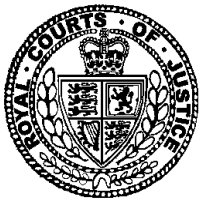

Neutral Citation Number: [2021] EWCOP 46

Case No: 1337884

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/06/2021

Before :

MRS JUSTICE LIEVEN

- -

Between :

THE LONDON BOROUGH OF SOUTHWARK

Applicant

and

P
(by her litigation friend, the Official Solicitor)

First Respondent

and

AA

Second Respondent

and

SOUTH LONDON AND MAUDSLEY NHS FOUNDATION TRUST

Third Respondent

- -
- -

Mr Jack Anderson (instructed by **London Borough of Southwark**) for the **Applicant**
Ms Fiona Paterson (instructed by **Edwards Duthie Shamash**) for the **First Respondent**
Mr John McKendrick QC (instructed by **Bindmans**) for the **Second Respondent**
The Third Respondent was not required to attend and was not represented

Hearing dates: **28 June 2021**

- -

Approved Judgment

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MRS JUSTICE LIEVEN

The Judge hereby gives leave for this judgment to be reported in this anonymised form. The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them may be identified by name or location.

Mrs Justice Lieven DBE :

1. This is an application to discharge P's mother AA as a party from Court of Protection proceedings. AA was discharged as a party by the Vice-President of the Court of Protection, Hayden J on 3 November 2020. That decision was set aside, on procedural grounds, by the Court of Appeal on 16 April 2021 and AA was reinstated as a party. The matter then came before me and was adjourned twice, once in order for AA to further consider her position and once very sadly because counsel for AA had tragically died. The background to the case is set out in the judgment of the Court of Appeal, [2021] EWCA Civ 512. I shall summarise it without setting out all the details.

2. P is now 19 years old. She suffers from cerebral palsy, atypical anorexia, PTSD and selective mutism. When she was 16 and living at home with AA, she was made subject to a child protection plan under the category of neglect. Sadly, earlier that year her father had died unexpectedly. In the course of carrying out its assessments, the Local Authority became aware of allegations that P had been sexually assaulted by a visitor to the family home. P's condition deteriorated and the Local Authority issued proceedings in the Court of Protection. She was admitted to a paediatric ward, with very severe anorexia and a BMI of 10.9. The documentation from the Local Authority records that at that stage she was considered to be so profoundly malnourished that she was considered to be at risk of death. Her unkempt state and general level of hygiene gave real cause for concern.

3. At the first directions hearing, on 25 June 2019, P and AA were joined as first and second respondents and the Official Solicitor ('OS') appointed as P's litigation friend. At that hearing, the Vice President made declarations, pursuant to section 48 of the Mental Capacity Act 2005 ('MCA') that there was reason to believe that P lacked capacity to conduct the proceedings and make decisions as to her residence, care and contact. He further ordered that P be removed immediately from the family home and that direct contact between P and AA be supervised and limited to once per week, but indirect contact could continue without restriction.

4. On 24 October 2019, the interim declarations which the Vice President had made on 25 June 2019 were extended and extended again later in the year.

5. On 30 April 2020, there was another hearing before the Vice President, by that stage hearings were being held remotely. The order contained a further interim declaration that *"there was reason to believe that P may lack capacity to make decisions with regards to residence, care (including treatment) and contact."*

6. On 24 June 2020, the Judge, made an order on the papers, which recorded that:

    1. P's trauma therapy has been suspended until her appointments can take place again as her therapist, Ms X of SLAM's Centre for Anxiety Disorder and Trauma, considers that it would be detrimental for P's mental health to continue with appointments by video.

    2. P's capacity cannot be re-assessed until such time as she has completed this therapy which will not resume until she can have the sessions in person, she has funding for another 12 sessions and it

may be that an application for funding for further sessions will be made.

3. Ms X has maintained regular contact with P throughout the COVID-19 pandemic by video to ensure that she is coping.

7. In October 2020, P revealed for the first time that she had been subject to emotional abuse by AA through various WhatsApp messages. She also disclosed that contrary to what she and her family had previously said, AA had been aware of the abuse by the alleged abuser, SB, but had taken no action. She also alleged, for the first time, that she had been physically and sexually abused by AA's new partner and father of P's half-sister who was born in October 2020.

