Case No: COP 13165704

IN THE COURT OF PROTECTION
THE HIGH COURT OF JUSTICE
FAMILY DIVISION

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Before:

MRS JUSTICE PARKER
Sitting as a Judge of the Court of Protection

- -

Between:

DA	**Applicant**
- and -	
DJ	**Respondent**

- -
- -

SIR ROBERT FRANCIS QC and MS SOPHIA ROPER (instructed by **Harcus Sinclair LLP**) for the **Applicant**
MR DAVID REES QC and MS KATHARINE SCOTT (instructed by **Bindmans LLP**) for the **Respondent**

- -

APPROVED JUDGMENT

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MRS JUSTICE PARKER:

1. This is a first application in these Court of Protection proceedings for an interim declaration and order in respect of a person who is to be referred to in these proceedings only by the initials 'DJ'. She is the respondent to the application brought by one of her children. The application is supported by his siblings. All have sworn one statement and one has filed a subsequent statement today. The applicant is to be referred to as 'DA'.

2. Yesterday, in advance of this hearing, I made a transparency order in which I made provision for the present preservation of anonymity of all the lay parties but not, of course, the judge or the legal advisors in these proceedings. The order was settled by counsel and I am most grateful to them. This hearing has, in fact, taken place in open court although it has not been attended by any member of the press.

3. DJ is not here and she is not aware of this application. The applicant's solicitors made contact with the Official Solicitor last week and I understand that at least one meeting took place between them when the Official Solicitor was informed of the basis of this application and the reasons for it, and with the evidence in support of it. The Official Solicitor is not yet appointed as litigation friend. I will be reminded to deal with that matter, as soon as I have decided whether this court has gateway jurisdiction to make any order today on the basis of the evidence so far produced.

4. The application has been presented today by Sir Robert Francis QC together with Ms Roper, and the respondent by Mr David Rees QC together with Ms Scott.

5. The children, who are all adult, assert that their mother has gradually exhibited more and more serious symptoms and characteristics of psychological and emotional disturbance over the last 15 or so years. The onset may well have coincided with two major traumas in her life. Each of them describes in their statements how their mother's behaviour altered from a warm presentation and an engaging personality, fully functioning in all aspects of her life, to paranoid and suspicious behaviour; increasing social isolation now almost entire; neglect of her health, including inadvertent self-harm by skin picking, pulling out her hair, lack of nutrition, lack of dental care, including losing at least one tooth in the presence of one of her sons; and maybe broken ribs after a fall from a ladder, but it is not known since she failed or refused to obtain medical attention. She has engaged in long-term use of cocaine which they say is obvious and has been persistent.

6. I am summarising a vast range of material (that is not a critical comment) in the statements which have been made. I have also seen a large body of text messages taken from the children's, if I may call them that, telephones showing that the suspicion and paranoia exhibited by their mother is wide-ranging and bizarre. She believes foreign agencies are everywhere conspiring against her. She seeks to protect herself against incursion in her own home not in a measured and rational way but in a way which indicates lack of considered thought. Her paranoia extends to her staff, now mostly or entirely dismissed save for her cleaner and family who have been bringing in food for her.

7. DJ comes from a wealthy background. There is concern also about the management of her own affairs. One of the members of staff who resigned

because of her out of control and intolerable behaviour was her accountant. A builder has also resigned because DJ wished to be smuggled out of her home in the boot of his car because of the fear of assassination.

8. A crisis arose on 28th September of this year. There was an incident with DJ's daughter. When the mother considered that her daughter required to perform some function which she the mother thought she had not, there was a lengthy episode when she was aggressively screaming at her daughter's front door. As a result of this incident, social services of the borough where she lives were asked to intervene but failed to do so.

9. Thereafter, the applicant, supported by his siblings, sought legal advice from a well-known firm of family solicitors who have now made this Court of Protection application.

10. As part of the preparation for this case, the applicant and his siblings have instructed a consultant psychiatrist, a Dr Glover, who has provided a report based on the statements to which I have referred and the text messages. He has not met or even seen DJ. I recognise, as indeed does Sir Robert, the limitations of this approach. Nonetheless, in my assessment, it is not one that can be wholly discounted or disregarded. The children have taken the view that it would be impossible, ineffective, and counterproductive to ask their mother to be assessed. She expresses herself to be wholly sane and rational.

11. Dr Glover, from his experience and upon reading the material with which he is provided, expresses the view that what is described is entirely consistent with one or more possibly interlocking psychiatric disorders. It is more than possible, because the symptoms are wholly consistent with this, that she suffers

from a bipolar disorder, possibly long-term depression. Her erratic conduct is highly associated with cocaine use and may be caused by it, or the cocaine use may be caused by the condition, or each may exacerbate the other.

