



Neutral Citation Number: [2019] EWCOP 3

Case No: 13281081

IN THE COURT OF PROTECTION

Coverdale House
East Parade
Leeds

Date: 21/02/2019

Before:

THE HONOURABLE MR JUSTICE COBB

Re B (Capacity: Social Media: Care and Contact)

Simon Garlick (instructed by **County Solicitor**) for the Local Authority
Sam Karim QC and Francesca P Gardner (instructed by **MJC Law** for the **Official Solicitor**) for Miss B

Hearing dates: 28 and 29 January 2019

Approved Judgment

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

.....
THE HONOURABLE MR JUSTICE COBB

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C-Transparency. It may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

The Honourable Mr Justice Cobb:

Introduction

1. The application before me concerns Miss B, a woman in her 30s with learning disabilities. By this judgment, I set out my conclusions in relation to a range of *capacity* questions on issues relevant to Miss B's life, including her capacity:
 - i) To litigate in these proceedings (see [22]-[24]);
 - ii) To manage her property and affairs (see [25]);
 - iii) To decide where she resides (see [26]-[28]);
 - iv) To decide on her package of care (see [29]-[31]);
 - v) To decide with who she has contact (see [32]-[33]);
 - vi) To use the internet and communicate by social media; (specifically, it is agreed that the question is 'whether Miss B has capacity to make a decision to use social media for the purposes of developing or maintaining connections with others') (see [34]-[41]) (the question was framed in a similar way in *Re A (Capacity: Social Media and Internet Use: Best Interests)* [2019] EWCOP 2 ('*Re A*'));
 - vii) To consent to sexual relations (see [42]-[46]).
2. Given that the point at 1(vi) above is relatively novel, much attention has been given in these proceedings to what constitutes the "information relevant to the decision" (*section 3(1)(a) Mental Capacity Act 2005: 'MCA 2005'*) to use social media for the purposes of developing or maintaining connections with others'. The Official Solicitor, who acted for A in *Re A*, has submitted through Mr Karim QC and Miss Gardner that the relevant information can be pared back to three essential components; the Official Solicitor took a different, and more expansive, approach in *Re A*. The local authority (adopting a line more akin to the arguments advanced across the board in *Re A*) has proposed that it should involve a fuller range of information. As it will be seen ([37]), I have taken a view which is closer to the approach of the local authority in this case, and of all of the parties in *Re A*.
3. My findings on capacity or incapacity set out below, whether as final or interim declarations, will provide a platform from which I will go on at a later hearing to consider best interests issues.

Statutory framework

4. I have approached the central issues arising here with keen attention to the statutory assumption that Miss B has "capacity unless it is established that [she] lacks capacity" (*section 1(2) MCA 2005*). My focus has been principally on *section 2* and *section 3* of the *MCA 2005* – and specifically, on whether, in relation to the matters under debate, she is unable, "at the material time" (i.e. now), to make a decision for herself "because of an impairment of, or a disturbance in the functioning of, the mind or brain" (*section 2 MCA 2005*). It is important in this case (and, as will be seen,

influential in the outcomes proposed) to have regard to the availability and appropriateness of “practicable steps” to help Miss B to make the relevant decisions (*section 1(3) MCA 2005*); this is one of the three key parameters of the *MCA 2005*. As the Mental Capacity Code of Practice stresses: “it is important not to assess someone's understanding before they have been given relevant information about a decision” (para 4.16) and that “it is important to assess people when they are in the best state to make the decision, if possible” (para 4.46).

5. The evidence has largely been directed to the familiar ‘functionality’ test contained in *section 3*; this requires me to consider whether Miss B can (a) understand the information relevant to each decision, (b) retain that information, (c) use or weigh that information as part of the process of making the decision or (d) communicate her decision (whether by talking, using sign language or any other means). If it is shown on the balance of probabilities that she is unable in any of these respects, then she is regarded as “unable to make a decision for [her]self”. As is commonly the case, I have been most concerned with the issues of ‘understanding’ ((a) above) and ‘using and weighing’ ((c) above).
6. Having heard the evidence and received the submissions of counsel, I have had cause to consider whether I should make *final* capacity declarations under *section 15 MCA 2005*, alternatively *interim* declarations under *section 48(a) ibid.*; interim declarations would be appropriate where the evidence is not complete, or where practicable steps could yet be taken to assist Miss B to make the decision but where there is nonetheless currently “reason to believe that P lacks capacity in relation to the matter”. Particularly given the essentially binary nature of the capacity question, I am keen to ensure that all reasonable opportunities have been given to Miss B, where relevant, to demonstrate her abilities before reaching definitive conclusions.

