Neutral Citation Number: [2016] EWCOP 12

Case No: COP12017112

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

First Avenue House
High Holborn, London, WC1A 9JA

26 February 2016

Before:

DISTRICT JUDGE ELDERGILL

- -

Between

PB **Applicant**

- and –

RB
(by her litigation friend the Official Solicitor) **1st Respondent**

-and-

London Borough of Haringey **2nd Respondent**

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- -

Mr Azeem Suterwalla (instructed by **Campbell-Taylor Solicitors**) for the **Applicant**
Mr Parishil Patel (instructed by **Irwin Mitchell LLP**)
for the **1st Respondent**
Ms Sarah Okafor for the **2nd Respondent**

Hearing dates: 8-9 December 2015

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Judgment

DISTRICT JUDGE ELDERGILL

This judgment is being handed down in private. It has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location.

§1 — INTRODUCTION

1. This decision follows a final hearing held on 8-9 December 2015.

2. The case concerns the welfare of RB, a 74 year old woman who has dementia. At the present time she lives in a residential care home referred to as E Care Home.

3. RB has one son (PB) and three daughters (CL, DB and LA).

4. The primary issue is whether it is in RB's best interests to remain at E Care Home or to return to her home at R Close.

5. A third possibility, that she move to extra care supported housing at R Court, is no longer an option because it is unlikely to have a vacancy for some considerable time. R Court could potentially have provided RB with a two-bedroom flat with 24 hour support.

6. PB specifically seeks orders that:

   (a) RB is returned home with a robust package of care;

   (b) In the alternative, RB is placed at R Court with an appropriate package of care; and

   (c) Certain restrictions on him are lifted or at least varied to allow him to visit his mother between 6pm and 12am on weekdays.

§2 — STRUCTURE OF THIS JUDGMENT

7. This decision is structured under the following headings:

§3 — THE PARTIES TO THESE PROCEEDINGS

8. The parties to these proceedings are:

PB	Applicant	*Son of the person concerned*
RB	First Respondent	*The person concerned ("P"), by her litigation friend, the Official Solicitor*
London Borough of Haringey	Second Respondent	*The relevant local authority*

9. In previous proceedings concerning RB, her daughters CL, DB and LA were also parties to the proceedings, being the third to fifth respondents respectively. They are no longer parties but continue to take an active interest in their mother's welfare.

§4 — BACKGROUND AND CHRONOLOGY

10. The court's involvement in decision-making on behalf of RB has a long history and Mr Suterwalla's skeleton argument helpfully included a chronology:

2003	RB moves to R Close, a one-bedroom sheltered council flat.
2009	RB is diagnosed with Alzheimer's disease. She begins to receive a care package which involves two carer visits a day or one visit plus a lunchtime visit to a local day centre.
28.02.11	PB makes an application to the Court of Protection concerning RB's finances and welfare.
11.05.11	PB is moved to B Lodge, ostensibly for a short stay respite.

23.06.11	A best interests assessment is conducted by social worker JR who concludes that RB wants to return home and that it is possible to achieve this with the right care package.
23.06.11	Dr TS (RB's consultant psychiatrist) assesses that RB lacks the capacity to make decisions about her care needs and financial management.
22.07.11	The London Borough of Haringey ('LBH') arranged for RB to sign a tenancy agreement for an extra care sheltered housing scheme flat at YY with 24-hour support.
15.12.11	Following a contested hearing, by interim order I authorised RB's return home as being in her best interests pending the final resolution of the case.
09.01.12	RB returned home.
16.02.12	A jointly-instructed Independent Social Worker Stewart Sinclair concluded that it was in RB's best interests for her to remain living at home with a care package.
08.05.12	Mr Sinclair's Addendum Independent Social Work (ISW) report noted that RB was settled at home and progressing well; it continued to be in her best interests to remain at home.
10-12.09.12	A fact-finding hearing was heard by me at which the local authority sought to prove 13 alleged facts concerning the conduct of RB's son, PB.
26.09.12	I handed down my findings of fact which were published on Bailii: *PB v RB & Ors* [2012] EWHC 4159 (COP) (2012) MHLO 174. For convenience, a copy is appended to this judgment, as **Annex A**. Some of the alleged facts were found to have been proved, others not.
8-9 and 11.10.12	A final hearing took place in order to hear the parties' oral evidence concerning the substantive issues of RB's future place of residence, care, treatment and contact with family members.
Jan 2013	The court delivered its judgment, a copy of which is appended to this judgment, as **Annex B**. RB was found to lack capacity to litigate and to lack capacity to decide where to live, what care to receive from her family and other persons and what level of contact to have with them. It was in her best interests to reside alone at

	R Close and to receive a care plan in accordance with the court's order.
12.11.13	My judgment was the subject of an appeal by PB. The appeal was heard by HHJ Altman, who dismissed the appeal. His judgment was reported and may be found at [2013] EWCOP B41. For convenience, it is reproduced as **Annex C**.
08.07.14	Following a hearing, the court ordered that contact between PB and RB be limited for up to 2 hours each day between Monday to Friday under supervised conditions with a community contact facility.
04.11.14	Following a hearing, the court ordered that it was in RB's interests for PB to attend R Close for up to 90 minutes each day to provide her with a meal.
29.11.14	RB was admitted to hospital.
24.12.14	RB was discharged from hospital to E Care Home as a step-down placement.
09.02.15	The local authority granted a standard authorisation for RB to be deprived of her liberty at E Care Home. The local authority immediately applied to court, pursuant to sections 21A and 16 of the MCA 2005, for a review of RB's standard authorisation.
01/02.06.15	RB visited R Close and the possible alternative placement at R Court.
16.06.15	Ms Rychlicka, acting on behalf of the Official Solicitor, attended RB at E Care Home.
18.06.15	A roundtable meeting was held. The local authority's position was that RB should remain at E Care Home.
30.06.15	The court set the matter down for a final hearing.
07.09.15	The final hearing was adjourned because the jointly-instructed ISW reports were unsatisfactory. Directions were given for a new ISW, Mrs S, to be instructed to prepare a report.
16.11.15	The (second) ISW, Mrs S, prepared her report.

8-9.12.15 The final hearing in these proceedings took place.

11. This chronology greatly simplifies the very difficult history in the case which is fully set out in **Annex B** to this judgment.

12. The critical document historically is my judgment of January 2013 and the order at the end of it. The underlying purpose of that order was recited within it:

(1) *On the evidence, the court finds that:*

a) Mrs B is still able to articulate a clear wish to remain in her own home for as long as possible.

b) Although RB lacks capacity to decide where to live, she is very near the boundary in this respect. Her strong and consistent wish to live at home is to be given very considerable weight.

c) It remains in her best interests to continue to live at R Close and for care and family contact arrangements to be based around a life at home.

d) Because her treatment and care needs are relatively simple, ordinarily it would not be difficult for her to live in her own home and to receive such care or help there as she requires.

e) All of her children, with the possible exception of DB, have behaved unreasonably in relation to the matters before the court. RB feels that they interfere and she does not wish to live with or be looked after by them. She is upset that her children do not get on and are always arguing.

(2) *The factor of magnetic importance in this case is to secure an arrangement that enables RB to live at home for as long as her health allows, and to manage any significant risk that she may lose her own home before her health requires that.*

(3) *The only significant present risk is that family conflict and/or family-professional conflict may make the provision of care at home untenable, for example because the care agency withdraws or because it is seriously affects RB's health.*

(4) *It is desirable to try to construct a framework that, as far as possible, addresses the risks posed to the viability of RB's residence and care plan by her children whilst reducing the need for the case to return to court. It is in RB's best interests to minimise the need for litigation and court intervention.*

13. The strategy set out in the order included the appointment of the local authority as RB's personal welfare deputy and a detailed care plan drafted by me which included injunctions and a penal notice, a costs warning and provision for the suspension of contact.

14. That plan and the hard work of the local authority to implement it has enabled RB to live in her own home for almost a further three years, from 9 January 2012 (when she returned home in compliance with the court's order) until 24 November 2014 (when she was admitted to hospital following a fall).

15. The key questions now are whether her wishes and feelings remain the same and whether her needs have significantly increased? Does she still have a 'strong and consistent wish to live at home'? Is the factor of magnetic importance still to ensure that she can live at R

Close for as long as possible? Can what she needs still be provided there without significant adverse consequences?

§5 — RB's MENTAL CAPACITY

16. For the purposes of the Act, a person lacks capacity in relation to a matter 'if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.' It does not matter whether the impairment or disturbance is permanent or temporary.

17. It is common ground that RB lacks capacity to litigate and to make decisions about her place of residence, contact and insofar as relevant her care.

18. PB told me that 'she is able to express her wishes and feelings albeit sometimes with some confusion present' and to that extent remains near the capacity borderline. I deal with that point later.

§6 — THE RELEVANT LAW

19. The relevant law was not in issue and therefore I shall keep this part of the judgment as short as reasonably possible.

European Convention on Human Rights

20. Article 5(1) imposes a positive obligation on the state to protect the liberty of its citizens.

21. Article 5 is engaged where an incapacitated person is deprived of their liberty. A proper authorisation or court order is required, which in this case is the standard authorisation.

22. Article 8 provides a qualified right that everyone has the right to respect for their private and family life, home and correspondence.

23. Any interference with RB's family or private life must be authorised by law, proportionate ('necessary in a democratic society') and for a permitted purpose, e.g. for the protection of her health. Due weight needs to be given to this when reaching the overall best interests conclusion and assessing whether any proposed interference with family life is justified and proportionate.

24. The court should consider the nature and strength of the evidence of a risk of harm. There must, as Peter Jackson J observed in Hillingdon LBC v Neary (2011) EWHC 413 (COP) at para 15(3), be a proper factual basis for concerns.

25. Once this court has completed its analysis of RB's best interests, it must satisfy itself that any infringement of her Article 5 and/or Article 8 rights which arises from its (provisional) conclusion is necessary and proportionate: see K v LBX (2012) EWCA Civ 79 at (35).

Mental Capacity Act 2005 — Statutory principles

26. The statutory principles set out in the Mental Capacity Act 2005 are well-known to the parties.

27. Very briefly, section 1 provides that a person must be assumed to have capacity unless it is established that she lacks capacity; a person is not be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success; a person is

not to be treated as unable to make a decision merely because she makes an unwise decision; an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in her best interests; and before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Determining best interests and the law

28. The correct approach to determining questions about what is in RB's best interests is set out in Section 4 of the Mental Capacity Act 2005:

Section 4 Best interests

(1) *In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—*

(a) *the person's age or appearance, or*

(b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*

(2) *The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.*

(3) *He must consider—*

(a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and

(b) if it appears likely that he will, when that is likely to be.

(4) *He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him ….*

(5) *Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.*

(6) *He must consider, so far as is reasonably ascertainable—*

(a) *the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*

(b) *the beliefs and values that would be likely to influence his decision if he had capacity, and*

(c) *the other factors that he would be likely to consider if he were able to do so.*

(7) *He must take into account, if it is practicable and appropriate to consult them, the views of—*

(a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,

(b) anyone engaged in caring for the person or interested in his welfare,

(c) any donee of a lasting power of attorney granted by the person, and

(d) any deputy appointed for the person by the court,

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

(e) "Relevant circumstances" are those—

(a) *of which the person making the determination is aware, and*

(b) *which it would be reasonable to regard as relevant.'*

Balancing the considerations and 'magnetic importance'

29. In the case of *ITW v Z* (2009) EWHC 2525 (Fam) at para. 32, Munby J (as he then was) gave the following guidance with regard to the different considerations listed in section 4 which the decision-maker must have in mind:

i. The first is that the statute lays down no hierarchy as between the various factors ... beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's "best interests".

ii. The second is that the weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case. A feature or factor which in one case may carry great, possibly even preponderant, weight may in another, superficially similar, case carry much less, or even very little, weight.

iii. The third, following on from the others, is that there may, in the particular case, be one or more features or factors which, as Thorpe LJ has frequently put it, are of "magnetic importance" in influencing or even determining the outcome.

Significance of the person's own wishes and feelings

30. The weight to be given to an incapacitated person's own wishes was also dealt with in the case of *ITW v Z* (2009) EWHC 2525 (Fam) at para. 35:

i. First, P's wishes and feelings will always be a significant factor to which the court must pay close regard: see *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* (2007) EWHC 2003 (Fam), (2009) 1 FLR 443, at paras (121)-(124).

ii. Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight ... it all depends ... upon the individual circumstances of the particular case (and) ... the weight to be attached to their wishes and feelings must depend upon the particular context ….

iii. Thirdly, in considering the weight and importance to be attached ... the court must ... have regard to all the relevant circumstances. (These) will include (but are not) limited to such matters as:

(a) the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings: *Re MM; Local Authority X v*

MM (by the Official Solicitor) and KM (2007) EWHC 2003 (Fam), (2009) 1 FLR 443, at para (124);

(b) the strength and consistency of the views being expressed by P;

(c) the possible impact on P of knowledge that his wishes and feelings are not being given effect to: see again *Re MM; Local Authority X v MM (by the Official Solicitor) and KM (2007) EWHC 2003 (Fam)*, (2009) 1 FLR 443, at para (124);

(d) the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and

(e) crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in his best interests.

31. More recently, the importance of the relevant person's wishes and feelings has been considered by Lady Hale in *Aintree University Hospitals NHS Foundation Trust (Respondent) v James (Appellant)* [2013] UKSC 67 ['Aintree'] and by Mr Justice Peter Jackson in *Wye Valley NHS Trust v Mr B* [2015] EWCOP 60 ['Wye Valley'].

32. In *Aintree*, Lady Hale said at para 45:

'45. Finally, insofar as Sir Alan Ward and Arden LJ were suggesting that the test of the patient's wishes and feelings was an objective one, what the reasonable patient would think, again I respectfully disagree. The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. Even if it is possible to determine what his views were in the past, they might well have changed in the light of the stresses and strains of his current predicament. In this case, the highest it could be put was, as counsel had agreed, that "It was likely that Mr James would want treatment up to the point where it became hopeless". But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.'

33. In *Wye Valley*, the relevant NHS Trust submitted that the views expressed by a person lacking capacity were in principle entitled to less weight than those of a person with capacity. Peter Jackson J accepted (at para. 10) that this was true 'only to the limited extent that the views of a capacitous person are by definition decisive in relation to any treatment that is being offered to him so that the question of best interests does not arise.' However, 'once incapacity is established so that a best interests decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given; in others, very significant weight will be due.'

34. His Lordship continued, at para. 13:

'13. In some cases, of which this is an example, the wishes and feelings, beliefs and values of a person with a mental illness can be of such long standing that they are an inextricable part of the person that he is. In this situation, I do not find it helpful to see the person as if he were a person in good health who has been afflicted by illness. It is more real and more respectful to recognise him for who he is: a person with his own intrinsic beliefs and values.

It is no more meaningful to think of Mr B without his illnesses and idiosyncratic beliefs than it is to speak of an unmusical Mozart.'

Importance of long-established family life

35. In the *Neary case* (*The London Borough of Hillingdon v Steven Neary and Mark Neary and Others* (2011) EWHC 1377 (COP)) at para 24, Peter Jackson J reminded local authorities, the courts and others of the importance of family life and the significance to be attached to it:

'Decisions about incapacitated people must always be determined by their best interests, but the starting point is their right to respect for family life where it exists. The burden is always on the State to show that an incapacitated person's welfare cannot be sustained by living and being looked after by his or her family, with or without outside support.'

36. In *Re MM; Local Authority X v MM (by the Official Solicitor) and KM* (2007) EWHC 2003 (Fam), (2009) 1 FLR 443, paras 115-121, the President stated:

(115) … As I said in Re S, at para (48):

'I am not saying that there is in law any presumption that mentally incapacitated adults are better off with their families: often they will be; sometimes they will not be. But respect for our human condition, regard for the realities of our society and the common sense to which Lord Oliver of Aylmerton referred in In re KD …, surely indicate that the starting point should be the normal assumption that mentally incapacitated adults will be better off if they live with a family rather than in an institution – however benign and enlightened the institution may be, and however well integrated into the community – and that mentally incapacitated adults who have been looked after within their family will be better off if they continue to be looked after within the family rather than by the State.

(116) We have to be conscious of the limited ability of public authorities to improve on nature. We need to be careful not to embark upon 'social engineering'. And we should not lightly interfere with family life. If the State – typically, as here, in the guise of a local authority – is to say that it is the more appropriate person to look after a mentally incapacitated adult than her own partner or family, it assumes, as it seems to me, the burden – not the legal burden but the practical and evidential burden – of establishing that this is indeed so. And common sense surely indicates that the longer a vulnerable adult's partner, family or carer have looked after her without the State having perceived the need for its intervention, the more carefully must any proposals for intervention be scrutinised and the more cautious the court should be before accepting too readily the assertion that the State can do better than the partner, family or carer.

(117) At the end of the day, the simple point, surely, is this: the quality of public care must be at least as good as that from which the child or vulnerable adult has been rescued. Indeed that sets the requirement too low. If the State is to justify removing children from their parents or vulnerable adults from their relatives, partners, friends or carers it can only be on the basis that the State is going to provide a better quality of care than that which they have hitherto been receiving: see Re F, F v Lambeth London Borough Council (2002) 1 FLR 217 at para (43).

(118) The fact is that in this type of case the court is exercising an essentially protective jurisdiction. The court should intervene only where there is a need to protect a vulnerable adult from abuse or the real possibility of abuse: see Re K, A Local Authority v N and others

(2005) EWHC 2956 (Fam), (2007) 1 FLR 399, at paras (90)-(92), and X City Council v MB, NB and MAB (by his litigation friend the Official Solicitor) (2006) EWHC 168 (Fam), (2006) 2 FLR 968, at para (27). The jurisdiction is to be invoked if, but only if, there is a demonstrated need to protect a vulnerable adult. And the court must be careful to ensure that in rescuing a vulnerable adult from one type of abuse it does not expose her to the risk of treatment at the hands of the State which, however well intentioned, can itself end up being abusive of her dignity, her happiness and indeed of her human rights. That said, the law must always be astute to protect the weak and helpless, not least in circumstances where, as often happens in such cases, the very people they need to be protected from are their own relatives, partners or friends: NS v MI (2006) EWHC 1646 (Fam), (2007) 1 FLR 444, at para (8).

(119) There is one final point to be made. The court, as I have said, is entitled to intervene to protect a vulnerable adult from the risk of future harm – the risk of future abuse or future exploitation – so long as there is a real possibility, rather than a merely fanciful risk, of such harm. But the court must adopt a pragmatic, common sense and robust approach to the identification, evaluation and management of perceived risk."

A balance-sheet

37. The best interests test is concerned with the best interests of RB and not the best interests of another person. The need for a balance-sheet approach is set out in the case of *Re S (Adult's lack of capacity: carer and residence)* (2003) FLR 1235.

Codes of Practice

38. The relevant codes of practice are the *Mental Capacity Act 2005: Code of Practice* (Department for Constitutional Affairs, London: TSO, 2007) and the *Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice* (Ministry of Justice, London: TSO, 2008). The codes do not have statutory force but professionals and some carers must have regard to their provisions, and the courts must take them into account where relevant: see section 42.

Deprivation of Liberty provisions

39. The relevant Mental Capacity Act provisions can be found in sections 4A, 21A, Schedule A1 and Schedule 1A. The underlying rationale of the legislative framework is that it is a protective scheme.

40. Schedule A1 to the 2005 Act provides that a person may only be deprived of their liberty under a standard authorisation if they meet six statutory requirements: age, mental health, mental capacity, best interests, no refusals, eligibility.

41. The requirement in issue here is the best interests requirement.

42. This is in reality four requirements masquerading as one. It is satisfied only if all of the following four conditions are satisfied:

    a) RB is being detained in the care home for the purpose of being given care or treatment in circumstances which amount to a deprivation of her liberty;

    b) This is in her best interests;

c) This is necessary in order to prevent harm to her; and

d) Her detention in the care home for the purpose of being given care or treatment in circumstances which amount to a deprivation of her liberty is a proportionate response to the likelihood of her suffering harm, and the seriousness of that harm (if she were not so detained).

§7 — DOCUMENTARY EVIDENCE

43. I received five large lever-arch bundles of documentary evidence which included position statements, the statements of the parties' witnesses, independent expert reports, medical, local authority and care home records, previous decisions, orders and correspondence.

Ms H, First ISW Report

44. The two reports of Ms H (C/72 and C/120) were unsatisfactory.

45. In her first report, Ms H recommended a return home because 'I cannot ignore the fact that RB wants to go home even though physically she seems to have thrived in her current environment' (para 17.13).

46. However, in paragraph 6.4 of the report Ms H recorded that RB wished to leave the care home because 'I will be able to see my mum and she will be able to visit me more … My mum is not well enough to come to see me, I miss her'. In her addendum report, Ms H states (at para 2.1) that 'Her reason [for wanting to go home] seems to be based on the fact that she misses her mother and that if she went home her mother would be able to visit her'.

47. It seems to me that an approach based on the premise that one 'cannot ignore' a wish to return home which is based on a wish to be reunited with one's long-dead mother is unsustainable. Nor does it help the court to say that a service user will require a 'robust' care package and 'a back-up care package' if she returns home. That is too vague to be useful.

§8 — ORAL EVIDENCE

48. Rule 96(1)(a) of the Court of Protection Rules 2007 provides that the general rule is that any fact which needs to be proved by the evidence of a witness is to be proved where there is a final hearing by their oral evidence.

Oral evidence of Mr Hatchman and Mr Fisher (the local authority social workers)

49. Mr Hatchman (Team Manager) and Mr Fisher (Practice Manager) gave their evidence jointly (referred to colloquially as 'hot-tubbing'). They confirmed and adopted their written statements.

50. They told me that RB was consistent in her wish to live at home until around the middle of 2015. That was clear from the Best Interests Assessor report of February 2015, the report of the first Independent Social Worker, Ms H, in April 2015 and, to some extent, the attendance note of the Official Solicitor dated 17 June 2015.

51. Consequently, in March 2015, Mr Hatchman and Mr Fisher had been of the view that it was in RB's best interests to return home and that remaining at E Care Home was 'not an option'. Although her needs had increased they had not increased enough to prevent a return home in accordance with her wishes.

52. There had been two significant changes since then.

53. In the first place, RB's expressed wishes and feelings have become much less consistent. Both Mr Hatchman and Mr Fisher agreed with Dr TS, RB's consultant psychiatrist, that RB no longer has a clear concept of home and that it has become particularly important to her to feel safe and secure. Her 'predominant feeling is that she wants to feel safe and secure and she feels that at E Care Home. She needs to know that someone is around to help. On her own she feels anxious or frightened.'

54. Secondly, RB's emotional and physical health has stabilised and improved at E Care Home and the benefits of being there had become very apparent. She is now much more content at E Care Home than she was at home previously. She is chatty, 'more alive and vibrant,' engaging with others. She has 'thrived' there, developed valuable friendships and relationships and 'become her own person'.

55. She appears to benefit from a more controlled and structured environment within which she does not have to worry about everyday things in the way she did at home.

56. The environment is comfortable and safe and she has easy access to the company of people other than professionals and family members. Her children have equal opportunities for visiting because the care home is neutral territory and she enjoys their visits and those of her grandchildren. Having been a carer herself, she involves herself in the welfare of other residents and enjoys this.

57. She has a proper diet and her diabetes and her weight are at a better level.

58. All of this, they say, is in stark contrast to the quality of life which she experienced at home and would again experience if she returned to live there. At home getting her out of the house had been 'a major achievement'. She had been unwilling to attend a day centre and did not develop friendships and relationships. She became withdrawn and possibly depressed in 2013 and 2014, partly because of the difficult family dynamics. If she returned home, she would again be alone for periods during the day because her home is too small to facilitate a carer being present at all times.

59. It is RB's support needs, rather than her personal care needs, that have increased since 2012. She now needs people around her and a lot of reassurance, prompting and structured support. She fears being alone and it would not take long for her emotional well-being to decline, possibly as little as 4-6 weeks. Furthermore, given the rapidity of mental decline between around March 2014 and August 2015 referred to in Dr TS's psychiatric report, it would only be 'a matter of time' before she required a move back into residential care.

60. Because of these changed circumstances, and in particular RB's enjoyment of the social interaction at E Care Home, her improved mental and physical health there and 'the complete change in her mood', both Mr Hatchman and Mr Fisher are now of the view that it is her best interests to remain at E Care Home.

61. PB's conduct is not presently a 'real feature' (i.e. factor) because his conduct has improved considerably. They would both like to think that he can be involved in providing care at E care home.

Mrs S's evidence (2nd ISW)

62. Mrs S told me that RB expressed a wish to go home but was confused as to where home is (C/196): 'I didn't think she was clear where home was'. She was not saying clearly that she wished to return home.

63. The historical difficulties at home, the fact that RB is settled at E Care Home and the lack of a clear wish to return to her real home were all relevant considerations.

64. Mrs S regretted referring to a return home as an 'experiment'. A better description was that RB would then be in a 'situation of uncertainty'.

65. Mrs S was concerned by the risk that RB would be unsettled and confused if she returned home. In saying that, she accepted that probably this was the case with all transitions and also that RB would be returning to a familiar environment. Furthermore, she had been able to adapt at E Care Home.

66. If RB returned home, there was a risk that she would not be able to return to E Care Home if things did not work out.

67. In a person's own home it is particularly important that the individual is motivated to receive care. RB did not always 'comply' at home. When at home in the past, she had refused breakfast and refused to get dressed in the morning. At E Care Home, staff could easily pop back later to try again.

68. As to why RB had been unwilling to go out at home, 'going outside one's circle of comfort is difficult for a person who is cognitively impaired. E Care Home took her to a community centre but she became agitated and wanted to go home.'

69. As to why the care package was not working at home, Mrs S had been struck by the difficulty which carers experienced 'to get RB to do anything' at home.

70. RB might not be willing to have people on hand at home who were not performing a particular care task ('did not have a specific remit').

71. There was a risk of falls but it was unlikely that RB would be left unattended for long provided she had a pendant and carers were visiting regularly.

72. RB had not demonstrated any propensity to try to cook for herself or to go out unaccompanied.

73. A person's 'self-protective ability' is very important if they are living alone. RB was now more vulnerable and less able to protect herself compared to when Stewart Sinclair wrote his ISW Report in 2012.

74. A return home might trigger 'memories of discordance' for RB.

75. Mrs S could not support a sudden cutting-off of night care after one or two weeks if RB returned home.

76. The main risk involved in a return home was to RB's emotional rather than physical well-being. The task-focused nature of her needs was straightforward. Her need for emotional support and reassurance was not and E Care Home provides for this. Indeed, she probably needs less reassurance at the care home because she can see the staff.

77. RB now needs a period of peace and tranquillity and a feeling of safety and security. It is important to imagine how she will feel back at home alone. A befriending service would not compensate for the companionship throughout the day that she has become used to. Her co-residents watch television with her, discuss programmes and what is going on.

78. Although PB has provided an evening meal to his mother in the past, RB did not want him to take on a carer's role.

79. PB did not understand his mother's condition. He has very exacting standards in relation to her care and Mrs S was concerned by his ability to deal with his concerns in a calm way. He is unable to tolerate the realities of late attendances by carers. He made a safeguarding alert to the CQC regarding RB's dental care at E Care Home.

80. The fact that the behaviour of some residents disturbs RB is a negative, to the extent it is true.

81. Because E Care Home has district nursing support, it would be unusual for a person such as RB to have to move from there into a nursing home in future.

Mrs P (Deputy Manager, E Care Home)

82. Mrs P told me that E Care Home has 30 residents across two floors. RB lives on the first floor with residents who have been there for more than a year. Some of her co-residents have been there for more than eight years and the client population has been stable since RB's arrival.

83. The turnover of staff is also small. Ms P has been there for 20 years, her assistant for ten years and all of the other members of staff for at least 2-3 years. Ms P sees RB five to six times a week.

84. Mrs P has known RB since she entered the care home on 24 December 2014. Transitions are unsettling and initially RB was vulnerable, distressed and lashing out. Her physical health was poor, she lacked motivation and there could be difficulties at night. Her demeanour had improved with improving physical health and a reduction in the confusion caused by a transition. Her physical and emotional health are now stable and she sleeps through the night. The improvement has been very apparent since August.

85. There can still be times when RB does not want to get up or to have food but things are done at her own pace. For example, if she does not eat at 8am food can be offered to her at 10am.

86. RB needs support in the form of reassurance from staff. She 'has adjusted to us, our regular faces seem to reassure her. She has a good relationship with staff, having been at E for a year now. She co-operates with care activities and it is likely that this is because of the relationships she has with staff rather than the environment per se.'

87. RB 'has formed very good relationships with other service users. She would miss all of that. They are her friends … we are like her new family … They all sit in the lounge and talk to each other, chatting and joking, holding hands, reassuring each other'.

88. RB and her co-residents 'like their regular places at table and RB eats her lunch with four other residents.' At present RB 'is a jolly person' and is 'generally content'.

89. RB has a commode near her bed and can get up at night to see to any toilet needs. Staff may assist her to use the commode.

90. When RB was taken to see R Court, 'she thought that we were sending her away and was very distressed'. We saw the same reaction when she was taken to see the dentist.

91. RB never mentions her old home to staff members.

92. RB's daughters visit three times a week and they bring RB's grandchildren.

93. PB 'is a nice man' and 'he knows he can come to see me'.

94. At present RB lives at E Care Home as an out-of-GP area respite resident and arranging dental care for her was problematic. The care home had to speak with Haringey and arrange a private dentist.

95. With regard to PB's concerns, his mother does watch TV but sometimes she does not want to: 'why would I make her if she doesn't want to?' Residents 'have a choice of food and she can have West Indian food if she wants to'.

96. Residents do not routinely walk in and out of each other's rooms.

PB (son and deputy for property and affairs)

97. In his written evidence, PB told me that 'While I accept my mum lacks the capacity to make a decision about where she lives, notwithstanding her confusion sometimes I remain of the firm view that her genuine wish is to return home to R Close.'

98. In his oral evidence, PB said that 'things went downhill following the injunction in July 2014'.

99. It was common ground that care at home was not working prior to RB's admission to hospital at the end of 2014. More particularly, there had been problems since around September 2013. The carers at home did not do the things which the carers in the care home do: 'The carers at E Care Home know their job and do it'.

100. When asked to comment on the fact that his mother appeared to be a lot happier and physically better at E than she had been at home, PB replied, 'It's down to the carers'. Prior to July 2014 she was 'as well health-wise as she is now'.

101. PB had needed to keep on the back of the carers at home, to make sure they did their job. 'They should know it'.

102. It was correct that PB's expectations could be viewed as too high 'if they [the carers] don't get up to scratch … If I do it, it's ok'. He had and would point out poor care to carers if he saw it. He had been justified in complaining to the CQC about his mother's lack of dental care.

103. It was true that domiciliary workers tended to be poorly paid and that there was a high turnover of staff. Previously his mother had benefited from three core care workers at home.

104. His mother needs skilled specialist dementia carers at home.

105. It was not correct that RB was 'in complete distress' at home following her fall in November 2014.

106. There might be a need for 24-hour support if his mother went home.

107. RB last said that she wanted to go home without prompting sometime prior to April 2015.

108. However, 'she knows that I know what she wants. She doesn't want to keep telling me'. She has simply submitted to the current situation.

109. A transition home is manageable. His mother might be distressed at times but 'only for a period, a month'. Although she is now 'a bit less capacitous' she adjusted to being back home within a fortnight of returning there from B Lodge. Nights were the key. She is able to get up and use the toilet at night.

110. At home his mother would have a sense of independence and peace of mind.

111. It is correct that she needs to feel safe and secure and to know that help is at hand if she falls.

112. With regard to a risk of falls at home, his mother has had the benefit of a neck pendant and also another pendant around her waist.

113. The risk of social isolation could be addressed by appointing a designated carer to take RB out, something which PB has requested in the past. However, she could not be forced to go out.

114. The risk of depression connected with social isolation is the only significant risk involved in a return home.

115. As concerns his sisters, he and they simply need to make sure that they avoid each other at his mother's home.

116. There is much less risk of confrontation than before: 'I've improved. I try not to argue with people now. It is a waste of my time and non-productive'.

117. The positives of E Care Home are that RB has the company of other residents, she has the support of carers in relation to medical assistance and the benefit of two-hourly checks. Her weight has reduced and her diabetes is more under control. The quality of care has been good (later downgraded under questioning to 'not bad' by PB). Sometimes she says that she likes being at the care home but that is not the same thing as wanting to live there.

118. The care home negatives are that his mother is 'moaning all the time' ('normally I tell her to stop moaning and she does'), she does not get on with some residents and is saying 'of course I want to go home'. There was a major incident on 28 November 'when a woman in a night-dress was taking things from her.' One female resident came into her room and his mother referred to her as 'a witch'.

119. The longer she remains at E Care Home, the less she can recall of home.

120. It is necessary to ask whether his mother is happy at the care home: 'Is she happy? 'She is happy to be there for now, that's all'.

121. PB disagreed with Mrs S that it was not in his mother's best interests for him to provide care and/or support to his mother at home between 6pm and midnight: 'It is not a difficult job. I just need to turn up, see to food and medication, put her to bed. It is basic stuff. May be for two years max.'

122. PB told me that he lives in a first-floor two-bedroom property around 2½ miles from E Care Home. There is no lift. PB (sic) is not confident using a wheelchair for his mother. His

mother last visited his home in 2014. He cooked a meal for her and they watched television; she enjoyed that.

§9 — SUBMISSIONS

123. I received both written and oral submissions, all of which were extremely helpful.

Mr Suterwalla for PB

124. In his skeleton argument, Mr Suterwalla submitted that the starting position is my detailed judgment following the hearing in December 2012. In that judgment the Court recognised RB's 'strong and consistent wish' to live at R Close [D60]. The Court had held (at [52]) that:

'Because she has expressed such a strong and clear wish to remain in her own home, and her relatively simple needs make it realistic to provide care in that setting, the aim must be to secure an arrangement that enables her to be at home for as long as her health allows.'

125. PB's primary position remained that it was in his mother's best interests to return home to R Close. He took that position because his mother did not require care in a residential placement, such care being disproportionate to her care needs, and she has constantly evinced a wish to return home. The validity of both of those points was not undermined by anything in Mrs S's ISW report of 16 November 2015.

126. More particularly:

(a) No compelling evidence had been adduced since 2012/2013 that RB's wishes and feelings with respect to where she should reside had changed;

(b) If his mother was capacitous she would wish to return to R Close;

(c) Her care needs could be met with the right package of support at R Close; and

(d) The reasons advanced by the local authority and by Mrs S as to why her care needs could not be met at R Close did not withstand proper scrutiny.

127. In his closing oral submission, Mr Suterwalla told me that the decision as to whether RB should remain at E or return home turned on five factors:

a) Her present wishes and feelings;

b) Her past wishes and feelings;

c) What she would be likely to decide if she still had capacity (substituted judgment);

d) Her present care needs; and

e) An assessment of the risks of physical and emotional harm.

128. The court should ask itself whether there was any evidence to displace the well-evidenced previously recorded position that RB wishes to remain in her own home. There was no compelling evidence that her position has changed and PB was satisfied that his mother wished to go home. Paragraph 10 of his final statement listed the occasions on which she had asked to return home.

129. The balance of the evidence indicated that RB is still able to express a clear wish to go home and 'has an understanding of what that means'. The most detailed report in connection with her present wishes and feelings was that of the second ISW, Mrs S. Her oral evidence that RB is confused about where her home is, and whether she wishes to return to it, was overstated and inconsistent with paragraphs 12-21 of her report.

130. If RB still had capacity to make the decision for herself she would not form the view that the time has come for her to move into a care home. Her past wishes and feelings had been clear and they were that she wished to live in her own home.

131. Nothing in her level of cognitive functioning, present care needs and risk of harm gave rise to insuperable difficulties. The previous problems associated with family dynamics and confrontation had been resolved. The previous problems associated with the quality of paid care at home could be catered for.

132. PB accepted that his mother's presentation is now different to how it was before her reception to E Care Home. However, she was not happy at the care home between December 2014 and May 2015 and it was too simplistic to attribute that unhappiness to the difficulties of transition.

133. Although it was said that she is now happier at E Care Home, that simply reflected her poor health in December 2014.

134. 'Would she be unhappy to return home?' was the question. Mrs S's evidence was essentially simply that there was a risk that she would be unhappy at home. She did not say that the arrangement would break down within a few weeks.

135. The main issue to come out of the hearing had been that of social isolation. It was accepted that RB generally presents well at E Care Home. However, the view that she needs reassurance and would be socially isolated at home was based on quite limited evidence of her not wanting to be left alone. The care home notes did not reveal a constant need for reassurance or attention and a robust care package at home could prevent her from becoming socially isolated. The family dynamics had been managed and there was no real concern that the historical problems of confrontation within her own home would re-emerge. The evidence that RB now needs 24-hour support 'was not particularly compelling' and meeting her physical needs had not been the primary focus of the case.

136. In summary, none of the evidence ought to lead the court to conclude that RB has now changed her wishes as to where she wishes to reside. Remaining at E Care Home was at odds with her long-standing wish to be at home and there was no evidence that she would be unhappy if she returned home.

Ms Okafor for the local authority

137. In her written submission, Ms Okafor noted that the the London Borough of Haringey, the Official Solicitor and the ISW Mrs S had all concluded on the evidence that it is in RB's best interests to continue to reside at E Care Home (C213).

138. The overwhelming weight of professional opinion was that RB currently benefits from or positively requires a 24 hour care and support package. The overwhelming family opinion was similarly that she benefits from or positively requires a 24 hour care and support package.

139. Dr TS had been asked to provide expert guidance in relation to RB's current wishes and feelings given the inconsistency of her responses to different people or to the same people at different times. She had drawn the court's attention to the fact that RB consistently referred to her mother during interviews with professionals. This indicated a desire and need on her part to feel safe and secure. It was apparent to Dr TS that RB would not like to return to an isolating environment and now felt a need to be looked after. This 'was a game changer' as Dr TS put it.

140. RB 'evidently no longer presents as wishing to live or being alone, however one may look at it' and a home is not a home merely because it brings with it more privacy or rights of occupancy if a person is miserable, isolated and prefers not to be alone.

141. RB suffered from short term memory loss as a result of dementia, was unable to take care of herself because of cognitive impairment and suffered from low mood and indeed depression at home. The care home supported her to make choices, provided her with peer group companionship, prompted her to socialize with other service users and encouraged her to engage in one-to-one conversation. It enabled her to occupy her time and to have a better quality of life.

142. Consequently, her presentation and health are now in marked contrast to what previously was evident in her own home. At home she was socially isolated and withdrawn; she could be confused or irritable, shouting and lashing out; her diabetes and weight were not well-controlled; she needed frequent prompting to take fluids and eat regular meals; refused to wear dentures; was observed to sleep mostly in a lounge armchair during the day; and was at risk of falling.

143. The particular benefits for RB of living at E Care Home included the following: her eating problems have been resolved and she readily goes to the dining area for meals; she now wears her dentures; her bedtime routine is well-established; she sleeps through the night once settled; her mood is stabile and she cooperates with staff with regard to the delivery of personal and domestic care; she has onsite access to a socially active environment and has formed attachments with residents and staff alike; she is able to participate in religious services and activities at the local church; she takes pride in her appearance and sees a chiropodist, hairdresser and optician.

144. It was not in RB's best interests to risk all of these benefits by sending her back to an isolating environment. Furthermore, such a return brought with it the potential for further unnecessary and lengthy interventions by the court each time her situation or residential needs changed. By allowing her to remain at E Care Home, the court would, as far as possible, be future-proofing her care needs, which were only likely to increase.

145. The property at R Close is a small purpose built one bedroom flat. It has a very limited capacity for a transition plan that involves monitoring day needs and any night time care required, and no space for a live-in carer.

146. The advantages and disadvantages of the two available placements, as they stood at the end of June 2015, had been fairly set out in the local authority's balance sheet:

Pros	***Cons***
E Care Home	
1. RB at times wishes to remain	1. *At times RB wished to return*

in E Care Home.

2. *RB is fully cared for both emotionally and physically. Since admission she has not had any falls, her diabetes is under control, she is going to bed at a reasonable time and she is eating regular and more healthy meals.*
3. *She has made new friends and is much more sociable.*
4. *Her spiritual needs are being met. A priest visits her once a week which she has commented on and values (the priest gave her a rosary which she wears).*
5. *Her wider family visit regularly which she enjoys and she appears to be much calmer and more relaxed. She is happier and more talkative and open to suggestions such as days out.*
6. *Her needs can be attended to in a more relaxed and less intense manner. There are more staff available and therefore she is under less pressure to get up/get washed/eat her meals at set times.*
7. *In reality, she has not been able to enjoy the supposed benefits of living at home (as listed in the other column) for a very long time.*
8. *The current placement has shown RB to be more independent and she has more control over what she wants. Moving her back to R Close would jeopardise this and she could well revert back to a withdrawn depressive state.*

to R Close.

2. *RB would no longer have her own tenanted flat.*
3. *Loss 'of associated place with happier times when she lived at R Close'.*
4. *In theory there would be a loss of independence in relation to matters such as when she wants to eat/drink and go out and how she wants her environment to look.*
5. *In theory she would lose her right to regulate her personal relationships with people on her terms. For example, when she chooses to invite people around.*
6. *In theory she may enjoy 'the entire privacy of the home' at R Close.*

R Close

a) *At times RB wishes to return to R Close.*

a) *The carer presence needed to replicate the current level and*

b) She would have her own tenanted one bedroom flat.

c) She would be living at a place where she can recall happy memories of family life.

d) In theory she would have greater independence in relation to matters such as when she wants to eat/drink and go out and how she wants her environment to look.

e) In theory she would have an almost absolute right to regulate her personal relationships with people on her terms. For example, when she chooses to invite people around.

7. *In theory she could enjoy 'the entire privacy of the home' at R Close.*

standard of care could not be sustained.

b) A care package of 24 hours for one week only would lead to a gap in care needs from week two. Some night time risk needs could not be met because her flat cannot accommodate a live-in carer.

c) Her home cannot facilitate a higher level of carer support should this be required in the future.

d) A move back to residential care as her needs increased further would be destabilising and also require another potentially lengthy court case.

e) There was no guarantee that E Care Home would have a place at that time.

f) She would lose the benefits of E Care Home where she has become comfortable and made friends.

g) A return home brought with it a high risk of RB slipping back, becoming socially isolated and depressed. Her paid carers at home had tried their level best to get RB to go out and access the community but to no avail. RB rarely went to the day centre as she was either too tired or too depressed.

h) There was a risk that conflict between RB's children would re-emerge.

i) There was a risk that the provision of care at home would again be disrupted by family members, for example PB, thereby placing RB at the centre of conflict and/or causing a breakdown of the care package.

147. The local authority did not seek an order regulating contact in the event that the court decided that RB should remain at E Care Home. Nor would a personal welfare deputy be required in that situation.

148. If Mrs RB remained at E Care Home, the local authority would pay for a bigger room. It would also arrange (in consultation with RB, her family and an advocate) for a choice of personal possessions to be brought to E Care Home from R Court and for an appropriate and sensitive clearance of her flat.

149. The local authority supported the publication of the judge's decisions in the case as being in the wider interests of justice, subject to the caveat that RB remain anonymous.

150. The current standard authorisation should be extended in order to allow the local authority time to require E Care Home to apply for a further authorisation.

Mr Patel for the Official Solicitor/RB

151. The case was finely balanced.

152. The starting point was RB's wishes and feelings (see the *Aintree* case).

153. The local authority had set out very ably the pros and cons of both possible places of residence (G/617).

154. The following factors had persuaded the Official Solicitor that on balance it was in RB's best interests to remain where she was:

(a) The evidence from a number of sources that she is happy, settled and secure at E Care Home. Mrs P's evidence was impressive and her picture was that of a lady happy in her surroundings. She had made friends, liked the staff, could ask for things and slept well most days. She sat with her friends during the day and the impression was that in RB's mind E had become her home. Carers were able to reassure her if something bothered her.

(b) Dr TS had known RB over a period of five years. She was clear that RB had deteriorated between March 2014 and August 2015. The wishes and feelings she expressed to Dr TS were inconsistent but one could infer a need to be in a safe and secure place which she regarded as home, and most of the time that was E Care Home.

(c) Mrs S noted in paragraph 6.5 of her ISW Report that RB said that she would be happy to remain at E if that was the decision of the court.

(d) Importantly, E Care Home ensures that RB's emotional needs are met. She has social interaction, reassurance, comfort and security there. Mr Hatchman said that she was a different person now. At home she had been depressed and uncommunicative, at E she was chatting and smiling and one could see her personality. The Official Solicitor's attendance notes from 2012, 2014 and 2015 tended to bear this out. Looking at the history of life at home, there was a risk that she would lose these considerable benefits at home. The attempts of core carers to address her social isolation at home had not been successful and it was difficult to get her to go out if she resisted that. Consequently, she had become depressed. At E social interaction at home was always there.

(e) PB was probably the family member who knew his mother best. However, whilst PB knew his mother well, he might be understating her needs. In cross-examination, at times he had seemed able to understand his mother's physical needs but unable to recognise her emotional needs. In addition, the reality of modern domiciliary care was that it is inconsistent and variable in quality and he seemed to over-estimate what can be provided by carers in the home.

§10 — ANALYSIS OF RB'S BEST INTERESTS

155. Having summarised the legal framework, evidence and submissions, I must consider RB's best interests.

Participation of RB in the decision-making

156. So far as reasonably practicable, RB has been permitted and encouraged to participate as fully as possible in the decision-making process. She has had many opportunities to express her wishes and preferences.

Whether a recovery of capacity is likely

157. RB's dementia has progressed to a level which means that it is now more difficult to ascertain her present wishes and feelings in relation to her place of residence.

158. It is unlikely that RB's capacity will improve so as to enable her to make these particular decisions for herself. Her condition is a progressive one. Therefore, a decision must be made for her now, by me, in her best interests.

RB's wishes and feelings

159. The law requires objective analysis of a subject not an object. The incapacitated person is the subject. Therefore, it is *their* welfare in the context of *their* wishes, feelings, beliefs and values that is important: *Westminster City Council v Sykes* [2014] EWCOP B9, (2014) 17 CCLR 139.

160. In taking RB's wishes and feelings into account, I have considered the case of *ITW v Z*, [2009] EWHC 2525 (Fam), the degree of incapacity, the strength and consistency of her views, the likely impact of knowing that her wishes and feelings are being overridden (if my decision is contrary to her wishes), the extent to which her wishes and feelings are rational, sensible, responsible and pragmatically capable of sensible implementation, and the extent to which her wishes and feelings can properly be accommodated within the court's overall assessment of her best interests.

161. I have also applied the judgments of Lady Hale in *Aintree University Hospitals NHS Foundation Trust (Respondent) v James (Appellant)* [2013] UKSC 67 and of Peter Jackson J in *Wye Valley NHS Trust v Mr B* [2015] EWCOP 60.

162. In 2012, a very experienced ISW, Stewart Sinclair, reported to the court that RB was 'able to articulate a clear wish to remain in her own home for as long as possible' (C/5).

163. RB also told Mr Sinclair that one day she might need to move into a care home:

'I accept that when I become more ill things will change and then I may not be able to live on my own, but I am not ready for that yet and for now I want to stay here' (C8/23).

'Maybe when I am older I will go to an old people's home, who knows? But not now. I do know that I once managed before without carers, but now I know I could not manage without help and I agree with support and perhaps I accept that I worry less than I used to because I know that carers will be coming if there is a problem, and as I said, if I needed to use my pendant I would, because that is obviously why I put it on' (C9/36).

164. While RB's statement is evidence that she understood that people's circumstances and needs change, and that she might not be able to live at home indefinitely, it does not answer the questions, 'What are her wishes and feelings now?' and 'Have we reached that point?'

165. Late in 2012, the court found that the factor of magnetic importance in her case was 'to secure an arrangement that enables RB to live at home for as long as her health allows and to manage any significant risk that she may lose her own home before her health requires that' (D/77).

166. It is not disputed that until 2015 RB consistently expressed the view that she wanted to live at home. For example:

a) On 1 April 2014 she attended the Memory Clinic and said that she did not 'want to go into a home, the carers work' (C/41). Her MMSE at this time was 21/30, an improvement of three points since her previous review, and her BADL score had likewise improved, by ten points to 26/60.

b) On 27 May 2014, a social worker best interests assessor recorded that:

'I asked RB where she would most like to live. I asked this question in various different ways but RB did not falter from stating she would only live in her home where she is living now [R Close]' (C/45).

The social worker noted that she had 'a lovely home full of family mementoes, photos and personal possessions' (C/45).

c) On 16 June 2014, Dr M reported that RB was happy in her own home: 'I feel safe here, I like it here and want to stay here … I haven't got no problems.'

Her main signs and symptoms at that time included memory deficits 'affecting significantly her short-term memory. She was unable to recall recent events and information'; 'increasing difficulties in being able to focus or sustain attention on simple mental calculation or tasks'; poor visuospatial function; inability to attend to basic personal care and activities of daily living without prompting, supervision and assistance; and poor executive function/inability to find a solution to a specified problem (C/49).

d) On 2 July 2014, Ms Taner visited RB on behalf of the Official Solicitor. RB did not feel well that day and was uncommunicative but with regard to the care she was receiving did say that she was 'fine'.

167. On 29 November 2014, RB was admitted to hospital following a fall at home. She had experienced significant weight loss prior to admission and her appetite had been very poor. The cause of this was diagnosed as being oesophageal ulcers which were successfully treated.

168. On 24 December 2014, RB was discharged to 'step-down' accommodation, E Care Home, initially for a period of four weeks. However, she has resided there ever since.

169. On her reception to E care home she was upset about being there and referred to being 'locked up here' and wanting to return home (B/330). However, she was disorientated and would also lash out at staff and tell them to 'Get out of my house' (B/254).

170. A three-week review was held on 14 January 2015. RB was much improved. She was eating and drinking regularly; allowing assistance with her personal care; going to bed at a reasonable hour; engaging with staff and others; and (it was recorded) generally much happier (B/167). On more than one occasion she said that she liked the residential setting and during the review she told her social worker 'that it is "nice here" and that she was "happy here". RB said that she doesn't think about going home' (B/168).

171. According to the Deputy Care Home Manager, Mrs P, RB started to settle and her health began to stabilise during February and March 2015 (B/254).

172. A standard authorisation was issued on 9 February 2015. The social worker best interests assessor recorded:

'Asked the direct question of where she would like to live, RB said she would like to go home. However, when I asked her how she would feel if she was told that she would have to remain in the care home she said "Alright. They are nice here and if I am asked to stay it would be alright"' [B175].

173. On 27 February, PB says that his mother told Ms Taner, visiting her again on behalf of the Official Solicitor, that she did not like E Care Home and wanted to go home (B/200). That is a simplification in my view. When asked about where she would like to live, RB said: 'I want to go home and live with my mum but they tell me she is too old to look after me now' (B/200). She complained that there was nothing to do at the care home.

174. A Summary of Needs AMD Report dated 6 March 2015 states:

'When we went through options for where she might live in the future, she is clear that she does not want to remain in the residential home, so this is not an option. We then went on to discuss extra care sheltered and that advantages of this being that carers would be available 24 hours a day, at first she was receptive to this. However, after discussing the option of returning home with a live-in carer this is the option she chose. We discussed the issue of privacy and the need to share facilities, but she was quite happy that a bed might need to be placed in her lounge for her carer to sleep in. She is also aware that there will be different carers and did not appear concerned by this' (G/597).

175. On 4 April 2015, RB was interviewed by Ms H, the first ISW instructed in 2015. She 'did not know the address of E Care Home but was aware she was in a care home. I asked RB where she would like to be, she responded, "I want to go home". She said this several times but was unclear where home was ('High Road bungalow' [an old address]) and when asked could not say why she wanted to go home ('I don't know why. I think I will be happier there'). She did not want PB to look after her: 'I don't want my son to look after me, no he can't do that, he hasn't got energy and patience (C/81) …. I don't want him to look after me, just visit me' (C/82).

176. According to the Deputy Care Home Manager, Mrs P, RB has been 'stable, happy and content' since May 2015 (B/254).

177. On 7 May 2015, local authority social worker Mark Fisher states that:

'She sat down and became quite tearful informing me of the death of her mum and dad … After a few minutes she gathered herself and we went on to discuss why I had come to see her. I asked RB about leaving E Care Home and going home and was surprised by her response. She was very clear in stating that she did not think going back to her home at R Close was a good idea as she would be alone. She wanted to be somewhere where people would be around her all the time, as she enjoyed the social contact. She said that she would preferably be somewhere where she could have her own space, but space for a carer to stay if she needed this…. We then went on to talk about a 2 bedroom property in a setting where there were people around all the time and she would be able to mix socially with other people and she seemed quite excited by this prospect' (B207/10).

178. According to a care home email dated 12 May 2015, when asked about her wishes 'her reply was that she didn't think that she could cope if she went home and wished that she could stay where she was. She became upset and referred to her mother dying' (B/215).

179. A visit to R Close on 1 June 2015 was of marginal usefulness because PB and the social services representative both appear to have put pressure on her to share their respective views, when the purpose of the visit was to enable her to express her view (B/225 and Exhibit PH/7). RB was aware that she was in her own home but was unable to identify the children in the pictures on the wall.

