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Neutral citation number: [2026] EWCOP 42 (T2)

Case No: Various

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF VARIOUS APPLICATIONS

By Her Honour Judge Hilder

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

Date: 10th September 2026

IN THE MATTER OF VARIOUS APPLICATIONS

IN RESPECT OF 'DIRECT PAYMENTS'

Hearing: 31st July 2026

Ms. Victoria Butler-Cole KC and Ms. Arianna Kelly (instructed by Apricity Law, Boyes Turner LLP, Anthony Gold Solicitors & EMG Solicitors) for the applicant deputies
Mr. Alexander Drapkin (instructed by the Public Guardian) for the Public Guardian
Ms. Georgia Bedworth (instructed by the Official Solicitor) for the Official Solicitor

This hearing was conducted in public subject to transparency orders made separately in respect of each matter. The judgment was formally handed down on 10th September 2026, all parties

having been excused attendance from that hearing. It consists of 70 pages, and has been signed and dated by the judge.
The number in square brackets and bold typeface refer to pages of the hearing bundle or, where the number is preceded by 'A', to the page of the related authorities bundle.

JUDGMENT

A. THE ISSUES FOR DETERMINATION

1. In *Lumb v. NHS Humber & North Yorkshire ICB* [2024] EWCOP 57 (T2) it was determined that:

    a. management of Direct Payments under The National Health Service (Direct Payments) Regulations 2013 was not within the 'general authority' of a property and affairs deputy because compliance with those Regulations required some decisions to be made of welfare-type;

    b. the Court of Protection could appoint a person to manage Direct Payments under those Regulations but it would require specific authority encompassing aspects of both the welfare and the property and affairs streams of the jurisdiction;

    c. on the facts of that case no deputyship appointment was required, case managers being available and willing to manage the Direct Payments by authority derived directly from the Regulations themselves.

2. There are now seven applications to be determined which together seek to achieve clarification of whether the Court of Protection can appoint deputies with authority to manage Direct Payments payable under a range of schemes; and, if so, the terms of the authority required.

3. These seven applications have been made by professional deputies who :

    a. are already managing Direct Payments, in what they consider to be their deputyship capacity;

    b. would all be unwilling to manage Direct Payments outside a deputyship appointment;

    c. unanimously contend that the *Lumb* decision was wrong in its conclusion that welfare-decisions are involved in the process of managing Direct Payments in accordance with regulatory requirements;

    d. seek, if they do not have it already, retrospective and prospective authority to manage Direct Payments.

    Making common cause, and in the interests of proportionality as to costs, the applicants have instructed a single team of representatives.

4. The Public Guardian, who has statutory obligations to supervise deputies, has been joined as respondent to each of these seven applications. The Official Solicitor has accepted the Court's request to act as *amicus curiae* within these proceedings, and was so appointed by order made on 25th January 2026.

5. In the parlance of the Mental Capacity Act 2005, the person who benefits from Direct Payments is '**P**'. For simplicity, in this judgment I shall adopt an equivalent approach, referring to the public body which 'foots the bill' of Direct Payments as '**F**', and the person who receives/manages the Direct Payments as '**R**'.

B. THE SEVEN APPLICATIONS

6. AH 13330937

   a. AH was born on 28th February 2005 and so is now 21 years old. She lives in a privately rented property with her mother and siblings. She sustained brain injury in a road traffic accident in 2012 and was awarded damages via a High Court settlement approval order made on 19th November 2024. The award included an amount in respect of annual deputyship costs, quantified at £23 000 per year from year 4. In due course, the damages will fund the purchase and adaptation of a property for AH.

   b. AH's current care package is made up of both family and professional carers. The Care Act care plan identifies (at page 35) that AH receives funded support of "104 hours/week (Monday – Thursday between 9am and 9pm and Friday at 10am until Sunday at 6pm)". The overall care costs are approximately £110 000 per year.

   c. There has been a series of deputyship appointments for AH:

      i. by order made on 14th February 2019, Michael Stirton of Greenhouse Stirton & Co Solicitors was appointed as property and affairs deputy for AH with authorities in standard terms;
      ii. by order made on 10th December 2020, the Stirton appointment was discharged and Foot Anstey Trust Corporation was appointed as replacement deputy, again in standard terms. (The period of this trust corporation deputyship included an application relating to welfare concerns, and an application relating to an appeal in respect of an EHCP plan);
      iii. by order made on 31st July 2025, the trust corporation appointment was discharged and Stacey Bryant and Asha Beswetherick of Apricity Law Limited were appointed jointly and severally as replacement deputies, again in standard terms. (The period of this deputyship has included orders to resolve issues about costs arising in respect of the EHCP.)

   d. AH has been receiving Direct Payments since 28th August 2023, so *before* the High Court approval order was made. That order includes reference in its schedules to a reverse indemnity from AH's deputy:

      i. the current deputy has informed the Court that, without this reverse indemnity, "the Defendant was refusing to settle", and therefore she

considers that, owing to the reverse indemnity, she is "obligated to seek DPs" [**ps para 6(e)**];

ii. AH's Direct Payments are made via two different schemes:
- the Care Act Direct Payments are approximately £86 000 per year, which is roughly 78% of the care costs;
- the SEN Direct Payments are approximately £99 000 per year. The reverse indemnity does not apply to these payments [**ps para 6(e)**].

e. By COP1 application dated 16th September 2025 [**AH1-13**], Stacey Bryant as deputy sought "directions concerning retrospective authority required in respect of the costs of receiving and managing Direct Payments". The transparency order was made on 24th October 2025.

f. The deputy's costs of managing AH's care package are said to be about £9 500 inclusive of VAT. Of that figure, approximately £2 370 inclusive of VAT "is the cost of liaising with the Local Authority concerning both sets of DPs" [**ps para 6(e)**].

g. **F** has indicated that it might be willing to pay a rate of £60 - £88 per week to organise the whole package of support for AH, and if no one was available to manage Direct Payments, it would directly commission care but would not be able to operate a mixed public and private package.

7. SF 13080340

a. SF was born on 25th December 1999 and so is now 26 years old. He lives with his parents and brother in their family home. SF sustained brain injury at birth, causing cerebral palsy and severe learning difficulties. He is non-verbal. He was awarded damages via a High Court settlement approval order made on 15th January 2019.

b. SF's current care package provides 24-hour care 7 days a week from a team of nine directly employed support workers, with his parents also providing care. The total care costs are approximately £375 000 per year.

c. There has been a series of deputyship appointments for SF:

i. by order made on 21st July 2017, Ruth Meyer of Boyes Turner LLP was appointed as property and affairs deputy for SF with authorities in standard terms;

ii. by order made on 28th February 2019, Alexander Wright also of Boyes Turner was appointed to act jointly and severally with Ruth Meyer;

iii. by order made on 2nd December 2021, those appointments were discharged and The Boyes Turner Trust Corporation Ltd was appointed as replacement deputy, in standard terms.

d. SF receives Direct Payments via the Care Act 2014. His deputy has been receiving and managing those monies since November 2024 (although the commencement date of the relevant agreement is 1st May 2024). The Direct Payments are approximately £96 000 per year, which is roughly 25% of the care costs.

e. By COP1 application dated 11th November 2025 [**SF1-8**], the deputy sought "directions" as set out in a statement. The transparency order was made on 24th October 2025.

f. The deputy's costs of managing SF's care package are said to be something like £15 000 inclusive of VAT per year [**ps paragraph 6(a)**] – inclusive of seeking public funding, and seeking backdated funding after delays by the local authority in assessing needs and finances. The costs attributable to management of the Direct Payments are said to be approximately £1 400 inclusive of VAT per year, but there have recently been additional costs incurred in attempts to increase the level of payments.

g. **F** has confirmed that it will not pay the deputy to manage the Direct Payments.

8. MCL 13645655

a. MCL was born on 27th November 2006 and so is now 19 years old. He lives with his mother and her partner. He suffered brain injury due to negligence at or around his birth, for which he was awarded damages via a High Court settlement approval order made on 21st November 2022. The award included an element for deputyship costs of almost £1 million over his lifetime, the current year's allocation being calculated at approximately £26 135.

b. MCL's current care package provides a tutor and support workers to act as teaching assistants, at a total cost of approximately £125 000 per year. The EHCP is prescriptive in the sense that it stipulates hours per week, ratio of support, training and review requirements, IT requirements, and frequency of trips to local places of interest. It is *not* prescriptive in the sense that it does not stipulate by whom these requirements should be delivered.

c. MCL has had only one deputy for property and affairs. By order made on 6th November 2020, Ruth Meyer of Boyes Turner LLP was so appointed with authorities in standard terms. An order was made in June 2021 authorising the deputy to take specified steps in respect of MCL's EHCP, and a further order was made in May 2023 authorising the deputy to purchase and adapt a property.

d. MCL receives Direct Payments of approximately £45 000, which is roughly one-third of his overall care costs. The deputy has been receiving and managing the Direct Payments since 13th March 2023.

e. By COP1 application dated 10th November 2025 [**MCL1-8**], the deputy sought "directions" as set out in a statement. The transparency order was made on 24th October 2025.

f. The deputy's costs of managing MCL's care package as a whole are said to be something like £2 800 inclusive of VAT per year, of which approximately £645 relates solely to the Direct Payments [**ps paragraph 6(b)**].

g. **F** has confirmed that, if the Court were to determine that managing this personal educational budget falls outside of the authority of the Deputyship order, then the local authority would agree to fund MCL's deputy to administer the personal

budget at the annual rate of 15% of the amount of the personal budget [**ps paragraph 6(b)** – the question was asked in an e-mail timed at 17.657 on 1st April 2026 [**MCL51**]. The response is not included in the bundle but has been filed separately]. The deputy's position in response to this appears to me to be confused:

i. [**ps para 6(b)**] "This represents more than the deputy's incurred costs last year in managing the DP: the deputies will accept the local authority's offer, and unless the deputy's costs were to very significantly increase, [MCL] would bear no personal costs in the deputy's management of the DP."

ii. There is only one deputy for MCL, so the use of the plural is assumed to be an error. The confusion lies in the contradiction that:
- the local authority's offer *only* arises "if the Court were to determine that managing this personal educational budget falls *outside of the authority of the Deputyship order*" (emphasis added); and yet
- the deputy is indicating that she "will accept the local authority's offer" expecting there to be still "*deputy's* management of the DP" (*emphasis added*), and not withstanding her general position in these proceedings that she would not be willing to manage Direct Payments outside of deputyship.

iii. The logical import of this contradiction is that the deputy considers that she can, as deputy, manage the Direct Payments <u>contrary to</u> the Court's determination that she has no authority to do so. I doubt that this is what she intends.

9. <u>HI 12321420</u>

a. HI was born on 13th October 2007 and so is now 18 years old. He sustained a brain injury at birth, in respect of which a claim for damages is underway. Settlement of liability was approved by order of the High Court made on 10th December 2012. Quantum has yet to be finalised but deputyship costs are a head of claim. Meanwhile, HI's living arrangements have not been straightforward, with welfare proceedings heard at a regional hearing centre of the Court of Protection. HI now lives in a property which he owns, without either of his parents. His current care package provides 2:1 care for 24 hours a day, at a cost of approximately £540 000 per year.

b. There has been a series of deputyship appointments for HI:

a. by order made on 22nd October 2014, Irwin Mitchell Trust Corporation was appointed as property and affairs deputy for HI;
b. by order made on 5th October 2015, the trust corporation deputyship was discharged and Alison Kaye of Switalskis Solicitors was appointed as replacement property and affairs deputy for HI;

c. by order made on 15th June 2017, Alison Kaye and Samantha Spain, both of Switalskis Solicitors, were appointed to act jointly and severally, with authorities in standard terms including to sell or let property;
d. by order made on 22nd February 2022, those appointments were discharged, and Potter Rees Dolan Trust Corporation Ltd was appointed as replacement deputy in standard terms excluding authority to purchase, sell or charge property;
e. by order made on 28th November 2024, the Potter Rees Dolan Trust Corporation appointment was discharged, and Samantha Hind and Jemma Morland of EMG solicitors were appointed jointly and severally, in standard terms including authority to purchase, sell or let property.

c. HI has received Direct Payments since July 2017. The Direct Payments are currently approximately £300 000 per year (£5 785.92 per week), which is roughly 56% of the care costs.

d. By COP1 application dated 6th October 2025 [**HI1-8**], the deputies sought "direction as to the extent to which retrospective approval is required in respect of the costs incurred…in receiving and managing the client's direct payments." The transparency order was made on 24th October 2025.

e. The deputy estimates that care related costs recently have been approximately £6300, including time spent liaising with the local authority regarding reassessment of HI's care needs following the welfare proceedings and subsequent changes to his care arrangements.

f. **F** has confirmed that it would not meet the costs of the deputy managing Direct Payments, it would not transfer current carers to a different care provider, and, if responsibility for HI's care was transferred to the local authority, it would move him to an alternative model of care (a care home or supported living placement) rather than continue care in his own home.

10. <u>EL 12788364</u>

a. EL was born on 14th August 2009 and so is now 16 years old. She lives in her own home with her mother, step-father and siblings. She sustained brain injury at birth, for which she was awarded damages via a High Court settlement approval order made on 12th May 2017. She does not receive periodical payments but the claim envisaged future deputyship costs of £23 000 per year.

b. There are concerns currently under investigation about the sufficiency of EL's care package. The care costs are approximately £30 000 per year.

c. EL has had only one deputy for property and affairs. By order made on 13th January 2016, Ruth Meyer was so appointed with authorities in standard terms, including to purchase and sell property.

d. EL receives Direct Payments from two separate schemes, involving both health and care authorities. Her deputy has been receiving and managing those monies

since June 2017. The Direct Payments from both sources together total approximately £16 000 per year, which is only just over half of the care costs.

e. By COP1 application dated 11th November 2025 [**EL1-8**], the deputy sought "directions" as set out in a statement. The transparency order was made on 24th October 2025.

f. The deputy has estimated that the costs of managing the care package overall in the past year were approximately £13 200 inclusive of VAT, but this was higher than usual because of a dispute. The cost directly attributable to management of the Direct Payments is said to be only about £180 inclusive of VAT [**ps para 6(c)**].

g. **F** has confirmed that it would not be willing to pay the deputy to manage the Direct Payments, or to 'transfer' the directly paid carer.

11. <u>TF 11421745</u>

a. TF was born on 6th July 2000 and so is now 26 years old. He lives in his own home, with his parents and brother. By order made on 22nd January 2025, TF's parents have been appointed as welfare deputies for him with authority to give or refuse consent to medical or dental treatments and to conduct complaints in respect of such treatment. TF sustained a brain injury at birth, for which he was awarded damages via a High Court settlement approval order made on 20th October 2008.

b. TF's current care package provides 2:1 care 24 hours a day, through both directly employed and agency-supplied support workers. The care costs are approximately £337 000 per year.

c. There have been two property and affairs deputyship appointments for TF:

   i. by order made on 10th February 2008, his mother was so appointed;
   ii. by order made on 18th August 2014, the appointment of TF's mother was discharged and Ruth Meyer of Boyes Turner Solicitors was appointed as replacement deputy in standard terms, not including authority to purchase, sell or charge property. (During this deputyship, orders have been made in respect of an EHCP appeal.)

d. TF receives Direct Payments of approximately £320 000 per year, which is roughly 94% of the care costs. The deputy has been managing the Direct Payments since May 2019.

e. By COP1 application dated 28th October 2025 [**TF1-8**], the deputy sought "directions" as set out in a statement. The transparency order was made on 24th October 2025.

f. The deputy estimates the costs of managing TF's overall care package as approximately £13 000 per year inclusive of VAT, of which the sum relating to management of the Direct Payments is approximately £800 inclusive of VAT, and

costs "relating solely to attempts to secure a lawful and adequate Personal Health Budget DP" are approximately £4 000 inclusive of VAT [**ps para 6(d)**].

g. **F** has confirmed that it would not pay the deputy to manage Direct Payments.

12. RF 13604385

a. RF is now 55 years old. She lives in her own home with two of her sons. She suffered a subarachnoid haemorrhage due to clinical negligence after a fall, for which she was awarded damages via a High Court settlement approval order made in 2023.

b. RF's current care package provides 24 hour 1:1 care from a four-person team. The care costs are approximately £195 000 per year.

c. There has been only one property and affairs deputyship appointment for RF. By order made on 16th July 2020, David Wedgwood and Alexandra Knipe of Anthony Gold Solicitors were so appointed jointly and severally, with authorities in standard terms, excluding authority to purchase, sell or charge property. An order authorising purchase of property was subsequently made on 23rd April 2024. On 3rd April 2025 an order was made in respect of steps taken by the deputies in a tenancy dispute.

d. By COP1 application 16th October 2025 [**RF1-5**], the deputy sought "directions" as set out in a statement. The transparency order was made on 24th October 2025.

e. RF receives Direct Payments of approximately £ 14 000 per year, which is roughly 7% of the care costs and currently the subject of 'correspondence' to ensure that RF is receiving all that she is entitled to. Her deputies have been receiving and managing those monies since October 2023.

f. The deputy estimates that the costs of managing the care package are approximately £2 200 per year but there were costs of more than £5 000 last year incurred in respect of employment issues (which include 'general employment management' ie set up of contracts under direct recruitment). The cost of managing Direct Payments specifically is about £1 200 per year inclusive of VAT.

g. **F** has confirmed that it would not be willing to pay the deputy to manage Direct Payments.

13. All of these matters (and one other, which has subsequently been withdrawn) were first considered together on 21st October 2025, when an order was made which:

a. provided for them to be heard together but not joined. AH was identified as the lead case, and Stacey Bryant (who is also Chair of the Professional Deputies' Forum) as the lead deputy;

b. directed each of the applicants to file at court and provide to the lead deputy a list of issues on which they sought further direction;

c. directed the lead deputy to file a composite list of the questions, and permitted the other applicants to file a position statement of any issues additional to those in the composite list or in respect of which they took a different position to the lead deputy;

d. listed a directions hearing.

