and statutory scheme applied by the MCA and the Code of Practice were established and the Public Guardian had raised no concerns.

50. In the event that he is not successful in relation to his first ground of appeal Mr McKendrick dealt with grounds two and three together. He submits the best interest evaluation was wrong for two reasons: (i) the Judge conflated the decision to revoke with whether it was in LL's best interests for CL to be his welfare deputy, and (ii) he

failed to carry out a detailed evaluation of the s4 factors and did not have proper evidence before him from the Health Board to carry out that evaluation.

51. He summarised the way the Judge dealt with best interests at [74] – [83] of his judgment as follows:

i) *many of the areas of authority given to CL were now before the court and it was 'disproportionate and unnecessary' to retain the deputyship and was an 'unjustifiable intrusion' into LL's life and decision-making;*

ii) *in respect of medical decision-making this was no more than a duty to be informed;*

iii) *the appointment was contrary to the principles identified by Keehan J in YH v Kent and nothing further than consultation was required;*

iv) *the deputyship would not enhance a collaborative approach;*

v) *it was "difficult if not impossible" to place weight on P's wishes and feelings;*

vi) *the discharge of the appointment was a justified interference in CL's Article 8 ECHR's rights.*

52. He submits that in reaching these conclusions the Judge erred in (i) failing to have regard to the detailed statutory framework in the MCA that governed the deputyship, this was particularly so where no breach of these duties had been established. (ii) the Judge had insufficient evidence before him to carry out a best interests analysis, including evidence as to how decision making would be undertaken if the order was discharged. It was oversimplistic to assume the MCA Code of Practice would supplant the basis of the alternative decision making, thereby denying him the opportunity to carry out an evaluation of the two competing options in order to consider them against the statutory framework. (iii) LL's wishes and feeling had not been properly considered in circumstances where he had been brought up and lived with CL for many years and had only been in his current placement relatively recently; (iv) he erred in his approach in asking whether it was in LL's best interests to have a deputy appointment as opposed to whether it was in LL's best interests for CL to be discharged as his deputy, this was demonstrated by the focus by the Judge on appointing a deputy who wishes to be consulted; (v) in referring to the 60 or so medical appointments attended by CL he failed to give proper weight that she attended as LL's decisions maker and was not simply consulted. Due to the complexity of LL's position the Judge failed to properly analyse and balance the structure that would replace it; (vi) he failed to give any adequate reasons for rejecting the narrowed authority of the alternative deputyship which in turn impacts on his s4 evaluation.

53. Mr Patel KC and Ms Rosie Scott, on behalf of the Health Board, resist both the application for permission to appeal and, if permission is granted, the appeal. In essence they submit that the Judge was not wrong in concluding that he could discharge the deputyship order under s 16(7), was not limited to only doing so under s16(8) and there was no material error in his best interests evaluation.

54. In relation to the first ground of appeal Mr Patel submits the plain language of s16(7) and (8) support the Judge's conclusion in determining that s16(8) complemented the power under s16(7), as it provided specific non-exhaustive circumstances when the court may consider revoking the appointment or varying the powers. In the Health Board's skeleton they submit the Judge's conclusion '*…is a straightforward and simple interpretation of s.16(7) and (8) MCA 2005 which promotes the purposes of the Act as a whole. His interpretation equips the court with flexible powers to promote P's best interests and autonomy by varying or discharging a deputyship order in P's best interests in circumstances where there is no relevant "s.16(8) behaviour" by the deputy. CL is wrong to submit otherwise, and she fails to explain how her restrictive interpretation of s.16(7) and (8) promotes the Act's purposes.'*.

55. The submissions on behalf of CL are, Mr Patel submits, inconsistent as the restrictive interpretation that is a central part of their appeal is at odds with the alternative case advanced on her behalf before the Judge below whereby she sought to vary her deputyship without any relevant 's16(8) behaviour'. Mr McKendrick's concession in this court that s16(7) enables the court to vary a deputyship order wholly undermines their case, as if that is accepted there is no rational basis for disapplying that general power to an application to discharge the deputyship order.

