



IN THE HIGH COURT OF JUSTICE

No. FD07P00104

FAMILY DIVISION

[2013] EWHC 3230 (Fam)

Royal Courts of Justice

Wednesday, 19th June 2013

Before:

MRS. JUSTICE THEIS

B E T W E E N :

LBX

Applicant

- and -

(1) K

(2) L (by his litigation friend, the Official Solicitor)

(3) M

Respondents

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J U D G M E N T

(As approved by the Judge)

MRS. JUSTICE THEIS:

1. This matter concerns a young man who I shall refer to as “L” for the purposes of this judgment, as he has been referred to in previous decisions). He was born on 21st December 1983, so he is now 29 years of age. He has a diagnosis of mild mental retardation and some learning difficulties with an IQ that has been assessed at 59.
2. These are proceedings under the Mental Capacity Act 2005. The court had determined that L lacks capacity to make certain decisions, in particular where he should live or who he should have contact with. The applicant in these proceedings is the London Borough of Waltham Forest and the respondents are L, with the Official Solicitor acting as his litigation friend, his father, (who I shall refer to as “K”, which is how he has been referred to in previous judgments) and his aunt, (who I shall refer to as “M”, which is the way that she has been referred to in previous judgments). This hearing was listed to determine issues relating to best interests.
3. This will be the fifth substantive judgment in this matter, the first being Baker J.’s dated 31st March 2010 [2010] EWHC 2422 (COP). I gave a judgment on 20th July 2011 [2011] EWHC 2419 (Fam), that decision was the subject of an appeal by K which the Court of Appeal dismissed in their judgment on 8th February 2012 [2012] EWCA Civ 79. I gave a further judgment following a hearing on 6th March 2012 [2012] EWHC 439. I refer to those judgments for the detailed background to these proceedings. For completeness, within the current application, I made a determination earlier this year on interim contact, which was appealed by K. Permission to appeal was refused by the Court of Appeal.
4. This hearing was prompted by an application made by M in October 2012 as a result of issues that arose concerning her contact with L. That was followed by an application made by the local authority in February 2013 to determine best interest decisions in relation to L. On the eve of this hearing, which was listed for five days, the Official Solicitor filed a position statement stating they wanted the court to determine the discrete issue of capacity first. The local authority and K objected, but not strenuously, to that course. It was possible to arrange the evidence so that the evidence relevant to that issue could be called first and not without some hesitation I acceded to that application on behalf of the Official Solicitor.
5. The preliminary issue, therefore, that I have to determine is whether there is an evidential foundation that L is more likely than not to have the potential to achieve mental capacity to make decisions regarding residence and contact, and some specific care related decisions. The Official Solicitor submits that he is.

That is opposed by the local authority and K. The burden of proof in relation to capacity is on the local authority, and the standard of proof is the balance of probabilities. Ideally, it would have been preferable to have more time to consider this judgment, but I am anxious about any further delay for L. What happens next is dependent upon my decision as to what further steps, if any, need to be taken to investigate capacity. The evidence concluded yesterday afternoon. The legally represented parties provided written submissions this morning. M, who represents herself, has not provided any written submissions. I am giving this judgment today on what is the third day of the five-day hearing.

6. I am going to take the background to this matter relatively shortly. The detailed accounts of the background, as I have said, are in the earlier judgments. L is the eldest of K's two sons. His younger brother, D, lives with his father, although I think he also spends some time abroad. L's mother has taken no active part in his life. L was initially cared for by M and the wider family in Trinidad before, in 1996, being cared for here by M. He moved to live with K in about 2001. He lived there with his father and D, save for a period of about five months in 2006 to 2007 when he was placed in the care of the local authority. This following an alleged incident of violence, during which he had no contact with K or D. In 2007 he returned to K's care in circumstances that remain in dispute. This resulted in M issuing proceedings in 2007 under the inherent jurisdiction which, following implementation of the Mental Capacity Act, converted into an application in the Court of Protection.
7. That application resulted in a number of hearings where the court determined a number of issues. L's capacity was not in issue in those hearings. It was accepted he lacked capacity. What was in his best interests was in issue and the court was required to make best interest decisions in accordance with the principles in s.4 of the Mental Capacity Act 2005. Mr. Justice Baker determined that there should be an investigation about the options for independent living for L. This was followed by a subsequent hearing before me in July 2011 when I determined that L should be placed on a trial basis in supported living at the J placement.
8. The matter returned to me in March 2012 when I concluded that L's best interests required his placement in the J placement to continue, which is where he still resides. I set out in the order in March 2012 a regime of contact between L and K and L and M. This placement has not been without its difficulties, about which there remains a considerable dispute between the parties. K has made a number of complaints about the care and support L receives in the J placement, which he considers to be inadequate in a number of respects. K also believes that L is subjected to influence by those members of staff in the J placement, members of the staff from the local authority and, in particular, his advocate. This is not accepted, and the local authority and the staff at the J

placement have found it difficult to manage K's behaviour and attitude towards them and suggests that at times K has not acted in L's best interests. This is disputed, in turn, by K.

