Neutral Citation Number: [2002] EWHC 18 (Fam/Admin)
IN THE HIGH COURT OF JUSTICE **FD01P01640**
FAMILY DIVISION
PRINCIPAL REGISTRY
MR JUSTICE MUNBY
(In Public)

A (by his litigation friend the Official Solicitor to the Supreme Court)

Claimant

v

A HEALTH AUTHORITY and Ors

Defendants

Ms Fenella Morris (instructed by Messrs Bindman & Partners) appeared on behalf of the Claimant

Mr Daniel Beard (instructed by Messrs Capsticks) appeared on behalf of the First and Second Defendants (the Health Authority and the Local Authority)

Mr John Hawkridge of Hawkridge & Company appeared on behalf of the Third Defendant (the Claimant's father)

The Fourth Defendant (the Claimant's mother) was neither present nor represented

(At the hearing on 21 January 2002 Ms Jenni Richards appeared in place of Ms Morris: the Third and Fourth Defendants were neither present nor represented)

IN THE HIGH COURT OF JUSTICE **CO/4767/2001**
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE MUNBY
(In Public)

THE QUEEN ON THE APPLICATION OF S (by her litigation friend)

Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

IN THE HIGH COURT OF JUSTICE **FD01P01919**
FAMILY DIVISION
PRINCIPAL REGISTRY
MR JUSTICE MUNBY
(In Public)

In the Matter of J (a child)

S (by her next friend)

Plaintiff

v

(1) Y LOCAL AUTHORITY
(2) J (by his guardian ad litem
the Official Solicitor to the Supreme Court)

Defendants

IN THE HIGH COURT OF JUSTICE **FD02C00001**
FAMILY DIVISION
PRINCIPAL REGISTRY
MR JUSTICE MUNBY
(In Public)

In the Matter of J (a child)

Y LOCAL AUTHORITY

Applicant

v

(1) S
(2) J

Respondents

Mr Ian Wise (instructed by Messrs Bhatia Best) appeared on behalf of S

Ms Kristina Stern (instructed by the Treasury Solicitor) appeared on behalf of the Secretary of State

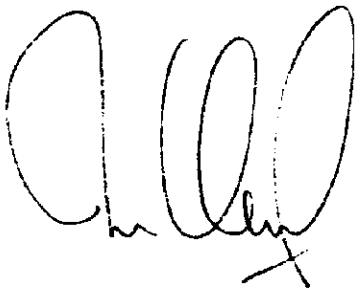
Mr Brian Jubb (instructed by the Solicitor to the Council) appeared on behalf of Y Local Authority

Mr Robin Barda (instructed by the Official Solicitor to the Supreme Court) appeared on behalf of J

(At the hearing on 21 January 2002 Mr Allan Levy QC appeared together with Mr Wise: the Secretary of State was neither present nor represented)

This is the Judgment delivered to the parties on 4 January 2002, together with a postscript dated 24 January 2002, handed down in public (without the need for attendance by any of the parties) at 9.45am on Thursday 24 January 2002

I direct that no further note or transcript need be taken or made of the judgment



24 January 2002

The Hon Mr Justice Munby

A v A HEALTH AUTHORITY and Ors

R (on the application of S) v SECRETARY OF STATE FOR THE HOME DEPARTMENT

MR JUSTICE MUNBY

4 January 2002
24 January 2002

1 I have in recent days had before me two cases each of which raised, albeit in different contexts, the same point of principle as well as points of practice and procedure going to the proper relationship between the Family Division and the Administrative Court. Whilst this judgment relates primarily to just one of these cases some passing reference to the other may, I think, be useful. I hope that what follows will be of some assistance to the profession in respect of what is likely to become an ever more frequent problem in practice.

2 I am giving this judgment in open court but because it involves claimants who are under disability - in the one case as an adult with a learning disability and in the other case as a child - I have prepared it in anonymised form. Nothing must be published which might identify anyone whose identity is not already revealed by this judgment.

A - the background

3 A was born in 1958. He has a learning disability with superimposed autistic tendencies. He is registered deaf, has no verbal communication and uses sign language. Although there has been no formal assessment of his capacity it is plain that A is not able to manage his property and affairs and that, applying the test laid by Thorpe J in *In re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290 and approved by the Court of Appeal in *Re MB (Medical Treatment)* [1997] 2 FLR 426, he lacks the capacity to decide for himself where and with whom he should live.

4 A's father and mother, the third and fourth defendants, were divorced many years ago when A was still a child. Both are still alive, though elderly, and have always concerned themselves with A's welfare. It is through absolutely no fault of theirs that neither of them is able to provide permanent accommodation for A. Hitherto they have both seen him regularly, usually at least once a week.

5 Until 1987 A lived at a long-term stay hospital provided by the statutory predecessor of the first defendant, which I shall refer to as the health authority. In 1987 A was discharged from that hospital on the basis that the social care which had been provided for him in the hospital would more appropriately be provided for him in the community. From then until the recent events which precipitated these proceedings A lived in accommodation provided for him by the second defendant ("the local authority") in the form of a small residential care home ("the

home") managed by a specialist company ("the care company"). The care company, which is wholly funded by the health authority, was set up in 1983 to provide care in the community for persons who have been discharged from long-term stay hospitals.

A - the statutory setting

6 In accordance with section 21(1)(a) of the National Assistance Act 1948 the local authority is under a duty to "make arrangements for providing residential accommodation" for A as someone "aged eighteen or over who by reason of age, illness, disability or any other circumstances [is] in need of care and attention which is not otherwise available to [him]". In accordance with sections 1A and 2(1) of the Local Authority Social Services Act 1970 the local authority's functions in relation to A under the 1948 Act stand referred to the local authority's social services committee.

7 The health authority has no responsibility under sections 1 and 2 of the National Health Service Act 1977 for providing A's accommodation (though it is obviously responsible for meeting his health needs) but has power under section 28A(2), if it thinks fit, to make payments to the local authority towards expenditure incurred by the local authority in meeting A's accommodation needs under section 21(1)(a) of the 1948 Act. It also has power under section 28A(9)(a) of the 1977 Act to make such payments direct to the care company. The Department of Health has published guidelines, *Health Service Guidelines HSG(92)43*, for the exercise of these powers.

8 A's accommodation at the home was provided by the local authority in performance of its duties under section 21(1)(a) of the 1948 Act. Because A had until 1987 been accommodated in the health authority's hospital, the cost of A's accommodation at the home was provided by the health authority. The health authority made payment direct to the care company under section 28A(9)(a) of the 1977 Act.

9 In short, therefore, the responsibility for accommodating A rests on the local authority under section 21(1)(a) of the 1948 Act; that responsibility is in fact discharged by the local authority 'buying-in' from the voluntary sector services which in accordance with HSG(92)43 are paid for by the health authority under section 28A(9)(a) of the 1977 Act.

10 Section 47(1) of the National Health Service and Community Care Act 1990, read in conjunction with the definitions in section 46(3), provides, so far as material for present purposes, that where it appears to a local authority that any person for whom they may arrange for the provision of accommodation under section 21(1) of the 1948 Act may be in need of such services, the local authority "shall carry out an assessment of his needs for those services" and "having regard to the results of that assessment, shall then decide whether his needs call for the provision by them of such services". Section 47(3) provides for the involvement

of a health authority in the assessment process.

11 In the exercise of its functions under section 21(1) of the 1948 Act the local authority is required by section 7(1) of the 1970 Act to act under the general guidance of, and by section 7A(1) of that Act to act in accordance with such directions as may be given by, the Secretary of State. In exercise of his powers under sections 7 and 7A of the 1970 Act the Secretary of State has issued the *National Assistance Act 1948 (Choice of Accommodation) Directions 1992*, which bind the local authority under section 7A, and the guidance in *LAC(92)27*, explaining the Directions, which binds the local authority under section 7.

12 So far as is material for present purposes paragraphs 2 and 3 of the Directions provide as follows:

> "2 Where a local authority have assessed a person under section 47 of the National Health Service and Community Care Act 1990 (assessment) and have decided that accommodation should be provided pursuant to section 21 of the National Assistance Act 1948 (provision of residential accommodation), the local authority shall, subject to paragraph 3 of these Directions, make arrangements for accommodation pursuant to section 21 for that person at the place of his choice within the United Kingdom (in these Directions called 'preferred accommodation') if he has indicated that he wishes to be accommodated in preferred accommodation.
>
> 3 ... the local authority shall only be required to make or continue to make arrangements for a person to be accommodated in his preferred accommodation if -
>
> (a) the preferred accommodation appears to the authority to be suitable in relation to his needs as assessed by them;
> (b) the cost of making arrangements for him at his preferred accommodation would not require the authority to pay more than they would usually expect to pay having regard to his assessed needs;
> (c) the preferred accommodation is available;
> (d) the persons in charge of the preferred accommodation provide it subject to the authority's usual terms and conditions, having regard to the nature of the accommodation, for providing accommodation for such a person under Part III of the National Assistance Act 1948."

13 Paragraph 1 of *LAC(92)27* reads as follows:

> "Under new community care arrangements social services authorities will increasingly be making placements in residential and nursing home care. This direction is intended to ensure where that happens that people are able to exercise a genuine choice over where they live."

Paragraph 3 provides that:

> "This direction is intended to formalise the best practice which most authorities would in any case have adopted. It sets out the minimum that individuals should be able to expect. It is not, however, intended to mark the limits of the choice that authorities may be able to offer people. Even where not required to act in a certain way by this direction, authorities should exercise their discretion in a way that maximises choice as far as possible within available resources."

Paragraph 13 reads as follows:

> "There will be cases in which prospective residents are unable to express a preference for themselves. It would be reasonable to expect authorities to act on the preferences expressed by their carers in the same way that they would on the resident's own wishes, unless exceptionally that would be against the best interests of the resident."

A - recent events

14 For some time A's father has been of the view that his son's needs would be better met if he moved from the home to a specialist autistic facility operated by another body in the voluntary sector which I shall refer to as the trust. He set out his views in a letter dated 26 October 1999. This has led to joint assessments of A carried out pursuant to section 47 of the 1990 Act by the local authority and the health authority on 11 May 2000, 21 June 2001 and most recently 31 July 2001. The latter assessment "recommended an alternative residential placement in a specialist autistic service". I observe that the assessment, prepared on a printed pro-forma, contains a box headed 'Client/Patient Agreement' in which the subject of the assessment is invited to record inter alia his agreement/disagreement with "the outcome of the assessment" and his willingness/unwillingness "to accept this joint assessment as the basis of my care plan". This part of the form, which may be signed by a "representative" on behalf of the patient, has not in fact been completed, the reason given being "speed of request for this assessment to be compiled".

15 On 7 August 2001 a care planning meeting was held which recommended that an alternative residential placement be sought for A. The care company disagreed with this recommendation. Following further inquiries, and after a number of different organisations in the voluntary sector had been approached, the decision come to was that the most appropriate placement was in fact that which A's father had identified in his letter of 26 October 1999, in other words a placement with the trust. The plan was for A to move to his new placement in October 2001.

16 By then A had in fact stopped living at the home. On 20 July 2001 he fractured his hip whilst out walking with one of his carers and was taken into hospital. He was removed from there on 27 July 2001 by his father and taken to his father's home,

where he has been living ever since. One unfortunate consequence of this is that A's mother has not seen him since he has been living with his father.

