Neutral Citation Number: [2022] EWCOP 39

Case No: 13361896 & 1385996T

IN THE COURT OF PROTECTION

The County Court
Birmingham

Date: 15/08/2022

Before :

HER HONOUR. JUDGE CLAYTON

- -

Re: AC and GC (Capacity: Hoarding: Best Interests)

- -

Alexander Campbell (instructed by **Legal Services**) for the Local Authority
Neil Allen (instructed by **Moore and Tibbits Solicitors**) for the Official Solicitor for AC
Mike O'Brien QC (instructed by **Irwin Mitchell Solicitors**) for GC
Public Guardian (excused from attending)

Hearing dates: 19-22 July 2022
- -

The Applications

1. These proceedings concern AC who was born on 24th of July 1929 and is 92 years old and her son GC. The proceedings in respect of AC were issued in 2020 as an application for an order

that she be moved from her home, where she was living with GC, to a respite placement to allow for issues of hoarding and cleanliness of the property to be addressed and the property made safe.

2. On 7 December 2021 the local authority issued section 16 proceedings concerning GC for an order that GC leave his home property so that it could be cleaned and, by an order on 8 December 2021, the court consolidated that case with AC's case. The court also directed that GC's mental capacity in particular domains be assessed by Professor Paul Salkovskis.

3. On 18 March 2022 the court reconstituted AC's proceedings as section 21A proceedings and the court declared it was in AC's best interests to move from hospital to AP care home and AC moved to AP on 21 March 2022. The court made declarations regarding AC within these proceedings under section 15 of the Mental Capacity Act 2005 that AC lacks the mental capacity to:

    a. Conduct these proceedings;
    b. Make decisions as to her residence; and
    c. Make decisions as to her care and support.

4. At the last hearing on 12 May 2022, the court listed a contested hearing on 19 to 22 July 2022 to determine:

    (I) whether GC has capacity to:

        (1) Manage his own property and affairs;
        (2) Manage AC's property and affairs;
        (3) Make decisions regarding his items and belongings;
        (4) Make decisions regarding AC's items and belongings.

    (II) whether AC should return home for a trial period receiving a package of care there.

    (III) whether to appoint a deputy for AC's property and affairs.

5. At the start of this hearing the court was informed that all parties agreed that the court should make a declaration under section 15 of the Mental Capacity Act that GC lacks capacity to make decisions regarding his own items and belongings and to make decisions regarding AC's items and belongings and that no declaration is required with regard to managing his own property and affairs, nor with regard to managing AC's property and affairs, since there is no need for any form of deputyship in respect of his own financial affairs, he has disclaimed the lasting power of attorney made in his favour in respect of AC and agrees to the court appointing a deputy in respect of her. This was with particular reference to *A Local Authority v JB* [2021] UKSC 52 which emphasised the importance of (1) identifying the precise matter upon which the person's decision is required; and (2) identifying the information relevant to the decision. All agreed that a deputy should be appointed for AC's property and affairs and, specifically, it

should be Debbie Anderson. She has confirmed a willingness to be appointed. I approve the agreement, the rationale behind it and agree to make the declaration as set out by the parties.

6. The only issue to be resolved, therefore, is whether AC should return home for a trial period, receiving a package of care there.

7. The parties were in full agreement that oral evidence was only required from Professor Salkovskis and the case could be decided upon his evidence, the evidence contained within the trial bundle and the written and oral submissions of each of the parties. They were able to do this in view of considerable work undertaken by those representing the parties in advance of the hearing, which enabled issues to be narrowed.

The Parties and their Positions

8. The applicant is the local authority, Coventry City Council, represented by Alexander Campbell of counsel, instructed by Mr Sebastian Brun of Coventry City Council Legal Services. They do not support a trial at home. They suggest proceedings should be concluded with AC remaining at AP. If there is to be a trial at home, they agree it should be for 10 weeks and subject to the conditions set out in the position statement of the Official Solicitor at paragraph 17. The same should be considered as read into this judgment and is appended to this judgment as Appendix 1. They would be willing to fund AP for 5 weeks and suggest AC should fund a further 5 weeks so that a place is kept for her for a total of 10 weeks. They support the appointment of Debbie Anderson as deputy for property and affairs if a trial at home is directed by the court. They agree the appointment of an Independent Social Worker would be appropriate to assess the trial at home, if ordered.

9. The first respondent is AC. She is represented by her litigation friend, the Official Solicitor, and represented at this hearing by Neil Allen of counsel. The solicitor who instructs him is Ms Lala. The OS sets out the proposed steps necessary to support a return home at paragraph 17 of the position statement prepared by Neil Allen and suggests if they are in place, on a fine balance, it would be in her interests to return home, initially by way of a trial period. He suggests the local authority should fund the cost of holding AP's placement open since AC will be funding her care package at home. He supports the appointment of Debbie Anderson.

10. The second respondent, GC, is the son of AC, and represented by Mike O'Brien QC, instructed by Ms Kirsty MacMillan of Irwin Mitchell LLP. GC's position is the same as that of AC.

11. The third respondent, the office of Public Guardian, was excused attendance at this hearing on the basis that decisions made here would likely resolve their application to discharge GC as lasting power of attorney for property and affairs of AC.

The Background

12. The background is set out in the case summary agreed by all parties, dated 18 July 2022, and should be taken as read into this judgment. It is appended to this judgment as Appendix 2. I have case managed this case for the last two years and so am familiar with it and the way in which matters have developed.

The Legal Principles

13. A statement of legal principles for this hearing has been agreed, most helpfully, by all parties and is set out in a 15-page document, which should be taken as read into this judgment and is appended as Appendix 3. The parties identified, and the court agrees, that by reference to *A Local Authority v JB* [2021] UKSC 52, one of the relevant matters requiring a decision relates to their items and belongings. Final declarations were made at this hearing that AC lacks capacity to revoke her lasting powers of attorney, and to make decisions about managing her property and affairs and her items and belongings. In relation to GC, final declarations were made that he has capacity to conduct these proceedings but lacks capacity to make decisions about managing his items and belongings (as opposed to his property and affairs more generally) and those of AC.

14. The parties and the court agree that the information relevant to making decisions in respect of one's items and belongings is as set out in the report of Professor Salkovskis, namely:
    (1) *Volume of belongings and impact on use of rooms*: the relative volume of belongings in relation to the degree to which they impair the usual function of the important rooms in the property for you (and other residents in the property) (e.g. whether the bedroom is available for sleeping, the kitchen for the preparation of food etc). Rooms used for storage (box rooms) would not be relevant, although may be relevant to issues of (3) and (4).
    (2) *Safe access and use*: the extent to which you (and other residents in the property) are able or not to safely access and use the living areas.
    (3) *Creation of hazards*: the extent to which the accumulated belongings create actual or potential hazards in terms of the health and safety of those resident in the property. This would include the impact of the accumulated belongings on the functioning, maintenance and safety of utilities (heating, lighting, water, washing facilities for both residents and their clothing). In terms of direct hazards this would include key areas of hygiene (toilets, food storage and preparation), the potential for or actual vermin infestation and risk of fire to the extent that the accumulated possessions would provide fuel for an outbreak of fire, and that escape and rescue routes were inaccessible or hazardous through accumulated clutter.
    (4) *Safety of building*: the extent to which accumulated clutter and inaccessibility could compromise the structural integrity and therefore safety of the building.

(5) *Removal/disposal of hazardous levels of belongings*: that safe and effective removal and/or disposal of hazardous levels of accumulated possessions is possible and desirable on the basis of a "normal" evaluation of utility.

15. Given the consensus that both AC and GC lacked capacity to make decisions about their items and belongings, the court has made best interests decisions to enable the family to be supported to have house-clearing and cleaning services enter the property on a number of occasions, along with legal representatives, to dispose of perished items and to either remove to storage or dispose of hazardous levels of belongings.