9. Sadly, the conflict between the local authority and K and M and K has not reduced despite the passage of time since these proceedings started nearly six years ago, which, irrespective of where the fault lies, has been unhelpful for L as he, as has been clear by the papers in this case, remains caught in the middle.
10. In October 2012 M made a bare application, supported by a statement, in which she complained about how K was preventing her from having contact and asked for L to live with her. The matter came back before me in January this year when I gave the local authority permission to make an application in respect of L's welfare. The local authority made that application, by which it seeks an order that it is in L's interests for him to move from the J placement into a supported living placement, in effect his own supported flat.
11. Unfortunately, following their return from an extended holiday in Trinidad, contact between L and K broke down. The circumstances of that breakdown are disputed, as are L's wishes not to resume that contact. Following the hearing on 8th March, when I refused to make an order for contact against L's wishes, the parties agreed to try mediation which took place on 16th May. There was some progress, but much remains in dispute. There was some limited contact arranged between L and K in April in the presence of a member of staff from the J placement. That was not successful, and, as a result, K has not seen L since, I think, late April this year. L has continued to have contact with M. There have been some recent difficulties, but the focus of M's concerns in this hearing has been about L accompanying her on an extended holiday to Trinidad later this year. She does not pursue any effective application in relation to caring for L.
12. The court next needs to consider the legal framework on the issue of capacity. That is set out very clearly in the opening sections of the Mental Capacity Act 2005. Section 1 deals with the principles:
 - “(1) The following principles apply for the purposes of this Act.
 - “(2) A person must be assumed to have capacity unless it is established that he lacks capacity.
 - “(3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.

- “(4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- “(5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- “(6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.”

Section 2 deals with the preliminary position in relation to capacity. Section 2(1) is the material part of that section which reads as follows:

- “(1) For the purposes of this 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, the mind or brain.”

Section 3 then deals with inability to make decisions and reads as follows:

- “(1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
 - “(a) to understand the information relevant to the decision,
 - “(b) to retain that information,
 - “(c) to use or weigh that information as part of the process of making the decision, or
 - “(d) 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.”

Subsection (4), significantly for the purposes of this case:

“(4) The 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.”

Section 4 deals with best interests. Section 4(4) is relevant for the purposes of this decision: it says that, in determining a person’s best interests, the person making the determination “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”.

13. In the Code of Practice that operates under the umbrella of the 2005 Act in relation to s.3, para.4.16 states relevant information includes “the nature of the decision”, “the reason why the decision is needed” and “the likely effects of deciding one way or another, or making no decision at all”. As I have said, the burden of proof in relation to capacity is on the local authority and the required standard is the balance of probability.
14. In relation to capacity, the cases state that there is little to add to the clear words of the statute. In essence, no further gloss should be added. In *CC v KK* [2012] EWHC 2136 in the Court of Protection Baker J. emphasised the need to present the options to the person concerned and not to start the assessment with a blank canvas. He adopted the words of Macur J. in *LBL v RYJ* [2010] EWHC 2664 that it was not necessary for a person to weigh up every detail of the options but rather to consider the salient features. He also stressed at paras.64 to 65 of the *CC v KK* decision that it was crucial to recognise that different individuals gave different weight to facts and professionals must not conflate a capacity assessment with a best interests assessment. This applies to the court as well, as I think is clear from the recent Court of Appeal decision in *PC and NC v City of York* [2013] EWCA Civ 478.
15. Turning to the evidence on the issue of capacity, although capacity has not been the focus of the previous hearing as it was not in dispute, it is clear that L has been regarded as having what has been termed “borderline capacity”. In the judgment in July 2011 I stated at para.93 as follows:

“L is able to function at a relatively high level in spite of his disability. He is borderline regarding his lack of capacity, and I quote from the report of Dr. Halsted:

“Given suitable conditions, he might be better able to express his own feelings and judgments authentically and more accurately. The issue affecting capacity, in my view, is not L’s innate mental ability, as assessed by psychometric testing, but rather the overwhelming emotional issues of others which he is poorly equipped to resist.’

“The court should pay great attention to possible steps that assist L in acquiring capacity or at least be put in a position to express genuine choices and preferences.”

Since then, he has been living away from the family home and, on the evidence, has been able to acquire more autonomy in managing his day-to-day life with the support that has been provided.

16. Within the current application, two further reports were commissioned, the first from Dr. Hall to consider the question of capacity and the second from Ms. Whitaker, an independent social worker, to consider best interests. In addition, I have heard oral evidence from both of them and also from K and a speech and language therapist with the local authority who had undertaken some assessments of L, most recently in relation to the extended holiday with his father in Trinidad at the end of 2012.
17. Dr. Hall’s first report is dated 2nd March 2013 following his assessment of L at the J placement on 25th February 2013. He concluded L lacks capacity in relation to residence, contact and care. In relation to residence, he said:

“L is able to understand some basic information about where to live. However, I do not think he understands sufficient information to be able to make a decision about residence and neither is he able to use information or weigh up factors in making that decision.”

In relation to contact he said:

“L is able to understand some basic information relevant to deciding who he should have contact with. However, I do not think he understands sufficient information in order to make a decision and also is not able to weigh up different factors important in making the decision. Again, he is clearly able to express a preference about who he sees.”