12. The proposal which is made on behalf of the applicant is, in my view, a moderate and tempered one. It is intended with the support of the Official Solicitor through his representative, Ms Hobey-Hamsher, to introduce psychiatric expertise in the form of a psychiatrist to DJ at her home in pursuit of an assessment. In order so to do, an order is sought, after the necessary interim declaration, without which the court can make no order, and after case management directions, for disclosure to be sought from the borough in which DJ lives and from medical attendants who may have assisted her in the past.

13. One of the complicating features of this case is that the family sought a medical assessment by a well-known psychiatrist from a well-known chain of institutions in 2011. The person from whom this assistance is sought is no longer in practice. DJ's account was that she had been given a clean bill of psychiatric health. Whether this is so or not is not clear because a report has never been disclosed. However, the applicant and the official solicitor are far more concerned about current information although acknowledge that a historical viewpoint may assist with any diagnosis if one is warranted.

14. It is agreed that if I approve this approach, the Official Solicitor is to instruct an independent psychiatrist; and a private GP, to carry out an assessment of: her current physical and mental health; whether or not she has capacity to conduct these proceedings; to make decisions as to whether or not to permit information about her health to be shared with others; as to her care and treatment including

the decision where she should receive such treatment; and to make decisions as to how to manage her property and financial affairs. There is, as yet, no evidence other than the general evidence as to her functioning as to whether the last is a matter which should cause any intervention, or whether she lacks the requisite capacity. However, Mr Rees has made the point which seems to me, certainly in my current assessment, to have some force, that the more complex the affairs the greater the degree of capacity needed to understand them.

15. In addition to the issue of capacity, it is suggested that the medical professionals should consider whether or not DJ is a vulnerable adult in need of the court's protection who is reasonably believed to be either: (1) under constraint; or (2) subject to coercion or undue influence; or (3) for some other reason deprived of the capacity to make the relevant decisions, disabled from making a free choice, or incapacitated and disabled from giving or expressing a real and genuine consent.

16. I have had some debate with counsel as to whether they wish me to make an order or any declaration in respect of this matter as an alternative to an MCA declaration. The present view is that I should not and notwithstanding my initial inclination to do so, I have decided that it would probably be unhelpful to interfere under the remit of this judgment. Provisions are made within the draft order with which I have been provided (a) for a letter of instruction to be prepared, (b) as to how the attempted visit to the home should be carried out, (c) for service (d) the redaction of documents, and (e) disclosure of documents within these proceedings.

17. If DJ is unwilling to see the experts instructed, or the medical professionals instructed; and/or the assessment is not concluded; it is agreed that a report should be written having regard to the written material alone. There are decisions to be made as to whether I am in a position to maintain my involvement in this case. This case has lasted something under three quarters of a day – that is not a criticism as I have needed to give very careful attention to a difficult and unusual case. The order also provides for further case management, and for costs.

18. Of course, all cases which engage the Mental Capacity Act where P has had for many years perfectly adequate and often more than adequate intellectual functioning, present their particular difficulties when the intellectual functions remain intact or reasonably intact, but the ability to put them into practice, to use the language of the MCA, to 'use and weigh' information, is impaired by psychiatric or other disorder.

19. A particular issue arises in this case as to what intervention I can make on an interim basis. Two decisions of Her Honour Judge Marshall QC, a circuit judge sitting in the Court of Protection, and Mr Justice Hayden, a Judge of the High Court Family Division, sitting as a judge of the Court of Protection, appear to conflict. I comment that neither of their decisions are binding on me but, of course, I must pay a great regard and respect to them. Judge Marshall is a specialist. Mr Justice Hayden is a colleague. Neither are to be regarded, in my view, as having precedence over the other in terms of the level of the judiciary or any other reason. Both of them are judges applying an equivalent jurisdiction to that which I am exercising today.

20. Judge Marshall's decision in *Re F* [2009] EWHC B30 (Fam) (reported *sub nom Re F (Interim Declarations)* at [2009] COPLR Con Vol 390), was referred to by Mr Justice Charles in *Re UF [2013]* EWHC 4289 (COP).

21. Before I turn to those decisions, I will set out the relevant sections of the Mental Capacity Act 2005 in order to set those decisions in context and to explain the statutory test which I must apply.

22. By section 1(2):

> "(2) A person must be assumed to have capacity unless it is established that he lacks capacity."

Therefore, this is for the applicant to prove, on a balance of probabilities, when a final determination is sought.

23. At (3):

> "(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success."

At the moment, there has been no opportunity to take any practical steps to assist.

24. By subsection (4):

> "(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision."

25. By section 2(1), headed, "People who lack capacity":

> "(1) ...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."

