

Neutral Citation Number: [2023] EWCOP 65

Case No: 13869239 & 13910506

IN THE COURT OF PROTECTION

IN THE MATTER OF SECTION 21A OF THE MENTAL CAPACITY ACT 2005

AND IN THE MATTERS OF MA and AA

Date: 8 December 2023

Before :

DISTRICT JUDGE SIMPSON

Between :

MA **First Applicant**
(by her litigation friend the Official Solicitor)

- and -

A Local Authority (1) **First Respondent**

An ICB (2) **Second Respondent**

And Between :

AA **Second Applicant**
(by his litigation friend the Official Solicitor)

- and -

A Local Authority (1) **First Respondent**

Ms Gourley (instructed by **BHP Law**) for the First Applicant
Mr O’Ryan (instructed by **EMG Solicitors**) for the Second Applicant
Ms Mahmood (instructed by in house legal teams) for the First and Second Respondent

Hearing dates: 18/ 19/ 20 October 2023

JUDGMENT

Please note references in this Judgment to “the Act” are references to the Mental Capacity Act 2005 and references in bold are to the relevant document in the trial bundle.

Introduction

1. These proceedings are concerned with MA, an 84-year-old woman with a diagnosis of dementia. This case is being heard alongside that of AA an 89 year old man who has been diagnosed with dementia, epilepsy, heart disease and cerebrovascular hypertension. AA is MA’s husband of 63 years.
2. MA and AA met when they were 11 years old. MA worked as a nurse for much of her life. She has been described as a “fiercely independent” and “very determined” lady [**G14/292**]. MA and AA have one son together, CA, who resides in outside of the jurisdiction. CA has been in attendance at multiple RTMs held during these proceedings but has declined to take up party status [**D38/124**].
3. In summary, MA and AA previously lived at home together as a married couple. After concerns about their ability to manage at home, MA and AA moved to reside together at placement 1 in the same room. MA was later moved to a room on another floor and contact with AA was stopped. Placement 1 was unable to provide the care MA required. MA was subsequently served notice and moved to placement 2 which was a specialist unit able to deal with MA’s particular needs.

A tiered plan was made to reintroduce contact between MA and AA via telephone, video call and then in person. After only two in person contact sessions, the local authority issued a COP9 application to end all contact, by any means, between MA and AA on the grounds of distress and risk posed to MA and AA at the end of contact sessions. This application is strongly opposed by MA.

Issues

Issue 1: Care and Residence.

4. 1a. What are the available options?
5. 1b. Of the available options, which of these is in MA's best interests and which of these is in AA's best interests? A holistic determination must then be made based on the needs and best interests of both.

Issue 2: Contact.

6. 2a. What are the available options?
7. 2b. Of the available options, which of these is in MA's best interests and which of these is in AA's best interests? A holistic determination must then be made based on the needs and best interests of both.

Issue 3: Declaration.

8. Should the court declare pursuant to Section 15 MCA 2005 that cessation of MA's contact with her husband is a breach of MA's Article 8 rights?

The Positions of the Parties

9. It is accepted by the parties that the mental capacity qualifying requirement under paragraph 16, Schedule A1 of the Act is met in relation to the standard authorisation for MA and AA. What is in issue, is where it is in AA's best interests that he should live, and whether it is in their best interests to have contact with each other and if so, by what means.
10. On behalf of MA it is submitted that AA residing at the sister care home of MA's current placement is an available option and it is in AA's best interests to reside and receive care there so MA and AA can have contact.
11. It is further submitted on behalf of MA that it is in AA and MA's joint best interests to have contact with each other and that should be face to face. In the alternative and AA does not move to a new place and remains in situ, that it is in their best interest to have contact by remote means.
12. On behalf of AA it is submitted that he should remain at his current placement and that it is not in his best interests to have contact with MA, subject to review in three months' time. AA is not seeking any declaration that the contact arrangements proposed by the local authority would amount to an unlawful interference with AA's Article 8 family life rights.
13. The first and second respondents would propose that both MA and AA remain in their current placements and that it is in both of their best interests for all contact to cease at this time. They go on to say that the cessation of contact between MA and AA does not constitute a breach of MA's right to a family life.

The Law

Capacity

14. It is a prerequisite for the Court being able to make any best interests' decision on behalf of MA or AA that they must lack the capacity to make a decision on the relevant issue for themselves at the relevant time.
15. However, no party takes any issue that AA lacks the capacity to make decisions about a) residence; b) care and support; c) contact with others; and d) conducting these proceedings. It is also not in issue that AA will not recover the capacity to make those relevant decisions in the foreseeable future.
16. The Court has already made declarations pursuant to section 15 of the Act that MA lacks the capacity to make decisions on care and residence; and capacity evidence was subsequently not challenged about her ability to make decisions regarding contact with others and to conduct proceedings. Likewise, the Court has determined that the qualifying requirement as set out in paragraph 15 of Schedule A1 to the Act was met: namely that MA lacks the capacity in respect of the question as to whether or not she should be accommodated in her current placement for the purpose of being given relevant care and treatment there - [D52-57]. It is also not an issue that MA will not recover the capacity to make those relevant decisions in the foreseeable future.
17. In those circumstances, I am satisfied that both MA and AA lack the capacity to make decisions about their contact with others, to conduct proceedings and to make a decision for themselves as to where they should reside and receive care and support and, therefore, the Court has the jurisdiction to make a best interests' decision on behalf of both of them about those issues.