He concluded the same in relation to his care needs stating that L “is not able to use, understand or use information to a sufficient degree, for example, the concept of trustworthiness, to be able to make decisions about who should provide him with care”. He did not consider any improvements would be to such a degree to enable him to have the mental capacity to make decisions about residence, care and contact.

18. He provided an addendum report dated 21st April 2013 to address what support he has or should receive with regard to decision making and, in the event that he lacks capacity, what weight should be put on his views regarding these decisions. He did not see L again but did conduct a telephone interview with his advocate. Dr. Hall set out what he regarded was the relevant information regarding residence, care and contact. At C577 of the bundle at para.14 he said as follows:

“My exploration of this with L is described in paragraphs 21 to 26 of my original report. Relevant information about different possible places to live that was important to L was (a) what opportunities for activities were associated with particular places to live; (b) the physical aspects of the place, such as the size of the room, the size and physical state of the garden and the facilities for clothes storage.”

Paragraph 15:

“Other aspects of the relevant information that I explored with him were (a) the financial aspects of any place to live, including rental and the cost of support associated with placement; (b) the location of any place to live with regards to his friends and relations; (c) the location of any place to live with regard to neighbourhood facilities; (d) who he would be living with.”

Then in para.16 he said:

“Other relevant information would include (a) more information about the facilities available in a place to live, such as access to cooking and laundry facilities, (b) more information about housing rights, such as security of tenure; (c) more information about risks of particular options, such as likelihood of negative events, such as burglary and exploitation.”

In relation to care, he said:

“This included his support needs in relation to (a) going out of the house, (b) cooking, (c) cleaning, (d) laundry, (e) money management, (f)

behaviour and who might be providing that care if he decided to be supported in that area.”

At para.18 he said:

“Other relevant information would include personal care. In relation to these needs, the relevant information would include a moderate amount of detail of what support is required and a basic understanding of how it could be provided and funded and, broadly, what quality control measures could be put in place.”

Then, finally, in relation to contact, he said at para.19:

“Relevant information we discussed included who he might see (his father, brother, aunt and his friend C) and what factors were important in making decisions about whether to see people, such as the positive aspects of their relationship, the risks of seeing people, the emotional factors, the importance of family ties, how other person might feel about his decision and the nature of friendship.”

Then at C581 he said as follows in relation to L’s ability to understand the relevant information and weigh it in the balance:

“With regard to residence, I found that L understood some basic information in relation to the physical characteristics of his new placement. However, I found that his understanding of this information was at a basic level and he did not understand sufficient detail in order to be able to make a capacitous decision. For example, he did not consider the state of repair of the building. For other aspects of the relevant information, such as the financial aspects of the placement and the location in relation to his friends and relatives and local facilities, his understanding was much poorer. In relation to decisions about care, L demonstrated a basis understanding of his care needs, but this was not sufficiently detailed in order to make a capacitous decision. For example, he did not understand sufficiently about protection from exploitation, the importance of hygiene and safety in the home. He also had extremely limited understanding of the financial aspects of care provision and the need for staff training and background checks.”

Paragraph 27:

“Turning to contact decisions, although L was able to say who he wanted to see and who he did not, he was not able to understand relevant information with regard to the positive aspects of his relationship with

his father and brother, the risks of seeing people, the emotional factors, the importance of family ties, how the other person might feel about his decision and the nature of friendship. With regard to weighing in the balance, this is, of course, hampered by the fact that he did not understand all the relevant information and that he therefore put too much weight on the factors that he did understand. For example, with decisions about residence he put too much weight on the basic physical characteristics and did not consider location or financial aspects sufficiently and with decisions about contact he put too much weight on his own feelings without sufficient consideration, for example, of the importance of family ties and how the other person might feel.”

At para.29 he said:

“I therefore remain of the view that L at the time of my assessment lacked the capacity to make decisions about residence, care and contact.”

19. In his oral evidence Dr. Hall confirmed that he undertook his assessment at the J placement and did not use any tangible techniques such as drawings but said the location of the assessment where L currently lived was useful to aid his oral assessment. He was asked where his relevant information differed from Ms. Whitaker’s. In relation to the issue of residence, he thought he placed more emphasis on the following aspects, as compared to Ms. Whitaker. Firstly, the financial aspects, he said it would encompass matters such as the level of rent and whether it was affordable or not. He did not consider L would be able to understand this even with support, although he accepted that L would only need to understand it to the extent that it related to the decision relating to residence. He volunteered that the issue of capacity to manage a tenancy was “fudged” all the time in relation to learning disability by local authorities. The second matter he thought that there was a difference between his analysis and Ms. Whitaker’s was connected to the issue of a tenancy, the need to understand the security of tenure and housing rights. For example, if you do some things you could be asked to leave the property. The third matter that he thought was also relevant that he thought he differed from Ms. Whitaker were the facilities that were available in the locality of the proposed accommodation, such as banks and shops, *et cetera*, albeit he agreed those would need to be in broad terms. He said his view was that L did not understand the basic range of facilities, although he did accept that L could understand with assistance such things as shops where you could buy food. The fourth matter in relation to residence: the level of risks was another aspect that he thought he differed with Ms. Whitaker. The safety of the neighbourhood of the proposed accommodation: he said he was not sure L would be able to reach sufficient understanding on this but accepted more work could be done on this aspect. In relation to the care

decisions, he considered issues such as laundry and the costs of care was where he differed with Ms. Whitaker, although he acknowledged the cost of the care would be funded by the local authority but that L would need some understanding.