Evidence and submissions

7. For the purposes of my determination, I heard oral evidence from Dr. Lisa Rippon, MBBS, FRCPsych, Consultant Psychiatrist, and from Ms K, Miss B’s social worker. I have been greatly assisted by their evidence, but I am clear that the decision on functional ability is ultimately mine not theirs (*CC v KK* [2012] EWCOP 2136).
8. I have received helpful oral and written submissions from counsel, Mr. Garlick for the local authority, and Mr Karim QC and Miss Gardner for Miss B. I have had the advantage of submissions on the common social media issues from Miss Butler-Cole and Mr McCormack, Mr. Patel QC and Mr. O’Brien, and Mr. Allen in the case of *Re A*. I also had the benefit of reading a useful paper on social media prepared by Ms Sophie Hurst, a barrister.
9. Miss B attended at court, and indicated that she wished to speak with me; it was agreed with counsel that this would be appropriate, so that she could express her wishes and feelings to me directly, and so that she could feel part of the proceedings (see *rule 1(2)(d) of the Court of Protection Rules 2017*). We spoke together in one of the conference rooms for a little over a quarter of an hour, in the company of Miss B’s solicitor (who took a note) and learning support worker. It was a pleasure to meet with her. She was chatty and in good spirits; I could not be under any misapprehension about the strength of her expressed wish to live with Mr. C.

10. In deciding on capacity to communicate by social media, counsel in this case had seen the proposed agreed formula of the outline ‘relevant information’ which counsel had prepared in the case of *Re A (Capacity: Social Media and Internet use)* (see [27] of that judgment), in respect of which I had heard the arguments in the previous week.

Background

11. Miss B suffers a learning disability and epilepsy and has considerable social care needs. She currently lives with her parents and sibling; although she has occasional overnight respite care which she appears to enjoy, and some community support, she is somewhat socially isolated. The family home is said to be unkempt and dirty; Miss B spends much of her time watching television. She enjoys colouring in pictures (an activity in which she was actively absorbed while I chatted with her at court).
12. Miss B struggles to manage her personal care and hygiene; she is grossly overweight. She is prone to confrontational behaviour when challenged, and can be physically aggressive. She is assessed as requiring support to maintain her safety when communicating with others; when she receives information which she does not want to hear, she often becomes dismissive, verbally aggressive and refuses to engage.
13. She is wedded to her mobile phone, and uses it to communicate via social media, principally using WhatsApp, Facebook and Snapchat. Miss B’s social media activity has, over the last three years, caused repeated concern to her adult social care workers. She has been known to send intimate photographs of herself, and to communicate her address and other personal information about herself, to male strangers. She is very keen to be in a relationship with a male. She is known to search the internet for a boyfriend by typing in male forenames, and when men respond, she asks them directly whether they will be her boyfriend. Once she has made a link with a potential mate, and they respond to her, she views them as a ‘friend’ and will quickly tell them that she loves them and wants to meet with them. She routinely ‘sex chats’ with males.
14. Unsurprisingly, a number of specific safeguarding concerns have been raised in this respect. For example, in 2016, she established contact with a male (Mr D), who early on in their communications told her that he would slit his wrists if she did not send him money. It is not known whether she did send money. Miss B told her care workers that she planned to live with Mr D “and have children” with him, though she had not at that point actually met him. Mr D had a history of criminal offending, including domestic assaults, and was said to suffer from a personality disorder and mental ill-health; through multi-agency intervention, the police managed to track down Mr D and dissuade him from meeting with Miss B. However, during 2017, Miss B ‘met’ a number of other men through social media. Adult social services continued to monitor her behaviour and sought to advise her of the risks and support her.
15. In light of the foregoing concerns, Miss B’s social worker – who has known her since 2011 – has conducted a number of capacity assessments over the last 2-3 years covering different aspects of Miss B’s decision-making. Ostensibly inconsistent conclusions have been reached through these assessments over time about Miss B’s capacity: while she has been shown to lack capacity in relation to consenting to sexual relations in October 2016, she was found to be capacitous in this respect in January

2017, and this position appears to have been confirmed in May 2018 (including an understanding of sexually transmitted disease (see [44] below)). While she was assessed as not having the capacity to understand the risks associated with engaging in conversations with males unknown to her in October 2016, she was found to be capacitous in this regard in January 2017; by May 2018 she was assessed as lacking capacity again to understand the risks of befriending strangers on the internet. Notably, Miss B has been assessed in relatively recent times as having capacity in relation to her care and support needs (assessment 4.11.16).