The Evidence

16. The local authority social worker, Sharon Holland ("SH"), has produced 10 witness statements. The final one is dated 18 July 2022, describes the condition of AC's property and exhibits a number of photographs, showing evidence of continued hoarding in certain rooms in the property but the statement making clear, too, that some progress has been made with the communal lounge, hallway, kitchen bathroom and AC's bedroom. A number of care agencies had been approached to enquire as to their availability to provide a package of care for AC at home. SH's statement of 4 July 2022 summarises the difficulties that some of those agencies had in being able to provide care. Some had a problem with their own resources and some others were concerned as to whether or not they would be able to manage, given the complexities of this case with regard to the issue of hoarding and the state of the property. One care agency had indicated they might be able to provide care. Subsequent information was provided to confirm their availability to provide the type of care package all agree would be necessary to maintain AC in her own home and to supplement care to be given by GC, if the court deemed it is in her best interests. They indicated they would be willing for GC to be the second carer, once he has been trained for "moving and handling, hoist and repositioning of AC" and that hoarding would not be an issue to support being provided.

17. SH concluded that it was in AC's best interests to remain at the care home and not to have a trial placement with a package of care at home because of a number of factors, including: the risk of self-neglect if she were to go home and refuse care from carers; the high risk of GC continuing to hoard in the property in light of the reports of Professor Salkovskis and the fact that GC has only very recently begun therapy to address his hoarding; the risk of carers ending AC's package of care at home if the condition of the property deteriorates; the impact on GC's mental health of his belongings being taken away (as a necessary prerequisite to any return home for AC even being a possibility); the local authority's concerns that efforts to address and improve the condition of the property will not be sustained once these proceedings have concluded and GC does not have solicitors who are taking a proactive role in seeking to improve the condition of the property. If the trial placement were to be ordered, the local authority would suggest a 10-week trial at home with the local authority paying to keep AC's

place at the care home open for the first five weeks and AC paying for the place to be kept open for the second five weeks.

18. In her descriptions of AC after she had moved to the care home, she said that AC queried why she could not return home. AC referred to antiques in her home that had been passed down through generations. On another occasion she told her that she wanted to be in her own home with her cat and to be able to die in her own home. She said, "she could not understand why she could not live in the house she has paid for" and said that "how she wishes to live is up to her and she wishes to live at home". She did recall that she had telephoned the police when she was home alone and realised GC had not come home. SH had been told by staff at the care home that were some signs of AC starting to hoard, refusing to allow carers to take away papers, chocolate and other items or to tidy her bed. These concerns were not expanded upon, nor repeated. There is no suggestion it is a significant issue for those caring for AC. This statement records AC consistently asking when she is able to return home. She is upset when GC is asked to leave when he visits her.

19. The local authority provided a report from the fire service which confirmed that there was a big improvement in the property and that the risks had dramatically reduced from when they were first involved. SH conceded it is positive that GC has agreed to having a deputy and that he will actively collaborate with the deputy in managing AC's property, affairs, and work with the deputy in relation to his hoarding but she remained concerned about the sustainability of the clearance of the property and whether GC could sustain the day-to-day running of the home and caring for AC as he is "is an unwell man and has his own issues".

20. There is no doubt that SH has worked exceptionally hard on this case and with great sensitivity, in very difficult circumstances. She has presented professional, detailed statements which provide clear analysis of the issues. The local authority has participated in many inter-party discussions and contributed to the very long list of requirements which would be needed if there is to be a trial at home. I commend them for dealing with the case in that way and, so ensuring the court had before it all the information upon which to make an informed decision.

21. Professor Salkovskis provided reports in respect of AC and GC and answered supplemental written questions which were put to him. When he was questioned by Mr Campbell, in court, he explained how serious it is when there is a combination of obsessive compulsive disorder (OCD) and a hoarding disorder. They are disorders which impair life, can cause much distress and when the two interact it is much more serious, he said, "like having Covid on top of asthma". He spoke of anticipating very specialised counselling to address GC's problems and that such counselling was likely to involve cognitive behaviour therapy (CBT). Although he had seen the email from GC's therapist, in his view, the type of therapy is short of what he recommends. He was disappointed that the NHS trust's offer of help had not materialised. He was clear that, if the deputy removes items, GC will be distressed by it, and resistant to it, and it will activate anxieties which are at the heart of his hoarding and OCD. He said, it would be harder to say whether GC would permit the removal of items. It would be easier if GC was

absent and the items were removed away from the area. Ideally, it would be better to collaborate with him to achieve the goals. In answer to my question, he said that nothing bad would happen to GC, there would be no psychotic episodes, but for a sustained change there would need to be a positive relationship between the deputy and GC. He noted considerable improvements in the property since when he had seen GC there and wished to commend GC for that. He stressed the important question is about re-acquisition and that GC is a third of the way up in what he has achieved. He will need to have some therapy based on reacquisition to avoid slippage. To Mr O'Brien QC, he indicated that someone with a hoarding disorder is often motivated to make improvements because they like people assisting them. He expressed his surprise that GC is on significant medication but has not had a medication review for many years. He said he would be willing to assist in recommending a suitably experienced counsellor and agreed that a referral could be made to his unit in Oxford to support GC if GC's NHS trust was prepared to refer him. He had not suggested the same in his report because of the conflict of interest.

22. I considered the statements of GC explaining his difficulties and setting out his proposals.

23. I considered statements of Sonal Lala, the solicitor instructed by the Official Solicitor to represent AC, which confirm consistency in AC's desire to live in and to return to her own home. I noted her final statement, exhibiting a letter written by AC on 13 July 2022 stating, "To the Court, I wish to remain living in my own home [correct address provided]. I have been very unhappy being taken away from my own home which I bought and paid for". She had signed the statement. AC told Ms Lala on 8 July that she wanted to write down some further information which she could provide to the Judge, with Ms Lala agreeing to visit her to collect the same a few days later. Additional photographs were provided of the property which helpfully showed AC's bedroom, the lounge, hallway and outside the property, as at 18 July 2022, and a helpful plan of the property with photographs attached.

The Participation of AC in the Proceedings

24. Ms Lala accompanied me on my visit to AC on 8 July 2022, which was made at AC's request and with the agreement of all parties, who provided their up to date positions in advance of the meeting. She prepared an agreed note of our discussions, which was subsequently shared with all the parties and filed with the court. It was a real pleasure to meet AC, in a quiet room designated for worship at the care home, on a very sunny afternoon. The home was very large, clean and very quiet. At the meeting AC told me that she had not wanted to come to live at the care home but had not been given a choice. She was unsure how long she had been there. She was clear that the property was a mess, that GC had OCD and that she liked to have her own things around her, to help her do legal work and investment work. She was anxious that people may have been too ruthless in clearing her belongings and was offered reassurance that care had been taken with her things. She told me that she had a cat called Jasper at home and that she missed him. She repeatedly told me she wanted to go home and that, "it's been a nightmare

being removed from it". She told me, if she were to go home, she would have to get a firm in to help her (I understood her to mean professional carers) and that GC was good at looking after her although he was not a tidy person because of his OCD. She told me that at the care home she prefers to eat her meals in her room rather than in the communal areas. She repeatedly asked me what I was going to do and stressed again that she wanted to be at home with GC and Jasper.