17 On 20 September 2001 an originating summons was issued in the Family Division on behalf of A by his litigation friend, an employee of the care company who describes herself in her witness statement dated 13 September 2001 as A's principal carer for the last 8½ years. The originating summons, addressed to the health authority and the local authority, seeks "an Order ... that the Defendants in the BEST INTERESTS of [A] do return him or cause him to be returned forthwith to his care home at [the home]". Both in the originating summons and in the litigation friend's witness statement there are allegations that A's rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms have been breached by the decision to move him from the home.

18 The originating summons came on before Coleridge J in the Family Division on 22 and again on 24 October 2001. By then the health authority and the local authority were taking the point that the proceedings were misconceived: the self-appointed litigation friend was not, so it was said, an appropriate person to represent A's interests; and in any event the appropriate form of proceedings was, it was asserted, an application for judicial review in the Administrative Court of what was said in the skeleton argument prepared by Mr Daniel Beard of counsel for the hearing on 24 October 2001 to be "the Defendants' decision pursuant to their duties under the Mental Health Act 1983 to place [A] in the care of [the trust]".

19 On 24 October 2001 Coleridge J made an order (i) recording the parties' understanding that A would remain with his father until further order or agreement between the parties, (ii) substituting the Official Solicitor as A's litigation friend and (iii) directing that what was described as the jurisdictional issue be determined as a preliminary issue. Arrangements were made by Coleridge J for the matter to be listed before me on 27 November 2001. This was done because I am one of only two judges of the High Court (the other being Wilson J) who is both a judge of the Family Division and a nominated judge of the Administrative Court. On 23 November 2001 I made an order joining A's father and mother as defendants.

20 The matter came on for hearing before me on 27 November 2001. A was represented by Ms Fenella Morris acting on behalf of his litigation friend, the Official Solicitor. The health authority and the local authority were represented as previously by Mr Daniel Beard. A's father was represented by his solicitor, Mr John Hawkridge. A's mother was neither present nor represented: she had sent a letter to the court explaining that illness prevented her attendance.

21 I dealt first with the interim arrangements for A pending the final hearing in January 2002 for which I gave directions. A's father gave certain undertakings the effect of which is that A will have weekly contact with his mother. A's father and Mr Hawkridge then withdrew, leaving Mr Beard and Ms Morris to argue the

preliminary point of law. I shall return to their submissions in due course.

S - the facts

22 I can deal with the facts of this case more shortly for in large measure the dispute has resolved itself without the need for any judicial determination.

23 S's short life - she has in the last few days reached her sixteenth birthday - has been marked by misfortune. I will not go into all the details. When she was only 12 years old she was sentenced for a very serious criminal offence to five years' detention under section 53(2) of the Children and Young Persons Act 1933 (see now the corresponding provisions of the Powers of Criminal Courts (Sentencing) Act 2000). She was released on licence in November 2000. Whilst at liberty she did two things: she became pregnant and then she committed a further serious criminal offence. She was recalled to custody in April 2001 and has latterly been detained in secure accommodation provided by a local authority which I shall refer to as authority X. Regulatory responsibility for secure accommodation lies with the Department of Heath and the Social Services Inspectorate. Funding responsibility lies with the Youth Justice Board. In July 2001 a two-year criminal supervision order was imposed on S for the offence committed whilst she was on licence. She is due to be released at the expiry of her original sentence on 27 January 2002 but will remain subject to the criminal supervision order.

24 On 1 October 2001 S was taken into a hospital where on 13 November 2001 she gave birth to a son, J. In the meantime, on 30 October 2001 the Prison Service's Mother and Baby Unit Admission Board had declined to offer a place for S and her child at a mother and baby unit within the Prison Service estate. Without a special licence from the Department of Heath and further funding from the Youth Justice Board it was not possible for J to go back with S to the secure accommodation when she left hospital. In these circumstances S understood that she was to be separated from J on 23 November 2001, when she was due to leave hospital and return to her secure accommodation.

25 On 21 November 2001 proceedings were commenced on S's behalf in the Family Division by originating summons seeking as against the only defendant, the Secretary of State for the Home Department, (i) that J be made a ward of court (ii) "an injunction under the inherent jurisdiction of the court and/or pursuant to section 8 of the Children Act 1989 to provide that there be no separation of [S] and her child without the permission of [S] or the court" and (iii) a "declaration under the inherent jurisdiction of the court that the separation of [J] from [S] would be a breach of the rights of [S] and her child to respect for their private and family life". An urgent application was made to Johnson J the same day. He directed the matter to be listed before me, as a judge of the Family Division who is also a nominated judge of the Administrative Court, on 22 November 2001.

26 When the case came before me on 22 November 2001 some of the urgency had gone out of the matter because the hospital indicated that it would be prepared to

continue to accommodate S and J until 4 December 2001 and the Secretary of State was willing to allow them to remain there for the time being. On the other hand it quickly became apparent that, whatever the outcome of the dispute between S and the Secretary of State as to what was to happen to her and J in the comparatively short period before her release on 27 January 2002, there were a number of continuing welfare issues in relation to both S and J which needed to be addressed as a matter of urgency with the local authority - a different local authority I shall refer to as authority Y - which has responsibility for them under Part III of the Children Act 1989.

27 Accordingly, having accepted an appropriate undertaking from the Secretary of State, I made J (but not S) a ward of court, invited the Official Solicitor to act on his behalf, directed that authority Y be joined as a party to the wardship proceedings and gave further directions with a view to the hearing of the matter before me on 30 November 2001. There having been some doubt as to the appropriate form of the proceedings against the Secretary of State I directed that S was to issue a claim form commencing proceedings in the Administrative Court for judicial review. I directed that the two sets of proceedings were to be heard together on 30 November 2001, on which occasion I would sit simultaneously in the Family Division to hear the wardship proceedings and in the Administrative Court to hear the judicial review proceedings. I indicated that, subject to my being satisfied as to the basis of the claim once I had seen the Form N461 as issued, I would grant S permission to apply for judicial review. The claim form was issued the next day, when I granted S permission to apply for judicial review. I directed that the matter was to proceed in accordance with the directions contained in the order I had made the previous day in the wardship proceedings and that service of the acknowledgement of service and all further documents was to be dispensed with.

28 By the time the matter came on for hearing before me on 30 November 2001 the dispute with the Secretary of State had been resolved. Agreement had been reached that S and J would be able to go together to the secure accommodation and would accordingly be able to stay together until S's release on 27 January 2002. The circumstances reflect great credit on all the agencies involved: authority X, which agreed to provide the secure accommodation, the Department of Heath and the Social Services Inspectorate, which agreed to grant the special licence, the Youth Justice Board, which agreed to provide the necessary funding, and the Secretary of State and the Prison Service, which agreed to the plan. They are all to be thanked and complimented for their humanity, compassion and sense of co-operative responsibility. I hope that S is suitably grateful. In the circumstances I made an order disposing of the judicial review proceedings in the Administrative Court and adjourned for a further hearing in the Family Division in January 2002 the welfare and other issues relating to S, J and authority Y which are likely to arise on S's release from custody.

The issues

29 Put very shortly the following issues arise: (i) In what court should cases such as these be litigated and by reference to what principles? (ii) Do such cases raise issues of public law or of private law? (iii) Should they be brought in the Family Division or in the Administrative Court? (iv) Are they to be determined by reference to the principles adopted by the Family Division when exercising its inherent parens patriae and declaratory jurisdictions or by reference to the principles applied by the Administrative Court in judicial review cases?

Parens patriae and the inherent jurisdiction

30 I turn to consider first the inherent parens patriae jurisdiction in relation to children and those whom the common law referred to in now outdated language as lunatics.

31 The origins, history and ambit of the court's inherent parens patriae jurisdiction in relation to infants (children) and its jurisdiction in relation to wards of court are set out in Ward LJ's judgment in *In re Z (A Minor) (Identification: Restrictions on Publication)* [1997] Fam 1 and need not be repeated here. For present purposes I need make only two points.

32 The first is that the inherent jurisdiction in relation to children is merely one part of a wider duty and obligation of the Crown as parens patriae, a duty as Heilbron J put it in *In re D (A Minor) (Wardship: Sterilisation)* [1976] Fam 185 at p 192H,

> "to protect the person and property of his subjects, and particularly those unable to look after themselves, including infants".

Thus the Crown as parens patriae had powers and duties in relation to both infants and adult lunatics. Under the Tudors and Stuarts jurisdiction in relation to both infants and lunatics was vested in the Court of Wards and Liveries. Following the abolition of that court in 1660 the Crown's power as parens patriae in relation to infants "came back again to the Chancery" (see *Viscount Falkland v Bertie* (1696) 2 Vern 333 at p 342 per Lord Somers LC), since which time it has been exercised successively by the judges of the High Court of Chancery, the judges of the Chancery Division of the High Court of Justice and, since 1971, the judges of the Family Division.

33 The other is that in relation to children the court's inherent jurisdiction is now supplemented, and in terms of normal day to day practice to a very large extent superseded, by the Children Act 1989, a near-comprehensive codification of the law relating to children. For present purposes there are four parts of the 1989 Act to which I should briefly refer. Putting the matter generally, and at some risk of over-simplification, Part II of the Act, entitled 'Orders with respect to children in family proceedings', deals with proceedings in relation to children in whose lives the state is not involved, Part IV, entitled 'Care and Supervision', deals with proceedings in relation to those children whom the state is seeking to take into its care or to supervise, whilst Part III, entitled 'Local Authority support for children

and families', sets out the duties and responsibilities of the state - specifically of local authorities - in respect of children who are in need or who for any other reason are being looked after by a local authority. Part I, entitled 'Introductory', contains one provision to which I should refer. Section 1(1)(a) provides that:

> "When a court determines any question with respect to ... the upbringing of a child ... the child's welfare shall be the court's paramount consideration."

34 Proceedings under Part II, conventionally referred to by family lawyers as private law proceedings, and proceedings under Part IV, conventionally referred to by family lawyers as public law proceedings, take place in family courts, in the High Court in the Family Division. Proceedings under section 25 will normally be dealt with in a family court - see *Re G (Secure Accommodation Order)* [2001] 1 FLR 884 - but otherwise contentious issues arising under Part III typically arise as proceedings by way of judicial review in the Administrative Court: see, for examples taken at random from what is now quite a long line of reported cases, *R v Royal Borough of Kingston-upon-Thames ex p T* [1994] 1 FLR 798, *R v Hammersmith and Fulham LBC ex p D* [1999] 1 FLR 642 and, very recently, *A v London Borough of Lambeth [2001] EWHC Admin 376* [2001] 2 FLR 1201, *[2001] EWCA Civ 1624* [2001] 3 FCR 673.

35 The position in relation to lunatics was quite different. In contrast to their jurisdiction in relation to infants the High Court of Chancery and its successor, the High Court of Justice, have never had parens patriae jurisdiction in relation to lunatics or other incompetent adults: see *ex p Lund* (1802) 6 Ves 781, *Beall v Smith* (1873) LR 9 Ch App 85 and *In re B (An Alleged Lunatic)* [1892] 1 Ch 459. Following the Restoration the Crown's power as parens patriae in relation to lunatics was assigned by Letters Patent under the Great Seal (latterly by Warrant under the Sign Manual) to specific individuals: at first to the Lord Chancellor, then from 1851 to the Lord Chancellor and the Lords Justices in Chancery, from 1875 to the Lord Chancellor, the Master of the Rolls and the Lords Justices of Appeal and finally, by Warrant dated 10 April 1956, to the Lord Chancellor and the judges for the time being of the Chancery Division. The same persons also exercised statutory jurisdiction under the Lunacy Acts of 1852-1890. It was the revocation of the Warrant in 1960, upon the coming into force of the Mental Health Act 1959, which created the lacuna the serious implications of which first became so apparent in *T v T* [1988] Fam 52 and *In re F (Adult Patient: Sterilisation)* [1990] 2 AC 1 and which has since produced so many judicial calls, as yet unheeded, for remedial action by the Legislature.

