Neutral Citation Number: [2024] EWCOP 4

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2024

Before:

MRS JUSTICE KNOWLES

- -
Re DY (Capacity)
- -

Varsha Jagadesham for the Applicant local authority
Peter Mant for DY by her litigation friend, the Official Solicitor

Hearing date: 14 December 2023
- -

Approved Judgment

This judgment was handed down remotely at 14.00pm on the 30th of January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

This judgment was delivered in public but a [reporting restrictions order OR transparency order] is in force. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the [children and members of their family OR the parties] must be strictly preserved. All persons, including representatives of the media and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Knowles:

Introduction

1. These proceedings concern an application for personal welfare orders pursuant to s.16 of the Mental Capacity Act 2005 ("MCA") regarding a young woman, DY, now aged 20, who is expecting her first child in January 2024. The personal welfare orders relate to DY's residence, care and contact with others. I have used the initials, DY, because these are the initials I used in a previously reported decision in May 2021 when I determined that DY had the capacity to engage in sexual relations (see decision at [2021] EWCOP 28).

2. The parties to the proceedings are the local authority and DY, acting by her litigation friend, the Official Solicitor. I have been the judge involved with these proceedings ever since 2020 so I am very familiar both with DY – having met her several times - and with the issues in these proceedings. I am very grateful to both advocates who participated in the hearing. Each made their submissions skilfully and cross-examined with sensitivity.

3. The crucial issue for my determination was whether DY had gained capacity to make decisions about her residence, care and contact with others. If she had, this court ceased to have jurisdiction and the proceedings would come to an immediate end. Having heard evidence from DY's social worker, SW, and from Dr Camden-Smith, a consultant psychiatrist, jointly instructed to assess DY's capacity, and having heard submissions, I decided that DY had capacity to make decisions about her residence, care, and contact with others. I reserved my judgment as there was insufficient court time to properly address the issues in this case.

Background

4. I explained a little of DY's background in my previously reported judgment and what follows draws on that summary.

5. DY has been diagnosed with two chromosomal duplicities, foetal alcohol spectrum disorder, and a moderate learning disability. She experienced childhood trauma, having suffered physical and sexual abuse as a child. DY has had a boyfriend, AB, since about 2020, and remains in a relationship with him to date. The parties agreed that DY is a highly vulnerable young woman who, at times, presents with challenging behaviour and has limited insight into her own vulnerability.

6. These proceedings began in 2020 and, in April 2021, DY moved to supported accommodation. Sadly, it became quickly apparent that this placement was unable to manage DY's behaviour which often placed her at risk. In November 2021, the landlord gave notice to DY. At a hearing in December 2021, I made final declarations that DY lacked the capacity to conduct these proceedings, make decisions about her residence, make decisions about her care and support, make decisions about her contact with others, and make decisions about her use of social media and the internet.

7. In April 2022, I approved DY's move to a supported living placement which I will call X for the purposes of this judgment. I accepted that DY had capacity to enter into a tenancy with X. I also authorised a reduced package of care and support for DY on the

basis that, doing so, would preserve DY's autonomy and foster a culture of trust and cooperation between DY and her new placement. I note that DY's engagement with support staff at X had been very variable.

8. In August 2022, I made interim injunctive orders against DY's former foster carer, Mr Z, preventing him having contact with DY. Mr Z was suspected of sexually abusing DY and is awaiting trial in 2024 for child sexual offences unrelated to DY's care. I made final injunctive orders in October 2022, Mr Z having indicated that he would not contest these. In December 2022, I made a final order that DY had the capacity to make decisions relating to her use of contraception, having accepted a report from DY's GP.

9. A final hearing was listed in February 2023 to determine whether DY's residence and contact arrangements were in her best interests. Regrettably, I was unable to conclude the proceedings and directed a report from an independent social work expert to consider DY's placement and contact arrangements. That decision was made following a recent disclosure by DY to her social worker, SW that she had been raped. Following the receipt of the independent social worker's report, the local authority undertook a significant amount of work to implement her recommendations and the Official Solicitor confirmed that she was content with the local authority's current support plan for DY. Whilst this work was progressing, DY became pregnant and her due date is in January 2024. DY has consistently expressed her wish to keep her baby and assessments by the local authority's Children's Services have been ongoing. DY's social worker confirmed in her ninth statement to the court that DY and AB have been offered a place at a parent and baby unit once their baby is born. DY has had a positive visit to the placement, and meetings to plan for a transition were underway at the time of the hearing in December. Helpfully, SW has confirmed that Adult Services will continue to fund DY's placement at X if she is assessed as being unable to care for her baby. SW is of the view that it would be in DY's best interests for her to return to X if her baby were to be removed from her care. However, if assessments indicate that DY can care for her baby, SW and Children's Services will work together to explore accommodation options that are suitable to meet the needs of DY and her baby.