25. All the parties agree a number of factual issues. They agree that AC has received good quality care at the care home and that it has been easier to meet her physical needs there. They agree that she has always maintained a wish to live in her own home and that, once she was removed from it to the care home, she continued to express a wish to return to it. All agree that there is a very close relationship between AC and GC, with each dependent upon the other emotionally. AC has significant funds, amounting to some £240,000, which will cover the cost of her future care, either at home or at the care home. All agree that acceptance by GC that he should disclaim the LPAs in his favour and his agreement to the appointment of Debbie Anderson as deputy for property and affairs, controlling the management of the belongings of himself and AC, is a significant development in the case. AC's deputy will have authority to remove items from the property whether they belong to AC or GC as it is AC's home. There is no dispute that the mental health of GC is a significant issue and that he will require long-term therapy to help him overcome the triggers which lead to his OCD and hoarding behaviours. The issue of hoarding will remain for a long time to come, at best, which is why there is a need for so many conditions to be put in place, if there is to be any possibility of AC being cared for within her own home, safely and successfully. If there is to be a trial at home, an independent social worker should be responsible for the assessment, in view of the fact the local authority have already formed a view as to whether or not it is likely to be successful. The conditions set out at paragraph 17 and 18 of the position statement, submitted on behalf of AC must be met if the trial is to be commenced. The risks of AC self-neglecting are reduced if she is provided with professional care. AC is 92 years of age with advanced dementia but with emotional and physical needs which are relatively straightforward and, by virtue of her age, she is likely to only have a limited number of years left to live and for that reason her wishes and feeling and the impact of those on her well-being are particularly important.

26. The local authority suggests that the plan for a package of care at home is too fragile given their belief AC may not cooperate with carers in her home and that there is a more than usual chance of the care package breaking down because of the hoarding issue, GC's mental health and the declining state of the home, at times. They accept that AC has fluctuated in her view as to whether or not she would accept carers in her home. The Official Solicitor reminds the court that there was a care agency involved with AC at home between March and May 2018 which worked quite well. AC cooperates with the professional carers at AP, with no suggestion that she has caused any problems in accepting their care. Mr O'Brien QC suggests that any issues of self-neglect will need to be addressed by the carers and by GC and that it is difficult to see why AC would now not want to have care at home, particularly as GC would have to reassure her that it is an important part of her remaining at home. He stresses, too, that

professional carers are used to dealing with people with dementia who may be changeable in their attitude to them. AC on occasions has acknowledged there will be a need for her to be cared for professionally, as well as by GC, at home and I find there is good evidence to show that she is accepting of professional care and recognises there is a benefit to her from it. There is no doubt that GC wants, more than anything else, for AC to return to her own home and be able to live there until she dies. He has been involved with these proceedings and the professionals within it sufficiently long enough to understand, if AC is to return home and to stay at home, he has to make strenuous efforts to deal with his hoarding disorder and to cooperate with the deputy to ensure his hoarding behaviours are sufficiently kept in check, to enable him to remain in the home with his mother or for her to remain in the home with him. He understands, too, the consequences of failing to put AC as his first priority, consistently, as AC was removed from her own home during the currency of these proceedings and all professionals have been clear that if the potential plan to enable AC to remain at home were to break down it is most likely that AC would be moved to a care home for the remainder of her life.

27. The local authority submits that it would be too distressing for AC to have to be returned to the care home or another care home, if a placement at home were not to be successful, or were to break down subsequently, and the fact that it would be likely she would be moving on a final basis rather than as a temporary measure means it would be likely to be yet more distressing for AC. The local authority had to concede that AC adapted to the move to the care home with little difficulty despite remaining consistent in her wish to return home and that it is questionable whether she would understand the difference between an intention to place her in a care home on a temporary or a permanent basis. Her recent conversation with myself showed confusion as to how long she had been at the care home and the reasons for her stay there. Mr O'Brien QC reasonably suggests that it would be upsetting to AC if she were told she could never again return to her own home. Mr Allen goes further and says the court must weigh up the definite emotional harm which would be caused to AC by having to remain at the care home against her wishes, against the potential harm to her if a return home fails. I agree with the submissions of Mr O'Brien QC and Mr Allen and do find that the local authority has underplayed the significant distress AC will suffer if she is told she is not to have an opportunity to return home.

28. The suggestion by the local authority that there is a significant risk of a breakdown in the arrangement with the care agency because of the challenge of dealing with the conditions of the property and the hoarding behaviours of GC and, if it does, there will be a limited number of other agencies willing to step in to take over the contract, on the basis of information available at this time, is a reasonable submission. They are particularly concerned that the mental health difficulties of GC make for a very challenging situation for professional carers. They accept that GC has achieved a great deal, but serious ongoing decluttering is required, GC will require long-term therapy, according to Professor Salkovskis and the therapy, which is currently in place, may not be the most appropriate. They accept that the proposal for a deputy goes some way to addressing the ongoing need to ensure the property remains

sufficiently de-cluttered to be a safe place to live and a place to which professional carers will go but suggest the proposal for a deputy is "not a magic bullet". They submit GC will respond badly to the direction of the deputy and that the deputy will be in a difficult position. On the other hand, Mr O'Brien QC points to the difference between how decisions have been made in the past and how they will be made in the future. Previously GC had the LPA for AC and so he did what he believed was needed. Now, once the deputy is appointed, it will be the deputy who will make the decisions on behalf of AC, who owns the house, and for whose benefit she will be acting. The deputy will decide what items stay in the property and what items are stored elsewhere or disposed of. In that regard the ending of the LPA and the handing over of power to the deputy is a very big step and one which GC knows must be taken to get AC home. He described it as a choice between his mother or hoarding. Mr O'Brien QC submitted Ms Anderson is very experienced and very capable and that the court will know, from its experience of her, that she will work hard to work collaboratively with GC. The burden will be lifted from GC. All of this improves the prospects of maintaining the care agency as the professional carers for AC. In addition, the deputy will employ a cleaner who will go in weekly. Mr O'Brien QC submitted that GC has been on a journey and that, with the help of his solicitor, who has told him what he needed to do, he has agreed to her suggestions and has developed a trusting relationship with her. In that way he has shown that he can manage change and can accept help. It would be an option for the deputy to pay for GC's solicitor's services from time to time, to advise GC and encourage him to continue with his decluttering programme.

29. It has been confirmed that the manager of the care agency has met with GC, has been to AC's home and has a very clear understanding of the difficult issues involved. One would expect that to improve the chances of the contract sustaining. Likewise, the ability of the care agency to deal with the deputy and to request her to make any changes required, to enable them to continue to provide care, lessens the prospect of it failing. If it comes to an end there would need to be a search at that time for an alternative care provider. It is not entirely risk free.

30. It was a surprise to all parties, to learn from Professor Salkovskis, that he had doubts that the therapist being funded to assist GC may not be the most appropriate person. GC indicated that he had tried to obtain the therapist through the NHS but was told there was a two-year waiting list. He had now had five sessions with the therapist and he found those helpful. He would be willing to meet with somebody recommended by Professor Salkovskis but would be sad to lose the therapeutic relationship he had started to build up with the therapist. He would welcome a review of his medication and, in light of the evidence of Professor Salkovskis in that regard, his solicitor was helping him to seek an appointment with his psychiatrist for a review of the same. No one has doubted the willingness of GC to engage with a suitably qualified therapist, nor to accept the advice given to him by such a therapist. There is evidence that he has acted upon the advice of Professor Salkovskis by engaging a psychotherapist and that he is already feeling the benefits of engaging with the therapist and open to changing to someone more appropriate, if such a person can be found. The court has previously agreed that AC's estate should fund a therapist for GC and it is likely that the deputy will make similar decisions with regard to treatment options for GC in the future. The statements of SH, the

photographs taken by her and Ms Lala and the evidence of Professor Salkovskis all show that GC has made significant strides in decluttering the property, allowing the cleaning of the same and giving up smoking in the home, accepting the advice that he should only vape in the home, as being a safer option. Whilst it has been a slow process Mr Campbell did not deny that it had all been in one direction and not a case of GC slipping backwards in his efforts at any stage within the currency of these proceedings.