8. In a material departure from P's previous statements, P indicated in late October 2020 that she no longer wished to live with her mother or have any contact with her mother. P explained she had been driven to make these disclosures out of a concern for the recently born child. In a hearing on 3 November 2020, Hayden J recorded that all contact between P and AA should cease and that AA be discharged as a party to the proceedings. That was the order subsequently successfully appealed to the Court of Appeal. Although formally the order was not set aside in its entirety, AA was re-joined as a party to the proceedings.

9. The terms of the Vice President's order of 3 November 2020 (in respect of contact between P and AA) indicates he was making that order under the inherent jurisdiction rather than the MCA 2005 and I will return to that point, later.

10. The proceedings were complicated by the fact that the alleged abusive messages which P had received were not at that stage disclosed to AA. A closed bundle was produced for the Court of Appeal and a Special Advocate was appointed to represent her. However, there was a gisting exercise carried out in order to ensure that AA's procedural rights were protected, and I indicate below what was set out in the gist –

(1) There were messages between AA and P which indicated that:

(a) P informed AA of abuse by AA's new partner but NM disbelieved her;

(b) P believed that the baby was at risk of abuse by AA's new partner;

(c) P was raped and physically abused by SB. She informed AA that abuse was occurring and believed AA took no action. AA was aware P had been assaulted by SB;

(d) AA told P not to disclose the abuse by SB or AA's new partner to anyone;

(e) AA threatened P that both she and the baby could be harmed if she did not speak to AA's new partner;

(f) AA continued to send P emotionally abusive messages after 10.12.20 until around the end of February 2021.

(2) There were messages from an anonymous source to P threatening her.

(3) There were exchanges between the treating team at SLAM, the Local Authority and police and updates from P's treating time at SLAM.

11. The position now is that some of the material, i.e. the messages between P and AA has been revealed to AA, and my understanding is that the primary material does not materially differ from the gist. Therefore, AA effectively has full knowledge of the matters that P is relying upon.

12. The most up-to-date position as to P's wishes and feelings is set out in a witness statement of Ms Dawson, who is instructed on behalf of the OS and who made a statement on 4 May 2021. She records that prior to October 2020, P had consistently told her she wanted to return to live with AA and have regular contact with her, but on 20 October 2020 informed her she no longer wanted to live with AA but did not want to give her reasons. Consistently she has said since that date that she does not want to return home and does not want any contact with AA or AA's new partner. Ms Dawson says she met P most recently via WhatsApp video call, and has produced an attendance note of that meeting in which she records that P told her she does not want contact with AA; does not want to live with her; and does not want AA to be a party to proceedings. The note went on to say P said she has not had any further threatening messages since February 2021.

13. In her witness statement, Ms Dawson also refers to a further discussion by text on 23 April to discuss what support P might need at that stage given that AA was appealing Hayden J's order of 3 November 2020 removing her as a party. Ms Dawson records that when she informed P that she was preparing an application to discharge AA as a party, P replied that: *"if she gets back in as a party I'm not being involved, I don't see why she should as she's not very supportive of me as a person."*

14. Then on 26 April 2021, Ms Dawson contacted P again by text and P said again: *"you can tell the judge I wouldn't want to be part of proceedings if my Mum was a party, I wouldn't see the point in participating as I don't want a relationship with her and she doesn't want me living away from home (despite me turning 20 this year)."*

15. Two points in respect of all of that – some of the communications with Ms Dawson are by text because P suffers from selective mutism and is sometimes very difficult to communicate with orally. Second, I did indicate I was very happy for P to join proceedings today and at a previous hearing had indicated I was happy to speak to P, but the view taken by the OS was that it was better if P did not join today and I did not understand P to want to do so or speak to me directly.