14. At a hearing on 25th January 2026, directions were given for:

a. each applicant to file a narrative statement addressing care arrangements and the funding thereof;

b. an advocates' meeting, and then the filing of a revised list of proposed questions for determination by the court;

c. further consideration both on the papers and at a hearing.

15. By order made on the papers on 24th February 2026:

a. the four different schemes of Direct Payments to be considered were identified;

b. it was recited that the applicants, the Public Guardian and the Official Solicitor all agreed that:

i. although the four schemes are not identical, there are broad similarities between them;
ii. the questions agreed between them arise in respect of all four schemes;
iii. addressing the questions in relation to all the four schemes in these proceedings is a more efficient use of court resources and the resources of the protected persons than considering each scheme separately;

c. the questions to be determined were set out in a schedule;

d. direction was given for each applicant to use their best endeavours to obtain answers to specified questions from **F**, to apply for further directions if felt necessary in light of whatever response was (or was not) received, and to file a narrative statement setting out the information gathered;

e. this hearing was listed.

16. In the matter of RF, the responses which came back from **F**[1] were thought by the deputies to be inadequate, so an application was made for a s49 report to be directed. By order made on 10th April 2026 ('The Refusal Order') I refused that application, noting that **F**'s response to date included the following explanation:

> "In cases where an adult or their representative is unable to manage P's Direct Payments, The London Borough of Redbridge will commission a package of care based on the care and support needs identified during the assessment.
>
> **….**
> The Local Authority does not have control over whom a domiciliary care agency employs. While the Local Authority can request that the agency considers taking on the existing personal assistants, it cannot instructor (*sic*) require the agency to do so.
> ….
> As this is currently a hypothetical scenario, the Local Authority is unable to provide a full response at this stage. Decisions regarding whether an agency would be commissioned, or whether alternative forms of support would be commissioned, depend on the individual's assessed care and support needs and on whether there is a suitable person available to manage Direct Payment (DP) arrangements on her behalf. Until a formal request is made, the LA is unable to comment further on this matter."

17. An application was made for reconsideration of The Refusal Order. On 1st June 2026, upon reconsideration, I affirmed that order noting that:

    a. requests for reassessment of [RF]'s needs have previously been made, most recently in September 2025;

    b. the Deputies consider that [RF]'s current support plan does not meet her needs in that:

        i. the local authority has assessed her needs as 18.25 hours of care per week; but
        ii. "the clinical team are of the view that" she needs 24 hour care;

    c. there may be a welfare issue in respect of whether [RF]'s needs are presently being met, which may require determination by the Court but is not likely to be addressed by direction for a s49 report and is clearly outside the authorisation of a property and affairs deputy, save as to bringing such issue to the attention of the Court as set out at paragraph 54.6 of *Re ACC* [2020] EWCOP 9;

    d. the deputies should confirm to the Court within 7 days whether they wished the application to be considered as referral of a welfare issue, in which case the court would be likely to join the local authority as party and designate it as applicant, and invite the Official Solicitor to act as litigation friend for RF.

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[1] In response to the question "If the statutory body would not be willing to continue P's current care arrangement in the absence of a person managing the Direct Payment, what arrangements would the statutory body make for P's publicly funded care?"

Nothing further has been filed by the deputies in response to that order.

18. So, in summary, these seven applications come from four deputyship-providing solicitors' firms and involve Direct Payments payable through four separate schemes. In marked distinction to the *Lumb* case and SBB:

    a. each of the Ps has a significant award of damages, all of which reflected deputyship costs as a head of claim;

    b. each of the Ps has an existing, bespoke package of care funded from both public and private sources;

    c. this funding arrangement has achieved consistent, loyal care teams which is a matter considered to be important to P and much valued by P's family members;

    d. the current deputy is apparently the *only* person willing to receive and manage the Direct Payments – and each of the deputies is *only* willing to manage Direct Payments within the framework of a deputyship appointment.

C. THE FOUR SCHEMES

19. The applications in respect of TF and EL involve The National Health Service (Direct Payments) Regulations 2013 – the same scheme as was considered in *Lumb*. I have been provided with a copy of these regulations [**A273**] and their Explanatory Memorandum [**A299**]. For brevity I will refer to this scheme as '**the NHS Regulations**.'

20. The applications in respect of AH, SF, HI and RF all involve The Care and Support (Direct Payments) Regulations 2014. I have been provided with a copy of these regulations [**A300**] and their Explanatory Memorandum [**A313**]. For brevity I will refer to this scheme as '**the Care Act Regulations**.'

21. The applications in respect of MCL and AH involve The Special Educational Needs (Personal Budgets) Regulations 2014. I have been provided with a copy of these regulations [**A314**] and their Explanatory Memorandum [**A322**]. For brevity I will refer to this scheme as '**the SEN Regulations**.'

22. The application in respect of EL involves The Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009. I have been provided with a copy of these regulations [**A324**] and their Explanatory Memorandum [**A339**]. For brevity I will refer to this scheme as '**the Children Act Regulations**.'

D. THE FUNDAMENTAL DISPUTE

23. The fundamental dispute in these proceedings is whether each or any of the four schemes of regulations requires the person receiving and managing Direct Payments ('**R**') to make decisions of a 'welfare' nature. This is fundamental to the applicant deputies because, if

authority to make decisions of a 'welfare' nature *is* required, none of them presently has it. Consequential questions therefore arise as to whether they should be given it, retrospectively and prospectively; and, if so, in what terms.

24. In the *Lumb* case, I came to the conclusion that the NHS Regulations do include exactly that requirement.

25. The applicant deputies accept that these proceedings are not an appeal against the *Lumb* determination. They were also clear, when I offered them the opportunity at the outset of the hearing, that they sought neither an adjournment nor allocation of current issues to a Tier 3 judge. They contend that the *Lumb* determination "is not binding", and they seek to persuade me now to come to a different conclusion. If successful in that, they are not concerned about inconsistent decisions because they consider that it would be clear that the later decision was to be preferred.

26. The Public Guardian and the Official Solicitor each also confirmed their position that I should proceed to determine the current applications.

27. So, I turn first to consider each of the four schemes individually, to identify what provisions (if any) suggest that welfare-type decisions are required by R.

28. The NHS Regulations [**A273**]:

    a. The relevant paragraphs of the *Lumb* judgment are 61 – 74.

    b. Of the regulations specifically referred to in the *Lumb* judgment, the following still appear to me now to be materially relevant:

        i. **regulation 2(1)(a)**: the definition of 'representative' specifies that taking up that role by virtue of deputyship appointment requires court-given authority "*in relation to matters in respect of which direct payments may be made*";
        ii. **regulation 5(5)**: in particular, (e) requires that R "*compl[ies] with the relevant provisions of these Regulations*";
        iii. **regulation 8(1)(c):** sets a requirement on the health body to agree with R "*the procedure for managing any significant risk*";
        iv. **regulation 8(6):** gives to R a right to probe the sufficiency of the care plan, by "*request[ing that] the health body inform them of the reason"* why it decided not to include a particular service in the care plan, and imposes obligation on the health body to give R such reason;
        v. **regulation 8(7)**: makes it obligatory before a health body can make Direct Payments that R "*must agree (a) that the patient's specified health needs can be met by the services specified in the care plan*";
        vi. **regulation 11(4)**: requires R, when requested by the health body, to provide "*information or evidence relating to (a) the health or condition of the patient or the health outcomes expected from the provision of any service and (b) the health outcomes expected from the provision of any service"*;
        vii. **regulation 11(5):** requires R, if they consider it reasonable to do so, to "*notify the health body when the patient's state of health or circumstances change substantially.*"

c. For the purposes of the *Lumb* determination, as recorded at paragraphs 41(b)(iii) and 43 respectively, I was referred to:

   i. *Flora v. Wakom (Heathrow) Limited* [2007] WLR 482 at para 16: "the text of an Act does not have to be ambiguous before a court may be permitted to take into account explanatory notes in order to understand the contextual scene in which the Act is set"; and
   ii. The *Explanatory Memorandum to the National Health Service (Direct Payments) Regulations 2013*", SI No. 1617.

d. Drawing on these matters, I concluded in *Lumb* (at paragraph 69) that R "standing in the shoes of an incapacitous recipient of a Personal Health Budget, must be able to 'plan' care arrangements - as in 'devise' them, not simply make administrative arrangements to pay for them."

e. I then [at paragraph 70 of *Lumb*] "checked that conclusion" by reference to "*Guidance on direct payments for healthcare: Understanding the regulations*" (published by NHS England, reference PR1363, version 2, dated 5 December 2022) [previously identified at paragraph 42 of the judgment]. That *Guidance* refers (at 78) in particular to **F** needing to be aware of the terms of a deputyship appointment, spelling out that a deputy "may only make decisions *about the person's healthcare and securing services on the persons' behalf to meet their care needs* if they have been appointed to deal with these matters." [*emphasis added*]. The Guidance refers to requirements on **R** "to help develop personalised care and support plans". I was satisfied that the Guidance confirmed my conclusion. I noted that the ICB had come to share this view too.

29. <u>The Care Act Regulations [**A300**]</u>:

a. Under the Care Act Regulations, Direct Payments to P (ie an adult lacking capacity to request the local authority to meet their needs by making payments to them) are made possible by **section 32** of the **Care Act 2014** [**A25**]. This statutory provision is convoluted. In order to understand how it works, it seems to me helpful to identify and label some of the factual situations in which a question of Direct Payments for P may arise by this provision:

   i. P may have someone "authorised under the Mental Capacity Act 2005 to make decisions about [their] need for care and support." I shall label that someone **W**, and such a P as **P(+w);**
   ii. P may <u>not</u> have anyone "authorised under the Mental Capacity Act 2005 to make decisions about [their] need for care and support." I shall label that P as **P(-w)**;
   iii. **W** may agree with a local authority that *another person* is "a suitable person to whom to make direct payments". I shall label that other person as **A;**
   iv. as above, I retain **R** as the label for the person who actually receives and manages the Direct Payments.

b. Using those labels:

i. pursuant to **s32 subsections (2) and (3)**, the local authority *must* make Direct Payments to "the authorised person" *if* certain conditions are met. "The authorised person" is **R**;

ii. the conditions which have to be met are set out in **subsections (5) to (9)** inclusive, and are as follows:
   (i) in respect of P(+w), where R is not W there is at least one W who supports a request by R;
   (ii) P is not within a class of persons in respect of whom F is prohibited from making Direct Payments, or F does not otherwise make a discretionary decision to refuse Direct Payments;
   (iii) F is satisfied that R will act in P's best interests "in arranging for the provision of the care and support" for which Direct Payments are made ('Condition 3');
   (iv) F is satisfied that R is capable of managing Direct Payments, either alone or with accessible help;
   (v) F is satisfied that Direct Payments are an appropriate way to meet P's needs.

The only one of these conditions which might illuminate the fundamental dispute in the current proceedings is Condition 3: does "Arranging for the provision of the care and support for which Direct Payments are made" suggest any more of an expectation on R than dispensing money and maintaining financial records in respect of a care and support package which has been predetermined by others?

For P(-w), the wording of Condition 3 sits uncomfortably with the Mental Capacity Act concept of collaborative decision-making. Similarly, in the context of a scheme premised on choice (see below), "arranging" provision of care and support sits uncomfortably with the standard authorities of a property and affairs deputy.

I have come to the conclusion that Condition 3 is best understood <u>not</u> as an indication of what court-given authorities R requires, but simply as a right of veto on the part of F, to avoid a situation where F may otherwise be obliged to make Direct Payments to an R whose interactions with/for P give cause for concern.

iii. pursuant to **subsection (4)**, a person is "authorised" if any of three scenarios arises. Taking each in turn:

> *"s32(4)(a) the person is authorised under the Mental Capacity Act 2005 to make decisions about the adult's needs for care and support*" – and so, **W may be R.**

(A person may have such authority under an LPA or a deputyship appointment.) This is a problem in terms of deputyship because, to

date, the kind of appointment which bestows authority to make decisions about 'needs for care and support' has generally been conferred by the Court separately from the kind of authority which bestows authority to manage money. So, unless W is *also* appointed as property and affairs deputy, W would be managing the Direct Payments *outside* deputyship.

Of the seven applications currently before the Court, only TF has welfare deputies appointed, and their authority is limited. It could not reasonably be interpreted as extending to making decisions about his needs for care and support such as are paid for by Direct Payments.

> *"s32(4)(b) where the person is not authorised as mentioned in paragraph (a), a person who is so authorised agrees with the local authority that the person is a suitable person to whom to make direct payments*" – and so, **A may be R but only by virtue of W's agreement.**

Again, of the seven applications currently before the Court, TF comes closest to being able to receive Direct Payments by this route. **If** the welfare deputyship extended to making decisions about TF's needs for care and support (which, in my view, it does not), TF's parents could agree with F that TF's property and affairs deputy was A, and by that means Ruth Meyer could be R. However, she would be managing the Direct Payments independently of her deputyship appointment, by virtue simply of W's agreement with the local authority.

NB Both subsection (a) and (b) of s32(4) are premised on *someone* having authority under the Mental Capacity Act to make decisions about P's needs for care and support ie of a welfare-type. That *someone* does not have to be R, but they have key input into who is R.

> *"s32(4)(c) where the person is not authorised as mentioned in paragraph (a) and there is no person who is so authorised, the local authority considers that the person is a suitable person to whom to make direct payments"* – **and so, for P(-w), F alone determines who is R.**

F *could* invite a person who is appointed as property and affairs deputy for P(-w) to be R, but equally F could consider 'suitable' someone who does not have any court-appointed role in P's life or any other authority under the Mental Capacity Act. Managing Direct Payments by this route is independent of any deputyship

appointment. It is by virtue simply of a decision by F as to suitability of R.

So, it seems to me that the overall 'vision' of s32 is that *either* someone with a welfare-type authority in respect of P at least has input into choosing R, *or* F chooses R. The Care Act itself does not *require* R to have *any* lawful authority to make welfare-type decisions for P.

c. Turning to the Care Act Regulations, the parties referred me in particular to **regulation 7** [**A304**], which specifies that a local authority must conduct a review periodically "for the purpose of ascertaining whether the making of direct payments is an appropriate way to meet the adult's needs". In such reviews:

   i. **regulation 7(2)** identifies seven categories of persons whom F must 'involve';
   ii. pursuant to **regulation 7(2)(c)**, **F** must 'involve' **R**;
   iii. pursuant to **regulation 7(2)(e)(ii)**, F must involve "(aa) the person who is authorised under the Mental Capacity Act 2005 to make decisions about the adult's needs for care and support (if different to the person in paragraph (c)) or (bb) if there is no such person, any person who appears to the authority to be interested in the adult's welfare" – and so respectively **W**, and **for P(-w) anyone with a welfare interest**;
   iv. pursuant to **regulation 7(3)**, **F** must "take all reasonable steps to reach agreement as to the outcome of the review with… (b)(i) the person who is authorised under the Mental Capacity Act 2005 to make decisions about the adult's needs for care and support, or (ii) where there is no such person, any person who appears to the authority to be interested in the adult's welfare" - again, respectively **W**, and **for P(-w) anyone with a welfare interest**.

   So, there are three categories of people who must be involved in reviews of Direct Payments: R, W, and anyone interested in P(-w)'s welfare. The applicant deputies suggest that the separate listing of W *in addition to/distinctly from* R tell us something useful about what kind of authority is required to be R – and in particular, that there is no requirement for welfare-type decision making authority. I do not agree. In my view, the separate listing of W and R as persons to be involved in a review simply reflects the necessary effect of the conclusions reached immediately above– that there is no prerequisite authority at all for being considered suitable by F to become R. That being the case, the separate listing of W and R in regulation 7 is simply a matter of comprehensively catching all permutations of persons relevant to the usual collaborative decision-making approach of the Mental Capacity Act. The very generality of including 'any person who appears to [F] to be interested in [P]'s welfare' at **7(2)(e)(ii)** and **7(3)** confirms this understanding.

Notably, the persons with whom F is required to seek agreement as to the review outcome do not include R.

d. I note additionally **regulation 10** which requires that, where P is also receiving NHS Direct Payments, **F** must take reasonable steps to co-ordinate its "systems, processes and requirements" with those which apply in the NHS system.

e. Apart from these provisions, there is nothing in the Care Act Regulations themselves which illuminates the fundamental dispute in the current proceedings. The regulations in this scheme are notably *less* prescriptive about what is required of R than the NHS Regulations.

f. Looking next to The Explanatory Memorandum [**A313**], I note its explicit espousal of the 'choice agenda' as set out in the following provisions:

> "7.1 Direct payments are crucial to achieving the Government's aim to increase independence, choice and control for service users and their carers through allowing them the opportunity to arrange their own personalised care. They give people the freedom to plan flexible and innovative ways to meet care and support needs, resulting in better outcomes for both the service user and their carer…
>
> 7.5 This instrument also creates new provisions designed to make using direct payments more flexible and less bureaucratic. Firstly, this instrument provides that local authorities cannot require a direct payment to be used by any particular person. This is intended to support the policy intention for direct payments to be used innovatively and flexibly, and to prevent local authorities from stating that a direct payment can only be used with a particular provider. Secondly, the local authority cannot require the direct payment holder to provide information more frequently and in more detail than is reasonably required by the authority to enable it to ensure that payment is being used appropriately and that any conditions are complied with. This is to ensure that the local authority processes of monitoring how direct payments are used is proportionate and as streamlined as possible, while still allowing local authorities to satisfy their statutory obligations to ensure the direct payment is used to meet care and support needs."

g. Additionally, I have been referred to care and support statutory guidance [**A840 – 920**]. I note in particular:

   i. **section 4.37 – 4.44** [**A849**] is headed "Ensuring Choice" and addresses the need for local authorities to "encourage a variety of different providers and different types of services", acknowledging specifically the relevance of this to "people who choose to take direct payments".

ii. Chapter 10 addresses "Care and support planning" [**A853**]:

(i) **paragraph 10.2**: "The person must be genuinely involved and influential throughout the planning process, and should be given every opportunity to take joint ownership of the development of the plan with the local authority if they wish, and the local authority agrees. There should be a default assumption that the person, with support if necessary, will play a strong proactive role in planning if they chose to. Indeed it should be made clear that the plan 'belongs' to the person it is intended for, *with the local authority role being to ensure the production and sign-off of the plan* to ensure that it is appropriate to meet the identified needs." (emphasis added);

(ii) **paragraph 10.5**: Ultimately, the guiding principle in the development of the plan is that this process should be person-centred *and person-led*… Both the process and the outcomes should be built holistically around people's wishes and feelings, their needs, values and aspirations, irrespective of the extent to which they choose or are able to actively direct the process." (emphasis added);

(iii) **paragraph 10.46** addresses information and advice to be provided by the local authority to "the person (and/or their independent advocate or any other individual supporting the person…". It includes information "that there is no curtailment of choice on how to use the direct payment (within reason), with the aim to encourage innovation."