Best Interests

18. Section 4A of the Act applies in respect of MA's current residence as she is deprived of her liberty there and provides:

4A Restriction on deprivation of liberty

(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 4(b).

(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)

19. In respect of a standard authorisation the supervisory body must be satisfied of the six qualifying requirements set out in paragraph 12 of Schedule A1 to the Act. The paragraph of relevance in the present case is paragraph 16 of Schedule A1 to the Act which sets out the best interests qualifying requirement:

16(1) The relevant person meets the best interests requirement if all of the following conditions are met.

(2) the first condition is that the relevant person is, or is to be, a detained resident;

(3) the second condition is that it is in the best interests of the relevant person for him to be a detained resident;

(4) the third condition is that, in order to prevent harm to the relevant person, it is necessary for him to be a detained resident;

(5) the fourth condition is that it is a proportionate response to –

(a) the likelihood of the relevant person suffering harm, and

(b) the seriousness of that harm for him to be a detained resident.

20. Pursuant to section 21A of the Act, a court can intervene in respect of a number of matters where a dispute arises in relation to a standard or urgent authorisation.

21. Section 21A provides:

(1) This section applies if either of the following has been given under Schedule A1 –

(a) a standard authorisation;

(b) an urgent authorisation.

(2) 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;

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

(3) 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.

22. Once an application is made pursuant to section 21A of the Act the court's powers are not confined to determining that question. The court has a discretionary power to make declarations pursuant to section 15 of the Act and decisions on P's behalf pursuant to section 16 of the Act¹.
23. Section 16(3) of the Act makes it clear that the court's powers under section 16 are subject to the provisions of the Act and, in particular, to section 1 and to section 4 of the Act. What governs the court's decision about any matter concerning personal welfare is the person's best interests. Where a person is unable to make a decision for themselves, there is an obligation to act in their best interests². When determining what is in a person's best interests, consideration must be given to all relevant circumstances³, to the person's past and present wishes and feelings⁴, to the beliefs and values that would be likely

¹ CC v KK and STCC [2012] EWCH 2136 (COP) at [16] per Baker J

² Section 1(5) of the Act

³ Section 4(2) of the Act

⁴ Section 4(6)(a) of the Act

to influence their decision if they had capacity⁵, and to the other factors that they would be likely to consider if they were able to do so⁶. Further, account must be taken of the views of anyone engaged in caring for the person or interested in their welfare where practicable and appropriate⁷.

24. In *HH v Hywel Dda University Health Board & Ors* [2023] EWCOP 18, Francis J set out how the Court should proceed in a two P situation, where the best interests decisions are interconnected. After confirming that proceedings should be consolidated, and that the same judge should hear both sets of proceedings, Francis J held that:

“I accept that this may lead the judge, and if that is me, it may lead me, to making a finding that each of them has different needs and different best interests, and so their best interests may conflict. Surely the appropriate thing then that we need to do is to balance these interests, to consider the conflict and to make a proper determination in a holistic manner having regard to the needs of each of them and the best interests of each of them” [43]

25. The leading case as to the application of the best interest’s criteria is the decision of the Supreme Court in *Aintree University Hospitals NHS Foundation Trust v James and others* [2013] UKSC 67. At [23] in *Aintree* (supra), Baroness Hale noted that the Act gives limited guidance about best interests and that every case is different [36] and at [39] stated that:

⁵ Section 4(6)(b) of the Act

⁶ Section 4(6)(c) of the Act

⁷ Section 4(7)(b) of the Act

‘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 consider what the outcome of that treatment for the patient is likely to be; 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 are interested in his welfare, in particular for their view of what his attitude would be’

26. At [45] her Ladyship added:

‘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’.