20. Also under this heading he considered monitoring of staff and carers, although acknowledged that this would be provided by the local authority, but considered L would need to know that and understand it. When it was suggested to him that L had an understanding of the role of the social worker, he said he thought that was a hard concept even with a high level of support. He considered that aspect to be less than 50%, and this was based on “taking everything together” was his rather generalised response to the justification for his analysis of it being less than 50%. Turning to information relevant to contact, he said risks of exploitation should be considered and family relationships, as in the importance of family ties. It was suggested to him that care needed to be taken on the subject of family relationship not to impose on someone with learning disabilities a value based approach. He agreed that the important considerations are L’s ability to understand this and consider it.
21. He summarised in cross-examination by Mr. Harrop-Griffiths, on behalf of the local authority, the key differences between his list and Ms. Whitaker’s were the financial aspects of residence, security of tenure, trust and exploitation and family ties and other people’s feelings. He said if what has been termed the “lower threshold” of information relevant to the decision was taken he considered it would be more likely than not that L had the potential to achieve mental capacity. If his somewhat higher threshold is adopted, he said it was highly unlikely L would have the potential to achieve mental capacity and he did not recommend any further assessment. He was equivocal as to the effect on L of undertaking any further work, at first saying it could be harmful and then, on reflection, saying that such work could be in his interests.
22. In relation to the work that had been undertaken with L, he said he knew the allocated social worker who he said, to his knowledge, was experienced in dealing with learning difficulty, and he imagined attempts had been made to discuss matters, such as the important aspects of a tenancy agreement. It appears that this was an assumption rather than being based on any information directly from the social worker. As he said, “I assumed that had gone on. Maybe that is a gap before a final decision is made”. He thought this would take a number of weeks to do if there was further assessment as there would be a need to build a rapport with L by whoever undertook this work.
23. Dawn Whitaker is an independent social worker who was instructed to carry out a best interest assessment. As part of that assessment, she saw L on 25th April of this year. She saw K the following day and had telephone consultations with D

and M and also with the relevant professionals who have day-to-day contact with L. Her detailed report contains an analysis of L's progress since being accommodated at the J placement, although she acknowledges that there remains a dispute about this between the local authority and K. In relation to progress that he has made, in her report at C666, at para.4.2, she lists L's identified progress, according to his multi-disciplinary team. Those are increased communication and vocabulary skills; increased confidence and assertiveness; ability to say no and make independent choices; further development and aspects of independent living skills; benefit from engaging in, enjoying a busy activity schedule; benefit from the structures and routines of the J placement; development and maintenance of independent peer friendships, which he enjoys; benefit from a re-established relationship with M; and expressions of feeling of "going places", which correlates with his desire to move to supported living.

24. The identified barriers that she saw in her report to L's progress were as follows: the disruption and anxiety caused to L associated with fellow resident MB and the process of his removal from the J placement; the negative impact of the adversarial relationship between K and his placement, the local authority; the negative impact on L of being embroiled in K's conflict with his multi-disciplinary team; the inability of K to fully accept and work with L's court ordered care plan; the negative impact on L of the various complaints that have been made by K; the negative impact of being embroiled in conflict between M and K; also the negative impact on L of inconsistent contact with his family and statements by K that he may cease contact with L altogether; and the negative impact on L of being subject to undue influence by others; and then, finally, L's inability to express his true wishes and feelings to others, especially his family and K in particular.
25. K's position and D's position was summarised in her report at C667, para.4.4, and include such matters as the J placement, the personnel at the J placement being underqualified to care for L; that the J placement have worked against L and K rather than collaboratively; that L has experienced abuse from fellow residents and that K's concerns and complaints have not been sufficiently acknowledged or adequately responded to, and this has resulted in substandard care; that L is not properly supported to maintain a healthy diet, to have sufficient exercise, that he requires 24/7 care, his personal care has deteriorated and his daily living skills have not improved. In relation to M, her position is that he has made some progress with increased confidence, an ability to be able to express his own views and to enjoy more freedom.
26. In Ms. Whitaker's assessment of L, to ascertain his wishes and feelings, she used drawings to facilitate a more concrete conversation with L regarding his

wishes and feelings. She described that in her report at para.7.2.15 at C684: where she-says:

“L’s drawings enabled the assessor to facilitate a more concrete conversation with L, regarding his wishes and feelings related to each option:

- Initially, this involved placing each of L’s accommodation drawings on the table before him;*
- Followed by, introducing L to the pre-prepared resources (as described at 7.2.3 above); taking time to ascertain his understanding of their meaning, e.g., the difference between living at / and visiting somewhere; wanting something / and not wanting something; and happy / okay / sad etc.;*
- L was able to distinguish between living at / visiting somewhere, by explaining that when you live somewhere, you sleep there; however, when you visit somewhere, you go home to sleep;*
- L was able link his understanding of the word ‘sleep’ to the visual representation of the drawing of a bed and bedstead;*
- Similarly, L was able to distinguish between wanting something / and not wanting something, by explaining that when you want something you like it; however, if you don’t like something, you don’t want it;*
- L was able to link each emotion to its respective visual representation; he described his understanding of the difference between □ HAPPY, □ OKAY, and □ SAD, by explaining that to him happy means ‘no pressure’, okay means ‘some pressure’ / ‘not bad’, and sad means ‘pressure and worry’;*
- The next stage involved asking L a number of open questions aimed at ascertaining his wishes and feelings regarding future accommodation options (L expressed his understanding that JL was not a future option). The assessor’s approach to questioning was guided by L’s responses:*
 - 1. The assessor asked L if he wished to place ‘TO LIVE’ cards on any of the drawing(s) [he did];*
 - 2. Next the assessor asked L if he wished to place ‘VISIT’ cards on any of the drawing(s), where he would like to visit, but not live [he did];*
 - 3. Following on, the assessor asked L if he wished to place ‘bed and bedstead’ cards, (representing sleep), on any of the drawing(s) [he did];*
 - 4. Next the assessor asked L to place a □ HAPPY, □ OKAY, or □ SAD card, on each of the drawings representing his future accommodation options [he did];*
 - 5. Following on, the assessor asked L if he wished to place ‘I WANT’ cards on any of the drawing(s) [he did]; next, the assessor asked L if he wished to place ‘NOT WANT’ cards on any of the drawing(s) [he did];*
 - 6. Then, the assessor asked L if he wished to place either / or both ‘WEEK’ and ‘WEEKEND’ cards on any of the drawing(s), re: where he would prefer to live / sleep during the week, and at weekends [he did];*

7. Lastly, the assessor asked L if he wished to place cards numbered 1-7 (representing the number of nights he would prefer to sleep), on any of the drawing(s) [he did].

This process was repeated to ascertain L's wishes and preferences regarding future contact with K and M:

- Initially, the assessor gave L the pre-prepared cards that were two-thirds blank, stating, 'DAD', 'AUNTY', 'L (full first name used)' and 'STAFF' (as described at 7.2.3 above);*
 - Next L was asked if he wanted to draw pictures of K, M, himself, and a member of staff on the respective cards. However, L stated that he could not draw people. The assessor asked L if he would rather draw 'stick' men and women, as opposed to actual individuals; however, he replied, 'no I can't'. The assessor asked L if he wanted her to draw stick men and women on each card; to which he agreed;*
 - The assessor asked L if he wished to embellish / personalise any of the 'stick' men and women drawn by the assessor. L was able to describe some characteristics of a particular staff member, and his aunt; which were subsequently added by the assessor (e.g., hair style, glasses, clothes etc.). However, L did not wish to do so for his father;*
 - The drawings enabled the assessor to facilitate a more concrete conversation with L, regarding his wishes and feelings related to contact;*
 - L was able to demonstrate his ability to distinguish between K, M, and the staff member; based on their respective drawings;*
 - L described his understanding of 'contact', by explaining that it means 'to visit a person', 'to go / or see someone';*
 - L was able to differentiate between JL, 'X', K's flat, M's property; and the 'community', which he understood to mean outside / or at a café etc:*
1. *Initially the assessor asked L if he wished to place the drawings of K and M, on the drawings of where they live [he did];*
 2. *Next, the assessor asked L if he wished to place the drawing of himself on any of the drawing(s), of where he would prefer to live [he did];*
 3. *Then the assessor asked L if he wished to place 'VISIT' cards on any of the drawing(s), of where and whom, he would like to visit, [he did]; next the assessor asked L if he wished to place 'VISIT' cards (crossed out (X)), on any of the drawing(s), of where and whom he would not like to visit [he did];*
 4. *Next the assessor asked L to place a HAPPY, OKAY, or SAD card on K's and M's drawings re: contact [he did];*
 5. *Following on, the assessor asked L if he wished to place 'I WANT' cards on any of the drawing(s), of where and whom he would like to have contact [he did]; next, the assessor asked L if he wished to place 'NOT WANT' cards on any of the drawing(s), of where and whom he would not want to have contact [he did];*

6. Then, the assessor asked L if he wished to place 'bed and bedstead' cards (representing sleep), on any of the drawing(s), where and with whom, he would like to stay and have overnight contact;

7. Next, the assessor asked L if he wished to choose the days of week he would like to have contact (using the days of the week cards) [he did]; then the assessor asked L if he wished to place the cards on any of the drawing(s) of where and whom, he would like to have contact [he did];

8. Lastly, the assessor asked L if he wished to have contact independently, or with staff support; L stated 'with staff'. The assessor asked L if he wished to place the staff member cards on any of the drawings of where and whom, he would like to have contact [he did] (duplicate staff card made so as not to restrict choices).”

27. In relation to both residence and contact her technique in doing this was informed by what she set out at para.7.2.19 when she said as follows:

“During this process I endeavoured to enable and encourage L to participate in the assessment as fully as possible by paying regard to the SALT advice regarding tips to aid L’s communication and understanding: use of short simple sentences, ensuring to speak at a normal volume with slow speed and basic words, taking extra time to pause and check understanding, breaking down difficult information into smaller points, allowing L time to understand and consider each point before continuing, repeating information where appropriate and summarising to check shared understanding.”