(iv) **Paragraph 10.47** sets out that "there should be no constraints on how the needs are met as long as this is reasonable. The local authority has to satisfy itself that the decision is an appropriate and legal way to meet need, and should take steps to avoid the decision being made on the assumption that the views of the professional are more valid than those of the person. Above all, the local authority should refrain from any action that could be seen to restrict choice and impede flexibility."

(v) **Paragraph 10.49** expands upon involvement of P – "Where the person lacks capacity … the local authority must involve any person who appears to the authority to be interested in the welfare of the person and should involve any person who would be able to contribute useful information".

(vi) **Planning for people who lack capacity** is addressed in paragraphs 10.59 – 10.65. In particular "… the local authority must commence care planning in the person's best interests…" but "The duty to involve the person remains throughout the process."

iii. Chapter 12 addresses Direct Payments:

a. **paragraph 12.2** explains that direct payments "provide independence, choice and control by enabling people to commission their own care and support." (The applicant deputies

assert [**ps para 56**] that this provision "refers to the holder of a Direct Payment as a 'commissioner' of the care plan". In my view that is putting something of a gloss on the provision.)

b. **paragraph 12.3** explains that "DPs, along with personal budgets and personalised care planning, mandated for the first time in the Care Act, provide the platform with which to deliver a modern care and support system. People should be encouraged to take ownership of their care planning, and be free to choose how their needs are met, whether through local authority or third-party provision, by DPs, or a combination of the 3 approaches."

c. **paragraph 12.24** is headed 'Administering direct payments' and explains the need for local authorities "to have systems in place to proportionately monitor direct payment usage". (The applicant deputies assert [ps para 56] that this provision "refers to the DP holder as 'administering' the payment". Again, in my view that is putting something of a gloss on the provision.)

iv. The Public Guardian makes reference to **paragraph 12.54** of the Guidance, which explains that if R has to go to hospital, F must conduct an urgent review to ensure that P continues to receive care and support.

30. <u>The SEN Regulations [**A314**]</u>

a. **Section 49 of the Children and Families Act 2014** [**A198**] creates the framework for Direct Payments under the SEN Regulations:

i. pursuant to **subsection 1**, a local authority that maintains an EHC plan for a child or young person must prepare a 'personal budget' if asked to do so by the child's parent or the young person;

ii. pursuant to **subsection 2**, the authority prepares a personal budget "if it identifies an amount as available to secure particular provision that is specified, or proposed to be specified, in the EHC plan, with a view to the child's parent or the young person being involved in securing the provision."

b. The statutory framework for Direct Payments is extended to "case[s] where the parent of a child, or a young person, lacks capacity" by **section 80** of the Children and Families Act 2014 [**A203**]:

i. **subsection 2** provides that regulations may make provision for references to a child's parent/young person to be read as references to "a representative" of the parent/young person;

ii. **subsection 6** defines 'representative' as including a deputy appointed "to make decisions on the parent's or young person's behalf in relation to matters within this Part".

c. The relevant 'part' of the Children and Families Act 2014 is Part 3, which is headed "Children and young people in England with special educational needs or disabilities." It includes provisions relating to 'Education, health and care provision' and 'Education, health and care plans.' Specifically, it includes at section 51 – 59 various actions that a child's parents or a young person can take in relation to appeals in respect of the *content* of an EHCP.

d. The SEN Regulations do include the provision envisaged at s80(2) of the Children and Families Act 2014 – at **regulation 16**, which stipulates that, where the parent of child with an EHCP or the young person lacks capacity, references to 'child' or 'young person' are to be read as references to their representative.

e. The terminology of the regulations requires some further clarification in the context of Court of Protection jurisdiction:
   i. "the child" or "the young person" is the ultimate beneficiary of Direct Payments, and so '**P**' in the Mental Capacity Act lexicon;
   ii. the person who manages the Direct Payments (**R**, in the terminology of this judgment) is the "recipient" – defined in **regulation 2** as "a person to whom direct payments are, or are proposed to be, made under regulation 5(2)".
   iii. some Rs are also "nominee" - defined in **regulation 2** as the person nominated in accordance with regulation 5(1)(c), and so, any R who is not the child's parent or the young person.
   iv. **regulation 4** specifies that Direct Payments may be requested only by a child's parent or a young person;
   v. pursuant to **regulation 5(1)**, Direct Payments may be made to:
      (a) the child's parent;
      (b) the young person; or
      (c) a person nominated in writing by the child's parent or the young person to receive direct payments on their behalf.
   vi. whilst **regulation 5(1)** does not itself use the term, it must be that the three categories there listed are the people subsequently referred to - in regulation 5(2) - as the "intended recipient".
   vii. **regulation 5(2)** specifies that Direct Payments may *only* be made to the 'intended recipient' *if* that person:
      (a) appears to F to be capable of managing them without assistance or with available assistance;

      (b) where the recipient is an individual, is over compulsory school age;

      (c) does not lack capacity within the meaning of the Mental Capacity Act 2005 to consent to the making of Direct Payments to them, or to secure the agreed provision; and

      (d) is not a person described in the Schedule to the Regulations.

   So, the 'intended recipient' may be a 'nominee'. The characteristics specified in regulation 5(2) do not include anything which illuminates the question of what authority would be required for a court-appointed deputy but, in my

view, this list of characteristics must be understood in the context of section 80(6) of the Children and Families Act 2014 - which requires authority "to make decisions on the parent's or young person's behalf in relation to matters within this Part".

What is the point of the first clause of regulation 5(2)(b) – "*where the recipient is an individual*…"? The "child's parent" and "the young person" are necessarily individuals, so this phrase can only apply to nominee Rs. The phrase therefore contemplates that a non-individual may be nominee R. The most obvious non-individuals likely to concern themselves with management of SEN direct payments would be trust corporation deputies. Since, pursuant to section 19(1)(b) of the Mental Capacity Act 2005, trust corporations can *only* be appointed as deputy "in relation to property and affairs", this phrase in regulation 5(2)(c) may therefore suggest some conscious consideration in the drafting of these regulations that welfare deputyship authority is <u>not</u> required to be R. That sits uncomfortably with section 80(6) of the Children and Families Act 2014 and the scope of actions that a child's parents or a young person can take in relation to appeals in respect of the *content* of an EHCP.

f. **regulation 6(1)(a)** permits F to make Direct Payments only where a request has been made for them and F is satisfied that R "will use" Direct Payments "to secure the agreed provision in an appropriate way".

g. **regulation 6(1)(b)** permits F to make Direct Payments to a child's parent or a nominee only if F is satisfied that the parent/nominee will "act in the best interests of the child or the young person when securing the proposed agreed provision."

So, the expectation of regulation 6(1) is that R will use Direct Payments to secure "agreed provision"[2], but who needs to "agree" the provision? The wording suggests that agreement comes *before* the request for Direct Payments. So, the implication is that it is the child's parent or the young person who must 'agree'.

h. **regulation 8(3)** requires R to notify F in writing of various, chiefly administrative, matters but also, at (b), that R will use the Direct Payments "only to secure the agreed provision";

i. **regulation 11(4)** provides that R may request F to review the making and use of Direct Payments. On such review, F may do various things including "increase, maintain or reduce the amount" of the Direct Payments;

j. pursuant to **regulation 12(2), (3)** R has rights to make representations in respect of any decision to reduce Direct Payments;

[2] "Agreed provision" is defined in Regulation 2 as "the goods or services specified in the local authority's notice under regulation 8(2)(b). Regulation 8(2)(b) provides as follows: "(2) The local authority must provide written notice to the recipient, specifying the following – (a) the name of the child or young person in respect of whom direct payments are to be made; (b) the goods or services which are to be secured by direct payments; (c) the proposed amount of direct payments; (d) any conditions on how direct payments may be spent; (e) the dates for payments into the bank account approved by the local authority."

k. pursuant to **regulation 13(4), (5)** R has rights to make representations in respect of any claim for repayment and recovery of Direct Payments;

l. pursuant to **regulation 14(5)** R has rights to make representations in respect of any decision to stop making Direct Payments.

31. The Explanatory Memorandum [**A323**] includes the following provision:

> "7.2 The policy intention underpinning the introduction of the offer of a personal budget from September 2014 is to give parents and young people with an EHC plan direct choice and control over the services they receive and allowing them to tailor provision to meet their own unique needs."

32. The SEND Code of Practice [**excerpts at A921 – 989**] contains virtually nothing about management of Direct Payments but I note from the section headed "Writing the EHC plan" [**A942**] the following stipulations at section 9.61:

- Decisions about the content of EHC plans should be made openly and collaboratively with parents, children and young people.
- Where a young person or parent is seeking an innovative or alternative way to receive their support services – particularly through a Personal Budget but not exclusively so – then the planning process should include the consideration of those solutions with support and advice available to assist the parent or young person in deciding how best to receive their support

33. <u>The Children Act Regulations [**A324**]</u>:

a. Sections 17 and 17A of the Children Act 1989 create the framework for Direct Payments.

b. **regulation 5**: a person is prescribed as a 'representative' if they are "a deputy … appointed by the Court of Protection pursuant to section 16(2)(b) of the Mental Capacity Act 2005 or a donee of a Lasting Power of Attorney" – with no further specification of the authorities granted to such deputy or attorney.

c. The Explanatory Memorandum [**A339**] includes the following provisions:

> "7.1 Direct payments are crucial to achieving the government's aim to increase independence, choice, and control for service users and their carers through allowing them the opportunity to arrange their own personalised care. They give people the freedom to design serves around their specific circumstances and needs, resulting in better outcomes for both the service user and their carer. They are a key part of the transformation of adult social care agenda set out in *Putting People First*."

The position of the applicant deputies

34. The applicant deputies wish to be able to manage Direct Payments, but *only* within the framework of deputyship authority. Their reasons of this are as follows [**ps para 25 – 26**]:

    a. if they managed Direct Payments outside deputyship, they would be adopting "a mixed role in which part of their work was acting on behalf of P (which would be covered within their existing insurance, regulatory and OPG supervision) and part of their work was as an individual in their own right, outside of those frameworks…", which would create risks for both P and them;

    b. acting in their own right but with an indemnity from P would not be satisfactory because primary liability would still rest with them, which could affect their personal lives and credit ratings. It would also be outside their insurance coverage and subject to the risk of a future deputy disputing the indemnity.

35. That position reflects Mr. Lumb's. However *un*like Mr. Lumb, the applicant deputies contend that property and affairs deputyship in standard terms *is* sufficient to enable them to manage Direct Payments. Their 'headline' reason for this is that their experience of the current applications demonstrates that "the role of the DP holder is to administer a public body's care plan, which P does not have a power to alter whether or not they have capacity. It is an operational task that is linked to seeking out statutory funding for P (a financial decision) and arranging care for P on a private basis. It is ancillary to property and affairs authority, not welfare authority." [**ps para 76**]

36. In support of their position, the applicant deputies have provided a 'statutory frameworks table', with a column for each of the four schemes and a row for each of 15 questions/approaches. The issues to be addressed in the rows appear to have been chosen by the person(s) who drew up the table without further explanation but I note:

    a. Row 10 addresses "Responsibility for preparing the care plan". For each of the schemes it is broadly identified that such responsibility lies with **F** but some associated obligations are referenced:

        i. in the column for **the NHS Regulations**: the requirement to agree the procedure for managing risk is noted, but not any of the other matters identified at paragraph 28(b) above;
        ii. in the column for **the Care Act Regulations**: statutory requirements to "involve certain individuals in preparing the care plan" are set out. I note that s25(5) refers to the local authority taking all reasonable steps to reach agreement with "the adult or carer for whom the plan is being prepared", and the absence of any direct reference to R;
        iii. in the column for **the SEN Regulations**: there is no reference to R;
        iv. in the column for **the Children Act Regulations**: there is no reference to R.

b. Row 11 addresses "Obligation to spend the direct payment in accordance with the care plan." It is identified that each set of Regulations requires, in slightly different language but to the same general ends, that Direct Payments are to be used solely for the purposes of securing services agreed / specified in the care plan.

37. Describing their 'headline' argument (ie how the applicant deputies have actually been managing the Direct Payments in issue), the applicant deputies explain [**ps para 42**] that they:

a. "do not decide what P's care needs are or what is required to meet those needs";

b. rather, they "obtain reports and opinions from appropriately qualified professionals, or rely on reports obtained during the personal injury proceedings, and then decide how to apply P's funds to implement that advice"; and

c. "either the public body determines the content of the care plan to which the funds correspond, or the funds are applied to an existing care package where the deputies have not made welfare decisions themselves but have relied on the expertise and decisions of others"; so

d. the decision to deploy Direct Payments "is no more a welfare or mixed decision than the decision to employ a particular care team and pay them for a particular number of hours."

38. In short, the applicant deputies contend that the role of R is "operational", consisting of "implementing the decisions taken by the statutory body to meet a person's needs in the discharge of their duties to that person" [**ps para 45**].

39. Nonetheless, the applicant deputies :

a. do accept that some Fs will suggest that the role of R is to write a care plan or determine how to meet needs - but they say that "this is simply not supported by the statutory frameworks" [**ps para 46**].

b. also accept that "public bodies may (or often will) take a light touch approach to the care plan in large, bespoke mixed care packages – essentially agreeing a contribution to the existing arrangements …rather than preparing detailed care plans of their own…" [**ps para 46**] - but they say that "does not change where Parliament has placed statutory responsibility."

They do not summarise the position this way but it seems to me that these acceptances must be understood as the applicant deputies saying that, in the circumstances accepted, F is simply behaving wrongly.

40. In support of their 'operational' approach, the applicant deputies identify the following features as common to all of the Direct Payment schemes under consideration [**ps para 43**]:

    a. the statutory body assesses need and determines how those needs can be met;

    b. there is never an obligation to request or receive Direct Payments;

    c. there has to be a capacitous person willing and, to the satisfaction of the statutory body, capable of managing Direct Payments – and then the statutory body must determine that the making of Direct Payments to that person will meet P's needs;

    d. the statutory body is 'the final arbiter of the care plan'.

41. I note that this list of common features does not include any mention of the 'choice' agenda set out in the Explanatory Memoranda. Nonetheless, the applicant deputies do, seemingly with positive/supportive intent, identify a feature which appears to me to stem from that agenda:

> "The distinction between DPs and directly-commissioned packages is typically that a DP holder may be willing to make practical arrangements for meeting those needs in a manner which would not ordinarily be commissioned by a public body, which are very rarely willing to directly employ care staff to be allocated specifically to P…….. The key benefit of a DP as a means of commissioning care is to allow a focus on P as an individual, and for the steady employment of named carers for P…." [**ps para 47**]

42. The applicant deputies also address each of the four schemes separately.

43. In respect of **the NHS Regulations**, the applicant deputies contend [**ps para 48**] that:

    a. the Guidance document referred to in *Lumb* cannot be treated as guidance on interpretation of the Regulations, relying on *R(CXF) v. Central Bedfordshire Council NHS North Norfolk Clinical Commissioning Group* [2018] EWCA Civ 2852 at 23;

    b. the Regulations read as a whole "provide a clear guide that the health body is the decision-maker in respect of DPs.";

    c. in respect of the matters identified at para 90 of *Lumb*, the applicant deputies say:

        i. they "do not demonstrate any duty on R to make welfare-decisions, or show that a capacitous P would be entitled to meet needs in a manner other than that approved by the health body." [**ps para 49**]

        ii. specifically, the regulations relating to addressing risk and providing updates are "an information-gathering exercise, not a welfare-decision-making exercise, and liaising with a statutory body on these points does not convert

an operational responsibility into a welfare decision-making role." [**ps para 50**] ;

iii. overall, the Regulations "demonstrate the overriding duty of the health body to act as welfare decision-maker on the use of DPs". [**ps para51**]

iv. specifically, in respect of the regulation 8 requirement to prepare a care plan and appoint a care co-ordinator, "The heath body decides what is to be delivered through a care plan, acting through the care co-ordinator. The representative or nominee's participation in the care plan is optional… consultation with those in P's life regarding their care is not unique to using a DP and does not mean that a decision is made by or on behalf of P – it is consultation, not decision-making authority. There is nothing distinct about these provisions than the normal process for requesting statutory funding outside of the DP context…" [**ps para 52**]

v. the extent of R's power is "to say that they do not think the plan would work and decline to be involved." [**ps para 54**]

44. In respect of **the Care Act Regulations** the applicant deputies:

a. contend [**ps para 55**] that the statutory body takes exactly the same approach whether services are commissioned directly or funded by Direct Payments – it prepares a care plan, involving P and taking reasonable steps to agree how to meet P's needs with P, those with welfare-decision-making authority, or those interested in P's welfare "with no reference to the DP holder". In short, "The local authority is the decision-maker and author of the care plan, not P, irrespective of the use of DPs";

b. assert [**ps para 59 & 60**] that R is "not in fundamentally different position from either (a) a care provider which had been commissioned by a statutory body to provide a service defined by a care plan but given operational responsibility for hiring appropriate staff, setting rotas and arranging care hours; or (b) a property and affairs deputy organising (through the spending of P's funds and employing of staff) a private care package for P which had been informed by a collaboratively agreed care plan under s4 MCA". In neither case would there need to be MCA authority to make welfare decisions; and

c. argue [**ps para 61**] that it would be 'undesirable' for R to need formal welfare decision-making authority – as and when welfare decisions are needed, s4 processes are generally preferable; but they also

d. accept [**ps para 62**] that "the choice of what model of care to use (directly-commissioned package of care by the local authority or a DP model of care) could be considered a welfare decision.