56. Mr Patel submits there is no principled basis for drawing a distinction between 'orders' and 'appointments', it is not consistent with the other provisions of the MCA, the Explanatory Notes or Code of Practice and leads to difficulties in application across the MCA. The provisions of s16(7) are clear, they confer broad powers that are subject only to the proviso under s16(3) that the court has to exercise those powers in accordance with the MCA and, in particular, s 1 (the principles) and s4 (best interests). As Mr Patel submits *'There is no language in s16(7)MCA 2005 which restricts its application to any particular subsection, or to any particular action by the court under s16'.* He submits this is significant as *'...there are three subsections in s.16 MCA 2005 which permit the court to take six different actions: i. S.16(2)(a): the court can make "a decision" on P's behalf; ii. S.16(2)(b): the court can "appoint" a deputy to make the decision; and iii. S.16(5): provides that the court may make "further orders" or give "directions" or "confer such powers" or "impose duties" on a deputy as is necessary or expedient for giving effect to or in connection with anything done under s.16(2).'* In these circumstances if Parliament had intended to restrict the court's broad powers under s16(7) to when it acted under a particular subsection it would have said so expressly. As Mr Patel sets out in the skeleton argument s16(7) *'...should properly be interpreted as a general, broadly-worded power, which empowers the court to vary or discharge any order that it makes pursuant to any of its powers under s.16, whether under 16(2)(a), s.16(2)(b), or s.16(5). This sensible interpretation of the word "order" encompasses all actions that the court can take under s.16(2), (5) or (6): orders, decisions, appointments, directions, "conferring powers" and "imposing duties". All of these actions the court can take under s.16 are "made pursuant to an order" (as the judge below noted, §49, judgment [17]). Any of these actions by the court properly fall within the language in s.16(7) MCA 2005 as being an order of the court" and so can be "varied or discharged" by a subsequent order (as provided for in the section).*

57. Mr Patel submits s 16(8) provides complimentary, non-exhaustive examples to s16(7). The Judge was correct in his analysis in the judgment below that the words 'in

particular' in s16(8) do not connote an exhaustive list of circumstances in which a deputyship may be revoked or discharged. The structure and language of s 16(8), following the general power in s16(7), it provides *'The court* ***may, in particular***, *revoke the appointment...if it is satisfied'* (emphasis added) of circumstances concerning the deputy's behaviour set out in (a) and (b). Mr Patel submits the combination of the subsections being consecutive, coupled with the phrase *'may, in particular'* supports the discrete power in s16(8) being in addition to those in s16(7). The phrase *'may, in particular'* on any ordinary understanding of language are not words that restrict, rather they *'empower further additional choices'*. In addition, he submits s 16(8) in fact provides an explanation regarding the powers under s16(7). First, s 16(8)(a) and (b) make clear the court can revoke or vary the deputyship when the deputy contravenes '*the authority conferred on him'* (s16(8)(a)), this is whether or not the deputy's behaviour was in P's best interests. The two grounds under s16(8) are mutually exclusive. In addition, s16(8)(b) clarifies that the court can consider the *'proposed'* behaviour of a deputy, as well as past and present behaviour. Again, providing further clarification to the general power under s16(7). This, Mr Patel submits, supports the Judge's conclusions at [50] of his judgment that s16(7) and (8) each have useful separate functions.

58. This analysis, Mr Patel submits, finds support in the other provisions in s16. S16(3) makes clear the courts powers under s16 are subject to the provisions in s16(3), meaning that the court can only exercise its powers under s 16 subject to limitations in other provisions in the MCA and by including the words *'in particular'* in s16(3) Parliament wished to draw particular attention to the provisions in ss 1 and 4. In doing that they do not prevent any other provisions in the MCA from imposing limitations on the court's powers under s16. Further, the court's powers under s16(1) and (2) to make decisions (itself or via a deputy) on P's welfare or property and affairs are described in s16(1) and (2). How those powers can be used are further specified in non-exhaustive lists in ss 17 and 18, which both use the term *'in particular'* providing lists to illustrate, not limit, how the powers can be used. This is supported by the Explanatory Notes that refers to the lists in ss17 and 18 as being non-exhaustive and indicative lists. To that extent Mr Patel submits the Judge was mistaken to refer to the provision of s16(8) as an *'oddity'* as to how it relates to s16(7), as it is in other parts of the MCA.