10. DY continues to be subject to a contact agreement which requires her to tell staff where she is going and who she will be spending time with outside X. In September 2023, DY went to Mr Z's home with two friends in order to collect some belongings of hers which he had retained. At no stage during that visit was DY alone with Mr Z. Mr Z has had no further contact with DY and has sought the local authority's assistance to prevent DY from approaching him in future.

11. In September 2023, because of improvements in DY's presentation and engagement with support at X, the parties agreed that a reassessment of her capacity would be appropriate in respect of conducting proceedings, residence, care, and contact with others. Dr Claudia Camden-Smith, who had been previously instructed to provide expert evidence on capacity, was re-instructed on these issues. In a report dated 17 November 2023, Dr Camden-Smith concluded that DY continued to lack capacity to make decisions in each of the relevant areas. Her report focused on how DY was likely to respond after her baby was born. The parties put questions to her, asking her to focus on DY's current capacity and arrangements were also made for Dr Camden-Smith to have discussions with DY's social worker, SW. Following those discussions, Dr Camden-Smith provided an addendum report in which she concluded that DY currently had capacity to make decisions about her residence, care and contact with others.

The Legal Framework

12. The principles in section 1 of the MCA require, inter alia, that:

a) a person must be assumed to have capacity unless it is established that they lack it (s.1(2));

b) a person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success (s.1(3)); and

c) a person is not to be treated as unable to make a decision merely because they make an unwise decision (s.1(4)).

Capacity is time and matter specific and should be assessed in the present.

13. A person lacks capacity in relation to a "matter" if, at the material time, they are unable to make a decision for themselves in relation to that "matter" because of an impairment of, or a disturbance in the functioning of, the mind or the brain (s.2(1)). A person is treated as unable to make a decision only if they are unable (s.3(1)): (a) to understand the information relevant to the decision; (b) to retain that information; (c) to use or weigh that information as part of the process of making the decision; or (d) to communicate their decision (whether by talking, using sign language or any other means).

14. In North Bristol NHS Trust v R [2023] EWCOP 5, MacDonald J summarised the approach to be adopted in the light of the Supreme Court decision in A Local Authority v JB [2021] UKSC 52, [2022] AC1322 as follows:

"[43] ... The Supreme Court held that in order to determine whether a person lacks capacity in relation to "a matter" for the purposes of s.2(1) of the Mental Capacity Act 2005, the court must first identify the correct formulation of "the matter" in respect of which it is required to evaluate whether P is unable to make a decision. Once the correct formulation of "the matter" has been arrived at, it is then that the court moves to identify the "information relevant to the decision" under section 3(1) of the 2005 Act. That latter task falls, as recognised by Cobb J in Re DD, to be undertaken on the specific facts of the case. Once the information relevant to the decision has been identified, the question for the court is whether P is unable to make a decision in relation to the matter and, if so, whether that inability is because of an impairment of, or a disturbance, in the functioning of the mind or brain.

[46] In A Local Authority v JB at [65], the Supreme Court described s.2(1) as the core determinative provision within the statutory scheme for the assessment of whether P lacks capacity. The remaining provisions of ss 2 and 3, including the specific decision making elements within the decision making process described by s.3(1), were characterised as statutory descriptions and explanations in support of the core provision in s.2(1), which requires any inability to make a decision in relation to the matter to be because of an impairment of, or a disturbance in the functioning of, the mind or brain. Within this context, the Supreme Court noted that s.2(1) constitutes the single test for capacity, albeit that the test falls to be interpreted by applying the more detailed provisions

> *around it in ss 2 and 3 of the Act. Again, once the matter has been formulated and the information relevant to the decision identified, the question for the court is whether P is unable to make a decision in relation to the matter and, if so, whether that inability is because of an impairment of, or a disturbance, in the functioning of the mind or brain."*

15. In identifying the relevant information in respect of a "matter", it is important not to overload the test with peripheral detail, but to limit it to salient factors. It is not necessary for the person to be able to weigh up every detail of the options (see, e.g. NK v RK and Others [2023] EWCOP 37 at [91]-[92]).