31. Mr Allen acknowledged there had been a decline after previous proceedings ended in 2018 but drew to the attention of the court that AC was deemed to have capacity then and so all the power was with GC. The fact that declarations have been made as to her incapacity in several domains paves the way for the formal package to be put in place which gives greater optimism for success. The argument as to the shift in power is a powerful one and I do find that places both AC and GC in very different positions now with the significantly improved chance of AC being able to live in her own home in rooms which are free of unmanageable clutter and with the care agency who will feel supported by a deputy making decisions, knowing a cleaner is going in regularly and the deputy will be managing the disposal or storage of items which reappear or build up over time. I set little store by the local authority's argument that GC has cooperated in recent times because of the spotlight of proceedings and may cease to cooperate once the proceedings have concluded because I take account of his knowledge that the case could be returned to the Court of Protection at any stage in the future and the fact that a new spotlight will be on him, in the form of the deputy making inspections and giving clear directions as to what she requires to be done in the home.

32. A great deal of care has been taken as to the consideration of conditions which would need to be in place to enable AC to live in her own home again on a trial basis, and beyond, and it is highly significant that GC has agreed to each and every one of those conditions.

33. The local authority suggest the risk of the placement of AC at home breaking down is too great and she should, therefore, spend the rest of her days at the care home even though it is against her wishes. Mr O'Brien QC highlights the authorities set out within the 'legal principles' document which make it clear that the aim of the court should not be to remove all risk but to create manageable risk and the court should not ignore the risk of institutional care failing by providing a sad and less than ideal outcome for AC.

34. Ultimately what has persuaded the Official Solicitor that a trial at home is in the best interests of AC is the consistency of her wishes to return, with her having such a strong sense of belonging to her home, to wanting to be where she has looked after people for three generations, where she can remember the past. I concur and add that that she has a strong desire to continue to live with her son, who moved back home to help care for her when her husband died, some 11 years ago, where she has familiar things around her, which takes on an even greater significance with someone who is likely to have a hoarding disorder herself. There is no doubting the importance to her of her relationship with GC, nor her strong desire to become reunited with her pet cat, Jasper. It is these issues which are of magnetic importance in this

case, when I bear in mind, she has lived in her home for 40 years, that she is now 92 with straightforward care needs and a limited life expectancy.

35. Hedley J, when considering whether it was in the best interests of an elderly man to be discharged from hospital to the home where he had lived for many years commented at paragraph 21 in *Re GC* [2008] EWHC 3402 (Fam), "*GC is a man in the 83rd year of his life and my concern is to ask myself: how will he most comfortably and happily spend the last years that are available to him?… Next it seems to me that for the elderly there is often an importance in place which is not generally recognised by others; not only the physical place but also the relational structure that is associated with the place…"*

36. In connection with the issue of the trial placement, Hedley J commented at paragraph 24: "*It seems to me that it would be wrong not to try even with the degree of pessimism, a placement with a package of support*". These sentiments resonate strongly with me as I consider the facts of this case.

37. There is no doubt that the article 8 ECHR rights of AC and GC are engaged, in that each have a right to respect for private and family life and, when undertaking a best interest analysis, the exercise does require consideration of the factors set out at MCA 2005 section 4. In the course of that evaluation a judge will always be required to factor in an assessment of whether the proposed course is necessary and appropriate and, in particular, whether it properly justifies the interference with the article 8 rights of P: *K v LBX and Others* [2012] EWCA Civ 79, CA. In carrying out that exercise I could not be satisfied that a final placement at the care home would be an appropriate and justifiable interference with AC's article 8 rights.

38. A trial of care at home is not without risk but, on the evidence before me, it is a manageable risk and one which should be taken to try to afford AC the opportunity of returning to her home, in improved circumstances, and with the hope and expectation that it will continue to improve in the coming weeks and months. She will be paying for the care package at home and paying towards the cost of the assessment by the Independent Social Worker under her public funding certificate in these MCA s.21A proceedings. The local authority agree to pay half the cost of retaining the placement at the care home for 10 weeks. I am told the care package at home will reduce significantly after the first week. It is reasonable for AC to pay half the cost of maintaining the placement at the care home whilst the trial at home goes ahead. It is to her benefit to keep the placement open for the duration of the trial period as, is in the event of a breakdown, the risk of distress to her would be significantly lessened if she were to be returning to the care home and to an environment with which she is familiar, with staff who are now known to her.

39. I agree to publication of this judgment.
40. Finally, I wish to draw attention to the very fine work which has been carried out in this case by all of the professionals. I have already spoken of the high quality of the work undertaken by the social worker. I mention now the skilled work undertaken by the solicitors for GC and

AC, to progress the cases of their clients, to provide support and assistance to them and the very best information to the court. Their work has been acknowledged by counsel, who have been able to achieve a great deal prior to the start of this hearing as a result of that diligent preparation. I wish to thank them as well as counsel who have shown sensitivity and attention to detail.

Appendix 1

Official Solicitor's proposed list of conditions for a trial placement at home

1. GC to be trained on moving and handling.
2. GC should continue to see a therapist because his mental health is critical to the trial and the long-term sustainability of his mother being at home.
3. GC must give full access to the care workers.
4. GC must not smoke in the property although he can vape. He can smoke outside.
5. GC to let the carers in the house for all care calls; if after two attempts he does not answer the front door, then carers to access the house keys from the key safe lockbox to let themselves into the house to care for AC; The key must be in the key safe and health and social care professionals must be informed of the number to access the key safe;
6. If AC refuses care from the carers, then GC to encourage her to have care from the carers;
7. The home to be kept in the same condition or better than it is as at the date of the hearing in July 2022;
8. GC to store all shopping in appropriate places such as fridge, freezer, and cupboards in a timely manner and not to keep the shopping in bags on the floors;
9. The fridge, cupboards, and bags of shopping to be checked for out-of-date and rotten food e.g. every 1 week. All rotten food and out-of-date food be disposed of in the outside dustbins when it becomes out of date;
10. GC should not be under the influence of alcohol or have been drinking alcohol when he is providing care for his mother; typically moving and handling and working alongside as the second carer. Otherwise, this could result in the carer not being able to provide care as cannot hoist singly and could result in the care agency withdrawing care;
11. All serious problems relating to the property to be reported to the deputy for AC immediately so they can be repaired in a timely and efficient manner including but not limited to excess damp/cold/heat; domestic hygiene, pests, and refuse (disposal of household waste); electrical hazards; fire safety; crowding and space; unsafe layout; ventilation and natural light, etc;

12. A cleaner to be employed to clean the home weekly in particular the areas of the house (AC's bedroom, bathroom, kitchen, hallway, utility room and the rest room for the carer), which are essential to the delivery of the care being provided to AC;
13. Any holiday plans and/or respite indicated by GC to be relayed to the relevant professionals giving sufficient time to ensure that suitable alternative care provision for his mother is found;
14. GC to inform the deputy, professionals, or his own social worker/therapist as soon as he recognises he is not coping so that he can be offered additional support;
15. Relevant professionals be allowed access to the home to assess, monitor and review the environment and AC's wellbeing and to look around the property. This would include announced and unannounced visits by the professionals;
16. AC should not be left on her own for longer than two hours given her age, health, and vulnerability if she was to return home for a trial period because she is entirely dependent on carers including GC for assistance including e.g. with toileting and food/drink and has since March 2022 been receiving 24/7 care at a care home;
17. The care agency have confirmed that they can provide 24 hours if GC is unwell and unable to be the second carer or if GC was going on holiday.

Appendix 2

Agreed case summary

Issues

1. Whether it is in the best interests of the first respondent, AC, to remain at the care home or return home with a package of care on a trial basis. If the latter, how should the success or otherwise of a trial period be assessed; and

2. Whether the second respondent, GC, has mental capacity to make decisions in the areas in which Professor Salkovskis was instructed to report, that is, his own property and affairs; AC's property and affairs; his own items and belongings; and AC's items and belongings.

3. Whether to appoint a deputy for AC's property and affairs following GC's disclaiming of the lasting powers of attorney.

Facts

The first respondent, AC, is a 92-year-old who since 2018 lives with a diagnosis of Alzheimer's dementia and alcohol-related brain damage. She used to be a [occupation] and had been residing at her home at [address] for over 40 years. Her husband passed away around 11 years ago and her son, GC, gave up his job to move in to look after her. He had been AC's main carer until she moved to [the care home].