180. RB then visited R Court the following day. Mr Hatchman recorded that she:

'was very tearful and looked upset. I asked her what was wrong and she told me that she didn't want to live "here" and that she wanted to live near her "mum" and wanted to return home. When I asked where "home" is, she confirmed that she meant the care home … she said she liked E Care Home "because they look after me"' (B/225/6).

She relaxed when Mr Hatchman told her that she would not be forced to move. He felt that a move to R Court 'would be counter-productive if RB is emotionally unable, physically unwilling [or] simply does not wish to make such a huge change in her living arrangements' (B/227).

181. This is consistent with what Mrs P told me which was that when RB was taken to view R Court, 'she thought that we were sending her away and was very distressed. We saw the same reaction when she was taken to see the dentist.'

182. On 16 June 2015, Ms Rychlicka visited RB on behalf of the Official Solicitor. RB said that she did not like the two places that she had visited earlier in June and that 'I don't want to move from this area. I've lived here for years and I like it here'. She got along with and liked the carers and was happy where she currently lived ('Yes, I like it here …. Peaceful and everything') (B/235). However, when pointedly asked if she wanted to go home, she said 'Yes, I would' (B/236) but then variously seemed to advocate R Court, R Close and the care home.

183. On 17 August 2015, RB was seen by her consultant psychiatrist, Dr TS. Dr TS interviewed RB alone and on neutral territory in order to minimise the possibility of influence or unconscious bias. She reported that RB has a history of psychotic depression and that her MMSE score had declined from 21/30 in March 2014 to 12/30 in August 2015. According to Dr TS's report:

'I would expect this level of decline in someone who has had a dementia diagnosis for that long and in my experience this decline is likely to continue with concomitant functional decline and increased care needs' (C/135).

184. RB seemed to confuse E Care Home and R Close:

'I don't know what to say. I like where I am living at the moment — R Close. I don't know if it's a residential home. I think it's a residential home … I was at home with my mum and I was taken sick and they brought me to hospital …, they say my mum couldn't take care of me any more' (C/135).

185. RB thought that she was around 40 years old and denied that her mother had passed away. There was no consistency in her answers. She confused her family home in the West Indies with her current flat and E Care Home and had 'no clear concept of home' (C/136).

186. On 1 September 2015, Ms Rychlicka visited RB on behalf of the Official Solicitor. RB said, 'I'm happy here but I want to go home because I'm worried about my mum'. She was very tearful, saying that she missed her mum a lot and that her mum had no one to look after her (B/335).

187. Mrs S, the second ISW in 2015, visited RB on 19 and 21 October 2015 and she also observed a contact session between PB and RB on the latter date.

188. On 19 October 2015, Mrs S asked RB if she knew where she was living 'at the moment'. She replied, 'I think it is R Close. It's nice there, a very nice area, nice people very friendly, (there was) a warden I can't remember her name'. She was able to describe her flat at R Close as having a bedroom, a sitting room, kitchen and bathroom. Social services people 'helped, all right, didn't give me no problem, very nice, I did want them to come, I didn't want them to have a day off. They sent someone else who wasn't rude to me' (Mrs S Report, para. 5.3).

189. With regard to E Care Home, RB said, 'don't know how long I am going to stay, I don't mind staying here, I think I would like to stay here, I like it here, the people are very nice. R Close happy, same way, everybody nice and friendly' (Mrs S Report, para. 5.9).

190. Later in the interview, RB said that 'I might be better back in my own place I like it there' (Mrs S Report, para. 5.12).

191. During their interview on 21 October 2015, RB expressed positive views about R Close ('I do like R Close … People nice and friendly at R Close … I can't remember about the flat') and E Care Home ('I get on well with the people it's nice and quiet here … I don't get bored, I never get bored') but was confused at times about where her son and daughters thought it was best for her to live (Mrs S Report, para. 6.3).

192. With regard to the possibility that PB could prepare her evening meal and assist her with getting ready for bed, RB replied 'I don't mind him cooking my meals ... I would like him to come and do for me. I don't mind him helping me, thing is I'm worried about PB not getting on with the carers. He could come and visit me sometimes, don't want him to live with me' (Mrs S Report, para. 6.8).

193. She was worried about being alone:

'I don't think I would like to be on my own. I don't want to be on my own at night. I want someone to keep me company in case something goes wrong. R Close is too small; I would not like carers to stay. I don't mind if PB has to sleep or visit sometime or stay very occasionally, okay, but not to live' (Mrs S Report, para. 6.10).

194. During the observed contact, 'PB said you want to go back to R Close don't you? RB replied, "I don't really know where I want to live. I like R Close"' (Mrs S Report, para. 8.6).

PB said his mother did not like R Court. She did not like the area and she did not know anyone there (para. 8.7).

195. ‘RB then said I would like to live here, I like it here, I would like to live in R Close. I know people and get along with people here. I help them out they help me. I could cook meals but I wouldn’t want to ((para. 8.8). ‘Later when PB was talking to his mother about R Close she said, “I don’t think I want to live here. I want to go back to R Close’ (para. 8.9).

196. Mrs S’s conclusion was that, ‘Throughout the proceedings RB has frequently expressed a wish to return home to R Close. (Sadly however RB's dementia has progressed to the extent that she is disorientated in time and place and “home” at times can mean R Close, E Care Home or the home where she believes her mother and father still live)’. RB was not saying clearly that she wished to return home.

197. PB very fairly says that it is inevitable that his mother now finds it difficult to remember her home given the passage of time. While he accepts that RB ‘may present as more confused now … greater confusion is not evidence that [her] wishes and feelings have changed’ and indeed the evidence ‘does not convincingly show that [her] wishes and feelings have changed’. He submits that, ‘In the absence of any solid or compelling evidence’ that RB’s wishes and feelings have actually altered from what they were in 2013, ‘there is no foundation for reaching the conclusion that her position as to where she would like to reside has changed’. He tells me that his mother confirms that she wants to go home when he puts the question to her and that at times Mr Fisher has unduly influenced her. Her statements about being happy to live at E Care Home reflect that ‘she does think the carers are nice but also because she wants to please people’.

Analysis

198. In contrast to the position in 2012, I can no longer identify from the evidence a ‘strong and consistent wish to live [at R Close]’ and in my view RB is no longer ‘articulating a clear wish to remain [at R Close] for as long as possible’.

199. RB last said to PB that she wanted to go home without prompting sometime prior to April 2015.

200. When RB visited R Close on 1 June 2015, the supervision note records that she was aware that she was in her home. However, there was not much interaction and she slept most of the time she was there. The note does record her expressing pleasure at being there or reluctance to leave and return to E Care Home. Much of the time at home seems to have been taken up by PB and the contact supervisor disagreeing or arguing about her best interests in her presence (B/232). She then visited R Court on the following day, became upset and asked to go home but significantly wanted to go home to E Care Home not to R Close.

201. Away from R Close, her memories of home seem to be fragmentary. When she is prompted and asked to focus there are times that she has some recollection of her one-bedroom flat, for example during her interview with Mrs S on 19 October 2015, and she may say that she wants to go home. However, even then her attention and recall are quite fleeting and disturbed by disorientation: ‘Mrs S asked RB if she knew where she was living *at the moment*. She replied, “I think it is R Close”.’

202. The degree of disorientation, and in particular RB’s confusion as to where she is now residing, is quite pronounced. On 4 April 2015 she thought home was ‘High Road bungalow’. On other occasions she seems to think that E Care Home is R Close and that she is living at R Close. On yet other occasions home is in the West Indies with her mother. Consequently, when she has expressed a wish to go home on several occasions since

February 2015 often it is in order to be reunited with her mother (interview with Ms Taner on 27 February 2015; interview with Ms H on 4 April 2015; care home email dated 12 May 2015; interview with Mr Hatchman on 2 June 2015; interview with Dr TS on 17 August 2015).

203. Because RB's expressed wishes have been difficult to interpret at times, it is particularly instructive to consider her present feelings. How does she feel at present? What do her demeanour and non-verbal behaviour indicate? Does she appear happy or sad, content or discontented, angry or calm? How does she seem to feel about her life at E Care Home? Is she anxious, distressed, frustrated, asking to leave, expressing dissatisfaction? What questions does she ask about her home and life without being led or prompted?

204. When RB briefly and inconsistently recalls her different homes in the community it seems to be with affection but in my view the evidence indicates that similarly she also feels affection for where she now lives and I believe that most of the time she now feels that E Care Home is home:

'I don't want to move from this area. I've lived here for years and I like it here'.

'Yes, I like it here …. Peaceful and everything'.

'I know people and get along with people here. I help them out they help me'.

'When I asked where "home" is, she confirmed that she meant the care home … she said she liked E Care Home "because they look after me".'

'I get on well with the people it's nice and quiet here … I don't get bored, I never get bored.'

She is chatty, 'more alive and vibrant,' engaging with others. She has 'thrived' there, developed valuable friendships and relationships and 'become her own person'.

She does not have to worry about things in the way she did at home.

She 'has adjusted to us, our regular faces seem to reassure her. She has a good relationship with staff, having been at E for a year now. She co-operates with care activities and it is likely that this is because of the relationships she has with staff rather than the environment per se.'

RB 'has formed very good relationships with other service users. She would miss all of that. They are her friends … we are like her new family … They all sit in the lounge and talk to each other, chatting and joking, holding hands, reassuring each other'.

RB and her co-residents 'like their regular places at table and RB eats her lunch with four other residents.'

At present RB 'is a jolly person' and is 'generally content'.

When she was not under the misapprehension that her mother is still alive, 'she didn't think that she could cope if she went home and wished that she could stay where she was' (care home email of 12 May 2015).

205. At this stage of her illness, it is likely that her happiness depends much more on how she lives than where she lives. She enjoys her current life for the most part (how she lives) and, if she could analyse her situation more fully, the importance for her of where she now lives probably lies in its impact on how she lives: does she have company, does she enjoy the company, feel secure and cared for, content, have access to her family and so on?

206. In my view, the balance of the evidence justifies findings that RB is happy and content living at E Care Home and that she feels that it is home most of the time. She does not want to leave and does not want to live by herself ('I don't think I would like to be on my own. I don't want to be on my own at night. I want someone to keep me company in case something goes wrong'). Although she could eventually readjust to living at R Close, she would be sad to leave her current carers and friends and it is likely she would feel anxious, more vulnerable, isolated and more depressed.

207. In my opinion, the balance of the evidence in relation to RB's present wishes and feelings does not point to a 'strong and consistent wish' to live at R Close or 'a clear wish to live there for as long as possible'. Indeed, in my view on balance the evidence suggests that she feels at home at E Care Home and feels that it is home most of the time. She would be sad to be required by me to leave.

Any written statements made by RB when she had capacity

208. RB's signed tenancy agreement is a written statement of a wish to make R Close her home at the relevant time.

RB's beliefs and values

209. Mrs S expressed the opinion that 'given a choice the majority of older people would prefer to remain in their own homes' and PB relied on this. However, I am concerned only with RB's wishes and feelings, not those of 'the majority of people'.

210. I accept that when RB had capacity (and for some considerable time afterwards) she greatly valued her independence and her belief-system placed a lot of emphasis on the importance of personal autonomy. At that time she expressed a clear wish to remain in her own home for as long as possible and this was important to her happiness. I sought to give effect to that.

211. The relevance and significance of an incapacitated person's previous wishes, feelings, beliefs and values from a period when they had capacity varies from person to person. In a case where a devout Jehovah's Witness is unconscious and a decision is being made about whether a blood transfusion should be given, the person's beliefs and values prior to becoming unconscious are of great significance. In a case such as RB's they must be balanced against the person's present wishes and feelings. In RB's case I give more weight to my finding that she is happy and content at E Care Home and feels at home there than I do to speculating about what she would now make of her present situation if she briefly had the capacity to assess her current incapacity and circumstances and was in possession of all relevant facts. I expect but cannot know that she would approach it as I have tried to do and would choose the option she feels is most likely to promote her happiness.

Views of her children, friends and non-professional carers

212. I have summarised the oral evidence of the witnesses all of whom gave me a great deal of useful information and demonstrated thoughtful compassion.

213. I was impressed by Mr Hatchman's evidence. For several years now he has supported RB in extraordinarily difficult circumstances characterised by conflict, litigation and a succession of formal complaints. He has for most practical purposes acted as personal welfare deputy. On numerous occasions it would have been easy to give up or to become antagonistic to one of the parties or to have pursued the most convenient solution. He has stuck it out. He deserves and should take much of the credit for the fact that RB has been able to live in her own home beyond 2011, and he has been ably supported in this by Ms Okafor. The evidence he gave was fair, measured and compassionate and I have given it considerable weight.

214. I also give considerable weight, as did the Official Solicitor, to the oral evidence of the deputy care home manager, Mrs P. She had an excellent grasp of RB's feelings, wishes and preferences. She was also kind-hearted, balanced in her evidence, not at all defensive and keen to promote people's autonomy.

215. Some of the evidence of Mrs S, the second ISW, was compelling. In particular, I was helped by her analysis of why RB has not wished to attend a day centre. I do not, however, accept her opinion that PB 'lacks insight'.

216. I was impressed by PB's evidence and demeanour. I thought that he showed considerable insight into his mother's needs and on the whole took a balanced view of the evidence. He was courteous to others in court and has clearly worked extremely hard to address and manage the issues referred to in previous judgments. He has always impressed me as compassionate and dedicated in his care for his mother and again that was very apparent. His arguments had merit and I have given his evidence considerable weight whilst ultimately departing from his conclusions in the important matter of his mother's present wishes and feelings, and how best to promote her current and future happiness.

217. The irony is that PB succeeded in gaining his mother's return home in 2012 notwithstanding the conduct issues but has not succeeded in achieving that in 2015 despite an absence of significant present concerns about his conduct. It may seem unfair to him but the reason for it is that both decisions have turned on my interpretation of RB's wishes and feelings and I find that these have changed.

Other relevant considerations

218. The following considerations seem to me to be relevant considerations:

(a) RB's needs

(b) PB's conduct

(c) Prognosis

(d) Autonomy

(e) R Court

(f) Trial period at R Close

RB's needs

219. The nature, intensity, unpredictability and complexity of RB's needs are not of a level which indicates a primary need for healthcare.

220. I agree with PB that his mother's care needs have not 'changed so substantially that she [could not] go home'.

221. I obviously accept that Mr Fisher formed the same opinion in March 2015 when he supported a return home 'with a robust support package'.

222. As Mrs S observed, the task-focused nature of RB's needs is straightforward.

223. However, as Mrs S also observed, RB's need for emotional support and reassurance is not so straightforward.

224. Being happy and content involves more than having one's basic personal care attended to, being protected from falls, having one's diabetes and diet monitored and so forth.

225. Having regard to the absence of a clear, consistent wish on RB's part to leave E Care Home and to return to her old home at R Close, to my mind the evidence is overwhelming that she is and is likely to be happier living at E Care Home than at R Close. Her cognitive decline and increased disorientation have greatly diminished the significance for her of living alone at R Close and increased her personal need to live in a more supportive environment.

226. I find that the weight of the evidence supports findings that:

a) She benefits from the care and support she receives at E Care Home.

b) She 'is a jolly person' and is 'generally content' at E Care Home, and more content there than she was at home previously. In particular, she is chatty, 'more alive and vibrant,' engaging with others. She has 'thrived' there, developed valuable friendships and relationships and 'become her own person'.

c) She appears to benefit from a more controlled and structured environment within which she does not have to worry about everyday things in the way she did at home.

d) The environment is comfortable and safe and she has easy access to the company of people other than professionals and family members.

e) E Care Home has a stable client and staff group and provides a very good service to its residents.

f) The particular benefits for RB of living at E Care Home include the following: her eating problems have been resolved and she readily goes to the dining area for meals; she now wears her dentures; her bedtime routine is well-established; she sleeps through the night once settled; her mood is stabile and she cooperates with staff with regard to the delivery of personal and domestic care; she has onsite access to a socially active environment and has formed attachments with residents and staff alike; she is able to participate in religious services and activities at the local church; she takes pride in her appearance and sees a chiropodist, hairdresser and optician.

g) Her presentation and health are now in marked contrast to what previously was evident in her own home. At home she was socially isolated and withdrawn; she could be confused or irritable; her diabetes and weight were not well-controlled; she needed frequent prompting to take fluids and eat regular meals; refused to wear dentures; was observed to sleep mostly in a lounge armchair during the day; was at risk of falling; and was often depressed and anxious.

h) It is not feasible to have a live-in carer at R Close and no place is available at R Court.

i) It is likely that many of the historical problems would recur if she returned to R Close, e.g. social isolation, depression, erratic sleep, reluctance to engage with paid carers, variable quality of paid care, some resulting frustration on PB's part.

j) For the reason given by Mrs S, I do not accept that 'there is no reason why social activities cannot be arranged were RB to return to R Close'. Even if a day centre is utilised, given the history it is unlikely that RB would be willing to spend time there. Going outside one's circle of comfort is difficult for a person who is cognitively impaired.

k) In short, I find that a return to R Close will almost inevitably lead to a deterioration in RB's mental health and emotional well-being and that she will be considerably less happy there than she is now at E Care Home.

227. If RB still had a clear and consistent wish to live at R Close notwithstanding the limitations and complications of life there that would be a very powerful counter-consideration. Personal freedom, independence and autonomy are hugely important for most people and many people prefer to prioritise their independence even when that comes at a considerable price in terms of personal comfort. That was the case in 2012 but I do not believe it is now.

PB's conduct

228. PB deserves enormous credit for the way in which he has addressed the issues highlighted in previous judgments. For example, Mrs S reported that JP and OM from the care home 'spoke warmly about PB. He is always nice and very pleasant when he visits. There has never been any aggression from him towards staff or towards other residents … [he] has also offered to carry out some minor DIY for the home'.

229. If PB's mother returned home, it is unlikely that his relationship with professional carers would be entirely incident-free. As he himself told me, he has 'needed to keep on the back of the carers at home, to make sure they do their job … They should know it,' and his expectations could be viewed as too high 'if they [the carers] don't get up to scratch …'

230. However, the improvement is such that I think any incidents would be much milder than was previously the case and also that he would ensure that he and his sisters visit at different times.

231. That being so, I agree with Mr Hatchman and Mr Fisher that PB's conduct is not a significant factor in any balance sheet analysis.

232. RB told Mrs S that she would not mind PB cooking evening meals and staying over occasionally ('I would like him to come and do for me. I don't mind him helping me').

233. In reaching my decision, I have proceeded on the basis that if RB returned home PB could be with her between 6pm and midnight and prepare evening meals and that this would be in her best interests.

234. However, for the reasons given, I believe that on balance the evidence suggests that RB feels at home at E Care Home and feels that it is home most of the time. She would be sad to be required by me to leave and would now be less happy at R Close.

Prognosis

235. I accept Dr TS's evidence that RB's decline is likely to continue with concomitant functional decline and increased care needs' (C/135).

Autonomy

236. I accept RB's submission that a residential placement carries with it certain deficiencies because the interests of the individual must sometimes yield to the interests of the group. RB enjoyed her Sky TV package and having control over what she watches.

237. In the past she has enjoyed living independently, as described above.

R Court

238. PB's alternative submission was that his mother should move to R Court if the Court did not agree with him that it was in her best interests to return to R Close. This was because 'residential care is still premature and … will only accelerate her decline'.

239. In truth, this 'third option' was not really pressed because a place is not available at R Court and there is no expectation that one will become available in the near future.

240. If a place was available at R Court, I find that potentially it would have had some significant advantages over R Close. RB would have her own private flat, the benefit of a second bedroom for her family or a night-time carer to stay over as her disease progresses, support from on-site professionals, a sense of greater independence than in a care home, more autonomy over what she watches on television, some social company, her own familiar furniture and her personal belongings from home. The manager of R Court has experience of successful transitions from care homes in similar circumstances.

241. Apart from the fact that no place is likely to be available and that transitions can be upsetting, RB is content at E Care Home and Ms P told me that when RB was taken to see R Court 'she thought that we were sending her away and was very distressed'. Mr Hatchman's evidence was similarly that RB was very tearful and looked upset when she visited R Court and she said that she did not want to live there. She relaxed when Mr Hatchman told her that she would not be forced to move.

242. He felt that a move to R Court 'would be counter-productive if RB is emotionally unable, physically unwilling [or] simply does not wish to make such a huge change in her living arrangements' (B/227).

243. On balance, I find that RB is happy and content where she is and does not feel that she wants to move. While R Court has some advantages, these would not outweigh those of E Care Home even if a place was available. She has made friendships at E Care Home, is happy and content there, feels safe and secure and it provides what she needs at this time of her life.

Trial period at home

244. The court could take the opportunity to test RB's ability to live at home. I have considered this possibility but have decided that it would not now be in RB's best interests.

245. For the reasons given, I have found that a return to R Close will almost inevitably lead to a deterioration in RB's mental health and emotional well-being and she will be considerably less happy there than she is now at E Care Home.

246. That being so, a trial period at R Close would be likely to lead to distress and unhappiness and I do not consider that to be justified in the absence of a clear and consistent wish on her part to live there.

Balancing the relevant considerations

247. Having regard to all of the relevant considerations, and giving them the weight I have done, I find that it is in RB's best interests to continue to live at E Care Home. In the absence of a clear and consistent wish to go home, and indeed given my finding that she would be sad to be required by me to leave E Care Home and would now be less happy at R Close, the factor of magnetic importance is now RB's happiness.

The standard authorisation

248. Turning to the deprivation of liberty best interests requirement, I find that the four conditions relevant to that requirement are satisfied:

Is RB being detained in the care home for the purpose of being given care or treatment in circumstances which amount to a deprivation of her liberty?

249. It was common ground that she is and the court agrees.

Is this in her best interests?

250. I have already explained why I find that it is.

Is this necessary in order to prevent harm to her?

251. A return to R Close will almost inevitably lead to a deterioration in RB's mental health and emotional well-being and she would be considerably less happy there than she is now at E Care Home.

Is this is a proportionate response given the likelihood of her suffering harm and the seriousness of that harm?

252. A continuance of residential care at E Care Home is proportionate in my view having regard to the risks which I have mentioned. If RB still had a clear and consistent wish to live at R Close notwithstanding the limitations and complications of life there that would be a very powerful counter-consideration in terms of proportionality. However, while that was the case in 2012 but I do not believe it is now. She would be sad to be required by me to leave E Care Home.

Whether the relevant purpose can be achieved in a less restrictive way

253. In reaching my view, I have had regard to section 1 and the need for me to consider whether the purpose for which the act is needed can be as effectively achieved in a way that is less restrictive of RB's rights and freedom of action.

254. I find that RB would be sad to be required by me to leave E Care Home and would now be less happy at R Close.

Compliance with the European Convention on Human Rights

255. Implicit in the best interest analysis is a consideration of RB's Convention rights and those of her family.

256. I accept that any limitation of family contact and home life is an interference with Article 8 rights and that it must be proportionate and for a permitted purpose.

257. In my opinion, the interference caused by my decision is prescribed by law, proportionate (to the identified risks) and for a permitted purpose. The arrangements outlined will protect and promote RB's health and well-being in ways that bring her enjoyment and are in her best interests. There are no restrictions on family contact at E Care Home.

Other matters

258. It is common ground that there should be no restrictions on RB's contact with family members and other persons. I would hope that it may be possible for RB to visit PB at his home and for him to be regularly involved in care and social activities.

259. Given PB's recent conduct, all injunctions relating to him are discharged. He will continue to be his mother's deputy for property and affairs.

260. Given that RB will no longer be residing at R Close, there is no further need for a personal welfare deputy and that order is also discharged.

261. The local authority has undertaken to purchase a larger room for RB at E Care Home.

§11 — SUMMARY & CONCLUDING REMARKS

262. I am very grateful to the parties for their assistance. I ask them to agree a minute of the order.

Neutral Citation Number: [2012] EWHC COP 0000

Case No: COP12017112

IN THE COURT OF PROTECTION
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

Royal Courts of Justice
Strand, London, WC2A 2LL

26 September 2012

Before:

DISTRICT JUDGE ELDERGILL

- -

Between :

PB	**Applicant**
- and -	
RB	**1st Respondent**
(by her litigation friend the Official Solicitor)	
-and-	
A London Borough	**2nd Respondent**
-and	
CL	**3rd Respondent**
-and-	
DB	**4th Respondent**
-and-	
LA	**5th Respondent**

Mr Stephen Simblet (instructed by **Campbell-Taylor**) for the **Applicant**
Mr Chris Buttler (instructed by **Irwin Mitchell LLP**) for the **1st Respondent**

Ms Kuljit Bhogal (instructed by **the local authority**) for the **2nd Respondent**
The 3rd-5th Respondents not attending

Hearing dates: 10-12 September 2012

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

DISTRICT JUDGE ELDERGILL

This judgment is being handed down in private. It consists of 19 pages and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

§1 — INTRODUCTION

This decision deals with a fact-finding hearing held on 10-12 September 2012.

§2 — THE PARTIES TO THE PROCEEDINGS

The parties to these proceedings are as follows:

PB	Applicant	*Son of the person concerned*
RB	First Respondent	*The person concerned ("P"), by her litigation friend, The Official Solicitor*
A London Borough/ALB	Second Respondent	*The relevant local authority*
CL	Third Respondent	*Daughter of the person concerned*
DB	Fourth Respondent	*Daughter of the person concerned*
LA	Fifth Respondent	*Daughter of the person concerned*

§3 — RB's MENTAL CAPACITY

For the purposes of the Act, a person lacks capacity in relation to a matter "if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."[1] It does not matter whether the impairment or disturbance is permanent or temporary.[2]

The parties agreed that RB lacks capacity to litigate and to make decisions about residence, contact and care.

§4 — DR S's REPORT ON PB

Mr B did not agree to being assessed by a psychiatrist from the relevant CMHT but he was willing to see Dr LS, who had examined him before in 2008.

Dr LS is a consultant psychiatrist approved by the Secretary of State under Section 12(2) of the 1983 Mental Health Act as having special experience in the diagnosis or treatment of mental disorder.

Dr LS was asked to provide a report setting out the current state of PB's mental health; his recommendations as to any services which may assist PB; and his recommendations as to any strategies which may assist PB to manage his relationships with his siblings and (his mother's) paid carers. The underlying purpose of the report was to assist the court to determine the issue of Mrs B's best interests in relation to her care and her contact with her son.

I am conscious that PB's sisters are parties and that they will receive a copy of these findings. For the purposes of this decision, I have kept my summary of Dr S's report as brief as possible.

The following is a summary of some of the most relevant passages in the report:

1. In February 2002, a doctor provided a statement in relation to PB's eligibility for Incapacity Benefit. The main diagnosis was given as a 'chronic anxiety state.' (This may cast some light, I believe, on PB's conduct in court, and why he left the court building and walked out on his previous legal representatives shortly before one of the hearings.)
2. In 2005, PB said that he could not live in a hostel because 'the noise would be too much for me.'
3. In May 2008 he told Dr LS that he had in the past '*locked himself away as problems with nerves, arguing all the time.'*
4. He is clearly very close to his mother and it would be unfortunate if this relationship, the only one he has maintained throughout the years, were to be disrupted.
5. Mr B was dissatisfied with the visiting carers: *"people come round but they are rushing all the time, they have not got time to cook, it is the same old routine, for example they have left my mother unwashed again."*
6. He had not had any contact with a psychiatrist until Dr LS's initial assessment in May 2008. At that initial interview, Dr LS 'diagnosed a personality disorder with impulsive and paranoid features.' He was offered a referral for Anger Management, which he declined. He did accept a trial of a low dose of olanzapine, to reduce his arousal levels.

1 Mental Capacity Act 2005, s.2(1).

2 Mental Capacity Act 2005, s.2(2).

7. At the follow-up appointment in June 2008 he reported a modest improvement with the olanzapine, and agreed to consider longer term psychological therapy. He was referred to the local NHS psychology service. He but did not pursue the possibility because "*it is a waste of time seeing a psychologist, my mother said so, they cannot help me".* He elaborated that "*it is just a mild problem, no big deal, if you are not attacking people they attack you".* When I challenged him and pointed out that he might be able to change, he again resisted this suggestion: *"If I change the way I am you find that people take you as a soft person and you end up like everyone else, doing something you do not want to do.*"

8. He made little eye contact with Dr LS. He talked rapidly in a monotone, rarely checking to see the doctor's response. There was no evidence of hallucinations, delusions or formal thought disorder and he was not clinically depressed.

9. Others were invariably against him and he was never in the wrong in such cases: "*people should not be picking on me – if they do, I shout at them – there is no point complaining as no one does anything. What else can you do? So I do not think there is much wrong with me. Now they are all on my back – the judge, the carers.*" "*Everyone is doing everything wrong to me – it is not a Court of Protection, it is a business, they are as corrupted as hell*.'

10. At his initial NHS psychiatric assessment, in May 2008, PB was accompanied by his mother. He told Dr LS at the time: '*I have a personality disorder, I do not like people around me, it makes me aggravated, it can end in a scrap. I cannot take too much noise.'*

11. 'There can be little doubt that Mr B is suffering from a personality disorder' (paragraph 15.1).

12. He is deeply dysfunctional in most if not all areas of his life.

13. He would meet the criteria for a paranoid personality disorder. He agrees that he is excessively sensitive and does not forget perceived insults or slights. He also admits being suspicious, and the history as documented above provides many examples of his interpreting intentions as malign, … His combativeness and tenacious sense of personal rights are a constant thread running through the history and mental state.

14. He could not be shaken from his belief that therapy would not be helpful for him. Unless he is willing to accept treatment, the prognosis must be very poor, as paranoid personality disorders do not improve spontaneously with time. The only alternative open to the Court in my opinion is to strengthen the existing boundaries, adhere strictly to them and use legal means to enforce them if necessary.

15. There is no standard treatment for paranoid personality disorder, but psychological therapy and medication are used. Mr B has already received, and reported some benefit from, a low dose of an antipsychotic agent to reduce his hostility and insensitivity.

16. Various modalities of psychological therapy are advocated for personality disorders. Both psychodynamic and schema therapy are available within the NHS, although they are difficult to obtain and there are long waiting lists. Anger management courses are relatively easily accessed in the NHS.

17. As an interim measure, to assist him to manage his relationships with his siblings and his mother's paid carers I suggested two strategies to him for avoiding angry outbursts: one is to count slowly to 10 before responding to what he perceives as a provocative remark. The other strategy is that when he feels the urge to shout, he should immediately leave the room or building for a few minutes, returning only when he feels more calm.

18. In the first instance I would recommend that he be again referred by his general practitioner to the local NHS Psychological Therapy Service for an assessment.

§5 — THE DISPUTED FACTS

The local authority sought to prove 13 alleged facts:

1. 8 March 2011: 'PB called [the carer company] and was verbally abusive: "why the fuck did you send a carer to my mother? If you send a carer to my mother again I will fucking kick her out." PB terminated the call.'

NB is a sector manager of the carers who visit RB at home. The local authority relied on his statement, in particular paragraphs 12 and 13 at page C/120, and he gave oral evidence to the court.

NB told me that this telephone call was made by PB to the out-of-hours team, not to him. The out-of-hours team then emailed NB, who said it was not safe to visit RB that evening. The carer company responded by doubling-up carers (PB left court for ten minutes at this point, saying as he left, 'Can't hear that lie.').

Under cross-examination, NB accepted that he did not mention doubling the number of carers in his statement, and nor was it referred to anywhere in the court bundle. He accepted that he was reporting what the out-of-hours team had told him. He had no first-hand knowledge of what was done or said. No contemporaneous case notes had been produced in relation to the allegation.

In his written response to the Scott Schedule, at H/255, PB accepted that he was upset about the issue of evening care. His mother had asked not to have evening care and at the time she had, or was believed to have, capacity to make such decisions (MG's assessment just over one month before concluded that RB had capacity to live as she chose). It had been agreed with VW, a local authority mental health social worker for older persons, that RB's care would consist of a morning visit and a lunch-time visit, i.e. no evening visit. PB was willing and able to provide the evening care and he was providing RB with a home cooked meal, which she preferred, and putting her to bed. Despite his mother's wishes and this agreement, the carer company continued to send out carers in the evenings. These carers were young and inexperienced and were unable to provide the care that RB needed. All of this was communicated to the company but they continued to send carers. PB became increasingly frustrated as he felt that he was banging his head against a wall.

Under cross-examination, PB accepted that he did make a telephone call that day to complain about the evening care, which his mother did not want and which he did not want. He accepted that he used the language quoted:

> *Did you say 'why the fuck did you send a carer to my mother'?*
>
> *'Only on the phone, remember.'*
>
> *Did you also say, 'If you send a carer to my mother again, I'll fucking kick her out.'*
>
> *'I did not mean it, just an expression.'*

In his oral evidence, PB accepted that he terminated the call ('Arguing all the time') and that he did not tell staff subsequently that he didn't mean what he had threatened ('If go again … fucking kick her out'). He thought that 'probably' he did apologise but accepted that this was not written down anywhere. Furthermore, his response to the Scott Schedule made no mention of an apology and he could not remember who he apologised to or when.

Counsel for PB told me that PB's call followed a long cycle of correspondence and communication with the carer company about his mother not wanting evening care: 'Given the lack of response, perhaps it was not surprising that matters reached this pitch.'

In my view, the evidence relied upon to show that the number of carers was doubled up and that PB apologised after the incident is weak and unsatisfactory.

Finding 1

On the balance of probabilities I find the allegation proven as stated: On 8 March 2011, PB called [the carer company] and was verbally abusive, saying 'why the fuck did you send a carer to my mother? If you send a carer to my mother again I will fucking kick her out.' PB terminated the call.

In terms of the context, I find that PB had become increasingly angry about the continuation of evening visits by carers. The language, volume and tone that he used to express his anger were triggered by his belief that evening visits were contrary to what had been agreed.

2. 9 March 2011: 'PB was verbally abusive and threatening towards a carer on the telephone. She terminated the call as a result. When PB called back he raised his voice and made threats: "If you put the phone down again I will fucking come round and smash the place up." The second call was also terminated as a result of his threatening behaviour.'

This incident is said to have taken place on the day following the first allegation.

The local authority again relied on the evidence of NB, at C/121 (para.16). He told me that this allegation also concerned a telephone call to the out-of-hours team. The carer said that she had disconnected the line because PB was screaming at her and threatening her. NB did 'not know what these threats were.' However, the out-of-hours team told him that when PB called back he made the threats recorded in the allegation.

In his written response to the Scott Schedule, PB noted that no contemporaneous care note had been produced to substantiate what was claimed. As in the case of the first allegation, he was upset that the carer company continued to send evening carers and by the quality of care being provided. The carers were young and inexperienced, and unable to persuade his mother to accept their care. As a result, RB was left unwashed for more than a week. Since then, the care plan has been amended to provide a pool of 4-5 carers/support workers who are familiar with RB, to minimise the chances of her refusing care.

In his oral evidence, PB admitted this allegation without demur: 'That's true.' He made no attempt whatsoever to deny it.

His counsel told me that there was no suggestion PB had ever been violent to carers, and nothing to suggest that anyone believed he would do what he had threatened. There was no record of what the carers said, and they were unlikely to record their own rudeness. (For the sake of completeness, PB did not claim that they were rude).

Finding 2

On the balance of probabilities I find the allegation proven as stated: On 9 March 2011, 'PB was verbally abusive and threatening towards a carer on the telephone. She terminated the call as a result. When PB called back he raised his voice and made threats: 'If you put the phone down again I will fucking come round and smash the place up'. The second call was also terminated as a result of his behaviour.'

In terms of the context, I find that PB had become increasingly angry about the continuation of evening visits and the quality of the care his mother was receiving.

3. 5 April 2011: 'Case notes record that PB called office on previous day accusing staff of not carrying out their job. He was very rude to Anna (office staff) and claimed there was no point in sending carers as they are not doing anything except giving medication. RB has been refusing personal care and PB expects carers to forcibly wash her. It has previously been explained to PB that carers are not permitted to do this.'

The local authority relied on H/187, which is an email sent by manager NB at 1.20pm that day to VW, a local authority mental health social worker. The email refers to PB calling the office 'yesterday', i.e. on 4 April, and being very rude to Anna (office admin).

In oral evidence, NB told me that his email was based on information given to him by Anna. He had no personal knowledge of what was said or how it was said. He could not recall if Anna said in what way PB was rude to her or if she told him the words used. He could not say if it was true that the carers were not giving RB a wash at that time. it was certainly true that his care staff could not physically force her to wash. At the time, it was not clear if RB had capacity to decide whether or not to wash, but it was her wish not to be washed: Staff 'would not overrule her if she said categorically that she did not want to wash.' There were times when RB did not get on with staff so that they could not deliver care.

In his written response to the Scott Schedule, PB stated that it was 'uncontroversial' that his mother did 'not respond well to inconsistent and inexperienced carers.' She often refused care in such circumstances. The social worker PH had noted that she 'co-operated much better with support work staff with whom she was familiar, and that a significant effort had been made to recruit and retain experienced and consistent staff where possible, with a current core team of two workers.' PB was pointing this out and understandably was upset that his mother was being left unwashed.

The local authority noted that his written response did not admit or deny the allegation in the Scott Schedule but sought to explain the background from PB's viewpoint.

Under cross-examination, PB accepted that the first two sentences were correct: 'Case note records PB called office on previous day accusing staff of not carrying out their job. He was very rude to Anna (office staff) and claimed there was no point in sending carers as they are not doing anything except giving medication.'

> *'I agree I was rude to Anna … NB had been round and cancelled the evening care. Lot of issues. Not case that it's justified, it's frustration. Probably did swear on the phone. A bad habit … I did shout at her.'*

He did not agree with the third sentence: 'RB has been refusing personal care and PB expects carers to forcibly wash her.' According to PB, his mother had not been refusing care:

> *'Two young carers were sent, laughing as they went out, sending the wrong people, they did not wash her because they weren't doing their job … RB was not refusing … Mum said they didn't often offer to wash her.'*

Finding 3

> ***On the balance of probabilities I find that the following part of the allegation is proven: On 4 April 2011, PB called the office accusing staff of not carrying out their job. He was very rude to Anna (office staff) and claimed there was no point in sending carers as they were not doing anything except giving medication.***

The significance of allegations 1-3

Counsel for the Official Solicitor invited me to accept that allegations 1-3 'are of some significance. They give rise to concern about PB's conduct towards carers and are likely to occur again without injunctions.' I accept that the three allegations are significant.

4. 19 April 2011: 'PB refused access to carer.'

The local authority relied on the case notes at H/219a and H/219b, produced on the day of the hearing.

The record at H/219b was made by NB who personally took the call from RB's daughter CL.

According to the email at 219b, sent by NB at 1.59pm on 19 April 2012, 'The carers went at lunch as requested and PB was present. PB refused to allow access to the carers saying that Mrs B is fine.'

According to social worker VW's note at 219a of a telephone call to PB at 3.23pm that day, 'Spoke to PB who is agreeable for me to visit Mrs B tomorrow, 20 April 2011 … Mr B said the carers visited at lunch-time and he told them Mrs B was fine and as he was with Mrs B they did not come in.'

According to NB's oral evidence, it was LA's husband who went to the hospital, not CL's; he did not go to the property himself; he could not remember which carers went; he could not say whether RB was at home to be visited or was still in hospital.

PB's oral evidence was likewise unsatisfactory and vague. Initially, he told me that his mother had gone into hospital the night before and had not yet returned home. Later on, he said that the door was open and the carers walked right in; he did not deny them access. Later still, he said that the carers 'looked into building and did not want to come in. Mum was not there'; 'I don't even know if my mum was in … If she was there I wouldn't have refused them access'; 'I'm not sure if she was there'; 'I wouldn't have refused access, I wouldn't have done that.'

Whatever happened on 19 April 2011, evidently it was not thought to be sufficiently significant at the time for any one involved to make a clear note, or to be able to recall the events now with any reliability. No one could tell me whether RB was at home at the time or was still in hospital.

Counsel for the Official Solicitor agreed with PB's counsel that the file notes were tenuous and their accuracy was disputed.

In my view, the allegation is not made out on the balance of probabilities. Such limited evidence as there is for the allegation is vague, confused and wholly unsatisfactory.

Finding 4

On the balance of probabilities, the court finds the allegation that on 19 April 2011 'PB refused access to carer' not proven. Its evidential value is 0.

5. 10 May 2011: PB refused access to the morning carers and told them not to come back at lunchtime (previously, the date was erroneously given as 5 May 2011).

The local authority relied on the evidence of NB, at C/124 (para. 26). NB told me that carer K had reported to manager MC that PB had denied access. NB was reporting, and repeating, what MC said.

According to PB's response to the Scott Schedule, PB accepted that he had refused access to the carers in the morning. However, he pointed out that a meeting was due to take place that morning with social worker PH to discuss RB's proposed move to B Lodge for respite care. Given the meeting, PB thought that carers would be in the way and he agreed with the company that no carers would be sent that morning. Because of a communication error, they were still sent and B told them to come back at lunchtime when the meeting would be over. In the circumstances, it was perfectly reasonable for PB to request that no carers attend that morning. Important discussions were taking place and PB was there to provide any care required by his mother.

Under cross-examination, PB accepted that he refused the carers access and also that he told them not to come back at lunchtime: 'That is correct.'

Counsel for the Official Solicitor took the view that this refusal of access was less serious than some of the other allegations and I agree.

Finding 5

On the balance of probabilities, the court finds the allegation that on 10 May 2011 PB refused access to the morning carers and told them not to come back at lunchtime to be proven.

The court also finds that this breach was relatively insignificant and there were special circumstances that day which mitigated the refusal.

6. 26 May 2011: 'PB was extremely rude and abusive towards reception staff at RB's GP's practice. He used foul language in the presence of other patients and a letter had to be written to him about his conduct.'

The local authority relied on the evidence of the GP, Dr D, at C/152, para. 6. She was not called to give oral evidence.

In his written response to the Scott Schedule, PB denied that he was extremely rude and abusive to reception staff (H/260). He was never sent a letter; rather, he was required to pick it up from the surgery, 'when he conducted himself perfectly appropriately.' Dr D's letter was not in the bundle. He acknowledged that he was upset with the GP surgery because they were withholding his mother's assessment from him.

Under cross-examination, PB accepted that 'there was a disagreement.' He thought that 'they had got out of, reneged, on their promise.' He accepted that he raised his voice and tone. Initially, he said that it was not true that he swore at surgery staff but he then told me, 'I did swear; that's the problem I've got.' 'Knowing me, if I had an outburst I probably did.' He had had 'one outburst in 42 years at that surgery.'

Counsel for the Official Solicitor noted that Mr B admitted an outburst and that he probably swore. There was nothing inconsistent between that and what Dr D said at C/152. Her evidence is not really contested, albeit hearsay.

Finding 6

On the balance of probabilities, the court finds the following allegation to have been proved: that on 26 May 2011 'PB was extremely rude and abusive towards

reception staff at RB's GP's practice. He used foul language in the presence of other patients and a letter had to be written to him about his conduct.'

7. 7 June 2011: 'PB had to be removed from the hospital by security guards, he was disruptive and verbally agitated.'

The local authority relied on the contemporaneous note at H/188, which is a record of a telephone call from Dr Shaw taken by EC. 'Dr S fed back that son/PB had to be removed from hospital today by security guards, he was disruptive verbally agitated as declined access to [h]is mothers medical records.'

According to PB's written response to the Scott Schedule, PB accepted that he had been upset. He had agreed with social services, in his mother's presence and with her agreement, that she would have a capacity assessment and that a copy of the assessment would be made available to both of them. However, 'the local authority then reneged on this agreement and denied PB access to the document.'

In cross-examination, PB said that 'If you're asking for a form and they're not giving you the form, what are you to do? You're going to get agitated and distressed.' 'I'm not leaving until I've got the form … I've given you my view.'

Finding 7

On the balance of probabilities, the court finds that on 7 June 2011 'PB had to be removed from the hospital by security guards and was disruptive and verbally agitated.'

8. 1 July 2011: PB shouted aggressively at a service user at B Lodge. He picked up a chair and was pointing it at the service user. PB was aggressive and out of control. RB was pleading with him to stop and go home. PT [Assistant Manager at B Lodge] felt unsafe around PB.'

The local authority relied on the statement of PT at C/107-108.

PT did not make a contemporaneous note. She did forward a statement to head office but it is not in the bundle (her statement in the bundle uses the word 'respondent' rather than head office).

In her oral evidence, PT said that she did not see what went on initially and she was relying on what the carers told her.

I was told by PT that L is in his early 70s and suffers from dementia. He has a poor short-term memory. He is taller than PB, slender, strong, friendly and jovial. He mobilises well. PT was not aware that L had ever attacked, hit, sworn at, or intimidated a service user, staff member or visitor. He did not wander into other residents' rooms. He 'is a TV person who goes from his room to the lounge. He may be forgetful but he knows where his room, the lounge and the toilets are.' He says, 'my room is no. 67.'

The incident was reported to the police, 'who took statements,' including one from PB. The court had not seen these statements. PT did not know the contents of these statements.

PT told me that statements were taken by care home staff from C (C/110), E (C/111) and CY (C/112). In cross-examination, it was suggested to her that the three of them described the incident in the same way, 'almost word for word.' Although their statements were similar, PT did not think that the three staff members 'wrote them together'.

As to this, I find that C and E's statements are almost identical. Either one of them saw the other's before writing their statement or they were drafted by them together. The standard of English in C's statement is very poor. Neither her statement nor E's imparts much information; only that they heard PB shouting at his mother, that the police were called and that PB accused L of holding him around the neck.

CY's statement is more informative. The first she knew of an incident occurring was 'when I overheard RB's son shouting aggressively to L never to touch him again' (C/112). PB 'rushed into the lounge to pick up a chair to point at L. And was about to use the chair against L. His mum was shouting telling him to stop. I pulled L aside and run to phone the senior on duty. PB still continued to exchange words with L, saying 'I don't want to see you with my mum.'

According to PT, CY called the main office to seek assistance at around 7.10pm.

When PT attended the scene in response to CY's call, she asked PB and L what was going on. PB said that L had held him around the neck and slapped him in the face.

According to PT, CY was standing between PB and L, and CY looked scared. PB was not medically examined but he had no obvious physical signs of injury (slap marks, redness of the skin, etc). He was 'very aggressive and out of control … shouting at the top of his voice.' 'I couldn't get a rational response from him. He kept saying that L needed to be controlled.' 'I felt unsafe around him because he was so aggressive and verbally aggressive and what I was saying had no effect on him, it didn't sway him. I felt that he was out-of-control and I was worried that he would lash out at me.' She felt that if she pushed any further, 'he might have retaliated.' His mother 'was anxious and nervous and couldn't calm her son down. She was upset and telling him to go home. He did not threaten to hit me and nor did he hit me. It was the volume. I tried to calm him down, using all my experience.' PB 'was shouting. He would not respond to me so I had to call the police. 'We got L to sit down, then I explained to PB that the police were being called because I was not getting through. He was shouting that he wanted to talk to the police. PT told PB, 'This is a residential home for the elderly. You can't behave like this … I went to the office and dialled 999. He was hyper, not in control … PB replied that he wanted to speak to the police. I walked away to make the call, PB walked behind me, shouting and saying that he had been hit. I went to my office. He came down with his mother behind him. I was concerned about his aggressive behaviour. Reception staff came to see what was happening.' His mother said, 'Calm down, Paul; Go home, Paul.' While in PT's office, he was given some paper and 'began to write down what is written here, while the police were on their way. He started to write out a complaint about the incident just before the police arrived. He was now much calmer than before.' He then gave PT his note, which appears in the bundle at C/113:

> *1/7/2011*
>
> *Time 7.20pm. L tried to put his arm round & he was goading me. I told L to back off. He did back off.*
>
> *Yesterday 30/6/2011. L done the same thing slap me round the face. But today he took it too far.*
>
> *Yours truly PB.*

Police spoke to PB and asked him to leave the building. He left when told to and was not charged with any offence.

PB has consistently stated that L assaulted him and that he was acting in self-defence. He denies that he 'lifted a chair to hit L with it.' In his written response to the Scott Schedule, he stated that L had touched him provocatively on two previous occasions, slapping him in the face on 30 June 2011 (see C113). PB backed down on both of those occasions. However, on 1 July 2011, L took it too far when he grabbed PB around the throat. PB was very upset at being assaulted and he picked up a chair in self-defence to put some distance in between him and L.

In cross-examination, PB said that L assaulted him, holding him in a head-lock and trying 'to dig my eyes out. I've been stabbed in the head twice by a mental health person. I'm not going to allow that again.' PB said that he did pick up a chair, in order to frighten L off. L wasn't calming down and 'still wanted a fight.' There was no space to swing the chair. L was 'outside in the hallway, I was in the kitchen, with the door frame in between us, preventing the chair from being swung.' He did not lift L and throw him like a ball: 'He was too strong. I couldn't throw him on the floor.' He did not go down, he came back at me.

PB accepted that he was shouting at the top of his voice, that PT and his mother were telling him to calm down, that his mother was upset and that initially PT couldn't get a rational response from him: 'I'd just been assaulted.' He began to calm down once L had sat down, and before he followed PT downstairs. He does not remember CY or anyone else standing between him and L.

Counsel for the Official Solicitor referred PB to his note, C/113, and pointed out that his note referred to two incidents, one from the previous day. PB's note suggested 'that all L did was put his arm around you … There is nothing in the note about him attacking you, punches, holding you around the throat?' PB replied that he didn't remember CY or anyone else standing between him and L and confirmed that L did back off when PB lifted the chair.

In his oral submission, counsel for PB reminded me that no charges were laid. The notes attached to PT's statement were not in the correct form, and were almost word for word copies of each other. PB said he had been attacked by L and also by him the day before: see C133. There was no evidence that he has lied about that. Reports from the nurses record PB 'speaking about [L] hold him in his neck' and 'shouting aggressively to L never to touch him again.' PB's response to the perceived threat was not unreasonable.' PT admitted that she did not see what took place.

In his oral submission, counsel for the Official Solicitor pointed out that there were two issues to determine: (a) whether the court accepts PB's evidence on self-defence before Ms T arrived, including what Ms T said about L's character; (b) in the light of (a) whether PB's behaviour after Ms T arrived was justified?

In my opinion, CY's statement is revealing. The first she knew of an incident occurring was 'when I overheard RB's son shouting aggressively to L never to touch him again.' This is consistent with PB's note at the time, 'L tried to put his arm round & he was goading me.' As counsel for the Official Solicitor implied, it is unlikely that L did more than that, given that PB did not record having been punched and nor can any of those present recall him shouting out that he had been punched. The fact that PB picked up a chair and pointed it at L, but did not strike L, is consistent with using the chair as a barrier or block, in self-defence. PB had accepted many of the allegations put to him and therefore some weight was to be given to his consistent assertion that he was acting in self-defence. Given the location (a facility for frail, older, people), L's mental health, age and circumstances and the distress caused to his mother and other persons present, in my view PB's reaction was excessive and reflected his problems with anger management, shouting and swearing.

Finding 8

As drafted, the allegation gives an incomplete and potentially misleading account of the event in question. On the balance of probabilities, the court finds that on 1 July 2011 a resident at B Lodge goaded PB and put his hand around PB's neck. This resident had behaved in a similar fashion the day before. PB reacted by lifting a chair and pointing it at the resident and telling him to back off. Because of his problems with self-control, anger management, shouting and swearing, PB's reaction to the resident's behaviour was disproportionate, having regard to the location (a facility for frail, older, people), the resident's mental health, age and circumstances and the distress caused to his mother and others. His mother and staff members were upset by his shouting and swearing. Some staff members thought that he was out of control and they felt unsafe. The police were called.

9. 9 August 2011: 'Dr D reported that PB had been verbally abusive on the telephone and had been verbally abusive in the surgery in May when a letter had to be written to him.'

The local authority relied on paragraph 7 of Dr D's statement at C/152 and on the note made of Dr D's telephone call on 16 August 2011: 'Dr D reported son, PB, who has been verbally abusive over the phone on 9th August. Previously verbally abusive in the surgery in May …' He was requesting access to his mother's medical records and a mental health assessment for the Court of Protection.

PB told me that he could not 'remember what happened on that day.'

Dr D's witness statement does not refer to any verbal abuse, and the note of her telephone call to the social worker on 16 August does not state what was said by PB that amounted to verbal abuse.

In my opinion, the evidence of verbal abuse is unsatisfactory. Dr D's witness statement does not refer to any verbal abuse. It records that PB 'spoke for a long time' and that she said that she would speak to the social worker. This she did on 16 August. Dr D's telephone call to the social worker was not made until a week later, when they discussed various aspects of RB's case and PB's involvement.

Finding 9

On the balance of probabilities, the court finds the allegation that on 9 August 2011 PB was verbally abusive to Dr D on the telephone is not proven. Its evidential value is 0.

10. 15 August 2011: 'PB could be heard raising his voice to RB on the telephone resulting in RB becoming very distressed and agreeing to end the call.'

The local authority relied on social worker EC's email of 15 August 2011, at H/183, and on paragraphs 8-10 of social worker EC's witness statement at C/73. For medical reasons, EC could not attend court to give oral evidence.

It would appear from the email of Monday 15 August 2011 that the alleged incident took place on Friday 12 August 2011. EC and CL visited RB on that day and EC telephoned PB at his mother's request and in her presence. RB became 'very tearful and distressed' and EC ended the call with her consent.