16. There is no single or clear explanation for the discrepancy in outcome of these assessments, as Miss B's learning disability and cognitive functioning is assessed as static not fluctuating. It seems likely that some 'teaching' offered by the community team for learning disability in 2017, educating her in relation to sexual relations and social media, was effective in those areas. Miss B appears to have retained information following that learning, at least for a short period; it is possible that she then forgot this information (*section 3(3) MCA 2005* of course provides that: "The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision"). There is also a small chance that there may have been either a lack of clarity on the part of the assessors about the application of the statutory criteria or the 'relevant information' which Miss B should know, and/or an inconsistency has crept in to the outcomes through assessments undertaken by different assessors. The variability of outcome might serve to underline the importance of presenting information to P in a way that is consistent and appropriate to meet the individual's needs and circumstances, attaching importance to explaining information using the most effective form of communication for that person (such as simple language).
17. In 2018, fresh concerns were raised about Miss B sending explicit sexual messages, intimate photographs, and money to men who were not known to her, but who she referred to as her "boyfriends". It was through this behaviour that she met Mr C. He is a man in his seventies who is a convicted sex offender, classed as 'medium / high risk' and subject to a Sexual Harm Prevention Order ('SHPO'). Although Miss B has been advised of the risks posed by Mr C, she bluntly refuses to believe the truth about his offending history. She remains in regular contact with him; she has met him several times, causing him on one occasion to be in breach of his SHPO. On at least one occasion she has stayed overnight with him at his home. Messages sent to Miss B by Mr C reveal that he describes her as his 'mistress' or his 'slave'. Miss B has confided in her social worker that she wishes to have his baby. Through Mr C it is believed that Miss B has met three of Mr C's 'friends' on social media, with whom it is said she has engaged in sex chats. Even recently, in discussion with Dr. Rippon, Miss B refuted as 'lies' what she has been told of Mr C's offending history. For his part, Mr C has worryingly confirmed to his probation officer that:
 - i) He is aware of Miss B's learning disability, and describes her as functioning as a 10-year old;
 - ii) He wishes to marry Miss B;
 - iii) He challenges the local authority's actions in informing Miss B of his offences;

- iv) He remains in regular contact with Miss B;
 - v) He actively seeks females on Facebook.
18. In October 2018, at the instigation of the local authority, and satisfied on the basis of the information then available that Miss B lacked capacity to make a decision about contact with Mr C, I imposed an interim injunction on Mr C prohibiting him from having any contact with Miss B; this was confirmed more recently at an ‘on notice’ hearing. There is evidence (as yet untested) that Mr C has been in breach of my last order, and the local authority has issued contempt proceedings which are imminently to be heard by the court.

Capacity: discussion.

19. *General observations:* In reviewing the capacity questions engaged here, I have reminded myself of the importance of establishing the causative nexus between the impairment of mind and the inability to make decisions. In this regard, counsel has rightly focused, when testing the evidence and making submissions, on the extent to which Miss B is influenced in her decision making by others – notably her father and/or Mr. C. Undoubtedly both men do exercise an influence over her; I was told (though make no finding) that her father can be abusive to her, verbally, and imposes boundaries on her which she finds unwelcome, whereas Mr C is persistent, and it may be thought controlling through his continual communications with her via social media (generally WhatsApp). I am satisfied that influence is a factor, but I share the view of Dr. Rippon that it is not actually operative on her decision making, and is in any event not more significant than the clearer evidence about impairment of the mind (Parker J in *NCC v PB & TB* [2014] EWCOP 14 at [86]).
20. While there is some logic to the strict decision-specific approach which I have summarised at [4] and [5] above, there is also some artificiality around the results. This case has revealed for me, once again, some of the anomalies of the required and disciplined approach in cases concerning capacity: thus, it will be shown that Miss B will be assessed as having capacity to decide on residence, but not her care (even if her proposed favoured residence is with someone who palpably will not care appropriately for her); she may have capacity to consent to sexual relations, but not have capacity to decide with whom to have those relations, or indeed any form of contact. That is the law which I must apply.
21. I have further borne in mind (and this is particularly relevant to the ‘residence’ question below) what Baker J (as he then was) said in *PH and A Local Authority v Z Ltd & R* [2011] EWCOP 1704 at [16(xi)]: “courts must guard against imposing too high a test of capacity to decide issues such as residence because to do so would run the risk of discriminating against persons suffering from a mental disability.”
22. *Capacity to litigate:* Dr. Rippon is of the view that Miss B lacks capacity to litigate as a result of her learning disability. In reaching this conclusion, Dr. Rippon has rightly applied the test set out in *Masterman-Lister v Brutton & Co. (No.1)* [2002] EWCA Civ 1889 at [75] and [79]

“[75] ... the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding,

with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem (or, as such a person is now described in the Civil Procedure Rules, a litigation friend) ...