In 2018, AC created lasting powers of attorney appointing GC as her sole attorney for both property and affairs and health and welfare.

Both AC and GC have been diagnosed by Prof Salkovskis as having a hoarding disorder. The local authority has been concerned that AC's care and support needs could not adequately be met in the home environment, as it continued to present a serious health and safety risk due to the volume of items in the property.

GC has his own mental health difficulties because of his Asperger's Syndrome, anxiety, OCD, hoarding disorder and occasions of depression. The main consequence of his OCD and hoarding behaviours has been cluttering of the house. Like AC, he has his own social worker to support him under the Care Act 2014. GC has recently started to receive therapy to address his fears about disposing of things.

The local authority filed an application in the Court of Protection in August 2020 seeking incapacity declarations and best interests' welfare orders under ss. 15 and 16 MCA 2005 that AC lacked capacity to make decisions about her residence, care, the risks of hoarding and ensuring the safety of her home environment (displaying at the time significant levels of clutter, dirt and disorder), and for AC to be moved to a respite placement whilst the poor sanitary conditions and

other hazards identified by professionals, including electricians and the fire services, could be dealt with.

The expert evidence obtained from Professor Paul Salkovskis within the proceedings is that AC lacks capacity to make decisions about her, residence, care, to make decisions regarding her own items and belongings due to the interaction between her long-established hoarding tendencies and memory impairment. He also found AC lacked capacity to conduct the proceedings. The court has made s.15 declarations[1] that AC lacks capacity to litigate these proceedings and make decisions about her residence and care.

Throughout the proceedings, AC has continued to express a wish not to leave her property and, as she is currently at a care home, to return to her house. GC remains concerned about the distress that this is causing AC.

On 4 January 2022, the local authority issued proceedings concerning GC. Those proceedings were an application for an order that GC leave the home property whilst its condition is addressed. By an order on 8 December 2021, the court consolidated GC's case with AC's case. The court also directed that GC's mental capacity be reported on by Professor Salkovskis. He concluded in April 2022 that GC has litigation capacity but lacks capacity to make (i) decisions about his own and AC's property and affairs, and (ii) decisions about his own and his mother personal items and belongings. GC disputes the former but accepts that he needs assistance to deal with his OCD when removing things form the home. The local authority and GC's solicitors therefore posed further questions of the expert, as it was not clear what factors he had taken into account in reaching his conclusions.

Specialist and cleaning agencies have been commissioned within these proceedings to assist GC with de-cluttering, disposal and storage of items, and with maintaining the cleanliness of the house. District Nursing, Occupational Therapy services, electricians and Fire Services have also been involved with assessing the wider safety considerations.

GC is receiving therapy to help him with his interacting mental-health diagnoses and in relation to the issues in these proceedings.

Separately, the OPG made an application to revoke GC's lasting power of attorney for AC for health and welfare on the basis of GC not acting in AC's best interests. On 21 December 2021, the court suspended the LPA for health and welfare. GC remains the LPA for AC's property and affairs but has recently confirmed that he will disclaim both LPAs.

On 27 February 2022, the emergency services responding to a call from AC attended the home and transferred AC to hospital saying that they observed poor sanitary conditions in the home and risks to AC's health and welfare. Whilst in hospital, a suitable nursing placement was identified by the local authority and GC to expedite her discharge. An urgent application was made with the agreement of the parties.

[1] And in the same order, pursuant to section 48 MCA 2005, the court has reason to believe that AC lacks capacity to revoke her lasting powers of attorney; provide access to her home to allow cleaning and decluttering to be carried out and for improvement works to the house to be completed; and make decisions about her property and affairs.

Pursuant to the court's urgent order dated 18 March 2022, AC was moved in her best interests from hospital to the care home where she currently resides. AC is a self-funder. She requires support with all daily care interventions mainly by two carers, although it should be noted that AC can eat and drink independently, only requires the support of one carer for her medication and can use the bed pan independently save for staff having to empty it. She is visited daily (twice a day) by GC. Her deprivation of liberty was authorised by the local authority for 3 months due to expire on 22 June 2022 but has since been extended by the order approved by the court on 13 May 2022 to ten working days after the hearing in July 2022, i.e. 5 August 2022.

The court order on 18 March 2022 reconstituted the proceedings as s. 21A proceedings.

Despite receiving good care at the care home, AC is clearly and consistently expressing the wish to return home and now challenges that DoLS authorisation under s. 21A MCA 2005.

At the hearing on 12 May 2022, the parties agreed that although positive steps have been taken to improve the condition of AC's home, it is not yet in a suitable condition for AC to be able to return there and that further information and any resulting work is required before the viability of a return for AC can be properly considered by the court.

The court listed a further hearing on 19, 20, 21 and 22 July 2022 before HHJ Clayton in the Court of Protection sitting at the County Court in Birmingham with a time estimate of four days. The purpose of the hearing is to determine whether AC should return home with a package of care on a trial basis and to determine whether GC has capacity in the domains on which Professor Salkovskis was instructed to report.

At the May hearing, the court adjourned the OPG's application until the court can determine whether AC should return home for a trial period (since, if AC does return home, what takes place during that trial period may help inform the OPG's application as to whether GC is acting in AC's best interests). The OPG's application has been listed to be heard on 27 July 2022.

On 28 June 2022, Professor Salkovskis provided his addendum report on GC's capacity. Consistent with his first report, he maintains that, aside from litigation capacity, GC lacks the mental capacity to make decisions about his own and his mother's financial property and affairs, and about his own and his mother's items and belongings.

AC told her legal representatives that she wished to meet with the judge prior to the July hearing to tell the judge directly her wishes and feelings about her care and living arrangements. The judge agreed and visited AC at the nursing home on 8 July 2022. The parties were in agreement with the judicial visit and provided the judge with a summary of their respective positions prior to the visit.

Case summary
Agreed by the parties' legal teams
18 July 2022

Appendix 3

Agreed statement of legal principles

The Applicable Law

Capacity

It is a fundamental principle of the law, set out at section 1(2) of the Mental Capacity Act 2005, that a person must be assumed to have capacity unless it is established that he lacks capacity. It follows that those asserting that a person lacks capacity bear the burden of establishing it.

Two other principles underpin the determination of capacity:

a. 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 – section 1(3); and

b. A person is not to be treated as unable to make a decision merely because he makes an unwise decision – section 1(4).

The "single test"[2] of capacity is set out in section 2(1) of the Act:

> *"A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, his mind or brain."*

That test falls to be interpreted by other provisions of the Act. Section 2 goes on to provide:

> *(1) It does not matter whether the impairment or disturbance is permanent or temporary.*
>
> *(2) 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.*
>
> *(3) …any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.*

A 'functional test' is set out in section 3 of the Act:

> *(1) …a person is unable to make a decision for himself if he is unable–*

[2] *PC and NC v. City of York Council* [2013] EWCA Civ 478 at paragraph 56.

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his decision (whether by talking, using sign language or any other means.)

(2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids, or any other means).

(3) 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.

(4) Information relevant to a decision includes information about the reasonably foreseeable consequences of –

(a) deciding one way or another, or

(b) failing to make the decision.

In *PC and NC v. City of York Council* [2013] EWCA Civ 478 at paragraphs 35 and 40 Lord Justice McFarlane expressly approved the approach of the first instance judge (Hedley J) set out in the following terms:

'Drawing these matters together, I am clear that the submissions made by Mr Hallin are sound and that the course adopted by Hedley J at paragraph 19 on the nature of the jurisdiction under MCA 2005 is the correct one. The determination of capacity under MCA 2005, Part 1 is decision specific. Some decisions, for example agreeing to marry or consenting to divorce, are status or act specific. Some other decisions, for example whether P should have contact with a particular individual, may be person specific. But 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. I do not agree with the Official Solicitor's submission that absurd consequences flow from a failure to adopt either an act-specific or a person-specific approach to each category of decision that may fall for consideration. To the contrary, I endorse Mr Hallin's argument to the effect that removing the specific factual context from some decisions leaves nothing for the evaluation of capacity to bite upon.'