36 Jurisdiction over the affairs of those unable to manage their property and affairs is vested in the Court of Protection under the Mental Health Act 1983 (the successor of the Act of 1959) but as is well known that Court does not have jurisdiction over the *person* of an incompetent adult. Nor does the parent or other relative of an incompetent adult have any authority, qua relative, to take decisions on behalf of the patient: see *In re T (Adult: Refusal of Treatment)* [1993] Fam 95

at p 103B. Indeed, the limited extent of the parental 'right' in relation to an incompetent adult is emphasised by Butler-Sloss LJ in *Re D-R (Adult: Contact)* [1999] 1 FLR 1161 at p 1165E:

> "The starting-point must be that L is an adult, but an adult under a disability. If she were competent there would be no question of enforcing a relationship between her and her father. He would have a right to a relationship as far as she consented to it and no further. Since L is under a disability and is not in a position to consent, following the principles set out in the *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1 line of cases, it becomes a question of - is it in her best interests to have contact with her father? If there was no conflict between the members of the family, it would be natural and desirable for L to have the love and support of those members of her family willing to give that to her. In the case where there is conflict, the best interests of an incompetent adult require the court to look at all the circumstances, which include the history and former relationship of the father and daughter, the current situation and the prospects for the future. There is, in my judgment, no presumption of the right to contact between a parent and an adult child, even one under a disability. But the relationship of father and daughter is clearly a relevant factor and may, in some cases, be a most important factor. That relationship must be weighed in the balance together with all the other relevant circumstances of each individual case."

37 It was to fill this lacuna that in *In re F (Adult Patient)* the House of Lords held that the High Court had inherent jurisdiction (see per Lord Brandon of Oakbrook at pp 63F, 65H), and not merely jurisdiction under RSC Order 15 rule 16, to make declarations in relation to the treatment of incompetent adults. The President's *Practice Direction (Declaratory Proceedings concerning Incapacitated Adults: Medical and Welfare Decisions)* issued on 14 December 2001 recognises that although proceedings which invoke the jurisdiction of the High Court to grant declarations as to the best interests of incapacitated adults are not assigned to any Division they are, having regard to their nature and the issues raised within them, more suitable for hearing in the Family Division. The *Practice Direction* accordingly provides that such proceedings should be commenced in the Family Division and will be determined by a Judge of that Division.

38 In the twelve years and more that have passed since the House of Lords gave judgment in *In re F (Adult Patient)* the jurisdiction has developed in many important respects. For present purposes the most significant milestones along the way have probably been *Re C (Mental Patient: Contact)* [1993] 1 FLR 940, *In re S (Hospital Patient: Court's Jurisdiction)* [1995] Fam 26, [1996] Fam 1, *Re D-R (Adult: Contact)* [1999] 1 FLR 1161, *In re S (Adult Patient: Sterilisation)* [2001] Fam 15 and *In re F (Adult: Court's Jurisdiction)* [2001] Fam 38. I have little doubt that this wholesome and entirely beneficial jurisdiction will continue to develop at least until such time as the Legislature sees fit to intervene. Now is not the time and this is not the place to attempt what would in any event be almost an

impossibility, namely a comprehensive statement of all aspects of this novel and still developing jurisdiction. What, however, I can usefully do is to draw attention to those aspects of the jurisdiction, clearly established as in my judgment they are by previous authorities, which are of particular importance in the present context.

39 The jurisdiction is *not* confined to questions concerning a patient's surgical, medical or nursing treatment. Drawing in particular on Lord Goff of Chieveley's observations in *In re F (Adult Patient)* at pp 72B, 76E and 76G, it has become recognised that the "treatment" and "care" which the court can regulate extends to all that conduces to the incompetent adult's welfare and happiness, including companionship and his domestic and social environment. As Sir Thomas Bingham MR said in *In re S (Hospital Patient: Court's Jurisdiction)* [1996] Fam 1 at p 18D:

> "[I]n cases of controversy ... the courts have treated as justiciable any genuine question as to what the best interests of a patient require or justify."

Or, as Hale J said in *In re S (Hospital Patient: Foreign Curator)* [1996] Fam 23 at p 30E:

> "[T]his court undoubtedly has jurisdiction to decide upon the legality of any proposed action in relation to the care of S".

40 So it is now clearly established that the jurisdiction can be invoked to determine where an incompetent adult shall live, who he should see and the circumstances of such contact, in other words to determine all those issues which prior to the 1989 Act would in relation to children have been subsumed under the terms custody, care and control or access (in modern jargon residence and contact). Examples of this aspect of the jurisdiction are to be found in *Re C (Mental Patient)*, *Cambridgeshire County Council v R (An Adult)* [1995] 1 FLR 50, *In re S (Hospital Patient: Court's Jurisdiction)*, *In re S (Hospital Patient: Foreign Curator)*, *Re D-R* and *In re F (Adult)*. As Dame Elizabeth Butler-Sloss P said in the latter case at p 50C:

> "A declaration is, in many ways, a flexible remedy able to meet a variety of situations. In the present conflict, where serious question marks hang over the future care of T if returned to her mother, there is no practicable alternative to the intervention of the court. ... If ... declarations are required which determine where T should live, there is nothing in principle to inhibit a declaration that it was in her best interests that she should live in a local authority home and should not live anywhere else; nor, while she was in the home, to regulate the arrangements for her care and as to with whom she might have contact."

41 Because the 1983 Act is not an exhaustive statutory code, and in particular because it does not cover the day-to-day affairs of the incompetent adult, the

declaratory jurisdiction of the High Court is not excluded by, and may properly be invoked side by side with, the statutory regime: *In re F (Adult)* esp at pp 48F, 49C.

42 The jurisdiction can be invoked by anyone whose past or present relationship with the incompetent adult, whether formal or informal, gives him a genuine and legitimate interest in obtaining a decision, in contrast to being a stranger or an officious busybody: *In re S (Hospital Patient: Court's Jurisdiction)*. Thus proceedings can be brought by a local authority. Examples of such applications are those in *Cambridgeshire County Council v R* and *In re F (Adult)*.

43 It is now recognised that the jurisdiction is exercised solely by reference to the incompetent adult's best interests, and that this involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, emotional and welfare considerations: *Re A (Male Sterilisation)* [2000] 1 FLR 549 and *In re S (Adult Patient)*. As Thorpe LJ said in the latter case at p 30E:

> "In deciding what is best for the disabled patient the judge must have regard to the patient's welfare as the paramount consideration. That embraces issues far wider than the medical. Indeed it would be undesirable and probably impossible to set bounds to what is relevant to a welfare determination."

Evaluation of the patient's best interests will often be assisted by the preparation of a balance sheet of the kind suggested by Thorpe LJ in *Re A* at p 560F, listing the advantages and disadvantages for the patient of what is proposed.

44 The jurisdiction extends not merely to declaratory relief but also to the grant of injunctive relief - at least interlocutory injunctive relief to preserve or regulate the status quo: *In re S (Hospital Patient: Court's Jurisdiction)* [1995] Fam 26 at pp 35F-36F.

45 For most practical purposes the declaratory jurisdiction in relation to incompetent adults is the same as that of a court exercising the parens patriae jurisdiction. This view, which had been foreshadowed by Sir Stephen Brown P in *Re G (Adult Patient: Publicity)* [1995] 2 FLR 528 at p 530C, was put very plainly by Thorpe LJ (with whom both Dame Elizabeth Butler-Sloss P and Mance LJ agreed) in *In re S* when he said at p 29H:

> "It seems to me to be a distinction without a difference, by which I mean that the parens patriae jurisdiction is only the term of art for the wardship jurisdiction which is alternatively described as the inherent jurisdiction. That which is patrimonial is that which is inherited from the ancestral past. It therefore follows that whilst the decision in *In re F* signposted the inadvertent loss of the parens patriae jurisdiction in relation to incompetent adults, the alternative jurisdiction which it established, the declaratory

> decree, was to be exercised upon the same basis, namely that relief would be granted if the welfare of the patient required it and equally refused if the welfare of the patient did not."

Hale LJ said very much the same in *R (Wilkinson) v The Responsible Medical Officer Broadmoor Hospital [2001] EWCA Civ 1545* at para [64]:

> "This jurisdiction has now developed beyond the simple declaration of what will or will not be lawful into something akin to the wardship jurisdiction relating to children".

46 There may be grounds for asserting that, allowing for the difference in the subject matter, for the incompetent adult is not, of course, a child, the declaratory jurisdiction in relation to incompetent adults is no less wide than the parens patriae and wardship jurisdiction in relation to children, though there are obvious difficulties with that view: see Thorpe LJ's words of caution in *In re F (Adult)* at p 54B. Let it be assumed, however, for present purposes that the jurisdiction is that wide, though I would certainly not be prepared to decide the point without considerable further argument. But be that as it may, what in my judgment is quite clear is that, however wide it may or may not extend, the declaratory jurisdiction in relation to incompetent adults can extend no further than the parens patriae jurisdiction in relation to children. Putting the same point somewhat differently, the declaratory jurisdiction must at the very least be subject to the same inherent limitations and restrictions as the parens patriae jurisdiction. To those limitations and restrictions I accordingly turn.

The inherent jurisdiction - limitations and restrictions

47 The judges of the Family Division are very familiar with the boundaries between private law and public law and conscious of the need for a judge not to stray beyond the proper limits of his jurisdiction. There are well recognised limits to the proper exercise of the inherent parens patriae and wardship jurisdictions. As Ward LJ said in *In re Z* at p 19A:

> "The wardship or inherent jurisdiction of the court to cast its cloak of protection over minors whose interests are at risk of harm is unlimited in theory though in practice the judges who exercise the jurisdiction have created classes of cases in which the court will not exercise its powers. An obvious class is where Parliament has entrusted the exercise of competing discretion to another, for example (a) the local authority as in *A v Liverpool City Council* [1982] AC 363; (b) the immigration authorities as in *In re Mohamed Arif (An Infant)* [1968] Ch 643 and *In re A (A Minor) (Wardship: Immigration)* [1992] 1 FLR 427; (c) another court of competent jurisdiction as in *In re R (Wardship: Restrictions on Publication)* [1994] Fam 254."

48 Earlier at p 17D Ward LJ had said:

> "The distinction became well established by *A v Liverpool City Council* [1982] AC 363 deciding that, while the prerogative jurisdiction of the court in wardship cases remained, the exercise of that jurisdiction was to be treated as circumscribed by the existence of the far-ranging statutory code which entrusted the care and control of deprived children to the local authorities as a result of which the undoubted wardship jurisdiction was not exercised so as to interfere with the day to day administration by local authorities of their statutory control."

49 It is for this reason that the court will not (indeed in my judgment cannot properly) exercise the wardship jurisdiction so as to interfere with the statutory duties of education authorities: *In re B (Infants)* [1962] Ch 201 and *In re D (A Minor)* [1987] 1 WLR 1400 (the latter an important case to which I must return in due course). Nor so as to interfere with the statutory duties of an adoption agency: *In re W (A Minor) (Adoption Agency: Wardship)* [1990] Fam 156.