59. Further, Mr Patel submits there is nothing in the language used in s16(8) which indicates it is a gatekeeping or stand alone provision. It does not have the same language as in s16(3), which has that function. This is further supported when considering the court's powers to revoke a lasting power of attorney ('LPA'), where the provisions of s22(3) are expressly limited. The court cannot act under s23(4) unless certain matters are established, this distinguishes the framework in s16(7) and (8) that do not limit the court's powers to terminate a deputyship.

60. As Mr Patel sets out, this difference is wholly consistent with the key purpose of the MCA, to promote P's autonomy. In relation to an LPA P will have been involved in selecting their LPA donee and deciding the extent of their decision-making powers, by contrast P would have had limited or no involvement in choosing a deputy or the extent of their decision-making powers.

61. Mr Patel submits the interpretation made by the Judge of s16(7) is consistent with, and accords with, the purpose of s16 and the MCA. The purpose of s16 is to establish

a broad set of powers to make decisions on P's behalf, with built in flexibility to cover the many different situations it could apply to in the context where P has lost capacity and a decision must be made. The Judge was correct when he concluded at [47] that "*If I were… to proceed on the basis that discharge could only occur in the circumstances set out within 16(8), it would lead to a curious position whereby the court would have to be satisfied as to the conduct set out therein before making the order discharging even if such continued appointment were no longer appropriate or necessary for reasons other than conduct of the deputy. The Court of Protection is by necessity an agile and responsive court. It makes orders that reflect changing circumstances to promote the needs and best interests of P. It would not be consistent with that or the overriding objective if the court could not discharge a deputyship when the best interests of P require it, notwithstanding that there is not the conduct under s.16(8).*"

62. Mr Patel submits it is notable that in his submissions Mr McKendrick is not able to identify how the restrictive interpretation sought of S16(7) promotes P's best interests, or the wider aims of the MCA. The focus of his submissions is more on protecting the deputy.

63. To support the Health Board's submissions in seeking to uphold the Judge's decision they illustrate the position by providing examples where it might be in P's best interests to vary or discharge a deputyship, absent any relevant s16(8) behaviour which, they submit, amply demonstrates that the appeal should not succeed. The examples relied upon are:

(i) P regaining capacity. Parliament can't have intended that in those circumstances for a deputyship order, even nominally, to remain in place. PD23B COPR supports that, as it provides that in the event of P regaining capacity the procedure to discharge an order made, including an order appointing a deputy, is by filing a COP9 application.

(ii) A deputy wishes to withdraw by reason of illness or retirement. Such circumstances cannot reasonably be interpreted as *'behaving in a way that contravenes the authority conferred…or not in P's best interests'*.

(iii) A deputy wishes to withdraw because relationships have deteriorated even though they continued to act in their authority and in P's best interests. Again, it could be in P's best interests to discharge the deputyship, and contrary to P's best interests for the court to be unable to act in such circumstances. In *Kambli v AR and the OPG* [2021] EWCOP 53 Senior Judge Hilder made clear that when dealing with such applications they should not be granted as a default response, but the particular facts of the case considered. In that case HHJ Hilder concluded that that the deputyship should be discharged as that was in P's best interests, not because of the deputy's 'behaviour' under s16(8).

(iv) A more suitable deputy becomes available. This is what Senior Judge Lush did in *Re RP* [2016] EWCOP 1 as there was an alternative deputy who was more suitably qualified for the particular circumstances of the case, such change was in P's best interests and no s16(8) behaviour was involved.