26. By subsections (2) and (3):

> It does not matter whether
>
> "(2) impairment or disturbance may be permanent or temporary.
>
> (3) A lack of capacity cannot be established merely by reference to—
>
> (a) a person's age or appearance, or
>
> (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity."

27. By section 3(1):

> "(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
>
> (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) ...[not relevant to the present case]."

28. By subsections 3(2), 3(3), and 3(4), if an appropriate simple explanation could be understood, retention of information for only a short period does not prevent the person from being regarded as able to make a decision, but the information relevant to a decision includes information about the reasonably foreseeable consequences of (a) deciding one or way or another, or (b) failing to make the decision.

29. Section 4 deals with the question of best interests which is the second stage after the question of my jurisdiction to make any order at all has been answered in the alternative.

30. Section 48 of the Mental Capacity Act, headed "Interim orders and directions", provides:

> "The court may, pending the determination of an application to it in relation to a person ('P'), make an order or give directions in respect of any matter if—
>
> (a) there is reason to believe that P lacks capacity in relation to the matter,
>
> (b) the matter is one to which its powers under this Act extend, and
>
> (c) it is in P's best interests to make the order, or give the directions, without delay."

31. It is submitted to me as a general proposition by both Sir Robert and by Mr Rees that s.48 of the Act is plainly crafted to give the court power to make an order or grant some form of relief prior to its coming to a final conclusion on the issue of capacity. There was not cited, as far as I can see, to either Judge Marshall in *Re F* or later to Mr Justice Hayden in *Wandsworth LBC v A McC* [2017] EWHC 2435 (Fam), the Law Commission report preceding the enactment and implementation of the Mental Capacity Act 2005, nor the explanatory notes published by TSO (The Stationery Office) alongside the Act. The relevant extract from the Law Commission report at paragraph 10.21 reads as follows headed "Emergency Orders":

> "10.21 As is the case under part VII of the Mental Health Act 1983, we consider that it would be useful for the Court of Protection to be able to make an order or give directions even if it cannot yet determine whether the person concerned actually lacks the capacity to take the decision in question. In exercising this emergency jurisdiction, the court would only be able to make the order or give the directions sought if it is of the opinion that the order or direction is in the best interests of the person concerned. *We recommend* that the Court of Protection should have power to make an order or give directions on a matter pending a decision on whether the person concerned is without capacity in relation to that matter (draft bill, clause 48)."

32. Page 23 of the explanatory notes, which are headed throughout with the rubric, "These notes refer to the Mental Capacity Act 2005 (C9) which received Royal Assent on 7th April 2005", heading "S.48 – Interim orders and directions" read:

> "133 This section allows the court to make interim orders even if evidence as to lack of capacity is not yet available where there is reason for the court to believe that the person lacks capacity in respect of a particular matter and it is in his best interests for the court to act without delay."

33. Judge Marshall's decision in *Re F* was an appeal from a district judge in the Court of Protection determined on 28th May 2009. The subject of the proceedings, to whom I shall refer as 'F' in this context, was a lady in early middle age suffering from a psychiatric condition which was found by the local authority, which had statutory responsibility for her care, to create substantial difficulty in providing appropriate care services due to her antagonistic and uncooperative behaviour. She was thought to suffer from "a dissociative disorder of movement and somatisation disorder".

34. The issue of F's capacity came into focus because she was being treated as a person who was able to decide for herself whether to accept or reject care services and whether she wished to cooperate in this. This type of disorder is one in which the sufferer is more than capable of and frequently does wish to express their views very clearly and strongly, but may be disabled from taking a capacitous decision by reason of the nature of the disorder in itself. So this bears some, although far from complete, similarity to this case.

35. The views of an experienced solicitor in mental capacity matters were expressed after he had interviewed F at some length and he took the view that she did not have capacity to give instructions for litigation about the provision of social care services because she was not able to appreciate the complexities of her position.

36. An application was made supported by the opinion of the solicitor and a COP 3 completed by a consultant neuropsychologist who had seen F on one occasion but who had formed tentative and inconclusive views. He formed the view that whilst the disorders with which she had been diagnosed were classed as mental illnesses, they did not necessarily involve impairment of reasoning, although he considered that it was certainly arguable that her reported discussions with her solicitors reflected a lack of capacity. He noted the disconnect between occasions when she was unable to express her views calmly, clearly, or concisely, and at other times was able to be clear. He acknowledged that F's solicitor held a different view.

37. The district judge refused to make any order and was only willing to adjourn the case to enable further medical evidence to be provided. If it were not provided within less than 28 days, the application was to be struck out.