45. Their interpretation of section 32 of the Care Act [**ps paragraphs 64 - 65**] accords with the one set out above. The applicant deputies emphasise that, while a health and welfare decision-maker may "bar" another from requesting a DP, such decision-maker "has no ongoing role in

managing a DP, as it is the local authority that determines how public funds are to be spent…" They

a. point out [**ps para 68**] that "it is not necessary for any formal welfare decision-maker to be in place for a DP to be managed, and welfare decision-making authority over P is simply not required as there are not welfare decisions to be made by the DP holder on behalf of P."

b. emphasise [**ps para 68**] Regulation 7(3) – the omission of R from the list persons with whom F is required to seek agreement as to outcome of a review of Direct Payments - as making clear that R "does not have any special status as to how P's needs are to be met."

46. In respect of **the SEN regulations** the applicant deputies "do not consider that either in law or practice, there are any meaningful 'welfare' decisions to be taken on behalf of P in administering SEN Direct Payments. The plan is written and specifies the provision to be made – the DP holder must 'secure the services' set out in the plan." [**ps para 73**] "The role of the DP holder is to deliver the EHC Plan in the manner specified by the local authority, and not to take welfare decisions on behalf of P as to how P's needs are to be met." [**ps para 69**].

47. In respect of **the Children Act Regulations** the applicant deputies submit that "using a DP to secure a specified service does not involve welfare-decision-making authority, as P does not determine the 'services they are obliged to receive'." [**ps para 75]**

<u>The position of the Public Guardian</u>

48. The overall position of the Public Guardian is that "some form of welfare power" is required for management of Direct Payments by court-appointed deputies, "save possibly in relation to certain SEN nominees" [**ps para 60**] :

a. in respect of **the NHS Regulations**, the Public Guardian does not dispute the conclusions in *Lumb* [**ps paragraphs 20 – 34**];

b. in respect of **the Care Act Regulations,** the Public Guardian notes that there is "little in the way of express obligations" on R in the regulations themselves but paragraph 12.54 of the Guidance "suggest[s] quite an active role in the care provision is expected" [**ps paragraph 39**] ;

c. in respect of **the SEN Regulations**, the Public Guardian considers that a deputy "would have to have welfare authority" to fall within the description at section 49 of the enabling Act - being appointed "to make decisions on the parent's or young person's behalf in relation to matters within this Part";

d. in respect of **the Children Act Regulations**, the Public Guardian considers that they and their underlying Act provide "no indication at all of the duties or powers

of a nominee…" The conclusion drawn from this is that "assuming that the payments are made to facilitate the deployment of a care plan that permits a certain amount of choice or flexibility within its bounds, it seems unlikely to the Public Guardian that this is purely a property and affairs role."

49. Contrary to the assertions of the applicant deputies, the Public Guardian considers that "often the care plans are not particularly prescriptive. They are unlikely to specify a particular provider to use. They are unlikely to specify the exact hours of the day when care is to be provided." (In oral submissions, Mr. Drapkin referred me to actual care plans in the current application, to demonstrate this point.) It follows that "all of that lies to be decided by those with the practical control of the care package. In a direct payment case that must be those in control of the direct payments." [**ps para 51**]

50. The Public Guardian draws a useful distinction [**ps para 52**] between

    a. scenarios such as the current seven applications, where the applicants' "role is in fact executed as essentially administrative while others make welfare decisions for P on the ground"; and
    b. "a case where for example, P's spouse becomes the direct payment holder, they are likely to apply the direct payments in line with the care plan in a hands on and practical manner, making what are obviously welfare decisions for P, such as when carers should attend, what carers should attend, and when particular care tasks should be carried out."

    The point of the distinction is that the way the current applicants describe their approach to Direct Payments "does not mean that an administrative one is the only authority that the role carries." (And moreover, the Public Guardian notes that "to the extent that the deputies are involved in negotiating the sufficiency of the direct payments, this would appear to involve elements of welfare.")

51. More broadly, the Public Guardian is concerned that the "operational" approach to Direct payments does P a disservice:

    > "Direct payments appear to have the ability to confer flexibility in care organisation. They should be held by someone who is at least able to exercise such powers as they have, even if, as the deputies submit, they are tightly constrained by the funding bodies." [**ps para 53**]

<u>The Official Solicitor's Submissions</u>

52. The Official Solicitor's submissions as *Amicus Curiae* are that:

    a. the responses of each F in the current applications support the applicant deputies' assertion that the principal advantage of Direct Payments is flexibility and consistency for P, allowing the appointment of individual carers with whom P is able to build a rapport and who have a deep understanding of P's needs. [**ps para 2**]

b. these proceedings are not about statutory duties imposed on public bodies. They are about the scope of deputyship authority - which is not affected by the existence of any statutory duty on a public body. [**ps para 4**]

c. management of Direct Payments, as the applicant deputies seek, must be understood as incorporating authority to *request*, *receive* and *use* such funds [**ps para 7**]

d. the import [**ps para 8**] of managing Direct Payments *as deputy* is that R:

   i. is entitled to an indemnity from P in respect of costs and liabilities incurred in such management;
   ii. may be entitled (subject to the Court order) to remuneration for the work involved in such management;
   iii. will be "treated as P's agent", pursuant to section 19(6) of the Mental Capacity Act 2005.

e. the potential advantages of Direct Payments (as in (a) above) mean that an approach which effectively limited Ps to reliance on directly commissioned services would place P in a worse position than a capacitous peer [**ps para 9**].

f. "It is important that a practical solution is found, within the boundaries of the legal framework of the MCA 2005 and the relevant statutory regulations, so as to ensure that the machinery of the MCA does not have the effect of inhibiting or restricting choice of individuals in so important a domain as care provision." [**ps para 10**]

53. In respect of the fundamental issue in these proceedings, the Official Solicitor's advice to the Court [**ps para 61 – 63**] is not simple but it is clear, and so I set it out in full:

> "37. A decision whether to request direct payments necessarily involves a welfare decision. The care plan is not prescriptive. Further, a decision needs to be made that it is in P's best interest that P's care is delivered by directly employed carers who are chosen by the deputy (in consultation with family and others concerned in P's welfare), or if directly commissioned services are in P's best interests. That is fundamentally a welfare decision. It may be a decision as to the nuts and bolts as to *how* to implement overarching decisions as to what care P needs, but that does not fundamentally change the nature of the decision as a welfare decision.
>
> ….
>
> 61. The authority required to request direct payments and deal with them in accordance with the relevant regulations is (save possibly in relation to SEN nominees) mixed authority ie it involves aspects both of property & affairs and health & welfare. It is necessary not only for the deputy to receive the payments, but also to expend those payments in the implementation of the care plan, which involves making decisions as to *how* that care plan will be

implemented. These are not high level welfare decisions. They are also decisions which will be made in consultation with others concerned in P's welfare, but they are still decisions which are decisions about personal welfare, rather than mechanical decisions about implementation of a detailed plan set out by the public authority. Such plans are not, in general, so prescriptive.

62. For the reasons set out in paragraphs 28 -31 and 38 above, the authority required in relation to each type of Direct Payment is not *exclusively* property and affairs authority: such authority necessarily involves taking decisions regarding P's welfare. Even a decision to maintain the status quo is a decision involving welfare considerations.

63. Given that dealing with the Direct Payments to employ carers, particularly where a package is funded by a combination of public and private funding, purely welfare authority is not sufficient. A welfare authority does not confer authority to deal with P's money, or with P's "affairs". Powers to deal with P's property and affairs in the absence of formal authority are extremely limited. Section 8 MCA 2005 allows reimbursement from money "in P's possession". Section 8(3) makes clear that it is possible to "spend money for P's benefit" but that would not mean that the act done was done "as deputy". An act is done "as deputy" if the statutory indemnity can be employed. Further, section 8 does not allow recovery of that expenditure from funds which do not belong to P, as would be the case where direct payments would be used to meet the costs of care."

Discussion

54. For each of the Direct Payment schemes under consideration there is a route to managing those payments ('being R') which does not require *any* court-given authority. That tells us that deputyship is not necessary for P to receive Direct Payments but it does not answer the fundamental dispute in these proceedings. The applicant deputies do not wish simply to manage Direct Payments – they wish to do so with the advantages of deputyship authority, namely indemnity for their actions and ability to charge P for their efforts. So the question remains: what authority is required from the Court of Protection for managing Direct Payments within deputyship?

55. The information before the Court in these proceedings is that, in reality, for each of the seven Ps, the only way for them to receive Direct Payments is if they can be managed within deputyship – because no one is available and/or willing to do it any other way. Before this situation is accepted in the determination of each application, the availability of an alternative R *may* need to be interrogated further. (There was an alternative option identified in *Lumb*.) However, for the purposes of this judgment, I assume this information to be correct.

56. The corollary of this 'reality' is that, unless appropriate deputyship authority can be identified and conferred, going forwards each P will only be able to receive directly-commissioned care and support, which is unlikely to replicate their current, tailored provision. I agree with the analysis of the Official Solicitor that this corollary means that P would be disadvantaged as compared to a capacitous peer. It is therefore important to find a way by which Direct Payments can be managed within deputyship. In my judgment that way must be workable across all the material circumstances in which P may find themselves eligible for Direct Payments to meet their needs – like SBB, with no significant assets; or like the seven Ps in the current applications, with the bittersweet advantages of a damages award.

57. Only the Court of Protection can confer deputyship authority. Whatever the provisions in the various Direct Payment schemes, they do not alter that basic situation in law.

58. Although its name is ancient, the jurisdiction of the modern Court of Protection is yet quite young. Nonetheless, for almost twenty years now there has been a settled approach of deputyship being considered in two distinct streams. As set out at paragraph 73 of *Lumb*:

> "(a) in accordance with the specific categories of s 16(1) of the [Mental Capacity] Act, the Court of Protection invariably confers *property and affairs* deputyship authorities separately to *welfare* deputyship authorities…

Management of Direct Payments raises the question of whether this is necessary or appropriate.

59. Adopting Ms. Bedworth's terminology, deputyship authority is "bottom up" ie there just is no deputyship authority unless and until the Court has conferred it. That applies to both 'streams' of deputyship. The realities of life and specific Mental Capacity Act provisions have meant that the authorities which are granted as 'standard' across the two streams are different: property and affairs deputyships standardly include a 'general authority', welfare deputyships do not.

60. As set out at paragraph 47 of *Re ACC* [2020] EWCOP 9:

> "The purpose of the 'general' authority is to enable a property and affairs deputy to do on behalf of P those myriad tasks too numerous to identify individually which are commonly required to manage an individual's financial affairs efficiently. The essence of its scope is the 'ordinariness' of the task contemplated."

61. As set out at paragraph 53.7(c) of *Re ACC* [2020] EWCOP 9:

> "… the authority of a property and affairs deputy does not encompass determination of P's care needs but it does encompass the application of P's funds to meet the costs of care arrangements. If those arrangements involve direct employment of carers, preparation of employment contracts will be encompassed within the 'general' authority to manage P's funds."

62. The applicant deputies *want* management of Direct Payments to fall within the 'general authority' of property and affairs deputyship. Hence, they describe what they *actually* do in respect of the Direct Payments being received in the present seven cases as purely 'operational', within the description set out at paragraph 53.7(c) of *Re ACC*. They point out that taking this approach would avoid any issues of retrospective authorisation in the cases presently under consideration (and, I am told, many others), and would keep to a minimum the need for future applications.

63. It is not clear to me that all the applicant deputies are in fact acting merely 'operationally.' For EL, there have been costs incurred in a dispute about managing the care package as a whole. For TF, there have been costs incurred in respect of adequacy of Direct Payments. For RF, the Deputies have become involved in welfare-type issues at least to the extent that, as previously recorded within these proceedings, they consider the current support plan does not meet her needs. In all of the cases, they advance the view that running a care package via Direct Payments is *better* than the alternative for the welfare of their P.

64. In *Lumb*, I determined that management of Direct Payments under the NHS Regulations involved welfare-type decision-making and so was outside standard authorisations of a property and affairs deputy. I did not otherwise consider the scope of 'general' authority. The current proceedings lead me to consider whether, even if I were to accept that the applicant deputies' have been acting purely 'operationally', management of Direct Payments could ever fall within the meaning of 'general' authority.

65. With the benefit of extensive argument, it seems to me difficult to say that management of Direct Payments within a regulatory scheme is an 'ordinary' part of managing property and affairs. Even viewed as a purely administrative function, 'operational' management of Direct Payments is a specific, distinct responsibility, easily identifiable, and involving complexities which are not of a 'day to day' type – such as deployment of funds within specific constraints, engagement with the paying public authority to satisfy that authority that the constraints are observed, and the repayment obligations. These (and other) aspects of managing Direct Payments are not 'ordinary' features of managing an estate, large or small. I note that the Official Solicitor takes the same view [**ps paragraph 36**].

66. In the same way as Cobb J (as he then was) in *Re A (Capacity: Social media and Internet Use: Best Interests)* [2019] EWCOP 2 considered that decisions about engagement with the internet and social media were distinct from decisions about other forms of contact and care, in my judgment it is clear that managing Direct Payments within the requirements of a regulatory scheme is 'operationally' distinct from 'day to day' general management of a person's property and affairs. It is not simply a matter of day-to-day 'myriad tasks'. There are particular and unique characteristics of managing Direct Payments which risk being 'lost' or overlooked if such management is just swept up as a generality, to the detriment of P. So, I find the argument of incorporation into 'general authority' uncompelling, even without yet having reached a conclusion as to the fundamental dispute in these proceedings.

67. Further and relatedly, I agree with the Public Guardian that, whether or not the applicant deputies have indeed been acting purely 'operationally', such description does not answer the fundamental dispute in these proceedings, which is what the role of R properly requires. If Direct Payments are to be managed via deputyship, the authority conferred by the Court of Protection must be sufficient to enable the Deputy to discharge the role

fully as conceived by the relevant regulations, not how the applicant deputies say they have interpreted it to date.

68. So, I turn to consider the specific Direct Payment schemes.

69. In respect of the NHS Regulations, the conclusion I came to in *Lumb* (paragraphs 68 & 69) was that management of Direct Payments included more than delegated financial administration, reflective of the 'choice' agenda.

70. In so far as the applicant deputies contend [**ps paragraph 48(b)**] that the *Lumb* judgment was wrong (at paragraph 70) to refer to the Guidance document, relying on *R(CXF) v. Central Bedfordshire Council NHS North Norfolk Clinical Commissioning Group* [2018] EWCA Civ 2852 [**A447**]:

    a. I acknowledge that I am bound by this Court of Appeal judgment (although I was not referred to it in the *Lumb* litigation).

    b. I acknowledge its conclusion (set out in paragraphs 23 and 24) that, both in principle and on authority, a Code of Practice cannot be used for the purpose of guidance as to what an Act means – "Regulations can only be used as an aid to interpretation of the Act under which they were made if they were contemporaneously prepared so that the draft Regulations formed part of the background against which Parliament was legislating. Later regulations made under the Act will be formulated by the executive… the executive can in no way alter the intention behind the enabling Act. Those Regulations made by the executive can have no bearing on what an Act means."

    c. I accept that the Guidance to which I was referred in *Lumb* was not contemporaneous to the relevant Act or indeed the Regulations – the full reference for the Guidance, including its date (5th December 2022), is set out at paragraph 42 of the *Lumb* judgment.

    d. I do not accept that the reference to the Guidance set out in paragraph 70 of the *Lumb* judgment invalidates the determination in that judgment. The conclusion had already been set out in the preceding paragraph. The reference to the Guidance was a "check" after the thinking process was complete.

71. I am not persuaded by the arguments of the applicant deputies that I should now depart from the conclusions reached in *Lumb*.

72. Each of the other schemes currently under consideration are much less prescriptive than the NHS regulations as to what is required of R. I have found no specific requirements in the Care Act Regulations or the Children Act Regulations which impose equivalent welfare-type requirements on R. In respect of the SEN Regulations, section 80(6) of the Act leans one way, but regulation 5(2)(b) perhaps leans the other. However, it is clear that all these regulatory schemes are underpinned by intention to give effect to the same 'choice' agenda:

    a. for the Care Act Regulations this is set out explicitly in the contemporaneous Explanatory Memorandum and the statutory guidance.

Paragraph 10.2 of the statutory guidance – which is general to 'care and support planning', rather than specific to cases where needs are met through Direct Payments - is particularly challenging to the approach of the applicant deputies. They describe being tasked solely with implementing a given care plan, but this paragraph describes a much more collaborative process of care and support planning, with "a default assumption that the person, with support if necessary, will play a strong pro-active role in planning if they chose to" and the role of the local authority described in administrative terms – "to ensure the production and sign-off of the plan". The 'choosing' of Direct Payments leans into the "default assumption", and surely requires more than an 'operational' approach.