(v) The appointment is contrary to P's wishes and feelings. Again, this is a situation that can arise (as in *Essex CC v CVF* [2020] EWCOP 65) where no s16(8) conduct arises.

(vi) Where the deputy seeks further powers. This may arise without there being any s16(8) behaviour. This was the situation in *EXB* where the deputy sought further direction from the court as to whether he could refrain from informing P about the level of the financial award in his favour. This was expressed to be done under s16(7).

64. Mr Patel takes issue with the reliance on the principle that general provisions do not override specific ones. As set out above, put simply, he submits s 16(7) and (8) can be interpreted together in the same way as similar constructions under the MCA of a broad power followed by non-exhaustive examples of that power.

65. Reliance on the submissions that the court does not need a power to discharge a deputyship in P's best interests due to the framework provided by the MCA that the deputy could not lawfully act without acting contrary to P's best interests leaves uncertainty and the better interpretation is that the court has power to discharge a deputyship when it is in P's best interests.

66. Mr Patel submits that the conclusions reached by the Judge are supported by the Explanatory Notes, although they can only be a guide. For example, under the heading dealing with s16 paragraph 69 states *'The court can always vary or discharge its orders and subsection (8) provides that it has power to take away or alter a deputy's powers if the deputy is overstepping his powers or not adhering to his best interest obligations'*. The Code of Practice provides guidance, but is not determinative. Mr Patel submits at paragraph 8.69, under the heading 'Who is responsible for supervising deputies?' it states that *'The court can cancel a deputy's appointment at any time if it decides that appointment is no longer in the best interests of the person who lacks capacity'*. This is a clear reference to the broader power in s16(7), it does not refer to the deputy's behaviour and refers to cancelling the deputyship in P's interests at *'any time'*.

67. Finally, under the first ground of appeal, Mr Patel submits the reported cases support the Judge's conclusions and the Health Board's submissions. Three reported cases expressly refer to exercising the power to discharge or vary a deputyship under s 16(7) (*Long v Rodman and Others* [2012] EWHC 347 per Newey J [17]-[32], *GGW v East Sussex County Council* [2015] EWCOP 82 Senior Judge Lush [18], [22]-[23] and *EXB (protected party) v FDZ* [2018] EWHC 3456 (QB) Foskett J [40]-[43]). In two further cases the court terminated deputyships on a best interest basis (without referring to the deputy's behaviour) by purportedly exercising a power under s16(8) (*EB v RC* [2011] EWHC 3805 (COP) per Senior Judge Lush at [41]-[44] and [47]-[51] and *Essex County Council v CVF* [2020] EWCOP 65 per Lieven J [24]-[25]). In three other cases the court terminated deputyships as being in P's best interests without any analysis of its powers under s16 (*Re RP* [2016] EWCOP1 per Senior Judge Luch at [29]-[35] and [40]-[45], *Re A* [2020] COP 38 per Hayden J [30]-[34] and *Kambli v AR and Public Guardian* [2021] EWCOP 53 per Senior Judge Hilder at [35]-[43]). In *AY v Hertfordshire Partnership NHS Foundation Trust & Co* [2015] EWCOP 36 District Judge Hilder (as she then was) exercised the court's power to revoke the deputyship under s 16(8) in circumstances where the court had concluded that the deputy had behaved, or was proposing to behave contrary to P's best interests.

As Mr Patel observes, there is no issue about that power, the issue in this case is whether that is part of a broader power under s16(7), an issue that was not considered in *AY.*

68. In the Health Board's skeleton argument they submit the Judges conclusion at [49] of the judgment that the distinction that the appellant sought to make between an order and appointment in s16 is, if it is established, a distinction without a difference as '*any appointment is made pursuant to an order'*. The Judge was right to conclude deputyship appointments are made by way of an order, they are contained in orders, they are amended, varied or discharged by further order. The order is the vehicle used by the court for conveying its decisions. In his oral submissions Mr McKendrick accepted this. As Mr Patel sets out in their skeleton argument *'This straightforward approach also has the merit of consistency with the language of the legislation and the structure of s.16.'* This is wholly consistent when considering these terms in the context of appeals under s53(1) and parts 20 and 13 COPR. As a result, Mr Patel submits that even limiting the different terms in s16 Parliament did not seek to make deliberate and overly fine and forensic distinctions in the language as the appellant submits, and it is clear that an appointment of a deputy is an order appointing a deputy.