[79] ... a person should not be held unable to understand the information relevant to a decision if he can understand an explanation of that information in broad terms and simple language; and that he should not be regarded as unable to make a rational decision merely because the decision which he does, in fact, make is a decision which would not be made by a person of ordinary prudence.”

23. She concluded that Miss B could not describe the nature of the current Court of Protection proceedings ...

“Despite me using simple language and explaining this information on a number of occasions, I do not believe that [Miss B] understood the nature of the current proceedings or could think through the consequences of issuing instructions ... [Miss B] lacked understanding of the information necessary to litigate in the current proceedings.”

24. The parties agree this expert opinion which chimes entirely with the evidence of the experienced social worker, and I concur that Miss B does not have capacity in this regard and that I can make this as a final declaration under *section 15 MCA 2005*.
25. *Property and affairs:* Dr. Rippon is the first professional to assess Miss B’s capacity to manage her property and financial affairs; there is in fact relatively little material in the papers on which to form a view. What is apparent is that, when asked, Miss B has a very poor understanding of finances, a grossly inflated sense of her income from benefits, and demonstrated no real appreciation of how her money is spent. She showed no understanding of the risks of financial exploitation, or of the ability to prioritise her expenditure. The local authority submitted that there was reason to believe that Miss B lacks capacity in this area of decision-making for the purposes of *section 48*; Mr Garlick submitted that the fact that the family arrangements for dealing with finance had allowed Miss B no experience of being responsible for her finances meant that there was insufficient evidence that she would not in the future be able to manage her property and affairs, and therefore that a *section 15* declaration was not appropriate. Dr. Rippon considered, having discussed these issues with her, that Miss B lacked capacity in this regard, and given the abstract nature of the concepts involved would not benefit from education in this area. The Official Solicitor agrees; so do I. A *section 15* declaration will be made.

26. *Residence*: The widely accepted test of ‘information relevant to a decision’ on residence is that which is set out in Theis J’s decision of *LBX v K, L, M* [2013] EWHC 3230 (Fam) at [43] namely:
- i) what the two options are, including information about what they are, what sort of property they are and what sort of facilities they have;
 - ii) in broad terms, 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);
 - iii) the difference between living somewhere and visiting it;
 - iv) what activities P would be able to do if he lived in each place;
 - v) whether and how he would be able to see his family and friends if he lived in each place;
 - vi) in relation to the proposed placement, that he would need to pay money to live there, which would be dealt with by his appointee, that he would need to pay bills, which would be dealt with by his appointee, and that there is an agreement that he has to comply with the relevant lists of "do"s and "don't"s, otherwise he will not be able to remain living at the placement;
 - vii) who he would be living with at each placement;
 - viii) what sort of care he would receive in each placement in broad terms, in other words, that he would receive similar support in the proposed placement to the support he currently receives, and any differences if he were to live at home; and
 - ix) the risk that his father might not want to see him if P chooses to live in the new placement.
27. Dr. Rippon was of the view that Miss B does *not* have the capacity to make a decision as to her residence. Dr. Rippon was particularly influenced in reaching this conclusion because of Miss B’s difficulty with abstract concepts: Dr. Rippon opined that Miss B was unable to understand the implications of moving away from her current home, supports, and community. Dr. Rippon was further of the view that while Miss B was able to understand “who she would be living with at each placement” ((vii) above) she was unable to assess the *risk* of living with Mr C. While acknowledging the artificiality of this situation, it seems to me that the implications of living with a particular person (and the risks which this may pose) are more appropriately considered under decisions on ‘care’ and contact than residence. Indeed, when cross-examined by Mr. Karim, Dr. Rippon accepted that Miss B had a “basic understanding” in respect of all of the nine areas covered by Theis J’s test above.
28. While it is fair to accept, as Mr. Garlick argues, that Miss B has an almost ‘childlike’ perspective on the issue of her residence, in my judgment it is the factor identified in (viii) above which is the most challenging to interpret or apply on the facts of this case. The Local Authority contends that Miss B lacks capacity in this respect because

she is unable to understand or weigh the sort of care she would receive in each placement, and that if she moved to live with Mr C for instance, she would lose accepted sources of support which she may not be able to replicate. I agree that she may not have fully thought-through the implications of a move, but the evidence reveals to me that Miss B *does* understand in broad terms the care she would receive if she lived with Mr C in contrast to living at home or in residential care. That the relationship with Mr C may pose risks to Miss B is a separate issue which I consider under ‘care’ and contact. In this regard, I have reminded myself of the cautionary words which I cited above (see [21]) – namely that I should not impose too high a test of capacity to decide issues such as residence for fear of discriminating against Miss B. In this regard, I am not satisfied that the local authority has discharged the burden of proving that Miss B does not have capacity; I find – as the Official Solicitor argues – that she *does* have capacity to make decisions in relation to residence.

