



Neutral Citation Number: [2012] EWHC 439 (Fam)

Case No: FD0700104

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/03/2012

Before:

MRS JUSTICE THEIS DBE

Between:

LBX
- and -
K, L & M

Applicant

Respondents

Mr H Harrop-Griffith (instructed by **Local Authority**) for the **Applicant**
Mr N Armstrong (instructed by **Creighton & Partners**) for **K**
Ms V Butler-Cole (instructed by **Steel and Shamash**) for **L** by his litigation friend the
Official Solicitor
M in person

Hearing dates: 16th & 17th February 2012

Judgment Approved

This judgment is being handed down in private on 6th March 2012. It consists of 20 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 concerns a young man L born on 21st December 1983 who is now aged 28 years. He has a diagnosis of mild mental retardation and some learning difficulties, with an IQ that has been assessed at 59.
2. These are proceedings under the Mental Capacity Act 2005 (MCA 2005), the court has determined that L lacks capacity to make certain decisions; where he should live or who he should have contact with. The Applicant is the LBX and the Respondents L (with the OS as his litigation friend) and his father K and his aunt M.
3. The central issue that I have to determine is whether it is in L's best interests that he should remain in supported living accommodation or return home. He has been living in supported accommodation called the J placement, on a trial basis, since 24th August 2011. The LBX submit that L should remain in supported living accommodation; this is supported by the OS on behalf of L and by M. K contends that L should return to live with him as this accords with his wishes or his wishes are difficult to determine and all the stated benefits that are relied on to support the decision for L to live in supported living accommodation can be achieved by L living at home, with all the additional benefits that living within the family brings L.
4. I do not propose to set out the background in any great detail. This will be the fourth reported judgment in this matter; Baker J gave judgment on 31.3.10 ([2010] EWHC 2422 (CoP)), I gave judgment on 20.7.11 ([2011] EWHC 2419 (Fam)), that decision was the subject of an appeal by K which the Court of Appeal (Thorpe, Black and Davis LJJ) dismissed in their judgment on 8.2.12 ([2012] EWCA Civ 79).
5. The detailed background can be found in those previous judgments, what follows is a summary. L is the eldest of K's two sons, his younger brother D is 23 years and lives with K. L's mother disappeared when he was a baby. For a period of time L was looked after by M and other members of the wider family. This was initially in Trinidad but from about 1996 he was looked after by M in the UK. He had regular contact with K and D, who by then had moved to the UK. From about 2001 he lived with K and D save for a period of about 5 months in 2006 – 2007 when he was removed into the care of the LBX following an alleged incidence of violence during which time he had no contact with K and D. In 2007 L returned to live with K in circumstances that remain in dispute. K and D raised concerns about the level of care received by L whilst he was in the care of the LBX. As a result of the circumstances of his removal from their care and the level of care L received there was, and remains, a considerable amount of distrust by K and D of the LBX.
6. The return of L to K's care resulted in M issuing proceedings in 2007 under the inherent jurisdiction which, following implementation of the Mental Capacity Act, converted into an application under those provisions in the Court of Protection.
7. There have been two substantive hearings since then. The first, before Baker J, in March 2010 laid the ground for investigation to take place about the options for independent supported living for L. Whilst L was living with K at that time he was spending one weekend a month at the A placement, where he was reported to be making good progress. Following the hearing before Baker J a facility, called the J

8. The plan set out in the order made on 24.1.11 did not take place, K's then solicitors came off the record and L's advocate, Advocate A, was effectively dismissed by K. Further meetings took place in April 2011, K attended one on 20.4.11 together with Mr Parker, a new advocate for L. A detailed transition plan was set out in the minutes of that meeting with visits over the course of the following month with a view to a final full-time move being on 23.5.11. The minutes record K agreeing to bring L to the first two visits. After that he would be dropped off by K. The first visit was to take place on 26.4.11; L was not brought for that visit or any subsequent visits.
9. Following further hearings K instructed new solicitors and the funding certificate was transferred to K's current solicitors, just prior to the hearing before McFarlane J (as he then was) on 16.6.11. That order declared that it was in K's interests for there to be consistency about advocacy services for him and the matter was adjourned for a hearing before me on 18th and 19th July.
10. The central issue I had to determine at the hearing in July was whether it was in L's best interest to move to supported living accommodation on a trial basis. In my judgment dated 20.7.11 I determined that it was; my reasons for reaching that decision are summarised in paragraph 105 and 106 of that judgment.