16. In LBX v K, L and M [2013] EWHC 3230 (Fam), Theis J identified the following information as relevant to decisions about residence, care and contact respectively:

Residence

a) what the options are, including information about what they are, what sort of property they are and what sort of facilities they have;

b) what sort of area the properties are in (and any specific known risks beyond the usual risks faced by people living in an area if any such specific risks exist);

c) the difference between living somewhere and visiting it;

d) what activities the person would be able to do if they lived in each place;

e) whether and how he would be able to see his family and friends if they lived in each place;

f) the requirement to pay rent and bills (though not the cost or value for money or the legal nature of the tenancy agreement);

g) the general obligations of a tenancy and any rules of compliance;

h) who he would be living with at each placement;

i) what sort of care he would receive in each placement in broad terms; and

j) the risk that other people might not want to see them if they choose to live in a particular placement.

Care

a) what areas the person under assessment needs support with;

b) what sort of support they need;

c) who will provide such support;

d) what would happen without support, or if support was refused;

e) that carers may not always treat the person being cared for properly, and the possibility and mechanics of making a complaint if they are not happy.

Contact

a) Whom the contact will be with;

b) in broad terms, the nature of the relationship between the person under assessment and the contact in question;

c) what sort of contact the person under assessment could have with each potential contact (including different locations, differing durations and differing arrangements regarding the presence of a support worker);

d) the positive and negative aspects of having contact with each person (which will necessarily and inevitably be influenced by P's own evaluations - such evaluations will only be irrelevant if they are based on demonstrably false beliefs). His past pleasant experience of contact with others will also be relevant and he may need to be reminded of them as part of the assessment of capacity.

e) the foreseeable impact of having contact or not having contact. This includes understanding if a person presents potential risks.

17. Finally, with respect to expert assessment, in AMDC [2020] EWCOP 58, Poole J identified in [24] a number of concerns about the manner in which an expert had fulfilled their instructions. These were as follows:

"(a) Paragraph 4.16 of the Code of Practice states, "It is important not to assess someone's understanding before they have been given relevant information about a decision. Every effort must be made to provide information in a way that is most appropriate to help the person understand". The expert's reports did not provide sufficient evidence either that AG had been given the relevant information in relation to each decision, or of the discussions the expert had had with P about the relevant information.

(b) It is not a criticism of an expert that at different times they have reached different conclusions about a person's capacity. Capacity can change and new evidence may come to light. However, in this case significantly different conclusions had been reached at different times without clear explanations of why the conclusions had changed or how the evidence as a whole fitted together. Further, the change in opinion between the June report and the August letter had followed the receipt of a single further statement and without any further face-to-face assessment.

(c) The expert's final conclusion had been reached on a broad-brush basis rather than by reference to each decision under consideration.

(d) A lack of information to show how AG had been assisted to engage when the expert had "hit a brick wall" in his attempts to have a discussion with her at his final interview. The lack of information left doubt as to whether AG was incapable of understanding the purpose of the interview, whether she had been given adequate support to engage, or whether she had simply chosen not to talk to the expert.

(e) A lack of a cogent explanation for why the presumption of capacity had been displaced in relation to the decisions under consideration. Conclusions were stated but "not clearly explained."

18. In [28] Poole J provided some suggestions for experts providing written reports to the court with respect to capacity which included:

"(e) An expert report should not only state the expert's opinions, but also explain the basis of each opinion. The court is unlikely to give weight to an opinion unless it knows on what evidence it was based, and what reasoning led to it being formed.

(f) If an expert changes their opinion on capacity following reassessment or otherwise, they ought to provide a full explanation of why their conclusion has changed.

(g) The interview with P need not be fully transcribed in the body of the report (although it might be provided in an appendix), but if the expert relies on a particular exchange or something said by P during interview, then at least an account of what was said should be included.

(h) If on assessment P does not engage with the expert, then the expert is not required mechanically to ask P about each and every piece of relevant information if to do so would be obviously futile or even aggravating. However, the report should record what attempts were made to assist P to engage and what alternative strategies were used. If an expert hits a "brick wall" with P then they might want to liaise with others to formulate alternative strategies to engage P. The expert might consider what further bespoke education or support can be given to P to promote P's capacity or P's engagement in the decisions which may have to be taken on their behalf. Failure to take steps to assist to engage P and to support her in her decision-making would be contrary to the fundamental principles of the Mental Capacity Act 2005 ss1(3) and 3(2)."