38. So far as Judge Marshall could ascertain the reasons for the decision it appeared that the district judge considered that since the Act laid down that mental capacity was to be presumed, she did not have jurisdiction to make any order unless and until this presumption was rebutted; and evidence was insufficient because Dr N was not saying that she lacked capacity. She was not prepared to make an order directing any psychiatric assessment or to join any other parties.

39. After setting out what she described as the basic general principles of the law, much as I have done, Judge Marshall went on to formulate her view. I note that in addition to the statutory provisions which I have already recited, she referred to paragraph 4.34 of the Code of Practice emphasising the importance of carrying out a sufficient psychiatric assessment if the person's capacity is in doubt. Judge Marshall commented that the Code appeared to assume that there would be expert evidence available to the court for evaluation where an issue about a person's capacity requires resolution.

40. At paragraph 25, she said:

> "It is obvious that situations can arise where the obtaining of a formal declaration or decision under s.15 or s.16 (namely a final determination) will take time, but common sense suggests that some action may be needed in the interim. Common sense also suggests that if lack of capacity in relation to any particular matter or decision is in issue (notwithstanding the presumption of capacity) then the court should have any necessary powers to enable the proper consideration and determination of that issue even (and, in fact, inevitably) if this means making orders or giving directions which affect the person whose capacity is in issue before that issue has been determined."

41. Judge Marshall then referred herself to s.48 of the Act and continued:

> "28. Mr Cragg argues that the words 'reason to believe that P lacks capacity' under s 48 are plainly a lower threshold test than 'proof on balance of probability that P lacks capacity'

under the combined effects of ss 2(4) and 15. He submits, further, that common sense says that it must be a relatively low threshold. The purpose of s 48 is to authorise the taking of urgent decisions which appear to be necessary in P's best interests 'without delay', before there has been an actual determination that P does lack capacity. The 'reason to believe' test is therefore met if there is evidence to suggest that there is a real possibility that P may lack capacity, as explained in s 3(1).

29. Mr Cragg argues, therefore, that the learned District Judge fell into error, because she in effect applied a higher test in declining jurisdiction. She applied the test whether there was in fact evidence before her sufficient to rebut the presumption of capacity, rather than only evidence suggesting that the presumption of capacity might be rebuttable.

30. Alternatively, if she did not apply the wrong test but applied the latter test, then she either erred in requiring too high a standard of possibility, or else she failed to analyse the evidence before her correctly. First, she appeared to have rejected or ignored Mr Rook's evidence, and looked solely at the medical evidence of Dr M. However, the evidence of Mr Rook, as an experienced mental capacity solicitor, had some weight. It clearly supported the view that there was

'reason to believe' that F lacked capacity at least (and directly) as far as litigation was concerned, but it also supported the view that there was reason to question and investigate other aspects of F's capacity.

31. Second, as to Dr M's evidence, he submitted that the District Judge had mischaracterised this as being evidence that F 'had' capacity. Fairly viewed, his opinion was so tentative and circumlocutory that it still supported the 'reason to believe' test, his eventual conclusion against pronouncing F to lack capacity being plainly driven only by the presumption of capacity which he felt obliged to apply because of the Act.

32. Mr Cragg's submission was therefore, that, taking the evidence overall, there was clearly sufficient evidence to give 'reason to believe' that F lacked capacity, certainly as regards litigation, and also sufficiently as regards other relevant matters such as appropriate care services for herself. This situation would therefore engage s 48 in principle. Thereafter, the second limb of the test for whether the court should intervene, namely whether it was in F's best interests for some action to be taken without delay, would come into play. He submitted that a decision to commission a detailed psychiatric report to enable F's wider capacity to be assessed without delay was a decision

> which could and (he submitted) plainly should then have been made under this section.
>
> 33. Mr Cragg observes that the practical consequence of the approach adopted by the District Judge was that it would, apparently in all cases, be necessary to obtain a detailed or expert psychiatric evaluation before the court would accept that it had any jurisdiction to entertain proceedings under the Act at all. He submits that this cannot be right because Part 15 of the Court of Protection Rules, shows that it is envisaged that the Court itself will 'manage' expert evidence, and plainly therefore assumes that it will be exercising jurisdiction before such evidence needs to be obtained, rather than only afterwards. The fact that expert evidence may only be filed with the permission of the court or a practice direction (rule 120) also shows that it is not intended that such evidence has to be obtained before the court can entertain an application regarding capacity in the first place."

I cite the judgment at such length because it is necessary for these six paragraphs to be read together in order to understand the submissions made.