In his written response to the Scott Schedule, PB 'accepted that the conversation was about his mother's move to TT. PB knew that his mother wanted to simply return home and that she was confused by all the changes and the pressure which had been placed on her to move to TT. PB was trying to explain this to his mum but she didn't fully understand at the time so she was upset. At all times PB was protecting her interests.'

In cross-examination, PB agreed that he raised his voice and that his mother was distressed. His mother 'was deprived of her liberty; everyone knows that. I said to mum, "You don't have to accept this or move to TT. You still have a choice. You can go home." I had to shout at her because she was shouting at me; she calmed down when she realised what I was saying.'

Finding 10

As drafted, the allegation gives an incomplete and potentially misleading account of the event in question. On the balance of probabilities, the court finds that on 12 August 2011 PB raised his voice to RB on the telephone and that this contributed to her being very distressed and the call being ended. The call was instigated by CL and RB was already very upset and sobbing when the call began.

Additional allegations

There were three allegations not in the Scott schedule which the local authority sought to prove. These alleged facts were set out in Mr H's statement of 29 August 2011, at C/240 and C/241, and they were not received by PB until 31 August 2011. The court accepted that the material was relevant and also the Official Solicitor's submission that an adjournment to deal with the three allegations properly was not required. PB's counsel was allowed time to take PB's instructions on the three matters.

11. Sunday 6 May 2012: PB was present at his mother's flat during his sister LA's contact time and his presence was not justified by any need for him to provide his mother with emergency care.

PB's solicitor admitted on his behalf that he should have left ten minutes earlier (G/159). PB had not seen his mother since Thursday 3 May 2012. He arrived later than planned, having purchased a wheelchair and some scales for his mother on the way. She told him that she was starving and PB took time to prepare her lunch and dinner and to cut her toe nails. When LA arrived, it was clear that PB was about to leave. LA's response to PB's solicitor's email can be found at G/164 and a carer's note is at H/154.

PB told me in his oral evidence that he was at his mother's flat during his sister's contact time. This was because his mother had not had a wash or anything to eat and he needed to provide emergency care: 'Yeah, that's correct … As soon as L arrived, I left anyway.' PB described his presence as being 'an accidental breach, an emergency, I did not regard it as a breach.' He said that his sisters had been present 'at my visiting times as well' but did not give any examples or detail in support of this contention.

Counsel for the Official Solicitor noted that PB had admitted that he was present during LA's contact time and suggested that the allegation was 'not so significant' as some others.

Finding 11

On the balance of probabilities, the court finds that on Sunday 6 May 2012 PB was present at his mother's flat during his sister LA's contact time. He was running late because of care that he had given to his mother. Although a breach of the order, there were mitigating circumstances in that he genuinely believed that his mother needed this care from him. He was preparing to leave when his sister arrived.

12. 5 July 2012: Whilst in the lobby area of the court PB raised his voice and was verbally aggressive towards his two sisters, CL and DB. This abuse went on for about ten minutes by which time the sisters were reduced to tears and visibly upset. They left the room with the Official Solicitor's counsel, to compose themselves.'

Mr H's note of this incident can be found in the court bundle at C/240.

In his oral evidence, Mr H told me that the parties, their representatives and witnesses were sitting in the waiting area outside Court 55. He 'saw PB raise his voice and become verbally aggressive. He interrupted CL's and DB's conversation, saying "That's all lies" … I'm the only one who cares about mum; the only one who does anything.' He was speaking in a loud voice and with an aggressive tone and manner, providing a commentary on what they were saying for slightly less than ten minutes. He did not swear or physically threaten his sisters. DB was tearful and visibly upset. CL was also upset but Mr H did not see her in tears. The Official Solicitor's counsel walked out of the room with the two sisters and, after that, it did not take PB long to calm down. Mr H said that he had been involved with the family for two years. He was shocked 'and did not expect it in a court of law. I've always had a civil relationship with him. I can operate with him but he and his sisters do not get on.'

In his oral evidence, PB accepted part of the allegation. He agreed with who was said to have been present. He also agreed that he shouted at CL, to 'tell her to stop lying all the time.' He said that, earlier in the litigation, CL had alleged that he had misused £7,000 of his mother's money. He remained where he was when CL and DB left the room. He said that he only interrupted once and that his sisters did not ask him to calm down. He did not see DB crying and denied making her cry: 'You can't blame me. It's not my fault.'

Counsel for the local authority told me that Mr H's oral account of what occurred accorded with her note of what happened, and counsel for the Official Solicitor invited me to prefer Mr H's evidence. PB's counsel reminded me that PB's sisters were, and are, privy to the lawyers' conversations because they are acting in person. They are personally involved in the discussions about changes to the care regime or order and this can make PB feel excluded and disadvantaged. The sisters had made serious untoward allegations about PB which he resented. With more active management, the incident 'could have been nipped in the bud.'

I accept Mr H's account. I found him to be calm, balanced and ready to concede valid points. Unfortunately, the behaviour alleged by the local authority in allegation 12 is not a one-off within these proceedings.

Finding 12

On the balance of probabilities, the court finds that on 5 July 2012, 'whilst in the lobby area of the court PB raised his voice and was verbally aggressive towards his two sisters, CL and DB. This went on for about ten minutes by which time one of his sisters was reduced to tears and both sisters were visibly upset. They left the room with the Official Solicitor's counsel, to compose themselves.'

13. 31 July 2012: When PB realised that care staff were present he did not leave as per his obligations but stayed and became verbally abusive towards the carer RD in front of his mother using inappropriate and threatening language. The police were called and PB eventually left. RB was very upset by the incident and did not attend the hairdressers. RB advised the carer that she did not want that to happen again. Although there may have been confusion about the time slots, PB should have left as soon as he realised a carer was present as per the obligation set out in the Court Order.'

According to the social worker Mr H's statement at C/241,

> *'The carer had called a cab to take PB to the hairdressers. About the time they were about to depart PB arrived at RB's flat to visit. When he realised the care staff were present he did not leave as per his obligations but stayed and became verbally abusive towards the carer in front of his mother using inappropriate and threatening language. The police were called and PB eventually left. The carer recorded that RB was very upset by the incident and did not attend the hairdressers. RB advised the carer that she did not want that to happen again, a reference to PB being aggressive and abusive to the carer in front of her. A copy of the care notes for the day is attached [see H/340].*
>
> *It is accepted that there may have been confusion about the time slots for the care plan. However that does not excuse that PB should have left as soon as he realised a carer was present as per the obligation set out in the Court Order. It does not excuse PB's behaviour whereby he was abusive and aggressive towards the carer in front of his mother. RB was distressed and upset by PB's behaviour and it is concerning that PB was unable to control his temper in front of RB.'*

In his oral evidence, Mr H accepted that RD's attendance at that point in the day was unexpected. She did not normally visit at that time. There had been four or five changes to the care plan during the past few months and there may have been confusion. Mr H could not say that RD's attendance at this time was discussed with PB in advance. The situation was unfortunate given the restrictions on PB.

Mr H only learnt of the incident the following day. He tried to sort out the arrangements for the following week. In his view, PB 'should have walked off [on seeing R] and contacted me' about the situation.

In her oral evidence, the carer RD accepted that her statement at C/246 and C/247 had been written by her on 5 September 2012. She said that RB 'was all ready to go and looking forward to having her hair done. She then changed her mind. When PB asked where I was taking RB, his tone changed and RB changed her mind: "No, my mum doesn't want to go." PB was shouting loudly and RB was upset. He threw the papers around, saying, 'where is the new care plan?' Then RB asked about the care plan. PB was getting really angry and was shouting until the police arrived. He shouted for a few minutes. RB said, "why are you swearing?" I can't remember which swear words he used. I simply remember RB crying and saying, "stop swearing." RB was crying for a few minutes and seemed overwhelmed by the whole situation. I went into the bedroom to put some clothes away. PB started doing some chicken wings while waiting for the police. He was still agitated but had calmed down. RB was still emotional and asking why when I left, after 45-60 minutes. I had not seen RB that upset before.'

RD believed that she made the hairdresser's appointment for RB about a week before and that it was for 3.30pm. She wrote the hairdresser's appointment down on RB's calendar. PB had been

using that time of the week to visit his mother. He turned up expecting to see his mother there. He was frustrated and went into another room, the kitchen. He was shouting and kept saying, 'Where is the care plan.' He was upset that he was not able to see his mother as per the care plan. He asked RD to contact the office. Initially he said, 'Hurry up and bring her back to see me,' but his tone of voice then made his mother change her mind.

In his oral evidence, PB said that no one had contacted him beforehand to tell him that his mother would not be available to see him. He believed that he had no other visit left that week because of a change to the day centre visiting arrangements. He did not shout at RD but he did say to her, 'You can leave if you like; there's no care plan in place.' RD replied that she was not leaving and said that she was taking his mother to the hairdresser's. At that point, RB said that she wasn't going. RD made some phone calls. The only care plan there was one done the previous year by EC.

In cross-examination, PB accepted that he was aware of the court order at F/30 and of the restrictions set out in paragraphs 7 (He must leave the property), 10 (Forbidden from causing distress) and 11 (Forbidden from complaining other than to MC or Mr H). He accepted that he hadn't left the property even though RD was there. He was pacing around the property and shouting and he threw the case notes to the floor. His mother was upset and told him to calm down; she didn't tell him to stop swearing. He was not trying to intimidate RD by raising his voice; 'I was upset with myself.' He denied that he was unable to communicate with people calmly and that his only method of sorting a problem out was to shout.

Finding 13

On the balance of probabilities, the court finds that on 31 July 2012 care staff were present with RB during PB's contact time and a hairdresser's appointment had been booked for her by a carer. The only care plan that could be found was one from the previous year. PB did not leave as required by the court's order. PB became verbally abusive towards the carer RD in front of his mother using inappropriate and threatening language. The police were called and PB eventually left. RB was very upset by the incident and did not attend the hairdressers.

§6 — SUMMARY

I agree with Ms Bhogal, counsel for the local authority, that the consistent theme is PB's confrontational approach and 'manner of communication' when challenged or frustrated: his tone, volume, demeanour, volatility and offensive language. His behaviour often upsets his mother, sisters and professional carers, or alienates them, so as to reduce his chances of achieving the changes he seeks.

I also agree with Mr Buttler, counsel for the Official Solicitor, that a key issue is whether his conduct indicates that 'without an injunctive order there will be an obstacle to the provision of care to RB. That is why we are going down this fact-finding route.' According to Mr Buttler, 'PB's inability to express his views without losing his temper indicates the need for such an order. If he is not getting his way there is a real chance that he will shout and swear at people.'

I do not believe that all of the current problems within the family can be laid at PB's feet. However, it would not be appropriate or helpful to say more at this stage.

I do believe that PB has made genuine attempts to modify his behaviour and to observe the court's orders since December 2011, when I first participated in a hearing in this case.

He is a devoted son and has taken very good care of his mother over the years.

My concern remains the same as it was in December 2011 and has been neatly summarised by Dr S recently:

> *'Unless he is willing to accept treatment, the prognosis must be very poor, as paranoid personality disorders do not improve spontaneously with time. The only alternative open to the Court in my opinion is to strengthen the existing boundaries, adhere strictly to them and use legal means to enforce them if necessary.'*

Without compliance, the end point of any enforcement strategy is committal to prison for breaches of the court's order. Therefore, I would ask PB to consider the only real alternative, which is to accept the help recommended by Dr S. To me, that is likely to be a much more constructive way forward.

IN THE COURT OF PROTECTION **Case No. 12017112**

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

AND IN THE MATTER OF RB

BETWEEN:-

PB

Applicant

And

RB

(by her litigation friend, the Official Solicitor)

First Respondent

And

A London Borough

Second Respondent

and

CL

Third Respondent

and

DB

Fourth Respondent

and

LA

Fifth Respondent

DECISION

District Judge Eldergill
Court of Protection, Royal Courts of Justice
Heard on 8–9 and 11 October 2012

§1 — INTRODUCTION

This decision deals with the final hearing held on 8–9 and 11 October 2012.

The issues to be determined in the proceedings concerned the residence, care, family contact and financial arrangements of RB.

The length of this decision reflects the complexity of the family relationships, the degree of hostility between some of the parties, their inability to agree key facts, the number of litigants in person, the intractability of many issues and the way in which the litigation has sometimes been conducted. During the proceedings, more than one party has attempted to correspond directly with the judge; failed to adhere to directions and timetables; not produced records when required; made allegations that could not be substantiated or acted unreasonably. Sometimes family members have not attended hearings, or made themselves available for questioning or to give undertakings. There has been a change of solicitors and counsel.

I have no doubt that further difficulties lie ahead. These may necessitate the case's return to court, possibly before a different judge, who will then have to disentangle the threads of the proceedings, the previous conduct of the parties, what has happened at past hearings, and so forth.

The benefit of a detailed summary is that it can stand as a largely accurate, and where appropriate binding, summary of where matters stand. I hope that the parties will not have to keep referring back to the five volumes of correspondence and case notes that have accumulated. Any future bundle can consist simply of this decision/summary and any new or additional documents that are not adequately summarised in it.

The representatives who attended this hearing and are familiar with the evidence and submissions may wish to proceed straight to '§14 Further Findings of Fact' and the sections following it. This is really a 40-page judgment (plus the detailed summary I hope can largely take the place of all of the bundles).

I hope that it will also be fairly clear which issues cannot realistically be raised again, which will be useful when it comes to any costs issues. Everyone must try to avoid repeating old arguments and grievances, reopening old factual disputes and/or making relatively trivial applications.

RB is still relatively young and well. With patience, it may be possible to devise a workable strategy that can maintain her in her own home for as long as she wishes.

This judgment should be read in conjunction with my previous decision following the fact-finding hearing on 10–12 September 2012, which is attached as **Appendix A**. A summary of the Independent Social Work (ISW) reports appears as **Appendix B**.

This decision is structured under the following headings:

§2 — THE PARTIES TO THE PROCEEDINGS

The parties to these proceedings are as follows:

PB (also referred to as 'Mr B')	Applicant	*Son of the person concerned*
RB (also referred to as 'Mrs B')	First Respondent	*The person concerned ('P') by her litigation friend, the Official Solicitor, in relation to her personal welfare issues.*
A London Borough/ALB	Second Respondent	*The relevant local authority*
CL (also referred to as 'Ms L')	Third Respondent	*Daughter of the person concerned*
DB (also referred to as 'Ms B')	Fourth Respondent	*Daughter of the person concerned*
LA (also referred to as 'Ms A')	Fifth Respondent	*Daughter of the person concerned*

§3 — MENTAL CAPACITY ACT PROVISIONS

The main statutory provisions are well-known to the parties.

In brief, section 1 provides that a person must be assumed to have capacity unless it is established that she lacks capacity; a person is not be treated as unable to make a decision unless all practicable steps to help her to do so have been taken without success; a person is not to be treated as unable to make a decision merely because she makes an unwise decision; an act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in her best interests; and before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

Best interests and section 4

Guidance as to how to determine P's best interests is set out in Section 4 of the Mental Capacity Act 2005:

Section 4 Best interests

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) *the person's age or appearance, or*

(b) *a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.*

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider—

(a) *whether it is likely that the person will at some time have capacity in relation to the matter in question, and*

(b) *if it appears likely that he will, when that is likely to be.*

(4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable—

(a) *the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),*

(b) *the beliefs and values that would be likely to influence his decision if he had capacity, and*

(c) *the other factors that he would be likely to consider if he were able to do so.*

(7) He must take into account, if it is practicable and appropriate to consult them, the views of—

(a) *anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,*

(b) *anyone engaged in caring for the person or interested in his welfare,*

(c) *any donee of a lasting power of attorney granted by the person, and*

(d) *any deputy appointed for the person by the court,*

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

(10) *'Life-sustaining treatment' means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.*

(11) *'Relevant circumstances' are those—*

(a) *of which the person making the determination is aware, and*

(b) *which it would be reasonable to regard as relevant.'*

Balancing the considerations and 'magnetic importance'

In the case of *ITW v Z* [2009] EWHC 2525 (Fam), Munby J (as he then was) gave the following guidance with regard to the different considerations listed in section 4 which the decision-maker must have in mind:[3]

'.... it may be useful to make three points, very familiar in the context of those other jurisdictions, which, allowing for the somewhat different context with which I am here concerned, seem to me to be of equal application to the statutory scheme under sections 1 and 4 of the 2005 Act:

i. The first is that the statute lays down no hierarchy as between the various factors which have to be borne in mind, beyond the overarching principle that what is determinative is the judicial evaluation of what is in P's 'best interests'.

ii. The second is that the weight to be attached to the various factors will, inevitably, differ depending upon the individual circumstances of the particular case. A feature or factor which in one case may carry great, possibly even preponderant, weight may in another, superficially similar, case carry much less, or even very little, weight.

iii. The third, following on from the others, is that there may, in the particular case, be one or more features or factors which, as Thorpe LJ has frequently put it, are of 'magnetic importance' in influencing or even determining the outcome.'

Significance of the person's own wishes and feelings

The weight to be given to an incapacitated person's own wishes was also dealt with in the case of *ITW v Z* [2009] EWHC 2525 (Fam),[4]

i. First, P's wishes and feelings will always be a significant factor to which the court must pay close regard: see Re MM; Local Authority X v MM (by the Official Solicitor) and KM [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at paras [121]-[124].

3 *ITW v Z* [2009] EWHC 2525 (Fam), per Munby J, at para. 32.

4 *ITW v Z* [2009] EWHC 2525 (Fam), per Munby J, at para. 35.

ii. *Secondly, the weight to be attached to P's wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular a priori weight or importance to P's wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P's wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic. Just as the test of incapacity under the 2005 Act is, as under the common law, 'issue specific', so in a similar way the weight to be attached to P's wishes and feelings will likewise be issue specific.*

iii. *Thirdly, in considering the weight and importance to be attached to P's wishes and feelings the court must of course, and as required by section 4(2) of the 2005 Act, have regard to all the relevant circumstances. In this context the relevant circumstances will include, though I emphasise that they are by no means limited to, such matters as:*

   a. *the degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings: Re MM; Local Authority X v MM (by the Official Solicitor) and KM [2007] EWHC 2003 (Fam), [2009] 1 FLR 443, at para [124];*

   b. *the strength and consistency of the views being expressed by P;*

   c. *the possible impact on P of knowledge that her wishes and feelings are not being given effect to: see again Re MM; Local Authority X v MM (by the Official Solicitor) and KM [2007] EWHC 2003 (Fam),* [2009] 1 FLR 443*, at para [124];*

   d. *the extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and*

   e. *crucially, the extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in her best interests.*

Significance of the family and family care

In the recent *Neary*[5] case, Peter Jackson J reminded local authorities, the courts and others of the importance of family life and the significance to be attached to it:

> *'Decisions about incapacitated people must always be determined by their best interests, but the starting point is their right to respect for family life where it exists. The burden is always on the State to show that an incapacitated person's welfare cannot be sustained by living and being looked after by his or her family, with or without outside support.'*

This important decision is the latest in a line of judgments dealing with this issue.

A balance-sheet approach

5 *The London Borough of Hillingdon v Steven Neary and Mark Neary and Others* [2011] EWHC 1377 (COP), at para 24.

The best interests test is an objective test, concerned with the best interests of P and not the best interests of another person. The following passage concerning the need for a balance-sheet approach to best interests comes from the President's judgment in the case of *Re S (Adult's lack of capacity: carer and residence)* [2003] FLR 1235:[6]

> *'The welfare of the mentally disabled person is paramount. The question, accordingly, is: which outcome will best serve her interests? Further, it is clear that the court goes about deciding that question by drawing up the balance sheet identified by Thorpe LJ in Re A (Male Sterilisation) [2000] 1 FLR 549 at 560F–560H:*
>
> > *'Pending the enactment of a checklist or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a claimant lacking capacity should draw up a balance sheet. The first entry should be of any factor or factors of actual benefit … Then on the other sheet the judge should write any counter-balancing disbenefits to the applicant … Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of that exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses. Obviously only if the account is in relatively significant credit will the judge conclude that the application is likely to advance the best interests of the claimant.''*

The deprivation of liberty provisions

At the suggestion of the Official Solicitor, the issue of whether RB was deprived of her liberty between 11 May and 28 October 2011 — and if not what changed during that period — and whether there was an unauthorised deprivation of liberty between these dates, will be considered at a later date, once the Supreme Court has given its judgment in the case of *Cheshire West and Chester Council v P* (2011) EWCA Civ 1333.

European Convention on Human Rights

Article 8 provides a qualified right that everyone has the right to respect for their private and family life, home and correspondence. It is engaged in relation both to a care regime at home and a care regime in a nursing home.

Any interference with P's family or private life must be authorised by law, proportionate ('necessary in a democratic society') and for a permitted purpose, which here would be for the protection of her health.

The positive obligation to respect the right to family life in the area of adult care is reflected in numerous domestic and European cases, recently in *Hillingdon LBC v Neary*,[7] but also (for example) in *In Re S (Adult Patient)(Inherent Jurisdiction: Family Life)* [2002] EWHC 2278 (Fam).

An intervention with the parties' rights under Article 8 is a serious intervention by the state which requires to be justified under Article 8.2.[8] It is only where the best interests of the person concerned compellingly require placement away from the family environment that such placement can be

6 *Re S (Adult's lack of capacity: carer and residence)* [2003] FLR 1235, per Wall J, at (14).

7 Hillingdon LBC v Neary [2011] EWHC 413 (COP).

8 LBB v JM, BK and CM (unreported, 5 February 2010). Hedley J.

justified as a proportionate interference with their rights under Article 8 and those of relevant family members.[9]

When focusing on the Article 8 rights of the person, and any other relevant person, the court should consider the nature and strength of the evidence of the risk of harm. There must, as Peter Jackson J observed in *Hillingdon LBC v Neary* at paragraph 15(3), be a proper, factual basis for such concerns.

Code of Practice

In coming to my decision, I have considered the relevant codes of practice, as required by section of the 2005 Act:

> ***42 Codes of Practice …***
>
> *(5) If it appears to a court or tribunal conducting any criminal or civil proceedings —*
>
> (a) *a provision of a code, or*
>
> (b) *a failure to comply with a code,*
>
> *is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question.*

The relevant codes are the *Mental Capacity: Code of Practice (Department for Constitutional Affairs, London: TSO, 2007)* and the *Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice* (Ministry of Justice, London: TSO, 2008).

More generally, the Code does not have statutory force but there ought to be cogent reasons for any departure.[10]

I have received some submissions concerning section 42 and the codes, which are referred to below in their appropriate place.

§4 — RB's MENTAL CAPACITY

For the purposes of the Act, a person lacks capacity in relation to a matter 'if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.'[11] It does not matter whether the impairment or disturbance is permanent or temporary.[12]

On 18 November 2011, Dr TS (a consultant psychiatrist) reported that Mrs B lacked capacity to litigate and to make decisions concerning her residence and care.

On 9 February 2012, in relation to contact, Dr TS reported that 'it is important to [Mrs B] to see all of her family but I do not think she has capacity to make complex decisions about who will do what for her, how or why.'

9 The PCT v P, AH and a Local Authority [2009] EW Misc 10 (EWCOP), per Hedley J.

10 See *R v. Ashworth Hospital Authority (now Mersey Care NHS Trust) (Appellants) ex p. Munjaz (FC)* (Respondent), HL [2005] UKHL 58, per Lord Bingham.

11 Mental Capacity Act 2005, s.2(1).

12 Mental Capacity Act 2005, s.2(2).

On 30 June 2012, a Special Court Visitor concluded that Mrs B lacks capacity to make decisions about where she should live; the nature and extent of the care services she requires; and the contact she should have with her children. She was 'unaware of any problems that might exist between them.'

As concerns contact with her children, the court notes and accepts Mr S's evidence that RB does not appear to adequately comprehend that the family difficulties could jeopardise the delivery of her care services, and also the special visitor's opinion that, as far as considering any problems her children may cause for her or others, she does not have the capacity to make decisions about such contact.

Shortly before the final hearing, the parties agreed that RB lacks capacity to litigate and to make decisions about her residence, contact and care. Accordingly, final declarations were made.

It is common ground that RB also lacks capacity to manage her property and affairs and capacity to make a Lasting Power of Attorney for Property and Affairs (evidence of Dr M, C67, accepted).

The fact that Alzheimer's disease is a progressive illness, RB's history of vulnerability and depression, and the complexity of the family dynamics make it unlikely that she will regain capacity to make her own decisions about the matters in dispute.

§5 — ABOUT RB AND THE PROCEEDINGS

RB ('Mrs B') was born on 4 September 1941 and is 71 years old.

In 1961, she same to England from the Windward Isles, and had a long career in the National Health Service. She retired at the age of 60 and was a regular parishioner at a local Catholic church.

Family circumstances

Mrs B married and later separated.

Her son PB is her youngest child. He lives quite close-by but in a different borough, and is his mother's appointee for social security benefits purposes.

Mrs B also has 3 daughters, CL, LA and DB (in order of age), all of whom are parties to the proceedings but are not legally represented.

Mrs B's son has a history of conflict and disagreement with his sisters, and there have been other conflicts within the family.

Mental health issues

In 2009, Mrs B was diagnosed as having Alzheimer's disease. It appears that she had a long history of depression before then, possibly dating back to when her son was a child. She took an overdose of tablets following the break up of her marriage [C102], and may have suffered from a psychotic depression in around 2002, when she received out-patient treatment.

According to her daughter CL, RB's prior mental health issues included depression and paranoia, and she was initially referred to the older persons mental health clinic 'for paranoia behaviour' [C126].

Mrs B herself described 'a history of mood swings and aggression … She stated that she would become aggressive and upset,' which resulted in her being prescribed Amisulpride 50mg od [C40]. She experiences low mood and motivation [C77].

RB moves to her present home in 2003

At the end of 2003, RB moved to a one-bedroom sheltered council flat in R Close. There is a warden on hand, who in the past visited her twice daily. Her flat was described to me as a small pleasant property on a sheltered estate which forms a cul-de-sac. All of the properties 'appeared to be well maintained, including the small front gardens.'

According to her son, he and his mother have placed their names on the housing list for a two-bed property [C35]. He said that ideally his mother will receive an offer in due course so that, as her care needs increase, he or a carer can be present to support her [C62].

Neighbour disputes in 2007-08

Mrs B's health and circumstances seem to have deteriorated in 2007. There were reports that PB had been aggressive towards her and some of her neighbours. On 11 January 2008, she was assessed by social worker SF [H221].

According to SF, Mrs B had become 'paranoid about neighbours taking her flowers,' had expressed suicidal thoughts and been prescribed anti-psychotic medication. Mrs B said that she had banned her son from visiting her and was prepared to consider applying for an injunction. It seems that the facts could not be established because the investigation of the neighbours' allegations was closed without any action being taken. It was around this time, however, that PB himself saw a psychiatrist, Dr LS (see below). What seems most likely is that Mrs B and her neighbours were in conflict, that PB entered into, or was drawn into, this conflict and that his mother asked him to stay away for a while.

2008–10: Attends day centre and diagnosis of Alzheimer's disease

SF recommended that Mrs B attend a local day centre, to help prevent a relapse of her illness, and in February 2008 she started attending a local day centre one day a week.

In 2009, she was diagnosed as having Alzheimer's disease. From then onwards, she received a care package from an agency which involved two carer visits a day, or one visit plus a lunchtime visit to the day centre.

On 2 March 2010, Mrs B increased her attendance at the day centre to two days a week.

Sisters CL and LA complain of financial and emotional abuse

On 21 June 2010, a social worker KB completed a mental capacity assessment, having seen RB at the day centre on 1 June. The assessment was undertaken because her daughters CL and LA had raised concerns about her 'possible exposure to financial and emotional abuse … they believe their brother PB is verbally abusing their mother and they are of the suspicion that he may be financially abusing her' [C48].

RB told KB that her son used to be aggressive and shout at her when he was younger. However, 'in recent years he does not shout at her and behaves respectfully towards her. When stressed her son will shout but she does not consider it to be so bad or directed at her and she is not frightened of him' [C49]. When asked about a reported incident when LA's husband M came to her house,

> *'Mrs B was adamant that M then invited her son to leave her property and come outside and fight with him. Mrs B was adamant that her son's behaviour of shouting and swearing was at no time directed at her … she felt that her 2 daughters were lying about her son's behaviour because they did not like one another … she does not give him personal money and he does not ask her for any' [C49].*

According to KB, RB was upset 'that people thought her daughters were good people because in her mind they were not.' Her son's presence in her life should not be of concern to them. He should be

able to still visit and assist her 'as he is not at her home every single day … she believes that she is more capable than her daughters regard her to be…' [C50]

KB concluded:

> *'On the balance of probabilities, I find that Mrs B appears to have capacity to choose to continue to maintain a relationship with her son and realise the knock on effect this has with his siblings and their offer of assistance to her at this time' [C50].*

September 2010: Care review meeting

On 3 September 2010, CL and LA attended a care review meeting. It was recorded that RB had put on weight, liked to eat sweet things and was prone to having swollen feet. Her blood sugar and blood pressure were checked by a district nurse. She did not want her children to look after her and felt that they interfered:

> *'Mrs B has three daughters and one son. Daughters have regular contact with Mrs B, but she feels they interfere.*
>
> *Daughter highlighted that their brother is not a good influence, but Mrs B said that the relationship with her son is fine' [H237].*
>
> *'… her daughters are concerned she is not managing, but Mrs B tends to get angry with them when they try to support her [H239] … Mrs B feels they are interfering in her life [H240],*

January 2011: carer visit in the evening added

On 28 January 2011, Mrs B's care package was increased, with carers also coming in the evenings for half-an-hour, to assist with her personal care and to 'support her to prepare for bed.'

Initially, they would come at 5 or 6pm, which was far too early, and then at 8pm. There was not much for them to do. PB says that Mrs B herself decided that she did not want them there in the evenings, so the evening visits stopped [C58].

January 2011: Sisters CL and LA again complain of financial abuse

On 31 January 2011, a lead nurse in the safeguarding adults team (MG) assessed RB. His report was undertaken in response to allegations made by CL and LA that their brother had been taking 'advantage of [RB's] vulnerability and taking money from her' [C40].

According to MG, RB described CL and LA as 'sick in the head … my daughters don't give me anything. One's a teacher and the other a director in a bank but they don't bring me nothing, not even a bit of shopping' [C41]. Her son was 'decent' and 'don't take money from me — why would he? He even refuses money I try to give him' [C41]. He was feisty and said how he felt and his sisters 'didn't like someone who's straight and speaks their mind'.

Mrs B's main paid carer described the family 'as doting, caring even a little pernickety, particularly her daughters' [C41].

MG concluded that RB had capacity to control her finances. She wanted to remain at home and be independent, and appeared to be fully mentally capacitated:

'Her fierce devotion to her son and frank hostility to her daughter's allegations appear to show that Mrs B is able to use-and-weigh the decisions she is making … I cannot find evidence of abuse' [C42].

28 February 2011: PB applies to the Court of Protection

Mr B applied to the Court of Protection on 28 February 2011, asking the court 'for protection over (his mother's) finances' and 'housing and medical and social welfare'. He was not legally represented at that time.

He asserted that his mother lacked capacity but also that she 'was still able to make decisions for herself, despite outside influences attempting to exaggerate her illness for their own reasons basically.'

Mr B was concerned that the local authority were failing to provide his mother with an adequate level of home care, and would place her into residential care before she needed that level of support.

It was not entirely clear what order Mr B wanted the court to make. However, the nature of his dissatisfaction was clear from the documents filed by him:

She should not be forced into accepting changes she is not happy with, basically she would feel she has gained some independence back and that will help her to not get so ill, so quickly.

As at the moment she is constantly worrying with the Doctors and Social Services attempting to over take her whole life in the long term ….

Also the carers are careless at times and except [sic] no responsibility for their mistakes.

The order would stop the outside influences from taking her last dignity now, her finances, money that she will need for a private care home at a later stage of her illness [B5].

My Mother needs me to manage her personal welfare [B33].

I do understand that the nhs is overstretched and the standard of elderly care is falling short in this country due to the amount of demand. Hence part private, part nhs is what she wants for the future …. The support unit have stopped sending care plans since October 2010 [C2].

District Judge Ralton gave PB permission to make the application and, in his initial directions on 13 April 2011, joined the local authority as a party. Because PB's application was not supported by an assessment of capacity in Form COP3, the local authority was ordered to obtain an assessment of RB's capacity; and PB was directed to file a statement explaining why the personal welfare issues could not be resolved by collaboration.

RB's sleep routine, oedema and cellulitis

On 1 March 2011, Dr TS (RB's consultant psychiatrist] noted that, having developed cellulitis over Christmas, RB 'still has oedema as she appears to be sleeping on the sofa at night with her legs down' [C131]. She 'clearly needs to be put to bed by evening carers as she needs to elevate her legs to reduce the oedema and risk of cellulitis [skin infection of the legs] and postural hypotension' [C132]. Her medication included Aricept 10mg od and Amisulpride 25mg od, which Dr TS proposed stopping.

Occupational therapy assessment

In March 2011, an occupational therapy assessment of RB's home at R Close found that RB was 'functionally independent' at home [C56].

8 March – 10 May 2011: PB's disagreements with the care agency

On 8 March 2011, PB called the care agency and was verbally abusive, saying 'why the fuck did you send a carer to my mother? If you send a carer to my mother again I will fucking kick her out.' PB terminated the call. The context was that he had become increasingly angry about the continuation of evening visits by carers. The language, volume and tone that he used to express his anger were triggered by his belief that evening visits were contrary to what had been agreed.

On 9 March 2011, PB was verbally abusive and threatening towards a carer on the telephone. She terminated the call. When PB called back he raised his voice and made threats: 'If you put the phone down again I will fucking come round and smash the place up.' The second call was also terminated because of his behaviour. In terms of the context, he had become increasingly angry about the continuation of evening visits and the quality of the care that his mother was receiving.

On 31 March 2011, social worker EC began working with the family. She had face-to-face meetings with RB's daughters but not with PB, who declined.

On 4 April 2011, PB called the care agency office accusing staff of not carrying out their job. He was very rude to Ms A and claimed there was no point in sending carers as they were not doing anything except giving medication.

At the fact-finding hearing, I accepted that the incidents with the paid carers on 8 and 9 March, and 4 April, were relevant to the issue of whether this conduct towards carers in 2011 was likely to occur again unless suitable injunctions were in place.

Between 3 and 10 May 2011, there were some further difficulties, in particular with regard to PB allowing care staff access to his mother. The relevant local authority manager said that he was going to see PB and his mother 'and that he wanted emergency respite for P and to have a serious talk with PB about the situation' [C124].

11 May 2011: Mrs B moves to B Lodge

On 11 May 2011, Mrs B moved to B Lodge, ostensibly for short stay respite. The local authority considered that this was necessary because PB had disrupted the paid care at home [C117-124].

Although the placement was arranged with the agreement of Mrs B and her children, PB was told that the move was a temporary one, 'a short respite placement of about a week,' and agreed to it on this basis: 'once she was there we were informed that it would be for 6-8 weeks. My mother had agreed to go on the basis it was for one week only' [C61]. According to his statement of 12 May 2011, the council were failing to provide his mother with an adequate level of care at her home [C7] …. I will not have the council forcing my mum into care, when they should be able to provide adequate care at home' [C8].

In the event, Mrs B remained at B Lodge until 9 January 2012.

26 May – 8 June 2011: PB's disagreements with GP and hospital staff

On 26 May 2011, PB was extremely rude and abusive towards reception staff at RB's GP practice. He used foul language in the presence of other patients and a letter had to be written to him about his conduct.

On 7 June 2011, RB was accompanied by CL and LA to the memory clinic for her quarterly appointment with Dr TS. Dr TS 'did not think' that she had capacity 'to make decisions re care needs

and financial management' [C136]. PB had to be removed from the hospital by security guards and was disruptive and verbally agitated.

On 8 June 2011, the social worker EC received six answer phone messages on her work mobile, left between 12.30 and 2.30am [C100].

19 June – 23 June 2011: Further social work and psychiatric assessments

A best interests assessment was conducted by social worker JR on 19 June 2011. She noted that RB wanted to return home to her flat. In her opinion, it should be possible to achieve this with a care package that included a minimum of three carer visits each day, and attendance at a day centre twice a week. This 'formal support would supplement the informal support provided by her family, and would enable the family to provide essential emotional support whilst not having to become involved in the more basic care tasks such as helping with washing and dressing.' It 'was not known if the difficult relationship between her son and daughters would impact on the care arrangements at home [C45] …. [However,] at this point in time, it would be in her best interest to return to her own home with support as detailed' [C46].

On 21 June 2011, RB saw Dr M, an experienced consultant psychiatrist commissioned by her son [C67]. He concluded that she did not have capacity to execute a Lasting Power of Attorney for Property and Affairs.

RB informed Dr M that she was in B Lodge temporarily and that she wished to return home soon. She 'was consistent in stating that she would prefer her son to look after her finances rather than any other family member, as she saw him more often' [C67].

On 23 June 2011, Dr TS (her consultant psychiatrist) assessed that RB lack the capacity to make decisions about her care needs and financial management.

The incident at B Lodge on 1 July 2011

On 1 July 2011, it was alleged that PB threatened a resident at B Lodge [C107-108]. According to the local authority's subsequent position statement, he 'attempted to assault [the] resident and is prohibited from entering the building.'

On 8 July 2011, the police informed EC that the allegation of assault had been lodged by PB, not by the resident [C101], or by a third person such as a staff member.

At the fact-finding hearing, I found that the local authority's account of what happened on 1 July was incomplete and potentially misleading. On the balance of probabilities, a resident at B Lodge goaded PB and put his hand around PB's neck. This resident had behaved in a similar fashion the day before. PB reacted by lifting a chair and pointing it at the resident and telling him to back off. Because of his problems with self-control, anger management, shouting and swearing, PB's reaction to the resident's behaviour was disproportionate, having regard to the location (a facility for frail, older, people), the resident's mental health, age and circumstances and the distress caused to his mother and others. His mother and staff members were upset by his shouting and swearing. Some staff members thought that he was out of control and felt unsafe. The police were called.

14 July 2011: Local authority becomes aware of the court's order

The local authority states that it only became aware of the court's order of 13 April — joining it as a party — on 14 July 2011. Even then, it was not until 16 August 2011 that it completed an Acknowledgement of Service; it objected to PB's application and submitted that it was in Mrs B's best

interests to move into residential care. (Having received the Acknowledgement of Service, on 1 September 2011 the court listed the matter for an attended directions hearing on 11 October 2011.)

22 July 2011: Mrs B signs a tenancy agreement for YY

Eight days after becoming aware of the Court of Protection proceedings, and notwithstanding the evidence of incapacity, the local authority arranged for Mrs B to sign a tenancy agreement at YY, for an extra care sheltered housing scheme flat with 24-hour support.

The local authority and Mrs B's daughters were present when she signed the agreement and considered that this was in her best interests; her son's position was that she should return home.

Although still at B Lodge, and still retaining her tenancy at R Close, RB therefore became liable for the weekly rent at YY of £257 per week when the tenancy commenced on 15 August 2011. RB was now in residential care but liable for the rent on two properties. By February 2012, the rent arrears at YY totalled over £6,000, in addition to an outstanding council tax liability [D18].

The meeting on 12 August 2011

On 12 August 2011, following complaints from PB, Dr TS saw RB with her daughter CL. According to the local authority, RB informed EC that she would like her daughters to have access to her medical and financial 'matters' [C72]. She wanted to go to YY and Dr TS and CL arranged for her to telephone PB. RB became tearful and distressed by their conversation. EC believed that he had no insight into his mother's needs or the effect of his behaviour on her. 'All of her daughters have stated they think a move to YY with a support plan is best for their mother and will reduce risks of her deterioration and improve her mental and emotional health' [C74].

PB agreed that he raised his voice and that his mother was distressed. She 'was deprived of her liberty; everyone knows that. I said to mum, "You don't have to accept this or move to YY. You still have a choice. You can go home." I had to shout at her because she was shouting at me; she calmed down when she realised what I was saying.'

At the fact-finding hearing, I found that the local authority's account was incomplete and potentially misleading. On the balance of probabilities, PB raised his voice on the telephone and this contributed to RB being distressed and the call being ended. However, the call was instigated by CL and RB was already very upset and sobbing when it began.

Local authority offer of mediation declined

According to EC's care plan of 24 August 2011, an offer of mediation by the local authority 'was declined … Mr B does not agree with [the local authority's] recommendations for provision of care, her daughters are in agreement' [C82, C86].

Directions hearing on 11 October 2011

At a directions hearing on 11 October 2011, District Judge Cushing ordered that Mrs B be joined as a party and invited the Official Solicitor to act as her litigation friend.

The local authority was directed to obtain a report concerning Mrs B's capacity to litigate and to make decisions about care, residence and contact. It was also required to serve the order on RB's daughters, who were to file any application(s) to be joined as parties by 8 November 2011.

The parties were given permission to jointly instruct an independent social work expert, and District Judge Cushing set the matter down for a final three-day hearing on 13 December, reserving the case to me.

Contact between PB and RB

Following the hearing on 11 October 2011, the local authority informed PB that his mother did not wish to see him until she had left B Lodge. However, on 21 October, she indicated that she did wish to see him, and contact at a local resource centre was arranged, commencing on 1 November 2011. A DOLs assessment was requested by social services.

On 27 October 2011, EC stated that she received a voicemail left by PB at 12.30am. He 'apologised for the late call and stated that police are trying to follow him when he leaves his mother's flat, that the Council are sending criminals to follow him … I contacted PB by telephone to reassure him the council would not follow him, he would not believe this' [C102].

26–28 October 2011: Standard authorisation issued/deprivation of liberty

On 28 October 2011, a best interests assessor determined that RB was deprived of her liberty at B Lodge and that this was in her best interests [E10].

The date of the standard authorisation issued by the local authority (as the 'supervisory body'), founded on this and the other five assessments, is given as 26 October 2011 [E43], which is before the assessments were completed.

The standard authorisation authorised B Lodge to deprive RB of her liberty until 8 January 2012. Therefore, there was now also a section 21A issue to be addressed when the case returned to court in December.

(At the suggestion of the Official Solicitor, the issue of whether RB was deprived of her liberty between 11 May and 28 October 2011 — and if not what changed during that period — and whether there was an unauthorised deprivation of liberty between these dates, will be considered at a later date, once the Supreme Court has given its judgment in the case of Cheshire West and Chester Council v P (2011) EWCA Civ 1333.)

4–7 November 2011: Medical reports

On 4 November 2011, RB's GP reported that she had not seen or examined RB for around a year. However, the fact that she was sleeping in bed every night was 'almost certainly the reason for her reduced leg swelling, which in turn has resulted in less infection' [C154].

On 7 November 2011, Dr TS saw RB at B Lodge without her daughters being present. RB thought that she should be going home but the council were sending her to YY. She did not know what it would be like.

Application to adjourn the final hearing

On 23 November 2011, PB applied to adjourn the hearing listed for 13-15 December 2011 and sought a directions hearing in its place. The grounds were that the independent social worker could not complete his report until February 2012 because of the local authority's failure to provide Mrs B's social care records in time; the required capacity report had not been filed or served; and the Official Solicitor had not yet consented to being appointed as litigation friend. The application was granted.

Interim hearing on 13 December 2011

I heard the case for the first time during the morning of 13 December 2011, when PB sought a direction that his mother be permitted to return home pending final orders and declarations, with a package of care arranged by the local authority.

The balance of the evidence indicated that she had consistently expressed a wish to go home. She expressed this view to her son on 25 May 2011 [E5, E14], to the best interests assessor on 21 June 2011 [C44 and C46], to Dr M on 24 June 2011, during the best interest assessment in August 2011 and to her solicitor on 7 December 2011.

Initially, RB's daughters supported their mother remaining at B Lodge for the time being. Furthermore:

- Ms L and Ms A submitted that their mother wished to move to the supported placement at YY.
- Their brother was unable 'to act in a co-operative and non-confrontational way with anyone involved in the provision of care and all financial matters relating to our mother.'
- According to CL, it was in her mother's best interests for a 'professional and accountable organisation' such as the local authority to manage her social and financial affairs, rather than her brother.
- According to DB, 'her health has improved a lot, and she is eating properly because she no longer has sugary foods, her son used to buy sugary foods at her flat, even though he still brings these things to her when he sees her, and he knows my mother is at risk of getting diabetes … At B Lodge … they put her to bed, so she don't have swollen legs anymore' [C142].

Following negotiations between the parties, and as planned, I heard the matter again briefly on 15 December, to approve the directions for RB's return home on an interim basis.

This proposal was now supported by the Official Solicitor and by RB's daughters, subject to an appropriate care plan and PB giving undertakings about his future conduct and compliance with the care arrangements. A contact schedule was included in the care plan, and PB gave undertakings that he:

> *(a) would not attend Mrs B's home when care is being provided to Mrs B or when other members of the family are present in accordance with the care plan or 15 minutes before or after care is to be provided;*
>
> *(b) would leave the property if he attended and carers were present and would not be present at the property after 9pm;*
>
> *(c) would not act in a manner which was obstructive of or detrimental to the provision of care to Mrs B;*
>
> *(d) would not act in a manner which would cause or would be likely to cause distress or inconvenience to Mrs B or those caring for her;*
>
> *(e) would not make comment or complaint about the provision of care to Mrs B to any person except specified persons at the care agency commissioned by the local authority.*

He gave further undertakings to provide money to the local authority from his mother's funds and to notify it of communications regarding medical appointments for her.

Other directions

As concerns the other directions:

(a) Mrs B's daughters were joined as parties.

(b) The local authority was directed to file a Scott Schedule setting out the alleged facts on which it sought findings, to which Mr B was to respond.

(c) A final hearing was listed before me on 28–30 March 2012.

(d) The local authority was to set out its position as to whether it had been appropriate for Mrs B to sign the tenancy agreement for YY and whether it would indemnify her for any liability and costs arising from signing it.

9 January 2012: Mrs B returns home

On 9 January 2012, RB returned to her home at R Close. It appears that she has been happy there since then. It has not been suggested to me that she has any wish to move again.

On 1 February 2012, her blood glucose level was 7.5 mmol/L (normal = 3-6 mmol/L), but there was uncertainty as to whether she had fasted before the blood test.

Independent social work (ISW) report of 16 February 2012

On 16 February 2012, Mr S, the independent social work expert, filed his initial report.

He recorded that he had been frustrated by communication difficulties, 'possibly emanating from the local authority', which had caused him inordinate organisational problems. He had offered to withdraw from the case without taking a fee but 'was, for better or worse, requested to remain involved, and reluctantly agreed to do so' [D9].

RB told Mr S that, when she was at B Lodge, she understood that she could not go home and 'EC my social worker … said I needed to be there' [D12]. Her children did not get on and were always arguing [D13].

Although the social work expert thought that it was a 'splendid' resource, and that staff there were knowledgeable, friendly and helpful, RB did not wish to move to YY, which was in an area where she did not wish to live.

Mr S concluded that it was in Mrs B's best interests to remain living at home with the current care package. RB had 'expressed the view to him that she would like PB and her other children to visit two to three times per week and that she did not wish PB to visit every day.'

He recommended mediation and that her children work towards 'some form of rapprochement' which elevated RB's best interests 'above the conflicts from within the family and allows professional carers to do their jobs, and allows RB to remain where she wants to be for as long as possible.'

Addendum independent social work report of 28 February 2012

In an addendum, Mr S stated that he had been able to speak with PH ('Mr H'), the team manager of the Older Persons Team. Mr H thought that the ISW report expressed a fair and balanced view of the situation, and the two of them had no points of disagreement. In Mr H's opinion, RB's children had 'unintentionally lost sight of the real issues' [D32]. He agreed that mediation was worth trying.

RB's daughters allege that their mother has refused care at home

In February, RB's daughters contended that their mother had been refusing personal care, refusing to leave her flat and was starting to self-neglect, in the same way that previously had necessitated her move to B Lodge in 2011. (I cannot find any real evidence to support the contention that RB's move to B Lodge was triggered by self-neglect.)

RB's daughters did not want any final orders or declarations made until these issues had been addressed. They still preferred placing their mother in an extra care facility such as YY. They did not wish to visit their mother at her own home if their brother's undertakings were not complied with and enforced. They repeated their view that it was desirable for the court to order than an independent person should manage their mother's finances.

On 6 March 2012, PH, the manager of the Older Peoples' Team, reported that any care issues identified by RB's daughters had arisen when there was a change in her normal carer 'and reverted back to normal again when the carer returned from leave.' It appeared that the concerns of self-neglect were more those of daughter CL than the local authority's.

16 March 2012: Official Solicitor applies for the final hearing to be vacated

On 16 March 2012, the Official Solicitor applied, with the consent of the other parties, for the final hearing to be postponed, because the local authority's evidence had been filed late (again) and Mr B had not, at that stage, filed his final evidence. Furthermore, an addendum report was required from Mr S, which addressed the concerns raised by Mrs B's daughters that she had been refusing care.

21 March 2012: RB's solicitor visits her (on behalf of the OS)

On 21 March 2012, RB's solicitor visited her. RB 'was appropriately dressed and the solicitor 'did not notice that her health/condition had deteriorated noticeably from when I met her at B Lodge … I asked RB whether it was OK for PB to visit every day. She replied that "he don't come everyday — alright as how he coming — fine."'

According to one of RB's main paid carers, Ro, RB was always reluctant to go out. She did not want half the food which the local authority provided. Ro had not noticed any change or deterioration in RB since her return home. PB had not interfered with her care since then. His behaviour had improved greatly. He could be a great help, drying her clothes and preparing meals.

Telephone directions hearing on 23 March 2012

A telephone directions hearing took place on 23 March 2012. It was agreed that a one-day interim residence, care and contact hearing should take place on 28 March, rather than the first day of a final hearing.

Interim hearing on 28 March 2012

In position statements for the interim hearing, it was alleged that PB had breached one or more of the undertakings given by him on 15 December 2011. In particular, he had failed to inform the local authority about one of his mother's hospital appointments and on occasions had been present at her flat when other family members were present.

The local authority indicated that it did not intend to issue a committal application at this stage but wished the court to remind PB of the importance of abiding by the agreements, and the serious nature of the undertakings given by him.

Very shortly before the start of the hearing, Mr B left the Royal Courts of Justice. He did not attend the hearing. According to his counsel, who frankly had been left at the altar, Mr B remained of the view that it was in his mother's best interests to live at home. He asked that the restrictions in place be relaxed to permit him to visit her when carers were present. I was unable to agree to that in his absence, for which there was no explanation.

Given that PB was not present to repeat his undertakings, I made injunctions to the same effect and a penal notice was attached. The order recorded that there were six alleged breaches of the undertakings,

four of which related to PB being present during his sisters' visiting times, and one to him being present when paid carers were present.

Other directions

Further directions were given in advance of a pre-trial review and final hearing, which was relisted for 10-12 September. The interim orders in relation to capacity and best interests were repeated. Permission was given for the independent social work expert to report to the court concerning Mrs B's alleged refusal of care.

Given that Mrs B was now back at home, it was agreed that it was in her best interests for the tenancy to be terminated, in order to avoid a liability for double-rent.

It was recorded that the local authority and YY had reached an agreement concerning the rent arrears that had accrued at YY, which did not involve RB herself having to pay anything. Although the local authority's formal position was that it had been appropriate for her B to sign the agreement, they would meet 50% of the cost of the tenancy to date and YY would meet the remaining 50%.

PB appeals

Following the hearing on 28 March 2012, PB sent appeal forms to the court in respect of the orders of 15 December and 28 March, using Form N161. He stated that he had never wished to give the undertakings in December. He had not attended the hearing on 28 March lest he be, or feel, pressurised into repeating the undertakings and agreeing the care plan: 'I let the Judge down for good reason and maintained my innocence by not signing into the undertakings' [B104].

4 May 2012: Dietician visits RB

On 4 May 2012, Mrs B was seen by a bank community dietician. Her weight was 75.3kg (BMI of 29) and her ideal weight was 51-64kg, but she had lost 9.9kg in the past 22 months, equating to 11.6% of her bodyweight [H264].

Mrs B said that she did not have diabetes, which appears to be correct.

Because of time constraints, most of the meals provided by the paid carers were ready-meals, 'which tend to have a higher fat, salt and energy content' [H265]. Her kitchen included biscuits, muffins, brioche, star cakes, pain au chocolat, finger madeleines and yoghurt crunch cereal bars [H265].

Some three weeks later, on 25 May 2012, her blood glucose level was tested and found to be 6.2 mmol/L (normal = 3-6 mmol/L) [H391], down from 7.5 mmol/L on 1 February.

6 May 2012: Breach of the care plan

On Sunday 6 May 2012, PB was present at his mother's flat during his sister LA's contact time. He was running late because of care that he had given to his mother. Although a breach of the order, there were mitigating circumstances in that he genuinely believed his mother needed this care from him. Furthermore, he was preparing to leave when his sister arrived.

Addendum independent social work report of 8 May 2012

According to Mr S, professional opinion was 'unanimous in reporting that RB is settled in her own home for the medium term future, and that the difficulties are generated around and not by RB, through sensitive, volatile and powerful family dynamics, the actual care of RB itself presenting "conventional" and low-key challenges in line with what might be expected given her diagnoses.'