The applicant deputies may be working in scenarios where a case manager, or civil proceedings, or a collaborative process has worked out the content of a care plan but the context of Direct Payments extends – as spelled out at paragraph 10.49 of the statutory guidance – to involvement in planning P's care support of "any person who would be able to contribute useful information." That seems to me to include anyone actually managing or contemplated for management of Direct Payments. Those public authorities who approach matters as the applicant deputies indeed identify (paragraph 39 above) might better be seen as acting within the statutory framework, not against it.

b. for the SEN Regulations, the 'choice' agenda is set out in the contemporaneous Explanatory Memorandum at paragraph 7.2. (I acknowledge the Public Guardian's analysis [**ps paragraphs 44 – 49**] that the role of a nominee may possibly be construed as "more mechanical", but also the difficulties inherent in a property and affairs deputy wishing to act as nominee once P reaches 16, at which point the parents' ability to 'nominate' falls away.)

c. for the Children Act Regulations, the 'choice' agenda is set out in the Explanatory Memorandum at paragraph 7.1. The regulations are silent as to R's involvement but, in line with the Public Guardian's approach, it seems unlikely that silence should be interpreted as not including R.

73. Having looked at the care plans for each of the seven Ps in the current proceedings, I cannot agree with the applicant deputies that they are 'prescriptive' to the point of rendering R's role simply a question of applying funds as directed. There is a great deal of leeway remaining as to how the specified *extent* of support is made manifest. The applicant deputies themselves acknowledge that this is the key advantage to Direct Payments. As the Official Solicitor notes, perhaps the decisions involved are not 'high level' and are being made in collaboration with others. Nonetheless, Rs are still making welfare-type decisions when, in accepting the role at all, they indicate their judgment that Direct Payments are an appropriate way of meeting P's needs for care and support; and thereafter, when they actually deploy the Direct Payments.

74. I am concerned, with the Public Guardian, that a purely 'operational' interpretation of the role of R fails to recognise the underlying purpose of Direct Payments, renders the 'choice' agenda illusory, and thereby does P a disservice.

75. So I conclude that, in all of the Direct Payment schemes currently under consideration, some authority beyond what is incorporated in the 'general' authority of a property and affairs deputy, and beyond simply 'operational' management of money, is required if Direct Payments are to be managed within deputyship.

76. I now turn to consider the specific questions which were agreed between the parties to require determination within these proceedings (modestly adapted in accordance with the conclusions reached as the journey through the questions progresses.)

E. THE SPECIFIC QUESTIONS

Q1 Is it possible as a matter of law for the Court of Protection to give a deputy authorisation *as deputy* to manage direct payments?

77. The parties agree that it *is* possible as a matter of law for the Court of Protection to give a deputy authorisation *as deputy* to manage direct payments *in respect of a P who is aged 16 or over.*

78. In *Lumb* (at paragraph 95) I specifically determined:

    a. (at paragraph 55) that Direct Payments within the NHS Regulations fall within the meaning of "….and affairs" and so were within the Court of Protection jurisdiction;

    b. (at paragraph 95) that the Court of Protection *could* appoint a deputy with specific authority to manage Direct Payments made under the NHS Regulations.

79. SBB being over 16, age was not a relevant consideration in the *Lumb* litigation but it is relevant to the generality of Q1 because of the different scope of the Court of Protection's jurisdiction in respect of property and affairs and in respect of welfare:

    a. pursuant to section 2(5) of the Mental Capacity Act 2005, no power under the Act is exercisable in relation to a person under the age of 16; but

    b. pursuant to section 18(3) of the Act, powers relating to P's property and affairs may be exercised even though P has not reached the age of 16 "if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18."

80. The applicant deputies' approach – that managing Direct Payments is within the 'general' authority of property and affairs deputyship – allows them to answer Q1 positively in respect of all Ps. They further point out [**ps para 10 - 14**] that having such authorisation from the Court of Protection is not itself sufficient for Direct Payments actually to be received and managed by the deputy, so there are 'multiple protections' in place in their approach:

a. the deputy would also have to be willing to act as R, and consider it in P's best interests for them to do so;

b. the statutory body would also have to reach its own decision that the deputy was a suitable person to manage Direct Payments in that capacity;

c. in respect of the SEN Regulations and the Children Act Regulations, the deputy would have to be nominated by the child's parent(s).

81. The approach of the Public Guardian and the Official Solicitor – that welfare-type decision making authority is required – leads them to conclude that Direct Payments can only be managed within deputyship in respect of a P who is over 16.

82. The Official Solicitor further considers it "doubtful" that Direct Payments under the Children Act regulations come within "… affairs" of a P who is under 16, since they are paid to the parents (not the child) and the associated obligations fall on the parent (rather than the child).

83. Nothing in the current proceedings leads me now to a different conclusion from that reached in *Lumb* as to the principle of whether the Court of Protection *could* appoint a deputy with specific authority to manage Direct Payments. I remain satisfied that there is nothing in the categorisation of powers within the Act which prevents a deputyship appointment which draws on powers from both categories. However, the limitations of each category must continue to apply – the scope of one (property and affairs) cannot somehow be 'read across' to the other (welfare) just because a single deputyship appointment combines authorisations from each category. It is the substance of the authorisation that matters, and welfare-type decisions for under 16s are not the province of the Court of Protection.

84. Having concluded that acting as R involves some welfare-type decision-making, it follows that authorisation to manage Direct Payments under these schemes *within deputyship* must incorporate sufficient authority for that welfare-type decision-making; and therefore it is only possible where P has reached the age of 16.

85. Although this conclusion is not now critical to any of the seven applications currently before me, I acknowledge that there are likely to other cases (such as where P sustained brain injury in the birth process) where this has a practical impact. To ensure that a P under the age of 16 is not excluded from the 'choice' agenda, it may be necessary for public bodies, families and case managers to look again at the alternative approach which was available in *Lumb*.

86. So, the answer to QI is 'yes, as long as the beneficiary of the Direct Payments (P) is over 16.'

Q2 If it is, can the Court confirm whether it is appropriate for the deputy to apply for direct payments 'as the adult' or agent of the adult, in circumstances where the statutory scheme in question provides a different route for application in the case of in capacitated service users?

87. The NHS Regulations and the Care Act Regulations both include a specific condition that P must have capacity to request a Personal Health Budget/Direct Payments, and an alternative route to requesting Direct Payments if P lacks such capacity. The parties agree that, in those schemes, it is not open to a deputy to "stand in the shoes of P" to request Direct Payments – the alternative route must be used. This is in accordance with my conclusion in *Lumb* (paragraph 85). I concur now.

88. The SEN Regulations and the Children Act Regulations do not have an equivalent approach. Where P is over 16, the parties agree that an appropriately authorised deputy *could* "stand in the shoes of P" to request Direct Payments. I concur.

Q3 Are any of the following steps within the 'general' authority granted by a property and affairs deputyship order in standard terms:

a. requesting Direct Payments from the statutory body and making arrangements for the Direct Payments to be paid;

b. negotiating with the statutory body concerning the Direct Payments' sufficiency;

c. the actual use and management of the Direct Payments once received to defray the direct and indirect costs of the implementation of P's care plan including but not limited to:

i. employment and payment of staff employed to carry out the care plan; and

ii. related costs, such as support of a case manager, human resources, payroll provider, insurance, and costs associated with employment-related disputes as reasonably incurred.

89. I have already set out above my conclusion that matters relating to management of Direct Payments do <u>not</u> fall within 'general' authority of property and affairs deputyship. Q3 seeks to break down various *aspects* of management of Direct Payments.

90. The applicant deputies acknowledge [**ps paragraph 27**] that in all the seven cases of these proceedings, the deputy utilises professional services of case managers "to minimise the deputy's own costs in managing the DP." Their argument seems to be that, using case managers in this way, some *aspects* of managing Direct Payments are "closely aligned with two tasks" which the Court has already determined to be within the general authority of a property and affairs deputy [**ps paragraph 28**]. They are referring here to my decision in *Re ACC* [2020] EWCOP9, and they identify those "two tasks" as follows:

a. "requesting public funding and negotiating its sufficiency at the outset and on an ongoing basis (and participating in reviews and re-negotiations as required); and

b. arranging private care packages (including the employment of care staff)"

91. I do not recognise the "two tasks" as described as being the subject of any determination in *Re ACC*. Neither does the Official Solicitor [**ps paragraphs 32- 35**]. Negotiating the sufficiency of public funding to meet care needs and participating in reviews of such funding were simply not considered in that judgment; and employment of care staff was considered only to the extent of preparation of employment contracts. As the applicant deputies accept [**ps para 33**], the issue of making arrangements for the use of public funds was not considered either.

92. Reading on in the applicant deputies' position statement, it becomes apparent that they make their argument in reliance on paragraphs 53 - 54 of *Re ACC*:

    a. paragraph 53 of *Re ACC* addresses specifically the question "To what extent does 'general authority' encompass authority to take legal advice on behalf of P?"

        i. no part of Q3 in these current proceedings is addressed to 'tak[ing] legal advice";

        ii. paragraph 53.6 of *Re ACC* spelled out the 'headline' conclusion reached, namely that "authority to do an act on behalf of P encompasses such ordinary legal tasks short of taking proceedings as are an ancillary part of giving effect to that authority";

        iii. paragraph 53.7(c) expressly concluded that "the authority of a property and affairs deputy does not encompass determination of P's care needs but it does encompass the application of P's funds to meet the costs of care arrangements. If those care arrangements involve direct employment of carers, preparation of employment contracts will be encompassed within the 'general' authority to manage P's funds";

        iv. *nothing* in paragraph 53 of *Re ACC* can properly be interpreted as authority for the proposition that the 'two tasks' now identified by the applicant deputies as aspects of managing Direct Payments are within the 'general' authority of a property and affairs deputy.

    b. paragraph 54 of *Re ACC* addresses specifically the question "Where is the line to be drawn between seeking advice and conducting litigation?":

        i. no part of Q3 in these current proceedings is addressed to 'the line to be drawn between seeking advice and conducting litigation";

        ii. paragraph 54.4 of *Re ACC* spelled out the 'headline' conclusion reached, namely that the approach advocated by the Official Solicitor was to be adopted. That approach (set out at paragraph 54.3) was that, in respect of contemplated litigation *in the realm of property and affairs*, 'general' authority extended up to 'receiving the Letter of Response';

iii. paragraph 54.6 of *Re ACC* spells out the contrast where the contemplated litigation is not 'in the realm of property and affairs': "there is simply no line to be drawn. A property and affairs deputy's authority relates only to property and affairs; it does not encompass seeking advice on welfare issues. It extends no further than meeting the deputy's responsibilities to draw to the court's attention that there is or may be a welfare issue for determination by seeking directions as to how such (potential) issue may be addressed";

iv. it was then acknowledged that "there is sometimes scope for argument as to whether contemplated litigation is in essence a property and affairs matter, or a welfare matter." Specific consideration was then given to "two particular types of public law decisions where the experience of the Court suggests that property and affairs deputies may find themselves having to consider closely the limits of their authority.

v. at paragraph 54.8(a) of *Re ACC,* applications for continuing healthcare funding were considered, with the following conclusions:

(i) the assessment criteria are not financial, but the decision is. Making an application for continuing healthcare funding for P is ancillary to the 'general' authority of a property and affairs deputy to ensure that P receives all the funds he is entitled to;
(ii) if the process of the application reasonably required the taking of advice, obtaining that advice is within the 'general' authority of the deputy, and no specific authority is required;
(iii) where an application is refused, the question of appeal arises. Procedures are not as considered in para [54.3] above - this type of appeal is made by letter to the CCG (or Health Board, in Wales), to be delivered within 6 months of the date of decision;
(iv) it is within the 'general' authority of a property and affairs deputy to take preliminary steps (including taking advice on the merits of potential appeal) up to but not including delivery of the letter of appeal. The deputy should seek specific authority to conduct the appeal on behalf of P, and without it proceeds at risk as to costs."

vi. at paragraph 54.8(b) Education, Health and Social Care plans were specifically considered, with the following conclusions:

(i) the assessment criteria are not financial, and neither is the decision. Even though there may be financial impact, the process of applying for an Education, Health and Social Care Plan is not within the 'general' authority of a property and affairs deputy;

(ii) Appeal lies to the First-tier Tribunal (Health, Education and Social Care Chamber), and must be made within two months of the decision, either by a parent of P of by P themselves, according to age.

(iii) A property and affairs deputy should seek specific authority to take any steps in respect of challenging an Education, Health and Social Care Plan, and without it proceeds as risk as to costs.

vii. the applicant deputies 'acknowledge' the decision at paragraph 54.8(b) but contend that "the decision to receive [Direct Payments] arising out of health needs, care needs or special educational needs has the same practical result for P of public funding which will displace private funding on care, and all are 'financial' decisions. If P were not receiving relevant education in an effective manner from a public body, P would need to commission this privately, and the 'financial' impact would be the same as in a package of healthcare."

In my judgment this approach fails to acknowledge that Direct Payments are an alternative to directly commissioned care, not simply a funding stream. The reference to "effective[ness]" reveals how far decisions about sufficiency, not just 'operational' considerations, are in reality inherent in the approach of the applicant deputies to Direct Payment arrangements.

viii. *nothing* in paragraph 54 of *Re ACC* can properly be interpreted as authority for the proposition that the 'two tasks' now identified by the applicant deputies as aspects of managing Direct Payments are within the 'general' authority of a property and affairs deputy.

93. I disagree with the assertion of the applicant deputies [**ps para 29**] that 'Requesting Direct Payments and negotiating the sufficiency of a directly commissioned care package is not of a meaningfully different character to the activities that were found to be appropriate in *Re ACC*." I do not accept that such interpretation of *Re ACC* is reasonable:

a. there is a material difference between making an application for Continuing Healthcare Funding, even including a letter challenging the decision, and requesting/negotiating/reviewing Direct Payment arrangements. The former is simply making an application for a source of funding, akin to applying for benefits, to maximise P's financial resources. Of course the property and affairs deputy will need to understand enough about the assessment criteria to form a view as to whether it is appropriate to make the application, but the application is clearly and only about accessing a funding stream, so as to enable a property and affairs deputy to "avoid unnecessary private expenditure on care arrangements" [**ps of applicant deputies, paragraph 30**]. It is <u>not</u> about sufficiency of the determination, or how funding is used to meet care needs;

b. requesting/managing/using Direct Payments involves much more than 'preparation of employment contracts';

c. application for Education, Health and Social Care Plans was expressly determined to be *outside* a property and affairs deputy's general authority.

94. In short, the applicant deputies are wrong to claim from *Re ACC* the authority which they do for the 'two tasks' set out in paragraph 90 above. Moreover, in my judgment such claim casts doubt on the description of their approach as 'operational' – 'negotiating sufficiency' cannot sensibly be described as an administrative task.

95. Happily, the applicant deputies' reliance on paragraph 53.7(c) of *Re ACC* is not problematic. The administration of carer's employment contracts *can* be regarded as within 'general' authority. The point in these proceedings however is that administration of employment contracts is only one aspect of 'managing Direct Payments.' As determined above, 'managing Direct Payments' involves wider questions.

96. So, the answer to Q3 is as follows:

a. no;

b. no;

c. no – save, as has been settled for some time in accordance with paragraph 53.7(c) of *Re ACC*, in respect of preparation of employment contracts for directly employed carers.

97. The applicant deputies seek further clarification as to "what steps deputies can take to respond to a refusal of statutory funding and/or an inadequate or unlawfully reasoned offer of funding under a standard deputyship order, and whether the answer to that question differs depending on whether the requests for statutory funding also involves a request for [Direct Payments]."

98. I have not heard argument on these questions of 'further clarification.' In the context of litigation about Direct Payments, it is not clear to me what the applicant deputies mean when they refer to 'statutory funding'. It would not be appropriate to extend these proceedings further to encompass a whole new issue at this stage. The judgment in *Re ACC* stands. In respect specifically of funding by Direct Payments, it follows from the determinations so far in these proceedings that the 'standard deputyship order' (ie the 'general' authority of a property and affairs deputy) does <u>not</u> encompasses authority to take <u>any</u> steps in respect of Direct Payments / refusal of Direct Payments / inadequate or unlawfully reasoned offer of Direct Payments. If in doubt as to the extent of their authority, a deputy should consider making an application to the Court for express authority. Otherwise, a deputy proceeds at risk as to costs (and potentially outside all the other benefits of deputyship appointment which lead the applicant deputies to decline to manage Direct Payments outside deputyship.)

Q4 If any of the steps identified in Q3 are found <u>not</u> to be within the 'general' authority of a standard deputyship authorisation, is the position different where the deputy is obliged to seek out public funding by means of a reverse indemnity in an order settling a damages claim on behalf of P?

99. This is a matter of dispute between the parties.

100. The position of the applicant deputies is that [**ps paragraph 36**]:

> "it is unnecessary and undesirable for separate proceedings to be required in the Court of Protection [to] authorise a deputy to fulfil obligations placed on P in the King's Bench Division, where:
>
> (a) P had a litigation friend appointed by the KBD Court who accepted the relevant obligations on P;
> (b) P's litigation friend was fully advised on the terms of settlement by leading counsel, with counsel's advice on settlement being disclosed to the court;
> (c) The consequential steps required by the deputy to seek out and receive DPs to ensure that P fulfilled those obligations were patent and set out in the terms of the order, along with the knowledge that the deputy would incur some costs in these tasks;
> (d) The proceedings specifically made provision for P's future deputyship costs, in the knowledge that the deputy would be expected to pursue and manage statutory funding on behalf of P; and
> (e) The terms of the settlement were approved by a High Court Judge."

101. This question is particularly relevant to the case of AH. However, I was informed during the hearing that in fact Direct Payments for AH were already being received at the time of the settlement order. So, it was not in reality a situation where the deputy was being obliged by the High Court to do anything that had not already been done.