27. In Re A [2001] 1 FLR 549, Thorpe LJ stated that the “*evaluation of best interests is akin to a welfare appraisal*” and a judge should “*strike a balance between the sum of certain and possible gains against the sum of the certain and possible losses. Obviously only if the account is in relatively significant credit will the judge consider that the application is likely to advance the best interests of the patient.*”

28. The Supreme Court has held that the jurisdiction of the Court of Protection was limited to a decision that a person is unable to take for himself and the court has no greater power to oblige others to do what is best than P would have himself. This means that, just like P, the court can only choose between the available options⁸.
29. In *Briggs v Briggs (Preliminary Issue) (No.1)* [2017] EWCA Civ 1169 King LJ stated at [95]: *Contact, for example, is an issue capable of going to the heart of whether being detained is in a person's best interests; it may be that in an ideal world P's best interests would be served by a deprivation of liberty in the form of her living in a care home properly looked after, where the appropriate medication regime will be adhered to and P will have a proper balanced diet. Desirable as that may be, and such a regime may well provide the optimum care outcome for P, but it may also be the case that unless, regular contact can be facilitated to a particular family member, the distress and confusion caused to P would be such that it would be no longer in her best interests to be detained, and that what might amount to sub optimum physical care would ultimately be preferable to no, or insufficient contact. The weighing up of such options are part of the best interests assessment process in relation to which the professionals who are eligible to be assessors are peculiarly qualified to conduct.*
30. In *ITW v Z. M and Various Charities* [2009] EWHC 2525 (Fam) Munby J stated at 32(iii):

⁸ N v ACCG and Others [2017] UKSC 22

“...there may, in the particular case, be one or more features or factors which, as Thorpe LJ has frequently put it, are of “magnetic importance” in influencing or even determining the outcome: see, for example, Crossley v Crossley [2007] EWCA Civ 1491, [2008] 1 FLR 1467, at para [15] (contrasting “the peripheral factors in the case” with the “factor of magnetic importance”) and White v White [1999] Fam 304 (affirmed, [2001] 1 AC 596) where at page 314 he said “Although there is no ranking of the criteria to be found in the statute, there is as it were a magnetism that draws the individual case to attach to one, two, or several factors as having decisive influence on its determination...””

31. Whether or not a person has the capacity to make decisions for herself, they are entitled to the protection of the European Convention of Human Rights (ECHR). In the present context, the relevant rights are found in Article 8 (the right to respect for a private and family life). Further, it is an aim of the UN Convention on the Rights of Persons with Disabilities to secure the full enjoyment of human rights by disabled people and to ensure they have full equality under the law.
32. The Court of Protection has power to grant declaratory relief by way of section 15 of the Act. Further in YA (F) v A Local Authority & Ors,⁹ Charles J concluded that the Court of Protection has jurisdiction:
 - a) To make declarations as to breaches of the ECHR rights of P himself, and

⁹ [2010] EWHC 2770 (COP)

- b) To make declarations as to breaches of the ECHR rights of a person other than P who can claim to be a victim of such a breach, where those breaches are said to arise out of acts done in relation to P.

33. Article 8 of the ECHR provides that:

Everyone has the right to respect for his private and family life, his home and his correspondence.

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.

34. It is necessary for the Court of Protection to consider whether the provisional conclusion of its best interest analysis: i) amounts to a prima facie breach of Article 8(1) ECHR; and ii) if so, whether that breach is nonetheless necessary and proportionate so as to be justified under Article 8(2) ECHR¹⁰. In circumstances where the Article 8 ECHR rights of a party conflicted with the same rights of P, P's rights would prevail¹¹. In assessing this, the court can use its jurisdiction to

¹⁰ K v LBX and Others [2012] EWCA Civ 79

¹¹ KK v Leeds City Council [2020] EWCOP 64 at [37] per Cobb J

“conduct an assessment of the person’s best interests beyond the scope of available options, in order to determine whether the public authority has acted in a way which is disproportionate and incompatible with a Convention right”¹²

35. In this case, it is relevant to consider the Local Authority’s duty under section 1(1) of The Care Act 2014. This sets out that the Local Authority has a duty to promote individual wellbeing, including in relation to personal relationships, and must ensure that any restriction on a person’s rights or freedom is kept to the minimum necessary.

The Evidence

36. I have been provided with two bundles for MA, the primary bundle running to 813 pages containing 20 factual statements from 5 different individuals, plus an additional factual statement from MA’s solicitor, expert evidence from Dr A and Professor B, as well as relevant documentation relating to MA’s care, medical and behavioural history. In addition, I was provided with a supplementary bundle running to 576 pages which contained MA’s care records.
37. I have also been provided with a bundle for AA running to 525 pages which contains 16 factual statements from 5 individuals together with expert evidence from Professor B, as well as relevant documentation relating to AA’s care and medical history.

¹² N v ACGG [2013] EWCOP 3859 at para 83(iii)

38. I have heard oral evidence from MA and AA's social worker, MR; AW the manager of Placement 1; and SES, the manager of Placement 2.
39. A summary of the most relevant oral evidence from each witness is set out below.
40. MR, the social worker for both MA and AA told me that:
 - a. She has been the social worker for both MA and AA for three years and has met them both (not necessarily together) on between 20-25 occasions. The care requirements for MA and AA are different.
 - b. MA has advanced dementia and challenging behaviours. Only two care homes in the area are able to accommodate her. She is currently residing at one of those homes – placement 2. She couldn't be managed anywhere else. MA's needs could not be met by placement 1.
 - c. AA is compliant and has no challenging behaviours. He doesn't have any nursing needs. He is not eligible to be managed at placement 2. She accepted that there is a sister home to placement 2 which is situated on the same site as placement 2 (hereinafter referred to as placement 3), which could care for AA, but as of yesterday (17th October 2023) there were no vacant beds.
 - d. Throughout their relationship MA has always been the dominant party. Since they have been residing at two different placements, there have been only two face to face visits which were distressing for both parties and the professionals involved. MA was physically pulling and pushing AA. At the end of the session MA became agitated, started shouting,

grabbing and tried to bite the social worker. It took 5 staff members to separate the parties and try and settle matters down via distraction techniques.