16. Finally, regarding P's position and wishes and feelings, I have a letter from her therapist, Ms X dated 6 May 2021, where Ms X records the sessions she has had with P and the fact she keeps in fairly regular contact with her even when they cannot meet. I will read one passage as it was much disputed:

> *"[AA] was removed from court proceedings on 03/11/2020 and was asked to refrain from contacting [P] around this time. However, threats and contact from [AA] and [AA's new partner] continued to reach [P] through different social media accounts and family members for some time after this, which I reported to police on several occasions. Following successfully blocking [AA] and [AA's new partner] from contacting [P]*

> *through most channels, [P] has been able to engage better in the therapy sessions. However, I remain concerned that she continues to receive abusive messages from [AA's] family members and must be continually vigilant about blocking them. The content of messages from [AA], [AA's new partner] and extended family members were abusive, threatening and deeply disturbing."*

17. The dispute is that Ms Dawson's statement suggests the messages ceased in February 2021, whereas Ms X suggests they continued. This may be no more than slightly poor use of language. However, given that the factual issues are not disputed, I do not find it necessary to get to the bottom of when precisely the abusive texts ended. For the purposes of weighing the issues before me today, I will assume that the messages ended in February.

18. At the end of her report, Ms X recorded that:

> *"I would be very concerned for [P's] wellbeing should [AA] be added again as a party to proceedings. In my clinical opinion this would cause undue stress and emotional harm to [P] and would affect her ability to engage successfully in the trauma therapy. It has already taken over a year to support [P] to feel safe enough to talk about the traumas she has experienced. Were her mother to be party to proceedings there would once again be an implicit threat of harm to [P] if she speaks out, meaning she would not be psychologically safe enough to continue to engage in therapy."*

19. I note that there is a current police investigation involving both AA and AA's new partner in respect of the threatening and abusive texts that have been received by P, and I also note AA is currently living with the baby in a mother and baby assessment unit and there are care proceedings ongoing in respect of the baby.

20. As I have said, this matter has come before me before and there was some hope that it might have been possible to settle matters by agreement. However, last Friday on 25th June 2021, the parties and I received a witness statement from AA and a second position statement from Mr McKendrick QC on behalf of AA, in which AA made clear she wished to continue to be a party. In the witness statement, AA sets out that she does wish to be a party and wishes to continue to be involved and give evidence about what she considers to be in P's best interests. However, the witness statement does not deal with the texts and anything to do with who sent them.

21. Just before this hearing commenced, I received a further position statement from the Official Solicitor referring to further evidence from the social worker which Ms Paterson suggested would point even more strongly to AA not being a party. In her position statement, Ms Paterson suggested I should adjourn these proceedings in order to deal with that further evidence and potentially reinstruct a special advocate. I took the view that the better course was to hear the submissions on the application as it stood before me, without that evidence, and then if I considered the evidence to be critical, reconsider it. As it turns out, I think the application can be fairly determined today and it would be strongly in P's best interests to do so now, rather than to adjourn yet again.

22. Turning to the principles I should apply, the Court of Protection Rules 2017 at Rule 1.13(b) refer to the overriding objective enabling the court to deal with a case justly and at proportionate cost, having regard to the principles contained in the Act, to include "ensuring P's interest and position…" Rule 9.13(3) states that the court may direct at any time that person to be removed as a party.

23. I note that the Court of Appeal in its judgment in this matter, at the end of judgment at paragraph 67 said:

> *"Mr Nesbitt rightly recognised that, if the appellant is restored as a party, it would not be inappropriate for the other parties to withhold disclosure of evidence to her pending a decision about what course should now be taken. This will no doubt depend to a considerable extent on developments since December 2020, about which we have no information. If the circumstances warrant it, the respondents may have to apply to the court for orders restricting the appellant's participation in the proceedings. If the circumstances are exceptional, they may apply to discharge her as a party. But any such applications must be made and determined in accordance with the legal principles set out above."* [emphasis added]

24. It is not clear to me, nor the advocates before me, where the reference to exceptional circumstances comes from. The Rules do not require any "exceptionality" before a party is discharged.

25. The principles to be applied are those at s.1(5) MCA, and were described by Baroness Hale in *Aintree University Hospitals NHS Foundation Trust v James* [2013] UKSC 67 as follows:

> *"[18] This Act is concerned with enabling the court to do for the patient what he could do for himself if of full capacity, but it goes no further. On an application under this Act, therefore, the court has no greater power than the patient would have if he were of full capacity.*
>
> *…*
>
> *[23] A person who has the capacity to decide for himself can of course make decisions which are not in his own best interests and no doubt frequently does so. Indeed, the Act provides that a person is not to be treated as unable to make a decision simply because he makes an unwise one: section 1(4). But both at common law and under the Act, those who act or make decisions on behalf of a person who lacks capacity must do so in his best interests: section 1(5)."*