102. As a basic principle, it is simply not possible for a judge of the King's Bench Division of the High Court, sitting as such, to exercise powers conferred by the Mental Capacity Act on the Court of Protection. It is for this very reason that judges of the King's Bench Division of the High Court can be and (as the President sees fit) are nominated to sit as Tier 3 judges of the Court of Protection. It is of course open to them to 'wear two hats at once' as they consider appropriate. That is not the situation which is the subject of Q4. In fact, as set out in *Peters v. East Midland Strategic Health Authority* [2009] EWCA Civ 145, the approach generally adopted was to require the deputy to make an application to the Court of Protection for a limit on their authority to be imposed. (I have in mind my decision in *Re BJB* [2024] EWCOP 59 (T2).)

103. So, I do not accept the applicant deputies' suggestion that the scope of a deputy's authority is somehow altered by the terms of High Court settlement approval order. I agree with the Public Guardian and the Official Solicitor that the existence of a reverse indemnity undertaking cannot make a difference to the scope of 'general authority.' There is merit in the Official Solicitor's illustration [**ps paragraph 40**] of the absurdity this would produce – "the deputy would have no authority to request and manage direct

payments the day before the order was approved, but would have such authority the day after the order was made. The scope of a deputy's authority cannot change in that way. It is a recipe for uncertainty." As the Public Guardian observes [**ps paragraph 57**] it "may not be what the parties to the consent order [for AH] either expected or hoped but it is not possible for them to change the scope and effect of a deputyship order."

104. So, the answer to Q4 is 'no, the position is no different because of a reverse indemnity in an order settling a damages claim on behalf of P.'

Q5 In so far as funds from Direct Payments are held by the recipients on trust, does any issue arise concerning restrictions on deputies' exercise of powers on behalf of P under section 20(3)(c) of the Mental Capacity Act 2005?

105. The parties all agree that no issue arises under section 20(3)(c) of the Mental Capacity Act 2005, and I concur.

106. In particular, the view of the Public Guardian and the Official Solicitor is summarised as follows:

    a. funds paid as Direct Payments are not held on trust;

    b. P is not a trustee;

    c. the power to use Direct Payments for P's care is not "a power vested in P as a trustee, beneficially or otherwise."

107. At one stage in *Lumb* submissions raised the question of whether Direct Payments were held on a *Quistclose* trust. Ultimately that argument was not pursued. In any event, the Official Solicitor's position statement [**paragraphs 52 – 58**, which are reproduced in Schedule 3 to this judgment] has helpfully considered the possibility, and dismissed it.

108. So, the answer to Q5 is "no, in respect of Direct Payments no issue arises under section 20(3)(c) of the Mental Capacity Act 2005."

Q6 If it is possible for the Court to give a deputy authority to manage Direct Payments, is such authority to be understood as:

a. authority in relation to P's property and affairs only; or

b. authority in relation to P's health and welfare only; or

c. authority which is mixed ie involving aspects of both property & affairs and health & welfare?

109. I have considered this question as "the fundamental dispute" in these proceedings – as above.

110. The conclusion I have come to is that the answer to Q6 is "authority to manage Direct Payments is to be understood as mixed, involving aspects of both property & affairs and health & welfare."

Q7 If the determination of Q6 is that the authority incorporates health & welfare issues (whether alone or in combination with property & affairs) having regard to s19(1)(b) of the Mental Capacity Act 2005, may a Trust Corporation be so authorised?

111. All parties agree that the answer to this question must be 'no.' This was alluded to in *Lumb*. The statutory provision is determinative.

Q8 If the determination of Q7 is 'no', would it ever be appropriate to confer authority to manage Direct Payments on an individual director of the Trust Corporation which is appointed as property and affairs deputy?

112. The applicant deputies consider that the scenario envisaged in this question "might be theoretically possible" [**ps paragraph 79**]. However, there is one of the seven current cases where the deputy is a Trust Corporation – SF. In that matter, the directors of the Trust Corporation deputy "do not wish to become unilateral health & welfare decision-makers for SF and consider this would create unnecessary costs and bureaucracy" [**ps paragraph 78**].

113. As the Official Solicitor points out [**ps paragraph 66**] there is no difficulty in principle with different persons holding different deputyship authorities in respect of the same P, or (pursuant to section 19(4) of the Mental Capacity Act 2005) there being joint and several authority in relation to some matters and joint authority in relation to others.

114. However, the Official Solicitor and the Public Guardian agree with the applicant deputies that significant practical difficulties would arise in the scenario contemplated in Q8. Where the costs of a care package were met in part by public funding (ie Direct Payments, under the control of the individual director and in respect of which that director owes duties) and in part by private funding (ie under the control of the Trust Corporation deputy), it would be unclear who should be the employer of any carer (which is said to be a particular advantage of having Direct Payments). It would be unclear who would make decisions, and decisions in the realm of private funding could have an impact on the public provision. I also agree that it is difficult to see how two different decision-makers, even if in legal terms within the same organisation, could be said to be in the best interests of P.

115. So, the answer to Q8 is 'no.'

Q9 If the answer to Q8 is 'yes', who would be the decision-maker in respect of the publicly funded elements of P's care package:

a. the individually authorised Director?

b. the Trust Corporation?

c. somehow shared between them?

116. In light of the answer above, Q9 does not arise.

Q10 If it is possible for the Court to give a deputy power to manage Direct Payments (ie the answer to Q1 is 'yes'), in what terms should such an order generally be expressed?

117. The Official Solicitor advises [**ps paragraph 70**] that it would be 'insufficient' simply to authorise a deputy 'to manage Direct Payments' because it is inherently unclear and fails to address both the requesting of such payments and the requirements in the role of R in respect of the care plan. Further [**ps paragraph 73**] the Official Solicitor considers that it 'makes sense for a deputy who is to manage Direct Payments (in the sense of requesting and then implementing care plans and defraying costs of care) to have authority to negotiate on all aspects, short of litigation." In particular she envisages this to include negotiations as to *sufficiency,* not just in the sense of whether the amount covers the hours but also as to whether the nature of the care is enough. 'Any [such] decisions would be taken by a deputy in P's best interests and in consultation with others and with the benefit of legal advice.'

118. Addressing Mr. Lumb's concern that the role of R involved tasks outside the expertise of a solicitor, the Official Solicitor does not consider this to be a bar against being granted deputyship authority to manage Direct Payments [**ps paragraph 76**]. By analogy, it is not necessary for deputies to have investment expertise before authority to invest is conferred. Deputies are expected to take and will take professional advice as appropriate.

119. Both the applicant deputies and the Official Solicitor have offered suggested wording for authority to manage Direct Payments, for which I am grateful. They overlap quite closely but also have material differences. Having considered both proposals carefully, in my judgment the appropriate authority should be worded as follows:

> "The deputy is authorised to consent to, receive and manage Direct Payments made for the benefit of [P] by any statutory body, in accordance with the requirements of relevant regulations. In order to give effect to this authority the Deputy is in particular authorised to:
>
> i. request a statutory body to carry out an assessment of [P]'s needs;
> ii. request a Personal Budget or a Personal Health Budget for P;
> iii. request Direct Payments as a means of a statutory body meeting its obligations to provide care and/or support for [P];
> iv. make representations to the statutory body making or proposing to make Direct Payments for the benefit of [P] as to
>
> i. whether [P]'s welfare would be best promoted by that statutory body making direct payments or not, and/or

ii. whether the statutory body's decision as to the level of direct payments or nature of the services included in any care plan is sufficient for [P];

v. exercise any rights which are available to the recipient of Direct Payments within the relevant regulations to seek and/or participate in a review or re-consideration of the statutory body's decision(s) or care plan;

vi. to use or apply the Direct Payments, which may include by way of direct employment of carers, in the best interests of [P] and subject to compliance with any conditions applicable as specified by the relevant statutory body and/or the relevant regulations.

(For the avoidance of doubt, nothing in this order authorises the deputy to appeal, or instigate proceedings for judicial review of, any decision made by the statutory body in respect of Direct Payments without further order of the Court.)"

120. For convenience, I have set out this wording in Schedule 1 to this judgment.

121. Whenever a deputyship appointment is made, the order sets out a self-description after the name of P: it says "ORDER APPOINTING A DEPUTY FOR PROPERTY AND AFFAIRS" or "ORDER APPOINTING A DEPUTY FOR PERSONAL WELFARE". Where authority to manage Direct Payments is included, neither of those descriptions would be fully correct. The words "AND MANAGEMENT OF DIRECT PAYMENTS" will need to be added. The wording as above could then simply be added to that section of the deputyship appointment order which is headed 'Authority of Deputy'.

122. Alternatively, the Direct Payments authority may be sought only sometime after a deputy's appointment. In those circumstances a free-standing order could be made, headed (as usual with subsequent orders) simply "ORDER". It would recite:

a. the fact of the deputy's appointment - 'By order made on … [X] ("the Deputy") has been appointed as [property and affairs][welfare] deputy for [P]'; and
b. the facts of the application - 'By COP 1 application dated [ ], the Deputy has applied for authorisation in respect of Direct Payments made for [P] in accordance with the [ ] Regulations;
c. any other matters considered pertinent.

And then, after IT IS ORDERED, the authorisation could be set out.

123. For the avoidance of doubt, and noting that the authorities of a welfare deputy do not usually include matters such as operation of a bank account, that type of practical step is implicit in the wording of part (vi) of the authorisation relating to Direct Payments –

Direct Payments could not be used or applied "as specified by the relevant statutory body and/or the relevant regulations" otherwise.

Q11 Can the Court confirm that, even in so far as the relevant regulations state that the individual acts as 'principal', in so far as the Court authorises a deputy to manage Direct Payments, they do so as deputies and are to be 'treated as P's agent' pursuant to s19(6) MCA 2005 when undertaking acts of management of such funds, including but not limited to entering into employment contracts on P's behalf?

124. This question arises in respect of:

    a. the NHS Regulations – regulations 5(5)(c) and 6(3)(a), respectively for representatives and nominees; and

    b. the SEN Regulations – regulation 8(4)(b), in respect of a nominee.

    These provisions require that R acts as principal for contractual arrangements in respect of care funded by Direct Payments but provided by directly employed carers.

125. Effectively, these regulations conflict with s19(6) of the Mental Capacity Act 2005, which provides that a deputy is to be "treated as P's agent" in respect of actions within deputyship. This provision in the Act is generally understood to mean that, as long as the deputy makes clear that they are acting as deputy, the deputy incurs no personal liability when entering into obligations on behalf of P.

126. The applicant deputies consider [**ps paragraph 83**] that these particular regulations are probably for "the primary purpose of clarifying that the DP holder cannot enter into an employment contract on behalf of the statutory body". They agree with that purpose. However they further consider that a deputy could be a principal on the contract whilst still being P's agent in accordance with the statutory designation of the Mental Capacity Act. Otherwise, they are worried about potential for personal liability and would therefore not be willing to manage Direct Payments.

127. The Official Solicitor notes [**ps paragraph 77**] that the relevant regulations only require R to act "as **a** principal", noting that the requirement is not to act as *the only* principal ie "the regulations do not preclude P from being bound by the contract, and liable to be sued on it." Further, the Official Solicitor points out that there are circumstances where an agent acting within his authority still incurs personal liability [**ps paragraph 81**, noting in particular Bowstead & Reynolds on Agency at 7 – 058 to 7 – 063] For example, if an agent commits a tort on instructions, the agent is not freed of personal liability but instead has a right of indemnity for any liability which he incurs for acts done within the scope of his authority: *Lifestyle Equities CV v. Ahmed* [2025] AC 1 at 91. The practical concern for deputies is the availability of the indemnity – which is addressed if they act within the scope of their court-conferred authority.

128. The Public Guardian looks more widely at the particular schemes [**ps paragraphs 66 & 67**], noting in particular regulation 17(9) of the NHS Regulations and regulation 14(7) of the SEN Regulations, which each provide for any right or liability of R to a third party in

relation to a service secured by Direct Payments generally transfers to F when Direct Payments stop. One of the triggers for Direct Payments stopping is that R has withdrawn their consent. The Public Guardian suggests that this provides reassurance to deputies about potential for personal liability.

129. The Public Guardian further suggests [**ps paragraph 69**] two possible ways of reading the conflicting materials together:

    a. "to say that the deputy would contract as principal subject to the statutory scheme but that they are entitled to an indemnity from P's estate in the usual way"; or

    b. "to read the regulations and the MCA 2005 as requiring P to be the principal."

    The first option puts the deputy in an identical position to a trustee. Given the unusual protections offered by the statutory scheme on the ending of Direct Payments, the Public Guardian considers that this is "not an unreasonable position for a professional deputy to adopt." The second option fits less well with the scheme of the regulations: the requirement to act as principal is expressly applied to representatives and nominees.

130. I am grateful to Ms. Bedworth and Mr. Drapkin for their detailed considerations of the agency considerations. It seems to me that there is actually little dispute here, and the concerns of the applicant deputies can be allayed.

131. So, the answer to Q11 is 'yes, where a deputy is acting within court-conferred authority to make the decisions which are required in management of Direct Payments, the indemnity for their actions which comes from s19(6) of the Mental Capacity Act 2005 will apply.' Such deputy may enter into a contract for employment of a carer on P's behalf but as principal to the contract, so meeting the requirements of the regulations whilst also being entitled to an indemnity from P's estate.

132. I recognise the implications of this issue for the applicant deputies, and any others who have been managing Direct Payments without the authorisation now formulated in response to Q10 above, seeking retrospective authorisation.

Q12 If the answer to Q11 is 'yes', and the Court does so confirm, is a deputy so authorised:

a. entitled to be reimbursed for reasonable expenses incurred in discharging those functions, pursuant to s19(7)(a) of the Mental Capacity Act 2005?

b. appropriately to be authorised to take remuneration for so acting, pursuant to s19(7)(b) of the Mental Capacity Act 2005?

133. In *Lumb* [**paragraph 80, footnote 2**] I noted that a capacitous person receiving Direct Payments would not ordinarily incur fees for their management and so, as a starting point, it was difficult to see why P should bear such costs. That observation still holds good. It is reflected in the fact that the damages awards of some of the Ps in the current applications specifically included such costs as a head of loss. However, it is not likely *on*

its own to be determinative of whether or not it is in P's best interests either to appoint a deputy or to confer on that deputy authority to manage Direct Payments.

134. There is no substantive dispute here. Once a deputy is appointed, in respect of performing the functions of deputyship as set out in the appointment order, the statutory provisions and the usual Rules will apply.

135. The answer to both parts of Q12 is 'yes.'

Q13 Where Direct Payments are available and P has a property and affairs deputy appointed in standard terms, if the deputy considers it to be in P's best interests, is it within the deputy's 'general' authority to appoint and pay a case manager to receive and manage such Direct Payments pursuant to a statutory scheme?

136. This question addresses an alternative scenario to that which is currently occurring in each of the seven applications currently under consideration:

    a. *instead of* a court-appointed deputy being R;

    b. *a case manager* would be R but paid for doing that job by the deputy from P's funds.

137. There is potential for confusion in the question's use of the word 'appoint': is it referring *either*

    a. to appointment as R *within the scheme* of regulations ("Scheme Appointment"); *or*

    b. to appointment more widely as case manager by a deputy ("Case Manager Appointment").

138. In respect of Scheme Appointment, no provisions exist for nomination on behalf of the incapacitous person under the Care Act Regulations. The Official Solicitor's analysis [**ps paragraph 90**] is that "… only 'a "representative", being a person with welfare authority, has the right to appoint a nominee. Under the SEN Regulations and the Children Act Regulations, the deputy does not have power to appoint a nominee for the same reason." I have added the emphasis here but I agree with the statement, in line with my conclusions above. It follows that a property and affairs deputy appointed in standard terms could <u>not</u> exercise a power *within the regulations* to *appoint* a case manager as R, as the deputy's nominee or otherwise.

139. The position of the applicant deputies as set out in their written submissions [**ps paragraphs 85 & 86**] differs. They consider that "the 'appointment' of a case manager acting as the recipient of the direct payment is a power held by the statutory body, and they would not have the power to 'appoint' a case manager in this role." They envisaged that, in three of the four schemes, a person (including a deputy) appointed by a public body could nominate another person to manage a direct payment on their behalf, subject to the public body's agreement in accordance with the statutory schemes. They analyse the schemes as follows:

a. the outlier is the **Care Act Regulations**, by which "only a capacitously-requesting person with care needs may appoint another to act on their behalf. If the person lacks capacity to the request, the requester and recipient must be the same person"; but in contrast

b. under **the NHS Regulations**, "a 'representative' may nominate another. If the deputy had successfully requested direct payments as a representative, they could appoint a nominee (who would need to be accepted by the health body before receiving direct payments)."

c. under **the SEN Regulations**, "a young person or parent can nominate another; if the parent or young person lacks capacity and has a 'representative,' that person can apply and nominate another. A deputy with relevant authority may act as a representative and nominate another."

d. under the **Children Act Regulations**, "a nomination may be made."

They then conclude "Thus, if the deputy has been a successful requester of a direct payment on three of the four schemes, they could nominate a case manager subject to the public body's agreement in accordance with the statutory scheme."

140. I acknowledge that this position was formulated on the basis of the applicant deputies' position as to the fundamental dispute in these proceedings. That position not having found favour, their assertion that a property and affairs deputy appointed in standard terms can effect a nomination to bring about Scheme Appointment of a case manager also fails. Such deputy cannot be a "successful requester". However, a deputy with the requisite authority and role under the NHS Regulations or the SEN Regulations could in principle make such a nomination.

141. In respect of Case Manager Appointment however, the position is different. If a deputy with standard authorities were to appoint a case manager for P, the case manager could then take whatever steps were open to them independently of the deputy to become appointed by F as R, on the basis that the deputy would pay them from P's funds for the time and effort of discharging that role. This appears to be the way the Public Guardian interpreted Q13 [**ps paragraph 71**].