69. Turning to the second ground of appeal Mr Patel does not accept the submission that the judge conflated two issues. The focus of the Judge's attention was on the discharge and not the appointment and in considering the application it was necessary for him to consider and contrast both situations, whether the deputyship remained in place or was discharged. The court needs to consider the impact on P of either granting or refusing the application (per Hayden J in *Re A [34]).* At [76] – [77] the judge considered the options, including the proposed variation, and was entitled to reach the conclusion he did.

70. As regards the third ground, Mr Patel submits the Judge was exercising his evaluative judgment of the relative facts and making a discretionary order. He was entitled to reach the conclusion he did and considered all the relevant circumstances as required by s4. This court should not interfere with the decision unless it is demonstrated the Judge had erred in principle or reached a conclusion that was wrong. This was, Mr Patel submits, a paradigm evaluative judgment.

71. Ms Upadhyay, on behalf of VL, limited her submissions to the third ground of appeal. VL supported CL's appeal limited to that ground in respect of paragraph 4(d) of the deputyship order only (consenting to routine medical or dental examination and treatment on LL's behalf) as he relies on CL to keep him informed of LL's complex medical picture. She focuses her submissions on [76] of the judgment which does not, in her submission, accurately reflect the position on the ground. CL has been entirely collaborative regarding medical appointments during the two and half years the deputyship had been in place. She submits the judge erred in relying on the protocol at [24] of the judgment, as it was not intended to be a replacement for a best interest order. When considering the protocol it says nothing about who is responsible for relevant information passing between clinicians, that was not the purpose of the protocol.

72. She submits the three options that were before the Judge were (i) the deputyship order remains in place, (ii) it could be revoked, or (iii) it could be varied in the terms

advanced by CL. Ms Upadhyay submits there was no best interest analysis of the three options. The Judge did not put his mind to the third option in [81], for example could the variation enhance the collaborative approach.

73. Ms Gowman, on behalf of LL through his litigation friend, fully supports the submissions on behalf of the Health Board as set out in her detailed skeleton argument.

Discussion and decision

74. The main focus of Mr McKendrick's skilful and comprehensive written and oral submissions relate to the first ground based on statutory interpretation, although he candidly acknowledged that the correct interpretation of the provisions that are under the spotlight in this appeal are not entirely free from doubt.

75. There is no real issue between the parties as to the relevant principles of statutory interpretation outlined above, the dispute centres on their application in this case and whether the Judge was wrong in reaching the conclusions he did. The task of this court is limited to considering (i) whether permission to appeal should be granted, and, if so, (ii) whether any of the grounds of appeal are established.

76. I am satisfied that permission to appeal should be given in this case on all three grounds on the basis that the issues raised, particularly relating to the first ground of appeal, have not been expressly considered before. The cases that have considered s16(7) and (8) have not always addressed them in a consistent way. I recognise that in many of those cases the court did not have the benefit of the detailed legal argument I have had in this case.

77. Turning to the substance of the appeal, the court is reminded that this is an appeal, and can only interfere with the decision if it is demonstrated that it was wrong in accordance with rule 20.14(4)(a) COPR, namely the court should only allow an appeal where the decision of the first instance judge was wrong.

First ground of appeal

78. Mr McKendrick's overarching submission on ground one is that the Judge was wrong to reject their arguments in relation to statutory interpretation of the relevant provisions.

79. In his judgment the Judge analyses the competing arguments regarding the interpretation of s 16(7) and (8) and sets out his conclusions at paragraphs [46] – [50].

80. The Judge notes at [56] that personal welfare deputyship orders are rare but the focus must remain on the words of the statute.