50 It flows from this that, as Lord Denning MR said in *In re F (orse A) (A Minor) (Publication of Information)* [1977] Fam 58 at p 86D:

> "The existence of wardship does not give the ward a privilege over and above other young people who are not wards".

Or, as Millett LJ said in *In re R (Wardship: Restrictions on Publication)* [1994] Fam 254 at p 271D:

> "the wardship court has no power to exempt its ward from the general law, or to obtain for its ward rights and privileges not generally available to children who are not wards of court".

51 Stark illustrations of the Family Division's limited powers are to be found in cases where a particular child's need for medical treatment comes into conflict with other and competing demands on a health authority's limited resources. Taking the view that it is for health authorities and not for the court to prioritise or allocate scarce medical resources, the Family Division declines to exercise its jurisdiction so as to give the child - even if the child is a ward of court - a prior call on limited resources. The point was very clearly put by Lord Donaldson of Lymington MR in *In re J (A Minor) (Wardship: Medical Treatment)* [1991] Fam 33 at p 41H:

> "mention should be made of one problem to the solution of which neither court nor parents can make any contribution. In an imperfect world resources will always be limited and on occasion agonising choices will have to be made in allocating those resources to particular patients. It is outwith the scope of this judgment to give any guidance as to the considerations which should determine such an allocation, save to say that the fact that the child is or is not a ward of court is a total irrelevance."

52 Lord Donaldson said much the same thing in *In re J (A Minor) (Child in Care:*

Medical Treatment) [1993] Fam 15 when he referred at p 28A to

> "the sad fact of life that health authorities may on occasion find that they have too few resources, either human or material or both, to treat all the patients whom they would like to treat in the way in which they would like to treat them. It is then *their* duty to make choices." [emphasis added]

The reason why such decisions must be for the health authorities and not the Family Division was explained in the same case by Leggatt LJ when he commented at p 31C that otherwise a health authority

> "would be obliged to accord to this baby a priority over other patients to whom the health authority owes the same duties, but about whose interests the court is ignorant."

53 There should be nothing surprising about any of this. It is clear that the court exercising its powers under the inherent jurisdiction cannot compel an unwilling private organisation or other outside party to provide a ward of court with education: *Re C (A Minor) (Wardship: Jurisdiction)* [1991] 2 FLR 168 (independent school refusing to admit ward of court). The position must be the same in relation to the provision of other services or facilities, for example accommodation. In my judgment the court exercising its private law powers under the inherent jurisdiction can no more compel an unwilling *public authority* than it can a *private* organisation or other outside party to provide care and attention to a child (even if the child is a ward of court) or to an incompetent adult. If it is to be said that a public authority is in some different position because it is a *public* authority then the answer in principle must surely be that this raises matters of public law to be determined, if not in public law proceedings, then at the very least by reference to the principles of substantive public law.

A v Liverpool City Council

54 It is worthwhile to dwell for a moment on precisely what it was the House of Lords decided in *A v Liverpool City Council*. The issue was revisited by the House in *In re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791, where members of the wider family of a child in the care of a local authority pursuant to section 1 of the Children and Young Persons Act 1969 sought to invoke the wardship jurisdiction so as to prevent the local authority placing the child for adoption outside the family. The House held that the inherent jurisdiction could not be invoked to remedy the inability of the relatives to challenge the exercise of a discretion which had been entrusted by Parliament to the local authority under a statutory code which did not admit of judicial supervision or review of the merits of the local authority's decisions as to the future of the child made under that statutory framework.

55 Referring to *A v Liverpool City Council*, Lord Scarman at p 795F said:

> "Authoritative speeches were delivered by Lord Wilberforce and Lord Roskill which it was reasonable to hope would put an end to attempts to use the wardship jurisdiction so as to secure a review by the High Court upon the merits of decisions taken by local authorities pursuant to the duties and powers imposed and conferred upon them by the statutory code."

At p 797C he said:

> "The High Court cannot exercise its powers, however wide they may be, so as to intervene on the merits in an area of concern entrusted by Parliament to another public authority. It matters not that the chosen public authority is one which acts administratively whereas the court, if seized by the same matter, would act judicially. If Parliament in an area of concern defined by statute (the area in this case being the care of children in need or trouble) prefers power to be exercised administratively instead of judicially, so be it. The courts must be careful in that area to avoid assuming a supervisory role or reviewing power over the merits of decisions taken administratively by the selected public authority."

56 The rule in *A v Liverpool City Council* does not of course mean that the court is powerless to act. In the first place it is important to note Lord Scarman's reference to the *merits* of the local authority's decision. He was not of course disputing the High Court's power of judicial review under RSC Order 53 (now CPR Part 54) when exercised by what is now the Administrative Court: he was disputing the High Court's powers when exercising in the Family Division the parens patriae or wardship jurisdictions. This is made clear by what he said at p 795H:

> "The ground of decision in *A v Liverpool City Council* [1982] AC 363 was nothing to do with judicial discretion but was an application in this field of the profoundly important rule that where Parliament has by statute entrusted to a public authority an administrative power subject to safeguards which, however, contain no provision that the High Court is to be required to review the merits of decisions taken pursuant to the power, the High Court has no right to intervene. If there is abuse of the power, there can of course be judicial review pursuant to RSC Ord 53: but no abuse of power has been, or could be, suggested in this case. The whole object of the appellants in instituting wardship proceedings in respect of the child in this case was to secure that the High Court would be in a position to review the decisions of the local authority on the merits of the case."

57 Moreover, as Woolf LJ pointed out in *In re D*, even the wardship court is not altogether powerless to act. In that case the Court of Appeal was concerned with a child whose special educational needs brought into play the local education authority's statutory powers and responsibilities under what Woolf LJ at p 1410D described as the "self-contained code" in the Education Act 1981, including in

particular its duty under section 5(1) to assess the child's educational needs and, depending upon the outcome of the assessment, its duty under section 7(1) to make a statement of the child's special educational needs. Summarising the effect of *A v Liverpool City Council* and *In re W* he said at p 1413D:

> "The true position is that the [wardship] jurisdiction remains but that the court must limit the exercise of its jurisdiction so as to avoid coming into conflict with the exercise by the local authority of its statutory powers and duties. As Pearson LJ said in *In re B (Infants)* [1962] Ch 201, 223:
>
> > "the effect of such an Act may be - not, I think, if one speaks accurately, to restrict the jurisdiction - but to restrict the scope of the proper exercise of the jurisdiction."
>
> Furthermore, notwithstanding the statutory code, there is no reason whatever why the court should refrain from exercising its jurisdiction when it is desirable for it to do so in order to assist a local education authority to perform its statutory duties. It is only if the effect of exercising its powers would be to create a conflict between the role of the court and the role of the education authority, or the risk of such conflict, that the court should decline to intervene."

58 Previously, in *Re S (Minors) (Wardship: Education)* [1988] 1 FLR 128 at p 129G, Waite J had said that:

> "Once wards of court, these children are 'in for a penny, in for a pound', and I hold that I have just as full and unfettered a jurisdiction to decide their educational future - notwithstanding the statutory code - as I have to determine any other step that requires to be taken in their lives with the appropriate authority of the court whose wards they remain."

Saying that Waite J had gone "clearly too far", Woolf LJ continued at p 1417A:

> "The court in wardship proceedings cannot prevent the local education authority from exercising its statutory jurisdiction if it decides to do so. But in this case no conflict or other difficulty arises. The wardship proceedings supplemented any powers which the local authority wanted to exercise but did not purport to oust such powers or their exercise. This is demonstrated by the fact that the local authority is now carrying out its own educational assessment."

Judicial review

59 I turn to consider judicial review, the modern name for a jurisdiction which originated in the inherent jurisdiction of the Court of King's Bench to control the (mis)exercise of jurisdiction by inferior tribunals and other bodies, whether judicial or administrative.

60 The development of this jurisdiction into the wide-ranging jurisdiction by way of judicial review, initially under RSC Order 53 and now under CPR Part 54, in the form in which we know it to-day is traced in the judgment of Lord Denning MR and the speech of Lord Diplock in *O 'Reilly v Mackman* [1983] 2 AC 237. Central to the analyses of both Lord Denning and Lord Diplock was the recognition of the emergence in modern law of the crucial distinction between public law and private law, neatly epitomised by Lord Denning MR at p 255B:

> "Private law regulates the affairs of subjects as between themselves. Public law regulates the affairs of subjects vis-a-vis public authorities."

The distinction between public law and private law is important for at least two reasons, one substantive, the other procedural.

Judicial review - substantive law

61 So far as concerns the substantive law the classic analysis is that of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at p 410C:

> "Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community".

62 I need not for present purposes refer further to what Lord Diplock had to say about "illegality" and "procedural impropriety". So far as concerns "irrationality" he said this at p 410F:

> "By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in his defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

63 As foreseen by Lord Diplock the test of "irrationality" has indeed been modified. The most recent authoritative statement of principle is that of Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at p 547A (paras [27]-[28]):

> "The contours of the principle of proportionality are familiar. In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 the Privy Council adopted a three-stage test. Lord Clyde observed, at p 80, that in determining whether a limitation (by an act, rule or decision) is arbitrary or excessive the court should ask itself:
>
> > "whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."
>
> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality. Most cases would be decided in the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach. ... First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights. ... [T]he intensity of the review ... is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review. On the contrary ... the respective roles of judges and administrators are fundamentally distinct and will remain so. ... Laws LJ rightly emphasised ... "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything."

64 *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital* shows that there can be cases where the "context" is such as to require what Simon Brown LJ at para [36] called "a full merits review" even on an application for judicial review. The context in *Wilkinson* was a detained patient's objection to the forcible injection of anti-psychotic drugs administered whilst he was under physical

restraint. He sought judicial review of the doctors' treatment decisions and an injunction to prevent further treatment without his consent. The Court of Appeal allowed his interlocutory appeal against the judge's refusal to order the doctors to attend the substantive judicial review hearing for cross-examination upon their witness statements. The basis of the Court of Appeal's decision was that the issue before the Administrative Court, which potentially engaged the patient's rights under Articles 2, 3 and 8 of the Convention, was precisely the same as that which would have arisen had the patient brought an action in tort for assault and that accordingly what was required was the same full investigation of the facts, including cross-examination of witnesses, as would have been appropriate had the proceedings in fact been brought in tort: see in particular Simon Brown LJ at paras [24]-[27], Brooke LJ at para [53] and Hale LJ at paras [56], [59], [62], [83]. As Hale LJ said at para [62]:

> "It cannot and should not matter whether proceedings in respect of forcible treatment of detained patients are brought by way of an ordinary action in tort, an action under section 7(1) of the 1998 Act, or judicial review. If there are relevant disputed issues of fact these will have to be determined, by cross examination if necessary."

Judicial review - procedure

65 So far as concerns procedural law the House of Lords in *O'Reilly v Mackman* held that, as Lord Diplock put it at p 285D:

> "it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

That of course was a reference to the fact that RSC Order 53 provided, as CPR Part 54 provides, to use the current terminology, (i) that an applicant for judicial review can proceed only if he first obtains the permission of a nominated judge of the Administrative Court (CPR 54.4) and (ii) that any application for judicial review must be filed "promptly and in any event not later than 3 months after the grounds to make the claim first arose" (CPR 54.5(1)).