[…]

'Hedley J was therefore correct in the approach that he adopted in paragraph 19 of his judgment by fixing his attention 'upon the actual decision in hand' with the result that ground of appeal 3A, as I have cast it, must fail.'

In a number of cases (*PH v. A Local Authority* [2011] EWHC 1704 (Fam), *CC v. KK & Ors* [2012] EWHC 2136 (COP) at paras 18 to 25 and *PCT v. LDV* [2013] EWHC 272 (Fam)), Baker J (as he was then) made a number of relevant and general observations to have regard to when a court is considering the issue of a person's capacity to make particular decisions:

a) capacity is both issue-specific and time-specific. In other words, it is necessary to assess a person's ability to make a particular decision at a particular time, not their ability to make decisions in general;

b) it is not necessary for the person to comprehend every detail of the issue, but the question is whether the person "can comprehend and weigh the salient details relevant to the decision to be made" and that assessment must bear in mind that "different individuals may give different weight to different factors";

c) the court must consider all relevant evidence and that it is important to remember that (i) the roles of the court and the expert are distinct (ii) the court is in a position to weigh the expert evidence against its findings on the other evidence and (iii) the court is the final decision-maker;

d) in considering the assessment of capacity and making its decision, the court should be careful not to be drawn towards an outcome that is more protective of the adult but should consider the matter in a detached and objective way.

The Supreme Court in *A Local Authority v JB* [2021] UKSC 52 stated at para 61 that the MCA 2005 applies a 'function' or 'understanding' approach to capacity by focussing on the personal ability of the person to make a particular decision. At paras 63-79, the Supreme Court clarified the correct ordering of the capacity test (i.e. starting with the question of whether the person is functionally capable or incapable of understanding, retaining, using and weighing the relevant information and communicating their decision). It also emphasised the importance of (1) identifying the precise matter upon which the person's decision is required; and (2) identifying the information relevant to the decision. It also made clear that the reasonably foreseeable consequences of making (or not making) the decision that the person must be able to understand, retain, use and weigh can include the consequences not just for the person but for others. In summary, there are three elements to be considered when determining a question of capacity:

1. Is the person able to make their own decision (with support if required)?
2. If they cannot, is there an impairment or disturbance in the functioning of their mind or brain?
3. If so, is the person's inability to make the decision because of the impairment or disturbance?

The Role of Experts

Whilst the evidence of psychiatrists is likely to be determinative of the issue of whether there is an impairment of the mind for the purposes of section 2(1) of the 2005 Act, the decision as to capacity is a judgment for the court to make (*Re SB* [2013] EWHC 1417 (COP)). Furthermore, *in PH v A Local Authority* [2011] EWHC 1704 (COP) Baker J. observed as follows at [16 (xiii)]:

> *'In assessing the question of capacity, the court must consider all the relevant evidence. Clearly, the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important. In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P.*
>
> *In* Oldham MBC v GW and PW *[2007] EWHC 136 (Fam), a case brought under Part IV of the Children Act 1989, Ryder J referred to a 'child protection imperative', meaning 'the need to protect a vulnerable child' that for perfectly understandable reasons may lead to a lack of objectivity on the part of a treating clinician or other professional involved in caring for the child. Equally, in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person - including, of course, a judge in the Court of Protection - may feel drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective*'.

In *DP v Hillingdon* [2020] EWCOP 45 Hayden J. said [§61] that '*I remain convinced that the failure to inform P as to what an assessment is actually addressing will probably be "fatal to" or, at least, "gravely undermine" the reliability of any conclusion."*

In *AMDC v AG & CI* [2020] EWCOP 58 Poole J. identified the requirements for an expert opinion on mental capacity in the Court of Protection. The court will note paragraphs 22 to 28 of the judgment. At para 28 the court set out the matters in detail:

"28 When providing written reports to the court on P's capacity, it will benefit the court if the expert bears in mind the following:

> *(a) An expert report on capacity is not a clinical assessment but should seek to assist the court to determine certain identified issues. The expert should therefore pay close regard to (i) the terms of the Mental Capacity Act and Code of Practice, and (ii) the letter of instruction.*
>
> *(b) The letter of instruction should, as it did in this case, identify the decisions under consideration, the relevant information for each decision, the need to consider the diagnostic and functional elements of capacity, and the causal relationship between*

any impairment and the inability to decide. It will assist the court if the expert structures their report accordingly. If an expert witness is unsure what decisions they are being asked to consider, what the relevant information is in respect to those decisions, or any other matter relevant to the making of their report, they should ask for clarification.

(c) It is important that the parties and the court can see from their reports that the expert has understood and applied the presumption of capacity and the other fundamental principles set out at section 1 of the MCA 2005.

(d) In cases where the expert assesses capacity in relation to more than one decision, (i) broad-brush conclusions are unlikely to be as helpful as specific conclusions as to the capacity to make each decision; (ii) experts should ensure that their opinions in relation to each decision are consistent and coherent.

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

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

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

(h) If on assessment P does not engage with the expert, then the expert is not required mechanically to ask P about each and every piece of relevant information if to do so would be obviously futile or even aggravating. However, the report should record what attempts were made to assist P to engage and what alternative strategies were used. If an expert hits a "brick wall" with P then they might want to liaise with others to formulate alternative strategies to engage P. The expert might consider what further bespoke education or support can be given to P to promote P's capacity or P's engagement in the decisions which may have to be taken on their behalf. Failure to take steps to assist P to engage and to support her in her decision-making would be contrary to the fundamental principles of the Mental Capacity Act 2005 sections 1(3) and 3(2).

29. The newly instructed expert in this case may or may not reach the same conclusions as Dr Quinn, but it will be important that the parties and the court can see from their report that the fundamental principles of the MCA 2005 have been followed, that proper steps have been taken to

support AG's decision-making and participation in the assessment, and that the conclusions reached are adequately explained."

Schedule A1 to the Mental Capacity Act 2005

Schedule A1 of the Act provides that the "managing authority", who may be a care home or a hospital, must obtain authorisation from the relevant local authority, the "supervisory body", to deprive someone lacking capacity of their liberty. The local authority has to arrange assessments in order to determine whether the qualifying criteria for the Deprivation of Liberty Safeguards ('DoLS') are met. That necessitates carrying out six assessments set out in para 12 and are: the age requirement; the mental health requirement; the mental capacity requirement; the best interests requirement; the eligibility requirement; and the no refusals requirement[3].

The authority to detain an individual under the DoLS derives from section 4A(5) of the Act:

> *'(1) This Act does not authorise any person ("D") to deprive any other person ("P") of his liberty.*
>
> *(2) But that is subject to–*
>
> > *(a) the following provisions of this section, and*
> >
> > *(b) section 4B.*
>
> *(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.*
>
> *(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P's personal welfare.*
>
> *(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).'*

The powers of the court in relation to Schedule A1 are set out in section 21A(2) which give the court jurisdiction for the purposes of Article 5(4) of the European Convention on Human Rights ("ECHR") to review the authorisation of a person's detention and provides that:

> *'Where a standard authorisation has been given, the court may determine any question relating to any of the following matters–*
>
> > *(a) whether the relevant person meets one or more of the qualifying requirements*
> >
> > *(b) the period during which the standard authorisation is to be in force*
> >
> > *(c) the purpose for which the standard authorisation is given*

[3] Further elements of the scheme are to be found in Schedule A1 to the Mental Health Act 2005 and in the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008/1858.

(d) the conditions subject to which the standard authorisation is given'

Thereafter section 21A(3) provides that:

'If the court determines any question under subsection (2), the court may make an order–

(a) varying or terminating the standard authorisation, or

(b) directing the supervisory body to vary or terminate the standard authorisation'

Paragraph 12(1)(d), Part 3, Schedule A1 of the Act specifies 'the best interests requirement' as a qualifying requirement. The best interests requirement is further defined at para 16 of Schedule A1.