81. Having carefully considered the detailed arguments in this case I am satisfied the appeal on ground one should be dismissed for the following reasons:

(1) A central plank of Mr McKendrick's submissions is that with the comprehensive framework in the MCA in ss 19, 20 and 58 it is not surprising that the grounds for revoking are more limited than a general best interest provision in s16(7), placing heavy reliance on the principle that general provisions do not override special ones

and seeking to draw a distinction between the terms '*appointment*' and *'order'* in s16. I agree with Mr Patel that position was significantly undermined with the concession by Mr McKendrick that an appointment of a deputy is set out in an order and that an ability to vary the deputyship order was retained in s16(7) but not to discharge that order, as that could only be done under s16(8).

(2) The conclusion reached by the Judge in [49] that it was wrong *'to draw a distinction between appointment and order. It is, if there is a distinction, a distinction without a difference. It is in my judgment plain that any appointment is made pursuant to an order. Accordingly, s16(7) is engaged.'* was, in my judgment, justified and this is now effectively conceded by Mr McKendrick. I accept Mr Patel's submission that s16(7) should properly be interpreted as a general, broadly-worded power, which empowers the court to vary or discharge any order that it makes pursuant to any of its powers under s.16, whether under 16(2)(a), s.16(2)(b), or s.16(5). As Mr Patel convincingly submits this sensible interpretation of the word "order" encompasses all actions that the court can take under s.16(2), (5) or (6): orders, decisions, appointments, directions, "conferring powers" and "imposing duties". Any of these actions by the court under s16 are made "pursuant to an order" and properly fall within the language in s.16(7) MCA 2005 as being an "order of the court" and so can be "varied or discharged" by a subsequent order (as provided for in the section).

(3) The Judge's conclusion in [50] is, in my judgment, also entirely justified when he states *'The words 'in particular' featuring within s16(8) do not connote an exhaustive list of circumstances in which a deputyship may be revoked or discharged.'* Mr Patel's submissions to this court, which I accept, compellingly demonstrate that in fact what the Judge considered was an oddity, to have a specification under s16(8) together with a generality under s16(7), is not the case, as the language used in s16(8) that the court *'may, in particular'* demonstrates, on a plain reading, that it is not an exhaustive list in s16(8). That submission is supported by provisions in the MCA (such as ss 17 and 18) when compared with other provisions (such as s22(3) which expressly limits the court's power to revoke an LPA), is wholly consistent with the underlying purpose of the MCA in the way Mr Patel outlines, and is supported by the terms of the Explanatory Notes and the Code of Practice.

(4) I reject Mr McKendrick's over reliance on the scheme within the MCA to regulate deputies to underpin his submissions regarding the interpretation of s16(7) and (8).His contention that "*if the deputy has no authority to act contrary to P's best interest why would Parliament provide the court with the power to discharge a validly appointed deputy because the discharge is in P's best interest*" rings hollow when such an interpretation is considered in the light of the various compelling examples Mr Patel listed in his submissions. If Mr McKendrick's submissions are correct that would result in the court being unable to discharge the deputyship order in the circumstances listed by Mr Patel, when P's best interests demands such an order is made. To accept Mr McKenrick's submissions would wholly undermine the purpose of the MCA. The justification given by Mr McKendrick of any perceived unfairness for the deputy does not stand up to scrutiny in circumstances where the deputy can fully engage and participate in the process that results in any decision.

Second ground of appeal

82. Turning to the second ground of appeal, that the Judge failed to recognise the difference between granting a deputyship and discharging a validly appointed one, this also, in my judgment, fails for the following reasons:

(1) In his judgment at [52] – [56] the Judge set out the legal framework and relevant guidance for granting a deputyship and between paragraphs [56] – [73] the competing contentions of the parties as to discharging the deputyship.

