[2011] EWCH 2419 (Fam)

Case No: FD07P00104

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

20 July 2011

BEFORE:
MRS JUSTICE THEIS DBE

- - - - - - - - - - - - - - - - - - - -

BETWEEN:

LBX Claimant

- and -

K
L
M Defendants

- - - - - - - - - - - - - - - - - - - -

MR HARROP-GRIFFITHS appeared on behalf the Local Authority
MS VICTORIA BUTLER-COLE appeared on behalf of the Official Solicitor
MR N ARMSTRONG appeared on behalf of K
M appeared In Person

- - - - - - - - - - - - - - - - - - - -

Judgment Approved

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

MRS JUSTICE THEIS DBE

This judgment is being handed down in private on 20th July 2011. It consists of 22 pages and has been signed and dated by the judge. The judgment is being distributed on the strict understanding that in any report no person other than the advocates and their solicitor may be identified by name or location and that in particular the anonymity of the Respondents and members of their family must be strictly preserved.

Mrs Justice Theis DBE:

1. This matter comes before me pursuant to the order of McFarlane J dated 16 June 2011. The proceedings, originally under the inherent jurisdiction, now proceed under the Mental Capacity Act. They concern L born on 21 December 1983. He is therefore now aged 27. L has a diagnosis of mild mental retardation and some learning difficulties, with an IQ that has been assessed at 59.

2. The issues to be determined at this hearing are: (i) whether it is in L's best interest to move to supported living accommodation on a trial basis; (ii) whether the hearing listed in September 2011 is required and, (iii) any further directions.

3. I do not propose to set out the background to this matter, other than where it is relevant to this judgment. It was extensively dealt with in Baker J's judgment on 31 March 2010. The transcript of that judgment is in the trial bundle before me and it should be read together with this one.

4. L has lived with his father, K, and his brother, D, since the early 2000's. Prior to that L lived with his aunt, M, in this country and, prior to that, the maternal family in Trinidad. Unfortunately K and M do not get on. M expresses concern about L remaining in K's care and K, in turn, expresses concern about L having contact with M. The Local Authority and the court have sought to hold the ring on various issues that have arisen from this conflict.

5. At some point in 2006 L was arrested, following an allegation that he had made an inappropriate comment to two girls in the street. In the event no charges were pursued. At the time L was allocated a social worker from the Local Authority's learning facility team. In the course of that social worker's work with L he informed her, she said, that K had struck him with a piece of wood and, on occasion, with a stick or belt. Following this he was removed to a place of safety where he remained for six months.

6. In about April 2007 he returned to live with his father and brother. It is not clear to me, as it is not clear to Baker J, nor to any of the professionals currently involved in the case, exactly why it was or how it came about that L returned to live with K and D. K and D state that when they sought to make contact with L, when he was in the care of the Local Authority, they were told L did not want to see them. According to them, there was a chance meeting in the street between L and his brother and L came home with him and has remained there ever since.

7. Both K and D have expressed concern about the care L received when he was in the care of the Local Authority, in particular his diet and personal hygiene. It is very clear from both the evidence of K and D that one of their real fears in relation to what is now proposed by the Local Authority is that if L goes into supported accommodation they may not see him again.

8. The return of L to K's care prompted M to commence proceedings, then under the inherent jurisdiction which, following the implementation of Mental

Capacity Act, converted into an application under those provisions in the Court of Protection.

9. Following directions made in 2007 an independent social worker, Ms Thakrar, was appointed to report to the court. She has remained involved in this case since then and has filed a total of eight written reports between 2007 and 2011.

10. At paragraphs 8 to 38 of Baker J's judgment, he sets out the procedural history leading up to the hearing before him on 31 March 2010. The issues Baker J had to consider at the hearing in March 2010 were four fold. Firstly, L's accommodation and residence. Secondly, his contact arrangements with other members of his family. Thirdly, the application by the Local Authority for the appointment of a deputy. And, fourthly, whether the proceedings should be brought to an end.

11. The position then regarding accommodation was recorded as follows in paragraph 41 of Baker J's judgment:

> "So far as accommodation is concerned, the position of the parties is as follows. The Local Authority, supported by K and the Official Solicitor, propose that L should continue to live with K in the short term, but that steps be put in train to identify a suitable independent supported living establishment to which he can move at some point in the next 12 months. M opposes the proposal that L should continue to live with K. She asks me to order that he should go to live with her. Alternatively, if I do not do that, she proposes that L should move as soon as possible away from K. This demonstrates the persistent ill feeling that persists between K and M."

12. Baker J heard evidence from M, K, Ms Thakrar and Advocate A (L's then advocate). In relation to accommodation and his findings, he said as follows:

> "46. I deal first with the question of accommodation. M put in an impassioned plea that I should allow L to return to live with her. She said that she had looked after him in the past and could do it again in the future. She said that she understands him. She did not trust K, she said, because he has a hold over L. She accepted that L would say and had said that he wanted to live with K, but she said that that was a reflection of influence of K over L.
>
> 47. K gave evidence and stressed how closely L was both to him and to his brother, D. He accepted that it is in L's interest to move to independent living in the future. He points out with realism that he would not be around forever, and what is to happen then to L, he asks. Clearly, it is in L's interest, says K, to be prepared for that eventuality. Thus he wholeheartedly supports the Local Authority's plan that L should be encouraged to move on to independent living.
>
> 48. Ms Thakrar gave evidence and stated that in her view L was settled with his father, although she supports the long-term aim of a move to independent living. She commended K for the way in which he had recognised that it was in L's interests to move on. Advocate A confirmed that L seemed comfortable where he lives, but confirmed

> that he had spoken with L about the possibility of moving to independent living - a suggestion that Advocate A supports.
>
> 49. Clearly, the balance of evidence is in favour of L remaining where he is. I listened carefully to M's evidence and also her final submissions to me in which she stressed how she and L had a good relationship until K got involved and interfered. I have considered carefully the strong arguments that M puts forward, but in the end I am entirely satisfied that the evidence points in one direction and in one direction only, namely, that for the moment L should continue to reside with K.
>
> 50. I fully endorse, however, the plan that the Local Authority put forward, supported by Ms Thakrar and the other professionals, and, importantly, endorsed by K, that L should move soon to independent living if that can be achieved. It seems to me, with respect to M, that she does not demonstrate that she really understands L's needs. I am sure she feels strongly about him and loves him and is concerned about him, but I am not satisfied she has really appreciated where his needs lie. I think K has demonstrated that he has a better understanding of what is in his son's best interests. So the order I will make in due course will be an order that provides L should remain living with K for the moment."