142. The applicant deputies point out [**ps paragraph 87**] that, for Ps with substantial care needs, deputies with standard term authorities often purchase private services to complement provision from public bodies, and they consider that paying case managers to manage Direct Payments would be a decision in the same vein. Their faith in such a way forward is however somewhat lukewarm. They inform the Court [**ps paragraph 88**] that:

> "… there have been limited numbers of case managers who have actually been willing to manage DPs. Many case managers have offered payroll or complementary services to those in receipt of DPs, but have not been willing to apply for and receive DPs in their own right. Several of the deputies in these applications have explored this option as an alternative to their managing the DPs, but to date, no viable plan which would wholly transfer this responsibility to a case manager has been identified in any of the test cases."

143. The Public Guardian notes the endorsement in *Lumb* of case managers acting as R, and considers that in many cases the scenario of Q13 "may be the obvious solution if a suitable case manager can be found."

144. The Official Solicitor also identifies [**ps paragraph 91**] that it would be possible for a case manager to be appointed as R by F or by P's parents (for example by regulation 5(4) of the NHS Regulations, or section 32(4) of the Care Act); that as such the case manager will be developing care plans; and that it would be within standard authorisations of a property and affairs deputy to use P's funds to remunerate the case manager for that work.

145. So, the answer to Q13 is best phrased in two parts:

    a. a property and affairs deputy appointed in standard terms does <u>not</u> have sufficient authority to bring about the appointment within the Direct Payment schemes of a case manager to manage such payments – the case manager will have to be given that role independently of the deputy; but

    b. yes, it <u>is</u> within the authority of a property and affairs deputy appointed in standard terms to engage a case manager for P and to use P's funds to pay that case manager for the work involved in their management of Direct Payments.

Q14 On an application for such authorisation as the court determines may be granted to a deputy in respect of Direct Payments:

a. what evidence should be provided?

b. should the application only be made after attempts have been made without success to identify other Direct Payment holders and/or to obtain funding from the public body for the deputy's costs in managing the Direct Payments?

c. should notice of the application be given to the funding body?

d. should notice of the application be given to any others and, if so, to whom?

146. The parties have agreed a list of matters in response to **(a)**. With some rearrangement of the order of matters on the list, I agree that the following matters will need to be addressed in evidence filed in support of an application for authority to manage Direct Payments:

    (1) A succinct descriptive account of P's current situation, including:
        (a) (if available) an explanation of P's care needs as assessed by the public body;
        (b) exhibiting (if available) the care plan prepared by the public body in accordance with its statutory obligations.

(2) A succinct descriptive account of P's current care arrangements - how and by whom it is delivered.

(3) The costs of P's current care arrangements.

(4) The size and nature of P's estate, including:
    (a) a succinct explanation of any High Court settlement order or ongoing damages claim;
    (b) a copy of any High Court settlement order.

(5) Details of any Personal Budget / Personal Health Budget under the relevant regulations, and of any Direct Payments.

(6) Narrative explanation of:
    (a) the apportionment of care costs as between private and public funding, currently;
    (b) if different, the anticipated apportionment of care costs as between private and public funding if/when Direct Payments are received.

(7) In respect of deputyship costs, going back up to the last 3 years (but no further unless the deputy considers older information to be particularly relevant):
    (a) the deputy's overall costs of managing P's property and affairs to date;
    (b) the deputy's costs (or likely costs) of managing the care package;
    (c) the deputy's costs (or likely costs) of managing the Direct Payments.

(8) A copy of any formal advice received by the deputy in relation to the Personal Budget / Personal Health Budget and the implementation of the care plan.

(9) A narrative account of views expressed by other relevant persons (including family members, others involved in P's care or treatment, any appointed attorney or other deputy etc.) regarding the pros and cons of meeting P's needs by Direct Payments.

(10) A narrative account of P's own past and present wishes and feelings relating to the manner in which P's care is delivered, in so far as they are ascertainable.

(11) A narrative account of steps taken to consider options for management of Direct Payments by someone other the deputy.

(12) The reasons why the deputy considers that

a. it is in P's best interests for his/her needs to be met via Direct Payments, as opposed to any alternative method by which the public body's duties to P could be discharged;
b. it is in P's best interests for the deputy to manage the direct payments, as opposed to anyone else.

(13) The response (if any) so far received from the relevant public body to being informed that the deputy is considering management of Direct Payments.

147. By way of clarification of (7), the requirement is intended to give the decision-maker a picture of deputyship costs over a period sufficient to 'iron out' any individual year of exceptional costs. The previous three years is, in my judgment, a proportionate maximum for that purpose. Clearly the deputy will not be able to provide information for any period longer than their appointment, so the 3 year maximum may not be achievable in all cases. The 3 year period is consciously longer than the period for which an application for retrospective authority is required (see the answer to Q19 below) because the purpose of the exercise is different.

148. For convenience I have set out this list, which is the answer to **Q14(a)**, in Schedule 2 to this order. Of course, the Court will still be able to ask for additional information if it is considered that there is anything case specific which requires it.

149. The parties have also agreed, in response to **(b)**, that "attempts ought to be made to identify another Direct Payment recipient". I am not persuaded that this wording correctly captures the appropriate approach.

150. The Official Solicitor identifies [**ps paragraph 92**] that a deputy contemplating an application for authority to manage Direct Payments "should first take steps to identify whether there is anyone else who is able or willing to act as representative (under the NHS Regulations) or authorised person (under the Care Act) and whether such person would want to nominate the deputy to receive the payments." I agree. "Similarly, if the parents of a young person were to request SEN or Children Act Direct Payments, they should be asked if they want the deputy to act as nominee." I agree with that too. This will affect the scope of the authority which the deputy needs to seek. However, this is not the same as requiring attempts "to identify another Direct Payment recipient."

151. In particular, I would like to avoid any suggestion that a deputy should be given authority to manage Direct Payments only as a 'last resort.' I consider the question more broadly - attempts should be made to identify who else is willing and suitable to act as R, with a view to working out whether or not an application is appropriate at all. It may be that such attempts resolve the situation and the deputy does not need to make any application, for example where a child's parent is willing to request and manage Direct Payments under the SEN Regulations. However, it may be that such enquiries produce more than one possible R, with disagreement as to which would be most appropriate. In those circumstances, from the range of options a best interest decision should be taken as to whose discharge of the functions of R would best meet P's interests, without hierarchy other than that which follows from the regulations themselves. I suggest that factors relevant to that consideration will include (but not be limited to):

a. degree of familiarity with P's needs, aptitudes, wishes and feelings;

b. financial cost to P;

c. administrative competence and convenience.

152. As to the matter of whether attempts should be taken to obtain funding from the statutory body for the deputy to manage Direct Payments before the deputy makes an application for authority to do that:

a. the Public Guardian considers that this *should* be a required step [**ps paragraph 73**];

b. the Official Solicitor considers [**ps paragraph 93**] that enquiries should be made, but the making of the application should not have to await a definitive answer, on the basis that this would introduce delay which is likely to be contrary to P's best interests;

c. I agree with the Official Solicitor's approach. Public bodies should endeavour to respond to a deputy's enquiry of this nature promptly, but experience acknowledges that requiring the response before making the application would be likely to build delay upon delay. The deputy should forward the response as soon as it is received, to be added to the information on the court file. If no response is available by the time the application is considered, it would be considered on the basis that public funding for the deputy's costs cannot be assumed.

153. So, in my judgment the answer to **Q14(b)** is best phrased in two parts: before making an application for authority to manage Direct Payments, a deputy should take steps:

a. to identify what other options there are for another person to manage the Direct Payments; and

b. to seek from the funding public authority confirmation of whether it is willing to meet the costs of the deputy managing the Direct Payments. A prompt response from the funding body is to be expected, but having such confirmation is not a precondition to making the application.

154. The parties have agreed, in response to Q14(c) that it is <u>not</u> necessary to give notice of the application to the funding public body or the defendant in any damages claim. I understand the question to be referring to formal notification as required by Rule 9.10 of the Court of Protection Rules 2017, as distinct from the informal awareness of a possible application which is implicit in the requirement (just set out in response to the immediately preceding question) to seek funding information from F.

155. The purpose of the notification requirements under the Rules is to ensure that persons with a proper interest in the application have an opportunity to raise objections. An application for deputyship authority to manage Direct Payments may impact on the range of persons to whom the public body can make Direct Payments but it cannot alter the underlying duties of F under relevant legislation, or the underlying issues in a damages claim. For that reason, I concur with the parties' agreed position.

156. The answer to **Q14(c)** is that it is <u>not</u> necessary to give the funding body formal notification of the application for deputyship authority to manage Direct Payments.

157. As to who should be notified, Practice Direction 9B paragraph 4 specifies that an applicant must seek to notify "at least three persons who are likely to have an interest in being notified"; and paragraph 5 specifies that "[m]embers of P's close family are, by virtue of their relationship to P, likely to have an interest in being notified" of an application.

158. The Official Solicitor has considered [**ps paragraph 98**] whether 'mere' notification, as opposed to being named as a respondent and therefore served with a copy of the application papers, is appropriate for some persons who are potentially alternative Rs – health and welfare deputies or attorneys, and adult members of P's family currently involved in P's care. She concluded that for those persons notification "will not necessarily be sufficient". In my view it is not necessary to be any more prescriptive than that at present. In accordance with the approach set out in response to Q14(b), steps will have been taken to identify other potential Rs *before* the application is made. Whether notification of such persons is then 'sufficient' or full service is required will depend on the full circumstances of the case, including the point at which the application is made. As long as notification clearly explains that authority to manage Direct Payments is being sought, in my view notification may well be 'sufficient.' It will then be open to the notified person to respond in such a way as would result in full service, if they so choose.

159. So, the answer to **Q14(d)** is that notification should be provided in accordance with Rule 9.10 of the Court of Protection Rules 2017 and Practice Direction 9B. Consideration should be given to whether persons clearly in a position to be alternative Rs should be formally served with the application for deputyship authority to manage Direct Payments, rather than 'merely' notified of it.

Q15 What guidance can the Court give as to when it would be in P's best interests for a deputy to be authorised to manage the Direct Payments?

160. The parties have agreed a list of factors which are relevant to whether management of Direct Payments via deputyship is in P's best interests, as follows:

    a. P's care package is funded by a mixture of public and private funding;

    b. under that care package P is able to access personalised and bespoke care which would is likely not to be available by directly commissioned public-funded care;

c. the package is working well;

d. no one else is willing to manage Direct Payments;

e. the costs of management of the Direct Payments are significantly less than the funds obtained through Direct Payments;

f. the family involved in P's care and/or others properly interested in P's welfare support the deputy's receipt and management of the Direct Payments.

161. I agree with all of these factors except that (d) merits further clarification. Whether or not someone else is willing – and suitable - to manage Direct Payments is indeed relevant to whether or not a deputy should be authorised to discharge that function but, as above, in my view it is not appropriate to view management of Direct Payments through deputyship only as a 'last resort'. There may well be cases where a family member of P would be willing to manage Direct Payments but still considers, as envisaged by (f), that it would be better for P if a deputy took on that role.

162. The proportionality of the deputy's costs – (e) in the agreed list above – also merits further consideration. Of the current applications it is notable that the matter of TF involves deputyship costs for managing Direct Payments even though the care package is heavily weighted towards public funding. The applicant deputies explain [**ps paragraph 94**] the strong preference of TF's family for the model of care which Direct Payments make possible – a consistent group of employed carers, rather than a probable inconsistency of agency carers. I accept that this approach may be appropriate. P's wellbeing cannot be measured exclusively in monetary terms. However I am not persuaded by the suggestion of the applicant deputies [**ps paragraph 96**] that a 'financial threshold' of costs incurred in managing Direct Payments could be set, below which the costs of an application for authority would be disproportionate. Such thresholds always age poorly as costs rise over time.

163. It is to be hoped that the agreed list of relevant factors is helpful to would-be applicants but it must be emphasised that this list is merely a generalised starting point. As always, in any particular case there may be other factors which are specifically relevant. The list should not be viewed as exhaustive.

Q16 Where a deputy has been managing Direct Payments without specific authorisation from the Court and has received remuneration for doing so from P's funds, must the deputy apply for retrospective authorisation for such remuneration?

164. Given the conclusions above, the applicant deputies accept [**ps paragraph 99(a)**] that an application for retrospective authority is appropriate. As I have said before, such application is in substance an application for relief from liability. The Official Solicitor and the Public Guardian agree that such application is necessary. However, in my view a proportionate approach can and should be taken, and the following questions explore this further.

Q17 If the answer to Q16 is 'yes', what evidence should be provided on making such an application?

165. Broadly, the Court will need to be informed of those matters which would be included in an application for prospective authority, historically framed. So, there should be set out in a COP24 statement:

a. a succinct narrative explanation of the circumstances in which a deputy took on the management of Direct Payments, including an account of P's needs and living arrangements at that time, and why it was then considered that the steps taken by the deputy were in P's best interests;

b. a summary of P's estate:

i. at the time when the deputy took on the management of Direct Payments, including the stage reached in any (potential) damages claim, and an explanation of any points of significant change (eg receipt of a damages settlement); and

ii. at the present time;

c. an explanation of the care package which was funded by Direct Payments, why this was preferable to what was available otherwise, and its cost (making clear, if the funding was mixed private and public, the balance of each);

d. on an annual basis, the amount of Direct Payments received, under which scheme of regulations, from which public body;

e. on an annual basis, the costs charged to P for the deputy's management of the care package generally and the Direct Payments specifically, including confirmation of whether such costs have been certified by the SCCO.

Q18 Where a former deputy has managed Direct Payments without specific authorisation from the Court and received remuneration for doing so, should P's current deputy seek direction from the Court as to ratification or recovery of such remuneration of the former deputy?

166. The parties agree that:

a. there is no obligation on a current deputy to seek ratification of payments made to a former deputy; but

b. the current deputy should *consider* whether it would be in P's best interests to make an application to the Court to recover from a former deputy remuneration which had been paid for management of Direct Payments (on the basis that there is no obligation to make such application if the current deputy does not consider it in P's best interests to do so.)

167. I agree with this approach. It properly reflects the responsibilities of the current deputy and is sufficient to ensure that P's interests are appropriately safeguarded. However I have *not* included in the summary above a further step which was also said to be agreed between the parties, namely that the consideration at (b) should include liaison with the previous deputy. In my view, any requirement for such liaison will be a case specific matter. There may be cases where the former deputy is simply no longer available for consultation. Even where that is not a problem, deputyship records are ordinarily copied to the new deputy in accordance with direction in the order discharging the old and appointing the new deputies. Those records will often be sufficient for the new deputy to form a view as to whether or not an application to recover remuneration is appropriate. Of course, if the records lead the current deputy to consider that such application *would* be appropriate, liaison with the former deputy (if possible) will be required. On the other hand, if the records lead the current deputy to consider that such application would *not* be appropriate, liaison with the former deputy would be unnecessary.

168. So, the answer to Q18 is that the current deputy does not need to seek ratification of management of Direct Payments by a former deputy but, in line with usual obligations to P, should consider whether an application to recover costs of such management is appropriate.

Q19 Is there a date prior to which retrospective approval of costs associated with Direct Payments need not be sought? For example, is retrospective approval required for periods prior to the date of:

a. the end of the deputy's last period of assessment by the SCCO;

b. *Calderdale MBC v AB, Lumb and AnB* [2021] EWCOP 56;

c. *Lumb v. NHS Humber & North Yorkshire ICB & Others* [2024] EWCOP 57 (T2);

d. any other 'long-stop' date, as directed by the Court?

169. In their written submissions the parties agreed that, if there is to be a long-stop date, it should be the date of the 2024 decision in *Lumb*. In oral submissions, the applicant deputies modified their position such that the 2024 decision in *Lumb* should be the long-stop date for cases involving the NHS Regulations, but the date of this judgment should be the long-stop date for cases involving the other statutory schemes.

170. Direct Payments have existed in various forms since the 1990s. The commencement date of any specific set of regulations is not particularly helpful for present purposes if the concept predates them. Potentially, there may have been deputies managing Direct Payments outside specific authority for quite a long time, beyond common 'limitation' periods. The *Lumb* [2024] decision was the first occasion when the Court was called upon to consider, and deputies were put on notice of the Court's view as to, the scope of deputyship authority required for management of Direct Payments. In my view, the proportionate approach is to regard the date of the *Lumb* judgment – 11th October 2024 – as the long-stop date from which applications for retrospective authority are required in respect of cases involving Direct Payments from *any* of the various schemes.

171. So, the answer to Q19 is that, unless there are case-specific factors which become apparent in light of this judgment, retrospective approval need not be sought for steps taken and costs incurred by a deputy managing Direct Payments for any period prior to 11th October 2024.

Q20 If the SCCO has already issued a final costs certificate (either in respect of the present deputy or previous deputies' work) should the present deputy make an application to review such a certificate for any period in which costs were claimed for managing a Direct Payment?

172. An SCCO-assessed bill is a judgment. The Official Solicitor has helpfully considered the procedural implications of any attempt to 'go behind' it [**ps paragraphs 109 – 110**].

173. There is an appeals procedure, with a time-limit of 21 days – CPR 52.12, Cook on Costs at 35.6. Potentially, permission to appeal out of time could be sought (on the argument that the judgment was made on a false basis, namely that the deputy was understood to be entitled to remuneration for management of Direct Payments when in fact that was outside their authority) but this is an additional hurdle and likely to involve satellite litigation, including as to deputyship authority to pursue such application. Given the policy underlying short time limits – namely finality of judicial decisions - it is not obvious that permission to appeal out of time would be granted. The relevant tests are set out in *R (Hysaj) v. Secretary of State for the Home Department* [2014] EWCA Civ 1633 and *R(Fayad) v. Secretary of State for the Home Department* [2018] EWCA Civ 54 at 22.