The Court's approach to a section 21A application is different to and distinct from its role in a standard welfare application. The section 21A application is intended to either vary or discharge a Deprivation of Liberty authorisation. In such applications, the task of the court is to evaluate the relevant qualifying requirements and to come to a view, on the available evidence, as to whether those requirements continue to be met (*DP v London Borough of Hillingdon* [2020] EWCOP 45 at para 35). Charles J also addressed this in *Re* UF [2013] EWCOP 4289).

That said, once an application is made under section 21A, the court's powers are not confined simply to determining the question of whether P meets one or more of the qualifying requirements and the court has the power to make declarations under section 15 as to whether P lacks capacity to make *any* decision, and once such a declaration is made, the court has wide powers under section 16 to make decisions on P's behalf concerning his personal welfare or property and affairs (*CC v KK* [2012] EWHC 2136 (COP), Baker J (as he was then) at para 16, *PH v A Local Authority* [2011] EWHC 1704 (Fam), Baker J (as he was then) at para 15).

Sections 15 to 17 of the MCA grant the Court of Protection power to make decisions concerning personal welfare and to make declarations and orders in respect of a person who lacks capacity. Section 15 deals with declarations, including declarations as to the lawfulness or otherwise of any act which has been or is to be done. Section 16 enables the court, by making an order, to make personal welfare decisions for a person without capacity, and, by section 17(1)(a), the court's power in this regard extends to deciding where P lives.

Section 16 MCA provides:

> Powers to make decisions and appoint deputies: general
>
> (1) This section applies if a person ("P") lacks capacity in relation to a matter or matters concerning—
>
> (a) P's personal welfare, or
>
> (b) P's property and affairs.
>
> (2) The court may—

(a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or

(b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.

(3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).

(4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—

(a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and

(b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.

(5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).

(6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.

(7) An order of the court may be varied or discharged by a subsequent order.

(8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy—

(a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or

(b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

Best interests

Where, because of their lack of mental capacity, a person is unable to make a decision that has to be made, that decision must be made for them in their best interests. That requires the court as decision maker to consider the matters outlined in section 4 of the MCA which provides:

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

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

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

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

(3) He must consider—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Mental Capacity Act 2005: Code of Practice provides guidance at Section 5: "What does the Act mean when it talks about 'best interests'". At 5.13, the Code recognises the wide and flexible range of factors that may be relevant to a best interests' decision:

"Not all factors in the checklist will be relevant to all types of decisions or actions, and in many cases other factors will have to be considered as well, even though some of them may then not be found to be relevant."

The leading case regarding the application of the best interests criteria is the decision of the Supreme Court in *Aintree University Hospitals NHS Foundation Trust v James and others* [2013] UKSC 67. At paras 39 and 45 of her judgment, Baroness Hale stated:

'The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological ……. they must try and put themselves in the place of the individual patient and ask what his attitude to the treatment is or would be likely to be; and they must consult others who are looking after him or interested in his welfare, in particular for their view of what his attitude would be.'

[…]

'The purpose of the best interests test is to consider matters from the patient's point of view. That is not to say that his wishes must prevail, any more than those of a fully capable patient must prevail. We cannot always have what we want. Nor will it always be possible to ascertain what an incapable patient's wishes are. .... But insofar as it is possible to ascertain the patient's wishes and feelings, his beliefs and values or the things which were important to him, it is those which should be taken into account because they are a component in making the choice which is right for him as an individual human being.'

In *Wye Valley NHS Trust v Mr B* [2015] EWCOP 60, Peter Jackson J (as he then was) stated:

'10. 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 ……. 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.

11. This is not an academic issue, but a necessary protection for the rights of people with disabilities. As the Act and the European Convention make clear, a conclusion that a person lacks decision-making capacity is not an "off-switch" for his rights and freedoms. To state the obvious, the wishes and feelings, beliefs and values of people with a mental disability are as important to them as they are to anyone else, and may even be more important. It would therefore be wrong in principle to apply any automatic discount to their point of view.

12 .... It is, I think, important to ensure that people with a disability are not – by the very fact of their disability – deprived of the range of reasonable outcomes that are available to others. For people with disabilities, the removal of such freedom of action as they have to

control their own lives may be experienced as an even greater affront that it would be to others who are more fortunate.'

In *ITW v Z, M & Various Charities* [2009] EWHC 2525 (Fam) Munby J (as he then was) set out a number of features at para 35 which may be important when assessing P's wishes and feelings:

a. The degree of P's incapacity, for the nearer to the borderline the more weight must in principle be attached to P's wishes and feelings;
b. The strength and consistency of the views being expressed by P;
c. The possible impact on P of knowledge that their wishes and feelings are not being given effect to;
d. The extent to which P's wishes and feelings are, or are not, rational, sensible, responsible and pragmatically capable of sensible implementation in the particular circumstances; and
e. The extent to which P's wishes and feelings, if given effect to, can properly be accommodated within the court's overall assessment of what is in their best interests.

In cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person (including a Judge in the Court of Protection) may feel drawn towards an outcome that is more protective of the adult. This point was articulated most strikingly in the judgment of Munby J in *Re MM (An Adult)* [2007] EWHC 2003 (Fam) at para 120:

'A great judge once said, 'all life is an experiment', adding that 'every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge' (see Holmes J in Abrams v United States (1919) 250 US 616 at 630). The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else. Often it will be appropriate to do so, but not always. Physical health and safety can sometimes be brought at too high a price in happiness and emotional welfare. The emphasis must be on sensible risk appraisal, not striving to avoid all risk, whatever the price, but instead seeking a proper balance and being willing to tolerate manageable or acceptable risks as the price appropriately to be paid in order to achieve some other good - in particular to achieve the vital good of the elderly or vulnerable person's happiness. What good is it making someone safer if it merely makes them miserable?'

When assessing what weight to be given to the risks identified to the P's health including whether a return home would be in their best interests, the court has confirmed that its function in challenges such as this can be to take decisions on behalf of P that public authorities feel are too risky for them properly to be able to take themselves, and that it is perfectly appropriate that responsibility for the outcome should fall on the shoulders of the court (*Re M (Best Interests: Deprivation of Liberty)* [2013] EWCOP 3456, Peter Jackson J (as he was then) at para 41).

In *Re GC* [2008] EWHC 3402 (Fam), Hedley J considered whether it was in the best interests of an elderly man to be discharged from hospital to the home where he had lived for many years and commented at para 21:

> *'GC is a man in the 83rd year of his life and my concern is to ask myself: how will he most comfortably and happily spend the last years that are available to him? …. Next it seems to me that for the elderly there is often an importance in place which is not generally recognised by others; not only the physical place but also the relational structure that is associated with a place …'*

In connection with the issue of a 'trial' placement, Hedley J commented at para 24:

> *'It seems to me that it would be wrong not to try, even with a degree of pessimism, a placement with a package of support'*

The decision of District Judge Eldergill in *Westminster City Council v Manuela Sykes* [2014] EWCOP B9 is of relevance:

> *'several last months of freedom in one's own home at the end of one's life is worth having for many people with serious progressive illnesses, even if it comes at a cost of some distress. If a trial is not attempted now the reality is that she will never again have the opportunity to live in her own home'*

and that

> *'although there is a significant risk that a home care package at home will 'fail', there is also a significant risk that institutional care will 'fail' in this sense (that is, produce an outcome that is less than ideal and does not resolve all significant existing concerns)'*

Mr Justice Hedley held in *P v M (Vulnerable Adult)* [2011] 2 F.L.R. 1375, at para [34]:

> *"I am very influenced, rightly or wrongly, but it is only right everyone should know it, by the timescales in the case. I am very influenced by the desire to allow people where it is at all possible to spend their end time within the family rather than in an institution, even if there are shortcomings in terms of care which an institution could address."*

In *Re NP* [2020] EWCOP 44, the court agreed that a trial period in the marital home would be the best option, concluding that there was not such a level of risk in the trial as to prevent the court from considering it to be in the best interests of the P to attempt the same. In reaching its best interests' decision, the court took account of Article 19 of the UN Convention on the Rights of Persons with Disabilities 2006, which provides the right to live in the community with choices equal to others, and General Comment No.5 of the United Nation's CRPD Committee on institutions[4] (paras 27 - 29).