The care plan was working well. Similarly, the contact schedule should remain in place for the time being because it was by and large working.

Mr S's concluded that it remained in RB's best interests to remain in her current home. As to the reported refusal of care, all of the professional evidence suggested that she was cooperating with professionals 'well within the parameters of what might be expected with someone affected by the level of her disabilities.' Local services had devised good strategies to manage RB's episodic reluctance to co-operate with care support staff.

Mr S 'completely adhered' to the views expressed in his original report. More particularly, he retained 'some optimism that specialist mediation could have a significant role in at best resolving the principle elements of these proceedings, and at worst narrowing the range of 'issues' to a much more manageable portfolio.'

PB instructs new solicitors

At around this time, Mr B instructed new solicitors and filed an interim application seeking the instruction of a court appointed expert to assess Mrs B's capacity. His new solicitors did not pursue the appeals previously lodge by him but did seek a relaxation of the restrictions.

Special Visitor's report of 30 June 2012

The court gave permission for the parties to instruct a special visitor to report on Mrs B's capacity. He saw RB on 22 June 2012 and reported on 30 June. His conclusions reflected those of Dr TS. He noted that Mrs B wished to remain in contact with all of her children. However, 'as far as considering any problems they might cause for her or others she does not have the capacity to make decisions about such contacts' [D53]. She might benefit from the increased social contact and stimulation provided by a day centre [D53-D54]. The appointment of a deputy who would consult the family members and professionals involved in Mrs B's care might be the best way forward [D54].

In the light of Dr TS's report, the capacity issue was not pursued any further and ceased to be a trial issue.

Pre-trial review on 5 July 2012

At the pre-trial review, the court ordered that the care plan and contact schedule remain in place, save that the care plan was modified to permit PB to provide his mother with evening meals on Monday, Tuesday, Wednesday and Friday each week.

The local authority and Mrs B's counsel expressed concern that he had been verbally abusive to his sisters outside court. This was not the first time that the court's attention had been drawn to PB's mental health or behaviour in court and the order of 5 July recorded that unless he:

> *'undergoes an assessment by a psychiatrist for the purpose of assessing the current state of his mental health and recommending any services that may assist him and advising on strategies for managing his relationships with his siblings and Mrs B's paid carers in order to assist the court to determine the issue of RB's best interests in relation to her care and contact with Mr B, the court may take that into account when deciding whether to relax the restrictions on contact.'*

At the subsequent fact-finding hearing, I found that 'whilst in the lobby area of the court PB raised his voice and was verbally aggressive towards his two sisters, CL and DB. This went on for about ten minutes by which time one of his sisters was reduced to tears and both sisters were visibly upset. They left the room with the Official Solicitor's counsel, to compose themselves.'

Incident on 31 July 2012

On 31 July 2012, care agency staff were present with RB during PB's contact time because a hairdresser's appointment had been booked by a carer. The only care plan that could be found was one from the previous year. PB did not leave as required by the court's order. He became verbally abusive towards the carer in front of his mother using inappropriate and threatening language. The police were called and PB eventually left. RB was very upset by the incident and did not attend the hairdressers.

6 August 2011: PB's application to change judge, etc

On 6 August 2012, it seems that PB himself applied (rather than through his solicitors) for a change of Judge and a change of the firm acting for the Official Solicitor. This must have been dealt with during my absence on leave and seems not to have progressed.

10 August 2011: Psychiatric report of Dr LS concerning PB

Following the pre-trial review in July, Mr B did not agree to being assessed by a psychiatrist from the relevant CMHT but was willing to see Dr LS, who had examined him before in 2008. Dr LS is a consultant psychiatrist approved by the Secretary of State under Section 12(2) of the Mental Health Act 1983 as having special experience in the diagnosis or treatment of mental disorder.

Dr LS stated that PB met the criteria for a paranoid personality disorder. 'He agrees that he is excessively sensitive and does not forget perceived insults or slights. He also admits being suspicious, and the history as documented … provides many examples of his interpreting intentions as malign … His combativeness and tenacious sense of personal rights are a constant thread running through the history and mental state.'

Dr LS recommended that PB allow his GP to refer him to the local NHS Psychological Therapy Service for an assessment.

The fact-finding hearing on 10–12 September 2012

A fact-finding hearing took place on 10–12 September 2012, at which the local authority sought to prove 13 alleged breaches of the court's orders. Some of alleged facts were found not to have been established and were given an evidential value of zero (see Appendix A). As concerns the alleged facts that were proved, I made the following observations:

> *I agree with Ms Bhogal, counsel for the local authority, that the consistent theme is PB's confrontational approach and 'manner of communication' when challenged or frustrated: his tone, volume, demeanour, volatility and offensive language. His behaviour often upsets his mother, sisters and professional carers, or alienates them, so as to reduce his chances of achieving the changes he seeks.*
>
> *I also agree with Mr Buttler, counsel for the Official Solicitor, that a key issue is whether his conduct indicates that 'without an injunctive order there will be an obstacle to the provision of care to RB. That is why we are going down this fact-finding route.' According to Mr Buttler, 'PB's inability to express his views without losing his temper indicates the need for such an order. If he is not getting his way there is a real chance that he will shout and swear at people.'*
>
> *'I do not believe that all of the current problems within the family can be laid at PB's feet …*

I do believe that PB has made genuine attempts to modify his behaviour and to observe the court's orders since December 2011, when I first participated in a hearing in this case.

He is a devoted son and has taken very good care of his mother over the years.

My concern remains the same as it was in December 2011 and has been neatly summarised by Dr LS recently:

> *"Unless he is willing to accept treatment, the prognosis must be very poor, as paranoid personality disorders do not improve spontaneously with time. The only alternative open to the Court in my opinion is to strengthen the existing boundaries, adhere strictly to them and use legal means to enforce them if necessary."*

Without compliance, the end point of any enforcement strategy is committal to prison for breaches of the court's order. Therefore, I would ask PB to consider the only real alternative, which is to accept the help recommended by Dr LS. To me, that is likely to be a much more constructive way forward.'

Telephone hearing on 17 September 2012

Following the fact-finding hearing, and the delivery of my findings of fact, the parties were unable to agree the precise terms of the care plan pending the final hearing on 8 October. Therefore, a short telephone hearing was arranged.

Final declarations were made as to RB's lack of capacity make her own decisions in relation to all of the relevant matters [F36].

The main area of disagreement concerned whether PB should continue to be allowed to provide some of his mother's meals pending the final hearing, in the light of concerns expressed by professionals about weight gain. Given that the final hearing was taking place shortly, on the balance of convenience PB was forbidden until then from bringing various foods into RB's home [F37]. The changes to the care plan were to take effect from Friday 21 September 2012.

The position reached at this stage was that the various capacity and factual disputes had been determined, the court had a final report from the independent social worker as to RB's residence and best interests, good evidence as to how she had fared at home since January, information from a dietician, and a psychiatric report on PB. Any deprivation of liberty that had occurred had been ended by RB being discharged home from B Lodge.

The seemingly intractable issues still to be resolved were the parties' differences about the care plan, their mother's needs, the amount of time each of them should spend with her and the need for injunctions and enforcement mechanisms.

The weekend of Saturday 22 September 2012

Things got off to a poor start, notwithstanding that the parties only had to abide by the interim arrangements for around three weeks, until the final hearing took place.

At 11.06pm on Saturday 22 September, CL emailed a 'Dear Judge' letter to the court complaining of incidents that had occurred since the care plan came into force the previous day. CL then sent another email to the court, addressed to me, on Monday 24 September 2012, at 3.04pm.

At 3.59pm, CL submitted a COP9 and COP24 by email, asking the court to take action in relation to alleged breaches between Friday 21 September and Sunday 23 September 2012. This was copied to the parties for their consideration, who were to liaise as to whether a telephone hearing was required before the final hearing. No such hearing was felt to be necessary, or at any rate productive.

1 October 2012: Dietetic review

On 1 October 2012, VB completed a dietetic review. Her weight was 78.8kg (BMI of 30.8) and her target weight was 70kg (BMI of 27). She had gained 3.5kg in the past five months (4.4% of her body weight). Once a week she attended the Haven Day Centre, where she had two biscuits with her mid-morning tea and 'staff were not aware of her healthy eating needs' [H392]. She did 'confess' to eating cakes. VB suggested that food record charts were kept for self-monitoring purposes. However, 'we feel this case no longer requires further intervention and have not arranged follow up' [H394].

Final hearing on 8–9 and 11 October 2012

The final hearing took place, as recorded below.

§6 — DR LS's REPORT ON PB

Dr LS was asked to provide a report setting out the current state of PB's mental health; his recommendations as to any services which may assist PB; and his recommendations as to any strategies which may assist him to manage his relationships with his siblings and (his mother's) paid carers. The underlying purpose of the report was to assist the court to promote Mrs B's best interests in relation to her care and her contact with her son.

Kept as brief as possible, on 10 August 2011 Dr LS reported that:

19. In February 2002, a doctor had provided a statement in relation to PB's eligibility for Incapacity Benefit. The main diagnosis was given as a 'chronic anxiety state.'

20. In 2005, PB said that he could not live in a hostel because 'the noise would be too much for me.'

21. In May 2008 he told Dr LS that he had in the past '*locked himself away as problems with nerves, arguing all the time.'*

22. He is clearly very close to his mother and it would be unfortunate if this relationship, the only one he has maintained throughout the years, were to be disrupted.

23. Mr B was dissatisfied with the visiting carers: *'people come round but they are rushing all the time, they have not got time to cook, it is the same old routine, for example they have left my mother unwashed again.'*

24. He had not had any contact with a psychiatrist until Dr LS's initial assessment in May 2008. At that initial interview, Dr LS 'diagnosed a personality disorder with impulsive and paranoid features.' He was offered a referral for anger management, which he declined. He did accept a trial of a low dose of olanzapine, to reduce his arousal levels.

25. At the follow-up appointment in June 2008 he reported a modest improvement with the olanzapine, and agreed to consider longer term psychological therapy. He was referred to the local NHS psychology service but did not pursue the possibility because '*it is a waste of time seeing a psychologist, my mother said so, they cannot help me'.* He elaborated that '*it is just a mild problem, no big deal, if you are not attacking people they attack you'.* 'When I [Dr LS] challenged him and pointed out that he might be able to change, he again resisted

this suggestion: "*If I change the way I am you find that people take you as a soft person and you end up like everyone else, doing something you do not want to do.*"'

26. He made little eye contact with Dr LS. He talked rapidly in a monotone, rarely checking to see the doctor's response. There was no evidence of hallucinations, delusions or formal thought disorder and he was not clinically depressed.

27. Others were invariably against him and he was never in the wrong in such cases: '*people should not be picking on me – if they do, I shout at them – there is no point complaining as no one does anything. What else can you do? So I do not think there is much wrong with me. Now they are all on my back – the judge, the carers.*' '*Everyone is doing everything wrong to me – it is not a Court of Protection, it is a business, they are as corrupted as hell*.'

28. At his initial NHS psychiatric assessment, in May 2008, PB was accompanied by his mother. He told Dr LS at the time: '*I have a personality disorder, I do not like people around me, it makes me aggravated, it can end in a scrap. I cannot take too much noise.'*

29. 'There can be little doubt that Mr B is suffering from a personality disorder' (paragraph 15.1).

30. He 'is deeply dysfunctional in most if not all areas of his life. He would meet the criteria for a paranoid personality disorder. He agrees that he is excessively sensitive and does not forget perceived insults or slights. He also admits being suspicious, and the history as documented above provides many examples of his interpreting intentions as malign, … His combativeness and tenacious sense of personal rights are a constant thread running through the history and mental state.'

31. He could not be shaken from his belief that therapy would not be helpful for him. 'Unless he is willing to accept treatment, the prognosis must be very poor, as paranoid personality disorders do not improve spontaneously with time. The only alternative open to the Court in my opinion is to strengthen the existing boundaries, adhere strictly to them and use legal means to enforce them if necessary.'

32. 'There is no standard treatment for paranoid personality disorder, but psychological therapy and medication are used. Mr B has already received, and reported some benefit from, a low dose of an antipsychotic agent to reduce his hostility and insensitivity.'

33. 'Various modalities of psychological therapy are advocated for personality disorders. Both psychodynamic and schema therapy are available within the NHS, although they are difficult to obtain and there are long waiting lists. Anger management courses are relatively easily accessed in the NHS.'

34. 'As an interim measure, to assist him to manage his relationships with his siblings and his mother's paid carers I suggested two strategies to him for avoiding angry outbursts: one is to count slowly to 10 before responding to what he perceives as a provocative remark. The other strategy is that when he feels the urge to shout, he should immediately leave the room or building for a few minutes, returning only when he feels more calm.'

35. 'In the first instance I would recommend that he be again referred by his general practitioner to the local NHS Psychological Therapy Service for an assessment.'

§7 — THE HEARING AND TRIAL ISSUES

The final hearing was held on 8–9 and 11 October 2012.

Non-attendance of 3rd-5th Respondents (Mrs B's daughters)

Mrs B's daughters did not attend the hearing and so were unavailable to be questioned on the truth and accuracy of their statements concerning their brother. CL's reasons were set out in a letter to court of 4 October 2012, rather than in an application notice or witness statement copied to the other parties.

PB's conduct in court

There were times during the hearing when PB found it difficult to control his frustration or anger.

(I have noted the advice he received from Dr LS about leaving a room or building if he begins to feel angry, and therefore did not regard sudden absences as being deliberately disrespectful to the court or the parties.)

Day 1, 8 October 2012

There was a verbal outburst at 12.15pm. The court took a break. On reconvening, counsel explained that, 'PB found that all a bit upsetting and he apologises.'

PB was then not present at 2.15pm for the start of the afternoon session. He walked into court at 3.20pm.

Day 2, 9 October 2012

At the scheduled start time, counsel did not know where PB was and his solicitors had been unable to contact him. They had no instructions to continue in his absence. An application not to start without him was refused.

PB arrived at 12.55pm. He interjected, 'I've got to be doing everyone's work'. He left the court at 12.58pm. His solicitor was asked to see him before he left the court building and to try to persuade him to remain and participate.

The hearing resumed at 2.40pm. It was adjourned for 15 minutes at 2.50pm because of a verbal outburst by PB. He then gave oral evidence and was questioned. I had to ask him to treat Ms Bhogal with respect: 'Sorry, Ms Bhogal'.

Day 3, 11 October 2012

The final day began with preliminary arguments on various legal points. At 10.40am, PB interjected, 'I do not want any care plan, no, fuck all.' He then left the building, returning to court at 11.35am.

At 11.52am, during Ms Bhogal's submissions about his conduct and the need for injunctions to continue, he interjected: 'I don't really give a damn, Stephen [his counsel's first name]. Do what you want … What a lot of bloody idiots.'

At 1pm, he left the hearing during the Official Solicitor's oral submissions.

Email to Dr LS

Following one outburst, an opinion expressed by Mr S, a change in the Official Solicitor's position and some discussion with the parties, I emailed Dr LS to ask him if he could assist us with the following supplementary issues:

> *The court has been hearing oral evidence this week, including evidence from Mr S who, as you know, is the other expert who has provided a report.*

Everyone agrees this is an exceptionally difficult case. I am rather concerned by Mr B's behaviour in court and, in particular, the lack of eye contact, the way in which he socially interacts with me and other persons in the case, the outbursts and anger, his reported antipathy to noise, and so forth.

As you know, there have been breaches by PB of court orders regulating contact and care. It is alleged that there have been further breaches since the court's last order in mid-September. How best to proceed is a difficult issue which involves considering several factors. These factors include the extent to which Mr B is capable of complying with court orders concerning his mother's contact and care, whether his mental health would preclude committal to prison because of the suffering it would cause him, whether committal would do any good. Is any purpose likely to be served by such a strategy, i.e. is there a chance that he would then modify his behaviour? Against this background, there are two points on which the court requires further guidance before final submissions tomorrow and I should be grateful if you could assist us by providing whatever guidance you can in the time available:

1) With regard to the likelihood of Mr B being able to comply with court orders, and the suitability of any enforcement strategy based ultimately on the threat of committal to prison, are there any differential diagnoses that you believe the court needs to consider or be aware of, such as Asperger's syndrome, or can I proceed on the basis that there are no differential diagnoses? I am conscious of the fact that we have relatively little historical information. The mental health social work expert thought that it would be valuable to have your opinion as to whether this needs to be explored further.

2) Do you have an opinion as to whether an 'unless order' approach might be likely to be more successful in terms of achieving compliance with court orders and contact arrangements than one based on a suspended order for committal to prison, followed, if necessary, by committal, and indeed further committals in the absence of any modified behaviour. An 'unless order' might be along the lines of requiring Mr B to partake in treatment, e.g. an anger management programme, as a condition of contact with his mother, or limiting his contact with her in the event of breaches unless and until his compliance improves.

Unfortunately, it turned out that Dr LS was abroad. (He did respond on his return — see below — and his response was circulated to the parties for supplementary comments and/or submissions. There were none.)

Supplementary bundle of documents

A supplementary bundle of documents was handed to me on the morning of the trial. I ignored pages 1-130, which were protected by legal advice privilege in relation to solicitor/ client communications. Pages 131 onwards added nothing significant.

Service of the court's previous order

The court's last order was issued on 20 September 2012, following the telephone hearing to approve the interim care plan.

As before, that order contained a number of injunctions forbidding PB from doing certain acts. The local authority alleged that PB had breached the order during the intervening three weeks. When the injunctions were read to him, PB said that he understood the meaning of the words and sentences comprising the injunctions, as read to him by me, but could not remember receiving a copy of the order.

The local authority accepted that it had not served the order on him personally, and had simply served a copy of it on his solicitors.

In the event, I took the view that spending a great deal of time on whether there had been further breaches of a *served* order since 20 September would not add to my understanding of the case, having regard to the history and Mr B's conduct in court. As a result of the recent fact-finding, and the other evidence, it was well-established that he found it difficult to control his frustration and anger, and difficult to adhere to care arrangements.

§8 — THE LOCAL AUTHORITY'S CASE

Ms Bhogal alleged that there had been further breaches of the order and care plan since the last hearing. Despite these breaches, the local authority would try to accommodate Mr B. There was a continuing need to monitor and supervise the situation.

Evidence

The local authority relied upon a number of witness statements made by professionals involved in RB's. In his statements, PH ('Mr H'), Team Manager, Older People's Team, stated:

> *'The hostility between the children has at times put R's mental and emotional health at risk. It has been very difficult trying to manage a package of care in the community because of the dynamics between the children, with all parties making counter claims about each others ability to support RB' [C166].*
>
> *Her health and social care needs could be managed at R Close 'but the dynamics and hostile relationship between her 4 children have made this option very difficult to manage' [C166].*
>
> *The local authority agreed that mediation would be useful in allowing the children to explore how their relationships and behaviour impacted on their mother's welfare [C167].*

Mr H also gave oral evidence, which was as follows:

1. He is a social worker with many years experience.

2. The original assessment had been that four visits were required each day, interspersed with family visits due to the difficult family dynamics.

3. Mr H was content for PB to prepare meals for his mother, and to have them with her, four evenings a week. However, he should provide a weekly food menu in advance and record all food provided by him in a food diary.

4. The 4.15-6.15pm time slot would continue. However, the present carer slot between 6.30pm and 7.15pm would need to be changed on the four evenings that PB provided meals between 4.15 and 7.00pm.

5. The current interim care plan circulated on 20 September 2012 (F38) provided for an evening carer slot of two hours between 9.30pm and 11.30pm. Such a long period of time was not required. On some occasions, RB had refused to go to bed, so that the carer spent two hours sitting around. Half an hour, between 9.30pm and 10.00pm, would suffice. The purpose of this visit would be to assist RB with any personal care tasks and to provide a

hot drink and medication. RB would decide whether to go to bed and the carer would not change that decision.

6. The morning carer would check if RB had gone to bed: was the bed made, was she in her night clothes, etc? If RB was not going to bed, it would be necessary to have a contingency plan and to revisit the arrangements, e.g. if she had not slept in bed on two consecutive nights. This might involve the district nurse visiting to establish the reason, followed possibly by the GP. The two-hour slot could be resurrected, to see if this helped RB to resume her previous habits.

Under questioning Mr H conceded, with regard to the proposed carer slot of 9.30-10.00pm, that Mrs B was hardly ever in bed before 10.00pm. Therefore all the carers would be doing was checking that she was still there, shutting windows, giving a drink and medication. There would be no personal care to deliver.

7. Agency carers were providing evening care to RB prior to her move to B Lodge. A problem then had been that she was not going to bed but staying in her chair, causing leg problems. It was not known why she was staying in her chair (Mr B: 'Don't blame me.'). There had been a safeguarding issue. PB would cancel the evening carers, saying they were not needed and that he would look after her. Initially, RB went to B Lodge for two weeks' respite.

8. Given the history, PH had reservations about letting PB undertake the half-hour evening slot. This slot allowed the situation to be monitored at the end of the day and, where necessary, for personal care to be delivered by a female. This care might involve seeing to 'toilet accidents' (she might 'wee herself and need to be changed … could happen … I'm not saying that it has recently').

Under questioning, Mr H accepted that there was 'no suggestion' that RB has a 'continence problem'. Furthermore, she can dress herself, get into her nightclothes, wash and brush her hair independently, but sometimes needs prompting. She does not receive Attendance Allowance for night-time needs; only the lower rate for the daytime.

On reflection, a later half-hour slot, between 10.30 and 11.00pm, would be better. Mr H had received feedback from the carers that RB got herself to bed on occasions. On many occasions she had fallen asleep in the chair. This had not improved since the last hearing. She 'clearly doesn't like having people around in the evening'.

9. The essential purpose of the final visit was to check that the household was 'ok at the end of the day.' If PB was the last person to be with his mother each day, there would be no check at the end of the day as to compliance with the care plan. At present, Mr H could not be 'confident' leaving responsibility for complying with and implementing the care plan to him. No doubt he would lock and secure the property. However, he might stay longer than agreed, into the early hours, so that RB became tired. That had been the feedback from her daughters in the past.

10. Mr H agreed 'one-hundred per cent' with the independent social worker's opinion that it was appropriate for the children to focus on providing love and affection and for professionals to provide the care. The purpose of the final evening care slot was not providing love and affection.

11. Mr H did not agree so much with Mr S's observation that RB had said that she was happy for PB to visit 2-3 times per week: 'If she wants to see him more than that, I'd support that.'

12. RB's daughters had a role to play.

13. The local authority would suggest monthly monitoring for three months, changing to six months and then annual monitoring. A social worker would receive daily feedback from the care agency and pull it together at the monthly care plan review meetings. The effectiveness of attempts to get RB into bed in the evening would be part of the monthly reviews.

14. If things were not progressing smoothly after three months, there would be a meeting of the professionals 'to see where to go.' All cases were reviewed periodically, that was standard practice; it didn't mean that the case had to come back to court. In this case, the 'complexity' of the family relationships 'impacted' on the ability of paid carers to provide care. In the past fortnight, temporary carers who were covering for a regular carer on leave had found it very difficult to care for RB because of PB's conduct.

15. At no time had RB been liable for double rent on two properties: Mr H took advice on that and discussed the situation with senior managers, who agreed she did not have to pay.

16. The local authority still wished to apply for welfare deputyship. It was a complex case and there was a history of problems arranging and delivering proper care to RB. The local authority did act as both the welfare deputy and the property and affairs deputy in a number of cases. Mr H would be involved in welfare decisions, the finance officer in making financial decisions. If there were significant breaches of the care plan, which continued, Mr H would consult the legal department about returning the case to court.

Local Authority's submissions

1. It was in Mrs B's best interests for her to continue to live at R Close and for the current care plan and contact framework to remain in place.

2. In his statement of 29 August 2012, PH had asked the court to 'consider appointing the local authority as the welfare deputy for Mrs B' on the ground that 'there has been a long history of disagreement between Mr B...and his sisters' and that 'it seems to me that these disagreements will continue indefinitely, and it is a very real chance given Mrs B's likely future needs that in the absence of a welfare deputy the Court will be called upon to mediate between the sides in the future.'

3. If the court did not consider that it was in Mrs B's best interests for the local authority to be appointed as her welfare deputy, it was not in her best interests for her son to fulfil this role given the historic disagreements with his sisters.

4. It was a concern that Mr B's instructions had changed in relation to the provision of meals following the fact-finding hearing and that he was not able to keep to arrangements even when the matter was coming back to court shortly. The local authority thought carers should provide the meals at the telephone hearing, which the court endorsed on an interim basis. A day later, PB said that he no longer wished to prepare meals.

5. The siblings should all be on an equal footing. The local authority should not give any priority, or extra power, to any of RB's four children. The local authority had to work equally with the family and any other arrangement might impact on RB's care.

6. There were three key areas to consider: the shape of the final care plan, the deputyship applications and the need for restrictions in injunctive form.

Care plan

7. The suggested revisions to the care plan involved the evening change from a two hour to an half-an-hour slot and PB preparing and providing meals four evenings a week, subject to providing a food menu and keeping a diary. Both suggestions had been supported by the ISW. RB enjoyed the food prepared by her son and facilitating this helped his overall compliance. The arrangement needed to be adequately monitored, and reconsidered if PB failed to comply.

8. There had been concerns about RB sleeping in her chair in the past. Some days it had been clear in the morning that she had gone to bed because the bed needed to be made, and it was recorded she had been in bed, at other times the carers had omitted to make any record at all. Since the current care plan was in place, the necessary information was now usually being recorded.

Deputyship applications

9. There was no need for a financial deputy at this stage. PB was his mother's appointee and this arrangement invested him with adequate powers. His sisters' criticisms of his financial management had not been made out and he had managed his mother's finances satisfactorily.

10. If in the future there were any problems gaining access to RB's money then the local authority, not PB, should be appointed as her deputy for property and affairs. Her funds had been reduced by the costs of the litigation and the local authority would act at little or no cost.

11. The local authority had concerns about elevating PB's status. Appointing him as deputy might give him too much control and status and in that way risk worsening family relationships.

12. The local authority was concerned by the decisions that PB might make if he was appointed as his mother's personal welfare deputy. There was a concern that he might impose his own views on his mother, rather than allow her to express her own views. When Ro had prepared a meal for RB, it was not clear that he allowed his mother a free choice between her meal and his meal. As to his mother's diet, he accepted that he had purchased disallowed items.

13. His behaviour had demonstrated that he was unsuitable to be his mother's welfare deputy. This was clear from the findings made at the fact-finding hearing and from his behaviour in court. Even if one ignored his behaviour in September, there had been several outbursts in court this week, despite the absence of his siblings and any witnesses from the care agency. The kind of outbursts directed towards professionals would be likely to impact negatively on his mother's paid carers. Furthermore, there had been outbursts in his mother's presence which seemed to disregard the effect on her.

The need for injunctions

14. The facts found by the court at the fact-finding hearing supported restrictions in injunctive form. Dr LS and Mr S, the ISW, had both supported the need for clear boundaries. There had been problems during the past three weeks. However, overall, his mother's situation had been more manageable since the injunctions were imposed. Mr B was asked at the fact-finding hearing about what he was and was not permitted to do, and he clearly understood the terms of the injunctions. He would have little incentive to keep to his time slots if the injunctions were lifted.

15. The breaches in the last three weeks had been more serious and had gone beyond mere slippage.

16. Mr S had hoped that paid carer Ro could deal with PB and handle his conduct. However, she was not going to be there all of the time. That was relevant to the impact of breaches on RB's home care and its viability, even if only limited detriment had been caused until now.

§9 — ISW'S ORAL EVIDENCE AT THE HEARING

The independent social worker, Mr S, gave oral evidence, which was as follows:

1. Since his report in May, he had seen Dr LS's report. His opinion that care should be provided by professionals had not changed.

2. The local authority had proposed making changes to the September care plan, with the evening carer slot being reduced from two hours to half-an-hour and PB both providing and giving his mother meals four times a week. It seemed reasonable to reduce the two hour slot to half-an-hour if RB was not benefiting from the extra time. It was 'fine' for PB to provide his mother with four meals a week if that could be maintained: 'She enjoys his cooking'. However, it might not be sustainable given his problems keeping to rules and regulations:

   'I'm less optimistic about his chances of keeping to such a routine having read the medical record, though not perhaps quite as pessimistic as Dr LS.'

3. PB had not always provided appropriate food. However, she had relatively few pleasures and it was important not to reduce them unless necessary. It was necessary to balance quality of life with longevity. There was a value to be placed on enjoying what you can while you can. Mr S would support restricting the intake of sugary drinks and chocolate, 'within socially acceptable limits'. RB had to have some pleasures and there had to be some leeway or margin. It was a matter of proportion.

4. The provision of meals had changed around three weeks ago, as a result of paid carer Ro's reports of inappropriate food being given to RB. It appeared that RB had put on weight in September and the local authority took the view that PB should only prepare meals, not provide them. Mr S would support a return to PB providing meals as long as a weekly menu and a diary record of food given was maintained, which was not so rigid as to require recording every ingredient.

5. As concerned Mrs B's evening care, there were not many 'hiccups' at present. There had been concerns about her sleeping in her chair. However, the proposed half-an-hour bedtime routine was sufficient, given that paid carers were also going in during the day, especially if that was RB's own preference.

6. Mr S would support including in the care plan a requirement that the morning carer monitor and record whether RB had been to bed. During the past three weeks, on most occasions the paid carers had not put her to bed. However, there had only been two incidents when RB was recorded as being in her own clothes the next day. That was 'very acceptable', 'absolutely within the parameters'.

7. Given the number of people involved in RB's care, professionals would know 'pretty quickly' if anything was going wrong. A contingency plan that involved reinstating the two-hour slot for a week seemed reasonable.

8. The balance of the current care plan was 'as good as it can get in this extremely difficult situation'. The chances of the care plan working were no higher than 50%, even if one was realistic about tolerating a little bit of slippage. The risk was that PB would not stick to what was agreed, visiting times and so forth, thereby creating problems for his siblings.

9. Since the last order, the carers' notes recorded half-a-dozen cases of Mr B being at his mother's home when he should not be there. That was more than 'slippage'.

10. If PB failed to comply with the care plan regularly, turning up at unscheduled times, the consequences would include RB experiencing stress and psychological harm, together with problems for paid carers, some of whom could be frightened, thereby making it hard to maintain the care regime. It might become unviable to provide professional care in RB's own home.

11. Initial monthly reviews moving to three monthly reviews sounded very sensible. However, Mr S did not want to be too prescriptive.

12. It was correct that PB had been willing to take part in mediation but CL was not.

13. It was 'very difficult to say' whether he supported the Official Solicitor's position advocating injunctions backed by penal notices. Such concrete boundaries might be the only mechanism if PB was unwilling to have any treatment. Mr S himself had considerable experience of working with people who had personality disorders. Compliance with a care plan was more likely if there was an injunctive order. As far as was known, Mr B had managed himself in the community over the years without huge problems of conflict with the law and authorities. That provided a 'slight glimmer of hope'.

14. In the event that further breaches led to a suspended order of imprisonment, Mr S was unable to say what would be the likely effect of the harder boundary of a suspended order in terms of compliance with the order:

'I don't know. I would prefer to answer that question in conjunction with a psychiatrist' through a joint assessment.'

15. Mr H had a good relationship with PB and seemed to be able to reason with him. A strategy that involved him meeting with Mr B in the event of further breaches, and trying to persuade him of the need to comply, before any return to court, was a preferable strategy.

16. Mr S's preferred strategy was probably local authority personal welfare deputyship plus an injunction plus a penal notice. In practice, the role could be performed by one of Mr H's colleagues and it could be helpful in giving the local authority some authority. Mr S was 'unsure' whether he shared the Official Solicitor's doubts about the ability of a welfare deputy to enforce compliance with the order. He and the Official Solicitor had disagreed about mediation, and he was perhaps more hopeful about Mr H's effectiveness. However, his opinion was based on very limited knowledge of Mr B's history and how he had survived in the community over the years. Mr S had not undertaken a Mental Health Act assessment.

17. Action should only be taken if it was necessary in order to make the care plan viable. Mr S was unable to say how many more breaches would justify bringing the matter back to court. 'One would need a psychiatric opinion.' The 'crunch would probably be if the paid carers say that they cannot support RB in her own home. It was a question of whether the carers could cope with the breaches.'

18. PB had personality ‘frailities’ and one had to seek ways of working around them, once one had identified them.

19. Mr S hoped that PB could be persuaded to accept some treatment.

20. As to whether a conditional or unless order might be beneficial — ‘Unless you agree to some form of treatment, you may not have contact or a suspended order will be made’ — that ‘could be quite helpful if it could be constructed’ along the lines suggested by Dr LS. It would be preferable to proceeding straight to a suspended order or to an immediate restriction of contact. A psychiatric opinion would be necessary for an immediate ‘unless order,’ in order to establish what treatment was appropriate, its feasibility, the likelihood of PB co-operating and likelihood of improvement.

21. Mr S agreed with the following suggested plan:

    a) Injunctions reinforced by penal notices;

    b) The appointment of welfare deputy;

    c) Mr H taking the role of talking with PB about difficulties and alleged breaches, and reviewing arrangements, before any return of the case to court;

    d) If things went so badly as to threaten the viability of the care plan, asking the court to make an unless order requiring PB to undergo treatment;

    e) If that did not work, the making of a suspended committal order and/or a reduction in PB’s contact with his mother.

22. The local authority was trying to put all of the siblings on an equal footing. However, it was correct that PB lived locally and had more time to spend with RB than his sisters, two of whom had demanding jobs. This created some tension. There were ‘fearsome family dynamics’ to deal with and the local authority had had ‘a hard time’ from all of the siblings. If RB was asking for more contact with or care from PB, it was right to examine that and factor it in. However, RB herself had suggested that she wanted to see less of her children — and a lot less arguing — rather than more of them. As far as Mr S could elicit, she got fed up and irritated with the bickering and wanted to spend more time on her own.

23. RB understood that ‘PB had some psychological frailties and felt that her other offspring should have some understanding of his difficulties’. They should make allowances for the way he was, but she did not necessarily wish to see him more, or have him provide more care.

24. It was correct that RB had told Mr S spontaneously that her daughter could be worse and make PB’s life difficult, and that she wanted PB to do everything. However, her overall view was that she wanted them all to stop arguing.

25. Mr S accepted that RB did not have ‘hugely complex care needs’ and that PB had not done much wrong in terms of the direct care he had provided to his mother.

26. It was correct that the paid carers did not always record if RB was in bed or asleep when they left: ‘No one denies the carers are over-worked.’

27. If the last visit was too early for bedtime, it might be that RB did not need to get into her nightie and therefore the presence of a female carer was less important.

28. Mr S did not support the idea of PB taking on the half-hour evening slot. PB had told Mr S that the 8.30pm slot was too early, not that an evening care slot was unnecessary. A 10.30 to 11.00pm slot was probably best, if possible.

29. It was a problem of boundaries. A female carer would be more suitable for bedtime routines. PB might 'loiter with the best of intents,' perhaps deciding to stay all night. Although there was no evidence of him wanting to stay, he liked to deliver as much care to his mother as possible and he found it very difficult to stick to rules and agreements. There was a significant risk that he might stay overnight, to be with or look after mum. RB had not expressed a desire for any of her children to be with her overnight.

30. The local authority had thought that RB had capacity to sign the tenancy agreement for The Trees.

31. Relatives often wanted to supervise the care being given to their family member by paid carers. A number of PB's concerns were valid and criticism of paid care was not necessarily wrong. It could even be appropriate to vocalise or put forward an unmerited concern if it was one expressed by the person being cared for. However, some people took things to disproportionate or irrational ends and there was the issue of mode of expression. A 'lot of noise can create a better service. However, there are structural issues. All local authorities use care agencies, staff are overworked, there are too few of them and budgets are limited'. The local authority had gone to great effort to bring in carers who RB knew and got on with.

32. Supposedly, paid carers Ro and J engaged well with RB, Be less well. However, Mr S himself had not seen anything indicating significant concern with Be.

§10 — MS L, MS A AND MS B'S CASE (MRS B'S DAUGHTERS)

1. According to CL's statement of 24 November 2011 [C126, C127, C128, C129], she wanted the local authority to take charge of her mother's personal welfare and finances,

   'because of the inability of the applicant to act in a co-operative and non-confrontational way with anyone involved in the provision of care and all financial matters relating to our mother. In particular, his behaviour towards the agencies who are essential to her care needs and also his sisters.…

   Despite [PB] not working during the day he would choose to visit our mother late in the evening and start complaining to our mother about the food we were bringing round for her and if we were there would argue and be confrontational towards us ….

   My sisters and I were prevented from going to our mother's home in the evenings to take care of her because of [PB's] volatile behaviour towards us such as aggressive and verbal abuse which was extremely distressing for both our mother and ourselves …. as he went there most nights she became more isolated from the rest of her family and friends …'

2. According to DB's statement of 24 November 2011 [C142]

   'My brother cannot control his behaviour and interferes with the carers and everyone else involved in my mother's care. Because of his behaviour with the carers, my mum's health became worse, when the carers could not visit her, when he was at her flat because of his behaviour and I did not like the way he acted offensively towards me and also when he acted how he wanted even when my mum was upset and told him she wanted him to stop …'

3. According to LA's statement of 25 November 2011, she supported the local authority's application to be appointed as her mother's personal welfare and financial deputy [C145],

'The situation with my mother's current position cannot be resolved through collaboration because [PB] has an ongoing history of volatile, confrontational and aggressive tendencies and has never been able to co-operate with any family or authorities and agencies involved in my mother's care and has chosen to deliberately impede her care being administered even when she was sick and showing deterioration in her own home (not allowing carers access and his continued aggressive behaviour towards carers) …'

4. LA said that she and her sisters had been deeply affected by being involved in court proceedings, and were upset by having to talk about the situation in court [C147]. She supported the proposal that the local authority take over the management of her mother's finances 'so that her money is used purely for her care and well-being and not subjectively for other's personal interests, and is not left open to abuse' [C148].

Position statement: residence, care and contact

5. In their joint position statement dated 23 August 2012, Mrs B's daughters stated that it was in their mother's best interests to remain at home but that this would only be possible 'if a robust care plan is in place and adhered to by all parties otherwise it will have a negative impact on her health and wellbeing.'

6. Prior to the amendments made to Mrs B's care plan at the pre-trial review on 5 July 2012, 'the plan was predominantly working due to the restrictions implemented by the Court.' They were concerned that there had been some break down of the plan 'because of changes not being clarified or discussed fully with the parties.' Since the changes to the care plan, Mrs B 'has become very subdued and unsettled and this is not fair to her especially as her mood and motivation were improving.'

7. If a robust care plan could not be implemented and adhered to by all parties, 'it would be in her best interests to be living somewhere where she could be cared for in a peaceful, secure and fully supported environment where professionals are on site.'

Position statement: welfare deputyship

8. It was not in Mrs B's best interests for Mr B to be made her welfare deputy. His relationship with Mrs B was 'a controlling one' which 'has a detrimental impact on the quality of [her] life because Mr B imposes his demands on her… He controls every aspect of her life including the food she eats, what she has in her house, what happens to her money and his volatile behaviour discourages relatives and friends visiting her in her home. He is unable to control this volatile behaviour in Mrs B's presence. As a result Mrs B is more isolated than ever, and her mood is very subdued and has low motivation. She is also now again overweight because of being given unhealthy meals at unreasonable late hours.'

9. 'Due to Mr B's abusive, aggressive and unmanageable behaviour the family feel he is unsuitable to have this responsibility as he cannot manage [Mrs B's] affairs in a manner that is transparent because he cannot communicate or conduct himself in a rational and considerate manner.'

10. A 'professional neutral deputy such as the local authority or the Court [should] be appointed [as RB's Welfare] Deputy.'

§11 — PB's CASE

1. At the hearing in March 2012, it was contended on PB's behalf that he should be allowed to visit his mother when carers were present because sometimes this could not be avoided, for example if he had to take his mother out.

2. In his statement dated 26 July 2012, PB stated that it was in his mother's best interests to remain at R Close with a package of care provided by the local authority. However, he wanted to be permitted to care for her on his own four evenings a week from 6pm until bed time. The evening care was ineffective, because it took place too early, and therefore frequently his mother was not put to bed. All orders restricting his care of his mother should be discharged as he was 'willing and able to adhere to the care plan,' and therefore there was no need for a court order with a penal notice attached. He should retain his appointeeship. The local authority should not be appointed as his mother's deputy for finances and/or welfare.

3. In his statement dated 16 August 2012, PB sought an order appointing him as his mother's welfare deputy 'because I know my mum better than anyone.' However, 'if the court is not minded to grant me the welfare deputyship, I am content for the court to retain control over my mum's personal welfare.' He objected to the local authority being appointed as welfare deputy because it 'has made some very significant errors in relation to my mum's welfare.' If the local authority was appointed as welfare deputy, he asked to be 'written out of (his) mother's care plan altogether as (he) would not be able to live with such a discriminatory and unjust decision.'

4. In his statement of 26 July 2012, he disputed 'almost all' of the allegations set out in the Scott Schedule. However, at the fact-finding hearing, he openly and honestly accepted many of the facts alleged. He has always denied suffering brain injury as the result of a car accident some years ago, being physically aggressive to neighbours, and being banned by his mother from visiting her, which matters found their way into social worker EC's report.

5. At the fact-finding hearing, PB accepted that in 2011 he had been upset about his mother's evening care. She had asked not to have evening care and was then believed to have capacity to make such decisions. PB had been willing and able to provide the evening care. He was providing RB with a home cooked meal, which she preferred, and putting her to bed. Despite his mother's wishes and this agreement, the care agency continued to send out carers in the evenings. All of this was communicated to the company but they continued to send carers. PB became increasingly frustrated as he felt that he was banging his head against a wall.

6. These carers were young and inexperienced and were unable to provide the care that RB needed. As a result, RB was left unwashed for more than a week:

   'Two young carers were sent, laughing as they went out, sending the wrong people, they did not wash her because they weren't doing their job … RB was not refusing … Mum said they didn't often offer to wash her.'

7. It was 'uncontroversial' that his mother did 'not respond well to inconsistent and inexperienced carers' and that she often refused care in such circumstances. Since that time, the care plan had been amended to provide a pool of familiar 4-5 carers/support workers, to minimise the chances of her refusing care.

8. At 2.40pm on the second day of this hearing, PB announced: 'I've broken the order, simple as that … I have to make sure the building is not burnt down … What am I supposed to do. I'm not going to go in the [witness] box.' At 3.05pm, PB confirmed his witness statements and gave the following oral evidence:

9. During the last three weeks, his mother had mostly put herself to bed. He would phone to remind her to change into her night clothes. She 'needs a bit of encouragement, otherwise she

sits on the settee.' Paid carer Be did not put her in her nightdress most of the time. His mother often slept on top of the bed-sheet — on, not in, the bed. Sometimes she slept in the bed but 'probably more often' on the bed.

10. His mother had experienced two falls since returning home. The first time she fell off a chair and bruised her left leg. She fell at night and was found in the morning, when the carer failed to notice the bruising. The second fall was just over a month ago.

11. His mother had told the independent social worker, Mr S, that she was happy with him doing everything [D14, xxix]. By then, she was back at home and he was covering for everyone:

'One of the carers was in Jamaica for three weeks. No one was shopping, cleaning, something was wrong. Care was sporadic. The carers were competing with me all the time … I was seeing mum five or six evenings a week … that was a good care plan … I was happy with it, as was mum.'

12. If appointed as his mother's personal welfare deputy, he would deal with problems by contacting the care agency and listing the things they were doing wrong. He had lodged complaints. They had 'brightened up their act' now and Mr B [the manager] had 'started to behave like a human being'.

13. He was able and willing to provide meals four times a week.

14. PB had seen the psychiatrist, Dr LS, some five years ago. A lot of the things he told him then were not true, for example that he had hurt himself with a hammer. The police had told him to see a psychiatrist with a view to seeking some compensation. He intended to claim sickness benefits. Dr LS had got it wrong. In the past PB had suffered from skin problems, and had avoided school, but there had been no mental health problems for a long time. 'I am trying to admit that I have a problem swearing.'

15. He was able to take care of his mother's care needs with help from paid carers and the local authority.

16. He wishes to be appointed as his mother's deputy for property and affairs. He had sorted out her financial problems in the past and managed to get money for her. The only problem in this respect was arguments with his sisters.

17. Under questioning by Ms Bhogal on behalf of the local authority:

    a) The care agency supervisor had infuriated him on the telephone the other day and I had used the 'f word' once … She shouldn't be lying on the phone.'

    b) It was correct that there was no ban on ready meals. Alternative ready meals providers had been investigated in the past ('We've tried that before, it didn't work'). However, 'mum does not like ready meals or microwaved food … she doesn't want all that crap. It's going round and round, she doesn't want it.'

    c) As concerns the food which the dietician found in RB's home in May 2012 (biscuits, cakes, brioche, etc), the carers brought in the cakes and the brioche, he brought in the madeleines. The muffins and the biscuits were for him. The 'carers give mum a cake every day as a snack … Ro buys muffins as well … I brought in the star cakes, the carers brought in the yoghurt crunch. They're bringing it in still … I brought in the hobnobs and the mini-doughnuts; mum and I eat those, two each. Ro was lying when she said that she was not bringing in a custard cake each day. 'I didn't go into court in March, they wanted me to sign an undertaking, I never agreed to the restrictions

… Obviously I've got a copy of the March order. I was never in agreement with it. The carers were doing it as well.' The 'judge is not going to lock me up for bringing in cake.'

d) PB did not dispute that his mother had gained in 3.5kg in weight during the previous five months, which amounted to 4% of her body weight and that he had been providing at least four evening meals since July. However, it was not the case that the carers were complying with the dietary plan and restrictions.

e) It was correct that he told Mr S that an evening carer visit at 8.30pm was too early, not that it was not required: 'I knew that it would never work … I was trying to be flexible.' Mr S had also stated that PB said that his mother was not able to get herself dressed for bed all the time, but his position had always been that she did not require a night-time carer.

Submissions

On PB's behalf, his counsel Mr Simblet submitted that:

The significance of Article 8 and RB's home, family and private life

1. The court should give weight to Article 8, to the importance of self-determination and promoting RB's welfare and relationship with her family. It was important that she should live as normal a family life as possible.

2. This was a case in which there was substantial and real family support, with a willingness to provide practical care, to the benefit of RB. Issues such as the conflict between the siblings ought to be secondary and were capable of resolution by the court making orders.

3. The court had tried to accommodate PB. However, there had been a number of challenges to him that had affected his attitude. He had been falsely accused by his sisters of misappropriating his mother's money.

4. The focus in the proceedings had been on coercive action against him and whether that was appropriate. It would be easy, but wrong, for the court to focus on those issues rather than RB's care and welfare. The case was about how best to provide for her welfare. The court had noted in an earlier judgment that he was a loving son. It should not be diverted into a cul-de-sac within which his compliance was the primary issue.

RB's personal welfare and the deputyship applications

5. There were now competing applications for deputyship.

6. PB began the proceedings because he was concerned about his mother's finances and welfare. In particular, he thought the local authority was acting unlawfully.

7. Not many people who would want their life to be controlled by a local authority. Fewer still would choose this particular council with its social services track record — the more so if there was someone in their own family willing to look after them. The care of many older people was organised and provided by their children. A local authority personal welfare deputy ought only to be appointed if the family were unwilling or unable to provide care, or were neglectful or abusive. That was not the case here.

8. The court was required to take account of what it thought RB would have wanted if she had capacity to choose. It was unlikely that she would wish to place her trust in a local authority that had removed her from her home, unlawfully and against her wishes. She had rather cantankerous views. It was highly unlikely that she would want the local authority to control and regulate her life when her son was willing for her to be assisted by professional carers.

9. The fact that the local authority had dealt unlawfully with RB called into their competence and ability to act as welfare deputy. There had been significant shortcomings in their management of carers, which had been explained in detail by PB and was highly relevant to the court's decisions.

10. Since the last hearing, there had been total confusion surrounding the care plan. It was PB, through his solicitors, who had repeatedly sought clarification on the care plan, albeit without success. He had been 'substantially mucked about' by the changes to the care plan. The dietician's report was agreed. The local authority was now content for him to provide meals. Things had turned full circle.

11. The local authority's management of the care plan had been a shambles. It had caused unnecessary conflict between PB and his siblings and mother's carers, conflict which could have easily been avoided. It had failed to action the agreed changes to the care plan following the pre-trial review on 5 July 2012; had unilaterally amended the care plan on several occasions; and had failed to properly clarify the support worker's hours in August.

12. Under questioning [F31, para. 17], Mr H had accepted that the order of July 2012 required the local authority to provide a monthly report concerning day care, etc, but also that a 'collated report' had not been provided. The information was provided by the care agency on a daily basis and the local authority 'could only apologise'. The 'previous social worker wasn't around any more.' There should have been reports for August, September and October.

13. It was important that the court recognise the important contribution which PB had made in enabling his mother to live a richer life in her own home. He was a competent and willing carer who showed great concern for his mother's welfare needs and had capacity to deal with them.

14. Many of the things that PB had advocated all along were now being implemented. The local authority had adopted PB's position in several respects. In January, he had wanted three carers, not four; no microwaved food; and for his mother not to be in a residential home. He had been proved right. Ditto the carers turning up too early for her to be put to bed, with the consequence that she slept on the chair or couch. The proposed 9.30-10.00 slot for the final carer had still been too early, given that often she went to bed later than 10.00pm. Now that was acknowledged, as was the fact that the function of the evening carer was essentially limited to securing the property and similar practical tasks.

15. If PB and RB had listened to the local authority, she would have surrendered her home and gone to YY. The local authority got her to sign a tenancy agreement for YY. It must have known that there was real doubt as to whether her capacity to decide to keep her present home was compromised. The local authority had exposed her to thousands of pounds of rent arrears. Under questioning, Mr H had accepted that 'in hindsight' her capacity was questionable and that 'on certain points' the arrangements had been inadvisable. However, he emphasised that it was a move to a self-contained flat that was contemplated, not to an institution.

16. PB had given oral evidence at the fact-finding hearing which the court had largely accepted. His evidence was sincere and credible. He was a reliable historian. Any concerns about his suitability, including those arising from the facts found by the court, could be dealt with by

limiting the scope of his deputyship. Section 20(2)(a) would prevent him from stopping his sisters seeing their mother.

17. The section 20(2)(a) restriction would apply whether PB or the local authority was appointed as RB's welfare deputy. The judge could prescribe contact arrangements, such as approving a schedule for RB to see her daughters at home, or for them to take her somewhere else, although CL did not seem to want to see her mother elsewhere.

RB's back problems

18. RB's back had worsened and PB believed that this was because she is not being taken out by the carers. The local authority should be required to take her out more frequently for walks. This would also improve the quality of her life.

RB's diet and weight

19. RB enjoyed eating meals cooked by her son . After the last hearing, it had turned out to be unnecessary and wrong to prevent him from providing meals. This restriction had affected negatively his perception of her care plan. Mr S appeared to accept that it had added to the friction and that that 'kind of thing' probably reinforced a lack of trust on his part.

20. PB was content to provide a weekly dinner plan and to record daily the food he prepared. However, the carers should be asked to provide the same information, so that there was complete transparency surrounding RB's diet, and effective monitoring of what she eats. He continued to have concerns about the type and volume of food the carers were feeding RB.

21. Being able to eat biscuits or cake — Ro said that RB had a sweet tooth — and her wishes and pleasures in this area should be given more weight than 'the restricting approach of the local authority and dietician.' It was important that an older lady be allowed her pleasures, rather than worrying about whether she was gaining a bit of weight. People must be allowed to indulge themselves. Virtually every citizen sometimes ignored dietary advice, on fizzy drinks on so forth, the reason being that they enjoyed it.

22. It was important not to over-emphasise the inchoate potential of weight gain and diabetes. If RB had capacity, no one could seriously believe that she would modify her existing diet because the dietician had told her to be more careful. Indeed, the carers gave her fruit juice and RB encouraged her son to bring prohibited items.

PB's behaviour and alleged interference with his mother's care

23. This was not a case of neglect or abuse by the son of an incapacitated person. There was no suggestion that he, or any of his siblings, had endangered RB's welfare.

24. As far as the provision of care was concerned, there was only a narrow dispute about particular aspects of the care plan.

25. There was almost no evidence of RB's care being impeded by her son's actions.

26. The court had to divorce PB's vexation within the proceedings from how he was at his mother's home. He had complained to the care agency, but by telephone rather than by turning up at their office and being threatening. He had not abused or disrupted the carers themselves. He made a helpful contribution and the judge needed to keep his eye on the ball.

27. Of the paid carers, RB seemed to get on best with Ro. In her report to the Official Solicitor [C278-C279], she said that PB had not interfered with his mother's care, could be a great help and that his behaviour had improved greatly.

28. PB did sometimes lose his temper but often turned out to be right on the substantive point. Quite often, the local authority later changed its position and adopted his view. The fact that the local authority could not see it at the time was frustrating for him. He had been concerned about the sloppy quality of some of his mother's care and, without him, she would have received a lower level of support.

29. With regard to the alleged breaches of the interim care plan issued on 20 September 2012, PB had stormed off but there was no suggestion that any of the alleged breaches caused any significant disruption (Judge: 'I'm not going there').