29. *Care*. It is agreed that the relevant test would be that set out by Theis J in *LBX v K and others* [2013] EWHC 3230 at [48] namely:
- i) what areas she needs support with;
 - ii) what sort of support she needs;
 - iii) who will be providing her with support;
 - iv) what would happen if she did not have any support or she refused it and,
 - v) carers might not always treat her properly and that she can complain if she is not happy about her care.

The funding of care, and the overarching arrangements for monitoring and appointing care staff work are not part of the ‘information relevant’ to the decision.

30. Dr. Rippon is of the view that Miss B does not have the capacity to make decisions about her care: she could not tell Dr. Rippon why having a support worker was important to her to access the community; she could not recognise the importance of structure and routine in her day; she cannot identify the type or amount of support she needs in the home (personal hygiene, managing her medication, or cooking meals), or in managing her own behaviours; she denied the need for, or benefit of, her respite care home. She does not understand the risks posed by Mr C; Dr. Rippon was of the view that she does not understand her own care needs on a day-to-day basis.
31. The Official Solicitor accepts that presently there is (per *section 48 MCA 2005*) “reason to believe that [Miss B] lacks capacity in relation to” her care provision, but that there is a case for offering her (per *section 1(3) MCA 2005*) “practicable steps to help” her to acquire that level of understanding. I disagree that education or practicable help will make a difference. In too many ways (identified in [30] above) does Miss B fall short (in some respects far short) of a level of understanding of the care which she needs in very many areas of her life such as to enable her to make a capacitous decision. I accept Dr. Rippon’s evidence that care provision is a complex and essentially abstract concept for which discrete educational packages “are not beneficial in improving an individual’s understanding”. I propose therefore to make a declaration in this respect under *section 15*.

32. *Contact*. The “information relevant” to the decision about contact is said to include the list proposed by Theis J in *LBX v K and others (supra)* at [45] namely:
- i) Who they are, and in broad terms the nature of her relationship with them;
 - ii) What sort of contact she could have with each of them, including different locations, differing durations and differing arrangements regarding the presence of a support worker;
 - iii) The positive and negative aspects of having contact with each person. Theis J added “This will necessarily and inevitably be influenced by [P]’s evaluations. His evaluations will only be irrelevant if they are based on demonstrably false beliefs. For example, if he believed that a person had assaulted him when they had not. But [P]’s present evaluation of the positive and negative aspects of contact will not be the only relevant information. His past pleasant experience of contact with his father will also be relevant and he may need to be reminded of them as part of the assessment of capacity”;
 - iv) What might be the impact of deciding to have or not to have contact of a particular sort with a particular person;
 - v) Family are in a different category; what a family relationship is.
33. The Local Authority maintains that Miss B lacks capacity in this area. The Official Solicitor accepts that Miss B currently does not have capacity but submits that she may be enabled to acquire capacity, and that I should make this as an interim declaration under *section 48 MCA 2005*. In my judgment the evidence strongly reveals that no amount of “practicable help” will enable Miss B to develop capacitous decision-making in this area; as I have indicated above (see [17]), she has shown herself to be unable to accept the fact of Mr C’s convictions (she has been told by five different professionals on seven separate occasions about these), and has been repeatedly dismissive of attempts to ‘educate’ her as to the convictions and their implications. She simply is not ‘using and/or weighing’ the information. Moreover, she has maintained firm denials of her own conduct in contacting men on the internet or sending inappropriate messages or images, when the opposite is patently known to be true. She is unable to explain how she could distinguish between a good and a bad person. I conclude that Miss B lacks capacity in this area, and am of the view that no amount of repeated discussion about the convictions is likely to shift her attitude; I propose therefore to make a declaration under *section 15*.
34. *Social media*. I set out the context in which I consider this issue in the introductory section (paragraphs [1]-[7]) of my judgment in *Re A*. I simply propose to adopt that narrative for this judgment, without rehearsing it all again here.
35. In this case, I am concerned with Miss B’s use of her digital device (mobile phone) to communicate by Facebook, WhatsApp, and Snapchat, both with those who are known to her, and specifically with those who are not known to her. It is that latter category about which I am most concerned for obvious reasons, particularly as she has routinely used social media to disclose personal information about, and/or imagery of, herself to them with a view subsequently to meeting with these strangers.