- e. At the end of the contact session the social worker asked AA how he felt, he stated i) his arm hurt; ii) he liked seeing MA and wanted to see her again. However, by the time they had arrived back at placement 1 AA couldn't remember seeing MA.
- f. When both placement 1 and placement 2 stated they wouldn't facilitate face to face contact, the social worker gave a pen picture to external care providers – a summary of which was circulated on day one of the hearing. She spent 20-30 minutes on the telephone to each and explained that the main risk which needed to be managed was around separation at the end of each session. It was accepted that the representatives of MA and AA did not have input into this pen portrait. The social worker stated that the pen portrait was open and honest of the situation as it was at the time. It was set out in a balanced and proportionate way.
- g. The social worker accepts that MA and AA should have contact if possible and is mindful of their Article 8 rights. There have been numerous MDTs to discuss how this can be facilitated in order that MA's behaviour is managed but without success.
- h. It was accepted that once AA realises who MA is, face to face contact goes well initially, but the issues arise at separation. AA is at risk of physical harm as MA pulls and pushes him and she becomes incredibly

agitated and takes time to settle down. The level of agitation MA experiences increases risk of panic attacks and possibly worse. AA can become unnerved.

- i. Phone contact was tried but the parties did not recognise each other's voice, so video was tried. During one video call "J" a lady AA has befriended in placement 1 was in the background and was introduced to MA by AA. This caused MA some distress and placement 1 has put measures in place to ensure this will not happen again. On the later video calls AA was confused and did not recognise MA even when reminded who she was, and MA became agitated when AA did not respond to her. Often AA would get up and simply go to the toilet as he had lost interest. Video calls are still being attempted but currently MA will not engage in video calls and AA simply walks away. In the social workers view – video calls are not in either party's best interests.
- j. Whilst placement 3 is a possibility for AA so he will be closer to MA, he is very settled in placement 1 and they are meeting his needs. The risks around face to face contact are still present. In any event there are no external providers who will facilitate face to face contact, and neither will placement 2.
- k. AA has made a number of friends in placement 1 and any move could be distressing for him. Given the issues around face to face contact and the fact AA is settled there is no benefit of him moving placements.
- l. Upon reflecting on AA's beliefs and values, the social worker does not believe AA realises who MA is nor does he have much memory of his

marriage. He believes and holds onto the concept of marriage. As to his wishes and feelings, AA does not realise that MA is not living with him in placement 1. On that basis AA is not at risk of any distress by not seeing MA. Any photograph and memory work may also be counterproductive as he may confuse MA with his twin sister of the same name.

m. The social worker accepts the contact situation should be reviewed in 3 months when the care needs, behaviour, medication and overall picture of AA and MA can be reconsidered.

41. My impression of the social worker was that she was professional, honest and straightforward in giving her evidence. It was clear she had worked hard for the benefit of the parties to ensure all available options had been considered.

42. AW, the manager of placement 1 gave evidence that:

a) She was present for both face to face meetings. At the second meeting it was set up for High Tea. There was some benefit to the meeting and there was around 35 minutes of conversation. The first difficulty was that a photo album was provided as a discussion document, this caused MA some distress as she thought it had been taken from her home. The second issue was upon separation. MA worked herself up significantly and AA became bewildered and confused and didn't know why she was upset.

- b) The video calls have little benefit, she has not been present for all calls but obtains verbal updates from staff on a weekly basis. AA struggles to understand the technology and the fact it was his wife on screen – he has said on occasion it wasn't. The calls are scheduled for 30 minutes but seldom last that long. The video calls are scheduled weekly at 11am on a Friday, as far as AW is aware they are not going ahead.
- c) AA derives no benefit from his calls with MA. MA is very repetitive in her frustrations and AA does not engage. On occasion AA thought MA was a man. Longer calls would be of no benefit as the scheduled time slot of 30 minutes is not utilised.
- d) During the time AA and MA lived together there was 1 to 1 support for them for their own protection and the protection of other service users. There were 5 safeguarding alerts following incidents with other service users. MA was the instigator and AA was the perpetrator as he was trying to protect his wife. MA would interfere with AA's eating, bathing and attending the chiropodist. Despite the 1 to 1 support AA lost 14.6kg whilst he and MA lived together in placement 1. Now that they are separated AA is settled, going on trips and gaining weight.
- e) AA has a lady friend J. They spend time together in the dining area and on trips. There has been some kissing and hugging. AA doesn't recognise J as MA generally but has referred to her as his girlfriend and wife.