42. In her decision, Judge Marshall concluded that Mr Cragg's arguments were well-founded. Her conclusion was:

> "35. The 'presumption of capacity' reinforces the general approach of the Act, that 'P's' basic right to have the power

to make decisions for himself is to be respected and protected, and can therefore only be displaced by sufficient evidence establishing that he does not have capacity in the relevant respect. However, such a finding is what ultimately grounds a formal declaration under s 15 of the Act, and s 48 expressly confers powers on the court to take steps 'pending' the determination of that question. It follows that the evidence required to found the court's interim jurisdiction under this section must be something less than that required to justify the ultimate declaration.

36. What is required, in my judgment, is simply sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard. There are various phrases which might be used to describe this, such as 'good reason to believe' or 'serious cause for concern' or 'a real possibility' that P lacks capacity, but the concept behind each of them is the same, and is really quite easily recognised.

37. I therefore accept Mr Cragg's submission that the 'gateway' test for the engagement of the court's powers under s 48 must be lower than that of evidence sufficient, in itself, to rebut the presumption of capacity. If and insofar as this was the test applied by the District Judge (as seems to have been the case), this was incorrect.

> 38. If the learned District Judge did not in fact ask herself whether the evidence before her was enough to rebut the presumption of capacity, but applied some lesser test, did she nonetheless apply too high a test? In my judgment she did, because it appears that she regarded nothing less than the positive opinion of a specialist medical practitioner to the effect that F did lack the relevant capacity as being sufficient to found her jurisdiction even to direct a psychiatric assessment of F.
>
> 39. This must, in my judgment, be setting too high a hurdle. The Act is meant to operate in a simple and practical way, and to facilitate any necessary determination about P's capacity if there is doubt. It is clearly intended at least that general medical practitioners and health professionals other than mental capacity specialists should be able to supply evidence which will enable the Court of Protection to decide whether it can or should intervene, and if so, how."

43. Judge Marshall went on to comment that the danger created by the Act with its "new and more sophisticated approach to mental capacity" is that general practitioners would believe that they could not complete an assessment for the court because of lack of supposed expertise, as in the case before her. She commented that this was likely to leave the most problematical cases before the court without any expert evidence at all. She commented:

> "It would be unfortunate if conclusive specialist assessment came to be regarded as necessary before the court would accept jurisdiction at all."

44. She referred to the delay and expense that this would cause, and the risk that a vulnerable person would "slip through the net of protection" particularly in cases where a psychiatric opinion could not be afforded. She then commented that expert evidence is most likely to be required in cases where lack of capacity is suspected but not clear. In cases where this was genuinely in doubt, such a case would be one

> "...in which the court should be able to intervene promptly to enable a fast and efficient determination of the issue."

45. She commented that a lower threshold for engagement of the court's powers under s.48 is:

> "...not at all inconsistent with the empathetic approach with the Mental Capacity Act 2005 and each adult is to be treated as entitled to make his own decisions which are not to be interfered with without good reason to suppose that he is vulnerable through lack of capacity."

46. She commented that the second, best interest, stage under s.48, provides the real protection for F against undue interference with his affairs and his right to make his own decisions. Her conclusion at paragraph 44 was that:

> "The proper test for the engagement of s 48 in the first instance is whether there is evidence giving good cause for concern that P

> may lack capacity in some relevant regard. Once that is raised as a serious possibility, the court then moves on to the second stage to decide what action, if any, it is in P's best interests to take before a final determination of his capacity can be made. Such action can include not only taking immediate safeguarding steps (which may be positive or negative) with regard to P's affairs or life decisions, but it can also include giving directions to enable evidence to resolve the issue of capacity to be obtained quickly. Exactly what direction may be appropriate will depend on the individual facts of the case, the circumstances of P, and the momentousness of the urgent decisions in question, balanced against the principle that P's right to autonomy of decision-making for himself is to be restricted as little as is consistent with his best interests. Thus, where capacity itself is in issue, it may well be the case that the only proper direction in the first place should be as to obtaining appropriate specialist evidence to enable that issue to be reliably determined."

47. Judge Marshall concluded that the threshold for engaging s.48 in that case was "clearly met". F's GP regarded the issue of capacity as difficult,. Dr M's opinion was tentative and undecided. Therefore he was thrown back on the presumption of capacity, whereas the evidence of the solicitor supported the view that F lacked capacity in relation to litigation; thus raising to the question of how far such lack of reasoning capacity might affect other aspects of her behaviour.

48. An objective reading suggested that either F did not fully understand the implication of her attitudes or that she did and was being deviously and deliberately overbearing or manipulative to try to get her own way, which might in itself be the product of impaired reasoning power. Therefore:

> "...the unclear situation certainly suggested a serious possibility that [F] might lack capacity in relation to decisions about her own care needs."

49. She concluded:

> "The case therefore invited a direction appropriate to the circumstances, to enable this issue to be resolved with dispatch, even though the situation might not have been serious enough to justify making any further direction or order with regard to [F's] living conditions at that stage."