In considering the less restrictive option for the P, whether it was in her best interests to return to her home to live with a contingency plan of maintaining her current residential placement for a period of time, Cobb J in *UF v X County Council & Others (No 2)* [2014] EWCOP 18 stated:

[4] Whilst observing *'the CRPD has not been incorporated into English and Welsh law,* [but] *the court should pay it due regard given the UK's ratification.'*

'***Less restrictive option***

82. *In reviewing the options, I have had regard to whether the delivery of care to UF (i.e. "the act" or "purpose") can be as effectively achieved in a way that is "less restrictive" of the person's rights and freedom of action (per section 1(6)) than another. In this instance, the issue arises as to whether delivery of care at* [P's home] *is likely to be 'less restrictive' than delivery of care at* [the residential care home].

83. *While the difference between living at home and living in a care home is one which vividly engages the 'best interests' arguments, I am not sure that it engages the provisions of section 1(6) to the same degree, if at all; while it may well be (and is likely to be in many cases) that care at home is less restrictive, it is necessary, in my judgment, to analyse the specific care regime in place in each setting to decide which is the less restrictive on the facts of the case.*

85. *Even if I were to conclude that the simple fact of living at home is less restrictive than living in a care home, such a consideration would have to yield to a wider 'best interests' principles discussed more fully above: see London Borough of Havering v LD & KD [2010] EWHC 3876 (COP) at [9]: "The "best interests" principle takes priority - that is to say, the option which is in the person's best interests must be chosen - which may not necessarily be the least restrictive alternative".'*

Article 8 ECHR

Article 8 ECHR is also a relevant factor:

> Article 8
> Right to respect for private and family life
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In *K v LBX and Others* [2012] EWCA Civ 79, the Court of Appeal confirmed that there is no presumption in favour of family life when undertaking a best interests' analysis. The exercise requires consideration of the factors set out at section 4. In the course of that evaluation a judge will always be required to factor in an assessment of whether the proposed course is necessary and appropriate and in particular whether it properly justifies the interference with the Article 8 rights of P. Thus, no artificial starting point should be imported into the exercise. Thorpe LJ observed, at para 35:

> *'the safe approach of the trial judge in Mental Capacity Act cases is to ascertain the best interests of the incapacitated adult on the application of the section 4 checklist. The judge should then ask whether the resulting conclusion amounts to a violation of Article 8 rights and whether that violation is nonetheless necessary and proportionate'.*

Davies LJ noted, at para 63:

> *'there will undoubtedly be many cases in this context where Article 8 considerations will be a very important factor. Where (as here) Article 8 is engaged and where (as here) there will be a potential interference with the right to family life which has to be respected then the interference has to be justified: that is fundamental. … Where (as here) the family life is long standing, is existing and is of high quality, due weight needs to be given to that in assessing whether the proposed interference with the family life is justified and proportionate and in reaching the overall conclusion on best interests'.*

The approach of Thorpe and Davies LJ in *LBX* (supra) has been widely applied see e.g.: *A North East Local Authority v AC and BC* [2018] EWCOP 34, at para 157; in *An NHS Foundation Trust v AB and CD* [2019] EWCOP 45, para 28.

Deprivation of liberty

Article 5 ECHR applies to persons of all ages. Everyone has the right to liberty and security of person. All persons are entitled to the protection of the right under Article 5 not to be deprived, or continue to be deprived, of their liberty, save in accordance with the conditions specified in Article 5(1) and in accordance with a procedure prescribed by law. The list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one, and only a narrow interpretation of those exceptions is consistent with the aim of that provision.

The procedure prescribed by law in a care home case (or a nursing home case, or a hospital case, but here we are concerned with a nursing home case) is within Schedule A1 to the Mental Capacity Act 2005 (see above).

The MCA 2005 makes specific provision in respect of acts or decisions which amount to deprivation of liberty. Deprivation of liberty is only permitted in three circumstances:[5]

> a. it is authorised by the Court of Protection by an order under section 16(2)(a) (which is the purpose of the current application);
>
> b. it is authorised under the procedures provided for in Schedule A1 (which relates only to deprivations in hospitals and in care homes, and therefore also applies in the matter currently under consideration);

[5] As identified by Lady Hale in *Cheshire West and Chester Council v. P and another* [2014] AC 896 at paragraph 8.

c. it falls within section 4B (which allows deprivation if it is necessary to give life sustaining treatment or to prevent a serious deterioration in the person's condition while a case is pending before the court and does not apply to the current application).

Section 64(5) of the Act provides that references to "deprivation of liberty" in the Act have the same meaning as in Article 5(1) ECHR. Any analysis of whether P has been in fact deprived of his liberty must therefore have close regard to the jurisprudence of the European and English courts on the interpretation of that Article.

There is no statutory definition of 'deprivation of liberty.' Currently, the domestic understanding of the term derives from the Supreme Court decision in *Cheshire West and Chester Council v. P and another* [2014] AC 896. That decision was not unanimous, which doubtless reflects the complexity of the issue, but the majority view expressed by Baroness Hale binds this Court and all parties to these proceedings.

The "essential character" of deprivation of liberty was a matter of agreement before the Supreme Court:

> *"It is common ground that three components can be derived from* [the Strasbourg authorities], *as follows:*
>
> *(a) the objective component of confinement in a particular restricted place for a not negligible length of time;*
>
> *(b) the subjective component of lack of valid consent; and*
>
> *(c) the attribution of responsibility to the state."* (Baroness Hale at paragraph 37)

The underlying principle of determining when circumstances amount to a deprivation of liberty was then set out:

> *".. what it means to be deprived of liberty must be the same for everyone, whether or not they have physical or mental disabilities. If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."* (Baroness Hale at paragraph 46)

An 'acid test' was defined: there is deprivation of liberty where a person

> *"was under continuous supervision and control and was not free to leave."* (Baroness Hale at paragraph 49)

It is not relevant that the care arrangements have a benevolent or beneficial purpose. A conclusion that a person's living arrangements amount to a deprivation of liberty does not of itself imply any criticism of persons who arrange and/or provide the care. Rather,

> *"It is merely a recognition that human rights are for everyone, including the most disabled members of our community, and that those rights include the same right to liberty as has everyone else."* (Baroness Hale at paragraph 1)

and a reflection of "policy" that

> *"Because of the extreme vulnerability of people like P, MIG and MEG, I believe that we should err on the side of caution in deciding what constitutes a deprivation of liberty in their case. They need a periodic independent check on whether the arrangements made for them are in their best interests…. Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us."* (Baroness Hale at paragraph 57)

There has been judicial consideration of what it means to be "free to leave." In the Court of Appeal decision in *Birmingham City Council v. D* [2018] PTSR 1791 Sir James Munby P confirmed that

> *"As I read her judgment (see paras 40–41), Baroness Hale DPSC was using "free to leave" in the sense I had described in JE v DE [2007] 2 FLR 1150, para 115:*
>
> *'The fundamental issue in this case … is whether DE was deprived of his liberty to leave the X home and whether DE has been and is deprived of his liberty to leave the Y home. And when I refer to leaving the X home and the Y home, I do not mean leaving for the purpose of some trip or outing approved by SCC or by those managing the institution; I mean leaving in the sense of removing himself permanently in order to live where and with whom he chooses …'*

Statement of legal principles
Agreed by the parties' legal teams
18 July 2022