26. Further reference to those principles is made in *Wye Valley NHS Trust v B* [2015] EWCOP 60 where Peter Jackson J (as he then was) said at paragraph 10 of his judgment:

> *"Where a patient lacks capacity it is accordingly of great importance to give proper weight to his wishes and feelings and to his beliefs and values. On behalf of the Trust in this case, Mr Sachdeva QC submitted that the views expressed by a person lacking capacity were in principle entitled to*

> *less weight than those of a person with capacity. This is in my view true only to the limited extent that the views of a capacitous person are by definition decisive in relation to any treatment that is being offered to him so that the question of best interests does not arise. However, once incapacity is established so that a best interests decision must be made, there is no theoretical limit to the weight or lack of weight that should be given to the person's wishes and feelings, beliefs and values. In some cases, the conclusion will be that little weight or no weight can be given; in others, very significant weight will be due."*

27. The importance of P's autonomy was emphasised by Hayden J in *Barnsley Hospital NHS Foundation Trust v MSP* [2020] EWCOP 26 at paragraphs 24 and 25:

> *"[24] When applying the best interests tests at, s.4(6) MCA, the focus must always be on identifying the views and feelings of P, the incapacitated individual. The objective is to reassert P's autonomy and thus restore his right to take his own decisions in the way that he would have done had he not lost capacity.*
>
> *[25] The weight to be attributed to P's wishes and feelings will of course differ depending on a variety of matters such as, for example, how clearly the wishes and feelings are expressed, how frequently they are (or were previously) expressed, how consistent P's views are (or have been), the complexity of the decision and how close to the borderline of capacity the person is (or was when they expressed their relevant views). In this context it is important not to conflate the concept of wishes with feelings. The two are distinct. Sometimes that which a person does not say can, in context, be every bit as articulate as wishes stated explicitly."*

28. In terms of balancing competing rights in the jurisdiction of the Court of Protection, this was considered by Sir James Munby in *London Borough of Redbridge v G* [2014] EWCOP 1361 at paragraphs 22 – 25. The facts were somewhat different from these because what was asserted were the Article 8 rights of a journalist who claimed to have formed a relationship of a social nature with P, but the basic principles at paragraphs 24 and 25 do apply here:

> *"24. Secondly, if for whatever reason, good or bad, reasonable or unreasonable, or if indeed for no reason at all, X does not wish to have anything to do with Y, then Y cannot impose himself on X by praying in aid his own Article 8 rights. For X can pray in aid, against Y, X's own Article 8 right to decide who is to be excluded from X's 'inner circle' and in that contest, if X is a competent adult, X's Article 8 rights must trump Y's. It necessarily follows from this that, absent any issue as to X's capacity or undue influence, X's refusal to associate with Y cannot give rise to any justiciable issue as between Y and X.*
>
> *25. Thirdly, if X lacks capacity, Y's Article 8 rights can no more trump X's rights than if X had capacity. Y cannot impose himself on X by praying in aid his own Article 8rights. Y's Article 8 rights have to be weighed and assessed in the balance against X's Article 8 rights. If Y's rights and X's rights conflict, then both domestic law and the Strasbourg jurisprudence require the conflict to be resolved by reference to X's best interests. X's best interests are determinative. As I said in Re S, para 45, referring to*

> *what Sedley LJ had said in In re F (Adult: Court's Jurisdiction) [2001] Fam 38, 57:*
>
> *"In the final analysis, as Sedley LJ put the point, it is the mentally incapacitated adult's welfare which must remain throughout the single issue (emphasis added). The court's concern must be with his safety and welfare.""*

29. Mr McKendrick relies on the somewhat contrasting judgment of Lord Justice Peter Jackson in *Re F (A Child Adjournment)* [2021] EWCA Civ 469 and in particular, paragraph 15.1:

> *"The court's first task was to get its legal bearings. The welfare paramountcy principle under ss. 1 (1) of the Children Act 1989 applies when a court determines any question with respect to the upbringing of a child. It does not apply to case management decisions. The touchstone for case management decisions is justice, not welfare, though in a family case welfare plays an important part in the assessment. That is made clear by the terms of the overriding objective in Rule 1 of the Family Procedure Rules 2010 , which requires the court to deal with a case justly, having regard to any welfare issues involved . That includes ensuring that it is dealt with expeditiously and fairly. (The delay principle under s. 1 (2) Children Act 1989 does apply to case management decisions, as of course does the 26 week timetable set by s. 32 for disposing of an application for a care order.) In the present case, it is unclear whether the Judge was influenced by incorrect submissions about the welfare principle, but he did not state that he was applying a test of fairness, or indeed what test he was applying."*