50. In *Wandsworth LBC v A McC*, Mr Justice Hayden was concerned with care proceedings in respect of three children aged 13, 15, and 17. The relevant part of the decision concerns only the 17-year-old referred to by the judge as "J". The case had a convoluted forensic history involving many assertions as to emotional and physical harm and neglect. HHJ Tolson QC, at the Central Family Court, made final care orders after having made a finding that threshold had been crossed on the basis of untested but disputed evidence. Judge Tolson runs a hard pressed and busy court and appears to have formed the view that the mother's case was unarguable. The Court of Appeal referred the case back and it was eventually heard by Hayden J. I note that the threshold was found to be established.

51. J wished to live with his mother. By the time of the final resolution of the case, all parties agreed that given his age, the judge was not able to make orders within the framework of the Children Act 1989 because the age limit after which this is impermissible had been passed. The local authority accordingly sought permission to pursue proceedings in the Court of Protection. They conducted an "assessment of mental capacity" during the hearing concluding that J lacked capacity due to his "lack of insight" and "inflexibility of thought". The social worker added to this that J was unable to "sift and weigh the issues underlying the decision" but gave no illustration of any example of this. Mr Justice Hayden found that:

> "...the assessment displays insufficient forensic rigour to justify its conclusion. Neither do I regard its determination that J lacks capacity as adequately reasoned."

52. That seems, if I may say so, to be a wholly correct assessment of what the judge describes. He went on, however, to consider the approach taken under the Mental Capacity Act. He reminded himself that:

> "One of the key principles of the Mental Capacity Act is that a person should not be treated as unable to make a decision until everything practicable has been done to help the person make their own decision..."

Also, he referred to the Code of Practice on this topic. He commented that the mental capacity of J was a very recent issue in the case.

53. At paragraph 49 he said:

> "It seems to me that a prerequisite to evaluation of a person's capacity on any specific issue is at very least that they have explained to them the purpose and extent of the assessment itself. Here, that did not happen. In my view, it is probably fatal to any conclusion. In any event, it, at least, gravely undermines it."

54. He reminded himself of the decision of Peter Jackson J, as he then was, in *PC and Anor v City of York Council* [2013] COPLR 409 as to the respect that must be given as to "...the space between an unwise decision and one which an individual does not have the mental capacity to take" and the importance of respecting that, "...space, and to ensure that it is preserved, for it is within that space that an individual's autonomy operates."

55. He then recorded certain observations of J as to his reasons for wishing to go home to his mother. The judge expressed the view at paragraph 52:

> "I am left with a real anxiety as to whether these remarks illustrate a lack of capacity to take the decision in focus or merely an illogicality or general unreasonableness on J's part."

I can entirely see why he took that view.

56. Mr Justice Hayden then set out ss 2(1), 15, 48, and 4 of the Act. He referred to two authorities, one of which was *Re F (Mental Capacity: Interim Jurisdiction)* and the other *Re FM and ANR* [2016] EWCA Civ 645. In *Re FM and ANR*, Lady Justice King LJ had dismissed an application for permission to appeal having been referred to the test in *Re F*. Having set out at paragraphs 36, 27,

38, 43, 44 and 46 of the judgment of Judge Marshall in *Re F*, King LJ followed that approach holding that:

> "...the evidence required to make an interim declaration under section 48 is at a lower threshold than the evidence required to make a final declaration and the proper test in the first place is (a) whether there is evidence giving good cause for concern that the person might lack capacity and (b) when that was raised as a serious possibility, the court should take and decide what action, if any, was in the person's best interests before a final determination of his or her capacity could be made."

57. She later observed that s.48 of the 2005 Act:

> "...allows the court, pending the determination of an application, to make an order if there is reason to believe that [P] lacks capacity, no more, no less at this stage."

She referred again to the "lower threshold test".

58. In *Wandsworth LBC v A McC* at [64] Mr Justice Hayden said that King LJ had been:

> "...reciting only what she considers to be uncontroversial law, she plainly did not regard herself as endorsing any formulation of the test."

59. He directed himself that, in any event, applications for permission to appeal are rarely, if ever, regarded as citeable authorities. I would comment that Black LJ,

as she then was, on more than one occasion stated that judgments on application for permission are not to be regarded as citable authorities.

60. Hayden J went on to reject Judge Marshall's approach. He said at paragraph 65:

> "...the presumption of capacity is omnipresent in the framework of this legislation and there must be reason to believe that it has been rebutted, even at the interim stage. I do not consider, as the authors of the 'Mental Capacity Assessment' did that a 'possibility', even a 'serious one' that P might lack capacity does justification to the rigour of the interim test. Neither do I consider 'an unclear situation' which might be thought to 'suggest a serious possibility that P lacks capacity' meets that which is contemplated either by Section 48 itself or the underpinning philosophy of the Act."