The Expert Capacity Evidence

19. Dr Camden-Smith provided four reports in these proceedings, one in 2020 and one in 2021 followed by two in 2023. Her report dated December 2020 concluded that DY lacked the capacity to conduct proceedings due to an inability to understand the relevant information, namely the nature of capacity, the decisions the court was being asked to make, the remit of the court, or her solicitor's role (beyond a very basic understanding that she was there to help). Additionally, Dr Camden-Smith concluded that DY lacked capacity to make decisions about her care and support. That was due to her inability to understand the relevant information, namely the areas in which she needed support, and what her risks would be if she did not have that support. Dr Camden-Smith detailed that DY was unable to understand the need for less tangible care and support, including staff managing her anxieties, being available for emotional support/supervision, structuring her day and providing access to meaningful activities. DY overestimated her emotional resilience and had no understanding of her vulnerabilities or of how at risk she would be without a highly restrictive placement. Further, DY lacked capacity to make decisions about contact with others due to her inability to understand the ways in which she was more vulnerable than others, and the risks that others posed to her. Dr Camden-Smith noted that, whilst DY stated that she was vulnerable, she was unable to explain

what that meant or how that impacted on her life. Additionally, whilst DY was able to identify the risks that some people might pose to other people, she did not understand that this risk also extended to her (being unable to identify any risks to her of contact with her parents or with her brother-in-law who is a registered sex offender).

20. In each domain where DY lacked capacity, Dr Camden-Smith concluded that this was due to DY's substantial cognitive deficits as a consequence of her moderate learning disability and developmental trauma. Dr Camden-Smith concluded that any improvements to DY's developmental trauma were likely to require years of intensive therapy in which DY had engaged well. However, DY's learning disability was immutable and present from birth. As a consequence of both these factors, Dr Camden-Smith opined that there was no prospect of DY gaining capacity within the next few years.

21. In her second report dated October 2021, Dr Camden-Smith found that DY's diagnoses had not changed. She continued to present as someone with a learning disability and as someone with a disorder of or impairment in the functioning of the mind or brain. In respect of DY's presentation, Dr Camden-Smith noted that, though she presented as someone who was quite able, it was likely that this was just a veneer of social competence and that her level of understanding remained poor. DY had spent the last few years in care and dealing with professionals on a regular basis and thus it was not surprising that she had learned to give the impression of competence. In contrast to the position when Dr Camden-Smith had reported in December 2020, DY now lacked capacity to make decisions about residence due to her inability to understand her own needs and the practicalities of living independently. DY was unable to understand the kinds of support she would need or her vulnerability should she live alone. She had no real strategies about how she would manage on her own and she was unable to verbalise how it would be different or better living on her own.

22. DY continued to lack capacity to make decisions about her care and support needs. As on the last occasion when she assessed her, Dr Camden-Smith considered that DY had no concept of her care and support needs, not understanding all the ways in which she was vulnerable and all the ways in which she was unable to meet her own needs. Her default strategy when asked how she would problem solve was to get her boyfriend to sort it out. Finally, DY lacked capacity to make decisions about contact with others because she did not understand the ways in which she was vulnerable, even from people who had abused her in the past. She had absolutely no understanding of the ways in which people might take advantage of her and was unable to comprehend that her previous foster carers might pose a risk to her. DY continued to see no risk in meeting with her brother-in-law.

23. More recently, Dr Camden-Smith reported in November 2023 following a significant improvement in DY's presentation accompanied by changes in her circumstances. These included DY's move to X; her pregnancy; and improvement in her engagement with staff at X since she had been allocated a new keyworker, G. Dr Camden-Smith was told about the safeguarding concerns relating to DY in respect of DY's allegation of rape and her visit to Mr Z in September 2023. Dr Camden-Smith was asked to assess DY's capacity to conduct proceedings, and make decisions about residence, care and contact with others. She did not discuss DY's presentation with her social worker, SW, during the preparation of her report.

24. In her report dated November 2023, Dr Camden-Smith concluded that DY continued to meet the diagnostic criteria for moderate learning disability, complex post-traumatic stress disorder and developmental trauma. She noted that, in common with many people who had these diagnoses, DY also had substantial deficits in her executive functioning. DY's developmental trauma/complex post-traumatic stress disorder was critical to understanding the way in which DY lacked capacity in some areas. People without DY's cognitive deficits were able to understand and make allowances for the deficits caused by developmental trauma and complex post-traumatic stress disorder but DY's impaired intellectual functioning made this difficult, if not impossible, for her. Dr Camden-Smith reiterated that DY's developmental trauma was chronic and long lasting though it might be amenable to amelioration via long-term therapy and, sometimes, medication. However, it was likely to be present in varying degrees throughout DY's life.

25. Dr Camden-Smith concluded that DY lacked capacity to conduct proceedings due to her inability to understand the nature of the proceedings, how a decision would be reached and what that decision would be. Her inability to understand was attributable to her learning disability which was lifelong and immutable. DY would not gain capacity in this area.

26. DY also lacked capacity to make decisions about her residence because of her inability to understand the relevant information. This was due to her learning disability but DY also had difficulty using and weighing the relevant information because of her executive dysfunction and impulsivity, both of which were attributable to her complex post-traumatic stress disorder. Dr Camden-Smith opined that it might be possible for DY to gain capacity in this area but this was unlikely in the context of the emotional, physical and psychological turmoil of a pregnancy, particularly one in which Children's Services had an interest.