(2) In his reasoning at [74]-[83] the Judge's focus was rightly on discharge, as that was the application he was being asked to determine. He clearly had in mind the context in which deputyships are granted but his analysis was on balancing the impact on LL of either granting or refusing the application, and the relevant competing considerations. This is well illustrated by what he set out at [74] when he stated: *'In my judgment, it is appropriate to discharge the deputyship in its entirety. Many of the decisions in respect of which authority is provided under the deputyship are now matters that are firmly before the Court of Protection or are otherwise matters in respect of which [CL] is no longer the decision-maker, in particular residence, with whom P should live, the day to day diet and dress, leisure and social activities, provision of care, services and future care. To retain a deputyship in respect of those matters would be disproportionate and unnecessary and would represent an unjustifiable intrusion into P's life and decision-making. Such an order would be contrary to the principles of section 16(4) and the guidance thereto and the principles echoed through the case law.'* There the Judge was carefully weighing in the balance the impact on LL of retaining or discharging the deputyship. He then went on from [75] to consider the proposed variation and reached the conclusion he did at [80] in rejecting the proposed variation and considered the *'appropriate approach is for consultation to be pursuant to section 4(7), supplemented by the protocols'* and for there to be a collaborative approach.

(3) Those conclusions reached were securely founded, and the Judge clearly explained reasons that underpinned them.

Third ground of appeal

83. The third ground of appeal contends the Judge failed to carry out a detailed and comprehensive best interests analysis in respect of the evidence available as to the best interests in respect of the discharge of the deputyship order.

84. In considering this ground the court has rightly been reminded that this is a discretionary decision reached by the Judge who has been the allocated Judge dealing with this case for some considerable time.

85. He set out at [81] that he accepted the Health Board's assessment of the actual provision of P's needs and the reality that the order provides for *'decision making to be vested in [CL] when she is not in a position to make those decisions'* and that the *'continuation of the deputyship would not enhance the collaborative approach required in this case'*. He refers to the fact that there is no analysis of wishes and feelings but accepted the submissions of the Health Board and on behalf of LL that in the circumstances of this case *'wishes and feelings on a conceptually complex matter such as this deputyship is difficult, if not impossible. One cannot extrapolate from the love that P has for his mother that he would wish for her to be his deputy.'*

86. I am satisfied that this ground of appeal should also be rejected for the following reasons:

(1) The Judge considered all the relevant matters in undertaking the best interest evaluation, he had been the allocated Judge for some time, had extensive knowledge of the case and was entitled to reach the conclusions that he did in [81] that he had sufficient evidence to carry out a best interest analysis.

(2) I reject the submission that the Judge applied an 'off switch' to LL's wishes and feelings. He recognised in the judgment at [5] and [82] the very strong and loving relationship between CL and LL before setting out his rationale for accepting the submissions on behalf of the Health Board and litigation friend regarding wishes and feelings. He did not apply an 'off switch' to this important issue but rather concluded that in the context of his long standing involvement with the case this was not a matter where LL's wishes and feelings would assist him. A conclusion he was entitled to reach.

(3) The Judge clearly had in mind the alternative decision making structure in the absence of the deputyship as he explicitly referred to the protocols, which he had detailed knowledge of, as providing for CL's involvement in medical appointments and care planning and the Judge accepted, as he was entitled to, the Health Board's and litigation friend's submissions that the usual s5 MCA and collaborative decision making structures would apply, with appropriate decisions being taken by relevant clinicians, which is what the protocols were designed to facilitate.

(4) The Judge considered the proposed variation of the deputyship and rejected it concluding that it would be better for LL not to vary but to discharge it in favour of the collaborative and consultative approach preferred by the MCA overall.

(5) Each of these conclusions the Judge was entitled to reach.

87. Drawing the threads together the Judge was right to conclude in his careful and well-reasoned judgment that s16(7) provides the court with a broad discretion to vary or discharge a deputyship order and is not limited in its application, save that it is subject to the provisions of s16(3), namely the principles in s1 and s4 best interests. Section 16(8) is a non-exhaustive provision which supplements s16(7).

88. Permission is given to appeal and the appeal is dismissed.