61. At paragraph 67, Hayden J concluded that in the first instance decision in *Re FM* (which was not, of course, the decision in *Re F*), had shown a "a dangerous elision between autism and incapacity" in that case. He regarded that as threatening individual autonomy.

62. At paragraph 69, he said:

> "...I think it is important to emphasise that Section 48 is a different test [from s.15] with a different and interim objective rather than a lesser one. 'Reason to believe' that P lacks capacity must be

> predicated on solid and well-reasoned assessment in which P's voice can be heard clearly and in circumstances where his own powers of reasoning have been given the most propitious opportunity to assert themselves."

63. At paragraph 70, he drew a distinction between s.38 of the Children Act ("*reasonable grounds for believing*") which he remarked is:

> "...set at a low threshold in order to take protective intervention for children, whilst Section 48, Mental Capacity Act, directly engages the autonomy of an adult in a legal framework where the presumption of capacity on individual decisions remains central throughout. Thus whilst the posited analogy does not hold, it serves, paradoxically to illustrate the extent and significance of the difference."

64. Hayden J went on to conclude that the test was not met in J's case because the purpose of the assessment was not explained to J and the analysis of the extent of his understanding was superficial and incomplete. The ultimate reasoning underpinning the conclusions of the assessment was vague and unsatisfactory:

> "It would be entirely disrespectful to J to curtail any aspect of his autonomy on the basis of such unsatisfactory evidence."

He concluded that he was entirely unclear as to whether J had capacity to decide where he lived or not.

65. It is uncomfortable, even invidious, to be asked to disagree with the decision of another judge of equivalent status. However, I am invited to approach this case by both counsel on the basis that Judge Marshall's reasoning should be preferred to that of Mr Justice Hayden. Both Sir Robert and Mr Rees submit that the stark and restrictive interpretation by Hayden J, with its requirement of explanation to the asserted incapacitous person and ability for his/her voice to be heard, makes the Act unworkable in practice and runs a high risk of imperilling the safety and wellbeing of those persons whom the Act and the judges are charged with protecting. Reliance is placed upon Judge Marshall's words which I have quoted at length and I am asked to approve them.

66. I regard her approach as consistent with the policy of the Act, one which makes sense on the basis of common sense and practicality as she observed. I agree that were it necessary in every case, as opposed to preferable, to defer assessment of capacity until there has been either a formal psychiatric assessment and/or engagement of P undermines the Act's purpose and unsupported, indeed is positively contradicted, by the Law Commission report and the explanatory notes after the Royal Assent which I have cited, I am satisfied that I can take into account such materials which are plainly to be regarded as *travaux préparatoires* and which are, in any event, consistent with a purposive construction of the Act.

67. Furthermore, to require the "voice" of P to be heard before reaching a decision as to whether the s.48 gateway is passed is not to be found within the structure of the Act itself but is, adopting the approach of Judge Marshall, one of the matters to be taken into account when considering the case in the round. I note

also that on the facts of the decision in respect of J in the Wandsworth case, the only material upon which the local authority appear to have relied was what J said himself. In contrast to the case before me, there appears to have been no other extraneous observation of behaviour, of attitude, examination of written material, and so on.

68. I can see that there may be cases in these highly fact-specific areas where to hear the voice of P explaining a comment or account may be an important part of the assessment process, particularly at the final stage. I disagree that there is any compulsion for such view to be expressed. In practice whether an explanation is required will mostly be where silence in the face of something calls for an answer.

69. In this case, as in a number of others, the court will be required to consider whether an emergency decision needs to be taken where the only information available is, as in this case, based upon an observation of P, that is to say DJ. I cannot see how anything that DJ might have said in answer to those observations would have assisted this court to determine whether or not the threshold under s.48 was passed. To engage her in that process would have risked delay, complete impasse, or at any rate, deeper lack of cooperation, and the real possibility of activities potentially leading to harm, by seeking to evade intervention. It is possible to envisage many like scenarios.

70. I disagree also with Hayden J that "a possibility" and particularly "a serious one" does not fulfil the test set out in s.43. Furthermore, an "unclear situation" which might "suggest a serious possibility P lacks capacity" in my view also

falls within the criteria to be considered or the circumstances to be considered under s.38.

71. I have been urged not to seek to recast the clear words of s.48 in any different language which might further confuse the law in this area. It is obvious to me that the word "reason" in s.48 means that there must be evidence upon which a belief is formed. It probably needs to be *prima facie* credible, not in the sense that it is believed but in the sense that it is capable of belief (for instance, something which is plainly fanciful or impossible might be capable of being disregarded), and I see no reason, indeed it seems to me axiomatic in the phraseology of s.48(a) that the court is entitled to draw inferences from the *prima facie* facts which are sought to be established.