27. As to residence, Dr Camden-Smith found that DY could understand the difference between living somewhere and visiting; that she had an understanding of different types of placement; that she could identify she could live with different people depending on where she was living; she could identify that there were different activities she could engage in in different settings; she could understand that there were pros and cons of and risks of living in different places that may be specific to her; and she could understand that different residential options came with differing models and levels of care and support. However, Dr Camden-Smith concluded that DY lacked capacity to make decisions about her residence because she dramatically underestimated the care and support that she would need when the baby was born. DY was adamant that she would not require any support or social networks and that, together with her partner AB, she would devote herself to her baby which would be enough support for her own needs.

28. Dr Camden-Smith was also of the opinion that DY lacked capacity to make decisions about her care and support needs because she did not understand her intangible care and support needs and underestimated her tangible needs. DY did not understand what the consequences would be of refusing carers or of carer support not being adequately provided. The lack of capacity was attributable to DY's learning disability coupled with her difficulties in using and weighing the relevant information as a consequence of her executive dysfunction and impulsivity, attributable to her complex post-traumatic stress disorder. It might be possible for DY to gain capacity in this area but this was unlikely

given the strains consequent upon her pregnancy already noted in respect to residence. Dr Camden-Smith's assessment focused on the care that DY was likely to need in the future when caring for a baby.

29. In respect of contact, DY lacked capacity to make decisions about her contact with others. This was due to her inability to understand the ways in which she was more vulnerable than others and the risk that others posed to her. Whilst she was able to identify some of the ways in which she had placed herself at risk, DY was unable to understand the factors that led her to behave in this way or articulate ways in which she could keep herself safe. Once more, Dr Camden-Smith made her assessment in the context of DY living with a baby and not in her current support setting.

30. Following receipt of Dr Camden-Smith's report, the parties agreed written questions for Dr Camden-Smith, the primary purpose of which was to clarify the evidential basis of her conclusions. It was also noted that Dr Camden-Smith had not consulted with professionals concerned with DY's welfare and it was thought this might be beneficial. In her addendum report dated December 2023, Dr Camden-Smith noted that she had been asked to review her opinion following a discussion with DY's social worker, SW. She also observed that she had been asked to assess DY's current situation including her pregnancy and needs related to that but not to take into account potential or likely outcomes following the birth of DY's baby. Dr Camden-Smith did not see DY for the purpose of this addendum report.

31. Dr Camden-Smith noted that SW had told her that, since becoming pregnant, DY's presentation had been markedly different. DY's relationship with her support worker, T, had been key to her acceptance of support at X. DY was now less resistant to support with the activities of daily living. However, DY's personal advisor, E, told Dr Camden-Smith that she continued to have concerns about DY's understanding of the risks others may pose to her and her child.

32. Dr Camden-Smith concluded that DY had capacity to make decisions about her residence, care and contact with others. However, DY continued to lack capacity to conduct the proceedings for the reasons explained in Dr Camden-Smith's November 2023 report. However, Dr Camden-Smith thought it was theoretically possible that DY could be educated and supported to understand the proceedings and to instruct her own solicitor although she was not currently motivated to engage in this area. This was not a priority for DY given the importance for her to engage in education and support regarding her pregnancy and the care of her baby. There was insufficient time prior to the hearing to participate in this educational process which, in any event, would be complicated by an almost *"certain"* change in DY's presentation and circumstances following the birth of her child.

33. As to residence, DY was now aware that she had help and support at X and that her relationship with T had been beneficial. She was able to understand that T would not be able to work with her if she lived elsewhere and that moving away from the locality of her current placement would limit the support SW and E could offer her. DY understood she would need to move away if she was placed in a mother and baby unit. DY had consistently been able to understand that the locality of her current placement had both positives and negatives. Similarly, as to care arrangements, DY was aware that SW and E were supporting her with her pregnancy. She understood the importance of maintaining her weight and eating nutritious food as well as living in a habitable

environment. DY was aware that she needed help and support to engage with antenatal care and appointments and that she required support to prepare for the birth of her baby. She was engaging with the necessary assessments and educational interventions. DY did not currently need support to keep herself safe as she was focused on her relationship with AB and preparing for the birth of her baby.