66 In *Cocks v Thanet District Council* [1983] 2 AC 286, decided at the same time as *O'Reilly v Mackman*, the House of Lords held that where private law rights depend on prior public law decisions they too must ordinarily be litigated by judicial review.

67 The precise scope of the rule in *O'Reilly v Mackman* is still a matter of debate: see for example *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624, *Mercury Communications Ltd v Director General*

of Telecommunications [1996] 1 WLR 48, *Trustees of the Dennis Rye Pension Fund v Sheffield City Council* [1998] 1 WLR 840 and *Clark v University of Lincolnshire and Humberside* [2000] 1 WLR 1988. But what in my judgment is clear is that the ground has shifted considerably since *O'Reilly v Mackman* was decided in 1982. The court today adopts an approach displaying more flexibility (the word used by Lord Slynn of Hadley in *Mercury* at p 57D) and which is more pragmatic (the word used by Lord Woolf MR in *Dennis Rye* at p 849D) than would probably have appealed to Lord Diplock, and this so as the better to stop what Lord Woolf MR in *Dennis Rye* at p 848A described as "this constant unprofitable litigation over the divide between public and private law proceedings". This wholly desirable flexibility is now facilitated by CPR 54.20 and CPR 30.5.

68 In *Dennis Rye* Lord Woolf said at p 848F:

> "In the majority of cases it should not be necessary *for purely procedural reasons* to become involved in arid arguments as to whether the issues are correctly treated as involving public or private law or both. (For reasons of substantive law it may be necessary to consider this issue.)" [emphasis in the original]

At p 849D he added that the pragmatic suggestions he had made

> "involve not only considering the technical questions of the distinctions between public and private rights and bodies but also looking at the practical consequences of the choice of procedure which has been made. If the choice has no significant disadvantages for the parties, the public or the court, then it should not normally be regarded as constituting an abuse. Here it is important to remember that there does not have to be an application to strike out even if it is considered that the wrong procedure has been adopted. *Often the interests of justice and the parties will be better served by getting on with the action.*" [emphasis added]

69 Even Lord Diplock had recognised that there might be an overlap in the particular case between private law and public law, for in *O'Reilly v Mackman* he continued immediately after the passage I set out above by saying:

> "I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis".

70 I finish with a reference to what Sedley LJ said in *Clark* at p 1993F (para [16]):

> "[I]n *Roy v Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 AC 624 their Lordships made it clear that it was not necessarily an abuse of process to elect to sue in contract for statutory payments where the public law element was not dominant. The present class of case is if anything stronger from this point of view than *Roy's* case, for where in *Roy's* case a statutory relationship happened to include a contractual element, here it is a contractual relationship which happens to possess a public law dimension. Both are a long way from the situation in *Cocks v Thanet District Council* [1983] 2 AC 286."

Jurisdictional overlap - the Family Division and the Administrative Court

71 Before leaving these jurisdictional issues there is one final and very important point to be made.

72 There will, of course, be cases which, although they concern the welfare of either children or incompetent adults, plainly involve only issues of public law and are thus properly litigated, if at all, by way of an application in the Administrative Court for judicial review. I have already given examples in para [34] above. But there are many cases which, even if in part they may involve some issue of public law, are also private law cases about the best interests of either a child or an incompetent adult. In what court and by what procedure are such cases to be litigated? The courts have consistently said, and I agree, that such cases are to be litigated in the Family Division and before judges of that Division. This approach, I might add, is entirely consistent with the President's recent *Practice Direction* to which I referred in para [37] above.

73 An early example of this approach, and, if I may say so, one replete with useful guidance, can be found in the wardship context in Woolf LJ's judgment in *In re D* at p 1419D:

> "As we have stated, it is now clearly established that the court will not use its jurisdiction in wardship to review the acts and decisions of local authorities either in relation to their powers and duties with regard to children committed to their care or in respect of decisions exercising their statutory powers as the relevant educational authority. But it can also be seen from this judgment that some of the issues raised by the father were in fact appropriate for consideration by judicial review.
>
> Where a situation arises where both wardship and judicial review proceedings may be appropriate, it is most important that steps are taken to ensure that the proceedings are heard together so far as possible. Although applications for judicial review are normally heard by a judge of the Queen's Bench Division and wardship proceedings by a judge of the Family Division, in appropriate cases arrangements can be, and are, made

> for the judicial review proceedings to come before a judge of the Family Division. So long as the application for leave to apply for judicial review is made promptly, it should be perfectly practical for the wardship application and the judicial review application to be listed before the same judge on the same day. Because wardship proceedings are in chambers and judicial review proceedings are normally in open court, they may not be able to be actually heard at the same time. However, if they are listed in this way they can be heard in the appropriate order one after the other. In this way the danger of conflict can be avoided and the length of the hearing substantially curtailed by the elimination of duplication of the evidence and argument.
>
> Even if it is not appreciated at the outset of the wardship proceedings that an application for judicial review is necessary, it is always possible by abridging time and dispensing with service in practice for the judicial review proceedings to be accelerated so as to avoid the necessity of the hearing of the two proceedings being separated or the wardship proceedings being delayed. While it is important to maintain the protection of public bodies provided by the requirements of proceedings under RSC Ord 53, those requirements need not, and should not, be allowed to interfere with the interests of justice, particularly in cases involving the welfare of children. With the co-operation of the court and the parties, the procedural requirements should not cause problems in practice.
>
> In this case the judicial review proceedings are now regrettably quite separate from the wardship proceedings."

Very similar observations have recently been made in relation to the overlap between proceedings for judicial review in the Administrative Court and charity proceedings in the Chancery Division by Stanley Burnton J in *R (Heather and Ors) v The Leonard Cheshire Foundation and HM Attorney General [2001] EWHC Admin 429* at para [103].

74 The same approach is to be found very clearly stated in *R v Portsmouth Hospitals NHS Trust ex p Glass* (1999) 50 BMLR 269, [1999] 2 FLR 905, where there was a dispute between a NHS trust and a child's parents as to what form of medical treatment was appropriate. The parents commenced proceedings for judicial review in the Administrative Court. Dismissing the application in limine Scott Baker J commented, (1999) 50 BMLR 269 at p 273, that

> "Contested factual evidence is usually an unsatisfactory basis for a judicial review application."

He continued at pp 274-275:

> "Neither the trust nor the applicant (David's mother) made an application to the court for what is known in shorthand as a 'best interests'

> declaration. Had they done so, no doubt the Official Solicitor would have represented the child and the difficult issues apparently raised by this case would have been considered and decided in relation to clearly established facts. One advantage of that course would have been that there would have been evidence before the court showing the advantages and disadvantages of the relevant medical procedures, and, in the event of dispute, the court could have had the advantage of an independent expert or experts instructed by the Official Solicitor. ... It is, in my judgment, regrettable (and the Official Solicitor tells me through counsel that he takes the same view) that neither side referred the case to the Family Division, which customarily hears such applications".

He concluded at p 277 by observing that "judicial review is too blunt a tool for the sensitive and ongoing problems of the type thrown up in the present case".

75 The Court of Appeal agreed, Lord Woolf MR saying this, [1999] 2 FLR 905 at p 909G:

> "In that judgment the judge indicated that he did not think judicial review was a satisfactory procedure to adopt. Judicial review is always regarded as the procedure of last resort. In the Family Division there are orders which can be made which deal specifically with situations such as the one which was before the judge:
>
> (i) It is possible for the Family Division to deal with what is called a specific issue under s 8 of the Children Act.
>
> (ii) It can make a declaration in the best interest of the child under the procedure referred to by the judge.
>
> (iii) It can make a child a ward of court.
>
> There are advantages and disadvantages to each of those procedures. There are advantages in making applications for judicial review. I would emphasise that, particularly in regard to cases involving children, the last thing that the court should be concerned about is whether the right procedure has been used in the particular case. The court always has sufficient powers to make sure that if a party adopts the proactive course then the right course can still be pursued and, if necessary, a judge from one Division can sit in the other Division to see that the matter is dealt with. The important concern of the court is to ensure that what is in the best interests of the child is determined, so far as the court is able to do so, on the material which is before it.
>
> In doing that, as in this case, the court often has the advantage of the great experience of the Official Solicitor. No doubt the judge was, and indeed this court is, grateful to the Official Solicitor for the skeleton argument

> which he has prepared on this application. That skeleton points out that there could be advantages in making David a ward of court."

76 In *Re F (Mental Health Act: Guardianship)* [2000] 1 FLR 192 the Court of Appeal held that wardship proceedings were a more appropriate remedy than an application for guardianship under section 7 of the 1983 Act, the latter being described by Thorpe LJ at p 199G as "not a child-centred jurisdiction". The advantages of Family Division procedure (in that case procedure under the declaratory jurisdiction) were also emphasised in the subsequent proceedings in the same litigation, commenced after the child had become an adult: *In re F (Adult)* at pp 46G-47C, 50C-F. A similar approach in relation to proceedings involving an incompetent adult had earlier been adopted in *Re R (Adult: Medical Treatment)* [1996] 2 FLR 99 (see at p 104D et seqq).

77 Next I should refer to the recent judgment of Collins J in *R (Payne) v Surrey Oakland NHS Trust [2001] EWHC Admin 461* where, dismissing an application for judicial review brought on behalf of an incompetent adult, he said (para [10]):

> "The reason why this application must fail and must be dismissed is because this is clearly the wrong forum to litigate, if litigation be considered necessary, any of the issues surrounding the proper course to be taken for the claimant."

78 He continued (paras [11]-[13]):

> "The High Court, through the Family Division, has jurisdiction to make declarations as to the best interests of an adult who lacks decision-making capacity. The court will exercise that jurisdiction if there is a serious issue which requires a court decision. If there is a real dispute as to the welfare of a patient and relatives take the view and, as I say, there is material to support the view that what is being proposed is not in the best interests of a patient then any proceedings that relate to that should, in my view, be taken through the Family Division. As I have said the Administrative Court, through judicial review, does not normally concern itself with issues of fact. It does not normally hear evidence and it concerns itself only with whether there have been errors of law.
>
> So far as the claimant is concerned it is perfectly obvious that the real issue is what is in her best interest having regard to the closure [of the home in which she is living] and that is a matter which ought, if it needs to be litigated, to be dealt with through the Family Division with the interests of the patient being looked after by the Official Solicitor. Indeed there is a practice note which has been drawn to my attention dated 1st May 2001 issued by the Official Solicitor which concerns itself with such issues.
>
> Mr Westgate submits that the existence of the parallel jurisdiction, as it were, does not in any way remove the jurisdiction of the Administrative

> Court. That of course is correct but, as has been made clear in many decisions, judicial review is a remedy of last resort and it is only if there is no appropriate alternative remedy that it is normally right to seek judicial review. Here not only is there an alternative remedy but it is a much better remedy because it will consider thoroughly the best interests of the patient if, as I say, any real issue in the end arises as to what are her best interests."

Collins J concluded (para [14]):

> "these proceedings ought not to have been brought in the Administrative Court at all".