30. None of the facts found by the court, or the fresh allegations, demonstrated that the care arrangements were not viable. There had been some slippage but overall the evidence was that the system was workable.

Contact, care and the relative involvement of RB's children

31. It was not appropriate to say that all siblings must have equal time with their mother simply because her daughters did not want her to spend more time with their brother. PB was ready, willing and able to spend more time with his mother than they were and, historically, had spent more time with her, cooking and providing. The inequality lay in their willingness to be involved and interact. The local authority's position that all of them should be on an equal footing was, therefore, the wrong starting-point. The court ought to differentiate between him and his sisters, and it was wrong to deal with someone who was ready and willing to provide more care or contact on the same basis as those who were not.

32. PB was able and willing to provide more care to his mother and her paid carers were overworked and pressurised. Be began her shift at 6am and was sleepy and tired at night. RB did not particularly get on with her and Mr H had accepted that she did not get on particularly well with some carers. There had been problems when Ro was on annual leave. The nature of the service was that carers went on holiday, were off work or moved to another job. Sometimes RB did not get on with unfamiliar substitutes. There was no suggestion that she preferred the company of paid carers to her son's company. She was sometimes in conflict with them. Her daughters' sense of resentment ought not to mean a paid carer taking a slot he could fill. The obvious solution was to have RB's care provided by her family and in particular the family member who said that he would like to do it. Mr H had said that he did not 'discount that'.

33. The local authority's position also ignored the fact that PB's sisters were sometimes unhelpful and combative. The evidence was peppered with incidents of them complaining or expressing concerns to the care providers.

34. It has been agreed between PB and his sisters that DB did not use her visiting slot between 7.15pm and 9.30pm on Friday evenings and that PB could use this slot instead. PB was happy to use it but he remained of the view that he should be allowed more evening slots.

Sanctions and enforcement (restrictions, injunctions, undertakings, penal notices, etc)

35. PB was concerned that his sisters, and specifically LA, had been causing their mother distress. It was clearly documented in the care notes that LA had been shouting at RB and that she was distressed by this. It was PB's position that his sisters should be forbidden by court order from acting in a manner which caused or was likely to cause RB distress.

36. It would be wholly wrong to make PB's contact with RB contingent on him accessing treatment.

37. PB did not accept the Official Solicitor's submission that the court had jurisdiction to make an order that contact with his mother be suspended unless he underwent treatment. There was no legal system in England and Wales which required a person to undergo compulsory treatment except in the very defined circumstances, and for the very defined purposes, of the Mental Health Act 1983. In any case where the Mental Health Act 1983 and the Mental Capacity Act 2005 were in conflict, the former Act was to be preferred.

38. Even if the court had jurisdiction to make an order in the terms sought, such an order was inappropriate. It was possible that a different diagnosis was more appropriate than that given by Dr LS. Consequently, requiring PB to seek treatment for a personality disorder that he might not have was a pointless exercise.

39. Even if Dr LS's report, including the diagnosis, was correct, as a matter of law the court had no jurisdiction to require someone to receive psychiatric treatment on pain of not being allowed to live a normal life which included visiting their mother. The court had previously found that PB was a devoted son and that he had taken good care of his mother over the years. It would be inconsistent to require him to seek medical treatment as a condition of remaining in his mother's life. This would amount to a prohibition of contact, and offend against the distinction between a restriction of contact and a prohibition.

40. Such an order would not be in RB's best interests. Either PB would seek treatment on a flimsy basis or he would not. If he did not, the Official Solicitor was asking someone to explain to her why her son was not with her. That would be devastating for her and not in her best interests. She herself had never required him to receive treatment and his behaviour was long-standing; for, if it was not long-standing by definition it couldn't be a personality disorder. Such an order could not be appropriate unless the court was willing to contemplate this outcome.

41. Since the last hearing, PB had been offered an appointment by his local CMHT, to be assessed by its consultant psychiatrist. This was due to take place on 19 November 2012. PB asked the court to wait until he had seen his new psychiatrist before handing down a final decision. PB intended to ask for a referral for anger management therapy and to make the outcome of the assessment available to the court (but did not give permission to the court to correspond with his psychiatrist or the CMHT directly).

42. It was right to seek to understand PB's needs and difficulties, even if he himself did not accept the assessments of others. Any applicant in his position would be frustrated to see their application being used to exert control over their own care of their mother.

43. As litigants in person, his siblings participated in discussions at court, and to that extent had more access to the local authority and the court. PB would think it unfair that he alone of the siblings was not directly engaged in court discussions. His sense of being disadvantaged in this respect would have been reinforced by seeing that his sister CL had emailed the judge directly.

RB's finances and the deputyship applications

44. It was RB who put PB in charge of her social security benefits when she had capacity. Only his sisters had questioned his propriety or suitability, without substance. He had dealt fairly with her finances and had a track record of complying with the court's orders concerning making payments to carers.

45. His sisters had not attended court to support or substantiate their evidence or, in particular, to be questioned about their false allegations. PB had been questioned on some of his evidence.

Their unreasonable allegations ought not to be allowed to triumph over his reasonable financial behaviour.

46. PB had helped the local authority in relation to his mother's finances and there was no evidence that he had tried to overlord it over the council or his sisters.

47. The court's order(s) required him to pay the local authority £x. The local authority accepted that he had done so. PH accepted that there had been 'no problems with that side [the financial side] of it'.

48. PB had some concerns about the council's suitability to be his mother's financial deputy. His concerns were well founded. The authority had failed to comply with court orders concerning the provision of monthly financial reports and in this respect had broken the July order. It accepted that it had not accounted to RB until the last minute prior to the next hearing.

49. PB was concerned that the local authority had still not refunded the surplus money in RB's local authority account to PB, on her behalf. Whilst he was content for the authority to retain £400 as a contingency fund, it should refund the remainder, and any future surplus be refunded on a quarterly basis. Because the local authority was using no more than £200 per month, it seemed sensible to reduce PB's monthly payments to the local authority from £350 to £250. That would reflect more accurately the actual sum required for RB's care.

50. It was likely that assets existed which required the appointment of a financial deputy. If RB had money in her bank account then someone needed to access it.

51. The local authority's main reason for inviting the court not to appoint PB as his mother's financial deputy seemed to be that it would annoy his sister CL, and possibly others; that was a poor reason.

52. If the local authority was appointed as RB's welfare deputy, that was an additional reason for not appointing it as her deputy for property and affairs, so as not to vest all powers over her in one set of hands. She would be wholly in their power. Insofar as the local authority did sometimes act in both capacities, that was probably where there was no family member to look after the person's interests.

PB's litigation capacity

53. No issued had been raised by the parties as to PB's litigation capacity.

§12 — THE OFFICIAL SOLICITOR'S CASE

1. At the fact-finding hearing on 10–12 September 2012, the Official Solicitor submitted that:

   a) The Court should approve a care plan of the kind appended to the order of 28 March 2012. This should also address recent concerns that RB had put on weight and not gone to bed at night, and include an amendment to permit RB to attend a day centre once or twice a week (as directed at paragraph 19 of the order of 5 July 2012). In support of this approach,

      i. RB's care needs were not complex.

      ii. Mr S had concluded that the care plan provided a very good service to her, it appeared that she was content with it and the 28 March 2012 order appeared to be effective.

iii. *Mr S had concluded that RB's care should be provided by paid carers and that her children should focus on providing love and affection.*

iv. *According to Mr S, the family dynamics contaminated the delivery of care to RB. To allow her son to perform personal care tasks would be a recipe for misunderstanding and conflict in a situation where the effectiveness of the paid care depended on the avoidance of conflict between him and the carers.*

v. *For PB to visit his mother when the paid carers were not present avoided a significant risk of conflict.*

vi. *All of RB's children wished to have contact with her, it was in her best interests to have such contact, and opportunities for contact should be divided equitably.*

vii. *RB had expressed the wish that she would be happy for PB to visit 2-3 times a week, not every day, with a similar pattern for her other children. Mr S had concluded that this was appropriate. Her wishes and feelings should carry substantial weight (MCA, s 4(6)(a)).*

viii. *The change to the care plan on 5 July 2012, which enabled PB to provide food to his mother (cf. preparing meals for the carers to give her) appeared to have led to RB eating inappropriate food and gaining weight. Mr S had previously concluded that, without agreement to the contrary, meals should be provided by paid carers.*

b) The care plan should be backed by an injunctive order.

i. *Unless PB was willing to give appropriate undertakings (which would be preferable), the Official Solicitor considered that the court should grant such injunctions, backed by a penal notice.*

ii. *It was relevant to consider:*

- *The risk of harm to RB if the injunction was not granted (Is it necessary to make such an order?); and*

- *The extent to which the injunction would interfere with PB's freedoms (Was it proportionate to make such an order?).*

iii. *As to the second issue, PB's freedom to visit and provide care to his mother was regulated by the care plan which, for the reasons stated, was in her best interests. It was therefore appropriate and proportionate to ensure that the care plan was effective. To finalise the interim injunctions would not go further than to make a breach of the care plan by PB actionable.*

iv. *Whether it was necessary to make an injunctive order depended on an assessment of risk. Risk is a function of the probability of an occurrence and the magnitude of harm in the event of the occurrence. In evaluating risk, the Court would need to consider:*

- *The consequences for RB if the care plan was disrupted, including exposing her to conflict; disrupting her enjoyment of her other family relationships; interfering with the ability of carers to meet her needs; and undermining the viability of remaining at home; and*

- *The likelihood of disruption in the absence of enforceable boundaries.*

v. *The magnitude of harm was potentially high. RB wished to live at home and all parties agreed that this was in her best interests, but a serious disruption of the care arrangements would undermine the viability of her remaining at home.*

vi. *As to the likelihood of disruption in the absence of enforceable boundaries, it was relevant to note that:*

- *PB had frequently challenged the adequacy of the care arranged by the local authority; and*
- *He objected to the care plan currently in place.*

vii. *Without psychological help, it was doubtful that he had the ability to resolve disagreements with the local authority or his sisters in a constructive way. The evidence for this conclusion included Dr LS's report; PB's lack of insight into his difficulties; the fact that he considered he had been victimised for challenging the quality of RB's care; the fact that he had said that he would cease to be involved in her care if the local authority was appointed as her personal welfare deputy; his admitted instances of aggressive or inappropriate behaviour; and his conduct within the proceedings, including his behaviour outside court on 5 July 2012.*

c) This was not an appropriate case in which to appoint a personal welfare deputy.

i. *A decision by the court was to be preferred to the appointment of a deputy to make a decision (MCA, s 16(4)).*

ii. *The court could appoint a personal welfare deputy where, for example, there was a need for ongoing decisions, there was a history of serious family disputes that could have a detrimental effect on the person's future care unless a deputy was appointed, or there was a need for ongoing personal welfare decisions to be made by someone independent of the family, such as a local authority officer (Code of Practice, paras 8.31, 8.38).*

iii. *Practicality was an important consideration: it could be appropriate to appoint a deputy where the need for a series of decisions made it impracticable to insist on them being taken by the court (G v E [2010] EWHC 2512 (COP), paragraph 59, per Baker J). However, Baker J made it clear that the importance of the s 16(4) principle was undiminished.*

iv. *The parties in this case would need to work together on an enduring basis. Day to day issues which were capable of resolution by agreement would not require the involvement of the court or a personal welfare deputy. If, on the other hand, a contentious issue were to arise in the future, it would be more appropriate for the court rather than a deputy to resolve the dispute:*

'In my view this is not a case where substantive decisions are likely to arise frequently over an extended period of time once final declarations on capacity and best interests are made. I submit that it is appropriate for the court to make decisions in relation to residence, care and contact and that any future decisions are likely to relate to practical amendments to the care plan and contact schedule to implement the declaration. While I am conscious of the historical difficulties between Mrs B's children and between Mr B and the local authority, the parties must seek to work together to seek solutions to practical day to day issues where they arise. I do not consider it to be in Mrs B's best interests for one party to be allowed to make these decisions contrary to the views of others involved in Mrs

B's case. I also note that a care co-ordinator is in place and that this individual is best placed to work with all parties to resolve such issues as they arise.'

d) It was not necessarily for the court to direct PB to undertake any of the recommendations made by Dr LS.

e) PB should be invited to confirm whether he intended to act on Dr LS's recommendations of his own volition.

f) Although Mr S had expressed the view that an advocate might assist Mrs B, she had declined the service and had already expressed her wishes and feelings. Her daughters were concerned that she had been distressed by the number of new professionals involved since the proceedings began. At this stage, it would be appropriate for the local authority to keep the suggestion under review, and to consider whether an advocate would assist once final declarations had been made and the parties had had time to reflect upon them.

g) Ms S had also proposed mediation. While the Official Solicitor would not oppose mediation taking place if Mrs B's family were all willing to participate, in view of the historical disputes mediation seemed unlikely to result in any desired rapprochement or significant benefit to Mrs B. In any event, it was imperative to achieve clarity and stability in respect of her care package and contact with her family by obtaining final declarations.

h) Although not instructed in relation to the property and affairs element of the proceedings, it would be appropriate for the court to resolve the welfare aspects of the case prior to the financial issues. Any orders made in relation to Mrs B's property and affairs should reflect and be consistent with those made in relation to her welfare.

2. At the commencement of this hearing, the Official Solicitor's view remained that there was no real alternative to a final order backed by injunctions or undertakings. He was more pessimistic about the need for committal proceedings, and his current position was that it was appropriate to make an application for committal. He had no desire to see Mr B in prison. His only concern was to secure compliance. A suspended order would be the first step.

3. At 3pm on the second day of the hearing, after an outburst and before PB gave his evidence, counsel announced that the Official Solicitor had revised his position. He now supported the local authority's application to be appointed as RB's welfare deputy provided their powers were narrowly drawn and limited to amending the care plan, including contact. A hearing should still be diarised for six weeks time so that the court could deal promptly with any contempt of court applications with a view to the granting of an unless order.

4. At the conclusion of the hearing, counsel for the Official Solicitor made the following supplementary submissions:

Financial deputyship

5. The Official Solicitor had no position and noted only that there was some logic to appointing the same person to be both the personal welfare and financial deputy.

The final care plan

6. The Official Solicitor endorsed his position statement at A/75 as to why the local authority care plan then proposed was the appropriate one.

7. In terms of the care plan, at the heart of the case was the need to separate the provision of care from social contact. The ISW believed that there was a risk that RB's care would not be viable if there was contamination between the two functions.

8. Everyone seemed to agree that, in terms of her best interests, the most important factor was that care at home be viable. Unless paid care at home was viable, RB would not be able to remain at home.

9. As to Article 8, and achieving a proper balance that respected the family rights of those involved, and their right to privacy and a home life, the care plan was not a restrictive one.

The need for injunctions and penal notices

10. The Official Solicitor endorsed his reasoning at A76-A78, which was fortified by the facts found by the court at the recent fact-finding hearing.

11. Mr Simblet's eloquent efforts to refute the impact of PB's conduct could not withstand analysis in the light of PB's conduct in the court room and witness stand, and in the light of the facts found at the fact-finding hearing.

Personal welfare deputyship

12. If the court was satisfied that it was appropriate to impose injunctions and penal notices on PB then it was obviously inappropriate for him to be personal welfare deputy.

13. The Official Solicitor had changed his position in relation to the local authority's application to be appointed as RB's personal welfare deputy. However, the welfare deputyship should be limited in scope. The Official Solicitor would not support giving the local authority a power to change RB's place of residence, only a power 'to tweak the care plan and with it the contact arrangements.' In the Official Solicitor's view, this followed inevitably from the evidence.

PB's compliance

14. The potential pathways had been sketched out. The local authority as personal welfare deputy would be invited to police the order.

15. By section 20(2)(a) of the Act, the court was not permitted to give a personal welfare deputy power 'to prohibit a named person from having contact with P.'

16. As a matter of law, the question arose whether making an individual's contact with 'P' conditional on the fulfilment of conditions amounted to a restriction of contact, or a prohibition contrary to section 20(2)(a).

17. 'Prohibited' had to be contrasted with 'restricted': see *Tool Metal Manufacturing Co v Tungsten Electric Co* [1955] 1 WLR 761. As a matter of ordinary language, a 'restriction' denoted a limitation of contact whereas 'prohibition' denoted a total prevention of contact.

18. The court could prohibit contact between an individual and 'P' but a personal welfare deputy could not. S/he could only restrict contact, including by requiring the individual to comply with certain conditions. This was subject to the caveats that the condition(s) must be reasonable and capable of compliance, otherwise the imposition of the condition would, in truth, amount to imposing a prohibition.

19. The court had to be satisfied that without treatment contact was inappropriate because the care plan would be put at unacceptable risk of becoming unviable. The court had to be satisfied that such a requirement was necessary and proportionate, i.e. that it was a more proportionate means of safeguarding RB than other routes such as imprisoning PB.

20. The court should make the order and then work with the personal welfare deputy to police the order. The justification for the approach rested and relied upon:

    (a) The scale of PB's behavioural problems, as shown by the facts found at the fact-finding hearing.

    (b) The scale of PB's behavioural problems, as shown by his behaviour in court and in the witness box.

    (c) His need to receive psychological treatment, as set out in Dr LS's report. PB was unlikely to accept treatment of his own volition, which left as the only option progressing to more Draconian action.

    (d) The court's finding at the conclusion of the fact-finding decision, where the judge urged PB to accept medical help as the only real alternative to a conventional enforcement strategy. He had not taken up that option to seek help.

21. How would this work in practice? The OS suggested the following wording: 'Unless PB forthwith seeks treatment for personality disorder and tells the welfare deputy of the steps he has taken to undergo such treatment, within x days of being asked, then contact between him and RB may be stopped/suspended' coupled with an order empowering the welfare deputy to suspend contact between PB and RB if PB was not complying with a condition of the requirement.

22. In that way, the welfare deputy would be the eyes and the ears and the order allowed for a flexible response. It was understood that the local authority would identify someone other than Mr H to be the 'supervisor' so as not to undermine Mr H's relationship with PB.

23. In the event that contact was suspended by the welfare deputy, the care plan would need to include a contingency arrangement for providing RB with the meals which currently t was envisaged her son would prepare and provide.

24. A review hearing in December could review how the arrangement was working and address any breaches alleged by the Official Solicitor, local authority or PB's sister.

§13 — DEVELOPMENTS FOLLOWING THE HEARING

Following the hearing on 8–9 and 11 October 2012, there were a number of developments concerning which it was necessary to inform the parties:

Emails from PB

Around ten hours after the hearing concluded, at 12.26am on Friday 12 October 2012, PB sent an email to me at a private email address, which I read at around 3am:

> *For your peace of mind*
>
> *DJ Eldergill*

Mr B apoligizing for my outbursts in court as the psychiatrist was un-sure what 3 options of help would do, but after my week long out bursts in court, I have come to the conclusion only one of the 3 options can possibly work.

I regret not taking your referral, but I have done one though my registered DR, as I explained to you, the condition was over dramatized to the psychiatrist.

I do not blame you for errors made in the COP trial DJ X was the one who made a bad order, so stop beating your self up over spilt milk, you have taught me the law well, as I was able to exercise that in court due to the authority not imposing the last order properly, that should make you smart concerning their suitability for any POA, as they flout the law worse than the COP, so the COP may have to look at controlling personal welfare and giving someone in touch with the care some major responsibility including care plans, as the OS are out of touch, so Give PH [at the local authority] a chance as he is reasonable and his judgment has improved since his barbaric mistakes over a year ago and his care plans are reasonable.

Yours Truly, PB

PS I am not writing to the PM to clear just your name, i am asking for fairness amongst the judges on what who hears what first. I have to start at the root of fairness to bring out a army of fair Judges AGREED. Any way it was nice to email you. PB

In response, I sent an email to his solicitor, copied to the other parties:

PB sent me an email at 12.25am this morning, to my old home/work email address, headed 'For your peace of mind'. Attached to it was a letter to the Prime Minister.

I can see that his email was kindly meant and was intended as a constructive contribution, which on the whole it is. Could you please ask him to contact me through you in future. I have added him to the 'blocked senders list'. Please assure him that this is not personal and I appreciate that he was troubled by and reflecting on things during the early hours. It is simply that the judge in his mother's case cannot receive private communications from the parties, as I recently reminded his sister.

If PH is able to help him access any relevant NHS help on an expedited basis then that would be very helpful. It seems that PB trusts him, he will no doubt have NHS contacts, and he knows the relevant diagnostic and other issues.

If any of the parties wish to make any representations about this morning's email, it may be best for the OS to co-ordinate this and to let me know if any action is required from me. Could [the OS's solicitor] let me know if she is able and willing to do this?

The OS's solicitor hoped 'to confirm the position by Monday.' In the event, no representations were made in response to PB's email, or to two follow-up emails, seeking to provide me with some further evidence. Since then, he has kindly corresponded to the usual court address.

Dr LS's supplementary observations

On his return to the UK, Dr LS responded to the questions sent to him during the final hearing:

1) *Without independent historical information regarding childhood development, it would be difficult to confirm or refute a diagnosis of Aspergers syndrome. However his interviews with me, and — as far as I can tell — the dominant theme in his interactions*

with others has been characterised by a paranoid flavour, which is not typical of Aspergers syndrome but is consistent with a paranoid personality. It is, I suppose, conceivable that he suffers from both conditions: if this would influence the decisions of the Court, the opinion of a specialist in the area of Aspergers syndrome could be obtained. This would almost certainly also require an interview with a family member.

2) *It would seem to me that an 'unless order' approach would be much more likely to be successful than one based on a suspended order for committal to prison.*

Dr LS's comments were circulated to the parties, who were asked to liaise and to file and serve any short supplementary position statements dealing with these post-hearing developments within seven days: 'Please let me know if you wish the court to take a different approach to that suggested above.' In the event, no supplementary position statements were filed.

On following up matters, at the end of November PB's solicitor wrote to inform the court and the parties that PB did not consent to his new psychiatrist disclosing any information about him to the court or to PH, 'or otherwise. Therefore, he asks that no one makes direct contact with his new doctor.' However, 'by way of further information, PB instructs me that he will be seeing the psychologist once weekly through the new mental health service … in order to be fully involved with his mum's best interests.'

At the beginning of December, I received a copy of the interim order and care plan agreed at the end of the final hearing and confirmation from the parties that they noted PB's position and had nothing further to add.

No committal application has been made by the local authority or any other party.

§14 — FURTHER FINDINGS OF FACT

As the Official Solicitor observed, my findings, decision and reasons would set the parameters of any future court applications.

In my view, it is in RB's best interests for me to make further findings of fact — and mixed findings of fact and law — in order to eliminate (or, more realistically) reduce the possibility of future arguments about past events, who bears responsibility, what was found, etc. Over time, I hope this will save the court and the parties time.

Some of the findings will be upsetting. However, in this case I do not believe that this can (or should) be avoided. PB has had to endure serious allegations and blunt criticism. It is important to make clear my overall view that this is not a straightforward case of needing to exclude or modify the conduct of a single family member. His siblings, in particular CL, have also contributed to the conflicts.

Mrs B's mental health

1. In the past, Mrs B has experienced mood swings, low mood, poor motivation and paranoid thoughts about neighbours. She has taken an overdose and occasionally behaved aggressively. She has been prescribed anti-psychotic medication.

2. As someone with a history of fragile mental health, it is particularly important to ensure that she is not exposed to high levels of conflict and stress.

3. Unfortunately, there is a long history of conflict between PB and his sisters which is likely to continue indefinitely. Apart perhaps from DB, all of her children bear significant responsibility for the family conflicts that have brought this case to court.

Mrs B's treatment and care needs

4. Mrs B's care needs are relatively simple.

5. She already lives in a sheltered flat with a warden on site.

6. In March 2011, she received an occupational therapy assessment and was found to be 'functionally independent at home.'

7. The care she requires in her own home presents only 'conventional and low-key challenges in line with what might be expected given her diagnoses.'

8. She is only 71 years old. If her family can be more co-operative, it is likely that she can live in her own home for a considerable time.

9. RB herself has cooperated with professionals and paid carers 'well within the parameters of what might be expected with someone affected by the level of her disabilities.' Any reluctance on her part has been sporadic.

10. The difficulties have not been generated by her, or by her care needs, but by the 'sensitive, volatile and powerful family dynamics' around her.

11. As the care agency manager observed, his agency deals with 'a lot worse cases … she would not be considered a priority case, but the family tensions have made it so … Even fairly trivial things will escalate, for instance a daughter will telephone us and tell us that RB is waiting outside … and they want us to telephone the police.'

Day centre attendance

12. RB can be reluctant to go out. She has benefited from the social contact and stimulation provided by attending a local day centre.

Diet and weight gain

13. On 3 September 2010, it was recorded that RB had put on weight.

14. On 4 May 2012, it was recorded that she had lost 9.9kg in the past 22 months, equal to 11.6% of her bodyweight.

15. On 1 October 2012, it was recorded that she had gained 3.5kg in the past five months (4.4% of her body weight). Her weight was 78.8kg and her target weight 70kg.

16. Mrs B does not have diabetes.

17. On 1 February 2012, her blood glucose level was 7.5 mmol/L but there was uncertainty as to whether she had fasted. On 25 May 2012, the level was 6.2 mmol/L (normal = 3-6 mmol/L).

18. On 1 October 2012, a dietician suggested that food record charts be kept for self-monitoring purposes. However, her case no longer required further intervention and no follow up was arranged.

19. Responsibility for periodic weight gain cannot be laid solely at her son's door, as has sometimes been implied. She always has had a sweet tooth. On 3 September 2010, it was noted that she had put on weight and liked to eat sweet things. Because of time constraints, most of the meals provided by her paid carers were ready-meals, 'which tend to have a higher fat, salt and energy content.' Day centre staff were not aware of her 'healthy eating needs' and gave her two biscuits with her mid-morning tea. The paid carers, as well as PB, have given her sugar-rich food at home.

20. There is a value to enjoying what you can while you can and RB has relatively few pleasures. It is important not to reduce them unless necessary and to balance quality of life with longevity.

21. RB's diet has been a cause of conflict and resentment even though it is a relatively minor issue at present. One of the benefits of living at home is being able to indulge oneself free from public control and guidance. There are cases where an incapacitated person's dietary or other habits puts their health at serious immediate risk but this case falls well short of that.

22. There has to be some leeway or margin — more than there has been to date. In a domestic situation full of emotion and conflict, differences of opinion about biscuits and cake, and how to control RB's preference for certain foods, have provoked more discussion and conflict than they merited, and so been the cause of unnecessary friction.

23. The hallmarks of this case have been intolerance and interference. Too often, family members (and occasionally professionals) have been unwilling and/or unable to tolerate something they disagree with or disapprove of — to let something go without making an issue of it. Every possible point has been seized and argued over without proper regard for whether its significance justified worsening relationships.

24. The focus needs to be on managing those conflicts which, if not managed, may put RB's residence at home at risk.

Self-neglect and refusal of care

25. As concerns the self-neglect and refusal of care reported by her daughters, the court accepts the professional evidence that RB has cooperated with professional carers 'well within the parameters of what might be expected with someone affected by the level of her disabilities.' At present, any risk of self-neglect or refusal of care by her is not significant.

Oedema, cellulitis, sleeping arrangements

26. RB has suffered from cellulitis and oedema.

27. She needs to elevate her legs to reduce the risks and it is important that she does not sleep with her legs down.

28. Without prompting and/or assistance, RB may fall asleep in her chair and not go to bed.

29. The evidence as to how often RB has slept in a chair is unreliable. On some days, the morning carer has to make her bed because she has slept in it. However, sometimes she

sleeps on, not in, the bed. On several occasions, the evening carer has recorded that she is in her night dress but not in bed, and no record has been made the following morning.

30. As far as the evidence allows, the current situation is satisfactory. There are few recent reports of RB still being in her day clothes the next morning.

31. It seems sensible that morning carers monitor and record whether RB has been to bed and that the situation is reviewed periodically by the local authority. This (it was suggested) could involve the district nurse visiting to establish the reason, followed by the GP and the two-hour slot being resurrected. However, how best to keep the situation under review will fluctuate with her medical condition, needs and wishes. It is not appropriate or helpful for the court to be prescriptive. Unless the suggested mechanism is obviously inappropriate, and not in the person's best interests, the court should let the professionals exercise reasonable professional discretion.

32. What is important is that any signs of a return or worsening of RB's cellulitis or oedema are dealt with promptly; subject to that, her overriding need is for everyone to focus on minimising conflict and fostering better relationships.

33. RB's back pain and quality of life may improve further if she can be taken out more often for walks, and motivated to do this, as suggested by her son.

Evening visits

34. In the past, PB has cancelled evening care visits, saying they were not needed and that he would look after his mother.

35. The need for an evening visit has variously been said to be 'to assist with her personal care'; that it enables personal care to be delivered by a female; 'to see to toilet accidents'; to 'support her to prepare for bed'; to give medication; 'to assist with any personal care tasks and to provide a hot drink and medication'; to check her well-being; to shut windows and secure the property; and that it allows the situation to be monitored at the end of the day.

36. There is no evidence that RB has a 'continence problem' and she is hardly ever in bed before 10.00pm.

37. In the past, evening visits took place too early, initially at 5 or 6pm, then at 8pm, when there was not much for the carer to do, and more recently a two-hour slot beginning at 9.30pm. Because RB was not ready for bed, there would be no personal care to deliver and again the carer often spent two hours sitting around.

38. Often, RB can dress herself, get into her nightclothes and wash and brush her hair independently; sometimes, she needs prompting. She does not receive Attendance Allowance for night-time needs, only the lower rate for daytime care or supervision.

39. Given her habits — 'She clearly doesn't like having people around in the evening' (PH) — and the fact that paid carers visit in the day, half-an-hour's help with her bedtime routine, each evening between 10.30 and 11.00pm, is likely to be sufficient.

40. The primary purpose will be to check compliance with the care plan and that she is 'ok at the end of the day,' and (if asked for or appropriate) to help with personal care. RB will decide whether she is ready to go to bed.

41. I accept that If PB is the last person to be with his mother each day there will be no final check on compliance with the care plan, and that at present this is undesirable. PB might be tempted to stay longer than his mother wishes or requires — what Mr S referred to as 'loitering with the best of intents.'

Place of residence

42. In the quite recent past, MG concluded that RB wished to remain at home and to be independent, and that she appeared to have capacity to make this decision.

43. She is still able to articulate a clear wish to remain in her own home for as long as possible.

44. She expressed this wish to her son on 25 May 2011, to the best interests assessor on 21 June 2011, to Dr M on 24 June 2011, to the best interests assessor in August 2011 and to the Official Solicitor's solicitor on 7 December 2011.

45. Although she has twice visited YY, she does not wish to live there.

46. She understands that she may need residential care in the future.

47. Since returning home to R Close on 9 January 2012, she has been happy there.

48. According to the manager of R Close housing complex, she is 'fine where she is for the time being.'

49. Although RB now lacks capacity to decide where to live, she is very near the boundary in this respect. Her strong and consistent wishes are to be given very considerable weight.

50. It remains in her best interests to continue to live at R Close and for care and family contact arrangements to be based around a life at home.

Risks to RB being able to remain in her own home

51. Because RB's treatment and care needs are relatively simple, ordinarily it would not be difficult for her to live in her own home and to receive such care or help there as she requires.

52. Because she has expressed such a strong and clear wish to remain in her own home, and her relatively simple needs make it realistic to provide care in that setting, the aim must be to secure an arrangement that enables her to be at home for as long as her health allows.

53. To allow her children or anyone else to disrupt and destabilise her home life and care so that she loses her home — because of their behaviour not her needs — would violate her right to respect for her home and private life, and be a complete travesty of justice. As with any form of domestic abuse, the court would need to restrain the perpetrator, and suspend contact, rather than manage the violation by ousting the victim from their own home. Because the perpetrator possessed capacity to choose how to behave, the loss or reduction of contact — painful as it would be for their mother — would be something they had caused. The counterpart of capacity is accountability for acts autonomously done and they could not properly claim to be the victim.

54. In my opinion, therefore, the factor of magnetic importance in this case is to secure an arrangement that enables RB to live at home for as long as her health allows, and to manage any significant risk that she may lose her own home before her health requires that.

55. RB's attachment to remaining in her own home is such that, if it comes to it, it is likely that she will be happier living in her own home with less contact with her children than in a more institutionalised setting. She would be upset to have little or no contact with a loved child but less upset than 'being taken into care' through no fault of her own, because they were disrupting her care.

56. The only significant present risk is that family conflict and/or family-professional conflict may make the provision of care at home untenable, for example because the care agency withdraws or because it is seriously affects RB's health. At the hearing, the independent social worker told me that the balance of the current care plan was 'as good as it can get in this extremely difficult situation'. However, the chances of the care plan working were no higher than 50%, even if one was realistic about tolerating a little bit of slippage.

Social worker JR concluded on 19 June 2011 that it 'was not known if the difficult relationship between her son and daughters would impact on the care arrangements at home.'

RB's consultant psychiatrist was of the opinion that she was 'fine' in her own home, subject to the proviso that it was crucial for the family dynamics to be managed so that support services were able to deliver the required care unhindered by family difficulties.

Mr H told Mr S that 'that there was no question that all of RB's offspring were, in their own ways, devoted to their mother and genuinely believed that they were all doing their best for their mother, but in the process they had unintentionally lost sight of the real issues.'

In his report of 8 May 2012, Mr S reported that professional opinion was 'unanimous in reporting that RB is settled in her own home for the medium term future, and that the difficulties are generated around and not by RB, through sensitive, volatile and powerful family dynamics … its genesis is within the complex and glutinous family dynamics that contaminate the delivery of her care.'

According to PH, Team Manager, Older People's Team, 'The hostility between the children has at times put R's mental and emotional health at risk. It has been very difficult trying to manage a package of care in the community because of the dynamics between the children, with all parties making counter claims about each others ability to support RB.' Her health and social care needs could be managed at R Close 'but the dynamics and hostile relationship between her 4 children have made this option very difficult to manage.'

What RB seeks from her children

57. RB is a very private person who does not like any interference in her life. Disruptions to her routines tend to upset her.

58. RB does not wish to live with her children, or to be looked after by them, because she feels that they interfere:

'No, I do not want to live with [PB], or any of my children and I like living on my own now and I just do not want to live with any of the kids; they are all too rude in their own ways and

show no respect for each other — they are not rude to me though — but they just do not get along with each other.'

'[Her] daughters have regular contact with Mrs B, but she feels they interfere … Mrs B feels they are interfering in her life.'

Mrs B's main paid carer described the family 'as doting, caring even a little pernickety, particularly her daughter.'

'I asked her why she believed PB might upset people, and she replied, stating that, "PB is a rude, feisty person and he lives on his own."'

59. RB would like all of her offspring to stop attempting to control her. Her own aspirations have been rather smothered by the powerful personalities of her off-spring.

60. RB is upset that her children do not get on and are always arguing.

'… they do not get along with each other and they are always arguing with each other and I do not know why, but my son is very ill and they find it hard to understand him at times.'

'… her overall view was that she wanted them all to stop arguing.'

61. I accept that relatives often want to supervise the care provided by paid carers, that some paid carers have been young and inexperienced and that RB benefits from having a pool of carers who are familiar with her needs. However, it is a fact of life that all local authorities use care agencies, budgets are limited, staff are overworked and there are too few of them. The local authority has gone to considerable effort to bring in carers who RB knows and gets on with.

62. I do not accept, at any rate without qualification, Mr S's opinion that RB only wishes to have contact with PB two or three times a week. Like Mr H, 'I do not agree so much with [this] observation … If she wants to see [PB] more than that, I'd support that.'

63. In my opinion, Mrs B's wishes as to how much contact she wants varies depending on the levels of conflict and interference, and how upset she is, at the particular time. For example, she has dealt with conflicts involving her son by asking him not to visit for a while where his visits have led to conflict with people she lives among; this, I suspect, is to protect his interests as well as to provide respite. On other occasions, she seems to enjoy seeing him more than two or three times a week, she likes his meals, and so on.

64. MG referred to RB's 'fierce devotion to her son.' When she had capacity, she chose to continue to maintain a relationship with him despite knowing the knock-on effect this had with her daughters. Most of the time, she enjoys seeing her son and is protective of him:

In his initial report of 16 February 2012, Mr S reported that when asked if she enjoyed seeing her son, RB 'was most emphatically positive about seeing' him.

'Our parents feel guilty about their divorce because they believe that PB, the youngest, suffered most by it.'

RB 'understood that PB had some psychological frailties and felt that her other offspring should have some understanding of his difficulties.'

'[PB] is not violent, he can get upset and angry but he is alright really and does not hurt anyone.'

Involvement of RB's daughters

65. I accept that RB's daughters are devoted to her and have provided her with a great deal of love and affection.

66. Their brother's recent behaviour towards them has quite often been confrontational and upsetting, and often he cannot control what he says:

'My sisters and I think that PB just rubbishes everything that everyone else is trying to do and that will never change …'

Despite [PB] not working during the day he would choose to visit our mother late in the evening and start complaining to our mother about the food we were bringing round for her and if we were there would argue and be confrontational towards us ….

My sisters and I were prevented from going to our mother's home in the evenings to take care of her because of [his] volatile behaviour towards us such as aggressive and verbal abuse.'

67. Having acknowledged that, I have come to a very clear view that one of the problems in this case has been that PB's very obviously unsatisfactory behaviour, in the form of temper outbursts, has resulted in attention being drawn away from the destructive input of some of his sisters.

68. The evidence does not support a finding that all of the conflicts in this case can be attributed to PB's behaviour, that it is a simple case of one perpetrator of conflict and four victims. As Mr S noted, the local authority has had 'a hard time from all of the siblings.'

69. Although necessarily the focus has often been on PB's conduct, CL's conduct, and to a lesser extent that of LA, have contributed significantly to the conflicts and disagreements that have characterised this case.

70. I accept that sometimes PB's sisters have been 'unhelpful and combative. The evidence was peppered with incidents of PB's sisters complaining or expressing concerns to the care providers.'

71. The viability of any care plan requires much clearer expectations of what is required from them in terms of their future conduct, the making of allegations and complaints and the level of unnecessary interference in the provision of care.

72. They, as much as PB, must 'rein it in' much more than has been the case to date. The court will need to set down a clear framework for them if they cannot achieve this through mediation, greater self-control , greater co-operation or less formal means.

73. PB's sisters have made serious and hurtful allegations and assertions about him that have not been supported by the detailed information necessary for me to give them weight. (For example, that he suffered a brain-injury that affected his behaviour, that he has relevant criminal convictions and that an ASBO was taken out against him.) At present, the *evidential* value of these allegations and assertions is zero.

74. On at least three occasions, PB's sisters have alleged or raised financial impropriety:

In June 2010, a social worker KB saw RB in response to CL and LA's concerns regarding 'possible exposure to financial and emotional abuse.'

'Mrs B has on more than one occasion expressed her belief that her daughters were lying about her son's behaviour because they did not like one another. According to KB, RB was upset that people thought her daughters were good people because in her mind they were not.'

In January 2011, a lead nurse in the safeguarding adults team (MG) assessed RB in response to allegations made by CL and LA, who stated that their brother PB had been taking 'advantage of [RB's] vulnerability and taking money from her.' According to MG, RB described CL and LA as 'sick in the head … my daughters don't give me anything … Her son was 'decent' and 'don't take money from me — why would he? He even refuses money I try to give him … I cannot find evidence of abuse.'

Notwithstanding the fact that two unsubstantiated allegations or 'concerns' of financial impropriety had already been raised and investigated, LA's statement in these proceedings included a passage arguing for the local authority's appointment as financial deputy 'so that her money is used purely for her own care and well-being and not subjectively for other's personal interests…' [C148].

75. The court does not wish to hear those allegations repeated unless supported by very clear evidence. By their nature, unsupported allegations of such a kind are insulting, raise the temperature, worsen relationships and provoke a response.

76. CL and LA have persistently criticised and undermined their brother's efforts and this has had a detrimental effect on his mental health and conduct. They seem to have almost nothing positive to say about him, not just vice-versa.

77. PB's sisters often appear to have the same difficulty he has in always having to take a point:

'If PB gets challenged by his sisters, he sees red! — but PB, in my opinion, is not always the one in the wrong and I myself witnessed a situation where PB had taken his mother to the bank and was late back and one of his sisters really had a go at him and she gave him a real verbal trashing — … one professional told me that they were driven to distraction by the arguments and constant telephone calls from the family day and night with the veiled threat that professionals were not "doing their jobs" — but all the family love their mother in their own ways and it is such a shame that they cannot come to an agreement.'

'Even fairly trivial things will escalate, for instance a daughter will telephone us and tell us that RB is waiting outside … and they want us to telephone the police.'

On one occasion, when LA's husband M came to RB's house, 'Mrs B was adamant that M … invited her son to leave her property and come outside and fight with him.

At 11.06pm on Saturday 22 September 2012, the first weekend of the new interim care plan, CL emailed a 'Dear Judge' letter complaining of incidents since the care plan came into force the previous day: 'PB prepared food for our mother yesterday teatime. When the carer arrived he was still there and mum was eating the food he had prepared. The carer … wrote in the notes that he left when he saw her.'

CL then sent another email to me, on Monday 24 September 2012 at 3.04pm: 'I didn't take food to mum on Saturday because … Ro … said she had prepared food for Saturday … Also, mum does not need to go to the hairdresser's or chiropodist every two weeks, only when she needs to which Ro does.'

78. In my view, there is compelling evidence entitling me to find that CL's behaviour in particular has contributed significantly to the level of family conflict that has undermined and threatened her mother's care:

In September 2010, CL and LA attended a care review meeting at which they highlighted that their brother was not a good influence, but Mrs B said that the relationship with her son was fine.

In January 2011, RB told MG that her son was feisty and said how he felt, and her daughters 'didn't like someone who's straight and speaks their mind'.

According to EC's care plan of 24 August 2011, an offer of mediation by the local authority was declined. In his report of 16 February 2012, Mr S reported that CL was unwilling to take part in mediation; In his oral evidence, Mr S confirmed that that PB had been willing to take part in mediation but CL was not.

According to Mr S, RB told him spontaneously that, "My daughter C can be the worst of my children, but they can all be difficult and they can also make PB's life difficult and C is very feisty and I do not always want to see her; I am happy with PB doing everything — C, the big one, always used to do everything but she was rude to me, she thinks that she can control everything …"'

'Remarking again about PB, RB stated that, "He can be very difficult, and maybe all my kids are bossy, but PB thinks that C could treat me better and maybe he thinks that C with all that money could indeed treat me better."'

79. Throughout the proceedings, CL and LA have adopted strategies geared towards achieving an outcome that involves their mother relinquishing her own home, contrary to her wishes. In their presence, their mother agreed that she wished to live at YY and that she would like them to have access to her medical and financial matters. In their absence, the weight of the evidence clearly demonstrates that Mrs B has consistently wished to live in her own home, that her residence at B Lodge was subject to a deprivation of liberty authorisation, that often she regarded them as interfering in her life, and that she was more willing than they to engage with her son and to tolerate his behaviour.

'All of her daughters have stated they think a move to YY with a support plan is best for their mother and will reduce risks of her deterioration and improve her mental and emotional health.'

PB: 'I said to mum, "You don't have to accept this or move to YY. You still have a choice. You can go home."'

On 7 November 2011, Dr TS saw RB at B Lodge without her daughters being present. RB thought that she should be going home but the council were sending her to YY.

Initially, at the hearing on 13 December 2011, RB's daughters supported their mother remaining at B Lodge for the time being and both CL and LA [still] submitted that their mother wished to move to the supported placement at YY.

On 16 February 2012, Mr S reported that RB told him that, when she was at B Lodge, she understood that she could not go home …'

In February 2011, RB's daughters contended that their mother had been refusing care (particularly personal care), refusing to leave her flat and was starting to self-neglect, in the same way that necessitated her move to B Lodge in 2011. RB's daughters did not want final

orders or declarations made until these issues had been addressed and they still preferred their mother to be placed in an extra care facility such as YY. The final hearing was postponed. On investigation, it appeared that the concerns of self-neglect were more those of daughter CL than the local authority:

- *RB's solicitor 'did not notice that her health/condition had deteriorated noticeably from when I met her at B Lodge …'*
- *One of RB's main paid carers, Ro, had not noticed any change or deterioration in RB since her move from B Lodge.*
- *PB had not interfered with her care since her return home and his behaviour had improved greatly. He could be a great help, drying her clothes and preparing meals.*

80. I accept that YY has much to offer. However, frequently CL and LA have been unable to differentiate between their own wishes and feelings and those of their mother. RB did not wish to move to YY, which was in an area where she did not wish to live. Even though their mother clearly wished to return home, and was content at home, they argued otherwise.

81. In terms of the quality of their relationship and contact with PB, CL and LA have all of the usual protections and remedies offered to people by the criminal and civil law. In terms of their mother's contact with him, she wishes to remain in her own home and, like most parents, to see all of them there.

Involvement of PB

82. To reiterate, I find that the situation is not as straightforward and one-sided as has sometimes been portrayed.

83. PB has demonstrated many virtues:

(a) He is kind-hearted and compassionate.

(b) He is a devoted son who has taken good care of his mother over the years and is committed to her welfare:

Mr S told me that PB had not done much wrong in terms of the direct care he had provided to his mother.

When he applied to the Court of Protection … Mr B was concerned that the local authority were 'failing to provide his mother with an adequate level of care at home … I do understand that the nhs is overstretched and the standard of elderly care is falling short in this country due to the amount of demand … The support unit have stopped sending care plans since October 2010 … I will not have the council forcing my mum into care, when they should be able to provide adequate care at home.'

He alone amongst RB's children supported her clear wish to return home and resisted the proposal that she move to YY. (At the same time, he bears significant responsibility for the fact that she needed respite care away from home in the first place.)

(c) He does not shout *at* his mother and behaves respectfully towards her.

(d) There will have been many occasions when his visits went well and nothing was recorded because nothing noteworthy occurred — what I call 'the silent evidence'.

(e) He has been willing to try to resolve the family disputes through specialist mediation: 'Yes, I am prepared to give it a go.'

(f) He has acknowledged that he can be difficult at times.

(g) He has made genuine attempts to modify his behaviour and to observe the court's orders since December 2011:

In March 2012, one of his mother's main paid carers, Ro, said that his behaviour had improved greatly, and that he could be a great help.

According to *the manager of R Close housing complex, 'PB certainly does love his mother in my opinion, and he really does have her best interests at heart, even though he has a few problems of his own and these can affect the care that is provided on some occasions. However, if people take him seriously he is usually ok providing people take the right amount of time with him and he really has provided a lot of care to her, and many mothers would like a son like PB.'*

(h) Since this hearing, it appears that he has been seeing a psychologist weekly 'in order to be fully involved with his mum's best interests.'

(i) At the fact-finding hearing, in most respects he was a sincere and credible witness. (In my opinion, much less so at the final hearing.)

PB's mental health and behaviour

84. As concerns PB's mental health and conduct, I have confined myself to Dr LS's medical report, Mr S's observations (he is a very experienced mental health social worker), the quality and content of Mr B's communications in writing and in court, the findings of fact on disputed matters, his own evidence, and any relevant evidence of professional witnesses I found to be reliable, in particular Mr H.

85. Dr LS stated that PB met the criteria for a paranoid personality disorder. 'He agrees that he is excessively sensitive and does not forget perceived insults or slights. He also admits being suspicious, and the history as documented above provides many examples of his interpreting intentions as malign … His combativeness and tenacious sense of personal rights are a constant thread running through the history and mental state.' Others were invariably against him and he was never in the wrong in such cases.

"Yes, I do lose my temper, but in the end I am right and others are wrong and you do not get anywhere if you try and just make complaints against systems so sometimes you do have to take the law into your own hands. I would not lose my temper if people actually listened to me, but it just never happens and people give up and I am not the type of person who does give up, when it comes to problems."'

86. PB's explanation that a lot of what he told Dr LS was untrue is implausible. Most of the facts and opinions set out in Dr LS's report are consistent with the overall picture and the undisputed facts.

87. PB's social manner, as noted by Dr LS, Mr S and the court, is relevant. It is possible that not all relevant diagnostic issues and treatment options have been fully explored.

88. PB's engagement with psychology services since the last hearing demonstrates a commendable willingness to address some of the underlying issues. However, he is unwilling to allow the court to write to his local CMHT. Therefore, I do not know whether, and to what extent, existing therapies are helping him and whether more could be done. Nevertheless, it is a good start and he deserves credit for his decision.

89. Without being able to give any guarantees, I have told PB that demonstrating that he is willing to undergo a full assessment of any unresolved diagnostic issues is likely to help, rather than hinder, his case. To date, I have been unsuccessful.

90. Some of his conduct in the proceedings, in and out of court, has (to put mildly) not helped to progress matters or to improve relationships with his family, professionals and his mother's carers:

On 8 March 2011, he called [the care agency] and was verbally abusive, saying 'why the fuck did you send a carer to my mother? If you send a carer to my mother again I will fucking kick her out.' He terminated the call. The context was that he had become increasingly angry about the continuation of evening visits by carers. The language, volume and tone that he used to express his anger were triggered by his belief that evening visits were contrary to what had been agreed.

On 9 March 2011, he was verbally abusive and threatening towards a carer on the telephone. She terminated the call as a result. When he called back he raised his voice and made threats: 'If you put the phone down again I will fucking come round and smash the place up'. The second call was also terminated as a result of his behaviour. In terms of the context, PB had become increasingly angry about the continuation of evening visits and the quality of the care his mother was receiving.

On 4 April 2011, he called the care agency office accusing staff of not carrying out their job. He was very rude to Ms A and claimed there was no point in sending carers as they were not doing anything except giving medication.

Between 3 and 10 May 2011, there were some further difficulties, in particular with regard to him allowing access to his mother.

On 26 May 2011, he was extremely rude and abusive towards reception staff at RB's GP's practice. He used foul language in the presence of other patients and a letter had to be written to him about his conduct.

On 7 June 2011, he had to be removed from the hospital by security guards and was disruptive and verbally agitated.

On 8 June 2011, the social worker EC received six answer phone messages from him on her work mobile phone, left between 12.30 and 2.30am.

On 1 July 2011, there was an incident at B Lodge. Because of his problems with self-control, anger management, shouting and swearing, his reaction to the resident's (very provocative) behaviour was disproportionate, having regard to the location (a facility for frail, older, people), the resident's mental health, age and circumstances and the distress caused to his mother and others. His mother and staff members were upset by his shouting and swearing. Some staff members thought that he was out of control and felt unsafe.

He left the Royal Courts of Justice shortly before the hearing on 28 March 2012, which he did not attend. Some days later, he stated that he had never wished to give the undertakings in December 2011 and did not attend lest he be, or feel, pressurised into giving the

undertakings again and to agreeing the care plan: 'I let the Judge down for good reason and maintained my innocence by not signing into the undertakings'.

At the pre-trial review on 5 July 2012, whilst in the lobby area of the court he raised his voice and was verbally aggressive towards his two sisters, CL and DB. This went on for about ten minutes by which time one of his sisters was reduced to tears and both sisters were visibly upset. They left the room with the Official Solicitor's counsel, to compose themselves.'

On the first day of the final hearing, at 12.15pm, there was an outburst which necessitated taking a break: 'PB found that all a bit upsetting and he apologises.' He was then not present at 2.15pm for the start of the afternoon session, walking into court at 3.20pm.

On the second day, his legal representatives did not know where he was and had no instructions to continue in his absence. He arrived at 12.55pm, interjected, 'I've got to be doing everyone's work,' and left court at 12.58pm. He returned at 2.40pm. The hearing was adjourned at 2.50pm for 15 minutes because of an outburst. He was questioned on his evidence and I had to ask him to treat Ms Bhogal with respect: 'Sorry, Ms Bhogal'.

On the third day, during preliminary legal argument, at 10.40am he interjected, 'I do not want any care plan, no, fuck all.' He left the building. He returned to court at 11.35am. At 11.52am, during Ms Bhogal's submissions concerning his behaviour and the need for the injunctions to continue, he said out loud: 'I don't really give a damn, Stephen [his counsel's first name]. Do what you want … What a lot of bloody idiots.' He left court again at 1pm during the Official Solicitor's oral submissions, having been admonished by me.

The consistent theme to all of these outbursts has been his confrontational approach and 'manner of communication' when challenged or frustrated: his tone, volume, demeanour, volatility and offensive language. His behaviour often upsets or alienates others, so as to reduce his chances of achieving the changes he seeks.

91. I accept that PB's behaviour in court has not been wilful, in any meaningful sense, and hence I have not regarded it as, or dealt with it as, contempt of court. He has, I feel, done his best and, after the event, he is usually contrite and apologises very nicely. That does not, however, affect the fact that he has a very significant problem with self-control and how he expresses himself. Although most experienced lawyers and social workers have seen it all before, and take it in their stride, care agency staff, family members and more tender or inexperienced professionals may be frightened or intimidated. There is a real risk of carers withdrawing their services and/or being unable to work constructively with him at certain times. For these reasons, in my view he would not be a suitable welfare deputy for his mother at present, assuming one is required.

Involvement of the local authority

92. The local authority has been heavily criticised by PB.

93. Contrary to what he believes, the local authority has been understanding and tolerant. It has yet to make a committal application.

94. I was impressed by Mr PH. I thought that his evidence was fair and measured. He readily conceded valid points under cross-examination. He was flexible and willing to look at all possible ways of resolving relevant issues and accommodating individual concerns.