- f) In summary, AW feels that the risks of contact by video or face to face outweigh the benefits because of the agitation of MA; AA's lack of engagement and confusion which heightens MA's agitation; the health risks to MA as a result of her agitation; and in respect of face to face contact the physical risk to AA, MA and staff. AW confirmed that even if a third party provider could facilitate face to face contact she would not permit that to happen at placement 1.
43. My impression of the manager of placement 1 was that she was honest and doing her best to assist the court. She was professional and courteous and had the best interests of AA and MA at the forefront of her mind.
44. SES, the manager of placement 2 gave evidence that:
- a) MA has resided in placement 2 since March 2023. She required 1 to 1 care for 72 hours. Initially she was very emotionally upset asking for AA all the time. She is now more content and doesn't get as emotional or aggressive. MA is close to staff and has a friendship group of 4 to 5 people, including a man who talks about gardens.
- b) SES was present at the face to face contact and said that the conversation was all about MA. Contact was limited and AA was quite withdrawn. AA spoke about his lady friend which upset MA. At the end of contact MA did not want it to end and became distressed having chest pain. It took 90 mins for staff to conclude matters (which involved MA biting SES's arm) and a further 3

hours to calm MA down. MA was referred to her GP regarding the chest pain who said it was anxiety.

- c) After face to face contact was stopped, telephone contact was tried but AA and MA were confused with the handsets. Thereafter a supported teams video contact was tried. There were some positive exchanges such as “I love you”, “Looking lovely today” but the dominant theme particular in the later sessions was that MA would recognise AA and would dominate the conversation talking about herself. AA would not recognise MA.
- d) There was one video contact where AA introduced J to MA, MA became very upset and hurt as she thought AA was having an affair. She cried in SES’s arms afterwards. Video contact is being attempted every Friday. There has been no effective call for 8 weeks. MA will not go on the laptop, she remembers something was upsetting but not sure what. Staff have tried other ways including having the laptop in MA’s room or using the telephone. MA will not talk to AA and is finding the weekly requests to do so distressing. Currently MA will do anything for SES and she doesn’t want to lose that trust.
- e) MA has seen her son at placement 2 on three occasions. The first visit was very stressful for all concerned but the last 2 were good and MA was less distressed.
- f) MA takes part in activities at the home including knitting, making pizzas, roulette night and as such her challenging

behaviours have reduced dramatically. SES stated that whilst MA's level of dementia is not as advanced as AA's, it is more advanced now than it was when she arrived at placement 2. MA has been discharged from the CPN, she still has medication to calm her down but this is used rarely and as a last resort.

- g) MA still asks about AA but no more than once a day (as opposed to constantly) and is satisfied by the honest response she receives from staff - which is he is at placement 1.
- h) AA would not be offered accommodation in placement 2 as he doesn't meet the criteria, in that he does not require nursing care.
- i) SES was taken to the supplementary statement of MA's solicitor (**page 15**) where the question was asked of MA "Do you like seeing him [AA] when he comes over?" MA's reply was "No, I'm quite happy". SES confirmed MA had said similar to her. She may ask "where's my husband today?" but doesn't really say much more than that. In SES opinion MA doesn't seem bothered about seeing AA, she may ask about him, but is easily distracted.
- j) Placement 1 and placement 2 have exchanged some recent photographs of MA and AA, MA recognises AA but he does not recognise her. MA did not get any benefit she became upset and anxious. MA has a memory book which includes pictures of her parents and AA. She doesn't really look at AA's photographs and has taken some out.

45. I found the manager of placement 2 to be passionate about the care she provides to MA and it is clear that the best interests of MA are respected. She was honest, professional and considered throughout.

Analysis

46. The evidence of all the professionals in this case indicated to me that both MA and AA should remain in their current placements and not (pending a review in 3 months time) have any form of contact. The Official Solicitor on behalf of AA supports that position, however the Official Solicitor on behalf of MA does not.
47. In these circumstances as per the case of HH¹³, I need to balance those interests, to consider the conflict and to make a proper determination in a holistic manner having regard to the needs of each of them and the best interests of each of them¹⁴. The most logical way to do that is deal with each of the identified issues in turn.

Issue 1: Care & Residence

48. ***Available Options:*** There is an issue between the parties as to the available options. On behalf of MA they are said to be:
- a) MA remaining at placement 2 and AA remaining at placement 1;
and
 - b) MA remaining at placement 2 and AA residing at placement 3.

¹³ HH v Hywel Dda University Health Board & Ors [2023] EWCOP 18

¹⁴ HH v Hywel Dda University Health Board & Ors [2023] EWCOP 18 at 43

On behalf of AA and the respondents it is said that there are no alternative options for either AA or MA's residence and care as there are no vacancies at placement 3. In response to that on behalf of MA it is said AA could move to placement 3 when a bed becomes available and as such should be classed as an available option.