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 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 adopt the default position of leaving L where he is, 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.

11. Following my order L moved to the J placement on 24.8.11, after a 3 week transition period. Following his move, L spent every weekend from Friday to Sunday with K and D and saw K on a Tuesday evening. He also had contact with M, although there was a break in that contact due to issues arising out of L's decision not to attend an event with M. L went with K for a holiday in Trinidad for about 6 weeks from early December until the middle of January.
12. A review meeting took place on 5.9.11 at L's flat at the J placement with K and L's advocate, Advocate B, present. The aim of the meeting was to review how the placement was going for L, and to review whether his support plan was meeting his needs. Unfortunately the meeting had to be brought to a premature end due to L becoming upset and leaving the room. Ms P, the allocated social worker, stated in her statement that the meeting had '*become one of K expressing his distrust of L's advocate and accusing me of telling untruths on L's care plan back in 2009. The meeting no longer became L's meeting and L requested in the presence of his advocate that the meeting be stopped and another date be arranged.*' Following that meeting a further meeting was held on 13.9.11, which K attended, where it was decided that the review be completed by the J placement with L, without the presence of K, and any further individual support assessment meetings would take place with the J placement staff and L in the first instance, with the views of K being taken at a separate meeting. In her statement dated 21.9.11 Ms P attached the exchange of emails between K and the LBX where he raised issues concerning L's placement at the J placement.
13. During this time L's contact with M had moved on to being fortnightly unsupervised for a period of at least 5 hours.
14. The matter came back before me on 26.9.11. The order made that day included the following declaration:

IT IS DECLARED IN THE INTERIM PURSUANT TO S.48 MCA 2005 THAT:

(i) It is in L's best interests to reside at the J placement pending further order of the court.

(ii) It is in L's best interests to have unfettered contact with K and D during L's free time.

(iii) It is in L's best interests to return to the family home for overnight leave on Friday and Saturday nights, from 3pm on Friday afternoon, returning to the J placement on Sunday afternoon at 6pm, subject to emergencies or unforeseen circumstances.

(iv) It is in L's best interests to have unsupervised contact with M of at least once a fortnight for at least 5 hours' duration on each occasion at the discretion of LBX, having due regard to his wishes and feelings as ascertained by his advocate, Advocate B. Contact arrangements with M will be reviewed monthly by LBX and the J placement.

(v) It is in L's best interests to continue to have Advocate B as his advocate during the course of these proceedings, or until further Order.

(vi) It is in L's best interests for LBX to be made his appointee forthwith, and for L to be given £40 of his weekly income (excluding housing benefit) each weekend.

15. Since that hearing there have been two further reviews of L's placement at the J placement together with a further assessment by the occupational therapist. The first review was in November and the second on 8.2.12; just before this hearing. The report from the J placement by SV (senior support worker and L's key worker) dated 13.1.12 summarises what they saw as L's progress since his placement there, they include:

- (1) Help with budgeting by way of weekly budget sheet for L;
- (2) Enrolment in adult education classes; since October L has been attending courses on personal care and computer literacy;
- (3) Travel support; since early November L has been travelling to and from his classes;
- (4) Engagement with E Employment Services, since January this has meant attendance one day per week
- (5) As well as weekly visits to K and joining activities with K, L attends the weekly Mencap club, wider activities (such as bowling, cinema etc) and support in making decisions to attend other activities such as a disco in early December.
- (6) Monitoring and support regarding L's food intake and his weight.
- (7) Monitoring and support regarding safety around the home and in the community.
- (8) Monitoring and support for L to assist his progress towards independence, for example a pictorial chart has been designed which prompts him with his daily tasks and support needs. Progress has been noted in a number of areas, for example in the first month of his placement L was supported to prepare his breakfast however in the few weeks prior to going on holiday L had shown progress in this area and was able to undertake this without staff support. He is able to follow the guidance given and adheres to it.