She says at para.7.2.20 at C686:

“At interview L was very able to communicate with the assessor [namely, Ms. Whitaker]. His expressive speech was clear and understandable. His responses, actions to questions were coherent and the content was very consistent and congruent throughout.”

She noted at para.7.2.21 that L expressed additional reasoning with regard to his wishes and feelings concerning matters for the court. She set out that these included wanting to stop contact with K due to pressure. He stated:

“K and D go on about different things. I do not know what to say and don’t know what they tell me next. Words in my head I tell staff.”

28. In terms of L’s wishes and feelings, Ms. Whitaker summarised those at page C687 of her report in 7.2.25:

“To live in living accommodation as per that proposed by the London Borough of Waltham Forest [he drew a picture and supported that with the process that she undertook], that he does not wish to live with K[and again supported that with the process with the pictures she undertook]. He does not wish to live with M [and again supported it in the same way]. He does not wish to have contact with K with or without staff either at the flat or within the community. He expressed his wishes both verbally and pictorially, that he does wish to have contact with M either at the property or within the community but with staff support [and again expressed his wishes and feelings the same way].”

29. Following receipt of this report, the Official Solicitor sought an opinion from her regarding L’s mental capacity. This resulted in her letter dated 11th June 2013 in the bundle at C716. She set out in that letter that she considered L was able to demonstrate understanding of some of the information relevant to decisions to be made regarding residence and care. She lists those matters in para.2.1 as being:
- (1) that the J placement was not a long-term accommodation option;
 - (2) the option of moving to X with support from the staff team;
 - (3) the option of returning to live with K at the family home;
 - (4) the difference between living at and visiting somewhere;
 - (5) what it means to sleeps somewhere;
 - (6) the difference between wanting and not wanting something;
 - (7) an ability to differentiate his understanding of “happy”, “okay” and “sad” is relevant to the decisions to be made; and
 - (8) understanding the days of the week.
30. In relation to contact and care, he was able to demonstrate an understanding of some of the information relevant to those decisions, namely, an ability to differentiate between K, M and staff; an ability to link K and M to their respective properties; an ability to identify and link a specific staff member from Mencap to his new staff team at the X placement; his understanding of having contact with somebody; an ability to differentiate between having contact at M’s or K’s property and community contact, for example, in a café; an ability to differentiate between wanting staff and not wanting staff present during contact; and, lastly, an ability to express feelings related to the potential consequences of

the different options. She also said that L was able to give some reasoning for his expressed wishes and feelings and those are set out in para.2.3 in the letter, namely, wanting to stop contact with K and D due to feeling pressure; an ability to evaluate the impact of pressure from D and K is different to that associated with M; being told to do naughty, silly things and having an ability to explain this; an ability to explain how this made him feel worry or to tell staff; an ability to weigh up some strategies for managing his predicament, i.e. “Even with staff, I worry about it”.

31. She continues in that letter to express the view that she believed that L’s ability to understand the questions outlined in para.2.5, taken from the MCA Code of Practice, and achieve mental capacity is likely to be dependent on a number of factors: firstly, what is considered to constitute relevant information by the person responsible for assessing L’s mental capacity and whether that can be conveyed to L in a form that is tangible to him, to his tangible understanding of the realistic accommodation options available to him; secondly, that L is given all practical and appropriate support to enable him to make the decisions for himself; thirdly, having relevant information about the decisions provided in a way that most appropriate to enable him to understand; and, fourthly, having the relevant information presented in a way that is appropriate for L’s need and circumstances and explained using the most effective, tangible form of communication. She then concluded in para.2.8 that, in her opinion, the evidence outlined in the letter suggested to her that L is more likely than not to have the potential to achieve mental capacity, to make decisions regarding residence and contact and some specific care related decisions.
32. In her oral evidence she said she found the use of the visual aids very helpful and considered that they could be used to consider abstract concepts, such as trust. By use of the drawings she said L was able to demonstrate his tangible understanding of the abstract concept of contact. If she had undertaken a capacity assessment, she said she would have used tangible resources, such as the techniques she undertook to ascertain wishes and feelings for the best interest assessment that she was instructed to undertake. She agreed it would be very helpful if there was a shared understanding of what the information relevant to the decision as to residence, contact and care was. She said her view was that L was able to demonstrate a basic understanding of the information relevant to decisions on residence, contact and care. She said it was not limited to the relevant information, but he was able to provide reasoning which involved using a weighing process. She said in the work she undertook with him there was plenty of opportunity for L to be inconsistent, but each time he was consistent, which she regarded as powerful. She accepted in cross-examination from Ms. Bretherton on behalf of K that you cannot rule out that these were not his true wishes because there is reference historically to him saying different things to different people, but she felt, bearing in mind her experience in

conducting these assessments, that she had been robust in the thought that she had put in and the safeguards that she had undertaken. It was her view that L could be pushed into capacity if it was facilitated appropriately. She regarded it as more likely than not that he would have the potential with the right work to gain capacity. She said it could be done by a replication of the process she undertook during the best interest assessment using pictorial aids and open questions. She said if she undertook the work it would be completed by the end of June.