49. It is quite clear that if AA were required to decide the matter now as I am being asked to do on his behalf, it is not an available option. As late as the day before the hearing enquiries were made by the party's social worker and no beds were available at placement 3. The only option I have before me is the current status quo, i.e. MA remaining at placement 2 and AA remaining at placement 1.
50. **Best Interests:** I am not being asked to determine whether MA should move placement, only AA. In the absence of alternative options, I have been invited to find that the best interests qualifying requirement is met in respect of the standard authorisations in place in respect of both MA and AA.
51. Whilst I accept that placement 3 is not an available option presently, I feel it would be useful in the broader sense of the case and to ensure that foreseeable future issues are dealt with proportionately now to consider it. It will also assist in the determination of issue 3 as to whether there is a breach of MA's Article 8 rights.
52. Those who represent MA have stated that they are entitled to put forward representations on her behalf as to what she would see as AA's best interests by virtue of section 4(7)(b) of the Act and I concur with that approach. It is common ground between the parties that a) AA is settled at placement 1 and accepting of assistance with his personal care; b) AA has made friends with other residents

at placement 1; and c) there is no risk of physical harm to AA as AA would, if he remained at placement 1, not be permitted in person contact with MA.

53. Those on behalf of MA have suggested that a move to placement 3 would have the following benefits for AA. Firstly, that he would be residing in closer proximity to his wife of 63 years as placements 2 and 3 are contained within the same grounds. Secondly, that AA will be afforded a greater opportunity to see MA; and finally, that AA will no longer need to seek the comfort and affection of J (a resident at placement 1) who on occasion AA has referred to as his girlfriend/ wife.
54. In respect of the first two benefits put forward, it is accepted by those who represent MA that in person contact is not an available option at this time and therefore whether AA resides at placement 1 or placement 3 his physical location will make no difference as to his ability to see MA.
55. It is completely understandable why MA would be distressed at the thought of AA seeking solace with J and would prefer her to not to be present in the same placement as him. The manager of placement 1 stated that AA does not recognise J as MA but does refer to her on occasion as his girlfriend or wife.
56. I accept that when capacitous, AA had chosen to live with MA and remain married for 63 years. I accept this would likely influence his decision had he had capacity. I also accept that AA has made positive reference that he would like to see his wife, that husband and wife should be together, and that she knows he loves her. However, the social worker gave evidence that she does not believe that AA knows who MA is nor has much memory of his marriage, but she believes he holds onto the concept of marriage. The social worker said

that AA is settled and does not feel there is any benefit of him moving placements.

57. The relevant circumstances appear to me to be that both parties have a dementia diagnosis, AA's is more advanced than MA's but her dementia has moved on since residing at placement 2. Moving AA to placement 3 will not at this stage have any impact upon his contact arrangements with MA (which will be determined as part of Issue 2), and but for a change of residence which would according to the social worker unsettle AA when he is settled and remove him from his friendship group there does not appear to be any real benefit to the move.
58. Taking into account the views of MA and AA's son (**I55**) he says it's sad and unfortunate that his parents are not together but understands the situation and agrees that his parents need to be cared for in different placements. This position was also put forward by the author of the section 49 report (**I21**).
59. Whilst conceptually I can understand why MA would wish AA to be physically closer to her despite physical contact not being an available option at present, and also why she would want him to be separated from J; on balance I can see no tangible benefit for AA to move from placement 1 to placement 3 as that would simply place him in a new unfamiliar environment where it would take him a while to get used to his new surroundings, build trust with residents and staff alike and settle.

Issue 2: Contact

60. **Available Options:** The available options are put forward as being a) the exchange of letters and photographs, b) telephone contact and c) video contact. It is conceded in closing submissions by those who represent MA that face to face contact is not an available option, and that assessment is one to which I agree.
61. The respondents' position is that the only option on the table for contact is video contact. It is my view that the available options are set out in paragraph 60 above and as such I will undertake a best interest's analysis in respect of those.
62. **Best Interests:** It is universally accepted that the starting point in this matter is that wherever possible, a husband and wife should have contact with each other. That would accord with MA's past and present wishes and feelings and to the beliefs and values that would likely influence her decision if she had capacity. It is however noted that the present strength of feeling that MA now has in respect of contact with AA has reduced, MA has stated to her solicitor and to the manager of placement 2 to the question "Do you like seeing [AA] when he comes over?" her response was "No, I am quite happy." Although it is accepted MA will still ask about AA most days but will be satisfied with the response that he is living at placement 1.
63. It could also be said that AA's past wishes and feelings and his beliefs and values that would likely influence his decision if he had capacity would be to have contact with MA. He does not ask about MA and it has been put to me that is because he believes J is his wife/ girlfriend.
64. Telephone contact was tried after face to face contact could not be facilitated, however, both AA and MA were confused by the handsets and did not recognise

each other's voice. When considering section 4(6) of the Act and what was said by Baroness Hale in *Aintree*¹⁵ I am mindful that if I put myself in the place of MA and ask myself what her attitude would be to being asked to speak on the telephone to someone she doesn't recognise – given the fact she is such a strong character my view is that she wouldn't engage. Similarly with AA, he has displayed in video contact that when he doesn't recognise MA he simply walks away from the call. On that basis given those relevant circumstances as required by section 4(2) of the Act I find that telephone contact for either party is not in their best interests.