36. Counsel in the case of *Re A* had raised, as Mr Garlick and Mr Karim had raised, as a first question whether social media use should form a sub-set of either ‘contact’ or ‘care’ or whether it is free-standing. I approach this question in this case as I did in *Re A* at [25] and [26] as follows:

“[25] The first question on which I am asked to rule is whether, in undertaking a capacity assessment, internet and social media use should form a sub-set of a person’s ability to make a decision about either ‘contact’ or ‘care’. Having heard argument in this case, and in *Re B*, I have reached the clear view that the issue of whether someone has capacity to engage in social media for the purposes of online ‘contact’ is distinct (and should be treated as such) from general consideration of other forms of direct or indirect contact. I am satisfied that wider internet use is different from general issues surrounding care. There is a risk that if social media use and/or internet use were to be swept up in the context of care or contact, it would lead to the inappropriate removal or reduction of personal autonomy in an area which I recognise is extremely important to those with disabilities. As the Court of Appeal made clear in *PC v NC and City of York Council* [2013] EWCA Civ 478 at [35], the court should consider the issues reasonably specifically:

“The determination of capacity under *MCA 2005, Part 1* is decision specific all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of *MCA 2005, ss 1 to 3* which requires the court to have regard to ‘a matter’ requiring ‘a decision’. There is neither need nor justification for the plain words of the statute to be embellished”.

[26] It seems to me that there are particular and unique characteristics of social media networking and internet use which distinguish it from other forms of contact and care; as I described above (see [4]), in the online environment there is significant scope for harassment, bullying, exposure to harmful content, sexual grooming, exploitation (in its many forms), encouragement of self-harm, access to dangerous individuals and/or information – all of which may not be so readily apparent if contact was in person. The use of the internet and the use of social media are inextricably linked; the internet is the communication platform on which social media operates. For present

purposes, it does not make sense in my judgment to treat them as different things. It would, in my judgment, be impractical and unnecessary to assess capacity separately in relation to using the internet for social communications as to using it for entertainment, education, relaxation, and/or for gathering information.”

37. I then went on in *Re A*, materially, to consider the test of ‘relevant information’, adding at [27-30] as follows:

“[27] The next question which arises is what is the ‘relevant information’ under *section 3(1)(a) MCA 2005* on which the issue should be assessed? Although counsel in this case [*Re A*] prepared an ‘agreed’ formula, I have had the benefit of wider argument on the issue in the two cases. Critical to my assessment of capacity in this regard, and the issue on which focus has been brought in this hearing, is what should be the “information relevant to the decision” which P needs to understand for the purposes of determining capacity to make a decision to use social media for the purposes of developing or maintaining connections with others (within the functionality / ability test). I have been careful not to overload the test with peripheral detail, but to limit it to the “salient” factors (per *LBL v RYJ* [2010] EWHC 2664 (Fam) at [24], and *CC v KK & STCC* [2012] EWCOP 2136 at [69]). In applying that discipline, I am conscious that a determination that a person lacks capacity to access and use the internet imposes a significant restriction upon his or her freedom.

[28] It is my judgment, having considered the submissions and proposals of the parties in this case and in *Re B*, that the ‘relevant information’ which P needs to be able to understand, retain, and use and weigh, is as follows:

- i) Information and images (including videos) which you share on the internet or through social media could be shared more widely, including with people you don’t know, without you knowing or being able to stop it;
- ii) It is possible to limit the sharing of personal information or images (and videos) by using ‘privacy and location settings’ on some internet and social media sites; [see paragraph below];
- iii) If you place material or images (including videos) on social media sites which are rude or offensive, or share those images, other people might be upset or offended; [see paragraph below];

- iv) Some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;
- v) Some people you meet or communicate with ('talk to') on the internet or through social media, who you don't otherwise know, may pose a risk to you; they may lie to you, or exploit or take advantage of you sexually, financially, emotionally and/or physically; they may want to cause you harm;
- vi) If you look at or share extremely rude or offensive images, messages or videos online you may get into trouble with the police, because you may have committed a crime; [see paragraph below].