95. I have reservations about EC's input in 2011 and the length of time RB remained at B Lodge — and was then subject to a deprivation of liberty authorisation — following her 'respite admission' and the best interests assessment of 19 June 2011.

96. The decision to get Mrs B to sign the tenancy agreement for YY on 22 July 2011 cannot be supported. It is correct that she accrued several thousands of pounds of rent arrears in respect YY before agreement to write off this (potential) liability was reached.

97. At times there has been confusion surrounding RB's care plan. Sometimes it has not been possible for family members or paid carers to locate the current plan. More particularly, the local authority did not action some agreed changes to it after the pre-trial review on 5 July 2012. Collated monthly care reports were not provided by the local authority for August, September and October 2012.

98. It was alleged that the council's management of RB's care plan caused unnecessary conflict. Any avoidable conflict caused by it in this respect is insignificant compared with the conflict generated by her children.

99. Probably because of funding and work pressures, PB's application to the court was not dealt with as quickly as he would have wished. The local authority only became aware of the court's order of 13 April on 14 July 2011. Even then, it was not until 16 August 2011 that it completed an Acknowledgement of Service. The final hearing listed for 13-15 December 2011 had to be adjourned, at least in part, because of the local authority's failure to provide Mrs B's social care records in time. In February 2012, the independent social work expert recorded communication difficulties which had caused him inordinate organisational problems, 'possibly emanating from the local authority'. On 16 March 2012, the Official Solicitor applied, with the consent of the other parties, for the final hearing to be postponed, because the local authority's evidence had been filed late. I do recognise that the volume of correspondence and complaints generated by RB's children have made it a very difficult case to manage and progress — including for me and court staff.

Who should provide the care

100. PB was of the view that he should be allowed more evening visiting slots.

101. I acknowledge that:

a) PB would like to be allowed to visit his mother when carers are present.

b) He would like to be permitted to care for her on his own four evenings a week from 6pm until bed time.

c) He is willing and able to provide personal care to his mother, with help from paid carers and the local authority as appropriate. (That is not in question.)

d) He has provided more care than his siblings, and his mother's paid carers are overworked and pressurised.

e) There is no clear evidence that his mother prefers the company of paid carers to his company, provided that she is free from upsetting conflict.

f) On its own, resentment ought not to mean a paid carer taking a slot he can fill.

g) Things which he has advocated for some time are now being implemented.

h) He has demonstrated that he has a good understanding of his mother's wishes and preferences.

i) Much of the care plan is agreed by all parties and there is only a fairly narrow area of dispute about particular aspects.

102. Notwithstanding these observations, I find that it is not presently in Mrs B's best interests for her son to provide evening care four evenings a week, to be allowed to visit her when carers are present or to provide personal care to her (other than meals).

103. My overriding reason for reaching this finding is that at present PB's behaviour — his anger and problems with self-control, the number of disagreements and disputes he is embroiled in, his approach to his sisters and some carers, his problems observing agreed rules and plans — makes this impractical. Although he has demonstrated a good understanding of his mother's wishes and feelings, he has also demonstrated that he has a poor capacity to control his frustration and anger, to work with others and to accept the realities of the quality of care that can be provided by care agencies.

104. Having regard to those factors, and the incredibly difficult family dynamics, I therefore accept the professional opinions that at present:

a) In terms of her best interests, the most important factor is that care at home is viable.

b) Providing in the care plan for PB to provide personal care 'would be a recipe for misunderstanding and conflict in a situation where the effectiveness of the paid care depended on the avoidance of conflict between him and the carers.'

c) Unless paid care at home is viable, RB will not be able to remain at home.

d) It is in RB's best interests for paid carers to deliver care 'and for the family to focus on delivering love and affection.' (This arrangement was supported 'one-hundred per cent' by PH, and also by social worker JR on 19 June 2011.)

e) For PB to visit his mother when the paid carers are not present avoids a significant risk of conflict. He is often preoccupied with what he thinks is wrong or deficient: 'PB is always looking for faults and has a notebook , … he can be a bit over-controlling …' (and witness the volume of correspondence and complaints).

f) PB has yet to demonstrate that he can adhere consistently to an agreed plan which takes into account the views and contributions of his mother's carers and other family members.

g) He likes to deliver as much care to his mother as possible and has found it very difficult to stick to rules and agreements. With regard to the evening care slot, there is a significant risk that he might stay overnight, to be with or look after her.

h) The consequences of PB failing to comply with the care plan regularly, and turning up at unscheduled times, include RB experiencing stress and psychological harm, together with problems for the paid carers, some of whom could be frightened, thereby making it hard to maintain the care regime.

105. I do not accept that there is 'almost no evidence of RB's care being impeded by her son's actions,' except in the limited sense that he has not physically interfered with a carer performing a particular piece of personal care. His actions have certainly 'impeded' the delivery of the limited care which RB requires.

106. I accept that some carers are tired at night; that there have been problems when Ro is on annual leave; that the nature of the service is that carers go on holiday, are off work or move to another job; and that sometimes RB does not get on with unfamiliar substitutes.

107. I do not accept at present that the 'obvious solution' is to have RB's care provided by her family and in particular the family member who has said that he would like to do it. PB may well be able to provide more personalised care — many families do provide most of the care themselves — but at present this would come at too high a price in terms of the conflict and upset generated, which his mother would have to endure; and she likes a quieter life with much less conflict than has been inflicted on her by her children. The care which the care agency provides is adequate and helps to shelter her from distressing family conflict. In March 2012, although appearing reluctant to discuss the issues of her residence, care and contact, Mrs B stated that she was 'happy' to be living in her own flat again. She stated that it was 'alright' for Mr B to visit as he was doing at that time and said that the current care arrangements were 'fine.'

108. In September 2012, although appearing reluctant to discuss her residence, care and contact, Mrs B stated that she wanted to remain living at home and that the current level of care that she was receiving was 'alright.' She did not want her children to provide any additional care for her and that she was happy with the frequency with which she saw them.

Providing meals

109. RB enjoys the food prepared by her son and facilitating this helps his overall satisfaction with the care arrangements.

110. The food he provides appears to be more nutritious, and more to his mother's liking, than the ready-meals provided by paid carers.

111. No adequate, alternative, ready-meal providers have been identified (within the available budget, I assume).

112. It was agreed that the care plan should be modified to enable PB to both prepare and provide his mother with evening meals on Monday, Tuesday, Wednesday and Friday each week (as compared with personal care such as washing, bathing, etc).

113. PB agreed that he will provide a weekly food menu and keep a basic food diary that does not require recording every ingredient.

114. Problems will arise if PB cannot adhere to his time slots for evening meals. He has demonstrated problems keeping to 'rules,' and Mr S was 'less optimistic about his chances of keeping to such a routine having read the medical record, though not perhaps quite as pessimistic as Dr LS.'

Placing the siblings on an equal footing

115. The local authority told me that it has tried to put all of the siblings on an equal footing. All of RB's children wished to have contact, it was in her best interests to have such contact, and the opportunities should be divided equitably. No priority or extra power should be given to any of the four children. Any other arrangement 'might impact on RB's care.'

116. Mr S's view was that, if RB was asking for more contact with or care from PB, it was right to examine that and factor it in. However, there were 'fearsome family dynamics' to deal with and Mrs B was distressed by all the interference and arguing.

117. In general terms, my simple view is that the court should prefer whichever arrangements are is in RB's best interests, having regard to her wishes and feelings and the objective of maximising the chances of her remaining in her own home, which depends on managing adequately the effect of her children's conflicts on the delivery of home care.

118. Equal is not necessarily the same thing as equitable. I would not object to PB spending more time with his mother, or doing more for her, merely because it departed from precise mathematical equality. However, at the moment, I find that this would not be in her best interests because a period of greater calm is required. Before this is appropriate, PB needs to demonstrate that he can control his behaviour more effectively. His mother is upset by the conflicts he becomes involved in.

119. There were times when I felt that PB was under the misunderstanding that I need to be satisfied that his conduct will continue to create conflict. I am already satisfied on ample evidence that he has caused conflict with his mother's carers and that his personality is such that this is likely to continue unless and until he can demonstrate that there are grounds for reviewing and revising this finding; for example, by a period of non-conflict or a report that he has undergone a successful programme of treatment.

Monitoring RB's care and welfare

120. I accept that, given the number of people involved in RB's care, professionals will know 'pretty quickly' if anything is going wrong.

121. Regular monthly care plan reviews, moving to three monthly reviews, seems sensible but it would not be helpful for me to be prescriptive.

Management of RB's property and affairs

122. It is common in the Court of Protection for one child to look after an incapacitated parent's finances. This avoids unnecessary work and complication.

123. PB is already his mother's appointee to the exclusion of his sisters and the local authority is content that this arrangement should continue. To this extent, he already has 'an elevated status'.

124. He has helped the local authority in relation to RB's finances and there is no evidence that he has tried to overlord it over them or his sisters. PH accepted that there had been 'no problems with that side [the financial side] of it'. His sisters' criticisms of his financial management have not been made out. Therefore, there is no good reason for changing the arrangement, which has proved to be workable and to promote his mother's best interests.

125. The only real practical issue is whether his mother's bank will allow him to access her account as appointee, or will require him or some other person to be appointed as her deputy. Banks vary on this.

126. Because he has a good record as appointee, there is no reason to think that he would not be a suitable deputy for property and financial affairs if his mother requires one. Her income and outgoings will be the same.

127. His behaviour in relation to his mother's care has sometimes been contrary to her interests and has needed to be controlled. His management of her finances has promoted her interests and has not needed to be controlled. At present, there is no good reason to remove the financial function from him. He deserves praise in this respect. To take the function away would be unfair and give him the impression that the court does not 'do as it finds'.

128. On the evidence, I find that RB's general preference has been for her son 'to look after her finances rather than any other family member, as she saw him more often.'

129. Some of PB's concerns about the council's suitability to be his mother's financial deputy were well founded:

a) The way in which the tenancy agreement for YY was signed, and rent arrears accumulated, was unsatisfactory;

b) The local authority failed to comply with court orders concerning the provision of monthly reports;

c) PB was concerned that the local authority had still not refunded the surplus money in RB's local authority account.

130. On the evidence, I find that to date PB has managed his mother's finances rather better than has the local authority. I am sure that the local authority has the *capacity* to perform the function if PB's financial management interferes with the delivery of care to his mother in the future. I will replace him if the circumstances merit it. At the moment, in my view, they do not.

131. Having acknowledged his suitability, at present there is no clear reason to appoint a deputy for property and affairs. The arrangements seem to be working well without a deputy having been appointed. Therefore, I will give PB the necessary 'investigate and report' power to enable him to establish his mother's assets and liabilities. If his report indicates that one or more banks will not allow him to access her savings, or to operate an account, unless he is appointed as her deputy, (as matters stand) I will appoint him or provide him with a single order enabling access. (Although short orders no longer exist, in general a single order is to be preferred to the appointment of a deputy.)

132. Obviously, a deputyship carries with it annual fees, the need for a bond and various reporting requirements, which are best avoided if no deputyship is necessary.

Role of the Official Solicitor

133. PB has criticised the Official Solicitor and the solicitors appointed by him. I do not share that criticism. Indeed, I can find no evidence to support this view.

Success or failure of the current strategy, care plan, contact schedule, etc

134. Before turning to future arrangements, and the terms of the court's order, it is worth briefly taking stock of where matters currently stand.

135. To make a banal observation, in life generally, and mental health and family work particularly, it is advisable to have a realistic measure of what constitutes success or failure. Whether a care plan has been satisfactory, adequate, inadequate, successful or unsuccessful partly depends on the aims, expectations and perspective of the individual making the

judgement. By analogy, if a patient expects or hopes that a particular drug will cure him of his illness, rather than alleviate the worst symptoms, he but not his doctor may later consider that the treatment was a failure. What constitutes failure depends on how failure is to be measured, e.g. failure to restore normal health or failure to improve the patient's function in certain key areas.

136. In RB's case, amongst all the difficulties, it is important not to forget that there has been some progress:

a) RB has been discharged home in accordance with her wishes.

b) Any deprivation of her liberty that occurred at B Lodge has been ended.

c) Hotly disputed capacity and factual issues have been determined.

d) The court has a final report from an independent social worker as to RB's residence and best interests, good evidence as to how she has fared at home since January, information from a dietician and a psychiatric report on PB.

e) In his addendum report of 8 May 2012, Mr S noted that Mr H was 'very pleased with the way the care plan was operating …' and that the care agency manager had commented that, 'Things are going well and the current situation is probably sustainable for a reasonable period … PB has, as far as we know, stuck to his routine and has been compliant.'

f) At the fact-finding hearing on 10–12 September 2012, the Official Solicitor noted Mr S's conclusion that the care plan provided a very good service to RB, she was content with it and that the 28 March 2012 order appeared to be effective. All of the professional evidence indicated that she was being well supported and appeared content in her own home. The contact schedule was by and large working well.

g) Services have devised helpful strategies to manage RB's episodic reluctance to engage with care support staff and family and social conflicts.

h) PB has decided to undertake some psychology sessions.

137. It is not all doom and gloom therefore, provided one takes a realistic perspective as to what is achievable and the time-frame within which it can be achieved.

138. In my opinion, it is not realistic to expect an outbreak of family harmony and an absence of all aggravation. It is realistic to work towards a reduction in the disruption to RB's care caused by her children which is sufficient to enable her to remain in her home for as long as her health permits.

139. Mrs B has no doubt had had to cope with unpleasant disagreements generated by her children for many years, so what we are aiming for is containment at a level that does not put her residence at home at risk or cause her more distress than she can cope with. Within this context, an obsessive interest in how many cakes she has eaten, who provided them, etc, is unhelpful, as is too much inflexibility about bedtime routines provided that there is no evidence that her oedema is returning or deteriorating, so as to cause her discomfort.

PB's litigation capacity

140. No issue was raised by his own legal representatives or the other parties as to PB's litigation capacity.

§15 — REMAINING ISSUES AND RB'S BEST INTERESTS

1. I find that, so far as reasonably practicable, RB has been permitted and encouraged to participate, or to improve her ability to participate, as fully as possible in the decision-making process. She has had many opportunities to express her wishes and feelings.

2. There is no realistic prospect that her capacity will improve within the time available to enable her to make these decisions for herself. The relevant decisions must be made for her.

3. I have set out RB's wishes and feelings and the weight to be attached to them. Her wishes and feelings are 'pragmatically capable of sensible implementation.' They 'can properly be accommodated within the court's overall assessment of her best interests.'

4. I have also set out the views of family members, professional carers and the other considerations that I consider to be relevant.

5. I have come to the view that the factor of magnetic importance in this case is to secure an arrangement that enables RB to live at home for as long as her health allows, and to manage any significant risk that she may lose her own home before her health requires that.

6. Section 1 regards me to have regard to whether the purpose for which the decisions are required can be as effectively achieved in a way that is less restrictive of RB's rights and freedom of action. I do not believe so.

The issues to be addressed

7. The following issues need to be addressed:

    a) The objectives and the shape of RB's care plan.

    b) The order the court should make

        In particular, should the court appoint a personal welfare deputy and/or a deputy for property and affairs and, if so, who should be appointed?

    c) What to do in the event of breaches of the court's order or the care plan

        In particular, the need for enforcement mechanisms such as injunctions, penal notices, unless orders and contact prohibitions or restrictions.

The objectives and shape of the care plan

8. RB wants to live at home and her care needs mean that this ought to be achievable.

9. The overriding objective of the care plan is to ensure that she can live at home for as long as possible.

10. In order to achieve this objective, the care plan also needs to ensure that she can be adequately cared for in that setting.

11. Personal care (other than the preparation and provision of meals) should be provided by a care agency rather than by a family member.

12. The court order should be no more prescriptive about the contents of Mrs B's care plan than is absolutely necessary.

13. Although it is necessary to give a clear steer as to the main matters in dispute, Mrs B's medical condition and needs, and therefore the shape of her care plan, will change over time. It would not be appropriate for the matter to have to come back to court each time the detail needs amending, or there is an objection to a proposed change, for example that evening care should commence half-an-hour earlier or later.

14. It is not this court's function to adjudicate on the adequacy of RB's care whenever a family member thinks that the quality of local services ought to be better. A person who loses capacity is no more entitled to an ideal care package than they were just before they lost capacity. What can be provided will still be subject to the same framework of statutory duties and budgetary constraints. To be blunt, their local services will be as stretched and under-funded as they were before; care agency staff will often be temporary, unqualified and lowly-paid; family visits may not always be possible at the ideal time; and compromises will be necessary. There is little the court can do to resolve these dissatisfactions, which have more to do with central and local government decisions about what resources can or should be made available to individuals than with the court deciding what to receive on their behalf.

15. Broadly speaking, it is for the NHS and the local authority to assess, within available resources, what publicly-funded medical and care services Mrs B requires. Insofar as this court has a contribution to make in a case such as this it is:

    (a) where appropriate, to manage or contain conflicts that have adversely affected the incapacitated person's best interests in a situation where their management requires imposing a framework that interferes with the usual legal rights of family members, so as to require authorisation by a court; and

    (b) to ensure that incapacitated people are not disadvantaged, compared to those with capacity, by their inability to make decisions about their treatment, care, entitlement to resources and contact with others.

16. Bearing all of this in mind, I will simply declare that it is lawful and in Mrs B's best interests to make the general declarations concerning her care plan that are recorded in the order below.

Mrs B's rights

17. The main risks to RB's care plan that have required the intervention of a court are the behaviour of her children — towards her, each other, the local authority and paid carer — insofar as this conduct has adversely affected her residence at home and personal welfare.

18. If Mrs B had capacity, she herself would be entitled to regulate this intrusive conduct by deciding:

    a) Who to see in her own home, how often and when;

    b) To instruct professionals not to disclose or discuss information about her care to particular relatives or professionals, or to allow them to make complaints about her care on her behalf (i.e., to interfere);

c) To refuse to allow a person, including a relative, to be involved in treatment and care decisions concerning her;

d) To say to one or more of her children that she does not wish to have contact with them, or significantly less contact, unless they 'mend their ways,' cease interfering with her life and care, and cease upsetting her by their constant disputes and arguing.

19. In an appropriate case, an incapacitated person should have exactly the same rights, options and strategies available to them.

The court's right to make unless orders

20. If Mrs B she had capacity, she could decide to say to one or more of her children, 'I've had it up to here. Unless you do x or y, I don't want you to visit for the moment and/or be involved in my care' — just as a spouse with capacity who is at the end of their tether might say to their partner, 'I can't continue like this unless you agree to get some help with your alcohol, drug, mental health issues, etc.'

21. As in marriage, this is not a step to be taken without serious thought. However, in my view, if the situation is sufficiently clear and perilous, I can make that kind of decision for a person who lacks capacity, because it is a decision they could lawfully have come to themselves if they still had capacity.

22. That is a long-winded way of saying that I do not accept (without qualification) Mr Simblet's submission that the court has no jurisdiction to make an order that PB's contact with his mother may be suspended unless he addresses his mental health and behavioural problems. I am not making a decision for him, which forces him to do anything, but a decision as to where his mother stands. I am not deciding that it is in his best interests not to see his mother but (on her behalf) that it is in her best interests not to see him for a while unless and until he can satisfy me —i.e. her, for I stand in her shoes — that his behaviour has changed and it will be less destructive and upsetting for me.

23. In *very* broad terms indeed, I accept that the legal system in England and Wales does not 'require a person to undergo compulsory treatment except in the very defined circumstances, and for the very defined purposes, of the Mental Health Act 1983.' But, again, in my view the position here is the same as between two people with capacity. One can say to the other, 'I cannot compel or require you to have treatment for your problem but if you choose not to then I chose not to see you, or to see you less frequently. That is where *my* interests lie.'

24. I do not think that the statement, 'In any case where the Mental Health Act 1983 and the Mental Capacity Act 2005 are in conflict, the former Act is to be preferred,' has any real bearing on this case. The 1983 Act is not in play, section 28 of the 2005 Act is not in play, and nor is Schedule 1A.

25. I do not accept the submission that 'requiring PB to seek treatment for a personality disorder that he might not have is a pointless exercise' is pertinent to my decision. It is not for me to say what treatment PB must or should receive — I am not a doctor — only that it is in his mother's best interests to say on her behalf that he needs to seek appropriate professional help. There is ample evidence to indicate that it is very unlikely that he can modify his behaviour unless he undergoes an assessment and accepts any help it is assessed he may benefit from.

26. If he has a mental disorder which is untreatable, the court will need to factor that in and look at other ways of limiting the conflicts. However, until recently he has not had any treatment. Professional help may be beneficial.

27. I accept that there is no evidence that RB herself ever required her son to receive treatment, either as a condition of contact or for any other reason. On the other hand, ultimately I am not making a substituted decision for her. Furthermore, matters have not reached this unhappy level before, where she has been deprived of her liberty in a care home and her life in her own home put at significant risk.

28. Essentially the same line of reasoning leads to the conclusion that in an appropriate case the court may decide, on RB's behalf, that unless her adult children with capacity agree to engage in mediation, or a more constructive way of resolving their differences, I will take their unwillingness to address the causes of my unhappiness into account when deciding whether it is necessary to suspend or restrict their contact with me and involvement in my care. Again, in extreme cases I think a parent with capacity might say to their warring children — and legally would be within their rights to say — 'This is too upsetting for me, and it is affecting my health and costing me a lot of money. You must all agree to accept some help, from a mediator or family worker, to stop this endless conflict and litigation. Unless you do so, I have decided that I will need to limit your visits or involvement in my care.'

29. Not to allow an incapacitated person the same right seems to me to disadvantage them, and discriminate against them, for no good reason.

Article 8 and RB's children's rights to be involved in her care

30. I accept that PB's Article 8 rights are a matter of great importance, as are those of his mother and his sisters.

31. He is a devoted son who has cared for his mother. If at all possible, he has a right to live a normal life that includes visiting his mother, and it is important to try hard to ensure that he remains in her life.

32. However, I am making a decision for RB. Part of the respect the law shows for the home, family and private lives of people with capacity is to recognise their right to end or limit relationships with people who may not want that. I have already found that RB has expressed a strong and clear wish to remain in her own home; that her relatively simple needs make it realistic to provide care in that setting; that to allow her children or anyone else to disrupt and destabilise her home life and care so that she loses her home would violate her right to respect for her home and private life; and that, where the perpetrator has capacity to choose how to behave, the loss or reduction of contact, painful as it would be for their mother, would be something they themselves had caused. If it comes to it, it is likely that RB will be happier living in her own home with less contact with her children than in a more institutionalised setting. She would be upset to have little or no contact with a loved child but less upset than 'being taken into care' through no fault of her own, because they were disrupting her care.

The framework for protecting Mrs B's rights and managing the conflicts

33. It is desirable to try to construct a framework that, as far as possible, addresses the risks posed by RB's children whilst reducing the need for the case to return to court. The aim must be to minimise the need for litigation and court intervention.

34. In my opinion, the management and enforcement options start with informal meetings and end with committal to prison.

Informal discussion and care reviews

35. I agree with Mr S that if PB's conduct (or that of any of his sisters) is sufficiently problematic, the first mechanism to be used should be meeting with Mr H, who has a good relationship with PB and has often been an effective go-between and problem-solver.

Advocacy and the appointment of an advocate

36. Although his help in this case has been essential, one objective is to be able to exclude the Official Solicitor from the family's lives as soon as possible. If he is no longer involved, it will still be necessary to have someone involved whose only role is to establish and advocate Mrs B's true wishes from a neutral standpoint.

37. A MIND Advocate was offered to RB but this offer was declined by her. It may depend how the person's role is presented to her but I agree with Mr S and Mr H that there is a role for an advocate to play; and the *Code of Practice* contains some useful guidance in this respect:

> *When is an advocate useful?*
>
> *15.4 An advocate helps communicate the feelings and views of someone who has communication difficulties. The definition of advocacy set out in the Advocacy Charter adopted by most advocacy schemes is as follows: 'Advocacy is taking action to help people say what they want, secure their rights, represent their interests and obtain services they need. Advocates and advocacy schemes work in partnership with the people they support and take their side. Advocacy promotes social inclusion, equality and social justice.'*
>
> *An advocate may be able to help settle a disagreement simply by presenting a person's feelings to their family, carers or professionals. Most advocacy services are provided by the voluntary sector and are arranged at a local level. They have no link to any agency involved with the person.*
>
> *15.5 Using advocates can help people who find it difficult to communicate (including those who have been assessed as lacking capacity) to:*
>
> • *say what they want*
>
> • *claim their rights*
>
> • *represent their interests, and*
>
> • *get the services they need.*
>
> *15.6 Advocates may also be involved in supporting the person during mediation ….*

38. One advantage of an advocate is that it would minimise the risk of local services receiving and acting on the kind of unreliable information that was expressed about RB's wishes and feelings in 2011. It is unlikely that anyone would have misunderstood her preference to go home, or have believed that she wanted to live at YY instead, if an independent advocate had been verifying what some family members claimed was her personal preference.

Mediation and dialogue

39. I agree with Mr S and Mr H that mediation is desirable.

40. It is important not to leave untried options that may help to narrow the issues and/or reduce conflict. The parties need to be encouraged to think about ways of resolving their differences other than by writing or appealing to a judge.

41. There is the funding issue. However, if mediation succeeds and some consensus as to the way forward can be agreed, ultimately it could be less hurtful, abrasive and expensive than further legal action.

42. I acknowledge the Official Solicitor's pessimism, which is supported by evidence, but it is important to guard against nihilism. Two experts have said it is worth trying, therefore it may be beneficial, it is unlikely to do any harm, and is even less likely to do more harm than continual litigation and family complaints.

43. Having experienced litigation first-hand, RB's daughters may now view mediation as preferable. Furthermore, reducing conflict requires all of her children to seek a greater understanding of the effect of *their* behaviour on their mother's welfare, not just the other party's.

44. For reasons already given, the order should provide that if the local authority offers the parties a process of mediation the court will take into account the refusal of any party to engage in that process when determining the contribution made by them to any breakdown of care or contact arrangements, and the extent to which they should pay or contribute to any avoidable court applications and/or hearings that are then necessary.

45. For as long as the family are engaged in mediation, no further applications to the court should be made without the consent of the Official Solicitor. This would be contrary to the spirit of engaging in mediation.

When is mediation useful?

15.7 A mediator helps people to come to an agreement that is acceptable to all parties. Mediation can help solve a problem at an early stage. It offers a wider range of solutions than the court can – and it may be less stressful for all parties, more cost-effective and quicker. People who come to an agreement through mediation are more likely to keep to it, because they have taken part in decision-making.

15.8 Mediators are independent. They have no personal interest in the outcome of a case. They do not make decisions or impose solutions. The mediator will decide whether the case is suitable for mediation. They will consider the likely chances of success and the need to protect the interests of the person who lacks capacity.

15.9 Any case that can be settled through negotiation is likely to benefit from mediation. It is most suitable when people are not communicating well or not understanding each other's point of view. It can improve relationships and stop future disputes, so it is a good option when it is in the person's interests for people to have a good relationship in the future.

15.10 In mediation, everybody needs to take part as equally as possible so that a mediator can help everyone involved to focus on the person's best interests. It might also be appropriate to involve an advocate to help communicate the wishes of the person who lacks capacity.

(Code of Practice)

Inducements

46. Obviously, if poor conduct and contact results in reduced contact then improved conduct and contact should lead to improved contact. There needs to be flexibility. A period of greater

co-operation with carers and other family members, and a reduction of conflict, should result in a clear benefit. For example, provided that RB is content, something like a relaxation of the usual contact or care restrictions.

Therapeutic options

47. PB has very helpfully decided to seek professional help although I do not know if he has rejected any treatment(s) that have been recommended.

48. He is guarded about the information he is willing to share with the court, and therefore the proof is in the pudding. If he manages to control his frustration and anger better than in the past, and there is a reduction in conflict, it may not be necessary for the court to know the detail. If he wants me to recognise that he is engaging well and making steady progress, or that Dr LS was mistaken in some material way, then he will need to let the court have a report. Given the family conflict, this report should be shared with the local authority and the Official Solicitor, but not copied to his sisters.

49. If it transpires that PB is not seeking appropriate therapeutic help then in my view, and for the reasons given, an 'unless order' is an option. This order might be in the nature of a suspension of contact unless and until PB undergoes an assessment, if contact has become highly disruptive and the option is more a proportionate and constructive way of dealing with the underlying causes of the conflicts than committal proceedings.

Participation in care reviews and decision-making

50. The starting-point is that close relatives should be consulted and involved in care planning. In this case, much clearer expectations are required of Mrs B's daughters in terms of their conduct, complaints and allegations. Unless a process of mediation is on-going, the care agency and local authority should keep a careful record of how many times complaints and calls are made about PB by his sisters, and any actions of theirs that generate conflict or undermine their mother's care or welfare. If they cannot let the professionals manage the situation, and their interference becomes disruptive, it would be appropriate for the local authority to limit the extent to which they are involved in information-sharing and care planning, and to manage the time they spend communicating with paid carers.

51. Because the care agency provides the day-to-day input, and their withdrawal will trigger a crisis, it is important to insulate their staff as much as possible from the conflicts that have characterised this case. If at all possible, it may be preferable to require Mrs B's children to direct all correspondence and calls to the local authority, to be filtered as necessary and taken into account at care plan reviews.

Reducing conflict by reducing contact

52. If contact is harming Mrs B then the most appropriate step is to restrict contact to a level that is not harmful to her.

53. In my view, the traditional enforcement mechanisms have a role to play in this case but less of a role than in more straightforward cases. Much of PB's behaviour is impulsive and soon regretted. I doubt that he thinks much about the consequences of his outbursts at the time, if at all. He simply 'loses it'.

54. If he becomes embroiled in conflict with those he is in contact with, less contact for a cooling down period would be my first preference, rather than a return to court for committal proceedings.

55. Contrary to PB's recollection, I find that there have been two occasions when his mother persuaded or asked him not to visit for a period when he was in conflict with those around her.

25. Any restriction of contact with PB or one of his sisters must be reasonable, necessary in order to manage an identified present risk that home care will be unviable unless contact is so restricted, and a more proportionate means of safeguarding RB and enabling her to remain at home than other options such as making a committal application. If contact is suspended for more than seven days then the matter should be listed before me for a telephone hearing.

56. Moving up the scale, in my view, is the option of supervising contact or requiring one or more of RB's children to see her outside the family home, for example at a day centre, where this is necessary in order to address an existing and real risk of visiting carers refusing to visit Mrs B at home.

Injunctions

57. PB asked that all 'restrictions' — undertakings, injunctions, penal notices — be discharged as he is 'willing and able to adhere to the care plan.' Therefore, there is no need for them. On the evidence, it is impossible for me to find that he has managed to adhere to his mother's care arrangements, nor therefore that he will be able to do so unless and until the existing state of affairs has changed in some positive way.

58. As the Official Solicitor suggested, it is relevant to consider:

- The risk of harm to RB if the injunctions are not granted (Is it necessary to make such an order?); and

- The extent to which injunctions will interfere with the enjoined individual's freedoms (Is it proportionate to make such an order?).

59. In RB's case, a care plan that includes regulating family visits and care is in her mother's best interests. It is therefore also in her best interests and proportionate to ensure that effect is given to it.

60. To include injunctions goes no further than to make a breach of the care plan actionable.

61. I agree with Mr S that compliance with the care plan is more likely if there is an injunctive order. If injunctions are not granted, PB will have less incentive to keep to his time slots and there is an obvious risk that the care plan will be disrupted, so as to expose RB and her carers to conflict and interference that undermines home care. For the moment, it is necessary for them to continue. He understands the terms of the injunctions and, overall, his mother's situation has been more manageable since they were imposed.

62. Not all of the present injunctions are appropriate. The clear focus has to be on critical boundaries, the crossing of which could justify bringing the matter back to court, rather than reliance on one of the other management mechanisms. As to the existing injunctions:

- PB is forbidden from being present at R Court at any time his mother's paid carers or other family members are present in accordance with the care plan.

  In PB's case, he needs to be enjoined not to breach this requirement, because of his record of doing so in the past.

I have removed the injunctions relating to the '15-minute either side of visits rule'. It is simply a case of ensuring that the care plan includes 15 minute barriers between visits. If PB or one of his mother's daughters or carers overlap, one of them is not 'present in accordance with the care plan'.

I have also removed the injunction, 'If PB attends the property at any time and finds that carers are present, he must leave the property.' That is mostly covered by the injunctions not to be there except in accordance with his allocated times and not to obstruct or disrupt his mother's care. I am not interested in fact-finding a more refined dispute as to who did what when a carer turned up at a time when PB was entitled to be there, in the absence of clear evidence of disruption or distress.

- PB is forbidden from being present at his mother's home during such evening, night-time and early morning hours as are specified in the care plan.

- PB is forbidden from acting in a manner which causes or is likely to cause distress to RB or those caring for her.

63. I propose to extend the following injunctions so that they include CL and LA:

- PB, CL and LA must not obstruct or disrupt the provision of treatment or care to their mother.

- PB, CL and LA are forbidden from commenting on or complaining about the provision of care to their mother or about each other's conduct to any person other than PH and/or to such other person(s) as the local authority nominates from time to time.

64. I shall remove the following injunctions:

- PB will provide to the local authority the sum of £350 per month from RB's funds to enable food, personal and domestic items to be purchased, such sum to be provided on the 2nd day of each month to the Adults team.

- In the event that he is informed that RB is likely to run out of money in any month, PB will promptly provide an additional £50 to the local authority Adult team for that month.

I have said that I intend to accept PB's assurance that he will continue to manage his mother's finances appropriately and will provide money for her maintenance. This enables him to demonstrate that he can work constructively with the local authority, and compromise reasonably with them, without the need for such injunctions. Obviously, if this informal arrangement breaks down, I shall have to place his mother's financial affairs in someone else's hands.

- PB will notify the local authority of any communications received at the property which he is aware contain medical appointments for RB by forwarding them to PH.

This is, or verges on, micro-management. If letters are not getting through then it is simply a case of ensuring that the GP, etc, know to inform the care agency and/or local authority of appointments.

- PB is forbidden from bringing into RB's home at Roseland Close any unhealthy snacks such as cakes, biscuits, crisps, sweets, chocolate or non-diet fizzy drinks.

This is, or verges on, micro-management and has consumed far too much court time. The court should only revisit the issue if there is clear evidence that Mrs B's health has deteriorated in a way that justifies asking a court to intervene, with all the conflict and unpleasantness that will cause.

Penal notices

65. Because PB has breached the court's orders in the past, penal notices will continue to be attached to the conditions above. If he complies with the requirements for a reasonable period of time, my confidence in him will increase with his compliance, and I will review whether they remain necessary.

Service of this and future orders

66. This is dealt with in my order, given the problems in this case.

Court applications including committals

67. As Mr S noted, the crunch will 'probably be if the paid carers say that they cannot support RB in her own home. It is a question of whether the carers could cope with the breaches.'

68. If the strategies described above are ineffective, and the care plan is becoming unviable, because of PB's conduct and/or that of his sisters, the local authority should bring the matter back to court — for example, with a view to asking the court to restrict contact further, to impose penal notices, to suspend contact indefinitely, to make a suspended committal order unless the party agrees to take some specific step (e.g., a carer's assessment, family work), to make a plain suspended committal order, to commit one of the parties.

69. The committal of PB to prison would affect RB and she would be distressed. That said, the distress of losing her home would be likely to be greatest of all.

70. If committal or suspended committal application does have to be heard in PB's case, I would hope that a psychiatric report, or a joint report with Mr S, could be obtained by agreement as to the likely effect of committal on his health, and any final alternatives.

71. Post-committal, the position is governed by section 48 of the 1983 Act.

72. Fact-finding must be kept to a minimum, which is one reason why I have kept the injunctions to a minimum. If breaches are accepted, that will probably suffice. If no breaches are accepted, but there is clear evidence of breaches, it would be preferable simply to seek to prove two or three serious, well-evidenced, breaches. If the breaches are not serious or the evidence is unclear then probably a different approach is preferable. If it is obvious that a fact-finding hearing was unnecessary, because the evidence is clear or the breach was technical, then there could be costs consequences.

73. If any of the parties do not attend future hearings that affect their rights and freedoms, orders affecting their rights and freedoms, including costs orders, may be made in their absence.

Costs

74. I have already referred to costs. All of the parties should read very carefully rule 159 of the Court of Protection Rules 2007, which sets out the circumstances in which the court may

order a party to pay all or some of the costs of the proceedings. In deciding whether this is justified:

… the court will have regard to all the court will have regard to all the circumstances, including—

(a)the conduct of the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and

(c) the role of any public body involved in the proceedings.

(2) The conduct of the parties includes—

(a) conduct before, as well as during, the proceedings;

(b) whether it was reasonable for a party to raise, pursue or contest a particular issue;

(c) the manner in which a party has made or responded to an application or a particular issue; and

(d) whether a party who has succeeded in his application or response to an application, in whole or in part, exaggerated any matter contained in his application or response.

Court review

26. A review hearing, to see how the arrangements are working, seems appropriate.

27. I will, of course, read carefully any COP9 applications received before then but, unless a different approach is clearly justified, shall deal with them at the review.

28. Hopefully the parties will have something positive to report, for example in relation to mediation and similar constructive strategies.

29. Nothing in my decision prevents any party from organising a case conference or a round-table meeting if it may be helpful as a way of resolving issues so as to avoid the need to return to court.

The personal welfare deputyship option

30. There is one matter left to consider, which is whether the local authority should be appointed as RB's personal welfare deputy (I have ruled out PB for the present).

31. The local authority wishes to be appointed. The Official Solicitor agrees provided their powers are narrowly drawn. They should exclude power to change RB's place of residence and be limited 'to tweaking the care plan and with it the contact arrangements.' Mrs B's daughters are broadly supportive of the application, PB is not.

32. The law in this area is helpfully set out for judges and other lawyers in the cases of *Re P* [2010] EWHC 1592 and *In the Matter of E* [2010] EWHC 2512(COP) (Fam).

33. The basic statutory framework can be summarised as follows:

(a) The vast majority of decisions on behalf of incapacitated persons are taken informally without the involvement of the court or appointment of a deputy.

(b) Many different people may be required to make decisions on the incapacitated person's behalf. For example, the person's spouse or partner, carers, doctors, nurses and social workers.

(c) There will be other times when a joint decision needs to be taken by a number of people, for example at a care planning meeting.

(d) The *Code of Practice* encourages settling disputes if possible by collaboration and agreement between the family members and professionals, rather than recourse to the court.

(e) Where a welfare matter is referred to the Court of Protection, because less formal methods of resolving the issue have failed, the court may:

(i) make declarations as to the lawfulness or otherwise of any act, omission or course of conduct in relation to the person;

(ii) by way of a 'welfare order' make the decision (or decisions) on the person's behalf;[13]

(iii) appoint a person — a 'deputy' — to make the decision on the person's behalf.[14]

(f) Where appropriate, references to a deputy or donee making decisions include acting on decisions made [s64(2)].

(g) As always, the court's powers (and a deputy's) are subject to the statutory principles set out in section 1 and the best interests provisions of section 4.

(h) Naturally, if the judge can make the decision, it will generally be inappropriate for her or him to authorise someone else to make it. Consequently, the Act provides that a decision by the court is to be preferred to the appointment of a deputy to make a decision; and that the powers conferred on the deputy should be as limited in scope and duration 'as is reasonably practicable in the circumstances': see s.16(4).

(i) A deputy is:

(i) appointed to make decisions on the incapacitated person's behalf, not on the court or judge's behalf (In other words, s/he is deputising for the person concerned, not for the judge or court);

(ii) is to be treated as that person's agent in relation to anything done or decided within the scope of their appointment and in accordance with the Act;[15]

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13 The court may also make such further orders and directions as it thinks necessary or expedient for giving effect to the order.

14 The court may also confer such powers and impose such duties on the deputy as it thinks necessary or expedient in connection with the appointment, and make such further orders and directions as it thinks necessary or expedient for giving effect to the order.

15 As a general proposition, whatever P has power to do herself may be done by her agent and, conversely, what a person cannot do herself cannot be done by her agent.

(iii) must act in accordance with the authority conferred by the court.

(j) By section 17(1), the court's powers when making a welfare order 'extend in particular to:

- *deciding what contact, if any, P is to have with any specified persons;*
- *making an order prohibiting a named person from having contact with P;*

(k) It is clear therefore that I have power to make a welfare order which prohibits or limits a child's contact with their mother. Having done so, I can make such further orders and directions as are necessary or expedient to give effect to the primary order. For example, I can attach injunctions, and require the local authority to incorporate the prohibition in the person's care plan, etc.

(l) I have come to the conclusion in this case that the issue is really whether it is impracticable for all relevant contact and personal care decisions to taken by the court because it is likely that a series of disputed decisions will need to be made over a period of time. As to this, the *Code of Practice* provides includes the following passages:

8.31 Sometimes it is not practicable or appropriate for the court to make a single declaration or decision. In such cases, if the court thinks that somebody needs to make future or ongoing decisions for someone whose condition makes is likely they will lack capacity to make some further decisions in the future, it can appoint a deputy to act for and make decisions for that person…

8.38 Deputies for personal welfare decisions will only be required in the most difficult cases where important and necessary actions cannot be carried out without the court's authority or there is no other way of settling the matter in the best interests of the person who lacks capacity to make particular welfare decisions.

8.39 Examples include when:

- *someone needs to make a series of linked welfare decisions over time and it would not be beneficial or appropriate to require all of those decisions to be made by the court. For example, someone (such as a family carer) who is close to a person with profound and multiple learning disabilities might apply to be appointed as a deputy with authority to make such decisions.*
- *the most appropriate way to act in the person's best interests is to have a deputy, who will consult relevant people but have the final authority to make decisions.*
- *there is a history of serious family disputes that could have a detrimental effect on the person's future care unless a deputy is appointed to make necessary decisions.*
- *the person who lacks capacity is felt to be at risk of serious harm if left in the care of family members. In these rare cases, welfare decisions may need to be made by someone independent of the family, such as a local authority officer. There may even be a need for an additional court order prohibiting those family members having contact with that person.*

(Code of Practice)

34. Clearly, there is an overlap between the examples in the Code to which I have just referred and the situation in Mrs B's case. The local authority believes that the long history of sibling

disagreements 'will continue indefinitely' and that there is 'a very real chance … that in the absence of a welfare deputy the Court will be called upon to mediate between the sides in the future.'

35. The legal issue in this case is the extent to which a welfare deputy may restrict contact between P and another person, if at all. This is because where the court appoints a deputy 'to make decisions on P's behalf in relation to the matter or matters,' section 20(2) provides that nothing …

> *permits a deputy to be given power—*
>
> (m) *to prohibit a named person from having contact with P;*

36. Only the court, therefore, may 'prohibit' a named person from having contact with P. This gives rise to the following sorts of question:

- If the local authority is appointed as Mrs B's welfare deputy, and it says to one of her children that they may not see her on Saturday, because it is a sibling's visiting day, does this amount to prohibiting P from having contact (in the sense that contact on this day is prohibited) or not (in the sense that everyone may have contact, 'including you', but at set times)?

- Can a welfare deputy, without going to court, prescribe a contact schedule that limits family members to certain visiting days or hours?

- Can a welfare deputy, without going to court, suspend contact, for say a weekend to allow tempers to settle, or is that a prohibition of contact?

- Can a welfare deputy make contact conditional on a child fulfilling a condition which is relevant to P's welfare and the effect of their contact on P, such as undertaking an anger management course?

37. The Official Solicitor's position was that 'prohibited' has to be contrasted with 'restricted': See *Tool Metal Manufacturing Co v Tungsten Electric Co* [1955] 1 WLR 761. As a matter of ordinary language, a 'restriction' denotes a limitation of contact whereas 'prohibition' denotes a total prevention of contact. Therefore, a welfare deputy has power to limit or regulate contact.

38. Furthermore, a deputy may limit a family member's contact by making it conditional on the fulfilment of conditions, such as undergoing treatment, provided such conditions are necessary, reasonable, capable of compliance and proportionate.

39. Mr Simblet asked me to take the view that attaching such conditions amounts to, or be, a prohibition of contact.

40. The following table contrasts the powers conferred by sections 17 and 20.

The powers which may be included in a court welfare order extend in particular to:	***In contrast, the position where a deputy is appointed to make a decision or decisions is as follows:***
(a) deciding where P is to live;	*(a) Not one of the decisions excluded by section 20.*

	Therefore, by inference, the court may authorise a deputy to make this decision;
(b) deciding what contact, if any, P is to have with any specified persons;	***(b) Not one of the decisions excluded by section 20. Therefore, by inference, the court may authorise a deputy to make this decision, provided it does not infringe the following paragraph.***
(c) making an order prohibiting a named person from having contact with P;	***(c) Nothing permits a deputy to be given power to prohibit a named person from having contact with P (reserved to a judge);***
(d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;	*(d) A deputy may not refuse consent to the carrying out or continuation of life-sustaining treatment in relation to P (reserved to a judge);*
(e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.	*(e) Nothing permits a deputy to be given power to direct a person responsible for P's health care to allow a different person to take over that responsibility (reserved to a judge).*
	(f) A deputy may not restrain P — restrict P's liberty of movement or use, or threaten to use, force to secure the doing of an act which P resists — unless certain conditions are met. These include that 'the deputy is acting within the scope of an authority expressly conferred on him by the court' and that the deputy reasonably believes that it is necessary to do the act in order to prevent harm to P.

41. Looking at the emboldened passages, it seems to me that the powers which the court can confer on a deputy include deciding what contact P is to have with specified persons, provided no named person is prohibited from having contact with them. That must as a matter of simple practicalities include making decisions which in P's best interests apportion visiting times between relatives, so as to avoid conflict and the breakdown of the care package.

42. I agree that 'prohibit' refers to a total cessation of contact until further order, which is why the power is so intrusive as to be reserved to a judge. In my view, 'prohibition,' as in the Prohibition Amendment to the Constitution of the United States, most often indicates a decree or order forbidding something or stopping something.

43. No judge may empower a deputy to decide on P's behalf that it is in their best interests to prohibit contact with a particular person, including a family member. However, unless the order appointing the deputy provides otherwise, a deputy may make decisions which in P's best interests apportion visiting times between relatives, so as to avoid conflict and a breakdown of the care package. Obviously, that power has to be exercised in accordance with sections 1 and 4 and the court's directions.

44. Next is the issue of whether the court can authorise a deputy to suspend contact with a named person if a cooling off period becomes necessary.

45. As with most things, this may be a question of degree and practicalities. The fact that a deputy may regulate and tweak contact in P's best interests will include modifications from time to time to the contact schedule that increase one sibling's time and reduce another's, without any change in the objective of minimising conflict, facilitating contact and enabling P to have good quality contact with all of her children.

46. Likewise, asking someone to leave RB's home because they are behaving in a way others present feel is aggressive or disruptive is not 'prohibiting' contact with them, merely bringing that particular episode of contact to an end. The situation is the same, I would say, where the deputy requires a short cooling-off period, along the lines of 'don't visit again until the care co-ordinator has phoned and discussed with you how best to deal with what has just happened.' That is managing contact.

47. No deputy can effectively facilitate contact with family members and paid carers in P's best interests without this kind of necessary short-term power to manage contact 'incidents' that have an immediate detrimental effect on P. For reasons of public policy, the courts should be slow to create a situation where a deputy has no alternative but to apply to the court for an order each and every time a dispute involving contact occurs when the purpose of appointing a deputy is to deal with and manage periodic incidents and disagreements that hopefully can be resolved.

48. To sum up, unless the court's order appointing them provides otherwise, in my opinion a welfare deputy's powers include a power to terminate a particular episode of contact where that is necessary in P's best interests. The deputy may also decide on P's behalf that further contact shall not take place for a short period whilst the incident and its effect on P is being reviewed and discussions are taking place with the person concerned as to how best to regulate contact so as to avoid further incidents. That is all part of managing the contact arrangements so as to seek to ensure that P has contact that is in her best interests with all relevant 'named' individuals.

49. Beyond that, I think that any power a deputy has to 'suspend' P's contact with a named person, beyond a very limited cooling-down period or period of negotiation, should be authorised by a judge; and, if not as a strict matter of law then, in this case at any rate, on a best interests basis.

50. I am conscious that Court of Protection orders made by puisne judges in serious cases do quite often authorise a local authority (without appointing it as a deputy) to suspend contact with a particular person, provide for supervised contact to take place, or have a contact schedule attached to them.

51. The rationale behind orders authorising a local authority to suspend contact, without appointing it as a deputy is, presumably, that it is a decision for the court, and made by it. Although the authority is given a discretion as to when and how to give effect to the court's decision, in the same way that a surgeon authorised to perform an operation on an incapacitated person has a discretion as to when and how to perform it, the court has already decided the disputed matter on P's behalf. The local authority and its officers are simply acting on, and carrying out, a decision made for P by the court, not being deputised to decide the issue brought before the court of whether contact may be suspended. Provided the local authority stays within the boundaries of the court's decision, such a provision does not make it the 'decision-maker' any more than a decision that it is in P's best interests to undergo surgery makes the surgeon the 'decision-maker' because s/he has control of the operational detail. Ditto, conveying someone to prison in pursuance of a court order (it is not the gaoler's decision), executing a warrant, etc. The court has decided what is to be done, determined the matter in question, resolved on the action to be taken, etc. All that is left to do is to implement that decision.

52. Having considered the current situation carefully, I believe that it is in RB's best interests for the court to appoint the local authority as her personal welfare deputy for a period of 12 months. This will give it clear authority to co-ordinate and refine a workable care plan and contact schedule, without their decisions on such matters being continually appealed to a judge. During this year, I hope that the care plan can include mediation and/or other strategies that may gradually reduce the amount of conflict between family members and paid carers. If all concerned can try to make that work, it may not be necessary to 'renew' the deputyship.

53. I intend to limit the authority's powers as RB's welfare deputy to making decisions about the following matters:

    (a) co-ordinating, approving, implementing and periodically reviewing a care plan for her which is not at variance with the declarations made in the court's order and includes a contact schedule that sets out when her children may visit her at her home; and

    (b) (subject to sections 1 and 4) requiring a named person to leave RB's home immediately and/or not to visit there until that person has discussed with RB's care co-ordinator (or a person nominated by them) the reason for requiring this and has agreed how best to manage future contact so as to avoid the problem or incident recurring.

54. In order to provide clarity, the court also makes the decision (rather than deputising the local authority to make it) that it is in RB's best interests to authorise the local authority to suspend contact between RB and one or more of her children for up to seven days without further court order provided it reasonably believes this is necessary and proportionate for the purpose of reducing conflict in her home and/or to avoid the breakdown of her care package.

55. I do not myself think that it is appropriate for me to give a deputy the power to make contact conditional on PB or anyone else undergoing an assessment or some form of treatment. That seems to me to offend against the requirement that the powers conferred by me on the deputy should be as limited in scope and duration 'as is reasonably practicable in the circumstances.' If such a condition becomes necessary, because the care plan is becoming unviable, it would be more appropriate for the judge to make a one-off order after proper argument and consideration, rather than to give a local authority or individual a power of such a scope. In any case, PB is presently undergoing some form of psychological treatment.

§16 — ORDER AND DIRECTIONS

I would ask the parties to submit a draft order in accordance with the above judgment.

PENAL NOTICE

TO PB (THE APPLICANT)

YOU MUST OBEY THIS ORDER. IF YOU DISOBEY THE INJUNCTIONS MADE AT PARAGRAPHS 8, 9, 10, 11 and 12 OF THIS ORDER, YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.

UPON

(1) Hearing the submissions of Counsel for the Applicant, the First Respondent and the Second Respondent.

(2) Considering the oral evidence of Mr H (Manager, Older Persons Team), Mr S (Independent Social Worker) and PB.

(3) Considering the Position Statements of the parties.

(4) Considering the statements and other documentary evidence contained in the trial bundle, other than those documents covered by legal professional privilege.

(5) Considering such additional evidence received since the hearing as is recorded in the judgment which accompanies this order.

WHEREAS

(1) On the evidence, the court finds that:

(c) Mrs B is still able to articulate a clear wish to remain in her own home for as long as possible.

(d) Although RB lacks capacity to decide where to live, she is very near the boundary in this respect. Her strong and consistent wish to live at home is to be given very considerable weight.

(e) It remains in her best interests to continue to live at R Close and for care and family contact arrangements to be based around a life at home.

(f) Because her treatment and care needs are relatively simple, ordinarily it would not be difficult for her to live in her own home and to receive such care or help there as she requires.

(g) All of her children, with the possible exception of DB, have behaved unreasonably in relation to the matters before the court. RB feels that they interfere and she does not wish to live with or be looked after by them. She is upset that her children do not get on and are always arguing.

(2) The factor of magnetic importance in this case is to secure an arrangement that enables RB to live at home for as long as her health allows, and to manage any significant risk that she may lose her own home before her health requires that.

(3) The only significant present risk is that family conflict and/or family-professional conflict may make the provision of care at home untenable, for example because the care agency withdraws or because it is seriously affects RB's health.

(4) It is desirable to try to construct a framework that, as far as possible, addresses the risks posed to the viability of RB's residence and care plan by her children whilst reducing the need for the case to return to court. It is in RB's best interests to minimise the need for litigation and court intervention.