79 Finally on this point I refer to *R (P) v Secretary of State for the Home Department [2001] EWCA Civ 1151* [2001] 1 WLR 2002, where the Court of Appeal had to consider the situation of those who find themselves in the same position as S and J. It is, however, the concluding comments at the very end of the judgment that are of particular importance in this context. The court said at p 2036F (paras [118]-[120]):

> "We hope that arrangements may be made by the authorities in the Administrative Court, in consultation with the President of the Family Division, to ensure that Family Division judges are able to assist in the work of the Divisional Court, or to sit as single judges, in judicial review cases which have a strong family law element. The number of such cases is bound to increase, as more and more challenges are brought under article 8 of the Convention.
>
> On the other hand, if any further challenges of this kind are made, they are likely to be challenges not so much to the lawfulness of the Prison Service's policy itself as to the application of that policy ... in an individual case. As we have already made clear, such challenges will have little prospect of success unless brought on behalf of a child whose welfare is seriously at risk from the separation. The child should therefore be separately represented in the proceedings, preferably by the Official Solicitor or by the Children and Family Court Advisory and Support Service.
>
> There is no reason why a challenge of that kind may not be brought in the Family Division by way of a claim that the Prison Service has acted or proposes to act in a way which is made unlawful by section 6(1) of the Human Rights Act 1998. Although the assessment of the merits of such a challenge must inevitably take into account policy considerations ... there is no statutory provision, rule or practice direction which requires such challenges to be brought in the Administrative Court, and the Family Division is the venue of preference for such cases. Needless to say, if relief is sought which is only available from the Administrative Court in CPR Pt

> 54 proceedings, that procedure must be followed, but in any event it is desirable that the challenge should be heard by a judge of the Family Division."

These comments are particularly significant given that in one of the cases which the Court of Appeal was considering the proceedings had first been brought in the Family Division, where they had been dismissed on the grounds that judicial review was the appropriate form of proceedings: see at p 2017B (para [41]).

Substance and procedure

80 Before leaving these authorities there is one observation I should add. As we have seen, there are many judgments indicating why it is desirable that certain types of cases, notwithstanding that they involve public authorities, should be tried not merely by a judge of the Family Division but in proceedings brought for the purpose in the Family Division. This is, of course, entirely consistent with the flexible and pragmatic approach to judicial review recognised in the authorities to which I earlier drew attention: see para [67] above. But there is nothing in any of these authorities to suggest that *procedural* pragmatism can or should affect *substantive* law. This, after all, is a distinction which, as I have already pointed out, Lord Woolf MR was careful to draw in the passage in *Dennis Rye* which I quoted in para [68] above.

81 On the contrary, in *R (P) v Secretary of State for the Home Department*, the very case where the Court of Appeal described the Family Division as the venue of preference for the litigation of a child's claim that the Prison Service has acted in a way made unlawful by section 6(1) of the Human Rights Act 1998, the court was at pains to point out that section 1(1)(a) of the 1989 Act does *not* apply to such a claim and that the child's welfare is accordingly *not* the paramount consideration: see at pp 2029F, 2031D, 2032G (paras [90], [91], [97], [101]). The correct approach, according to the Court of Appeal, is that spelt out in *R (Daly) v Secretary of State for the Home Department*. The consequence, as the Court of Appeal recognised, is that the court is *not* concerned in that type of case to review the merits of the decision: see at pp 2021G, 2022D (paras [60], [64]). In other contexts, of course, as *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital* demonstrates, the intensity of review required by the nature of the human rights interests at stake may be such as to necessitate a full merits review.

A - the contrasting submissions

82 The very able and interesting submissions which have been addressed to me by Mr Beard and Ms Morris stand in stark conflict.

83 For his part, Mr Beard asserts that the decision under challenge in these proceedings is the decision of the local authority and the health authority, in the discharge of their statutory duties, to provide A with a residential care placement at the trust rather than with the care company. He accepts that this decision is

amenable to judicial scrutiny but asserts that it must be tested according to what he calls orthodox judicial review principles. Furthermore, he says, any allegations of breach of the 1998 Act are to be scrutinised by the court applying the principles set out in *R (Daly) v Secretary of State for the Home Department*. On neither basis, he says, is the test that of A's best interests.

84 Mr Beard points out, correctly, that neither of A's parents is able to provide him with permanent accommodation. There has been no suggestion by anyone that there is any better person than the local authority to be caring for A or that A's interests would be better served by *not* accepting care and accommodation from the local authority. He submits that the local authority, having decided in conjunction with the health authority that a placement with the trust is better for A than his placement at the home with the care company, has decided in the exercise of its statutory duties to offer A the placement with the trust. He says that what is now being said on A's behalf by the Official Solicitor is, in effect, that in the discharge of their duties the local authority and the health authority should offer him a different placement. Thus understood, he says, the reality is that the dispute amounts to a challenge by way of judicial review which is to be assessed according to the tests applicable on judicial review and not by reference to A's best interests. He says there is no good authority for the proposition that the decision of the local authority and the health authority can be challenged by way of the declaratory jurisdiction or by reference to a best interests test. He adds the telling comment that were such a challenge possible it is difficult to see why *all* public decisions involving incompetent adults could not also be challenged in this way rather than by way of judicial review.

85 Ms Morris, on the other hand, characterises the dispute as being one between public bodies and relatives as to the best interests of an incapable adult in respect of his residence, there being linked to that dispute certain difficulties between the relatives as to contact. (I should emphasise that neither the local authority nor the health authority has ever sought to restrict A's contact with either of his parents.) She has helpfully enumerated a number of concerns which the Official Solicitor has about A leaving what as she points out has been his home for some 14 years and moving to a placement with the trust which it is suggested may make it more difficult for him to maintain contact with his mother. She says that the issues are essentially factual and require a 'best interests' adjudication having regard inter alia to the expert evidence which, as permitted by Coleridge J's order, the Official Solicitor is in the process of obtaining. A determination confined by orthodox judicial review principles would, she submits, be unduly restrictive, indeed contrary to law and wholly undesirable given the needs and interests of an incapable adult such as A. The issues in the case, she says, are precisely those upon which the Family Division may and should adjudicate. She submits that there should be a consistent and unified approach to the taking of decisions on behalf of incompetent adults, whatever the subject matter of the decision (including decisions about where and with whom to reside) and what or whoever the parties. She submits that the fundamental principle to be applied is that decisions should be taken in the incompetent adult's best interests, and that hitherto there has been

no suggestion that a different test - for instance a *Wednesbury*, a 'super-*Wednesbury*' or a *Daly* test - should be applied when the decision concerned arises out of the exercise by a statutory body of its powers or obligations in relation to an incompetent adult. Indeed, as she points out, many if not most decisions about the provision of care for incompetent adults will arise broadly within a statutory framework as they are usually cared for by public bodies. It would, she says, introduce uncertainty and anomaly into this area of the law if a different test was to apply where one of the parties to the dispute is a local authority.

86 As a separate point, and praying in aid those parts of the Directions and of *LAC(92)27* which I have referred to in paras [12] and [13] above, Ms Morris says that Mr Beard's case is founded on a false dichotomy between the assessment of "need" under section 47 of the 1990 Act and the determination of "best interests" - the two concepts although legally distinct amounting to much the same thing most of the time. She submits that Parliament's intention was that disputes as to what residential care is to be provided to an incompetent adult pursuant to section 21(1) of the 1948 Act should be determined in accordance with his best interests (the phrase used in paragraph 13 of *LAC(92)27*), and that A should be afforded the choice (the word used in paragraph 2 of the Directions) which would be offered to a capable applicant for local authority accommodation. This, she says, can be achieved either (were he able to do so) by A's own expression of a preference or (since he is not) by a judicial determination on his behalf of his best interests.

87 Each of these competing submissions contains, if I may say so, an important element of the truth. Neither, however, provides a full and complete picture. Taken together they suggest that it is in the proper characterisation of the dispute that one will find the solution to the problem.

88 In order to resolve the conundrum one has, I think, to go back to first principles.

Conclusions

89 Consistently with what I have already said, the focus of concern must plainly be on substantive law, not on matters of procedure. The crucial question in the final analysis is not whether the proceedings are better brought by way of judicial review in the Administrative Court or under the inherent jurisdiction in the Family Division, important though that issue is and highly desirable as it is that such proceedings should in fact be brought in the Family Division. Rather the crucial question is what test is to be applied as a matter of substantive law when, as will usually be appropriate, the matter is in fact proceeding in the Family Division rather than in the Administrative Court.

90 To identify the operative rule of substantive law it is not enough in this area of the law merely to identify the problem with which the court is grappling or even to identify the various protagonists. Typically, and herein as it seems to me lies the

key to the present problem, one must also analyse the true nature of the issue or issues before the court.

91 Let me give an example. Suppose that the question is whether or not a child should have potentially life-saving heart surgery. And let us suppose that on this central issue there is a dispute between the child or her parents on the one hand and the NHS hospital providing the treatment on the other. By what test is the dispute to be resolved? Is the determining criterion to be the judge's perception of what is in the child's best interests? Or something else? The answer, in my judgment, is that it all depends on the precise nature of the dispute between the parties and on what precisely it is that the judge is being asked to do.

92 If the NHS hospital *is* willing to provide the treatment, and the only obstacle to the operation going ahead is the refusal of the child or her parents to give the necessary consent, then the matter will be decided by the judge applying the best interests test. Notwithstanding that the NHS hospital is a public authority operating within the statutory framework of the 1977 Act, the dispute contains no public law element. It is one wholly within the realm of private law. It should accordingly be resolved in the Family Division in what can conveniently be called private law proceedings (whether brought under the inherent parens patriae jurisdiction or under Part II of the 1989 Act being neither here nor there) and by reference to the usual Family Division best interests test.

93 If, on the other hand, the NHS hospital is *not* willing to provide the treatment, because of a lack of resources or because it considers that other patients or other forms of treatment ought to have priority, then the matter cannot be decided by a mere application of the best interests test. The dispute is not a private law dispute. It is one within the realms of public law and, it may very well be, human rights law. It must be resolved, whether in the Family Division or in the Administrative Court, and whether in judicial review proceedings or in some other form of proceedings, by reference to public law criteria, in particular the criteria spelt out in *R (Daly) v Secretary of State for the Home Department*. Lest I be misunderstood I should add this: if the matter is one of life and death the intensity of scrutiny demanded in accordance with *Daly* may well be (though I express no concluded view on the point) very high indeed: cf *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital*.

94 Taking heart surgery as an example (there are of course many others) the contrast between the two types of case can conveniently be illustrated by reference to well-known authorities. *R v Central Birmingham Health Authority ex p Walker* (1987) 3 BMLR 32 and *R v Central Birmingham Health Authority ex p Collier* [1988] CAT 88/1 were both cases where proceedings were brought with a view to compelling an under-resourced health authority to carry out heart surgery on seriously ill children: in the one case a premature baby and in the other a 4-year old child whose health was in immediate danger. Appropriately the claims in each case were brought by way of proceedings for judicial review and were judged (necessarily, at a time prior to the coming into force of the 1998 Act) solely by

reference to classic public law criteria: today, of course, they would fall to be determined by reference to the criteria in *R (Daly) v Secretary of State for the Home Department* and, it may be, *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital*. In each case the claim failed notwithstanding that the operation was in the child's best interests. A further example of what is analytically precisely the same type of case, though in fact it involved a health authority's refusal to fund experimental treatment of a 10-year old child suffering from leukaemia, is to be found in the well-known case of Jaymee Bowen: *R v Cambridge Health Authority ex p B* [1995] 1 WLR 898, reversing [1995] 1 FLR 1055. On the other side, and by way of contrast, there is *Re M (Medical Treatment: Consent)* [1999] 2 FLR 1097, where the refusal of a 15-year old girl to consent to the heart transplant which was needed to save her life was overborne by a Family Division judge exercising the inherent parens patriae jurisdiction and applying the best interests test.