34. Finally, in relation to contact, Dr Camden-Smith revised the conclusion of her previous report, namely that DY underestimated her vulnerability. She concluded that, when calm, DY demonstrated an understanding that she had put herself at risk and that others had discussed this with her and tried to stop her doing so. DY's current focus on being safe in her pregnancy meant she had not placed herself in contact with others who might pose a risk to her and, therefore, her vulnerability was not a current risk though it may become one in the future. Though DY continued to have a limited understanding of the effects on her of the trauma she had experienced, she did not presently need to have any more in-depth or complex understanding to keep herself safe in her current circumstances. Dr Camden-Smith observed that, in each of the domains where DY had capacity, DY remained vulnerable to losing capacity in the future, particularly during the emotional, physical and psychological turmoil of being pregnant, having a baby and being involved with Children's Services.

35. In view of the change in her opinion, Dr Camden-Smith was invited to attend a round table meeting on 6 December 2023 so that the reasoning behind her change of position could be further explored. At the meeting, Dr Camden-Smith explained that:

a) the focus of the original report had been on the baby's birth and future events;

b) her change of position had also been influenced by discussion with SW who knew DY much better than she did;

c) DY had a good understanding about the option of a mother and baby unit which Children's Services were proposing;

d) her original concern that DY dramatically underestimated her support needs was overly focused on DY's future needs once a child had been born;

e) DY's understanding of her vulnerability in relation to contact with others depended on the circumstances and who she was having contact with. In a settled environment with support, DY could make decisions about contact; and

f) contact with Mr Z was different because one of DY's vulnerabilities was seeking care and love from past abusers. DY had some theoretical understanding about her relationship with Mr Z but Dr Camden-Smith was not convinced that DY fully understood what had happened to her with Mr Z. This was difficult because he had never been convicted of any offence in relation to DY.

The Hearing

36. I heard oral evidence from Dr Camden-Smith and from SW, DY's social worker. At the conclusion of the evidence, Miss Jagadesham and Mr Mant made oral submissions.

37. SW's oral evidence confirmed the contents of her ninth statement. She has been DY's social worker since August 2022 and confirmed that, during her involvement, she had observed a significant change in DY's presentation and an increased willingness to engage with professional intervention and support. This change had been particularly marked since DY learned she was pregnant but had been visible beforehand, namely during discussions with DY in November 2022 about her use of contraception. DY's demeanour was calmer generally and her interactions with staff at X were more polite and warm whereas previously she had expressed resentment and hostility when staff offered support. DY had worked with Children's Services social workers and had participated in many different meetings to assess and plan for care and support for her and her unborn baby. She had retained key pieces of information by recalling these in subsequent discussions and had behaved in a way which showed an ability to weigh up and use the information provided to her by professionals. The risk posed to DY through contact with others had significantly decreased as a result of her focus on her baby's health and well-being and her determination not to place her baby at risk of harm. DY was engaging with Children's Services in a calm and measured way even if she was upset about the concerns expressed about her potential parenting ability. DY had also taken on board the concerns about her contact with Mr Z and another person who presented a risk to her.

38. In her oral evidence, Dr Camden-Smith explained that DY's learning difficulty was not of a degree which meant she could not understand basic information but she noted that DY was almost always operating at the upper limit of what she was able to manage cognitively. Her functioning was fragile and dependent on circumstances and the current state of her relationships. Dr Camden-Smith confirmed that DY had the capacity to decide to live at X and understood what was being asked of her in a move to a mother and baby placement. With respect to contact with Mr Z, Dr Camden-Smith explained that this issue was the most difficult for DY because of her enmeshed relationship with him. When calm, DY could use and weigh information about the risks that he might pose but, when overwhelmed and upset, DY's capacity to make decisions about contact with Mr Z was likely to be compromised.

39. In cross-examination by Miss Jagadesham, Dr Camden-Smith acknowledged the less than ideal circumstances in which she had reported in November and December 2023. She emphasised that her assessment had been based upon DY's circumstances after the birth of her baby and the effect of her evidence was that DY was defensive and dismissive of the matters which Dr Camden-Smith sought to explore with her. Dr Camden-Smith explained that her assessment of DY's capacity had been revised following a meeting with SW who was in a good position to provide information about how DY reacted in daily life outside the confines of a capacity assessment conducted by a relative stranger. Dr Camden-Smith doubted that a further assessment visit by her would be beneficial or make DY more willing to engage with her. Overall, DY remained vulnerable and prone to making unwise decisions, in particular about her contact with others.

The Positions of the Parties

40. What follows is a brief summary of the positions of the local authority and the Official Solicitor at the conclusion of the evidence.