13. He then dealt with contact and ordered that L should have contact with his aunt once a fortnight, for about three hours. In relation to the appointment of a deputy, the judge did not see any reason to change the position whereby L's father manages his finances.

14. Turning to the future of the proceedings, he said at paragraph 55 of his judgment:

> "The fourth issue is the question of the future of these proceedings. It is obviously undesirable for proceedings to continue indefinitely, although in cases of this sort it seems to me there is a danger that they do. Nonetheless, these proceedings, it seems to me, should continue for the time being for these reasons. First, no final decision can be taken about his long-term residence until the possibility of, and options for, independent supported living have been investigated. The Local Authority intends to embark upon that process in the next few months and then a decision can be taken. In my view, that is a decision which should be carried out under the umbrella of these proceedings. Secondly, I am far from satisfied that the future of contact is so clear and unproblematic that I can let the proceedings come to an end at this stage. I think it will be in L's interests to review contact and to see whether it is still working in the interests of L before these proceedings come to an end. Thirdly, by not allowing proceedings to come to an end, I will be able to postpone a decision about the appointment of a deputy until the future of L's residence and accommodation has been clarified."

15. He then sets out the terms of the order at paragraph 56. The intention then was that steps should be taken for L to move to independent accommodation. The matter was going to go back for review by the court in December 2010.

16. L continued to have respite care one weekend a month at the A placement. He was making progress there and a report from Mr G in October 2010 sets out what he does during his time there and the considerable progress he has made.

17. Following the hearing in March 2010 enquiries were made about suitable accommodation for L. A facility, the J placement, was identified early in 2011. This was in the location of the family home (about eight minutes by bus between the family home and the J placement) which is supported accommodation in that there are staff on hand during the day and staff there at night. There are two flats, one downstairs with disabled access and a two bedroomed flat upstairs. The upstairs flat was identified for L. There is one person living there already and L will join him.

18. There is a record of a meeting on 29 November 2010 and a draft care plan that was circulated before that meeting. That meeting records the discussion that took place about supported accommodation and what it could offer. There was discussion about a trial period and it records that it can be organised, once a suitable property becomes available. The minutes record that K agreed that the social worker, Ms P, could start the search for an appropriate placement. The minutes then record the discussion about the care package that would be available; a draft had been circulated, as I said, before the meeting. There was then a section that identifies the points and concerns made by K and he sets out his very real concerns about the regime there (in the bundle at C360) and there are a number of bullet points there setting out the concerns that K then raised. It then records that K agrees to support the trial period and support L during the trial period in supported accommodation. The minutes also record discussion regarding L's contact with his aunt and how that can move on to include some unsupervised time and L's views.

19. It then appears from the evidence that K and L went on a six week trip to Trinidad, from early December to about mid January. The hearing scheduled for December 2010 was adjourned to January and was heard by Baker J on 24 January 2011. K's evidence was that he thought he returned to this country the week before, on about 15 January 2011.

20. The order made on that day was the result of negotiation between the parties and their lawyers outside court. The order declared that it was in L's best interest to reside at the J placement and to have the care plan set out in the plan dated 15 December 2010. The order then goes on to declare that after L has moved to the J placement it is in the best interest to have contact with his father and brother as set out in the schedule attached to the order. That schedule provided for contact be agreed between K and the Local Authority, for it initially to visiting only and then a review involving all parties after a period of three months to consider a move on to staying contact.

21. There was provision for Advocate A, L's then advocate, to convey any request by L to have staying contact earlier than the three month review. The order provided for the matter to be reviewed by the court in September.

22. K was legally represented at that hearing by solicitor and counsel who had represented him for some time. The updated evidence that was before the court and the parties was a statement from Ms P, the social worker, dated 7

December 2010, a statement from K date 7 December 2010 and a report from Ms Thakrar in November 2010.

23. K raised in his statement his concern that the move to supported accommodation was too soon and that L needed to show more of an interest in certain practical skills. He suggested that if the court was minded to order a move to supported accommodation it should do so on a week-on week-off basis. He concluded that statement as follows:

> "I accept that L moving to supported accommodation is in his best interest in the long term, however I do feel that L has a long way to go."

He then repeats his week on week off proposal.

24. Following that hearing, the social worker made contact with the J placement and K and L visited the accommodation in early February 2011. Around that time K sent an email, I think dated 8 February 2011, informing the parties that he had dismissed his solicitors. He said he did not see a schedule regarding contact; he did not agree to it and regards it as an unnecessary restriction of his contact with L.

25. On 4 March he sent an email describing the newspaper reports concerning the Neary case. He sent a further email shortly thereafter in a similar vein.

26. On 23 March 2011, he wrote an email entitled 'Dismissal' to L's advocate, Advocate A, and Advocate A had no choice but to accept that dismissal, having received a letter confirming that position from L.

27. In early April 2011, K sent a number of emails to the parties accusing varying professionals of providing false information to the court. The Local Authority held a professionals' meeting on 2 March 2011, which included staff from the J placement. The purpose of the meeting was recorded as follows: ‘to agree a transition plan for when L moves into the J placement, which will enable him to cope better with the change in his life and settle in better. It will also enable professionals involved with L to be clear on what form the transition plan will take’. It is unfortunate that that meeting did not involve K or D, this aspect was not explored in the evidence before me.

28. A meeting was convened on 20 April 2011 in order to establish what K's concerns were to try and find a way forward. Amongst others, K attended as did Advocate AA, a new advocate K arranged for L. The minutes of that meeting are in the court bundle. They record the detailed discussions that took place at that meeting. They record, in particular, the concerns outlined by K,

which included his concerns about restrictions on contact, bearing in mind his experience with the Local Authority in 2006 and 2007. Although the minutes record K saying he would not take part in the move, he is reported later on as saying that he would support the transition but would remain concerned about contact.