30. Mr McKendrick says the same principle applies in the Court of Protection. However, I do not consider that the analogy is entirely apt, although the point may be somewhat academic on the facts of this case. In proceedings under the Children Act 1989 the parent has a right to be a party, not least because s/he has in law parental responsibility. However, in the Court of Protection the parent of an adult child has no rights to party status and as such the legal analysis is different. The legal relationship between a minor child and his/her parents is quite different from that of a person over 18 and their parents. Having said that, it is obvious that justice to any third party is a highly important consideration.

31. Mr Justice Cobb made the point very clearly in *KK v Leeds City Council* [2020] EWCOP 64:

> *"It seems to me that a judge may well find, indeed would be highly likely to find, that it is necessary to withhold sensitive evidence/information from a third-party applicant for party status in Court of Protection proceedings where disclosure would be likely directly to harm P, or otherwise indirectly harm or adversely affect P, such as by inhibiting P in his/her active participation in proceedings. It must be remembered that the whole purpose of the welfare jurisdiction under the MCA 2005 is to protect and promote the best interests of P (see by analogy with the child, Re A at*

> *§18); the proceedings must not become an instrument of harm to P (again see Re A at §21)."*

32. As Cobb J said the whole purpose of the MCA is to protect and promote the best interests of P. Where the interests of P's parents, here AA, conflict with P's best interests then P's interests must take precedence. There is a real danger in this litigation of that fundamental principle being forgotten.

33. However, it would be vanishingly rare in a Court of Protection case for justice to a third party to result in a decision which was contrary to the best interests of P. It is critical to be clear where one starts from in the analysis under the MCA. There are always two questions under that Act; does P have capacity and if not, what is in P's best interests? Critically, P is an adult and has the rights that go with being an adult, subject to the loss of capacity. As Hayden J put it in the **Barnsley** case the *"whole focus of the MCA is to reassert P's autonomy and his or her right to take their own decisions."* The focus in Children Act proceedings is entirely different. The principles underlying the two statutory schemes are not analogous, and they should not therefore be conflated.

34. The Official Solicitor argues strongly it is in P's best interests for AA to be removed as a party and that accords with P's wishes and feelings. The wishes and feelings are set out above and have since October 2020 been entirely clear and consistent. It is correct to record that before October 2020 P had indicated that she did want to live with her mother and that she wanted to have contact with her mother. However, as I set out in the chronology above, P's position fundamentally changed in October 2020 (when she made the allegations) and therefore her previous expressions of wishes and feelings cannot be relied upon, nor can the psychiatric assessments, given her absolutely clear change of position. In determining the weight to be attached to P's wishes and feelings I take into account, firstly that they have been consistent for a considerable period and secondly, that P is quite capable both of expressing her wishes and doing so in an articulate and thought out fashion. P does appear to be close to the borderline of capacity in respect of decisions about contact with her mother.

35. Mr McKendrick argues that AA has a right to be a party and to express her views and set out her views as to what is in P's best interests. He relies upon the finding by the Court of Appeal that AA had Article 8 rights in respect of P. The Court of Appeal referred (at paragraph 34) to the case of ***Kugathas v SSHD*** [2003] EWCA Civ 31 and the case law in respect of Article 8 and adult parents. Then at paragraph 53, the Court held, that AA's relationship with P fell within category of relationships identified in ***Kugathas*** as giving rise to family life under Article 8:

> *"As Senior Judge Lush concluded in Re B (when endorsing the draft guidance submitted by the Official Solicitor in that case) and as accepted by all the parties before us, a decision by the court to dispense with the service of an application on a person who would otherwise be entitled to it is not a "decision made, under [the] Act for or on behalf of P" within the meaning of s.1(5). Accordingly, it is not a decision which "must" be made in P's best interests. Case management decisions to discharge a party from proceedings or withhold reasons for a decision are similarly outside the ambit of s.1(5). On the other hand, Cobb J was plainly right when he observed in KK v Leeds City Council that "the best interests of P… should occupy a central place in any decision to provide or withhold*