95 Now what is the essential difference between the two types of case? Plainly it cannot turn either on the nature of the human or medical problem which has arisen or on the identity of the parties to the dispute, nor even on the fact that one of the parties is, as is almost always so in medical-ethical cases in the Family Division, a public authority operating within a statutory framework. No, the crucial distinction goes to the identity of the decision-maker whose decision is being scrutinised by the judge and, crucially, to what precisely it is that the judge is being asked to do.

96 If the decision which the judge is being asked to review, consider, endorse or overturn, as the case may be, is that of the patient (or her parent) refusing to accept treatment which the health authority or the NHS hospital is willing to provide, then the dispute is a private law dispute which falls properly within the inherent parens patriae jurisdiction and is to be resolved by reference to the best interests test. If, on the other hand, the decision which the judge is being asked to review, consider, endorse or overturn, as the case may be, is that of the public authority exercising its statutory discretion, then the dispute properly falls to be considered by reference to public law principles.

97 Putting the point very shortly, if the task facing the judge is to come to a decision for and on behalf of a child or incompetent adult then the welfare of that person must be the paramount consideration. If the task for the judge is to review the decision of a public authority taken in the exercise of some statutory power then the governing principles are those of public law.

98 This analysis is, as it seems to me, consistent with, and is indeed the only analysis consistent with, the cases referred to in paras [47]-[53] above. It is the only analysis consistent with what Lord Scarman called, and what still remains, the "profoundly important rule" in *A v Liverpool City Council*. It is the only analysis consistent with *R (Daly) v Secretary of State for the Home Department*. And, for reasons already touched upon in para [81] above, it is, as it seems to me, the only analysis consistent with *R (P) v Secretary of State for the Home Department*.

99 In this sense I agree with Mr Beard when he says that the common feature of all the cases decided under the inherent declaratory jurisdiction (and indeed those relating to children decided under the inherent parens patriae jurisdiction or in wardship) is that it is *the decision of the incapable person* upon which the court adjudicates, whereas in the present case, as he would have it, the court is being asked to review *the statutory decision of a public authority*.

100 Ms Morris, says Mr Beard, is confusing judicial surrogate decision-making - the province of the Family Division judge exercising the inherent declaratory or parens patriae jurisdiction - with judicial review of public authority decision-making - the province of the Administrative Court judge exercising jurisdiction by way of judicial review. With the fundamental premiss of Mr Beard's submission, although not with all the conclusions which he seeks to derive from it, I entirely agree.

101 I should add that I can see nothing in the decision of Collins J in *R (Payne) v Surrey Oakland NHS Trust* (in relation to which I have read not merely the judgment but also the claimant's Form N461) or in the decision of Mr David Pannick QC (sitting as a Deputy High Court Judge) in *R (Collins) v Lincolnshire Health Authority [2001] EWHC Admin 685* which is in any way inconsistent with these conclusions.

In re F (Adult)

102 Ms Morris places great reliance on *In re F (Adult)*, where a local authority sought successfully to invoke the court's inherent declaratory jurisdiction to claim a declaration enabling it to direct where an incompetent adult, T, should live and to restrict and supervise her contact with her natural family. She points out, correctly, that the local authority in that case had no statutory powers under the 1983 Act or otherwise to direct where T should live but that it proposed to accommodate her, in a place of its choosing, in exercise of its powers under section 21(1) of the 1948 Act: see at pp 40E, 45C, 47C, 48E. She points out that, as Sedley LJ put it, at p 57C:

> "it should be clearly said now that it is T's welfare which will remain throughout the single issue."

She further observes that the Court of Appeal made clear that for the purposes of the jurisdiction there was no difference in principle between a local authority or other statutory body and an individual: see at pp 46B, 50C. So, she submits, *In re F (Adult)* is authority that the correct test by which to evaluate the local authority's decision in the present case is that of A's best interests.

103 Ms Morris, in my judgment, reads too much into *In re F (Adult)*, a case in which the point which is now in issue simply did not arise for consideration.

104 In order to understand just what *In re F (Adult)* did and did not decide it is, I think, important, to understand what the issue was in that case. In *In re F (Adult)*

the local authority, as I have said, sought to invoke the court's inherent jurisdiction to claim a declaration enabling it to direct where an incompetent adult, T, should live and to restrict and supervise her contact with her natural family. T's mother disputed that the court had any jurisdiction to grant such relief. The argument put forward by her counsel, Mr Richard Gordon QC, as summarised by Dame Elizabeth Butler-Sloss P at pp 44H-45H, was as follows:

> "Mr Gordon agreed that the local authority had the locus standi to bring proceedings but submitted that the court did not have the jurisdiction to make a declarations the effect of which would be coercive and which would require T to live as directed by the local authority, and which also would give the local authority control over whom T met and the circumstances of such contact. ... Mr Gordon submitted that the exercise of the court's jurisdiction to grant declarations was dependent upon the existence of some right on the part of the local authority which in effect wished to invoke an immunity against liability if it detained T in a local authority home, prevented her from returning to live with her mother and regulated her relationship with her natural family. A local authority was a creature of statute and there was no statutory justification for the control sought by the local authority to restrict where T should live or who should contact to her. Although the local authority had duties under the philosophy of "care in the community," the care was voluntary and not directive. ... It was the deliberate decision of Parliament to reduce the ambit of guardianship ... and the curtailment of the guardianship regime by the [1983] Act ... had the effect of excluding T from its provisions. It also ousted the common law doctrine of necessity. The courts were therefore unable to fill a gap caused by statutory amendments. There was no place in the present situation for the doctrine of necessity, which, if applied, would trespass upon and indeed usurp the will of Parliament."

105 That argument was rejected by the Court of Appeal. At p 47E the President asked the following question:

> "Do the present facts demonstrate a situation in which the doctrine of necessity might arise, that is to say a serious justiciable issue that requires resolution in the best interests of an adult without the mental capacity to decide for herself?"

Answering that question she continued at p 47F:

> "It is clear that there are two competing views on the future residence of T. *She does not have the capacity to make that decision herself.* The views of the mother and the local authority appear at present to be irreconcilable, although the Official Solicitor's view is that a court decision setting out the best interests of T might resolve the conflict. Her welfare is in dispute and, if the case of the local authority is made out, T would be at risk of significant harm to a degree that, had she been under 17, she

> would have been likely to be the subject of a care order under section 31 of the Children Act 1989 as are her seven siblings." [emphasis added]

Having then referred to the judgment of Sir Thomas Bingham MR in *In re S (Hospital Patient: Court's Jurisdiction)*, the President concluded at p 48B:

> "I have no doubt that, in the case of T, there is a serious justiciable issue which ... requires a decision by the court."

106 Sedley LJ, as it seems to me, explained very clearly what the issue before the court was when at p 54H he said this:

> "If returning to her mother is in truth a source of danger to her, I agree that, absent any statutory inhibition, the court may, by declaring what is in T's best interests, sanction not only the provision of local authority accommodation (which in any case needs no special permission) but the use of such moral or physical restriction as may be needed to keep T there and out of harm's way. That the court has such power is shown most sharply, I think, by Dame Elizabeth Butler-Sloss P's question to Mr Gordon: what if the dispute as to T's best interests were between her mother and an older sister? There, said Mr Gordon, the court would be able to adjudicate because a sister's powers, unlike a local authority's, are not limited by statute. This, with respect, cannot be an answer. It begins by conceding - rightly - that the court has power to resolve such a dispute in T's best interests; but it then seeks to draw a distinction of status unrelated to those interests. The correct view, it seems to me, is that neither the mother nor the (imaginary) sister nor the local authority possesses by virtue of their status any power to detain T. *Nor*, however, *does T have the capacity to choose* one of them as an appropriate carer. If the role of carer is contested, *it is the court alone which has the power* - and in my judgment the duty - *to make that choice in T's best interests*." [emphasis added]

107 It is quite clear, in my judgment, that all the court was doing in *In re F (Adult)* was to act as a surrogate decision-maker on behalf of T, deciding on her behalf that she should live where the local authority was proposing and in accommodation which it had chosen and was willing to provide. The choice which the court had to make on T's behalf was between the accommodation 'package' being offered by the local authority and the accommodation 'package' being offered by T's mother. Crucially the court was not being asked to require the local authority to do anything it was unwilling to do. The present case is entirely different. The originating summons as issued seeks to compel the local authority and the health authority to do the very thing they have decided not to do, that is to return A to the home.

<u>Conclusions - S</u>

108 Consistently with *R (P) v Secretary of State for the Home Department* the proceedings brought on behalf of S were appropriately commenced in the Family Division and invoking the inherent jurisdiction. The directions I gave accorded with the approach suggested by Woolf LJ in *In re D*.

109 As I have already described, the dispute with the Secretary of State was in the event resolved without the need for further judicial assistance. I say no more about it save that it plainly had to be resolved in accordance with the substantive principles laid down in *R (P) v Secretary of State for the Home Department* itself (see para [81] above). The remaining part of the proceedings concerns welfare and other issues relating to S and J which prima facie have to be resolved applying normal Family Division principles. Authority Y's involvement arises, at least in the first instance, under Part III of the 1989 Act and it is conceivable that some public law issue may therefore arise. In that event the various matters in issue will have to be resolved having regard to and applying the principles I have sought to set out above.

Conclusions - A

110 As I have already observed Mr Beard characterises the dispute as involving a challenge to the decision of the local authority and the health authority, in the discharge of their statutory duties, to provide A with a residential care placement at the trust rather than with the care company whilst Ms Morris characterises it as a dispute as to the best interests of an incapable adult. Both are right up to a point. Neither in my judgment is entirely right.

111 Correctly understood the case in my judgment involves - or, to be more precise, may, when all the evidence is to hand, be seen to involve - a number of different issues and disputes which it is important for purposes of accurate legal analysis to keep separate:

(1) There is a dispute between A's father and the care company as to where A should live. That is an issue in relation to which A's mother also has views and which the Official Solicitor wishes to investigate with the assistance of an expert.

(2) There are difficulties as between A's parents as to A's contact with his mother, though as I have said neither the local authority nor the health authority has ever sought to restrict A's contact with either of his parents.

(3) There is the need to afford A the "genuine choice" in relation to his accommodation which, if he were capable of acting for himself, he would be entitled to exercise in accordance with the Directions and *LAC(92)27*.

(4) There is the need to ascertain the preferences of A's carers and his own best interests as contemplated by paragraph 13 of *LAC(92)27*.

(5) There may be a challenge either to the assessment made on 31 July 2001 and/or to the decision taken on 7 August 2001.

There may be other issues.

112 In the light of the principles as I have sought to explain them I can express my conclusions very shortly.

113 Issues (1)-(4) require, in my judgment, a judicial determination of A's best interests. Each of these issues properly falls exclusively within the ambit of the Family Division's inherent declaratory jurisdiction. In relation to each of them, as Ms Morris correctly submits, the essential task for the court is to determine on A's behalf where his best interests lie. In relation to each of them the task the court is embarked upon is judicial surrogate decision-making. Accordingly it was entirely correct for the applicant to commence these proceedings in the Family Division and invoking the inherent jurisdiction.

114 Issue (5) on the other hand involves in the final analysis a judicial review of public authority decision-making which, as Mr Beard correctly submits, is in the final analysis to be determined not by reference to A's best interests but rather by reference to the well-established principles of substantive public law, including, as Mr Beard accepts, those now to be found in *R (Daly) v Secretary of State for the Home Department*. Lest there be any misunderstanding I should add that the decision-making context here is not, as it seems to me, to be equiparated with that in *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital*. Issue (5) does not, in my judgment, justify, let alone require, a full merits review.