29. The transition plan is then set out in some detail. The visits would take place over the course of the following month with a view to a final full-time move being on 23 May 2011. The minutes record K agreeing to bring L to the first

two visits. After that he would be dropped off by his father. The first visit was to be on 26 April. L was not brought for that visit or any subsequent visits.

30. Ms Thakrar was instructed to prepare an addendum report on 5 May 2011 with the request to advise the court whether it was still in L's interest to move to the J placement in light of K's position. Her report is dated 19 May 2011.

31. The matter was back in court on 12 May 2011 before Baker J. K was unrepresented, but attended the hearing. A draft order was handed to him which provided for a declaration that it was in L's interest to be placed in the J placement on 31 May 2011 and the contact provided for in the January order was varied to supervised contact. That order was not capable of agreement and Baker J adjourned the matter to a hearing before Hedley J on 24 May 2011, with a time estimate of one day with the direction of who was to attend to give evidence. A direction was made for Ms Thakrar to file her report. The hearing before Hedley J was adjourned as K had instructed fresh solicitors and the transfer of the file and the LSC funding certificate was not completed.

32. The funding certificate was transferred to K's current solicitors just prior to the hearing before McFarlane J on 16 June 2011. That order declared that it was in L's interest for there to be consistency about advocacy services for him and the matter was adjourned to be heard by me on 18 and 19 July, with a time estimate of two days. The order recorded the issues this hearing was to determine, directions were made of a filing of a further report from Ms Thakrar as to a trial period of supported living.

33. Ms Thakrar's most report is dated 11 July 2011. In summary, it recommended a trial period of supported accommodation initially for three months, which would be reviewed after a month with reviews built in after that. She stressed the importance of L's views being obtained by an independent advocate.

34. I have updated statements from K and Ms P. In his statement K states that although he accepts he agreed to move in January 2011 "having fully reflected after the hearing" he confirms that he is of a view that such a move would not be in the best interest of L. He describes in that statement the impact of such a move on L's relationship with his family and a loss of day-to-day contact with not only his family but other aspects of the family home, for example the pets. He describes the attempts he has made to secure larger housing for the family. In relation to L's independence, he states:

> "I agree that in the long-term it is important for L to obtain further independence skills."

35. He then sets out the skills L has acquired, that his skills continually increase and this can take place in the home. He produced a bundle of photographs which graphically illustrate and describe the various things L does with his family. K continued in that statement:

> "If there does come a point when L develops sufficient living skills to move into supported accommodation or in the alternative, then I think it should be addressed then. It does not have to be explored now."

36. In relation to the suggestion of the trial period, he states he does not support that but if the court disagrees with him he is prepared to go along with it. He

sets out his concerns about relying on what L says, as he says different things to different people. He denies putting any pressure or seeking to influence L's wishes. He concludes his statement by setting out some general concerns. Firstly, his concern that L will not be cared for properly in the J placement compared to home and refers to what happened in 2006 and 2007 regarding L's weight and general appearance. Secondly, the failure of the Local Authority to invite him to meetings, in particular the meeting of 2 March 2011. Thirdly, the failure to arrange any meetings to discuss the events of 2006 and 2007 and his feeling about those events. He states a letter dated 7 May 2008 from the Local Authority, which refers to a confusing and a difficult time for K did not go far enough. Finally, the need for an occupational therapist report to have up-to-date information about how L is functioning and the time it takes to undertake certain tasks.

37. Ms P's most recent statement sets out what the J placement can offer. In addition to the accommodation that I have already described, the 21 hour support per week, some facilities to be shared between three people who live there. This supports L with managing the accommodation and tenancy, paying rent, bills, organising repairs, shopping, meal preparation, personal care and day-to-day routines. In addition, L will receive one off additional one-to-one support, which is aimed at helping him access new activities, employment, managing relationships and further prompts for day-to-day routines. L will be allocated a key worker too.

38. In terms of contact with his family, this has evolved. At a hearing on 16 June 2011 the issue was raised as to whether L would stay at the J placement during the week and return to K at weekends. Following that hearing, the Local Authority made enquiries of the J placement and they were able to facilitate a regime that would include L returning to the family home each Saturday for an overnight visit as part of the transition plan. It would need to be kept under review.

39. Some of the concerns raised by K in his statement have been discussed with the personnel at the J placement, for example the concern regarding healthy eating and prompting regarding his personal care. There will need to be discussion about the management of visits from the family. Whilst there is no restriction proposed, it is clearly important that the support that is designed for L is not disrupted. For example, it may be felt that the one-to-one sessions between L and his support worker need to take place with L on his own.

40. It was planned that M's contact was to continue as part of the transition plan. Also, the support L had been receiving regarding his sexual psychological health would continue. He had further appointments planned with Mr W.

41. K attached in his most recent statement various letters from family, friends and importantly L's brother, D. Some of those letters have been converted into statements. D describes his relationship with his brother, the various activities they undertake together and their day-to-day routine in the home. He refers to the time L was removed from the family home in 2006 and the effect of that on the family and the fear that it may happen again.

42. In addition, there were statements from other family friends, including Mr S and Mr J who each describe that they have observed about L and his relationship within his family.

43. Finally, in terms of the updated documentary evidence that was before me the Official Solicitor filed a statement and position statements and attached to the position statement was a report from the advocate who had been appointed for L detailing her four visits with him and an attendance note of a recent meeting between L and his solicitor.

44. During the hearing before me, which lasted two days, I heard oral evidence from Ms P, the allocated social worker since September 2009, K, D, Mr S, Mr J, M, Advocate B and Ms Thakrar.

45. Ms P's evidence confirmed Local Authority support for the trial period at the J placement. She was asked about the events that occurred in 2006 and whether she understood K's concern the Local Authority is seeking to do what they did then. She said she understood that feeling, but made it very clear that what is being sought now is very different. She explained the thinking behind the regime set out in the schedule of contact attached to the January 2011 order. She said she understood from K's point of view he saw that as being the Local Authority in control, but he was represented at the hearing in January 2011 and his legal team took a full part in negotiations.