THE COURT DECLARES THAT

(1) RB lacks capacity to litigate and capacity to decide where to live, what care to receive from her family and other persons and what contact to have with them.

AND FURTHER DECLARES THAT IT IS LAWFUL AS BEING IN HER BEST INTERESTS FOR

(1) RB to reside alone at her current home.

(2) RB to receive such care as is set out in a care plan co-ordinated, written and periodically reviewed by the local authority after consultation with RB and her children in line with such legal requirements, codes of practice and departmental guidelines as are in force at the time.

(3) RB's care plan:

(a) To be managed, where possible, by an experienced care co-ordinator independent of the care agency and family members who can help to reduce, contain and manage family and family-carer conflict.

(b) To set out ways of managing any significant risks that RB may lose her own home before her health requires that.

(c) To set out what is required from <u>each</u> of RB's children in terms of their future conduct, the making of allegations and complaints and any behaviour likely to interfere with the provision of care to RB in her own home.

(d) To include consideration of all ways in which family and family-carer conflict can be reduced, contained and managed without the continual need for RB's welfare to be referred to a court, including:

(i) dealing initially with significant grievances by organising a meeting or discussion with a specified professional;

(ii) strategies for reducing interference with the work done by paid carers, such as requiring all complaints and concerns made by any of RB's children to be submitted in writing to the care co-ordinator, to be dealt with at her/his sole discretion, and/or to be dealt with at care review meetings;

(iii) mediation;

(iv) the appointment of an advocate for RB;

(v) agreed 'cooling-off' arrangements;

(vi) regular reviews of the adequacy of the care plan by the care co-ordinator or a person nominated by them;

(vii) case conferences and/or round-table meetings.

(e) To seek to ensure, within available resources, that RB has available to her a pool of paid carers who are familiar with her needs.

(f) To provide that personal care (other than the preparation and provision of meals) may only be provided by paid carers.

(g) To provide that PB's children may prepare and provide meals as specified.

(h) To apportion the time each week that Mrs B's children and her paid carers may spend with her, having regard to her need to have reasonable contact with all of her children, her health, the need to provide paid care to her and her need to spend some time alone or without family contact.

(i) To require that none of RB's children may be present at her home during such hours as are specified as being reserved for her to sleep, rest or have time to herself without family contact.

(j) To provide for monitoring RB's sleeping arrangements.

(k) To make provision for monitoring her weight and blood sugar levels.

(l) To require PB and paid carers to keep a record of food given to her at home.

(m) To make provision for ensuring that any signs of a return or worsening of her cellulitis or oedema are dealt with promptly and adequately.

(n) To include a visit at the end of each day by a paid carer, who may check RB's well-being, compliance with the care plan and (when asked for or appropriate) help with personal care.

(o) To include consideration of the desirability of RB attending a day centre and, if this is in her best interests, the arrangements for facilitating her attendance.

(p) To give the care co-ordinator a discretion to relax or modify any of the above requirements on a trial basis, on the basis of an agreement reached through mediation, or as a reward for conduct that has reduced the level of conflict to which RB has been subjected.

(q) To provide for RB's case to be returned to court if the above options have not effectively managed family and other conflicts such that there is a clear risk that the care plan will become unviable without a further court order, and with a view to asking the court to (for example):

(i) further restrict PB's contact with one or more family members;

(ii) suspend her contact with one or more family members;

(iii) make a person's contact or level of contact with her conditional upon their agreement to take some specific step (e.g., a carer's assessment, family work, mediation);

(iv) provide for contact with RB to take place away from her home and/or under supervision;

(v) impose penal notices on persons not currently subject to penal notices;

(vi) make a suspended committal order unless a party agrees to take some specific step (e.g., a carer's assessment, family work, mediation);

(vii) make a plain suspended committal order;

(viii) commit one of the parties.

AND ORDERS AS FOLLOWS

(1) Without the consent of the Official Solicitor, no application may be made or heard whilst RB's children are engaged in a process of mediation (or some similar process which has as its aim reducing family conflicts and/or reducing conflict between family members, professionals and paid carers).

Appointment of a deputy for property and affairs

(2) By a separate order of even date, PB is authorised to investigate RB's property and affairs and to report to the court as to the same, in order to enable the court to determine whether it is necessary to appoint a deputy for property and affairs for RB.

Appointment of a personal welfare deputy

(3) The relevant office-holder of the local authority is appointed as RB's personal welfare deputy for a period of 12 months from the date of issue of this order.

(4) Without prejudice to their powers under other legislation, the personal welfare deputy's powers shall be limited to making decisions about the following matters:

(a) co-ordinating, approving, implementing and periodically reviewing a care plan for RB which is not at variance with the declarations made in this order and includes a contact schedule setting out when her children may visit her at her home;

(b) Subject to sections 1 and 4 of the Mental Capacity act 2005, requiring a named person to leave RB's home immediately and/or not to visit there until that person has discussed with RB's care co-ordinator (or a person nominated by them) the reason for requiring this and has agreed how best to manage future contact so as to avoid the problem or incident recurring.

Suspending contact for up to seven days

(5) By decision of the court, the Second Respondent (local authority) is authorised to suspend contact between RB and one or more of her children for up to seven days without further

court order provided it reasonably believes that this is necessary and proportionate for the purpose of reducing conflict in her home and/or to avoid the breakdown of her care package.

(6) If contact is, or is to be, suspended for more than seven days, the Second Respondent (local authority) shall file a Form COP9 and arrange for an urgent telephone hearing to be heard within two working days of such application being lodged.

Matters which the court will consider if the case is returned to court

(7) In the event that the matter has to return to court, in addition to any orders specifically applied for, the court of its own motion will consider whether it is in RB's best interests, as being necessary and proportionate to protect her right to live and be cared for at home alone, for the court to:

a) Make 'unless orders' that require one or more family members to engage in mediation and/or an assessment of ways in which they may be helped to modify their behaviour so that RB's contact with them is less distressing and/or her independent life and care at home is less at risk.

b) Limit the rights of family members to receive information about RB's care and treatment and to make complaints on her behalf in respect of her care.

c) Exclude a person from involvement in treatment and care meetings and decisions concerning RB, if their involvement has obstructed, disrupted or interfered with the provision of paid care to their mother.

d) Reduce conflict by prohibiting, significantly reducing or supervising contact, or by providing that contact takes place away from her home.

Injunctions

(8) PB is forbidden from being present at R Court at any time his mother's paid carers or one or more of his sisters are present in accordance with the contact schedule that forms part of the care plan.

(9) PB is forbidden from being present at his mother's home during such evening, night-time and early morning hours as are specified in the care plan.

(10) PB is forbidden from acting in a manner which causes or is likely to cause distress to those caring for RB.

(11) PB, CL and LA are forbidden from obstructing, disrupting or interfering with the provision of paid care to their mother.

(12) PB, CL and LA are forbidden from commenting on or complaining about the provision of care to their mother or about each other's conduct to any person other than such person or persons as the local authority nominates from time to time.

Penal notice

(13) As regards PB only, the Court gives permission for a penal notice to be attached to paragraphs 8,9, 10, 11 and 12 of this order.

PENAL NOTICE — TO PB (THE APPLICANT)

YOU MUST OBEY THIS ORDER. IF YOU DISOBEY THE INJUNCTIONS MADE AT PARAGRAPHS 8, 9, 10, 11 and 12 ABOVE, YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.

Court review hearing

(14) Unless varied by subsequent order, the case shall be set down for a review on the **first available date after 1 July 2013**, with a time-estimate of half-a-day.

(15) The parties are encouraged to consider engaging in a mediation process before then.

(16) The hearing may be vacated by consent of the parties.

Non-attendance at future hearings

(17) If any of the parties do not attend a future hearing that affects their rights and freedoms and family contact, orders affecting their rights and freedoms and family contact, including costs orders, may be made in their absence.

(18) The court reminds the parties that the court rules clearly envisage that persons who provide the court with statements will be available for questioning and be able to justify their evidence and conduct as necessary.

Case conferences and round-table meetings

(19) Nothing in this order prevents the parties from consenting to hold a case conference and/or a round-table meeting if they consider that it would or may be helpful as a way of resolving issues so as to avoid the need to return to court.

(20) If a party unreasonably refuses to consent to such a proposed case conference and/or a round-table meeting, their refusal will be taken into account by the court when deciding whether it is justified for the court to order that party to pay all or part of the costs of any hearing which is then necessary.

(21) The court will assist the parties in any and all constructive attempts to resolve or determine significant matters that properly require the court's intervention or assistance, without any penalty as to costs. However, the court reserves the right to award costs against one or more parties if it is necessary in order to ensure that the court is not used to make decisions about disputed or relatively insignificant issues which the parties should be able to agree without recourse to the court.

Future committal applications

(22) Fact-finding must be kept to a minimum.

(23) Prior to any committal hearing, the First and Second Respondent may agree with the person in respect of whom the application is made for a further report or report(s) to be prepared in connection with possible alternatives to committal, that person's health and the likely effect of any committal on their health.

Service of this and future orders, care plans and contact schedules

(24) This order, and all future orders, care plans and contact schedules, shall be served on all of RB's children by the local authority, either by letter or (where agreed) electronically.

(25) All of RB's children must acknowledge service of orders, care plans and contact schedules within 14 days of the date on which it was/they were posted or sent electronically by confirming safe receipt in writing (by letter or email) to the local authority.

(26) Where service is through a party's solicitors, their solicitors must also confirm that their client has confirmed to them safe receipt of the order, care plan and/or contact schedule as the case may be.

(27) If the local authority does not receive written confirmation from one or more of RB's children within the 14-day period specified, it must forthwith make enquiries of them and notify the court of the outcome.

(28) An appropriate costs order will be made if a completely unnecessary court hearing is the consequence.

Future costs

(29) PB, CL and LA are warned that at future hearings the court will consider where appropriate whether it would be justified in ordering one or more of them to pay the costs of the application and hearing.

(30) The court will have regard to all the relevant circumstances, including:

(a) the conduct of PB, CL and LA before, as well as during, the proceedings;

(b) any refusal by PB, CL and/or LA to engage in a process of mediation or a process proposed by the local authority which has as its aim reducing the level of family conflict and its impact on RB;

(c) whether there was a genuine issue that required the court's determination, and whether a party is simply rearguing an issue which the court has already determined or made plain its views on;

(d) whether it was reasonable to raise, pursue or contest a particular issue;

(e) the manner in which the party has made or responded to an application or a particular issue; and

(f) whether they have exaggerated any matter contained in their application or response.

Liberty to apply

(31) Having regard to events since the last hearing and the terms of this order, the parties have liberty to apply for a period of 21 days from the date of this order, so as to be able to make any representations as to the terms and/or wording of the order which the parties were unable to make at the last hearing.

Costs

(32) No order as to costs, save a detailed assessment of any publicly funded parties' costs.

PENAL NOTICE

TO PB (THE APPLICANT)

YOU MUST OBEY THIS ORDER. IF YOU DISOBEY THE INJUNCTIONS MADE AT PARAGRAPHS 8, 9, 10, 11 and 12 OF THIS ORDER, YOU MAY BE HELD TO BE IN CONTEMPT OF COURT AND YOU MAY BE IMPRISONED, FINED OR HAVE YOUR ASSETS SEIZED.

SECOND ORDER

UPON

(1) Hearing an application made by PB of [address], who is the appointee of RB of [address]

THE COURT ORDERS AS FOLLOWS

(1) The applicant is directed to investigate as to the assets, property, income and liabilities of RB and report back to the Court of Protection by [8 weeks] by means of filing a duly-completed Form COP1A.

(2) Any person, including any bank or other financial institution, which possesses information concerning the property, finances or affairs of RB is hereby authorised and required to provide that information to the Applicant or his solicitors, Messrs [Name].

(3) For the purpose of giving effect to this order the Applicant and his solicitors are authorised to execute or sign any necessary deeds or documents.

APPENDIX A

IN THE COURT OF PROTECTION **Case No. 12017112**

IN THE MATTER OF THE MENTAL CAPACITY ACT 2005

AND IN THE MATTER OF RB

BETWEEN:-

PB

Applicant

And

RB

(by her litigation friend, the Official Solicitor)

First Respondent

And

A London Borough

Second Respondent

and

CL

Third Respondent

and

DB

Fourth Respondent

and

LA

Fifth Respondent

DECISION

District Judge Eldergill
Court of Protection, Royal Courts of Justice

§1 — INTRODUCTION

This decision deals with a fact-finding hearing held on 10-12 September 2012.

§2 — THE PARTIES TO THE PROCEEDINGS

The parties to these proceedings are as follows:

PB	Applicant	*Son of the person concerned*
RB	First Respondent	*The person concerned ("P"), by her litigation friend, The Official Solicitor*
A London Borough/ALB	Second Respondent	*The relevant local authority*
CL	Third Respondent	*Daughter of the person concerned*
DB	Fourth Respondent	*Daughter of the person concerned*
LA	Fifth Respondent	*Daughter of the person concerned*

§3 — RB's MENTAL CAPACITY

For the purposes of the Act, a person lacks capacity in relation to a matter "if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."[16] It does not matter whether the impairment or disturbance is permanent or temporary.[17]

The parties agreed that RB lacks capacity to litigate and to make decisions about residence, contact and care.

§4 — DR S's REPORT ON PB

16 Mental Capacity Act 2005, s.2(1).

17 Mental Capacity Act 2005, s.2(2).

Mr B did not agree to being assessed by a psychiatrist from the relevant CMHT but he was willing to see Dr LS, who had examined him before in 2008.

Dr LS is a consultant psychiatrist approved by the Secretary of State under Section 12(2) of the 1983 Mental Health Act as having special experience in the diagnosis or treatment of mental disorder.

Dr LS was asked to provide a report setting out the current state of PB's mental health; his recommendations as to any services which may assist PB; and his recommendations as to any strategies which may assist PB to manage his relationships with his siblings and (his mother's) paid carers. The underlying purpose of the report was to assist the court to determine the issue of Mrs B's best interests in relation to her care and her contact with her son.

I am conscious that PB's sisters are parties and that they will receive a copy of these findings. For the purposes of this decision, I have kept my summary of Dr S's report as brief as possible.

The following is a summary of some of the most relevant passages in the report:

36. In February 2002, a doctor provided a statement in relation to PB's eligibility for Incapacity Benefit. The main diagnosis was given as a 'chronic anxiety state.' (This may cast some light, I believe, on PB's conduct in court, and why he left the court building and walked out on his previous legal representatives shortly before one of the hearings.)

37. In 2005, PB said that he could not live in a hostel because 'the noise would be too much for me.'

38. In May 2008 he told Dr LS that he had in the past '*locked himself away as problems with nerves, arguing all the time.'*

39. He is clearly very close to his mother and it would be unfortunate if this relationship, the only one he has maintained throughout the years, were to be disrupted.

40. Mr B was dissatisfied with the visiting carers: *"people come round but they are rushing all the time, they have not got time to cook, it is the same old routine, for example they have left my mother unwashed again."*

41. He had not had any contact with a psychiatrist until Dr LS's initial assessment in May 2008. At that initial interview, Dr LS 'diagnosed a personality disorder with impulsive and paranoid features.' He was offered a referral for Anger Management, which he declined. He did accept a trial of a low dose of olanzapine, to reduce his arousal levels.

42. At the follow-up appointment in June 2008 he reported a modest improvement with the olanzapine, and agreed to consider longer term psychological therapy. He was referred to the local NHS psychology service. He but did not pursue the possibility because "*it is a waste of time seeing a psychologist, my mother said so, they cannot help me".* He elaborated that "*it is just a mild problem, no big deal, if you are not attacking people they attack you".* When I challenged him and pointed out that he might be able to change, he again resisted this suggestion: *"If I change the way I am you find that people take you as a soft person and you end up like everyone else, doing something you do not want to do.*"

43. He made little eye contact with Dr LS. He talked rapidly in a monotone, rarely checking to see the doctor's response. There was no evidence of hallucinations, delusions or formal thought disorder and he was not clinically depressed.

44. Others were invariably against him and he was never in the wrong in such cases: "*people should not be picking on me – if they do, I shout at them – there is no point complaining as no one does anything. What else can you do? So I do not think there is much wrong with*

me. Now they are all on my back – the judge, the carers." "*Everyone is doing everything wrong to me – it is not a Court of Protection, it is a business, they are as corrupted as hell*.'

45. At his initial NHS psychiatric assessment, in May 2008, PB was accompanied by his mother. He told Dr LS at the time: '*I have a personality disorder, I do not like people around me, it makes me aggravated, it can end in a scrap. I cannot take too much noise.'*

46. 'There can be little doubt that Mr B is suffering from a personality disorder' (paragraph 15.1).

47. He is deeply dysfunctional in most if not all areas of his life.

48. He would meet the criteria for a paranoid personality disorder. He agrees that he is excessively sensitive and does not forget perceived insults or slights. He also admits being suspicious, and the history as documented above provides many examples of his interpreting intentions as malign, … His combativeness and tenacious sense of personal rights are a constant thread running through the history and mental state.

49. He could not be shaken from his belief that therapy would not be helpful for him. Unless he is willing to accept treatment, the prognosis must be very poor, as paranoid personality disorders do not improve spontaneously with time. The only alternative open to the Court in my opinion is to strengthen the existing boundaries, adhere strictly to them and use legal means to enforce them if necessary.

50. There is no standard treatment for paranoid personality disorder, but psychological therapy and medication are used. Mr B has already received, and reported some benefit from, a low dose of an antipsychotic agent to reduce his hostility and insensitivity.

51. Various modalities of psychological therapy are advocated for personality disorders. Both psychodynamic and schema therapy are available within the NHS, although they are difficult to obtain and there are long waiting lists. Anger management courses are relatively easily accessed in the NHS.

52. As an interim measure, to assist him to manage his relationships with his siblings and his mother's paid carers I suggested two strategies to him for avoiding angry outbursts: one is to count slowly to 10 before responding to what he perceives as a provocative remark. The other strategy is that when he feels the urge to shout, he should immediately leave the room or building for a few minutes, returning only when he feels more calm.

53. In the first instance I would recommend that he be again referred by his general practitioner to the local NHS Psychological Therapy Service for an assessment.

§5 — THE DISPUTED FACTS

The local authority sought to prove 13 alleged facts:

1. 8 March 2011: 'PB called [the carer company] and was verbally abusive: "why the fuck did you send a carer to my mother? If you send a carer to my mother again I will fucking kick her out." PB terminated the call.'

NB is a sector manager of the carers who visit RB at home. The local authority relied on his statement, in particular paragraphs 12 and 13 at page C/120, and he gave oral evidence to the court. NB told me that this telephone call was made by PB to the out-of-hours team, not to him. The out-of-hours team then emailed NB, who said it was not safe to visit RB that evening. The carer company responded by doubling-up carers (PB left court for ten minutes at this point, saying as he left, 'Can't hear that lie.').

Under cross-examination, NB accepted that he did not mention doubling the number of carers in his statement, and nor was it referred to anywhere in the court bundle. He accepted that he was reporting what the out-of-hours team had told him. He had no first-hand knowledge of what was done or said. No contemporaneous case notes had been produced in relation to the allegation.

In his written response to the Scott Schedule, at H/255, PB accepted that he was upset about the issue of evening care. His mother had asked not to have evening care and at the time she had, or was believed to have, capacity to make such decisions (MG's assessment just over one month before concluded that RB had capacity to live as she chose). It had been agreed with VW, a local authority mental health social worker for older persons, that RB's care would consist of a morning visit and a lunch-time visit, i.e. no evening visit. PB was willing and able to provide the evening care and he was providing RB with a home cooked meal, which she preferred, and putting her to bed. Despite his mother's wishes and this agreement, the carer company continued to send out carers in the evenings. These carers were young and inexperienced and were unable to provide the care that RB needed. All of this was communicated to the company but they continued to send carers. PB became increasingly frustrated as he felt that he was banging his head against a wall.

Under cross-examination, PB accepted that he did make a telephone call that day to complain about the evening care, which his mother did not want and which he did not want. He accepted that he used the language quoted:

> *Did you say 'why the fuck did you send a carer to my mother'?*
>
> *'Only on the phone, remember.'*
>
> *Did you also say, 'If you send a carer to my mother again, I'll fucking kick her out.'*
>
> *'I did not mean it, just an expression.'*

In his oral evidence, PB accepted that he terminated the call ('Arguing all the time') and that he did not tell staff subsequently that he didn't mean what he had threatened ('If go again … fucking kick her out'). He thought that 'probably' he did apologise but accepted that this was not written down anywhere. Furthermore, his response to the Scott Schedule made no mention of an apology and he could not remember who he apologised to or when.

Counsel for PB told me that PB's call followed a long cycle of correspondence and communication with the carer company about his mother not wanting evening care: 'Given the lack of response, perhaps it was not surprising that matters reached this pitch.'

In my view, the evidence relied upon to show that the number of carers was doubled up and that PB apologised after the incident is weak and unsatisfactory.

Finding 1

> ***On the balance of probabilities I find the allegation proven as stated: On 8 March 2011, PB called [the carer company] and was verbally abusive, saying 'why the fuck did you send a carer to my mother? If you send a carer to my mother again I will fucking kick her out.' PB terminated the call.***
>
> ***In terms of the context, I find that PB had become increasingly angry about the continuation of evening visits by carers. The language, volume and tone that he used to express his anger were triggered by his belief that evening visits were contrary to what had been agreed.***

2. 9 March 2011: 'PB was verbally abusive and threatening towards a carer on the telephone. She terminated the call as a result. When PB called back he raised his voice and made threats: "If you put the phone down again I will fucking come round and smash the place up." The second call was also terminated as a result of his threatening behaviour.'

This incident is said to have taken place on the day following the first allegation.

The local authority again relied on the evidence of NB, at C/121 (para.16). He told me that this allegation also concerned a telephone call to the out-of-hours team. The carer said that she had disconnected the line because PB was screaming at her and threatening her. NB did 'not know what these threats were.' However, the out-of-hours team told him that when PB called back he made the threats recorded in the allegation.

In his written response to the Scott Schedule, PB noted that no contemporaneous care note had been produced to substantiate what was claimed. As in the case of the first allegation, he was upset that the carer company continued to send evening carers and by the quality of care being provided. The carers were young and inexperienced, and unable to persuade his mother to accept their care. As a result, RB was left unwashed for more than a week. Since then, the care plan has been amended to provide a pool of 4-5 carers/support workers who are familiar with RB, to minimise the chances of her refusing care.

In his oral evidence, PB admitted this allegation without demur: 'That's true.' He made no attempt whatsoever to deny it.

His counsel told me that there was no suggestion PB had ever been violent to carers, and nothing to suggest that anyone believed he would do what he had threatened. There was no record of what the carers said, and they were unlikely to record their own rudeness. (For the sake of completeness, PB did not claim that they were rude).

Finding 2

On the balance of probabilities I find the allegation proven as stated: On 9 March 2011, 'PB was verbally abusive and threatening towards a carer on the telephone. She terminated the call as a result. When PB called back he raised his voice and made threats: 'If you put the phone down again I will fucking come round and smash the place up'. The second call was also terminated as a result of his behaviour.'

In terms of the context, I find that PB had become increasingly angry about the continuation of evening visits and the quality of the care his mother was receiving.

3. 5 April 2011: 'Case notes record that PB called office on previous day accusing staff of not carrying out their job. He was very rude to Anna (office staff) and claimed there was no point in sending carers as they are not doing anything except giving medication. RB has been refusing personal care and PB expects carers to forcibly wash her. It has previously been explained to PB that carers are not permitted to do this.'

The local authority relied on H/187, which is an email sent by manager NB at 1.20pm that day to VW, a local authority mental health social worker. The email refers to PB calling the office 'yesterday', i.e. on 4 April, and being very rude to Anna (office admin).

In oral evidence, NB told me that his email was based on information given to him by Anna. He had no personal knowledge of what was said or how it was said. He could not recall if Anna said in

what way PB was rude to her or if she told him the words used. He could not say if it was true that the carers were not giving RB a wash at that time. it was certainly true that his care staff could not physically force her to wash. At the time, it was not clear if RB had capacity to decide whether or not to wash, but it was her wish not to be washed: Staff 'would not overrule her if she said categorically that she did not want to wash.' There were times when RB did not get on with staff so that they could not deliver care.

In his written response to the Scott Schedule, PB stated that it was 'uncontroversial' that his mother did 'not respond well to inconsistent and inexperienced carers.' She often refused care in such circumstances. The social worker PH had noted that she 'co-operated much better with support work staff with whom she was familiar, and that a significant effort had been made to recruit and retain experienced and consistent staff where possible, with a current core team of two workers.' PB was pointing this out and understandably was upset that his mother was being left unwashed.

The local authority noted that his written response did not admit or deny the allegation in the Scott Schedule but sought to explain the background from PB's viewpoint.

Under cross-examination, PB accepted that the first two sentences were correct: 'Case note records PB called office on previous day accusing staff of not carrying out their job. He was very rude to Anna (office staff) and claimed there was no point in sending carers as they are not doing anything except giving medication.'

> *'I agree I was rude to Anna … NB had been round and cancelled the evening care. Lot of issues. Not case that it's justified, it's frustration. Probably did swear on the phone. A bad habit … I did shout at her.'*

He did not agree with the third sentence: 'RB has been refusing personal care and PB expects carers to forcibly wash her.' According to PB, his mother had not been refusing care:

> *'Two young carers were sent, laughing as they went out, sending the wrong people, they did not wash her because they weren't doing their job … RB was not refusing … Mum said they didn't often offer to wash her.'*

Finding 3

> ***On the balance of probabilities I find that the following part of the allegation is proven: On 4 April 2011, PB called the office accusing staff of not carrying out their job. He was very rude to Anna (office staff) and claimed there was no point in sending carers as they were not doing anything except giving medication.***

The significance of allegations 1-3

Counsel for the Official Solicitor invited me to accept that allegations 1-3 'are of some significance. They give rise to concern about PB's conduct towards carers and are likely to occur again without injunctions.' I accept that the three allegations are significant.

4. 19 April 2011: 'PB refused access to carer.'

The local authority relied on the case notes at H/219a and H/219b, produced on the day of the hearing.

The record at H/219b was made by NB who personally took the call from RB's daughter CL.

According to the email at 219b, sent by NB at 1.59pm on 19 April 2012, 'The carers went at lunch as requested and PB was present. PB refused to allow access to the carers saying that Mrs B is fine.'

According to social worker VW's note at 219a of a telephone call to PB at 3.23pm that day, 'Spoke to PB who is agreeable for me to visit Mrs B tomorrow, 20 April 2011 … Mr B said the carers visited at lunch-time and he told them Mrs B was fine and as he was with Mrs B they did not come in.'

According to NB's oral evidence, it was LA's husband who went to the hospital, not CL's; he did not go to the property himself; he could not remember which carers went; he could not say whether RB was at home to be visited or was still in hospital.

PB's oral evidence was likewise unsatisfactory and vague. Initially, he told me that his mother had gone into hospital the night before and had not yet returned home. Later on, he said that the door was open and the carers walked right in; he did not deny them access. Later still, he said that the carers 'looked into building and did not want to come in. Mum was not there'; 'I don't even know if my mum was in … If she was there I wouldn't have refused them access'; 'I'm not sure if she was there'; 'I wouldn't have refused access, I wouldn't have done that.'

Whatever happened on 19 April 2011, evidently it was not thought to be sufficiently significant at the time for any one involved to make a clear note, or to be able to recall the events now with any reliability. No one could tell me whether RB was at home at the time or was still in hospital.

Counsel for the Official Solicitor agreed with PB's counsel that the file notes were tenuous and their accuracy was disputed.

In my view, the allegation is not made out on the balance of probabilities. Such limited evidence as there is for the allegation is vague, confused and wholly unsatisfactory.

Finding 4

On the balance of probabilities, the court finds the allegation that on 19 April 2011 'PB refused access to carer' not proven. Its evidential value is 0.

5. 10 May 2011: PB refused access to the morning carers and told them not to come back at lunchtime (previously, the date was erroneously given as 5 May 2011).

The local authority relied on the evidence of NB, at C/124 (para. 26). NB told me that carer K had reported to manager MC that PB had denied access. NB was reporting, and repeating, what MC said.

According to PB's response to the Scott Schedule, PB accepted that he had refused access to the carers in the morning. However, he pointed out that a meeting was due to take place that morning with social worker PH to discuss RB's proposed move to B Lodge for respite care. Given the meeting, PB thought that carers would be in the way and he agreed with the company that no carers would be sent that morning. Because of a communication error, they were still sent and B told them to come back at lunchtime when the meeting would be over. In the circumstances, it was perfectly reasonable for PB to request that no carers attend that morning. Important discussions were taking place and PB was there to provide any care required by his mother.

Under cross-examination, PB accepted that he refused the carers access and also that he told them not to come back at lunchtime: 'That is correct.'

Counsel for the Official Solicitor took the view that this refusal of access was less serious than some of the other allegations and I agree.

Finding 5

On the balance of probabilities, the court finds the allegation that on 10 May 2011 PB refused access to the morning carers and told them not to come back at lunchtime to be proven.

The court also finds that this breach was relatively insignificant and there were special circumstances that day which mitigated the refusal.

6. 26 May 2011: 'PB was extremely rude and abusive towards reception staff at RB's GP's practice. He used foul language in the presence of other patients and a letter had to be written to him about his conduct.'

The local authority relied on the evidence of the GP, Dr D, at C/152, para. 6. She was not called to give oral evidence.

In his written response to the Scott Schedule, PB denied that he was extremely rude and abusive to reception staff (H/260). He was never sent a letter; rather, he was required to pick it up from the surgery, 'when he conducted himself perfectly appropriately.' Dr D's letter was not in the bundle. He acknowledged that he was upset with the GP surgery because they were withholding his mother's assessment from him.

Under cross-examination, PB accepted that 'there was a disagreement.' He thought that 'they had got out of, reneged, on their promise.' He accepted that he raised his voice and tone. Initially, he said that it was not true that he swore at surgery staff but he then told me, 'I did swear; that's the problem I've got.' 'Knowing me, if I had an outburst I probably did.' He had had 'one outburst in 42 years at that surgery.'

Counsel for the Official Solicitor noted that Mr B admitted an outburst and that he probably swore. There was nothing inconsistent between that and what Dr D said at C/152. Her evidence is not really contested, albeit hearsay.

Finding 6

On the balance of probabilities, the court finds the following allegation to have been proved: that on 26 May 2011 'PB was extremely rude and abusive towards reception staff at RB's GP's practice. He used foul language in the presence of other patients and a letter had to be written to him about his conduct.'

7. 7 June 2011: 'PB had to be removed from the hospital by security guards, he was disruptive and verbally agitated.'

The local authority relied on the contemporaneous note at H/188, which is a record of a telephone call from Dr Shaw taken by EC. 'Dr S fed back that son/PB had to be removed from hospital today by security guards, he was disruptive verbally agitated as declined access to [h]is mothers medical records.'

According to PB's written response to the Scott Schedule, PB accepted that he had been upset. He had agreed with social services, in his mother's presence and with her agreement, that she would have a capacity assessment and that a copy of the assessment would be made available to both of them. However, 'the local authority then reneged on this agreement and denied PB access to the document.'

In cross-examination, PB said that 'If you're asking for a form and they're not giving you the form, what are you to do? You're going to get agitated and distressed.' 'I'm not leaving until I've got the form … I've given you my view.'

Finding 7

On the balance of probabilities, the court finds that on 7 June 2011 'PB had to be removed from the hospital by security guards and was disruptive and verbally agitated.'

8. 1 July 2011: PB shouted aggressively at a service user at B Lodge. He picked up a chair and was pointing it at the service user. PB was aggressive and out of control. RB was pleading with him to stop and go home. PT [Assistant Manager at B Lodge] felt unsafe around PB.'

The local authority relied on the statement of PT at C/107-108.

PT did not make a contemporaneous note. She did forward a statement to head office but it is not in the bundle (her statement in the bundle uses the word 'respondent' rather than head office).

In her oral evidence, PT said that she did not see what went on initially and she was relying on what the carers told her.

I was told by PT that L is in his early 70s and suffers from dementia. He has a poor short-term memory. He is taller than PB, slender, strong, friendly and jovial. He mobilises well. PT was not aware that L had ever attacked, hit, sworn at, or intimidated a service user, staff member or visitor. He did not wander into other residents' rooms. He 'is a TV person who goes from his room to the lounge. He may be forgetful but he knows where his room, the lounge and the toilets are.' He says, 'my room is no. 67.'

The incident was reported to the police, 'who took statements,' including one from PB. The court had not seen these statements. PT did not know the contents of these statements.

PT told me that statements were taken by care home staff from C (C/110), E (C/111) and CY (C/112). In cross-examination, it was suggested to her that the three of them described the incident in the same way, 'almost word for word.' Although their statements were similar, PT did not think that the three staff members 'wrote them together'.

As to this, I find that C and E's statements are almost identical. Either one of them saw the other's before writing their statement or they were drafted by them together. The standard of English in C's statement is very poor. Neither her statement nor E's imparts much information; only that they heard PB shouting at his mother, that the police were called and that PB accused L of holding him around the neck.

CY's statement is more informative. The first she knew of an incident occurring was 'when I overheard RB's son shouting aggressively to L never to touch him again' (C/112). PB 'rushed into

the lounge to pick up a chair to point at L. And was about to use the chair against L. His mum was shouting telling him to stop. I pulled L aside and run to phone the senior on duty. PB still continued to exchange words with L, saying 'I don't want to see you with my mum.'

According to PT, CY called the main office to seek assistance at around 7.10pm.

When PT attended the scene in response to CY's call, she asked PB and L what was going on. PB said that L had held him around the neck and slapped him in the face.

According to PT, CY was standing between PB and L, and CY looked scared. PB was not medically examined but he had no obvious physical signs of injury (slap marks, redness of the skin, etc). He was 'very aggressive and out of control … shouting at the top of his voice.' 'I couldn't get a rational response from him. He kept saying that L needed to be controlled.' 'I felt unsafe around him because he was so aggressive and verbally aggressive and what I was saying had no effect on him, it didn't sway him. I felt that he was out-of-control and I was worried that he would lash out at me.' She felt that if she pushed any further, 'he might have retaliated.' His mother 'was anxious and nervous and couldn't calm her son down. She was upset and telling him to go home. He did not threaten to hit me and nor did he hit me. It was the volume. I tried to calm him down, using all my experience.' PB 'was shouting. He would not respond to me so I had to call the police. 'We got L to sit down, then I explained to PB that the police were being called because I was not getting through. He was shouting that he wanted to talk to the police. PT told PB, 'This is a residential home for the elderly. You can't behave like this … I went to the office and dialled 999. He was hyper, not in control … PB replied that he wanted to speak to the police. I walked away to make the call, PB walked behind me, shouting and saying that he had been hit. I went to my office. He came down with his mother behind him. I was concerned about his aggressive behaviour. Reception staff came to see what was happening.' His mother said, 'Calm down, Paul; Go home, Paul.' While in PT's office, he was given some paper and 'began to write down what is written here, while the police were on their way. He started to write out a complaint about the incident just before the police arrived. He was now much calmer than before.' He then gave PT his note, which appears in the bundle at C/113:

> *1/7/2011*
>
> *Time 7.20pm. L tried to put his arm round & he was goading me. I told L to back off. He did back off.*
>
> *Yesterday 30/6/2011. L done the same thing slap me round the face. But today he took it too far.*
>
> *Yours truly PB.*

Police spoke to PB and asked him to leave the building. He left when told to and was not charged with any offence.

PB has consistently stated that L assaulted him and that he was acting in self-defence. He denies that he 'lifted a chair to hit L with it.' In his written response to the Scott Schedule, he stated that L had touched him provocatively on two previous occasions, slapping him in the face on 30 June 2011 (see C113). PB backed down on both of those occasions. However, on 1 July 2011, L took it too far when he grabbed PB around the throat. PB was very upset at being assaulted and he picked up a chair in self-defence to put some distance in between him and L.

In cross-examination, PB said that L assaulted him, holding him in a head-lock and trying 'to dig my eyes out. I've been stabbed in the head twice by a mental health person. I'm not going to allow that again.' PB said that he did pick up a chair, in order to frighten L off. L wasn't calming down

and ‘still wanted a fight.’ There was no space to swing the chair. L was ‘outside in the hallway, I was in the kitchen, with the door frame in between us, preventing the chair from being swung.’ He did not lift L and throw him like a ball: ‘He was too strong. I couldn’t throw him on the floor.’ He did not go down, he came back at me.

PB accepted that he was shouting at the top of his voice, that PT and his mother were telling him to calm down, that his mother was upset and that initially PT couldn’t get a rational response from him: ‘I’d just been assaulted.’ He began to calm down once L had sat down, and before he followed PT downstairs. He does not remember CY or anyone else standing between him and L.

Counsel for the Official Solicitor referred PB to his note, C/113, and pointed out that his note referred to two incidents, one from the previous day. PB’s note suggested ‘that all L did was put his arm around you … There is nothing in the note about him attacking you, punches, holding you around the throat?’ PB replied that he didn’t remember CY or anyone else standing between him and L and confirmed that L did back off when PB lifted the chair.

In his oral submission, counsel for PB reminded me that no charges were laid. The notes attached to PT’s statement were not in the correct form, and were almost word for word copies of each other. PB said he had been attacked by L and also by him the day before: see C133. There was no evidence that he has lied about that. Reports from the nurses record PB ‘speaking about [L] hold him in his neck’ and ‘shouting aggressively to L never to touch him again.’ PB’s response to the perceived threat was not unreasonable.’ PT admitted that she did not see what took place.

In his oral submission, counsel for the Official Solicitor pointed out that there were two issues to determine: (a) whether the court accepts PB’s evidence on self-defence before Ms T arrived, including what Ms T said about L’s character; (b) in the light of (a) whether PB’s behaviour after Ms T arrived was justified?

In my opinion, CY’s statement is revealing. The first she knew of an incident occurring was ‘when I overheard RB’s son shouting aggressively to L never to touch him again.’ This is consistent with PB’s note at the time, ‘L tried to put his arm round & he was goading me.’ As counsel for the Official Solicitor implied, it is unlikely that L did more than that, given that PB did not record having been punched and nor can any of those present recall him shouting out that he had been punched. The fact that PB picked up a chair and pointed it at L, but did not strike L, is consistent with using the chair as a barrier or block, in self-defence. PB had accepted many of the allegations put to him and therefore some weight was to be given to his consistent assertion that he was acting in self-defence. Given the location (a facility for frail, older, people), L’s mental health, age and circumstances and the distress caused to his mother and other persons present, in my view PB’s reaction was excessive and reflected his problems with anger management, shouting and swearing.

Finding 8

As drafted, the allegation gives an incomplete and potentially misleading account of the event in question. On the balance of probabilities, the court finds that on 1 July 2011 a resident at B Lodge goaded PB and put his hand around PB’s neck. This resident had behaved in a similar fashion the day before. PB reacted by lifting a chair and pointing it at the resident and telling him to back off. Because of his problems with self-control, anger management, shouting and swearing, PB’s reaction to the resident’s behaviour was disproportionate, having regard to the location (a facility for frail, older, people), the resident’s mental health, age and circumstances and the distress caused to his mother and others. His mother and staff members were upset by his shouting and swearing. Some staff members thought that he was out of control and they felt unsafe. The police were called.

9. 9 August 2011: 'Dr D reported that PB had been verbally abusive on the telephone and had been verbally abusive in the surgery in May when a letter had to be written to him.'

The local authority relied on paragraph 7 of Dr D's statement at C/152 and on the note made of Dr D's telephone call on 16 August 2011: 'Dr D reported son, PB, who has been verbally abusive over the phone on 9th August. Previously verbally abusive in the surgery in May …' He was requesting access to his mother's medical records and a mental health assessment for the Court of Protection.

PB told me that he could not 'remember what happened on that day.'

Dr D's witness statement does not refer to any verbal abuse, and the note of her telephone call to the social worker on 16 August does not state what was said by PB that amounted to verbal abuse.

In my opinion, the evidence of verbal abuse is unsatisfactory. Dr D's witness statement does not refer to any verbal abuse. It records that PB 'spoke for a long time' and that she said that she would speak to the social worker. This she did on 16 August. Dr D's telephone call to the social worker was not made until a week later, when they discussed various aspects of RB's case and PB's involvement.

Finding 9

On the balance of probabilities, the court finds the allegation that on 9 August 2011 PB was verbally abusive to Dr D on the telephone is not proven. Its evidential value is 0.

10. 15 August 2011: 'PB could be heard raising his voice to RB on the telephone resulting in RB becoming very distressed and agreeing to end the call.'

The local authority relied on social worker EC's email of 15 August 2011, at H/183, and on paragraphs 8-10 of social worker EC's witness statement at C/73. For medical reasons, EC could not attend court to give oral evidence.

It would appear from the email of Monday 15 August 2011 that the alleged incident took place on Friday 12 August 2011. EC and CL visited RB on that day and EC telephoned PB at his mother's request and in her presence. RB became 'very tearful and distressed' and EC ended the call with her consent.

In his written response to the Scott Schedule, PB 'accepted that the conversation was about his mother's move to TT. PB knew that his mother wanted to simply return home and that she was confused by all the changes and the pressure which had been placed on her to move to TT. PB was trying to explain this to his mum but she didn't fully understand at the time so she was upset. At all times PB was protecting her interests.'

In cross-examination, PB agreed that he raised his voice and that his mother was distressed. His mother 'was deprived of her liberty; everyone knows that. I said to mum, "You don't have to accept this or move to TT. You still have a choice. You can go home." I had to shout at her because she was shouting at me; she calmed down when she realised what I was saying.'

Finding 10

As drafted, the allegation gives an incomplete and potentially misleading account of the event in question. On the balance of probabilities, the court finds that on 12 August 2011 PB raised his voice to RB on the telephone and that this contributed to her being very distressed and the call being ended. The call was instigated by CL and RB was already very upset and sobbing when the call began.

Additional allegations

There were three allegations not in the Scott schedule which the local authority sought to prove. These alleged facts were set out in Mr H's statement of 29 August 2011, at C/240 and C/241, and they were not received by PB until 31 August 2011. The court accepted that the material was relevant and also the Official Solicitor's submission that an adjournment to deal with the three allegations properly was not required. PB's counsel was allowed time to take PB's instructions on the three matters.

11. Sunday 6 May 2012: PB was present at his mother's flat during his sister LA's contact time and his presence was not justified by any need for him to provide his mother with emergency care.

PB's solicitor admitted on his behalf that he should have left ten minutes earlier (G/159). PB had not seen his mother since Thursday 3 May 2012. He arrived later than planned, having purchased a wheelchair and some scales for his mother on the way. She told him that she was starving and PB took time to prepare her lunch and dinner and to cut her toe nails. When LA arrived, it was clear that PB was about to leave. LA's response to PB's solicitor's email can be found at G/164 and a carer's note is at H/154.

PB told me in his oral evidence that he was at his mother's flat during his sister's contact time. This was because his mother had not had a wash or anything to eat and he needed to provide emergency care: 'Yeah, that's correct … As soon as L arrived, I left anyway.' PB described his presence as being 'an accidental breach, an emergency, I did not regard it as a breach.' He said that his sisters had been present 'at my visiting times as well' but did not give any examples or detail in support of this contention.

Counsel for the Official Solicitor noted that PB had admitted that he was present during LA's contact time and suggested that the allegation was 'not so significant' as some others.

Finding 11

On the balance of probabilities, the court finds that on Sunday 6 May 2012 PB was present at his mother's flat during his sister LA's contact time. He was running late because of care that he had given to his mother. Although a breach of the order, there were mitigating circumstances in that he genuinely believed that his mother needed this care from him. He was preparing to leave when his sister arrived.

12. 5 July 2012: Whilst in the lobby area of the court PB raised his voice and was verbally aggressive towards his two sisters, CL and DB. This abuse went on for about ten minutes by which time the sisters were reduced to tears and visibly upset. They left the room with the Official Solicitor's counsel, to compose themselves.'

Mr H's note of this incident can be found in the court bundle at C/240.

In his oral evidence, Mr H told me that the parties, their representatives and witnesses were sitting in the waiting area outside Court 55. He 'saw PB raise his voice and become verbally aggressive. He interrupted CL's and DB's conversation, saying "That's all lies" … I'm the only one who cares about mum; the only one who does anything.' He was speaking in a loud voice and with an aggressive tone and manner, providing a commentary on what they were saying for slightly less than ten minutes. He did not swear or physically threaten his sisters. DB was tearful and visibly upset. CL was also upset but Mr H did not see her in tears. The Official Solicitor's counsel walked out of the room with the two sisters and, after that, it did not take PB long to calm down. Mr H said that he had been involved with the family for two years. He was shocked 'and did not expect it in a court of law. I've always had a civil relationship with him. I can operate with him but he and his sisters do not get on.'

In his oral evidence, PB accepted part of the allegation. He agreed with who was said to have been present. He also agreed that he shouted at CL, to 'tell her to stop lying all the time.' He said that, earlier in the litigation, CL had alleged that he had misused £7,000 of his mother's money. He remained where he was when CL and DB left the room. He said that he only interrupted once and that his sisters did not ask him to calm down. He did not see DB crying and denied making her cry: 'You can't blame me. It's not my fault.'

Counsel for the local authority told me that Mr H's oral account of what occurred accorded with her note of what happened, and counsel for the Official Solicitor invited me to prefer Mr H's evidence. PB's counsel reminded me that PB's sisters were, and are, privy to the lawyers' conversations because they are acting in person. They are personally involved in the discussions about changes to the care regime or order and this can make PB feel excluded and disadvantaged. The sisters had made serious untoward allegations about PB which he resented. With more active management, the incident 'could have been nipped in the bud.'

I accept Mr H's account. I found him to be calm, balanced and ready to concede valid points. Unfortunately, the behaviour alleged by the local authority in allegation 12 is not a one-off within these proceedings.

Finding 12

On the balance of probabilities, the court finds that on 5 July 2012, 'whilst in the lobby area of the court PB raised his voice and was verbally aggressive towards his two sisters, CL and DB. This went on for about ten minutes by which time one of his sisters was reduced to tears and both sisters were visibly upset. They left the room with the Official Solicitor's counsel, to compose themselves.'

13. 31 July 2012: When PB realised that care staff were present he did not leave as per his obligations but stayed and became verbally abusive towards the carer RD in front of his mother using inappropriate and threatening language. The police were called and PB eventually left. RB was very upset by the incident and did not attend the hairdressers. RB advised the carer that she did not want that to happen again. Although there may have been confusion about the time slots, PB should have left as soon as he realised a carer was present as per the obligation set out in the Court Order.'

According to the social worker Mr H's statement at C/241,

> *'The carer had called a cab to take PB to the hairdressers. About the time they were about to depart PB arrived at RB's flat to visit. When he realised the care staff were present he did not leave as per his obligations but stayed and became verbally abusive towards the*

carer in front of his mother using inappropriate and threatening language. The police were called and PB eventually left. The carer recorded that RB was very upset by the incident and did not attend the hairdressers. RB advised the carer that she did not want that to happen again, a reference to PB being aggressive and abusive to the carer in front of her. A copy of the care notes for the day is attached [see H/340].

It is accepted that there may have been confusion about the time slots for the care plan. However that does not excuse that PB should have left as soon as he realised a carer was present as per the obligation set out in the Court Order. It does not excuse PB's behaviour whereby he was abusive and aggressive towards the carer in front of his mother. RB was distressed and upset by PB's behaviour and it is concerning that PB was unable to control his temper in front of RB.'

In his oral evidence, Mr H accepted that RD's attendance at that point in the day was unexpected. She did not normally visit at that time. There had been four or five changes to the care plan during the past few months and there may have been confusion. Mr H could not say that RD's attendance at this time was discussed with PB in advance. The situation was unfortunate given the restrictions on PB.

Mr H only learnt of the incident the following day. He tried to sort out the arrangements for the following week. In his view, PB 'should have walked off [on seeing R] and contacted me' about the situation.

In her oral evidence, the carer RD accepted that her statement at C/246 and C/247 had been written by her on 5 September 2012. She said that RB 'was all ready to go and looking forward to having her hair done. She then changed her mind. When PB asked where I was taking RB, his tone changed and RB changed her mind: "No, my mum doesn't want to go." PB was shouting loudly and RB was upset. He threw the papers around, saying, 'where is the new care plan?' Then RB asked about the care plan. PB was getting really angry and was shouting until the police arrived. He shouted for a few minutes. RB said, "why are you swearing?" I can't remember which swear words he used. I simply remember RB crying and saying, "stop swearing." RB was crying for a few minutes and seemed overwhelmed by the whole situation. I went into the bedroom to put some clothes away. PB started doing some chicken wings while waiting for the police. He was still agitated but had calmed down. RB was still emotional and asking why when I left, after 45-60 minutes. I had not seen RB that upset before.'

RD believed that she made the hairdresser's appointment for RB about a week before and that it was for 3.30pm. She wrote the hairdresser's appointment down on RB's calendar. PB had been using that time of the week to visit his mother. He turned up expecting to see his mother there. He was frustrated and went into another room, the kitchen. He was shouting and kept saying, 'Where is the care plan.' He was upset that he was not able to see his mother as per the care plan. He asked RD to contact the office. Initially he said, 'Hurry up and bring her back to see me,' but his tone of voice then made his mother change her mind.

In his oral evidence, PB said that no one had contacted him beforehand to tell him that his mother would not be available to see him. He believed that he had no other visit left that week because of a change to the day centre visiting arrangements. He did not shout at RD but he did say to her, 'You can leave if you like; there's no care plan in place.' RD replied that she was not leaving and said that she was taking his mother to the hairdresser's. At that point, RB said that she wasn't going. RD made some phone calls. The only care plan there was one done the previous year by EC.

In cross-examination, PB accepted that he was aware of the court order at F/30 and of the restrictions set out in paragraphs 7 (He must leave the property), 10 (Forbidden from causing distress) and 11 (Forbidden from complaining other than to MC or Mr H). He accepted that he

hadn't left the property even though RD was there. He was pacing around the property and shouting and he threw the case notes to the floor. His mother was upset and told him to calm down; she didn't tell him to stop swearing. He was not trying to intimidate RD by raising his voice; 'I was upset with myself.' He denied that he was unable to communicate with people calmly and that his only method of sorting a problem out was to shout.

Finding 13

On the balance of probabilities, the court finds that on 31 July 2012 care staff were present with RB during PB's contact time and a hairdresser's appointment had been booked for her by a carer. The only care plan that could be found was one from the previous year. PB did not leave as required by the court's order. PB became verbally abusive towards the carer RD in front of his mother using inappropriate and threatening language. The police were called and PB eventually left. RB was very upset by the incident and did not attend the hairdressers.

§6 — SUMMARY

I agree with Ms Bhogal, counsel for the local authority, that the consistent theme is PB's confrontational approach and 'manner of communication' when challenged or frustrated: his tone, volume, demeanour, volatility and offensive language. His behaviour often upsets his mother, sisters and professional carers, or alienates them, so as to reduce his chances of achieving the changes he seeks.

I also agree with Mr Buttler, counsel for the Official Solicitor, that a key issue is whether his conduct indicates that 'without an injunctive order there will be an obstacle to the provision of care to RB. That is why we are going down this fact-finding route.' According to Mr Buttler, 'PB's inability to express his views without losing his temper indicates the need for such an order. If he is not getting his way there is a real chance that he will shout and swear at people.'

I do not believe that all of the current problems within the family can be laid at PB's feet. However, it would not be appropriate or helpful to say more at this stage.

I do believe that PB has made genuine attempts to modify his behaviour and to observe the court's orders since December 2011, when I first participated in a hearing in this case.

He is a devoted son and has taken very good care of his mother over the years.

My concern remains the same as it was in December 2011 and has been neatly summarised by Dr S recently:

> *'Unless he is willing to accept treatment, the prognosis must be very poor, as paranoid personality disorders do not improve spontaneously with time. The only alternative open to the Court in my opinion is to strengthen the existing boundaries, adhere strictly to them and use legal means to enforce them if necessary.'*

Without compliance, the end point of any enforcement strategy is committal to prison for breaches of the court's order. Therefore, I would ask PB to consider the only real alternative, which is to accept the help recommended by Dr S. To me, that is likely to be a much more constructive way forward.

APPENDIX B

THE INDEPENDENT SOCIAL WORK (ISW) REPORTS

Mr S is an experienced social worker with significant expertise and experience in this area.

Mr S submitted his first report on 16 February 2012, an addendum on 28 February 2012 (following a discussion with PH for the local authority), and a further addendum on 8 May 2012 (in response to supplementary questions relating to Mrs B's alleged refusal to accept care).

Mr S's report of 16 February 2012

In his initial report of 16 February 2012, Mr S reported as follows:

1. He had no background information about PB or his sisters.

2. There was no carer's assessment of PB.

3. RB was able to articulate a clear wish to remain in her own home for as long as possible:

   'I accept that when I become more ill things will change and then I may not be able to live on my own, but I am not ready for that yet and for now I want to stay here.'

4. Although she had twice visited YY, on both occasions accompanied by two of her daughters, she did not wish to live there.

5. She was able to express a clear view that she understood that she might need residential care in the future.

6. She did not appear, fully or even partially, to comprehend that the family difficulties could potentially jeopardise the delivery of her care services.