65. Thereafter, video contact which was assisted by staff at each placement took place. There were some positive exchanges such as “I love you”, “Looking lovely today” but the dominant theme particular in the later sessions was that MA would recognise AA and would dominate the conversation being repetitive about her frustrations essentially talking about herself. AA didn't really engage or interact (**I52**), would appear confused and would not recognise MA. This would heighten MA's frustration and agitation.
66. There was one video contact where AA introduced J to MA, MA became very upset and hurt as she thought AA was having an affair. She cried in the manager of placement 2's arms afterwards. Video contact is being attempted every Friday. There has been no effective call for 8 weeks. MA will not go on the laptop, she remembers something was upsetting but not sure what. Staff have tried other ways including having the laptop in MA's room or using the telephone. MA will not talk to AA and is finding the weekly requests to do so

¹⁵ *Aintree University Hospitals NHS Foundation Trust v James & others* [2013] UKSC 67 at 39

distressing. Currently MA will do anything for the manager of placement 2 and she doesn't want to lose that trust.

67. MA and AA's son has observed that neither AA nor MA understand what a video conference was (**I55**), and whilst it is not explicit does not seem to express an opinion which goes much further than that on whether the calls should continue.
68. It is clear from the evidence that MA now no longer wishes to engage in video calls and is finding the weekly requests to do so distressing. AA did not engage in the video calls when they were effective and would become confused and walk away. In this case it is clear from the evidence that since proceedings have commenced the dynamic has changed due to the advancing nature of the dementia diagnosis. Earlier this year MA wanted to see AA whereas AA was indifferent. Now the evidence supports the fact that neither party is strongly requesting contact, MA asking about AA but then not wishing to engage in weekly video calls. However, the manager of placement 2 said that MA would be devastated to learn there would no longer be the option of contact.
69. In considering the oral evidence of the manager of placement 2 in light of the words of Thorpe LJ¹⁶, I need to strike a balance between the sum of certain and possible gains against the sum of certain and possible losses. MA trusts the manager of placement 2 and is engaging more within the placement now than when she first arrived. If I require the manager of placement 2 to engage MA in something which she does not wish to do, I risk the loss of that trust and as such the quality of life that MA is obtaining within placement 2 diminishing. When

¹⁶ Re A [2001] 1 FLR 549

that is offset against the benefit of having contact with AA who does not wish to engage in any event – it seems the emotional well being of MA is better protected by her not engaging in video contact.

70. Finally, I will deal with the exchange of letters and photographs. This is because this is how in practice it has been dealt with between the parties. In respect of AA, the social worker gave evidence that any photograph and memory work may be counterproductive as he may confuse MA with his twin sister of the same name.
71. The manager of placement 2 expanded on this by stating placement 1 and placement 2 have exchanged some recent photographs of MA and AA, MA recognises AA but he does not recognise her. MA did not get any benefit she became upset and anxious. MA has a memory book which includes pictures of her parents and AA. She doesn't really look at AA's photographs and has taken some out.
72. The evidence clearly shows a conflict between past wishes and feelings and present wishes and feelings. Professor B opined "*I have no unique insights as to how this situation can be managed. My only observation is that as her dementia progresses, it is likely that MA will become less distressed. There may even become a time when (like AA), MA is unable to recognise her husband or appreciate his presence. Sadly, this reflects the natural progression of the illness. It would be appropriate to keep this under review.*" **(I63)**.
73. It is put on behalf of MA that to stop all forms of contact is too risk-averse and paternalistic and goes against MA's Article 8 rights, expressed wishes and feelings and her dignity and autonomy as an adult. Such a submission does not

sit comfortably with the evidence which is that MA won't engage in video contact and does not derive any benefit from letters and photographs as she becomes anxious actively avoids or removes photographs of AA.

74. This then brings me back to the case of *Aintree*¹⁷ where Baroness Hale said “But insofar as it is possible to ascertain the patients wishes and feelings, 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”.
75. In respect of this contact option for MA I find from the evidence that her current wishes and feelings are the factor which are of magnetic importance¹⁸ as it is that factor which enables her to function well on a daily basis, to enjoy activities provided at placement 2 and engage with the residents in a civil and enjoyable manner. To be paternalistic is not simply stopping someone from doing something because they may find it distressing, it can also be read as making someone do something they do not wish to do as that is what someone else feels is best for them.
76. On that basis I do not find the respondents have adopted a too paternalistic approach and have made a decision which reflects a thorough best interests assessment.
77. Sadly, the evidence shows that AA simply does not recognise MA.