46. She agreed that what was being proposed now was more generous contact, including staying contact. As she set out in her statement, this followed enquiries made by the Local Authority following a request at the June hearing. It was suggested to her that this only occurred due to the fuss kicked up by the father. She acknowledged the closeness of the family and the care given to L by his family. Various points in the balance were put to her and she responded stating that one of the risks is that by not taking up this opportunity for L to experience independent living in a supportive environment in a planned way (as opposed to a crisis,) would not assist him in helping to work towards independence.

47. Although she accepted L had said different things to different people, the point was made to her that she should have been more balanced in her statement about the different things that he had said, she was clear that he had said to her that he wanted his own space. She said he will not know unless he is given the opportunity to try. She said he finds it very difficult to express preferences in the abstract unless he has experienced it.

48. K's oral evidence was, if I may say so, very powerful. He clearly and understandably has very strong views about what he considers to be in L's best interest. When he spoke about his feelings about what happened in 2006 and 2007, I was left in no doubt that what he had experienced then had left a very deep emotional wound which, despite the passage of five years, had only superficially healed. On more than one occasion he clearly feared that by even taking the first step in this process of a move to supported accommodation, he may end up in a situation where L is denied contact with his family. On one level he can accept the need for L to move to more independence, but even a small step in that direction resurrects his fears from events in the past. At the end of his cross-examination by the Local Authority, he said:

> "I am concerned that by sending my son there [the J placement], I may not see him again."

49. However, he accepted earlier that there were different people involved with the Local Authority now.

50. He described the routine in the family home and the activities he undertakes with L, which include playing cricket, looking after the birds, cycling and playing snooker. He produced a list he had prepared regarding issues he wanted to discuss regarding his concerns in relation to the proposed placement of the J placement. Many of them are set out in a record I have already referred to of the meeting that took place on 29 November 2010.

51. He was clear that he felt that the personal care given to L would be less and that all the skills that are part of the J placement could be undertaken at home. He expressed very clearly that he considered a move away from the family home to involve a breach of the Article 8 rights of the family, namely him, D and L.

52. He was quite dismissive of the various advocates L had had. He said he had not met a good one, save possibly Advocate AA, but his funding had been cut.

53. In cross-examination on behalf of the Official Solicitor, he did not accept the record of the meeting in April 2011 that he agreed to the transition plan. When asked about why he had not attended the planned visits, he said "L said he was not interested. He was playing football."

54. He was asked about his view regarding the role of the various advocates L had had and was asked about what they had reported about what L had said about not living at home. He said that he would only accept it if he was present when it was said by L.

55. He accepted that one day L will need to move from home, but that it was being pressed too hard at the moment. When it was suggested that it may be more difficult for L to express and make choices in the family environment, he said L can go anywhere he wants to; he has his own key and if he wants to go he can. "He makes his own choices".

56. D, in his oral evidence, described the pressures this case has put on the family. He graphically described the effect of the events in 2006 and his chance meeting in 2007 with L. He said he is living at home out of choice, although he accepted there may come a time when he would want to live away from home. He accepted that L will need to move on to independent living, but did not think it should happen now in the way proposed. As he said, "There is no point to move now" and he fears L will not be pushed hard enough in the J placement. He said, "If he [L] wants to move, he can go". He fears any view L has expressed about moving have been because L felt under pressure.

57. Mr S gave evidence. He has been a headmaster of a primary school for 12 years and has an adult son living at home with cerebral palsy. His son and L do various activities together. On his account, he clearly has had a difficult experience with the care given to his son in hospital. He said L had never expressed to him the wish to live away from home.

58. Mr J gave evidence about his relationship with the family. He has known them for a long time and they regularly play snooker with K and L on Friday nights. He graphically described L's strength in hitting the snooker balls but

his inability to tactically play the game. He said he deliberately did not talk to L about the issues of this case. He commented on K's knowledge of the issues raised by this case and I got the impression it was a frequent topic of discussion between them, no doubt often in the presence of L.

59. M gave evidence that she supported a plan regarding the J placement and she wished to have more contact with L. She wants it to be more flexible and include later times in the day so they can undertake activities that L enjoys, such as going to the cinema.

60. Advocate B gave evidence. She is an experienced freelance advocate, having previously worked in the D Advocacy Project, an independent advocacy project for people with learning difficulties. She confirmed a report produced by her which was attached to the Official Solicitor's position statement. She was clear she understood the need to allow L to express himself and need to avoid leading questions. She said she considered L as being quite eloquent and articulate and felt he was able to make choices. She said he feels so conflicted about upsetting his father and avoid doing anything that would not show he is a good son. She described him as being in a position where he does not feel he has any control and that these are all common features, in her experience, of people with learning difficulties.

61. She said L clearly remembered her, even though she had not seen him for about a year. They had only met once before when she was involved in a drama workshop L had attended. She described L as being aware of the court case, asking to see his solicitor if she came too and wanting to see her after the conclusion of this court case.

62. Her view was that L was under pressure, but felt that was more to do with the pressure from home. She recorded L saying that he did not want to go to the J placement, which he referred to as "that place". She said in her experience it was very typical of people with learning difficulties to want to please their parents.

63. Ms Thakrar in her evidence was clear that L is worried about saying the wrong thing. She felt that the structure of the court proceedings had helped L; it enabled him to develop certain skills, for example the respite care at the A placement and contact with his aunt. She was asked about the thinking behind the January contact schedule and said that it was to enable L time to settle down and to adapt and the good relationship L had with his advocate was going to help convey his wishes and feelings.

64. She agreed that if a trial period was to take place there needed to be a proper transition plan with support, for example occupational therapy support and continued support from Mr D and the need for L to have an advocate who is independent.

65. She was asked in some detail about the tone and language of her May report. She was taken to particular passages between paragraphs 10 and 21 of that report where it was suggested she had used strong language, even though she had not seen the parties again prior to preparing her report. She said she was concerned about the turn of events and the fact that communications with K were made in the way they were in strongly expressed emails in the early hours of the morning and complaints being made.