33. In cross-examination by the local authority she was taken to the letter of instruction which invited her to raise any issues regarding capacity with the relevant parties (in the bundle at D101), which she did not in her main report and only did so when invited to by the Official Solicitor. She said she was not asked the specific question. Her instructions were to undertake a best interests assessment. She was asked on behalf of K, how could she ensure L's consistency in answers that she placed reliance on is not just another facet, as I have already said, of L providing consistently different answers to different people. As I have already set out, she went to great lengths to guard against that by careful preparation, by not using leading questions, by neutral responses in order to validate the process she undertook. She acknowledged that there was a risk that he is giving answers he wants people to hear but reiterated the safeguards, in her opinion, she undertook in the process she adopted and that L had not met her before. When asked about the impact that L was not having regular contact at the time of her assessment with K, she said that she understood contact had just started again. She was pressed about the need for L to understand details regarding any tenancy agreement. She said he needs to know the "do"s and the "don't"s and the general obligations of a tenancy but not the detail. She said you could separate the ability to understand the detailed nature of the tenancy agreement and a decision as to residence. In relation to family relationships, she said the importance was to ascertain L's understanding rather than to impose any views about them on him.
34. Mr S, who is a speech and language therapist with the local authority, gave evidence. The information from him in the court bundle consists of two letters setting out his involvement. His most recent is at the end of last year in order to assess L's capacity to decide about a proposed holiday with his father in Trinidad. He has also undertaken previous assessments in relation to specific decisions, for example, access by others to his medical records. He gave some rather general evidence about capacity but accepted that he had not undertaken any assessments of L's capacity to make decisions about residence, contact and care. He was able to highlight some aspects of those decisions he considered L would have difficulty with.

35. K gave oral evidence to supplement his detailed written statement that I have seen and read. He remains concerned that L is influenced by who he is talking to. He says different things to different people and gave as an example the account in the report from Dr. Halsted in 2007. He considers L is being influenced by others, in particular his advocate. He considers that L does not have capacity to make decisions as to residence, contact and care.
36. I am enormously grateful for the very full written submissions from the represented parties. In essence, the local authority and K rely on the evidence of Dr. Hall. They submit his assessment is robust and can be relied upon by the court. I have carefully considered the detailed written submissions that they have made. The Official Solicitor submits that the capacity assessment undertaken by Dr. Hall is not compliant with the Mental Capacity Act or the Code. Therefore, the local authority are unable to establish the burden of proof and the court should not proceed until that is done. In particular, they rely on the fact that Dr. Hall's evidence was that if the lower threshold was applied to the relevant information it was more likely than not that L had capacity or, at the very least, had the realistic potential for capacity.
37. In reaching my conclusion, I have carefully considered the fact that Ms. Whitaker did not specifically raise the issue of capacity in her main report and that she was instructed primarily to undertake a best interests assessment. Although there was an invitation to consider the issue of capacity in the letter of instruction, it was buried deep in the narrative of the rather long letter and was not in the section of the letter that was entitled "Your instructions". Understandably, it was not the focus of her attention, which was to consider best interests. As was suggested and, I think, canvassed in the oral evidence, it may be more prudent in future to flag up that issue more prominently in the letter of instruction in the future and contain it in the section entitled "Your instructions".
38. Having considered all the evidence and the submissions that have been made, I have reached the conclusion that there does need to be a further assessment as to L's capacity. I have reached that conclusion for the following reasons.
39. Firstly, I consider the basis of Ms. Whitaker's opinion to have a securer evidential foundation. Her detailed written report is well structured and each stage is justified by careful analysis. Whilst the focus of the main report was best interests, it is supplemented by the letter dated 11th June which sets out very clearly the rationale that founds her opinion. She was, in my judgment, clearly able to separate the requirements in the Act to understand, retain and use or weigh information from matters that are irrelevant. Her approach was consistent with other areas of decision making, as is set out in the case of *PH v A Local Authority* [2011] EWHC 1704, a decision of Baker J. where he guarded against imposing too high a test of capacity to decide upon issues such as residence

because to do so would run the risk of discriminating against a person suffering from a mental disability.

40. Secondly, Ms. Whitaker's preparation for her assessment of L was carefully thought out in advance with detailed consideration to the strategies she was going to use. Her decision to use the tangible resource of drawings resulted, in my judgment, in her being able to assess L's level of understanding in an effective and reliable way, albeit in the context of her report of best interests. Her approach in finding a tangible example of an abstract concept was consistent with the general observations of Baker J. in *PH*. Whilst the focus of her report was best interests, it meant as described in the letter dated 11th June, she was able to obtain information relevant to decisions on residence, contact and care and reasons for the views L expressed. She also had access to much fuller information than Dr. Hall.
41. Thirdly, Dr. Hall's evidence by contrast, in my judgment, did not display the same level of thought or consideration or analysis in gathering information from L. He had not considered the use of drawings or pictures, even though this method was used as a daily support for L. The effectiveness of Ms. Whitaker's approach is illustrated by the additional information she was able to gain from L about the environment of the proposed placement.
42. Fourthly, I consider that Ms. Whitaker's analysis in relation to capacity had more depth than Dr. Hall's. She was clearly able to articulate what she considered to be relevant information or not with underlying rationale. By contrast, I considered Dr. Hall's analysis to be somewhat superficial and based more on generality, for example, his assumption that work had been undertaken by the allocated social worker when it had not and he had not even checked.
43. Fifthly, in relation to the dispute regarding what should be included in information relevant to the decision, I agree with the analysis submitted in the written submissions of the Official Solicitor in relation to those aspects. In para.8 of the written submissions in relation to residence I agree that the relevant considerations are:
 - (1) what the two options are, including information about what they are, what sort of property they are and what sort of facilities they have;
 - (2) in broad terms, what sort of area the properties are in (and any specific known risks beyond the usual risks faced by people living in an area if any such specific risks exist);
 - (3) the difference between living somewhere and visiting it;