[29] With regard to the test above, I would like to add the following points to assist in its interpretation and application:

- i) In relation to (ii) in [28] above, I do not envisage that the precise details or mechanisms of the privacy settings need to be understood but P should be capable of understanding that they exist, and be able to decide (with support) whether to apply them;
- ii) In relation to (iii) and (vi) in [28] above, I use the term 'share' in this context as it is used in the 2018 Government Guidance: 'Indecent Images of Children: Guidance for Young people': that is to say, "sending on an email, offering on a file sharing platform, uploading to a site that other people have access to, and possessing with a view to distribute";
- iii) In relation to (iii) and (vi) in [28] above, I have chosen the words 'rude or offensive' – as these words may be easily understood by those with learning disabilities as including not only the insulting and abusive, but also the sexually explicit, indecent or pornographic;
- iv) In relation to (vi) in [28] above, this is not intended to represent a statement of the criminal law, but is designed to reflect the importance, which a capacitous person would understand, of not searching for such material as it may have criminal content, and/or steering away from such material if accidentally encountered, rather than

investigating further and/or disseminating such material. Counsel in this case cited from the Government Guidance on ‘Indecent Images of Children’ (see (ii) above). Whilst the Guidance does not refer to ‘looking at’ illegal images as such, a person should know that entering into this territory is extremely risky and may easily lead a person into a form of offending. This piece of information (in [28](vi)) is obviously more directly relevant to general internet use rather than communications by social media, but it is relevant to social media use as well.

[30] I should add that I heard argument on the issue of whether to include in the list of relevant information that internet use may have a psychologically harmful impact on the user. It is widely known that internet-use can be addictive; accessing legal but extreme pornography, radicalisation or sites displaying inter-personal violence, for instance, could cause the viewer to develop distorted views of healthy human relationships, and can be compulsive. Such sites could cause the viewer distress. I take the view that many capacious internet users do not specifically consider this risk, or if they do, they are indifferent to this risk. I do not therefore regard it as appropriate to include this in the list of information relevant to the decision on a test of capacity under *section 3 MCA 2005*.”

38. In an assessment in May 2018, Miss B said that she would not talk to a stranger, but did not believe that someone who she met on Facebook was or would be a ‘stranger’. When asked in 2016 about contacts made through social media, Miss B was unable to say how she would tell if someone was ‘good’ or ‘bad’ on Facebook. Miss B was further asked two years later (May 2018) how she would be able to work out who was a good or not a good person on social media; Miss B stated:

“... because she is talking/texting/messaging with them this in her views means that they are good. I asked how she knows the person is who they say they are, and how does she know they are telling her the truth? [Miss B] stated that they are good because they are speaking with her and stated she does not think anything else about it. I asked [Miss B] how she could keep herself safe. [Miss B] stated she would be alright and did not give any further information about this.”

39. She told Dr. Rippon (January 2019) that the people she met on line were “generally good” and could not contemplate that people may lie online. Dr. Rippon was of the view that Miss B had struggled to identify strategies to keep herself safe, and was concerned that Miss B viewed ‘friends’ who she met on Facebook as important to her, not considering it possible that they were capable of doing her harm. She had difficulty in understanding what other people’s motives might be. There is strong

evidence that she is victim of the behaviours described as ‘conduct risk’ and ‘contact risk’ set out at [4] in *Re A*. Miss B’s behaviours are not, I am satisfied, merely ‘unwise’. They are attributable to the impairment of her functioning of her mind.

40. On the evidence, I am therefore satisfied that Miss B currently does not have capacity to decide to use social media for the purposes of developing or maintaining connections with others. I consider that attempts in the form of practicable help should be offered to enable her to acquire capacity; until those steps have been taken, I propose to make an interim declaration only under *section 48 MCA 2005* at this stage.
41. In the event that, after practicable help has been offered, Miss B remains unable to make the decision about social media use, I apprehend that significant issues will arise in the ‘best interests’ evaluation in relation to the exercise of her freedoms which are protected by *Article 10* and *Article 8* of the *European Convention on Human Rights* and *Articles 21* and *22* of the *United Nations Convention on the Rights of Persons with Disability* in the context of her use of the internet; Mr. Karim has helpfully drawn attention to these issues at this hearing. I readily acknowledge that any interference with those rights (by way, for example, of supervision, filters, ‘Parental Control Applications’, and monitoring) will have to be justified and proportionate. Careful thought will also have to be given to the ways which can be devised which are effective in limiting or supervising her internet and social media use without being unduly “restrictive of [Miss B’s] rights and freedom of action” (*section 1(6) MCA 2005*).
42. *Consent to sexual relations*: The final area on which my determination is required is whether Miss B has capacity to consent to sexual relations. This is a question which is directed to the nature of the activity, rather than to the identity of the sexual partner. In this regard, I have specifically considered the Court of Appeal’s decision in *IM v LM and others* [2014] EWCA Civ 37, in which the Court confirmed that the correct approach (per [79]) was as identified in a series of first-instance judgments including the decisions of Munby J (as he then was) in *X City Council v MB & NB* [2006] EWHC 168 (Fam) and *Re MM, Local Authority X v MM* [2007] EWHC 2003 (Fam), Mostyn J in *D Borough Council v AB* [2011] EWHC 101 (Fam) and Baker J’s decision in *A Local Authority v TZ* [2013] EWHC 2322 (COP). I have had further regard to the more recent decision of Baker J in *A Local Authority v P and Others* [2018] EWCOP 10.
43. It is clear that the information relevant to the decision in this area includes:
 - i) the sexual nature and character of the act of sexual intercourse, the mechanics of the act;
 - ii) the reasonably foreseeable consequences of sexual intercourse, namely pregnancy;
 - iii) the opportunity to say no; i.e. to choose whether or not to engage in it and the capacity to decide whether to give or withhold consent to sexual intercourse.
 - iv) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections;