66. It was suggested to her that her language was emotional and as a professional advising the court had not kept the right balance. She did not accept those criticisms. It was put to her that her most recent report is of much more conciliatory tones and that this has only been caused by K kicking up such a fuss. She said the situation she was responding to was different. She was asked to consider the tone of her May report in the context of K's experiences in 2006 and 2007. She said she understood that, but felt that K needed to get help and not re-enact his historical experiences year after year.

67. It was put to her that her default position was to support the Local Authority plans and that, therefore, that raises questions about her ability to produce robust and reliable independent judgments in the future. She responded that when she left the case in late 2010 early 2011 she understood the position was developing well in collaboration between the parties. She was concerned that the impact on L of the change in K's position. She was clear that there has to be an established system of communication between K and the Local Authority, which will avoid the breakdown that occurred earlier this year.

The position of the parties on the law and the facts.

68. M has very clearly set out to me what she would like. She supports the proposal of the Local Authority and wants more flexibility regarding her contact time.

69. The Local Authority adopts the legal arguments advanced by the Official Solicitor. They submit that the starting point for the court is an objective consideration by the court of best interest. Such consideration does not start off without any presumption that any one environment is best. One of the factors that the court needs to consider is that when a disabled adult has lived in a particular environment for some time without problems arising, good reason will be needed to show that a change in his environment is in his best interest. Where a move away from the family home is proposed there may be more significant implications in respect of his right to respect family life but it is not inevitable, that by moving to independent living a young disabled adult would have his family relationship damaged or broken. Each case and situation is fact sensitive.

70. Against the starting point of cautious and careful consideration of any change to long-standing arrangements must be balanced the value of allowing disabled adults opportunities that they would otherwise have had open to them, and the need to respect their autonomy by enabling them to make informed choices and express informed preferences. They rely, in particular, on an unreported decision of Wood J in January 2009 called DCC v S where he states that in his experience:

> "Whilst in many cases the family may be providers of care and nurture to such adult, there seems to be a philosophical and practical shift towards ensuring as great a degree of independence in living arrangements as possible."

I am rightly reminded that social work policy and generalised ambitions are not to be applied unthinkingly to all situations.

71. The Local Authority have rightly reminded me of provisions of section 4 of the Mental Capacity Act 2005 and the need for the court, when considering what is in L's best interest, to consider all the relevant circumstances, including the obligations the court has to consider as set out in the sub-sections. In particular, my attention was drawn to sub-section (6) regarding wishes and feelings and sub-section (7) regarding views of others.

72. In summary, the Local Authority submit that all the parties have the same goal, best captured perhaps by D's oral evidence when he said, "to see L in his own flat". The debate between the parties is how best to achieve that. According to the family, it should be at some unspecified point in the future or according to the Local Authority to make use of the opportunity afforded by the J placement becoming available, being so close to the family home.

73. In relation to L's wishes and feelings, he has expressed different things, but has said he would like more space; not physical space but private and social space. If he did move there would be a change in the family relationships, but due to the proximity of the J placement to the family home and being in the local environment which is familiar to L, he would be able to maintain good and close contact with his family and other social contacts.

74. The evidence points, it is submitted by the Local Authority, to L being unable to make choices in the abstract. He needs to actually experience what is being proposed before he can properly express a view. The examples of the A placement and the contact with the aunt are relied on in support of that. Clearly the court will need to carefully balance the change in family relationships, the fact that L would not have family carers and, by definition, they would be different from the family. The family have concerns regarding diet and the spectre and fear of abuse, however against that is the actual nature of the J placement, which is more of a home than an institutional unit. Close support and monitoring is part of the plan. It will need further discussion with K.

75. One of the concerns expressed is how the parties and, if required, the court can measure L's views about any such placement. Mr Harrop-Griffiths submits, on behalf of the Local Authority, the court needs to look at all the evidence, not only from the advocate but the staff at the J placement and what the family say. That alone would not be a reason to proceed with what is being proposed.

76. On behalf of K, Mr Armstrong has been particularly persuasive. He, first of all, invites the court to make findings about events that took place in 2006 and 2007. He says the court can do that on the material it has before it. As he says in his position statement, although the details surrounding this period are not entirely clear (in part because relevant records have not been disclosed, it is said), but from what is available, he submits, that there are grounds for K to be upset and he draws the court's attention to the following matters.

77. Firstly, it is common ground that on 23 November 2006, immediately after being assessed by a psychiatrist, Dr A, for then outstanding criminal proceedings to determine whether he was fit to plead in respect of a trial relating to sexually inappropriate behaviour, L entered Local Authority care. Secondly, that it is also common ground that the immediate reason for this was that L had disclosed that he had been hit by K. Thirdly, there is an issue around when L first made these disclosures. Fourthly, it is, in any event,

common ground that no-one now seeks to assert that this allegation of assault was true.

78. Fifthly, the authority states that it did not take L into care in response to the allegation, rather relying on the psychiatrist, Dr A, who was determining the fitness to plead issue. It is said the authority assessed L as having capacity to decide matters of residence and contact and then acceded to a request by L to leave home and to have no contact with either K or D. Sixthly, it is submitted that the assessment of capacity was wrong; it was only a verbal assessment, the written report dealing only with fitness to plead and litigation capacity. It seems on the information available Dr A may not directly have been asked to assess capacity as to residence and contact. In any event, that sits uncomfortably with assessments that were undertaken in June 2006, January 2007 and March 2007 in relation to L's capacity. In addition M had issued her present application under the inherent jurisdiction in early 2007 and possibly asserted lack of capacity with regard to residence and expressly asserted that L was vulnerable and highly suggestive. Seventhly, despite this material, which partially pre-dates but strengthened throughout the five month period, it is submitted that it appears the Local Authority never re-visited its assessment of capacity, instead continuing to rely on choices which it should have been clear, L had no capacity to make. It is submitted that this remained the position until L took matters into his own hands and returned with D as soon as he saw him.