Issue 3: Declaration of Breach of Article 8

¹⁷ Ibid at 15 at 45

¹⁸ *ITW v Z. M and various charities* [2009] EWHC 2525 at 32 (iii)

78. In this case I have conducted an assessment of the person’s best interest beyond the scope of the available options, in order to determine whether the public authority has acted in a way which is disproportionate and incompatible with a Convention right¹⁹.
79. I have evidence from Professor B that *“the N Care Plan and a PBS (Positive Behaviour Support) Plan has been comprehensively completed. I have no comments on this other than to compliment its authors on its thoroughness.” (I60)*. He further stated *“I have to say that I cannot match the expertise and experience the has been accrued by the multi professional group involved in their care. My perspective is from one single discipline (old age psychiatry) and only having a snapshot of interactions with MA and AA and the professionals involved in their care. I am extremely impressed with the care and attention of all the professionals involved in MA and AA’s care. I found them to be sympathetic yet practical and clearly respect the dignity and the autonomy of the couple.” (I63)*.
80. During my best interests analysis of Issues 1 and 2, I have not found any evidence that the respondents have acted in a way which is disproportionate and incompatible with a Convention right.

Conclusion

81. I set out below the balance sheet exercise of the advantages and disadvantages in respect of Issue 1 of residence of AA at placement 1 and placement 3 on the basis of the findings I have made in relation to the evidence.

¹⁹ N v ACGG [2013] EWCOP 3859 at para 83(iii)

Placement 1 Advantages	Placement 3 Advantages
AA is settled in placement 1 and they are meeting his needs	Closer in proximity to MA
AA has made a number of friends in this placement	AA will no longer need the comfort and affection of J
AA has strong connections with staff who have shown commitment to AA and his wellbeing	

Placement 1 Disadvantages	Placement 3 Disadvantages
	Would be distressing for AA to move from an environment in which he is settled
	A move to be closer to MA would not have any impact on the face to face contact arrangements with her

	This is not an available option at this time
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82. In the circumstances, when balancing those factors, the outcome is clear and obvious. There is no difference in the care and treatment AA would receive at either placement and nor would he be able to see his wife.
83. However, given the risk of distress to AA occasioned by any move of placements, it is not and cannot be in his best interests to move from placement 1 to placement 3 even if a bed were available.
84. I set out below the balance sheet exercise of the advantages and disadvantages in respect of Issue 2 being contact between AA and MA by way of letters and photographs; telephone calls and video calls on the basis of the findings I have made in relation to the evidence.

Advantages of Contact	Disadvantages of Contact
No risk of physical harm as contact options are all remote	AA does not recognise MA
Accords both parties past wishes and feelings and beliefs	AA does not engage in telephone or video calls

MA asks about AA and therefore to see him on video would satisfy her he is safe and has not left her	MA does not wish to take part in video calls and does not recognise AA's voice on telephone calls
	MA becomes anxious whilst looking at photographs of AA and chooses to avoid them and remove them from her album

85. When balancing the factors above, there is clearly a conflict between MA and AA's best interests. In respect of AA, the answer is blatant and obvious – there should be no contact. However, in respect of MA, the answer is less obvious. MA could draw a benefit from contact but at the present time does not wish to engage and is displaying a reluctance to engage in video calls due to a past bad experience which she can no longer recall save for she didn't like it. In addition, when shown photographs of AA is displaying signs of anxiousness and has actively removed such photographs from her album. In my judgement it appears to me that MA would not currently derive a benefit from contact. I appreciate that there will be some distress to MA but when weighed up with the distress she faces each time any remote type of contact is imposed, that no contact is in her best interests at this time.
86. To compound that judgement, I have considered the case of HH²⁰ where Francis J said when considering the best interests in a two P situation, we need to

²⁰ HH v Hywel Dda University Health Board & Ors [2023] EWCOP 18 at 43

balance their interests, consider the conflict and make a proper determination in a holistic manner having regard to the needs of both of them and the best interests of each of them. When weighing those factors in respect of MA and AA the answer is far clearer, there should be no contact.

87. I am aware that this analysis is a prima facie interference with AA and MA's right to a family life under Article 8. A declaration of such is sought in respect of MA but not AA. However, I have found that the decision is a necessary and proportionate one in order to protect MA's best interests. For the same reasons, I find that the Local Authority has complied with its duty under section 1(1) of the Care Act 2014
88. For the reasons set out above, it is in both AA and MA's best interests that they each remain at the current placements and do not have any form of contact at this stage. I understand that contact will be kept under review by the respondents, the first review to be undertaken in three months' time when the care needs, behaviour, medication and overall picture of AA and MA can be reconsidered.
89. Finally, I am grateful to the legal representatives of all parties together with the professionals involved who have worked incredibly hard to ensure there can be no doubt that all options have been explored for MA and AA to ensure their Article 8 rights have been respected and their best interests observed.