41. The local authority was critical of Dr Camden-Smith's change of position with respect to DY's capacity. It noted that Dr Camden-Smith's November report assessed DY's capacity in the future rather than in the present. That deficiency had not been remedied by speaking to SW especially in circumstances where Dr Camden-Smith had not seen DY for the purposes of her addendum report. Her reliance upon SW's observations of DY substituted the social worker's observations for her own assessment in circumstances where SW was not the capacity assessor. Given DY's obvious reluctance to engage with her, Dr Camden-Smith had too readily assumed a lack of capacity in her November report yet had failed to explain in detail why her addendum report concluded that DY did have capacity in the matters under consideration. This was particularly surprising given the conclusions in her first report that there was no prospect of DY gaining capacity within the next few years without at least having good engagement with intensive therapy. The local authority maintained that DY lacked capacity in respect of contact with others because she could not understand the extent of her vulnerabilities. Nevertheless, the local authority was alive to the improvement in DY's presentation overall but submitted that, notwithstanding Dr Camden-Smith's evidence, DY lacked capacity to make decisions about her residence, care and contact with others.

42. The Official Solicitor submitted that it was entirely proper for Dr Camden-Smith to rely on the discussions with SW when coming to a conclusion about DY's capacity. It was clear that Dr Camden-Smith had struggled with the assessment exercise of a very vulnerable young woman who was less than willing to engage. The evidence before the court as to residence established that DY knew what options were available to her; knew the difference between living somewhere and just visiting it; knew about the payment of rent and bills in broad terms; and knew about the requirements to inform her placement when she went out and did so. With respect to DY's care needs, it was evident that she had a greater understanding of her need for support and would seek out support from her key worker and others. She had an understanding that her well-being was affected when she did not accept support and realised that significant changes to her care and support could not happen as quickly as she would like them to because of the involvement of the local authority and, to a lesser extent, the Court of Protection. Finally, with respect to contact needs, DY was capable of identifying the risks to her contact with others when calm, settled and supported. Her recent decision to have contact with Mr Z was an impulsive and unwise act not uncommon for a teenager/young adult but did not necessarily mean that DY lacked capacity in that domain. In conclusion, the Official Solicitor submitted that the statutory presumption of capacity could not be rebutted on the present evidence before the court.

Analysis

43. Ever since 2021, the unchallenged expert evidence before the court had established that DY lacked capacity to make decisions about her residence, care needs and contact with others. Thus, the change in Dr Camden-Smith's opinion in early December 2023 came as something of a surprise and prompted closer scrutiny of her capacity assessment, both as to process and also as to content.

44. Turning first to process considerations, the parties had agreed Dr Camden-Smith's instruction but did not make clear in the letter of instruction that the ambit of her enquiry was restricted to DY's current circumstances rather than what the situation would be after she had given birth. It was unfortunate that clarity was not present at this initial

stage because DY's as yet unknown future circumstances loomed large over the capacity assessment itself and distracted from a focus on the here and now.

45. Secondly, DY's rather superficial engagement with Dr Camden-Smith made the assessment much more difficult. The November 2023 report certainly suggested that Dr Camden-Smith may have hit the *"brick wall"* identified by Poole J in AMDC. Dr Camden-Smith had taken great care to ensure that the circumstances in which her assessment took place were as optimal as possible and thus conducive to establishing a clear picture of DY's capacity. Thus, DY was well-rested; communication was adapted to meet DY's slow processing abilities; and DY was supported by her personal advisor, E. Despite these measures and despite DY's apparently improved co-operation with Dr Camden-Smith compared to previous assessments, DY was resistant to any discussion which might illuminate her thought processes and focussed on saying things which she thought showed she could care for her baby. DY denied problems and was unable to be reflective about the nuances of her current situation. In short, she was defensive and, as Dr Camden-Smith described it in the round table meeting, *"quite brittle"* during interview.

46. It must be noted that Dr Camden-Smith's assessment took place in a context where most of the professionals working with DY had seen a real improvement in her engagement and understanding and this development had prompted the capacity reassessment. Thus, the unchanged capacity conclusions in the November 2023 report caused the parties to reflect on the ambit of Dr Camden-Smith's instructions and whether she might benefit from discussion with those who knew DY better than she did. The questions exploring Dr Camden-Smith's November report drew attention to those matters and prompted her to speak with SW, DY's social worker, and then to submit an addendum report which reversed her capacity assessment in respect of residence, care and support needs, and contact with others.