79. It is submitted that this of itself seems inconsistent with a man who did not want to see his brother or father. On the face of the information available the Local Authority appears to have been perfectly content with the sudden move home. Adult protection meetings that followed later seemed to be focussed on financial and other matters.

80. It is submitted that K's position as to the lawfulness of all this is reserved. At the very least, it is submitted, it is difficult to see how it complied with the procedural protection supported by Article 8. K and D, according to them, were told virtually nothing and they appear to have been deceived about what was happening at the time. It is submitted the lack of records, in particular surrounding the advice of Dr A, is worrying and may of itself give rise to an interference that the decision making process was inadequate.

81. In any event, it is submitted that there is also strong prima facie evidence of a substantive breach; a five month separation of the family based only on verbal capacity assessment that was obviously out of step with other contemporary material which was later abandoned.

82. As I canvassed with Mr Armstrong during closing submissions that has not been the focus of this hearing. It was not specifically raised at the directions hearing on 16 June 2011 as requiring specific investigation by the court at this hearing. It has not been investigated in a great length in oral evidence and no proper consideration has been given as to what if any further disclosure would be required from any other records.

83. In relation to the law, Mr Armstrong submits the starting point in any assessment of best interest is that mentally incapacitated adults are better off with their family. In support of this proposition he relies on a number of cases. Firstly, the case of re SR, a decision of Munby J (as he then was)

reported at [2002] EWHC 2278. This was a decision under the inherent jurisdiction in relation to the residence of a young adult who lacked capacity due to chromosomal abnormality, which resulted in him having severe learning disabilities and some physical disabilities. Although 19 years of age, he functioned at the same developmental level as a two year old. At paragraphs 23 to 25 of his judgment Munby J referred to the well-known words of Lord Templeman in his speech of the House of Lords case of KD:

> "The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered. Public authorities cannot improve on nature. Public authorities exercise a supervisory role and interfere to rescue a child when the parental tie is broken by abuse or separation."

84. At paragraph 25, he says:

> "I do not suggest that this statement of principle can simply be transported entire into the area of law with which I am here concerned. But, allowing always for the fact that a mentally incapacitated adult is neither in fact nor in law a child, the sentiments which underlie Lord Templeman's statement surely have a powerful resonance in a case such as this."

At paragraph 49 and 50 he continued:

> "49. I am not saying that there is in law any presumption that mentally incapactitated adults are better off with their families: often they will be; sometimes they will not be. But respect for our human condition, regard for the realities of our society and the common sense to which Lord Oliver of Aylmerton referred *In re KD,* surely indicate that the starting point should be the normal assumption that mentally incapacitated adults will be better off if they normally live with a family rather than in an institution – however benign and enlightened the institution may be, and however well integrated into the community – and that mentally incapacitated adults who have been looked after within their family will be better off if they continue to be looked after within the family rather than by the State.
>
> 50. We have to be conscious of the limited ability of public authorities to improve on nature. We need to be careful, as Mr Wallwork correctly cautions me, not to embark upon "social engineering". And I agree with him when he submits that we should not lightly interfere with family life. If the State – typically, as here, in the guise of a local authority – is to say that it is the more appropriate person to look after a mentally incapacitated adult than his own family, it assumes, as it seems to me, the burden – not the legal burden, but the practical and evidential burden – of establishing that this is indeed so. And common sense surely indicates that the longer the family have looked after their mentally incapacitated relative without the State having perceived the need for its intervention the more carefully must any proposals for intervention be scrutinised and the more cautious the court should be before accepting too readily the assertion that the State can do better than the family. Other things being equal, the parent, if he is willing

> and able, is the most appropriate person, to look after a mentally incapacitated adult; not some public authority, however well meaning and seemingly equipped to do so. Moreover, the devoted parent who – like DS here – has spent years caring for a disabled child is likely to be much better able than any social worker, however skilled, or any judge, however compassionate, to 'read' his child, to understand his personality and to interpret the wishes and feelings which he lacks the ability to express. This is not to ignore or devalue the welfare principle; this common sense approach is in no way inconsistent with proper adherence to the unqualified principle that the welfare of the incapacitated person is, from beginning to end, the paramount consideration."

85. The second case I was referred to is MM [2007] EWHC 2003, again a decision of Munby J, where he referred to Lord Templeman's observations in re KD and at paragraphs 116 and 117 warns against social engineering, the limited ability of public bodies to improve on nature and that the quality of public care must be at least as good as that from which the child or vulnerable adult has been rescued. If the State is going to justify removing children from their parents or vulnerable adults from their relatives, it can only be on the basis that the State is going to provide a better quality of care than that which they had hitherto been receiving.

86. The third case was re A, another decision of Munby J, reported [2010] EWHC 978. In that case he emphasises the need for the Local Authority to be sensitive and avoid being, or being seen to be, heavy handed.

87. The fourth case he relies on is the recent decision of Peter Jackson J in the London Borough of Hillingdon v Neary [2011] EWHC 1377 where Peter Jackson J found an Article 8 breach in part and at paragraph 155.1 stated as follows:

> "No acknowledgement ever appears of the unique bond between Steven and his father or of the priceless importance to a dependant person of the personal element in care by a parent rather than a stranger, however committed."

88. Mr Armstrong submits the court should not simply say "lets find out". He submits there are good reasons in this case why this trial should not be undertaken. In relation to a balancing exercise a court has to undertake, he submits the following factors are relevant. For the move, he submits, there are two main considerations. Firstly, the main benefits of a move are said to be that it will enable L to achieve a greater degree of independence, or at least be able to test whether that is possible. This arose in the context of difficulties relating to housing in the family home which have since been resolved by D giving up his bedroom to L, who now has his own space. Secondly, the reliance on acquiring independence skills, he submits that are speculative and marginal. L is going to require a lot of support and may never acquire the necessary skills and there is no real evidence that he could not acquire them with sufficient support at home. The professional judgments that advocate this course are weakened by the failure to conduct a balanced analysis (for example, of L's views). They have to an extent "steamed ahead" with plans and not taken a more measured approach.