174. The applicant deputies point out [**ps paragraph 99(i) and (j)**] the current realities of timescales for SCCO determinations, and question the proportionality of any funds potentially recoverable.

175. Given all these complications, the Official Solicitor's conclusion is that "it is likely to be a rare case in which it is in P's best interests to re-open an assessment." I accept that assessment. It should be borne in mind that P has had the benefit of the deputy's work in managing the Direct Payments. In my judgment, it is not necessary, proportionate or appropriate to seek review of an already finalised SCCO assessment of costs.

176. So, the answer to Q20 is 'no.'

177. The applicant deputies seek further clarification as to "whether bills which are currently awaiting assessment at the SCCO should be withdrawn". They inform the Court (and I understand it to be correct) that such bills under £42 000 may have been filed from April 2025, and bills over £42 000 from autumn 2024.

178. Again, this is a matter on which I have not heard argument. However, I note that the 'awaiting assessment' period closely aligns with the period in respect of which application for retrospective authority is required. When the Court of Protection determines such application (which, it is to be hoped, would be a fairly contained time-frame), *if* retrospective authority is granted, it is likely to be expressed as 'subject to' or

'at the level assessed by the SCCO' - so assessment is likely still to be required. If retrospective authority is *not* granted, then assessment of the overall bill will *still* be required albeit with the complication of excluding whatever sum relates to the unauthorised management of Direct Payments. Therefore, it seems to me that there is nothing to be gained for the deputies, the Court of Protection *or* the SCCO by withdrawing *now* bills which have already been submitted for assessment. If circumstances arise whereby *all* need for assessment is extinguished, the bill can *then* be withdrawn.

179. The SCCO will be aware of this judgment and will no doubt plan its own work allocation accordingly, and indeed may choose to issue its own guidance. I anticipate that it would be of assistance to the SCCO if – rather than *withdrawing* an application for assessment in any matter likely to be affected by this judgment - the deputy *notifies* the SCCO of *which* outstanding bills include claims for which an application for retrospective authorisation by the Court of Protection is now required.

Q21 In cases with mixed public and private funding, if it is necessary to provide evidence of the costs of managing Direct Payments with applications for authority (prospective or retrospective), to do so:

a. should the costs of managing Direct Payments be determined on a 'but for' basis (ie but for the Direct Payment, the costs would not have been incurred)?

b. if the determination of (a) is 'no', how should the costs be determined, and what evidence should be provided to calculate this allocation?

c. if P's care team was already employed on a private basis prior to receipt of Direct Payments, do any of the care-team's employment-related costs fall as part of costs associated with managing a Direct Payment?

180. All parties agree that costs should be allocated on a 'but for' basis.

181. In all of the current applications, P's care package is funded from a mixture of public and private sources. The arrangements relating to the privately-funded elements (including the employment of private carers) would not be funded by the public body whichever model of receiving public funding was adopted – the funding would fall to P's private resources anyway, irrespective of Direct Payments. I accept the submissions of the applicant deputies [**ps paragraph 103**] that it would be very challenging to produce a rational figure for costs of managing Direct Payments on any basis other than the 'but for' approach.

182. The Public Guardian's approach [**ps paragraph 81**] is that:

a. if the deputy has expended P's funds on costs incurred in management of Direct Payments without authority, that is a breach of the deputy's fiduciary duty;

b. such breach is best addressed as giving rise to equitable compensation, which is subject to 'but for' causation;

c. if costs would have been incurred in any event, no need for compensation arises;

d. the (c) part of Q21 should be answered on a case by case basis applying that approach.

183. The Official Solicitor agrees [**ps paragraphs 111 – 113**] with the Public Guardian. In respect of the (c) part, she advises that

> "Where initial costs would have been incurred in any event, then those should not be treated as costs of the direct payments. Later costs will depend on the specific circumstances, and may need to be apportioned depending on the proportion of the care costs attributable to public funding as compared with private funding. If though, these costs would have been incurred in any event (because P needs a privately funded care package, as opposed to a directly commissioned care package), those costs would not meet the 'but for' test."

184. Applying this to the question actually posed, it seems to me that if P had a care team which was already employed on a private basis prior to receipt of Direct Payments, it cannot be said that the employment-related costs of the care team would not arise 'but for' Direct Payments. Trying to reduce the negatives in that sentence, it can be said that such costs arose and continue irrespective of Direct Payments.

185. So, the answer to Q21 is (a) 'yes', (b) does not arise, and (c) 'no'.

186. The applicant deputies further seek clarification in respect of a different situation, namely where there was *no* privately employed care team *before* the Direct Payments - a care team "was appointed at the outset on a mixture of [Direct Payments] and private funding, but where they would not have been so appointed without the [Direct Payment] funding being available." In this scenario, 'but for' the Direct Payments *none* of the costs of managing the care team would have been incurred.

187. It is important to remember here that the question of apportioning management costs between care funded privately and care funded by Direct Payments arises in the context of an application for *retrospective* authority to manage Direct Payments – paragraph 165(e) above. In my judgment it would be sufficient in such applications to explain this different scenario – that *no* care management costs would have been incurred 'but for' the availability of Direct Payments. The question of retrospective authorisation to charge fees for such management will then be determined with due consideration to all the *other* factors set out in paragraph 165 above, particularly (a) and (c).

Q22 What type and level of supervision would the Court expect the Public Guardian to apply to deputies authorised to manage Direct Payments?

188. The Public Guardian and the Official Solicitor agree that "full health & welfare supervision would not be appropriate. General supervision as applied to property and affairs deputies would be appropriate."

189. The Public Guardian has filed evidence [in a statement by Katrina London, **G33- 40**] explaining the manner in which deputies are supervised by her office. In respect of supervision of welfare deputyships, I note that the Public Guardian's team currently comprises seven Executive Case managers and eight General Case managers, and supervises approximately 2 825 cases. The Public Guardian is concerned that, if all the cases where it is thought that a property and affairs deputy is currently involved with Direct Payments (approximately 750) were suddenly required to be supervised by her welfare deputyship supervision team, it would require significant (approximately 25%) additional staffing – even without accounting for increased 'first contact calls' as the new system bedded in. I note those concerns.

190. Supervision is a statutory responsibility of the Office of the Public Guardian, not of the Court, so the type and level of supervision applied is primarily not a matter for determination in these proceedings. However, it is practical and sensible for the Court to have regard to how deputyship functions across the wider system of its use. Considering it is helpful to set out the Court's 'expectations' in respect of supervising any deputy exercising authority to manage Direct Payments, I am willing to do so.

191. The Court's own functions lead to the expectations that the supervisory regime applied to each deputyship is:

    a. practicable for both the supervisory body and the supervised deputy;

    b. relevant to the authorities which the deputy exercises;

    c. comprehensive to the authorities which the deputy exercises;

    d. not excessive to the authorities which the deputy exercises.

192. The welfare-type aspects of managing Direct Payments are circumscribed by the relevant regulations. It is not therefore to be expected that the panoply of "full Health and Welfare supervision" is required. Rather, it should be clear in the report submitted for supervisory purposes:

    a. what decisions have been made in respect of Direct Payments – including

        i. at the outset, the decision that Direct Payments are the most appropriate way to meet P's needs for care and support;
        ii. in respect of any reviews, what contributions the deputy has made;
        iii. whether there has been any other engagement with, or consideration of need for engagement with, the relevant public body; and

    b. the reasons why such decisions have been made the way they have.

193. If those requirements are met, the Court simply expects that appropriate supervisory scrutiny is given to the deputy's decision-making, through whatever administrative arrangements the Public Guardian sees fit.

Q23 Is the supervisory position different where the relevant regulations require the deputy to act 'as principal' when discharging relevant functions?

194. The Public Guardian and the Official Solicitor consider that the supervisory requirement is not altered because of any requirement of the regulations that the deputy is acting 'as principal'. I agree. P's interests and vulnerabilities are no different whether the deputy acts as principal or otherwise. Neither should be the supervision. The Public Guardian's supervisory role stems from the deputyship authority, not from the contractual arrangements.

195. So, the answer to Q23 is 'no'.

Q24 In any case in which the deputy is managing Direct Payments without the authority of the Court of Protection, what is the supervisory position?

196. The wording of this question is internally problematic. If the management is 'without the authority of the Court of Protection', the management is not being done as 'deputy'. The supervisory position is that the Office of the Public Guardian *only* supervises deputyship functions.

197. If the question is intended to address a situation where, contrary to the expressed intentions of the applicant deputies, a person ('X') is both appointed as property and affairs deputy for P and *also* accepts in their personal capacity a role of managing Direct Payments, then the answer to the question is that the Office of the Public Guardian supervises X's discharge of deputyship functions but <u>not</u> X's management of the Direct Payments. I note that the applicant deputies have identified, as did Mr. Lumb, several factors which disincline them to adopt this approach. I further note that, should any appointed deputy be willing to take X's approach and manage Direct Payments in their personal capacity outside deputyship, the Public Guardian has indicated [**ps paragraph 84**] her expectation that, in their deputyship capacity, X would provide "some basic information" about what was happening with Direct Payments.

198. On the other hand, if the question is intended to address the situation (as in the seven applications currently under consideration) where deputies *have been managing* Direct Payments *without* the authority which this judgment determines to be necessary, then the answer to the question lies in the requirement (as determined above) to seek retrospective authorisation. When considering such applications, it will be open to the Court to direct a report from the Office of the Public Guardian pursuant to section 49 of the Mental Capacity Act 2005 if felt necessary. (I do not expect that to be the norm.)

<u>CONCLUSIONS</u>

199. In this judgment I have considered four schemes by which public authorities may make Direct Payments to enable a person's needs for care and support to be met, as opposed to commissioning such provision themselves. I have reconsidered conclusion previously reached in respect of the NHS Regulations, and I have also considered the Care Act

Regulations, the SEN Regulations and the Children Act Regulations. I have concluded that management of Direct Payments in accordance with the requirements of each and all of these schemes requires some decision-making of a welfare-type.

200. On the way to reaching this conclusion, I have determined that management of Direct Payments cannot properly be regarded as a routine aspect of quotidian management of an estate. Rather, it is a complex set of specific, identifiable tasks and obligations to be regarded as *sui generis* and not within the meaning of 'general' authority in a standard-terms property and affairs deputyship appointment. The conclusion that management of Direct Payments involves some decision-making of a welfare-type puts this beyond doubt.

201. It is within the jurisdiction of the Court of Protection to appoint a deputy with authority to make decisions of a type which involve a mixture of both the property and affairs, and the health and welfare, streams of the Court's jurisdiction. The separation of work streams in the Mental Capacity Act 2005 and in court processes is only a matter of workability and convenience. It does not reflect how people lead their lives, and it does not restrict the Court's ability to respond to lived experience. The authority which is needed to manage Direct Payments *within deputyship* is set out, in the terms of a draft order, in Schedule 1 to this judgment.

202. In order to obtain appropriate deputyship authority, an application to the Court of Protection will be necessary. That application may be included in a first application for deputyship appointment, or it may be made subsequently by a deputy who is already appointed. The information which should be provided in support of the application is summarised in Schedule 2 to this order. As always, each application will be particular to its own facts. So the matters listed in Schedule 2 should not be regarded as exhaustive. If a particular case requires provision of additional information, that should be provided with the application and may otherwise be directed by the Court.

203. Twenty-four questions were posed within these proceedings about the practicalities around management of Direct Payments within deputyship. I have answered each of those questions.

204. I would like to record my thanks to the Official Solicitor and her team for the assistance they have provided to the Court as *Amicus*, my appreciation of the engagement in these proceedings of the Public Guardian and her team, and my gratitude to all counsel, instructing solicitors and applicant deputies for the constructive and timely way in which they have conducted matters.

205. I now invite the legal representatives to file an agreed draft order setting out any further directions sought for determination of the seven applications in light of this judgment.

HHJ Hilder

Schedule 1: Wording of Direct Payment authorisation

The deputy is authorised to consent to, receive and manage Direct Payments made for the benefit of [P] by any statutory body, in accordance with the requirements of relevant regulations. In order to give effect to this authority the Deputy is in particular authorised to:

(i) request a statutory body to carry out an assessment of [P]'s needs;
(ii) request a Personal Budget or a Personal Health Budget for P;
(iii) request Direct Payments as a means of a statutory body meeting its obligations to provide care and/or support for [P];
(iv) make representations to the statutory body making or proposing to make Direct Payments for the benefit of [P] as to
    i. whether [P]'s welfare would be best promoted by that statutory body making direct payments or not, and/or
    ii. whether the statutory body's decision as to the level of direct payments or nature of the services included in any care plan is sufficient for [P];
(v) exercise any rights which are available to the recipient of Direct Payments within the relevant regulations to seek and/or participate in a review or re-consideration of the statutory body's decision(s) or care plan;
(vi) to use or apply the Direct Payments, which may include by way of direct employment of carers, in the best interests of [P] and subject to compliance with any conditions applicable as specified by the relevant statutory body or/or the relevant regulations.

(For the avoidance of doubt, nothing in this order authorises the deputy to appeal, or instigate proceedings for judicial review of, any decision made by the statutory body in respect of Direct Payments without further order of the Court.)

Schedule 2

Matters to be addressed in evidence provided in support of an application for Direct Payment authorisation

(1) A succinct descriptive account of P's current situation, including:
   (a) (if available) an explanation of P's care needs as assessed by the public body;
   (b) exhibiting (if available) the care plan prepared by the public body in accordance with its statutory obligations.

(2) A succinct descriptive account of P's current care arrangements - how and by whom it is delivered.

(3) The costs of P's current care arrangements.

(4) The size and nature of P's estate, including:
   (a) a succinct explanation of any High Court settlement order or ongoing damages claim;
   (b) a copy of any High Court settlement order.

(5) Details of any Personal (Health) Budget under the relevant regulations, and of any Direct Payments.

(6) Narrative explanation of:
   (a) the apportionment of care costs as between private and public funding, currently;
   (b) if different, the anticipated apportionment of care costs as between private and public funding if/when Direct Payments are received.

(7) In respect of deputyship costs (going back up to the last 3 years, but no further unless the deputy considers older information to be particularly relevant):
   (a) the deputy's overall costs of managing P's property and affairs to date;
   (b) the deputy's costs (or likely costs) of managing the care package;
   (c) the deputy's costs (or likely costs) of managing the Direct Payments.

(8) A copy of any formal advice received by the deputy in relation to the Personal (Health) Budget and the implementation of the care plan.

(9) A narrative account of views expressed by other relevant persons (including family members, others involved in P's care or treatment, any appointed attorney or other deputy etc.) regarding the pros and cons of meeting P's needs by Direct Payments.

(10) A narrative account of P's own past and present wishes and feelings relating to the manner in which P's care is delivered, in so far as they are ascertainable.

(11) A narrative account of steps taken to consider options for management of Direct Payments by someone other the deputy.

(12) The reasons why the deputy considers that

(a) it is in P's best interests for his/her needs to be met via Direct Payments, as opposed to any alternative method by which the public body's duties to P could be discharged;

(b) it is in P's best interests for the deputy to manage the direct payments, as opposed to anyone else.

(13) The response (if any) so far received from the relevant public body to being informed that the deputy is considering management of Direct Payments.

Schedule 3

Official Solicitor's submissions in respect of *Quistclose* trusts

"52. This question arises out of submissions made in *Lumb*. In *Lumb*, as part of his argument that the NHS Direct payments were not part of P's property, the deputy argued that the NHS Direct Payments were held on a *Quistclose* Trust. In summary, this was because the use to which the NHS Direct Payments could be put was strictly circumscribed. Under the regulations, the NHS Direct Payments may only be used to implement the care plan.

53. Although the use of NHS Direct Payments (and indeed other Direct Payments) is circumscribed, it does not follow that the Direct Payments are held on a *Quistclose* Trust.

54. The nature of a *Quistclose* Trust was explained by the House of Lords in *Twinsectra v. Yardley* [2002] 2 AC 164: see also Lewin on Trusts at 9-045 – 9-055; 9-060. A *Quistclose* trust arises where property is paid to a third party for a particular purpose. The recipient has a *power* (but not generally an obligation) to apply the funds for that purpose. If the funds are not so applied, or the purpose becomes impossible, then the payer can recover the money *because* they retain a beneficial interest in the funds. This is the *only* trust which arises. The property paid is held by the recipient on trust for the payer, pending the application of the funds in accordance with the authorised purpose, at which point the trust is discharged.

55. It is an essential ingredient of the *Quistclose* Trust that there is an intention on the part of the payer to retain a beneficial interest in the funds: see *Prickly Bay Waterside v. British American Insurance Co Ltd* [2022] 1 WLR 2087.

56. The NHS Regulations do not clearly show an intention on the part of the public body to retain a beneficial interest in the direct payments. Regulation 15 provides that the ICB *may* require payment of funds in certain circumstances. It does not state that repayment *must* be made, as would be the case in the event that the public authority's proprietary in the payments continued. Moreover, the authority's decision to request repayment can be reviewed.

57. An intention to create a *Quistclose* Trust is not required for the statutory regulations to operate as intended. Moreover, the creation of the *Quistclose* Trust would create difficulties. It would also involve the recipient being a trustee for the payer i.e. the deputy owing fiduciary duties to the public authority. Such fiduciary duties would be in direct conflict with the duties to P. As the Public Guardian states, the obligations to use the direct payments in a particular way and make repayment in certain circumstances are sui generis statutory obligations: they do not involve a trust. The introduction of the trust analysis is an unnecessary complication and is not mandated by the statutory schemes.

58. The funds must be used in accordance with the obligation sunder the relevant statutory scheme. The power to use the direct payments, although P will benefit from the use of the funds, is not a beneficial power *vested in* P (like a power to consent to sale) – where P lacks capacity P has no power to use the funds. Instead they are powers to spend money in a way which *benefits* P.