72. Pursuant to Rule 95 of the Court of Protection Rules 2007, the court can take into account hearsay evidence at any stage. Although consistent with the approach in Children Act proceedings, it would probably be wise for a court in its later fact finding mode to adopt a disciplined approach, having regard to the source of the evidence, whether it is first hand or more distant hearsay and the reliability of the method by which it has been recorded. Furthermore, as Mr Justice Baker has made clear in more than one decision, the assessment of capacity is not for experts but is for the court although they may, particularly in difficult cases, as Judge Marshall remarked, be assisted in expert opinion in coming to a conclusion.

73. So adopting the simple test in the Act, do I have reason to believe that DJ lacks capacity? I have the evidence of four witnesses which concurs, with considerable overlap, but also with individual observation and experience.

There are only two explanations for this. Either this is a concoction in which the siblings have conspired, or that each may have influenced the other to have embroidered or embellished true events; or it is true. In practice a substratum of truth is probably sufficient enough to fulfil s.48 in any event.

74. As a matter of general experience, wholesale conspiracies to concoct evidence are not unknown but are relatively rare. The court is enjoined in cases where health and wellbeing may be an issue to take a cautious approach by the formulation of s.48. Furthermore, I have hearsay evidence on which I can place a considerable degree of weight at this stage particularly because it appears to be first hand-evidence and in respect of both the direct and hearsay evidence, I have DJ's text messages, the flavour and the detail of which is wholly consistent with the account given, which I would have to regard as difficult although perhaps not impossible to concoct.

75. Therefore, my analysis of the primary evidence is that there are reasons to believe that the situation on the ground is as described. Acknowledging that Dr Glover has not had any first-hand evidence about DJ, he has clear and detailed accounts of her behaviour which he finds to fall into the category of an established psychiatric/mental disturbance which can be named, i.e. diagnosed. I accept Sir Robert's submission that where P's refusal to comply with a psychiatric assessment which cannot be physically coerced it cannot have been intended by Parliament (and indeed the whole structure of the Act militates against this conclusion), to create a situation in which the court is unable to intervene.

76. I have dealt with this matter in such detail partly because I have been presented with a unified position on behalf of the applicant and the Official Solicitor. Therefore, I felt it incumbent upon me to look at these issues with particular care. I have come to the conclusion, as is obvious from the judgment so far, that I find the s.48 (a) test satisfied on an interim basis. It may be that all of the children will be required to give evidence in due course. DJ may give instructions which require them to be challenged. The official solicitor may take the view that he ought to challenge them in any event. If the primary facts are proved, then the court will have to consider what conclusions to draw pursuant to ss 15 and 16 of the Act.

77. At the moment, having found 48(a) to be satisfied this matter is one to which my powers under the Act extend, I have to decide whether it is in DJ's best interests to make the order or to give directions without delay. In one sense, this is not an urgent case. This is a chronic condition, if the evidence I have heard is established, although it may be one that is deteriorating. However, I have evidence from DJ's daughter of a particularly alarming episode within the last two months and the evidence that I have is of a gradually declining presentation.

78. If I put off taking this decision now, the question is when would I ever be in a position to decide the circumstances were serious enough to intervene?. I would never have the evidence that I require from a psychiatrist even with the limited second opinion on the papers which the Official Solicitor quite rightly, in my view, would propose as an alternative to a full examination if such is not

achievable. There would be more than a real possibility and an unacceptable risk that harm would occur to DJ in the reasonably foreseeable future.

79. Therefore, in my view, particularly since Christmas is looming and a two-and-a-half-week recess in the offing, I regard it as in DJ's best interests to give directions which will set this case on a path towards determination without delay.

80. A draft order has been put before me crafted by Sir Robert and Mr Rees. As I have already described, its terms speak for itself. I need not elucidate it for the purposes of this judgment. I have already expressed it to be proportionate and measured and it is the best way in which it is possible that some degree of cooperation and understanding may be achieved.

81. I therefore express myself to be satisfied in respect of s.48. It would be helpful, in case I am not able to take this case further and I have not yet been able to establish this from the Clerk of the Rules, for there to be a recital in the order that I am satisfied in respect of s.48 that DJ lacks capacity, my powers are engaged, and it is in her best interests to make the order without delay. In so doing, I have followed and adopted the approach of Judge Marshall in the cited case.

82. I most grateful for the assistance I have received in what I have found to be, in some respects, a troubling case where this will not be the end of the road by any means and the first step has just been taken.