89. Against the move, he highlights eight matters:

1. The family relationships are strong, made more so in adversity caused by the external pressures and particularly the events of 2006 and 2007, the day-to-day needs of L and this litigation, which has been going on since 2007.

2. The existence of the strong sibling relationship between L and D which is strengthened by the day-to-day life they share, ranging from sharing meals to common interests and Ds care for his brother's physical health.

3. The improvements in L's life and independence skills that have already taken place in the context of the family home, for example L attends college, attends Mencap events.

4. The quality and strength of this family, of the love and care described in the various letters and witness statements filed in support. Those views come from a range of backgrounds and experience and have observed the family in different contexts.

5. The expressions of preference attributed to L are mixed. It is submitted that he says different things to different people. There has been over reliance on his recent expressed wishes. The overwhelming weight of expression of preference are for staying at home and they have been given to a wide range of people. They include Dr Halstead, the advocate during 2009, statements to the Official Solicitor, speech and language therapists, Mr J, Mr P in April 2011, the ISW in November 2010 and when L was seen more recently.

6. The loss of care being given by the family which is not, and never can be, the same as that provided by those in institutional care. This relates not only to personal care but also diet and wearing appropriate clothes. The care provided by the family cannot be compared to that provided by the Local Authority, which can sometimes be thoughtless and too casual with the interests and views of family members.

7. Although there is a risk that if L remains at home he might achieve less in the way of independence skills than he could conceivably gain in a dynamic Local Authority placement. There is, at least, as greater risk that if he moves L will lose a significant part of family life on which he depends and would be at risk of a number of adverse consequences which would not be readily discoverable, either due to the lower incidence of Local Authority care or L not being able to communicate the difficulties effectively.

8. The inherent risk in proceeding with a trial and not being able to easily ascertain or measure the success of what was taking place due to L's communication difficulties. In addition, the risk that the professional judgment of those who have given evidence to date too readily accepted what has been termed the default position, which if he moves will be to remain in Local Authority accommodation.

90. Ms Butler-Cole on behalf of the Official Solicitor in her closing submissions submitted that in considering the Article 8 arguments the court must consider

the aspect of the right to private life. She submits in the context of L this includes personal autonomy.

91. In relation to criticisms that have been made of the Local Authority she submits they have to be looked at in the context K agreed to the move. That was his evidence in March 2010. The process moved relatively slowly. The care plan was circulated at the end of November prior to the meeting at the end of November. The January 2011 order was entered into after negotiations outside court, when all parties were represented. The contact regime set out in the schedule attached to the order was not unduly restrictive, but was to enable there to be some certainty regarding initial planning for L's move to the placement.

92. The complaints that things should have been done differently around the many hearings have to be looked at in the context of the many months of planning that had been abruptly bought to a halt. Attempts were made to move matters on collaboratively but in the context of events, it is not surprising the details around the proposed move became more restrictive because then it appeared to be the only option. The plan has since been changed to try and reach agreement to move the position forward for L. There are risks inherent in the change to the proposed contact, but overall in the context of K supporting the proposed move, if that is what the court decides, that is in L's overall interest. I agree with those observations that have been made on behalf of the Official Solicitor.

93. In relation to the balancing exercise she submits the following are relevant factors. For the move she submits there are three main factors. Firstly, the benefits to be derived from personal autonomy. L is able to function at a relatively high level, in spite of his disability. He is borderline regarding his lack of capacity, and I quote from the report of Dr Halstead:

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

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

94. Secondly, L has potential to develop further in terms of the acquisition of practical skills to develop his own ideas, preferences and choices. Whilst practical skills may, to some extent, be able to be learnt whilst living in the family home, there are real concerns that L, is not able to exercise his autonomy and develop his ability to control and direct his own life while living with K. This is based on reports of conversations with L when he has said that K has told him what to say or what to think about important topics, such as residence.

95. There have been long-standing concerns about K being anxious about what L says. There are historical references to conversations being taped. This was reinforced by the evidence of Advocate B about L wanting to please his father

and the decision by the father, in the context of these proceedings, of letting L watch the Panorama programme and then ask questions about his experience in care afterwards. L inevitably picked up on the strong views in the family home. The OS recognises that L is susceptible to the influence of others, any expressions of preference he makes cannot be viewed as necessarily reflecting his wishes.

96. Thirdly, it accepted that L will need to move to an external placement and the issue is timing. It is beneficial for L if it takes place sooner rather than later. This was raised not only in the context of accommodation. This holds true whether L's response to a placement at the J placement is positive or negative, as in either case knowledge of L's response will inform future care provisions for him.

97. There are two main reasons against the course proposed by the Local Authority. Firstly, and importantly, the loss to L of his family relationships that would inevitably change if he moves to the J placement. Important elements of his home life would be lost if he moved and these cannot be replicated. Whilst acknowledging the significance of these losses the Official Solicitor submits that the weight of these losses are at least ameliorated if the placement at the J placement is sufficiently flexible to allow L to return home, so that he can spend time with his father and brother and other aspects of home life that are important to him, such as caring and being with his birds. This has been reflected in the adjustment to the proposed placement at the J placement, which allows staying contact at the family home.

98. Secondly, the concerns outlined by K and L’s brother, D, about L's inability to care for himself, the risk of disputes with other residents, concern about his diet and lack of stimulation and whether they will be able to be monitored effectively and acted upon. The level of support which is proposed is high, is flexible and dynamic and the concerns identified will be kept under review. This will not be, as K fears, a repeat of what happened in 2006 and 2007 when L's family life was seriously disrupted.

99. The Official Solicitor submits the balance comes down in favour of the court authorising a trial period being in L's best interest.

Decision

100. The issues raised by this case are difficult and complex. In relation to the submission made on behalf of K that the court should make findings about events that took place in 2006 and 2007 when L was removed from the family home, I have already outlined the forensic difficulty with that in that such a finding was not identified as a matter to be determined at this hearing.