7. Her consultant psychiatrist, Dr TS, was of the opinion that she was 'fine' in her own home for the time being. However, this was subject to the proviso that it was crucial for the family dynamics to be managed so that support services were able to deliver the required care unhindered by family difficulties.

8. Local Authority social services staff had 'innocently and inadvertently' given the impression to RB's daughters that they could effectively 'side' with the local authority and this 'impression' had had to be withdrawn.

9. A MIND Advocate had been offered to RB, to facilitate contact, but this offer was declined by her.

10. RB had said that she did not have any 'favourites' amongst her children.

11. When asked if she enjoyed seeing her son, RB 'was most emphatically positive about seeing' him.

12. RB made a number of remarks about her relationships with her children and their relationships [D13-D14]:

'... they do not get along with each other and they are always arguing with each other and I do not know why, but my son is very ill and they find it hard to understand him at times.'

'[PB] is not violent, but he can get upset and angry but he is alright really and does not hurt anyone.'

'I am not frightened of him and he does not trouble me and he does not argue with me, but neither does he always tell me when his coming — he just comes and makes me a cup of tea.'

'No, I do not want to live with [PB], or anybody or any of my children and I like living on my own now and I just do not want to live with any of the kids; they are all too rude in their own ways and show no respect for each other — they are not rude to me though — but they just do not get along with each other.'

'RB then spontaneously added that, "I accept that when I become more ill things will change and then I may not be able to live on my own, but I am not ready for that yet and for now I want to stay here."'

'I asked her why she believed PB might upset people, and she replied, stating that, "PB is a rude, feisty person and he lives on his own."'

'I asked her about the frequency of her son visiting her, and she replied, stating that, "Carers are different regarding visits, but I do not want PB to visit every day and I do get on with all of my carers but that is not the same as trusting them ... one carer is so lazy she might as well be a statue for all the good she does, and she does not even offer tea or coffee!.....I am perfectly happy with PB visiting me two or three times a week."'

'RB then spontaneously stated that, "My daughter C can be the worst of my children, but they can all be difficult and they can also make PB's life difficult and C is very feisty and I do not always want to see her; I am happy with PB doing everything — C, the big one, always used to do everything but she was rude to me, she thinks that she can control everything and she works in a bank, I cannot remember which one, but she has been there for years and by now she probably owns some of it! L another daughter is a teacher and D does not work as she is not well and has hearing difficulties."'

'RB then talked a little about her daughter C, stating that, "She is a director or something in that bank somewhere in the city — she has a big house and she is the one with the money, (RB laughs at this point with reference to banker's pay) she is mean though, and never brings me orange juice here and saves all her money —maybe she now owns the bank!!!"'

'Remarking again about PB, RB stated that, "He can be very difficult, and maybe all my kids are bossy, but PB thinks that C could treat me better and maybe he thinks that C with all that money could indeed treat me better."'

'I then asked RB again about residence, and her thoughts on the future, and she told me that, "Maybe when I am older I will go to an old people's home, who knows? But not now."'

Mrs B's paid carer commented:

> *'I think that things are going reasonably well at the moment and I can calm PB down. PB is always looking for faults and has a note-book, but I have never witnessed a problem between mum and PB, but he does care for her on his own; he can be a bit over-controlling as well, but I have never really seen a real problem …'*

When contacted by Mr S, PB 'acknowledged that he could at times be difficult, remarking that,

> *"Yes, I do lose my temper, but in the end I am right and others are wrong and you do not get anywhere if you try and just make complaints against systems so sometimes you do have to take the law into your own hands. I would not lose my temper if people actually listened to me, but it just never happens and people give up and I am not the type of person who does give up, when it comes to problems."'*

PB was willing to try to resolve the family dispute through specialist mediation: 'Yes, I am prepared to give it a go.'

CL told Mr S that her mother had always wanted to help her son and that had been her choice when she had capacity:

> *'Our parents feel guilty about their divorce because they believe that PB, the youngest, suffered most by it' [D21].*

CL did not think that mediation would work. Contact with PB must be away from her mother's home if she remained there:

> *' As long as she sees him and contact is managed, that is the key to everything, and the only way it will work is if visits are supervised and he does not interfere with her life and her care and if he is in her home, he should be supervised' [D21].*

> *'My sisters and I think that PB just rubbishes everything that everyone else is trying to do and that will never change, but we will not abandon her but if she ends up with PB, she will have to visit us, because we will not go there' [D22].*

Mr S's opinion

Mr S gave his opinion that it was in RB's best interests to remain in her own home if a package of care could be made to work:

> *She has also expressed the view to me that she would like all her children to stop interfering in her life, so it may be in her best interests for the Local Authority to ensure the delivery of good quality care, and for the family to focus on delivering love and affection [D23].*

> *RB has indicated to me that she would like her contacts with all her children to be around two or three times a week, and it may be that all those involved in this dispute might like to reflect on her wishes.*

> *… although mediation is highly unlikely to bring about peace and love in this very complex dispute, if the parties could agree to such a process, I believe that there is a significant chance that some form of rapprochement could be agreed that elevates RB's best interests above the conflicts from within the family and allows professional carers to do there jobs, and allows RB to remain where she wants to be for as long as possible.*

I think that RB's needs for herself are relatively simple; she would like to be supported in her own home by carers and to have regular but not too frequent contact with her family.

I think that these basics will be applicable to any environment in which she lives unless her condition deteriorates.

It would be helpful if PB would agree to a Carer's Assessment, and disclosure of appropriate records so that those working with this dispute can be reassured that no relevant information has not been disclosed.

RB has suggested that she would like all her offspring to stop attempting to control her … RB's own aspirations have been rather smothered by the powerful personalities of her offspring.

… most opinions are sympathetic to RB's wish to remain in her own home, and if this wish is jeopardized by the over-zealous devotion of PB to his mother, then this devotion has to be managed and there has to be no ambiguity in the care-plan unless, as noted throughout this report, mediation can achieve a different agreement.

Therefore, at least for the time being, care should be provided by professionals and the love and affection can be provided by the offspring … I would not support personal care tasks being undertaken by PB, as it is a recipe for misunderstanding and conflict, in my opinion.

Mr S's observations of PB's contact with his mother

Mr S's comments concerning RB's one-hour contact with her son on 13 February 2012 are, in my opinion, significant:

'for almost the entire time that I was present in the home, PB remained at the dining table in his mother's house seated in a position where visible contact between RB and PB was difficult if not impossible, and even audible communication was difficult, as PB talked to his mother without her being able to see him and whilst he was seated at the dining table looking at the wall in the opposite direction to his mother.

Effectively, when talking to his mother, PB was talking to the wall and RB was getting irritated by her inability to hear or see her son [D19].'

'During my observation visit, PB remained seated at the dining table in an area of the ground floor attached to the kitchen, (although he kindly made me tea and did get up a couple of times to show me some items, such as his notebook of purchases made for his mother). RB and carer Z remained seated on the settee throughout, and no eye contact or physical contact was made between PB and RB. PB conducted all conversation with RB whilst at the dining table, either almost or completely out of the view of his mother. At no time did RB appear perturbed or upset by this rather unusual communication 'configuration' [D29].

Mr S's addendum report of 28 February 2012

In an addendum, Mr S stated that he had had an opportunity to speak with PH, on behalf of the local authority. Mr H agreed that mediation was worth trying and Mr S concluded by stating:

'Although mediation may be relatively costly, if it succeeds and some form of consent can be accomplished, ultimately it could be less hurtful and abrasive, (and less expensive) than

resolution through full legal remedy, the latter of which could potentially further erode RB's dwindling estate to a greater degree than the former process' [D32].

Mr S's addendum report of 8 May 2012

According to Mr S, professional opinion was:

> *'unanimous in reporting that RB is settled in her own home for the medium term future, and that the difficulties are generated around and not by RB, through sensitive, volatile and powerful family dynamics, the actual care of RB itself presenting 'conventional' and low-key challenges in line with what might be expected given her diagnoses.'*

Views of PH for the local authority

Mr H had noted that the care plan was working well; he was 'very pleased with the way the care plan was operating …'

Views of the care agency manager

The care agency manager, Mr C, had commented that,

> *'Things are going well and the current situation is probably sustainable for a reasonable period and the only problem is when a familiar member of staff might be off duty and RB can be a little resistant to new faces; she gets on fine with the regular carers that she knows but it can be a bit of a struggle with new people, but nothing too prolonged or serious and PB has, as far as we know, stuck to his routine and has been compliant.'*

According to Mr C, his care agency had

> *'a lot worse cases than that of RB and she would not be considered a priority case, but the family tensions have made it so … Even fairly trivial things will escalate, for instance a daughter will telephone us and tell us that RB is waiting outside … and they want us to telephone the police' [D37].*

Views of the manager of R Close housing complex

The manager of the R Close supported housing complex, Mrs J, gave Mr S much useful information [D38-D39]. She said that she had known RB for around five years and was familiar with the general situation. RB was a very private person who did not like any interference in her life. Disruptions to her routines tended to upset her. She was able to say where she would like to live and had consistently expressed the same preference before and after her diagnoses. In many ways she had not changed and was the same now as when Mrs J first knew her; her personality had remained significantly intact. She was a very strong-minded person who had been troubled by mental health problems for some years. Medication had helped her and she could be friendly and relaxed with people she knew.

Mr S's conclusions

RB was content at home and it remained in her best interests to remain there.

As regards the reported refusal of care, all of the professional evidence suggested that RB was cooperating with professionals 'well within the parameters of what might be expected with someone affected by the level of her disabilities.'

Local services had devised good strategies to manage her episodic reluctance to co-operate with care support staff.

The local authority had amended their care-plan to provide a very good service for RB, and had incorporated structures to help manage the social complexities of this dispute.

Much of the professional care input was not generated by RB's needs, which were said to be 'low to modest, rather its Genesis is within the complex and glutinous family dynamics that contaminate the delivery of her care.'

The contact schedule should remain in place for the time being because it was by and large working. All of the professional evidence indicated that RB was being well supported and appeared content in her own home:

> *'It would therefore, in my respectful opinion, be most unfortunate if RB's stable* situation *was inadvertently sabotaged by her offspring, all of whom fervently and genuinely believe that they have their mother's best interests at heart, even though there are different interpretations of 'best interests' within the sibling group.*
>
> *At the present time the boundary of formal regulation appears to be successfully containing the family dynamic aspects of this dispute, but as commented on above, I would hope that mediation may offer the hope of rapprochement and consequential possible re-engineering of the contact structure in the near future, (partly depending on whether or not mediation is agreed and takes place, and the outcome of such a process).'*

Mr S 'completely adhered' to the views expressed by him in his original report. More particularly, he retained

> *'some optimism that specialist mediation could have a significant role in at best resolving the principle elements of these proceedings, and at worst narrowing the range of 'issues' to a much more manageable portfolio.'*
>
> *'I retain some optimism that formal specialist mediation could possibly allow the development of family contact between RB, and her offspring, that allows a more consensual arrangement between the siblings and RB and professional carers, and is therefore potentially more relaxed and less governed by formal regulation.'*

Case no. 1196 0903

Court of Protection
On Appeal

Date: 12 November 2013

Before:

HIS HONOUR JUDGE ALTMAN

- -

Between

PB

Appellant

and

RB
(By Her Litigation Friend, the Official Solicitor)

First Respondent

and

A London Borough

Second Respondent

and

CL

Third Respondent

and

DB

Fourth Respondent

and

L a

Fifth Respondent

- -
- -

Appellant Stephen Simblet (instructed by Campbell-Taylor Solicitors)
First Respondent Chris Buttler (instructed by Irwin Mitchell Solicitors)
Second Respondent Kuljit Bhogal (instructed by A London Borough's Legal Services Department)

Hearing Date: 9 August 2014

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Judgment

Note; in view of the passage of time this judgment is being handed down without a draft having been first circulated to counsel. If counsel wish to refer to any corrections, omissions or errors they should do so if at all possible within 7 days. Paragraphs 20-22 were prepared after judgment had been reserved and if counsel wish to make any submissions up them they should be submitted within 7 days.

1. This appeal concerns the meaning of 'prohibiting' contact in Section 17 of the Mental Capacity Act 2005 which I understand has not be considered in a reported decision.

2. This is an appeal from the Order of District Judge Eldergill that followed a judgment handed down on 29 January 2013 after a hearing over three days in October 2012. The appeal was entered following an extension of time granted by the learned Judge by way of application for permission to appeal. The central ground was expressed in the skeleton argument supporting the grounds of appeal as being;

> "Whether the court can use its own power to prohibit contact with unnamed people to provide a Local Authority deputy with power to suspend contact for up to one week and whether such arrangements are ultra vires section 20 (5) of the Mental Capacity Act."

There is no challenge to the findings of fact of the Judge.

3. On the 3 May 2003 His Honour Judge Horowitz QC gave permission to appeal confined to the delegation to a deputy of the power to 'suspend' contact.

4. I have considered the judgment of the learned Judge. I refer, briefly, to the background facts against which he set his decision and the scheme of the relevant part of the Mental Capacity Act 2005, before identifying and analysing the issues that fall for consideration in this appeal. In this context the appeal raises the question as to:

(I) whether the arrangements made as to contact within the order of the Judge were outside the statutory powers capable of being delegated to the deputy,
(II) whether, if they were within such powers, the exercise of the power in the circumstances of this case was in the words of the skeleton supporting the appeal "perverse" or "plainly wrong" and
(III) In the event that the order was either outside the power of the court or else plainly wrong, whether there may be some other mechanism to achieve an equivalent outcome that was appropriate.

This involves the interpretation and reconciling of the adjoining provisions of Sections 17(1)(b) and (c) of the Mental Capacity Act 2005, both of which, differently worded, make reference to a power to arrange a period of no contact but where in accordance with section 20 only one such provision permits actions that may have this effect from being carried out by a deputy.

BACKGROUND

5. In 2011 a psychiatrist reported that RB lacked capacity and in due course the parties agreed that she lacked capacity, inter-alia, to make decisions about her residence, contact and care. This appeal is concerned with contact. RB was 71 years of age at the time of the hearing. Her son PB, the applicant and appellant, is her youngest child and there are three older daughters. He has a history of conflict with them and there have been other conflicts within the family. RB has been diagnosed as suffering from Alzheimer's disease. I have not referred to earlier medical history. She was living in her own home and the plan was for her to remain with the assistance of a care package arranged by the Local Authority.

6. In February 2011 PB applied to the Court of Protection. The application expressed dissatisfaction with the contribution of the Local Authority to RB's care. Thereafter PB had disagreements with the care agency which involved, on the findings of the Judge, angry, aggressive, threatening and abusive conduct by PB towards the agency and carers.

7. From May 2011 until January 2012 RB was housed in "B Lodge". The Local Authority considered that PB disrupted the paid care at home. The Judge catalogued in his judgment a number of incidents of difficult behaviour by PB in relation to the local authority, the carers and those at "B Lodge". The local authority, notwithstanding evidence of incapacity and the commencement of proceedings, arranged with her daughters for RB to move into a sheltered housing

scheme. In due course in January 2012 RB returned to her home, PB giving a number of undertakings as to his conduct. RB has remained at home and the Judge confirmed that she appeared happy to remain there. In February 2012 an independent social work report noted RB's wish for her daughters to visit two or three times a week and that she did not wish PB to visit every other day as he had tended to do. The independent social worker recommended mediation to elevate the situation above family conflicts. Following the return home it was reported in March 2012 that PB had not interfered with RB's care and that his behaviour had improved greatly. In May 2012 the contact schedule was noted to be working. In June 2012 a special visitor reported that RB wished to remain in contact with all her children but that she did not have capacity to make decisions about contact where the children may cause problems for her or others.

8. In August 2011 there was a medical assessment of PB identifying the assistance of psychological services and pointing to the very close relationship between him and RB. In September 2012 there was a fact finding hearing in which the Judge found the consistent theme of PB's confrontational approach when challenged or frustrated relating to his tone, volume, demeanor, volatility and offensive language. The Judge found that his behaviour often upsets the mother, his sisters and the professional carers and alienates them so as to reduce the chance of achieving the changes he was seeking. Nonetheless the Judge found that PB had made genuine attempts to modify his behaviour and that he was a devoted son and had taken very good care of the mother over the years. He also found that not all of the current problems within the family were to be laid at PB's feet. In his judgment the Judge made further specified findings of fact. He found that apart perhaps from DB, all of RB's children bear significant responsibility for the family conflicts that have brought the case to court and that the difficulties had not been generated by RB or by her care needs, but by the sensitive volatile and powerful family dynamics around her. He found that the factor of "magnetic importance" was to ensure that RB lived in her home. He found that RB's wishes as to how much contact she wanted varied depending on the levels of conflict and interference and how upset she is at a particular time. For example she had dealt with conflicts involving PB by asking him not to visit for a while where his visits had led to conflict with people she was living among. On other occasions, he found, RB enjoyed seeing him more than two or three times a week and she likes his meals.

9. The judge noted that there were times when PB behaved well and had made genuine attempts to modify his behaviour. However the Judge also instanced a number of examples prefaced by the words

> "Some of his conduct in the proceedings, in and out of court, has (to put it mildly) not helped to progress matters to improve relationships with his family, professionals and his mother's carers."

10. In considering that it was not in her best interests to receive care from her son the Judge found:

> "My overriding reason for reaching this finding is that at present PB's behaviour – his anger and problems with self-control, the number of disagreements and disputes he is embroiled in, his approach to his sisters and some carers, his problems observing agreed rules and plans – makes this impractical. Although he has demonstrated a good understanding of his mother's wishes and feelings, he has also demonstrated that he has a poor capacity to control his frustration and anger, to work with others and to accept the realities of the quality of care that can be provided by care agencies."

11. The Judge described the view of the Local Authority in relation to contact as being that whilst it may be appropriate for PB to have more parental contact than his sisters "there were "fearsome family dynamics" to deal with". The Judge held that the overriding objective of the care plan was to ensure that RB lived at home. He held that the aim of the court was

> "Where appropriate, to manage or contain conflicts that have adversely affected the incapacitated person's best interests in a situation where their management requires imposing a framework that interferes with the usual legal rights of family members, so as to require authorisation by a court… To ensure that incapacitated people are not disadvantaged, compared to those with capacity, by their inability to make decisions about… contact with others."

The Judge held that the main risks to the care plan which may require the intervention of the court related to the behaviour of the children. If RB had capacity she would be entitled to regulate this intrusive conduct by actions which included saying to one or more children she did not wish to have contact with them, or significantly less contact unless they cease interfering with and upset her.

12. Against this background the Judge turned in Section 15 to 'Remaining Issues and RB's Best Interests'. He considered contact under the heading "reducing conflict by reducing contact." He found that if contact were harming RB then the most appropriate step was to restrict it to a non-harmful level. He found that

> "If he becomes embroiled in conflict with those he is in contact with, less contact for a cooling down period would be my first preference, rather than a return to court for committal proceedings… Any restriction of contact with PB or one of his sisters must be reasonable, necessary in order to manage an identified present risk that home care will be unviable unless contact is so restricted, and a more proportionate means of safeguarding RB and enabling her to remain at home than other options such as making a committal application. If contact is suspended for more than seven days then the matter should be listed before me for a telephone hearing… Moving up the scale, in my view, is the option of supervising contact…"

13. The judge there set a period of 7 days as the maximum period during which the deputy could arrange for there to be no contact. I notice the aim behind the order made to fulfill that decision was to create a power to "suspend" contact. As a means of supporting the care plan other provisions were made such as injunctive orders but they do not form part of this appeal. A review by the court was provided for. However, the Judge then considered the need for the Local Authority to become personal welfare deputy "to tweak the care plan and with it the contact arrangements." I note the aim of the power to "tweak" arrangements.

THE LEGAL FRAMEWORK

14. The Judge considered "the personal welfare deputy ship option". He referred to the application of the local authority to be appointed as deputy with the support of the Official Solicitor, provided the powers were narrowly drawn. In considering factors relevant to the appointment of a deputy the District Judge directed himself to relevant sections of the Act. I have considered the statutory provisions relating to contact. There is no issue taken on this appeal as to the relevant provisions. In particular reference was made to the following sections of the Act.

> Powers to make decisions and appoint deputies: general
>
> 16(1)...
>
> (4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—
>
> (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
>
> (b)the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances….
>
> Section 16 powers: personal welfare
>
> 17(1) The powers under section 16 as respects P's personal welfare extend in particular to—
>
> ...
>
> (b) deciding what contact, if any, P is to have with any specified persons;
>
> (c) making an order prohibiting a named person from having contact with P;...
>
> ...
>
> (2) Subsection (1) is subject to section 20 (restrictions on deputies).
>
> Restrictions on deputies

20 (1)

…

(2) Nothing in section 16(5) or 17 permits a deputy to be given power—

(a) to prohibit a named person from having contact with P;…

…

THE WORDS USED

15. I note that Parliament makes two adjacent provisions that lie together and I find that the intention to be inferred from that very fact appears to be to draw a distinction between the two processes. That distinction is emphasised, I find, by the decision of Parliament as set out in the statute to permit deputies to undertake actions under one provision but not under another. Accordingly it is necessary to determine the difference between a deputy's arranging for a period of no contact as part of 'determining what contact if any P is to have' which is permissible on the one hand, or as an act of 'prohibiting' contact on the other which is impermissible for a deputy. Such differences have been argued in terms of the intention of Parliament, in terms of the length of time implied in the two provisions, in the amount of contact that is implied, in the degree of on-going review and consideration of contact implied in the provisions, in the impact of the provision on the pre-existing level of contact affected by the application of one or other of the provisions.

16. I start, with the assistance of submissions from counsel, with an examination of the meaning of the word 'prohibit'. I adopt the submission of Mr Buttler that in construing the meaning of the word 'prohibit' Parliament is to be taken to have used the word correctly and exactly (Spillers Ltd v Cardiff Assessment Committee [1931] 2 KB 21 per Lord Hewart CJ 42043) and where the language of an Act is clear the ordinary sense of the words should be adhered to unless they would lead to some absurdity, or some repugnance or inconsistency with the rest of the Act (Caledonian Railway v North British Railway (1881) 6 App Cas 114 per Lord Blackburn). This leads to applying the dictionary definition which gives meanings such as 'to forbid, deny or preclude something'.

17. However, I find that this takes the analysis only so far. The Judge defined 'to prohibit' as referring to 'a total cessation of contact until further order'. In the context of controlling contact, the challenge is to find the difference between that and 'deciding what contact if any'. It seems to me that the word 'prohibit', if used in isolation, could apply to a number of situations; 'Parking prohibited for 7 days for building works' (a single fixed period of a number of days) 'parking prohibited for house removal on the 21st March'(a single day), 'Parking prohibited on Wednesdays', (a recurring day each week) 'Parking prohibited until further order' (a total cessation without fixed limit of time). I find that transposing 'contact' for 'parking' demonstrates the width of the

definition in its practical application. It includes uncertain or unlimited periods, or fixed periods, it may be continuous or intermittent, it may relate to a single occasion or several such times. The common factor, of course, is that during the period of its operation there is no contact. But that can also be said of 'deciding what contact if any' which imports a decision that may result in no contact.

18. Accordingly it seems difficult to identify a 'prohibiting' of contact by looking at a proposed period without contact and applying to it the ordinary meaning of the word 'to prohibit' in order to find an absolute difference between prohibiting contact on the one hand and determining a period of 'contact if any'. A week without contact, for instance, could be referable to the application of either form of words if they are looked at disjunctively and based simply on the ordinary meaning of words.

19. In this case there are the two provisions that enable arrangements to be made for periods in which there is no contact. But Parliament must, it seems to me, have intended that there should be a difference. This is to be inferred from the fact that the provisions are placed side by side and providing in Section 20 that under only one of the provisions can one of the arrangements be made by the deputy. In finding the meaning of the provisions it seems to me, therefore, preferable not to look for a free-standing definition of 'to prohibit', but rather to identify the difference between the two provisions bearing in mind the words used in each sub-section of Section 17.

20. In reaching this conclusion I have referred to a further canon of statutory construction:

> "the meaning of statutory words is determined not by reference to any subjective intentions of the legislators, but by reference to the sense which an informed legal interpreter would give to them in the context in which they are used. The context of statutory words is both internal and external. The internal context requires the interpreter to situate the disputed words within the section of which they are part and in relation to the rest of the Act…
> (Sir Rupert Cross, 'Statutory Interpretation' 3rd Edition),
>
> "...to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connection with its whole context..."

Brett v Brett (1826) 3 Add 210 per Sir John Nicholl (referred to in the second edition of the said work).

In the third edition, the editors provide an example by reference to **Re DML** [1965] Ch 1133. That case considered adjacent provisions in Section 102 of the Mental Health Act 1959. This section empowered the judge to secure (the doing of all such things as appear necessary…)

> (b) for the maintenance or other benefit of members of the patient's family; or (c) for making provision for other persons or purposes for whom or which the patient might be expected to provide if he were not mentally disordered.

In considering the difference between 'family' in the first sub-section and other persons in the second Cross J said at page 1137:

> "The contrasting language of sub-clauses (b) and (c) suggests to my mind that the legislature considered that the word "family" consisted of persons for all of whom the patient might prima facie be expected to make some provision. This, I think, indicates that the word does not include collateral relatives."

I find that in this case the very juxtaposition in the statute of the two provisions being considered makes their context an essential ingredient in interpreting their meaning, particularly in defining the limits of the word 'prohibit'. The context to be seen within Section 17 is that the word 'to prohibit' is in an adjoining sub-section to the phrase 'deciding what contact if any'. I find that the approach to statutory interpretation requires the court to seek a construction of 'to prohibit' as something different from 'deciding what contact if any' even though actions under either sub-section may result in a period without contact.

21. Accordingly I have considered the words in their context. I find that there is a difference in the manner of expression;

> "**deciding what contact**, if any, P is to have with any specified person"

is juxtaposed with

> "**making an order prohibiting a named person** from having contact with P"

The reference to 'prohibit' is a bald expression, the other is 'wrapped' in a sentence; the first part of a process, the second more of a free-standing activity. The actions are qualified by the surrounding words; 'deciding what contact if any' describes a process of determining contact presumably as part of managing it which will lead to a determination, one incident of which may be for an element of no contact; the other is described as a singular activity of 'making an order prohibiting'. The word 'deciding' permits of an on-going process where 'making an order prohibiting' seems more of a single act. The fact that it relates to the making of an order of course immediately places it within the court's own processes away from the day to day work of a deputy. It would appear, I find, that an examination of the words in their context identifies section 17(1)(b) as leading to the possibility of no contact as part and parcel of managing contact on an on-going and fairly flexible basis. Section 17(1)(c)will apply where a period is set up as more of a response to some identified cause and standing alone; 17(1)(b) will be part of monitoring

in an on-going way; 17(1)(c will be the consequence of a situation, set up to stretch forwards, with the panoply of the formality and finality of a court order; the former seeming, as part of a process, to be more subject to review or monitoring during its course. I infer this particularly from the clear word 'prohibiting' unattached to any surrounding process. These differences do not appear to be absolute or to lead to totally different situations, but demonstrate, at the least, a difference of emphasis.

22. I am fortified in this approach by having considered the intention of Parliament "to be attributed to the words used" (Cross on Statutory Interpretation page 26). 'Deciding what contact if any' may be a process undertaken by a deputy whereas 'prohibiting' is reserved to the court. I refer to Section 16 (4) of the Act set out above.

It is not practicable for day to day management of contact to be dealt with by constant reference back to the court. In the words of the Judge in paragraph 47 on page 94 of the judgment, "the courts should be slow to create a situation where a deputy has no alternative but to apply to the court for an order each and every time a dispute involving contact occurs when the purpose of appointing a deputy is to deal with and manage periodic incidents and disagreements that hopefully can be resolved". I find that the attribution in the statute of 'deciding what contact if any' to deputies and 'prohibiting' to the court supports the construction that the first is concerned with the day to day management of contact, taking steps to avoid conflict and support the care plan, whereas the second refers to a more strategic and long term process, such as where an action is required to create a pattern or provision as to no contact, for instance where it may be found inappropriate for a certain person to have contact, or to do so to a limited extent as part of a pattern. Counsel for the Local Authority submits that prohibit refers to a permanent arrangement; whilst I find that this is not necessarily as clear cut as that, nonetheless it does lend itself to the sort of order that would have to be sought from the court; a more strategic and long term arrangement than would be appropriate for a deputy to take.

23. ln considering these differences in this particular case I refer to submissions on behalf of the parties as to various aspects of the arrangement for no contact.

(a) The length of time. If a period of no contact is arranged, the longer it goes on the more it will cease to be part and parcel of contact management and acquire a life of its own. In this case Mr Simblet says that a week is disproportionate and a prohibition, Mr Buttler says it is part of regulating contact over a comparatively short period and if introduced in the appropriate way, looking at the best interests of RB and acting proportionately with a reasonable belief in the necessity to make this arrangement, it is an arrangement of contact under section 17(1)(b) and permissible. I find that the length of time no contact goes on for is a relevant consideration in determining if the arrangement by a deputy is permissible. The judge, by setting the maximum of one week to which I later refer, would appear to have ruled that it is the Court that has decided

in this case the maximum period for an arrangement for no contact to lie within section 17 (1)(b).

(b) Mr Simblet raises another context; what he called 'the life as lived'. In order to determine which sub-section applied the court should consider the impact of no contact as compared with what would normally happen without intervention in this family. Mr Simblet argues that for a family where children visit their elderly relative say every 2 weeks, a restriction for up to a week would appear proportionate, but where, as here, there is a pattern of daily visits by PB and twice weekly visits from the daughters, to stop contact for an entire week amounts to a 'prohibition' because of its inconsistency with the context, external to the words of the statute, of the pattern of life of this family and therefore disproportionate. However I find that the 'life as lived' in this case must also include the evidence both of the mother's having asked her son to visit less frequently and of her being less welcoming of his visits when he caused a disturbance. These are part of the range of facts found by the Judge.

24. Accordingly I find that in order to construe the adjacent provisions it would appear that the difference between the two provisions is determined by asking if the period without contact could be part and parcel and an incident of an on-gong management and monitoring of contact in a flexible way for a proportionate period of time and as a proportionate adjustment to the arrangements that would otherwise have taken effect in this particular family or would it be more of a specific response, standing alone, to a situation with the consequence of a set pattern of no contact probably for a more substantial period of time commensurate with an application to court.

THE APPEAL ISSUES

25. On behalf of the Appellant it is argued that the judge's decision to make an order that allowed the appointed deputy to prevent contact with any of RB's children for a period up to one week is outside the powers of the deputy under section 20 (2) (a) of the Mental Disability Act; as expressed by Mr Simblet "the only question is whether the power to suspend contact with someone for up to a week amounts to a prohibition."

26. On behalf of RB Mr Buttler, instructed by the Official Solicitor, stated in his skeleton "the only question of law concerns the meaning of the words 'to prohibit a named person from having contact with RB' and he submitted that if those words would allow the court to restrict contact between the named person and P, then the appeal must fail. I pause to note that this rather begs the question as to whether no contact for a week is a restriction or a prohibition. In this appeal and in the judgment of the Judge, the words 'restriction' and 'suspension' of contact are used, but it seems to me that in construing the statute it is preferable to consider the actual words used. I refer later to the case of **Tool Metal Manufacturing Co. Ltd. V Tungsten Electric Co. Ltd**..[1965] 1 WLR HL 761.

The analysis of the Judge

27. The concluding central order of the Judge that is subject of this appeal is to be found in Section 54;

> "54. In order to provide clarity, the court also makes the decision (rather then deputising the local authority to make it) that it is in RB's best interests to authorise the local authority to suspend contact between RB and one or more of her children for up to 7 days without further court order provided it reasonably believes this is necessary and proportionate for the purpose of reducing conflict in her home and/or to avoid the breakdown of her care package."

The main analysis begins in paragraph 41.

> "41. It seems to me that the powers which the court can confer on the deputy include deciding what contact P is to have with specified persons, provided no named person is prohibited from having contact with them. That must as a matter of simple practicalities include making decisions which in P's best interests apportion visiting times between relatives, so as to avoid conflict and the breakdown of the care package."

I find that this demonstrates that at the outset the Judge clearly had in mind the need to limit the power of the deputy to Section 17(1)(b) and to avoid purporting to delegate a power to prohibit.

28. I find that this is then further demonstrated in paragraph 42 where the judge states:

> "42. I agree that 'prohibit' refers to a total cessation of contact until further order, which is why the power is so intrusive as to be reserved to a judge…"

I find that the Judge there directed himself to the need to distinguish the power to be given to the deputy from one of prohibition. I explored earlier in this judgment the possible different applications of the word 'prohibit' and the judge's definition here is, I find, not the only one. However I find that consideration of this appeal requires me to consider the substance of the order set out later and not the general definition here.

29. The recognition that the deputy may not 'prohibit' contact is carried on in paragraph 43 of the Judgment:

> "43. No judge may empower a deputy to decide on P's behalf that it is in their best interests to prohibit contact with a particular person, including a family member. However, unless the order appointing the deputy provides otherwise, a deputy may make decisions which in P's best interests apportion visiting times between relatives, so as to avoid conflict and a breakdown of the care package. Obviously, that power has to be exercised in accordance with sections 1 and 4 and the court's directions."

30. The Judge then goes on to consider whether there is an entitlement to 'suspend' contact and concludes that this is a matter of degree and he gives examples of what he regards as permissible suspension;

> "44. Next is the issue of whether the court can authorise a deputy to suspend contact with a named person if a cooling off period becomes necessary."
>
> "45. As with most things, this may be a question of degree and practicalities. The fact that a deputy may regulate and tweak contact in P's best interests will include modifications from time to time to the contact schedule that increase one sibling's time and reduce another's, without any change in the objective of minimising conflict, facilitating contact and enabling P to have good quality contact with all of her children."

31. I note that here, it seems, the Judge is looking not just at the period, but at the purpose of the period without contact as part and parcel of managing contact. The Judge finds that this is not 'prohibiting' contact.

The Judge then considered other arrangements about contact short of a prohibition:

> "46. Likewise, asking someone to leave RB's home because they are behaving in a way others present feel is aggressive or disruptive is not 'prohibiting' contact with them, merely bringing that particular episode of contact to an end. The situation is the same, I would say, where the deputy requires a short cooling-off period, along the lines of 'don't visit again until the care co-ordinator has phoned and discussed with you how best to deal with what's just happened.' That is managing contact."

32. The Judge then enlarged on this in the following paragraph:

> "47. No deputy can effectively facilitate contact with family members and paid carers in P's best interests without this kind of necessary short-term power to manage contacts "incidents" that have immediate detrimental effect on P. For reasons of public policy, the courts should be slow to create a situation where a deputy has no alternative but to apply to the court for an order each and every time the dispute involving contact occurs when the purpose of appointing a deputy is to deal with and manage periodic incidents and disagreements that hopefully can be resolved."

33. The Judge then summarized the powers of the deputy up to this point in his reasoning:

> "48. To sum up, unless the court's order appointing them provides otherwise, in my opinion the welfare deputy's powers include a power to terminate a particular episode of contact where that is necessary in P's best interests. The deputy may also decide on P's behalf that further contact shall not take place for a short period whilst the incident and its effect on P is being reviewed and discussions are taking place with the person concerned as to how best to regulate contact so as to avoid further incidents. That is all part of managing the contact arrangements so as to seek to ensure that P has contact that is in her best interests with all relevant 'named individuals."

The Judge goes on to consider any more extensive arrangement for no contact that leads him to conclude that the court should fix the maximum period for which a deputy can arrange for no contact.

> "49. any power to 'suspend' beyond a 'very limited' cooling down period or period of negotiation 'should' be authorised by a judge, 'if not as a strict matter of law then, in this case at any rate, on a best interests basis".

34. The Judge goes on to draw a distinction between setting the maximum period, which he reserves to the court, and managing contact within that framework which he delegates to the deputy. It is this to which objection is taken by Mr Simblett.

35. In paragraphs 50 and 51 the Judge provided an illustrative explanation of his approach which is criticised by Mr Simblet. However, I leave that to one side, and I return to it in due course. First I refer to the following passages in which, in paragraphs 52 to 54 the Judge set out his appointment of the deputy and the main terms of his appointment.

36. I return to paragraphs 52 to 54 that contain the order of the Judge: Paragraph 52 deals with the appointment in itself of the personal welfare deputy. In paragraph 53 he repeats the powers he indicated in paragraph 46 and in paragraph 54 he deals with the deputy's powers that are subject to objection in this appeal;

> "52. Having considered the current situation carefully, I believe that it is in RB's best interests for the court to appoint the local authority as her personal welfare deputy for a period of 12 months. This will give it clear authority to coordinate and refine a workable care plan and contact schedule, without their decisions on such matters being continually appealed to a Judge...
>
> "53 I intend to limit the authorities' powers as RB's welfare deputy to making decisions about the following matters:
>
> (a) coordinating, approving, implementing and periodically reviewing a care plan for her which is not at variance with the declarations made in the court's order and includes a contact

> schedule that sets out when her children may visit her at her home; and
>
> (b) (subject to sections 1 and 4) requiring a named person to leave RB's home immediately and/or not to visit there until that person has discussed with RB's care co-ordinator (or a person nominated by them) the reason for requiring this and has agreed how best to manage future contact so as to avoid the problem or incident recurring."

I refer to paragraph 54 above where the Judge made the order objected to as …. A prohibition.

37. I return to paragraphs 50 and 51 that are criticised by Mr Simblet;

> "50. I am conscious that Court of Protection orders made by puisne judges in serious cases do quite often authorise the local authority (without appointing it as a deputy) to suspend contact with a particular person, provide for supervised contact take place, or have a contact schedule attached to them.
>
> 51. The rationale behind orders authorising a local authority to suspend contact, without appointing it as a deputy is, presumably, that it is a decision for the court, and made by it. Although the authority is given a discretion as to when and how to give effect to the court's decision,… The court has already decided the disputed matter on P's behalf. The local authority and its officers are simply acting on, and carrying out, a decision made for P by the court, not being deputised to decide the issue brought before the court of whether contact may be suspended. Provided the local authority stays within the boundaries of the court's decision, such a provision does not make it the 'decision maker' any more than a decision that it is in P's best interests to undergo surgery makes the surgeon the 'decision maker' because s/he has control of the operational detail. Ditto, conveying someone to prison in pursuance of a court order (it is not the gaoler's decision), executing a warrant, etc. The court has decided what is to be done, determine the matter in

> question, resolved on the action to be taken, etc. All that is left to do is to implement that decision."

38. Mr Simblet argues that here even where the Court sets the outer limit of the action, as here described, there remains a discretion on the part of the deputy as to whether to act and if so to what extent. He distinguishes this process from the surgeon or gaoler here described. I agree that the Judge is here describing a process where the court decides on an action and the Local Authority is simply the executant. In a general way I find that this describes a process in which actions are divided between the court and the Local Authority. I agree that if this were intended to be the reasoned basis for the Judge's order it could be criticised for failing to recognise that even with a maximum period of 7 days set by the Court, nonetheless the Local Authority would exercise a discretion within that limit. If this part of the Judgment had gone onto a finding that the Judge was going to authorise the Local Authority not as a deputy but simply to carry out the court's decision of a 7 day period without contact, then of course such a finding would not recognise that the Local Authority would in fact exercise discretion as a deputy.

39. However, I find that when it comes to the actual decision it is clear that paragraph 54 does not follow paragraph 51 in that way. I find it is clear that paragraph 54 treats the handling of contact by the Local Authority as actions of the deputy and within their discretion. The Judge makes that clear by beginning paragraph 53 with the words;

> "I intend to limit the authority's powers as RB's welfare deputy to making decisions about the following matters…"
>
> And beginning paragraph 54 with the words
>
> "…the court also makes the decision (rather than deputising the Local Authority to make it) that it is in RB's best interests to authorise the local authority to suspend contact…for up to 7 days"

40. And here the judge recognises that the Local Authority as deputy retains a discretion as to how to act by setting out some of the conditions they should

take into account such as reasonable belief and proportionality. I find that the Judge has removed discretion from the Local Authority and decided the maximum period of 7 days. He has then left intact the discretion of the Local Authority as deputy within that period. I find that in paragraphs 50 and 51 the Judge is not to be read as paving the way for finding that the Local Authority acts in relation to all aspects of contact without discretion but as an executant. In any event I find that paragraphs 50 and 51 do not form part of the core decision or 'ratio decidendi' for the actual decision is expressly set apart, I find, from any situation in which the Local Authority does not act as a deputy without discretion. Central to his decision, I find, is the decision of the Judge to limit the maximum period of no contact and I find that this is an important element in distinguishing paragraphs 17(1)(b) and 17(1)(c) the need to do which the Judge, from his judgment, clearly had in mind.

41. On behalf of the Appellant Mr Simblet has raised the following.

> (a) It is said that as a matter of principle delegating the power to suspend contact for up to a week is delegating a power to prohibit and therefore an impermissible delegation and the Court should have reserved that power to itself. Mr Simblet argues that the distinction between "deciding what contact if any" and "prohibiting" it is not a matter of fact and degree and a power is either in the nature of a prohibition or not. He argues in this case that it is the provision of the judge for 7 days without contact that is a prohibition, no matter in what way the arrangement for no contact in that period is made. I disagree. I accept that a deputy could act in a way that would be seen as prohibiting contact for a period of a week, but I find that that would depend on the facts of a case. If a deputy were to make a blanket ban on contact for a week without considering all the factors and conditions imposed by the Judge, without reviewing it in the light of representations made, and in the light of particular circumstances, then it may be that in a particular case a deputy could offend the provisions of the Act. I find this is a matter of fact and degree. Mr Simblet has not suggested what period, under section 17 (1)(b), would not, as a matter of general principle, be a prohibition . I find that, as matter of principle, the exercise of the power of a deputy under Section 17 (1) (b) could lawfully lead to a situation in which a particular person had no contact for 7 days depending on the circumstances of the case. I reject the proposition that there is a general principle to be found in rendering one week automatically a prohibition. I find in this case one should consider the whole of the judge's order which relates to the

conditions that the deputy must satisfy as well as the period without contact in itself.

(b) Mr Simblet submitted that on the facts, a prohibition where PB and RB had contact almost daily, a power to 'suspend' for as long as a week was of such a change as to amount to a prohibition and impermissible, resulting as it might in RB's being prevented from seeing any of her children for as long as a week. Here I find Mr Simblet does not argue in terms of general principle but rather of fact or degree, to the effect that to prevent RB from seeing her children for as long as a week is perverse and, Mr Simblet would say, amounts to a prohibition. Mr Simblet says one should compare the effect of what results from the control of contact with 'the life as lived', being in this case of a lonely old woman whose life is the visits from her children, PB 5 times a week and the daughters twice a week. A suspension for a week can be a prohibition and when one looks at the circumstances of this case it is a prohibition, he says.

I find that if the period without contact is to fall within Section 17 (1) (b) then in order to avoid being a prohibition it must relate to the circumstances prevailing and to be part and parcel of the process of managing contact in the light of those circumstances. It follows, I find, that the impact of such a course on the people involved is one of the facts to be considered and I accept that one of those facts is to look at the impact on the family, that is its effect on how the family lived or would have lived; the 'life as lived' to which Mr Simblet referred. I find that the Judge clearly had this in mind. As referred to earlier, the Judge had found that RB's wishes for contact varied depending on the levels of conflict and her asking PB to not visit for a while, that on two occasions she had asked PB to not come and RB was recorded as being distressed when there was conflict on such visits. I find that when viewing this factor on its own, it cannot be said that no contact for a week would be such a difference in the 'life as lived' as to be perverse or, indeed, more than the process of managing contact under Section 17 (1) (b). Indeed I find that it would not be inconsistent with what is liable to have occurred in this family if RB had capacity and one was to reflect the 'life as lived'. I find it would not amount to a prohibition on its own, and in any event there are other factors that affect the exercise of discretion of the Local Authority to keep their actions within that sub-section to which I have referred.

(c) Mr Simblet submitted that, following paragraphs 50 and 51 of the judgment it was incorrect to conclude that by setting the 7 day limit the court had made the decision, that no discretion was left to the deputy and that therefore there would be no impermissible prohibition by the deputy. I have already considered these paragraphs; I find that the Judge deliberately did give discretion to the Local Authority by setting the upper limit.

(d) Mr Simblet submits that in reality the provision is not a matter of fact and degree but plainly a prohibition rather than a restriction, a distinction that was argued for by counsel for the Official Solicitor. Mr Simblet referred to the Judge's reference to **Tool Metal Manufacturing Co. Ltd. V Tungsten Electric Co.Ltd.,** to which I earlier referred. In that case the court had to interpret two provisions, one for prohibition and one for restriction. I am referred by Mr Buttler to the speech of Lord Oaksey at page 778 where he said:

"A person, though not prohibited, is restricted from using something if he is permitted to use it to a certain extent or subject to certain conditions but otherwise obliged not to use it"

In that case both 'prohibition' and 'restriction' were statutory terms and the court had to construe them. I note Mr Buttler's submission that the draftsman did not use the term 'restriction' in this instance, but although the word has been used from time to time in these proceedings I do not find it assists in interpretation for it does not appear in the relevant sections of the Act and was not used by the Judge in his central findings and order.

(e) The context in Section 20, where preventing a deputy from prohibiting contact is referred to alongside provisions preventing a deputy from acting where the person had capacity, or from interfering with life-saving treatment, shows the importance of this provision. It is therefore unlikely, it is argued, that Parliament intended the bar against 'prohibiting' contact to apply only to an extreme situation, leaving the deputy otherwise free to substantially prevent contact. I agree that the meaning of words in a statute must be viewed in relation to their context. In so far as the Judge defined in general terms a prohibition as being 'a total cessation of contact until further order' I agree that this does not cover all possible instances of prohibition, as I have instanced in this judgment. However I find that in making his order, limiting a period of no contact to 7 days and emphasising other pre-conditions to providing for such a period, the judge was making provisions, as I summarise below, that in any event did not amount to a prohibition.

(f) Mr Simblet submits that a comparison can be made with the tests to determine when a restriction on a person becomes a 'deprivation of liberty' under the Mental Disability Act, and in particular the use of the words 'the degree of intensity' of the restrictions (Lord Bingham in **Secretary of State v JJ** [2007] UKHL 1 AC 385) and the comparison with what would be 'normal life' (per Baroness Hale at paragraph 62). Reference was made to whether conditions imposed were 'unusually destructive of the life of the controlee', a test applied in **Secretary of State v AP** [2010] UKSC 24 [2011] 2 AC 1. Munby LJ in **Cheshire West and Cheshire Council v P** [2011] EWCQ Civ 1257, [2011] 1 MHLR 430 referred to a comparison process with someone not

resident in a care home, with a comparator with the equivalent characteristics of the person being considered. Mr Simblet submits that applying the 'comparative' approach to ask a visitor to leave may be possible to envision, but that it is difficult to envision the banning of one, or more important all, of a person's children for a week. I accept that element of 'prohibition' may be one of degree as to length, and that the longer an arrangement for no contact goes on, the closer it comes to a prohibition in the terms of the statute. However the process of comparison with normal life to be relevant must, it seems to me, include the characteristics of this situation that there is a risk of substantial disturbance and conflict on visiting. I can imagine a family making arrangements that result in limited contact and many elderly relatives are as a result, in my view, visited once a week or even after longer periods. However, the comparison approach was not greatly argued before me, and I have found it of limited assistance in this case. The reason is that the context of the provisions as to contact was a determination by the Judge that the most important aim was to enable RB to remain in her own home, and that this was threatened by the risk of disruptive contact. It was the introduction of arrangements to stop contact that resulted from this aim. No comparator was described to me, and I have not myself found a comparator, here, or comparable 'normal life'. I find that the reference to the cases dealing with deprivation of liberty has been of limited assistance in this case, at least to the extent argued before me. Of more relevance is the examination, on which the parties have focused, of the comparison in fact and in this case between the pattern of life in this family and the potential effect of a period of 7 days without contact.

(g) It is argued that the arrangement for no contact for up to 7 days offends Article 8 of schedule 1 of the Human Rights Act 1998, that recognises the right of everyone to respect for private and family life. Mr Simblet complains that although the Judge placed importance on Article 8 he did not follow this through in the decision making process. Of course the exception to this right is permitted where it is in accordance with the law and is necessary in a democratic society in the interests of the rights and freedoms of others. It seems to me that the Judge, in providing for the court to set the maximum period, was himself setting the maximum limit of interference and leaving to the deputy only the exercise within that limit. Further the judge referred to the 'fearsome family dynamics', and in making his order he imposed the requirement of a 'reasonable belief this is necessary and proportionate for the purpose of reducing conflict in the home. I find that related to the balancing of the rights and freedoms of others. Article 8 provides in the exception to 'the rights and freedoms of others'. I find that the confining of any period to that which was necessary and proportionate in this context ensured that any period without contact would not offend Article 8. In these circumstances it seems to me that the arrangements, properly applied, do not infringe

Article 8, but are defined so as to be compliant. It seems to me that for instance in the passage in his judgment quoted in paragraph 11 of this judgment the Judge properly addressed and applied the issues correctly in this connection.

42. On behalf of the Second Respondent Local Authority it is submitted that 'prohibit' means a total cessation of contact. I agree that during the relevant period it imports a total cessation, but that does not dictate the period of that situation. It is submitted that the word carries a 'permanence' and again I agree that it seems to carry that significance but again limited to the period drawn for it.

43. Mr Buttler, counsel for the Official Solicitor, has made a number of submissions:

a. He relies on the principles of statutory construction that words in a statute are deemed to have been correctly used (Spillers Ltd v Cardiff Assessment Committee (1931) 2 KB 21 and that the ordinary sense of the word should be adhered to which is in the Oxford Dictionary 'forbid, deny or preclude', to which I have already referred.

b. reference is made to the Tungsten case that distinguishes 'restriction' from 'prohibition', again to which I have already referred.

c. Mr Buttler points out that on a day to day basis in order to respond to a disturbance that has occurred and in order to bring an end to unsatisfactory contact it is practical and sensible for the local authority to be able to say 'no contact for a period' which is no more than a week. It would be difficult to keep returning to court and would limit the capacity to act quickly and immediately in response to a particular situation. I find that this lies behind the Judge's order in this case as the purpose for it.

d. Mr Buttler points out that to adopt the Mr Simblet's argument would result in a situation where the deputy could not stop contact for any period without its being a prohibition. I find considerable force in this. Mr Simblet conceded that to ask someone to leave a period of contact to avoid a disturbance would be permissible management of contact, but he did not describe any period without contact that could otherwise avoid the description of a prohibition. I have found that the juxtaposition of the subsections implies that there can be periods of no contact that are not to be regarded as a 'prohibition' as that term falls to be defined in the context in which it lies. Further in his comparison

to 'the life as lived' it seems to me that the facts of a case do become relevant and that this is not a matter of principle.

CONCLUSION

44. I find the order of the Judge provided for the deputy to be able to arrange for a period of no contact in the following circumstances

A. It had to be no more than seven days

B. In accordance with section 1 of the Mental Capacity Act 2005 the action must be in the best interest of RB and before implementation consideration must be given to a solution that would be less restrictive of a person's rights and freedoms.

C. In accordance with Section 4 in pursuing best interests, if practicable and appropriate, there should be prior consultation with RB, PB and his sisters in so far as the deputy reasonably believes it is in the best interests of RB.

D. The deputy must reasonably believe that the arrangement for no contact is both necessary and proportionate for the purpose of reducing conflict in her home and/or to avoid the breakdown of her care package. This was more fully explained in the passage of the judgment set out at paragraph 12 of this judgment, and requires that any arrangement for no contact (the judge used the word 'restriction' but I find he did not do so with any specific definition in mind) must be in order to manage an identified present risk that home care will be unviable unless contact is so restricted and a more proportionate means of safeguarding RB and enabling her to remain at home the other options. I note the reference to 'managing contact'

E. The purpose would arise if contact were harming RB and the aim was to reduce it to a non-harmful level.

45. The period without contact was not a 'bare' provision, but carried with it obligations of management, relevance and proportionality that had to be fulfilled as summarised in the passage quoted at paragraph 10 or this judgment. I find that this is an important ingredient in determining whether this is a Section 17 (1) (b) or 17 (1) (c) case.

46. I find attraction in the argument that one must compare the effect of no contact with the situation without such provision. I find that the order of the judge did

not run so counter to the 'life as lived' to amount to a prohibition because although there was a history of daily contact there was also a history of the requests for less frequency and the discomfort at times of RB.

47. I find that the longer the period of prohibition the more difficult it will be to establish proportionality. I find that 7 days is proportionate where the other conditions are fulfilled. I find that by imposing the maximum of a week the Judge was in effect providing the framework for the deputy, all other conditions being met, to be able to act under section 17 (1) (b) and avoid acting under section 17 (1) (c).

48. I find that the terms imposed rendered the power delegated to the deputy to be part and parcel of the management of contact and to lack the characteristics of prohibition to which I earlier referred. Under the terms the deputy would use the power to 'decide what contact if any' as a management tool to avoid conflict and support the care plan on a day to day basis; he would not be making the sort of strategic or more long term decision that would otherwise be referred to the court, so as to bring his power under the judge's order within section 17 (1) (b).

49. I find that taking all these factors into account the provision by the Judge cannot be said to have been wrong, or plainly wrong, in his being satisfied, as he clearly was, that there was not a prohibition. Indeed I am satisfied he did not provide for prohibition by the deputy. I dismiss this appeal

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