- (4) what activities L would be able to do if he lived in each place;
- (5) whether and how he would be able to see his family and friends if he lived in each place;
- (6) in relation to the proposed placement, that he would need to pay money to live there, which would be dealt with by his appointee, that he would need to pay bills, which would be dealt with by his appointee, and that there is an agreement that he has to comply with the relevant lists of “do”s and “don’t”s, otherwise he will not be able to remain living at the placement;
- (7) who he would be living with at each placement;
- (8) what sort of care he would receive in each placement in broad terms, in other words, that he would receive similar support in the proposed placement to the support he currently receives, and any differences if he were to live at home; and
- (9) the risk that his father might not want to see him if L chooses to live in the new placement.

44. I agree the matters set out in para.10 should not be included because they would set the bar too high. Those are, firstly, the cost of the placements and the value of money; secondly, the legal nature of the tenancy agreement or licence; and, thirdly, what his relationship with his father might be in 10 or 20 years’ time if L chooses to live independently now. To include them would result in surprising results, for example, such that he could be said to have capacity to decide to live somewhere where there was not a tenancy agreement, and the position in relation to the long-term consequences is again setting the bar too high. The Act in s.3(4) makes it clear it is only “reasonably foreseeable consequences” only.

45. I agree also with the analysis of the Official Solicitor as to to contact in para.13 save for one matter. So I agree with the first one, who they are and in broad terms the nature of his relationship with them; secondly, what sort of contact he could have with each of them, including different locations, differing durations and differing arrangements regarding the presence of a support worker; and, thirdly, the positive and negative aspects of having contact with each person. This will necessarily and inevitably be influenced by L’s evaluations. His evaluations will only be irrelevant if they are based on demonstrably false beliefs. For example, if he believed that a person had assaulted him when they had not. But L’s present evaluation of the positive and negative aspects of

contact will not be the only relevant information. His past pleasant experience of contact with his father will also be relevant and he may need to be reminded of them as part of the assessment of capacity.

46. In relation to the last aspect under contact, which is what might be the impact of deciding to have or not to have contact of a particular sort with a particular person, I think there needs to be some reference in there to family in that family are in a different category, and I will hear submissions in relation to adjustments to that aspect.
47. I agree also that in relation to contact the matters set out in para.14 are not relevant: abstract notions, like the nature of friendship and the importance of family ties, subject to the point that I have just made relating to recognising the family in the last of the agreed aspects; the long-term possible effects of contact decisions, for the reasons I have already given in relation to s.3(4); and risks which are not in issue, for example, those mentioned by Dr. Hall, such as the risk of financial abuse.
48. Turning to care, again, I agree with the matters itemised in para.15 as being the relevant information, namely, what areas he needs support with, what sort of support he needs, who will be providing him with support, what would happen if he did not have any support or he refused it and, lastly, that carers might not always treat him properly and that he can complain if he is not happy about his care, I agree in relation to the information in para.16 that it is not relevant, that is how his care will be funded, and how the overarching arrangements for monitoring and appointing care staff work.
49. When considering the Code of Practice, I do not consider that in the capacity assessments to date sufficient regard has been had to the benefits of using tangible tools such as drawings. As a result, I do not consider L has been given all practical and appropriate support and the consideration of relevant information has come into sharper focus after Dr. Hall's assessment and there has not been the opportunity to present it to L in a way that is appropriate for his needs and circumstances.
50. With the benefit of hindsight, particularly in cases of borderline capacity such as this, consideration should have been given to a more structured approach for regular reviews about assessing capacity, with structured reviews as to the most effective way of communicating and structuring work to be undertaken with L to do that. It is accepted by the local authority that this was not done in this case.
51. Capacity is the gateway to the provisions of the Mental Capacity Act 2005. Section 1 of the Act is clear as to the guiding principles. The evidence of

Ms. Whitaker casts sufficient doubt on the issue of capacity, that it has to be investigated further before the court can finally determine the application. In my judgment, there has not been a compliant assessment of L's capacity and the relevant areas to date. The relevant information had not been identified prior to Dr. Hall's assessment with L in February. He did not see L again for the purposes of the addendum report. The requirements of the Act are clear, particularly in s.1(3), s.3(2) and para.4.16 of the Code. In addition, I have been referred to Article 12(3) of the UN Convention on the Rights of Persons with Disabilities, which states as follows:

“States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”

52. Finally, I have reached this decision after extremely careful consideration because I am acutely conscious that it will inevitably lead to some delay in decisions being made regarding L, but I am driven to the conclusion that it is essential that those decisions are made in accordance with the very clear requirements of the Mental Capacity Act. The consequences of any decisions made will have long-term consequences for all concerned.