- v) that the risks of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.
44. All assessments of Miss B in this respect have revealed that she understands the mechanism of the sexual act. As I earlier indicated, in 2016, a mental capacity assessment concluded that Miss B lacked capacity to consent to sexual relations because she did not understand the risk of sexually transmitted infection. Later assessment, following a period of education, (see [15] above) concluded that Miss B *did* understand that risk, had retained that information, and was able to weigh the information, sufficiently to satisfy professionals that she was capacitous in this regard. That said, there was some doubt about whether the professional conducting the assessment had done so applying the correct test (*IM v LM, AB and Liverpool City Council* [2014] EWCA 37).
45. The evidence placed before me reveals that she continues to understand the mechanics of sexual intercourse and the risk of pregnancy (per Dr. Rippon). The evidence however reveals that she is once again less objectively clear in her understanding or appreciation of the risks of sexually transmitted infection. She recently told the social worker that she did not consider that risk of a sexually transmitted infection arose unless the male had a “dirty penis”, and that as Mr C has a shower in his house (“and he had a clean dick and showered every day”), this risk would not arise. I regard this as such a flawed appreciation (her ‘using or weighing’) of the risks of sexually transmitted infection through sexual relations that it falls outside a proper ‘understanding’ for the purposes of *section 3*; indeed her ‘appreciation’ of the risks would be likely to give her a false sense of security on the issue. Dr. Rippon was not sure why Miss B’s appreciation of sexually transmitted infection appears to have changed, but felt that with some practicable help, her understanding could potentially be restored and/or improved.
46. The Official Solicitor has argued that Miss B does have capacity in this area, and that this lack of clarity over the sexually transmitted infection is of no material consequence. I do not agree, and share Dr. Rippon’s view that Miss B’s understanding of the information relevant to sexual relations is currently erroneous, and that currently therefore there is reason to believe that Miss B lacks capacity in relation to this matter. The local authority proposes some education for Miss B in this area, with a view to re-assessing the capacity question once she has had that practicable help. I concur with this approach and propose to make an interim declaration under *section 48* pending the completion of the delivery of this practicable help.

Conclusion

47. My conclusions are therefore as follows:
- i) I declare that Miss B lacks capacity to litigate in these proceedings; this is a final declaration under *section 15 MCA 2005*;
 - ii) I declare that Miss B lacks capacity to manage her property and financial affairs; this is a final declaration under *section 15 MCA 2005*;
 - iii) I find that Miss B has capacity to decide where she resides;

- iv) I find that Miss B lacks capacity in relation to her decisions on her package of care, and would not benefit from a programme of help in this regard; I propose to make a final declaration that she lacks capacity in this respect under *section 15 MCA 2005*;
- v) I find that Miss B lacks capacity in relation to her decisions on contact, and would not benefit from a programme of help in this regard; I propose to make a final declaration in this respect under *section 15 MCA 2005*;
- vi) I have reason to believe that Miss B lacks capacity in relation to her decisions to use social media for the purposes of developing or maintaining connections with others and propose to make an interim declaration under *section 48 MCA 2005*, directing a programme of work to offer her practicable help in this regard;
- vii) I have reason to believe that Miss B lacks capacity in relation to her ability to consent to sexual relations and propose to make an interim declaration under *section 48 MCA 2005*, directing a programme of work to offer her practicable help in this regard.

48. That is my judgment.