115 I say "in the final analysis" for this reason. As Ms Morris has pointed out, the underlying question for everyone at the end of the day has to do with A's needs and welfare. The task for the Family Division in relation to those issues which lie within its exclusive jurisdiction is to ascertain A's best interests. The task for the local authority and the health authority when assessing his requirements for the purposes of their statutory assessment of him is to identify his needs. As Ms Morris says, these two concepts may be legally distinct (and indeed they lie within the provinces of different decision-makers) but much of the time, and so I imagine in A's case, they will amount to very much the same thing. In other words this is, as it seems to me, a case very much like *In re D*. The court's inherent jurisdiction is being invoked perfectly properly: not illegitimately, in conflict with let alone to oust public authorities, but legitimately and in part to supplement public authority decision making. The factual similarities between the two cases will not have escaped notice. *In re D* involved a statutory assessment of educational needs as a prelude to the provision by public authorities of special educational services. This case involves a statutory assessment of needs as a prelude to the provision by public authorities of accommodation. In my judgment the inherent declaratory jurisdiction is no more inappropriately invoked here than was the wardship jurisdiction in *In re D*. Within the limitations identified by Woolf LJ in that case, the inherent declaratory jurisdiction can as properly be deployed in this case as the

wardship jurisdiction was in that.

116 Moreover in this connection there is another point to be borne in mind. Given that the ultimate questions for both the court and the public authorities are so similar there is no reason to jump too readily to the conclusion that the court and those authorities will end up coming to different conclusions. Of course that may happen. If it does the problem will at that point become one of public law to be resolved not by reference to the inherent declaratory jurisdiction but rather by reference to the principles of substantive public law. But it is perhaps more likely that both will come to the same conclusion. As Woolf LJ said in *In re D* at p 1416C:

> "in law ... the local authority cannot voluntarily surrender its statutory obligations. However, when examined, those obligations will usually provide the authority with a discretion as to how they are to be exercised. Thus in relation to their duties in respect of a child who has special education needs, the Education Act 1981 gives the local education authority a considerable degree of discretion as to how it exercises its powers and fulfills its duties ... For example, under section 7(1), the local authority are only under an obligation to make a statement of the child's special educational needs "if they are of the opinion that they should determine the special educational provision that should be made for him." If the wardship court, after a full investigation, has decided what educational provision should be made at the invitation of the local authority, it is reasonably to be expected that the local authority would be of the opinion that there remains no further need to determine the special education provision to be made for the child under section 7."

117 I should add one final observation. The form of the relief as originally sought on A's behalf when the originating summons was issued understandably caused the health authority and the local authority concern. As framed that relief failed to distinguish properly between the two different jurisdictions which are, or may be, in play here: the inherent declaratory jurisdiction of the Family Division and the jurisdiction (whether exercised in the Family Division or in the Administrative Court) to grant relief according to principles of substantive public law against public bodies exercising statutory functions. The originating summons, as it seems to me, inappropriately elided relief which can properly be granted by the Family Division under its inherent declaratory jurisdiction with mandatory relief which, at least in some respects, could be granted (if at all) only in public law proceedings by way of what until recently was called an order of mandamus.

118 Now the Official Solicitor accepts that the grant of any declaration is a matter for the court in the exercise of its discretion. But, relying upon *In re S (Adult Patient)*, the Official Solicitor suggests that were I to grant a declaration that it is in A's best interests to reside at the home, the effect of the grant of that declaration would be to make any other course of action (for example A residing with the trust) unlawful. Put more generally, the Official Solicitor submits that the effect

of a declaration that a particular course of action is lawful as being in the best interests of an incapable adult is that all other courses of action are unlawful. So, says the Official Solicitor, such a declaration has coercive effect.

119 The analysis which underlies that submission provides a good reason, as it seems to me, for proceeding with caution before granting a declaration in that form in a case such as this. One must be careful, however, not to read too much into *In re S (Adult Patient)*, a case, after all, quite unlike this case and which involved no public law element at all.

120 It is well recognised that in this, as in other contexts, the declaration as a remedy has only limited effect. In the first place, a declaration in strict law changes nothing. As Lord Goff of Chieveley recognised in *Airedale NHS Trust v Bland* [1993] AC 789 at p 862G, a declaration as to the lawfulness or otherwise of future conduct is "no bar to a criminal prosecution, no matter the authority of the court which grants it". Putting the point more generally, Lord Lowry at p 875H said that:

> "the court has no power to render lawful something which without the court's sanction would have been unlawful".

To much the same effect Lord Mustill, having recognised at p 888H that "the decision in the present case does not create an issue estoppel in the criminal courts and therefore does not form a conclusive bar to any future prosecution", continued at p 890C:

> "The declarations will not however alter the legal status of the proposed conduct from what it would have been even if no declarations had been sought, nor will it make any change in the existing criminal law. The declarations will therefore achieve no more in the present case than the useful but limited function of reassuring the doctors that what they wish to do was lawful when proposed and will be lawful when carried out, and will as a by-product ensure that in practice if the proposed conduct goes ahead no prosecution will ensue."

121 Moreover, as the Court of Appeal pointed out in *St George's Healthcare NHS Trust v S* [1999] Fam 26 at p 60C:

> "Non-compliance with a declaration cannot be punished as a contempt of court, nor can a declaration be enforced by any normal form of execution, although exceptionally a writ of sequestration might be appropriate: see *Webster v Southwark London Borough Council* [1983] QB 698. Apart from that rare exception it operates solely by creating an estoppel per rem judicatam between the parties and their privies: *In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 64."

122 It follows in my judgment that a declaration cannot, in any sense in which the

Official Solicitor is using the phrase, have a "coercive" effect on a public authority which is not a party to the proceedings.

123 Here, however, the relevant public authorities - the local authority and the health authority - are of course parties. And, as the Court of Appeal pointed out in the *St George's* case at pp 59A, 59H, whereas "a declaratory order does not take effect in rem but only as between the parties to the proceedings (and any other persons bound by a representation order)", on the other hand:

> "a declaratory order does have effect, between the parties to the proceedings in which it was made, as a conclusive definition of their legal rights".

Therefore unless carefully qualified by suitable language any declaration the court grants in the present proceedings will in principle be "conclusive" as to the "legal rights", and presumably also as to the legal obligations, of the two authorities.

124 Now whether or not such a declaration would be "coercive" in the sense in which the Official Solicitor uses that word, it follows from what the Court of Appeal said in the *St George's* case, read in the light of the principles as I have set them out in paras [96], [97], [114] and [117] above, that it cannot be right for the court to grant a declaration binding on a public authority unless satisfied either (i) that the declaration does not encroach on the authority's public law functions or (ii) that if it does it can be justified on public law grounds and applying appropriate principles of substantive public law.

125 If it be correct that a declaration of the kind envisaged by the Official Solicitor would indeed be "coercive" of the local authority and the health authority then that, as it seems to me, is an even more compelling reason why no such declaration should be granted unless the court is satisfied that the case is one in which mandatory relief by way of an order of mandamus could properly be granted.

126 To put the point specifically: if the Official Solicitor is correct when he submits that the effect of the grant in these proceedings of an unqualified declaration that it is in A's best interests to reside at the home would be to make it unlawful for the local authority and the health authority to accommodate A anywhere else, then it follows in my judgment that it would not be right for the court to grant such a declaration unless persuaded that an order of mandamus could properly go compelling the authorities to accommodate A at the home. Furthermore, and without finally determining a point which may never arise on the facts and which may in any event require further argument once the relevant facts have been determined, I have to say I find some difficulty envisaging circumstances in which an order of mandamus in such terms would ever be appropriate. In the final analysis decisions under the 1948 Act and the 1990 Act are for the local authority and not the court. So the most extensive relief the court could normally be expected to grant would be a quashing order (an order of certiorari) to quash the

decision of the local authority and a mandatory order (an order of mandamus) requiring the authority to reconsider and redetermine the matter according to law. For to go any further would normally involve the court impermissibly arrogating to itself a responsibility which Parliament has entrusted to others. Only if it was satisfied that there was but one conclusion to which the local authority could lawfully come would the court be justified in going further. I should add that I can see nothing in *R (Daly) v Secretary of State for the Home Department*, or for that matter in *R (Wilkinson) v Responsible Medical Officer Broadmoor Hospital*, to lead me to any different conclusion.

127 The Official Solicitor also submits that a public authority which had reached a different decision in the exercise of its statutory powers would at the least be bound to review its decision in the light of the Family Division judgment. Put in those terms I think, with respect, that the Official Solicitor goes too far. A local authority would only be "bound" to review its decision if ordered to do so by the court and such an order could only be made on recognised public law grounds justifying the grant of an appropriate order of mandamus. In practice, of course, and for reasons I have already touched on in para [116] above, a public authority is likely to wish to reconsider matters in the light of the court's conclusions. Furthermore, and even if the case is not one for a mandatory order (order of mandamus), I can see nothing impermissible in the court seeking in an appropriate case to encourage such a course by including in its order, for example, a recital in this or some similar form:

> "It appearing to the court that it is (OR that it may be) in the best interests of A that ... [etc]
>
> And the court inviting (but not requiring) the local authority to reconsider in the light of this order and of the judgment of ... [etc]".

128 It follows in my judgment that, given the complexity of the issues in this particular case (see paras [111]-[114] above), very careful thought will require to be given in formulating any appropriate declaratory or other relief I may be asked to grant.

129 Because as it seemed to me the originating summons as originally issued might not be framed in the most appropriate way, on 27 November 2001 I gave the Official Solicitor permission if so advised both to amend the existing proceedings and also to issue proceedings for judicial review. In the event, although on 4 December 2001 he filed an amended claim form, he decided not to issue any proceedings for judicial review.

Postscript

130 Both cases, as it happened, came back in front of me on 21 January 2002 though neither was in quite the shape I had anticipated when delivering the above judgment.

131 A: By the time the case returned to court in January 2002 for the final hearing the Official Solicitor had carefully investigated and considered all aspects of the matter, in particular the expert evidence which, in accordance with Coleridge J's order, he had in the meantime obtained. He had concluded, entirely appropriately, that A's best interests did indeed require that he should live not at the home but with the trust. There was, accordingly, no dispute between the parties as to where A should live. Nor was there any remaining controversy as to A's contact with both his parents. The case thus concluded without any further argument. The parties had been able to reach agreement as to the form of the order the court should be invited to make. I was entirely content to endorse that order which, I was satisfied, accorded in all respects with A's best interests.

132 S and J: Unexpected developments following S and J's return to the secure accommodation in December 2001 led authority Y to conclude that J's best interests required an urgent application to the court under Part IV of the 1989 Act. On 31 December 2001 the vacation urgent applications judge, Bennett J, made an interim care order placing J in the care of authority Y. The effect of that order was, of course, automatically to discharge the wardship in relation to J: see section 91(4) of the 1989 Act. When the case returned to court on January 2002 it was agreed - very properly I might add - that the interim care order should continue at least for the time being. It was also agreed that there was in the circumstances no purpose in the existing private law proceedings under the inherent jurisdiction and Part II of the 1989 Act continuing. It was accepted on all sides that at least for the time being the matter should proceed by way of the public law proceedings in relation to J brought by authority Y under Part IV of the Act. I agreed and gave appropriate directions to that end.