101. As the written opening position statement, submitted on behalf of K, acknowledges in paragraph 5 "relevant records have not been disclosed". No request has been made with these proceedings that such disclosure should be

made and I have no idea what further material would be available to inform any factual of determination as to what took place during this period and what the rationale was behind various decisions at each stage. To embark on a fact finding exercise on the basis of incomplete evidence would, in my judgment, be fundamentally flawed.

102. What I can say, as I have already indicated to Mr Armstrong, is that despite the passage of time I am entirely satisfied that there remains in K and D, but in particular K, a palpable fear that what is being proposed will end up as a re-run of what happened in 2006 and 2007, when L lost contact with his family. On K and D's version of events, if correct, there remains a real sense of injustice about the decisions that were taken during that period and the gross interference in their family life. If their version of events is correct their position is very understandable and it should be factored in when considering their actions and decisions in this case. Having experienced such an interference in their family life it is readily understandable why they fiercely guard against any further disruption and L's right to remain at the family home.

103. However, the court's task is different and whilst acknowledging that factor, the court has to stand back and consider what is objectively in L's best interest. In my judgment, whilst the court must factor into the balancing exercise it has to undertake, the family life that L clearly has with K and his brother that should not be the starting point as submitted by Mr Armstrong. Each case is fact sensitive and requires the court to undertake the balancing exercise in reaching its decision as to what is in L's best interest. What the court has to do, as set out in subsection 4(4) of the Mental Capacity Act, is consider all the relevant circumstances when undertaking that exercise.

104. I also bear in mind the Article 8 rights that are clearly engaged in this case that everyone, namely K, L and D, have a right to respect for their private and family life, their home and their correspondence and that there should be no interference by a public authority with the exercise of those rights except as in accordance with the law and is necessary and proportionate.

105. Having considered the written and oral evidence the detailed written and oral submissions, the relevant considerations in conducting the balancing exercise in my judgment can be summarised as follows:

1. L's family life at home with K and D is a significant benefit to L. The standard of care he receives is very high and the emotional attachments and relationships very strong. Any interference with that will need to be justified as being proportionate.

2. L is borderline capacity. The improvements he has made, as the evidence demonstrates, during the course of these proceedings in being able to articulate his views and express his wishes they should be supported and built on if possible.

3. L's need and right to a private life, which includes steps to personal autonomy, need to be given weight.

4. Historically the evidence demonstrates L has not easily been effectively able to make decisions about things or choices in the abstract. He needs to experience them to enable him to make an informed choice. Tangible examples of this are the respite care at the A placement and his contact with his aunt.

5. Whilst historically he has expressed a wish to remain living at home, this must be looked at in the context of his understandable wish to have the approval of his father and to be seen as being a good son. On the evidence, it is more likely than not that he will have picked up what his father's views are about opposing the plans to move to supported accommodation. A vignette was provided by the evidence of Mr J about the father talking about little else than the issues raised by these proceedings. D referred in his evidence to pressures arising from these proceedings in the family home.

6. There is broad agreement about the need for L to live independently in due course. The issue is when and the timing for that.

7. The suggestion on behalf of K and D that L has the choice now to leave the family home if he wanted to fails, in my judgment, to properly recognise the reality of the position L finds himself, as described most graphically by his current advocate, Advocate B, whose evidence I accept.

8. The accommodation that has been identified at the J placement is known to the Local Authority. The social work evidence is that it has a proven track record. It has detail of good and valuable support, is very close to the family home and the local area that L is familiar with.

106. Having considered these factors, I have come to the clear conclusion that L's best interests are met by the court authorising a trial period at the J placement. This is for the following reasons:

1. It is in L's best interest for steps to be taken to enable him to achieve as much personal autonomy as possible. He is borderline capacity and the court must seriously consider steps that would enable him to either regain capacity, or enable him to make informed choices and decisions.

2. Historically L has not been able to make such choices in the abstract. He must experience them before he is able to make those decisions and choices.

3. The inevitable interference in family life L currently enjoys is justified and proportionate due to the proximity of the J placement to the family home and the support offered and the flexibility in the regime for contact proposed.

4. The risks in relation to personal care, diet, day-to-day routine are well supported by the regime of support proposed. While this will inevitably be different from that provided by family members, it can be done collaboratively with the family. It has to be looked at in the context of enabling and allowing L to make informed decisions and choices about independent living. To their very great credit both K and D have said that if the court's decision is to

authorise a trial period they will support it. That support can only benefit L in his journey to making that decision.

5. His wishes have varied over time. However, the evidence points to L becoming increasingly unable to freely express his views due to the conflict in loyalty he feels in relation to his family.

6. The concern about the parties and the court not being able to effectively review the proposed placement due to difficulties involving L's views being effectively expressed, coupled with the risk that professionals will too readily adapt the default position of leaving L where he is, in my judgment, counter balanced by the continuing scrutiny and oversight by the court. In addition, L has his own independent advocate who is particularly impressive and the father has an effective legal team.

7. All parties agree that the goal should be to enable L to move towards independent living. The debate is, as I have said, about when that should happen. To enable L to make the informed choice he needs to experience it. There remains a real risk that he would feel unable to make such an informed choice whilst he remains in the family home.

8. The reality is that he will only be able to experience the skills required in having a tenancy and all that goes with such responsibility (paying rent and bills) by being placed in that situation in a suitably supportive way, which is what the J placement can offer.

107. I fully appreciate that this decision is not the one that K or D want. I have factored into my decision the fact that both he and D will, once the decision of the court has been made, support this decision for L's benefit. Although there have been difficulties in the past L is indeed truly fortunate to have such a close and supportive family who have done so much for him and who are of enormous value to him.

108. Having reached the decision that this trial period should take place, I agree with the submissions that it should take place sooner rather than later and will hear submissions as to its structure on the ground to include, in particular, strategies in place to ensure communication does not break down and the extra support that we have identified during the hearing, in particular from the occupational therapist.

109. I will also hear submissions as to when the matter should be reviewed by the court and how the court's decision is going to be communicated to L.

110. In addition, consideration needs to be given to the continued involvement of M and how her contact with L is going to be factored into the next stage.

111. I also direct that a transcript of this judgment is prepared as a matter of urgency, so that it is available to be used to move this case forward.