> *sensitive information or evidence to an applicant" and that "the greater the risk of harm or adverse consequences to P (and/or the legal process, and specifically P's participation in that process) by disclosure of the sensitive information, the stronger the imperative for withholding the same". Here, the appellant's rights under ECHR were plainly engaged, both under Article 6 and Article 8. She came within the scope of Article 6, as summarised in Regner v Czech Republic and Evers v Germany, and her relationship with P fell within the category of relationships identified in S v UK and Kugathas v SSHD as giving rise to a right to respect for family life under Article 8. Insofar as her rights conflicted with P's, the law required the conflict to be resolved by reference to P's best interests: London Borough of Redbridge v G and others. KK v Leeds City Council. But any restriction on the appellant's rights should have gone no further than strictly necessary."*

36. I am not entirely sure I would have agreed with Baker LJ at paragraph 53, but I do not have to debate that issue because in my view the position has further evolved since the evidence that was before the Court of Appeal. It is apparent from paragraph 67 of the Court of Appeal judgment that the Court expected a judge in my position to revisit the evidence in the light of developments since October 2020.

37. Since October 2020, P has made it entirely clear that she does not want contact with her mother. In my view whatever Article 8 rights AA had in relation to P in respect of the earlier evidence (which was considered by the Court of Appeal), the weight to be accorded to any such rights has significantly diminished in light of the further evidence. We now have a position where P has been living away from family home for at least 2 years and most importantly where P is now an adult, being no longer under the age of 18 and has expressed in the clearest way that she does not want to have contact or an ongoing relationship with her mother, who she says was complicit in her abuse. In my view, that assertion of her rights must cap and seriously diminish any Article 8 rights of her mother.

38. The other point Mr McKendrick relies on strongly is to say allegations have been made by P against her mother, and AA must have the right to respond to those allegations. He relies on the fact that it appears that Hayden J may have been making his order at least in part under the High Court's Inherent Jurisdiction in respect of vulnerable adults, rather than under the Mental Capacity Act. This, he suggests means that principles set out above, about the paramount interests of P under the MCA, might be balanced differently in a case under the Inherent Jurisdiction.

39. Firstly, I would revert back to the order of 25 June 2020 which as I set out above, made clear that capacity was not going to be revisited until the therapy had been completed. That order was indubitably made under the MCA. In my view, that is the appropriate way to approach this case, which continues to be under the Act. In the light of the June 2020 interim declaration, and accepted position that at the start (of the proceedings) P did not have capacity and that this would only be revisited once therapy was completed, I am going to proceed on the basis that P continues not to have capacity in relation to contact with family members.

40. Further, and in any event in respect of any alleged injustice to AA, I agree with Ms Paterson that it is entirely open to AA to file evidence saying that she did not send the

texts and to produce evidence to that effect. Mr McKendrick argues that because there is a criminal investigation AA is being placed in a difficult position, but I can only say she is not in difficulty if she did not produce the texts and can produce evidence to that effect. Even if, given the intersection with the criminal law, she would want to be careful in what she says, there is no reason I can see why she cannot say she didn't send the texts if that is the true position. I cannot see any requirement of natural justice for her to be a party in order to refute the allegations. This is not a case where without being a party she does not know the substance of the allegations.

41. In conclusion, my starting point is twofold; I should facilitate P's participation in the proceedings; and have at the forefront of my mind her best interests.

42. Focussing on those two central issues, P has made clear that if her mother continues to be a party to the proceedings, she will not feel she can be involved. In my view, to put the mother's rights before P would be to entirely subvert purposes of the Mental Capacity Act. Secondly, it is very clear from evidence from Ms Dawson and most importantly, Ms X that it would be contrary to P's best interests for her mother to be a party to these proceedings.

43. Mr McKendrick says those concerns can be dealt with by AA's indication she would not actually come to the hearings and by redacting various personal information, but in my view that does not begin to answer the fundamental point which is that P's best interests are served by AA not being a party.

44. If AA wants to put in evidence as to the texts and what she thinks is in P's best interests she can do so, albeit without knowing all the evidence before the court but in circumstances where the evidential position as to best interests and wishes and feelings is so clear, in my view AA should be removed as a party.