47. What took place following the November 2023 report from Dr Camden-Smith was an entirely appropriate process in which the parties refocussed the ambit of the capacity assessment away from the future and grounded it firmly in the present. Equally, it gave Dr Camden-Smith the opportunity to obtain much fuller information about DY's functioning from those who knew her best. In retrospect, it might have been helpful if Dr Camden-Smith had asked for extra time to consult with DY's professional network before she submitted her November 2023 report but I acknowledge that she was working to a deadline as the hearing was listed for 14 December and, in those circumstances, may have felt unable to do so. A further interview with DY was not required and would, I suspect, not have landed well with DY who was by then even more preoccupied with the impending birth of her baby and the plans being made by Children's Services. In my view, it would be beneficial if expert capacity assessors ensured that, as a matter of routine, they cross-checked their conclusions by looking at the wider canvas about how a person functioned and, if possible, by speaking to those who knew the person being assessed well. This is of particular importance when their conclusions may be at variance with previous capacity assessments.

48. Turning to the content of Dr Camden-Smith's report, she implicitly acknowledged that she had not explained the volte-face in her capacity assessment as fully as she should have done. The failure to do so did not, however, invalidate her overall conclusions which were, by then, bolstered by the input of SW and had been refocussed on the present rather than the unknown future. It was also evident that the less than ideal

circumstances in which Dr Camden-Smith assessed DY together with the lack of clarity regarding her initial instruction had overly influenced her assessment of DY's capacity in respect of residence, care needs and contact with others. I note that no party disputed Dr Camden-Smith's conclusion that DY lacked capacity to conduct this litigation.

49. My assessment of DY's capacity does not depend on Dr Camden-Smith's reports but also takes into account the social work and other evidence about DY. Having reviewed all the evidence before me, I concluded that, at present, DY has the capacity to make decisions about her residence, care needs and contact with others.

50. Despite the submissions made by the local authority, I was less troubled by the apparent incompatibility between Dr Camden-Smith's first report and her December 2023 addendum report insofar as this concerned any timescale for DY to gain capacity in the relevant matters. Dr Camden-Smith's first report was dated December 2020, some three years earlier, and I observe that it might be expected for DY to mature with age notwithstanding her cognitive difficulties. That process was indeed plain in the social work evidence which demonstrated that DY's often heightened emotional responses to minor life events or challenges had significantly abated with the passage of time, and particularly so during her pregnancy. Whilst that process in no way diminished the significance of the cognitive and emotional difficulties which burden DY, it assisted in understanding how she now came to have capacity in the relevant matters. I agree with Dr Camden-Smith that DY's functioning is fragile and circumstance/relationship dependent and that she is nearly always operating at the upper limit of what she can manage cognitively.

51. With respect to residence, Dr Camden-Smith's November and December 2023 addendum reports together with the social work evidence established that DY knew what options were available to her; knew the difference between living somewhere and just visiting; knew about the payment of rent and bills in broad terms; knew about the rules of X placement and how she had to fulfil these; knew about the sort of care she would get there; knew about the pros and cons and risks of living in different places that might be specific to her; and knew about there being different activities available in different settings. Likewise with respect to care needs, DY had a much better understanding of her need for care and support and who would provide that support to her such as T, her keyworker at X. DY had understood that her well-being was affected when she did not accept support and was aware that changes to her support were at the mercy of structures outside her control such as this court or the local authority.

52. The most problematic matter before the court was DY's capacity to make decisions about her contact with others. When calm, settled and supported as she now was in the later stages of pregnancy, DY was, at present, capable of deciding with whom she should have contact. I accept SW's evidence that the risks posed to DY by contact with others had decreased considerably as a result of her focus on her baby's health and well-being and her desire not to place her baby at risk. However, the decision by DY to visit Mr Z in September 2023 was troubling given the complexity of her relationship with him. I agree with Dr Camden-Smith that, when upset, DY's capacity to make decisions about her contact with Mr Z was likely to be compromised. However, SW told me that DY had taken on board the concerns about her contact with Mr Z and another person who posed a risk to DY. I observe that the visit to Mr Z's home was made by DY and two friends for a very specific purpose, namely, to collect her belongings which Mr Z had retained. It was a short visit and DY was never alone with Mr Z. Though I accept

Mr Mant's description of that visit as impulsive and unwise, what actually transpired and how the visit was organised by DY did not compromise DY's safety in any way or render her vulnerable.

53. In conclusion, I have concluded that the statutory presumption of capacity cannot be rebutted on the wide canvas of evidence before the court. DY has capacity at present to make decisions about her residence, care needs and contact with others. Whilst I – together with others involved with DY – have concerns that DY may lose capacity in the future, it is not appropriate to make anticipatory or contingent declarations in the circumstances of this case. I cannot predict how DY will respond to the birth of her baby and the stresses of living in a parent and baby unit but, if she loses capacity in relation to a matter, an application can be made to restore this matter to the Court of Protection.

Conclusion

54. I wish DY and AB all the very best for the birth of their baby. It is something for which I know DY has longed for some time.

55. That is my decision.