SV notes in this report *'In the 14 weeks L has been using the service, he has demonstrated a good level of motivation and a move towards independence. He is more confident when communicating with staff and is able to express his wishes or concerns. L has key working sessions with his keyworker, which gives him the opportunity to discuss his placement and any new areas of support, which may be identified.'* At the end of the report he states *'L demonstrates all the qualities of a young man wishing to develop his independence with the potential to do so. However at times L has to balance the choice of enjoying his independence over complying with his father's requests. It is our view that if this balance can be struck, then this will ease the pressures on L and allow him to progress further with his independence and life skills.'*

16. The updated occupational therapy report followed two visits to see L on 14th and 29th November. This assessment was completed by an occupational therapist who had known L for some time. Whilst her assessment focussed on two daily living tasks chosen by L (ironing a shirt and changing sheets/duvet) her report states the following *'The therapist conducting the visit has know L for some time. It was noted that his activities of daily living skills seem to have improved since he has been living at the J placement. He appears to be more in control of his life and to this end appeared more*

17. Whilst there had been no formal meeting with K since the events in September, there had been regular contact via email between K and SV regarding issues arising from L's placement at the J placement. In particular, there had been a number of issues reported by K. They can be summarised as follows:

- (1) On 3.10.11 K raised concerns with the J placement relating to L's behaviour observed by K when he was passing the J placement. He reported he observed L leaning out of his window displaying inappropriate behaviour towards a group of school girls. He was concerned that such behaviour was taking place when staffs were at the J placement. In her statement Ms P states *'DA, support worker from the J placement reported that he had also overheard L's behaviour and had a one to one consultation with L later that day to address the concerns raised by K and overheard by himself and the manager. DA reported that he had re-enforced with L that his behaviour was highly inappropriate and could lead to further action being carried out against him, if the girls had complained. DA reported that L was clear that he would not do this again. The issue of inappropriateness within the community is revisited as part of L's 'Stay Safe' core objectives as set out by the service. The inappropriateness of the behaviour was also re-visited and re-enforced during a review meeting held on the 9th November 2011 with L's advocate present.'*
- (2) K attended the J placement on 29.1.12 to drop something off, he reports he spent about 30 minutes with L and no staff were present.
- (3) On 2.2.12 K was informed that L had ripped up his two winter coats. He said L informed him that he had acted in this way as staff members *'G and SV had pressurised and hurried him to go and meet the Advocate on 30th January and he got angry'*. He said he contacted the J placement when L told him this. His concerns were that he was not notified of this incident, it meant L was going out without a proper coat and highlights difficulties in the way staff are communicating with L. At his review on 8.2.12 Ms P reports this issue was discussed with L. In discussion with Advocate B further advice and support was

given how L could best communicate if he felt under pressure.

(4) On 5.2.12 K said he was passing the J placement and saw L inside his room hitting a ball with his shoe, he watched him for about 15 minutes. The ball went outside the window and landed down by the bins, L came down to get it and started picking up rubbish and then throwing snowballs at passing cars. K reported that he went in to the J placement to see who was allocated to L, he was informed the person was at another building looking after other people. K was concerned L had been left unsupervised.

18. One of the issues that occupied the majority of the evidence before me at this hearing was seeking to establish what L's wishes are in relation to staying at the J placement or returning home. I heard oral evidence from M, L's social worker Ms P, support workers at the J placement (SV and PC), K, D, Ms L, Mr S and Advocate B (his advocate).

19. On 23rd January one of the support workers at the J placement called PC was with L at the J placement. During their meeting L was on the telephone to K and became upset and said he wanted to go home to live with K. PC spoke to K on the phone before L's phone call with K finished. She recorded what took place in the records at the J placement as follows:

'L informed me that he is upset and feeling down. He said he had had a great holiday with his Dad and didn't want to come back to the J placement, but his father advised L to return back to the service. L informed me that he was happy when he was living with his father and brother and is missing them and his pets. He said he does not like living at the J placement but he does not have a choice he also expressed that he don't understand why he got to come back and live here when he is not happy and no one understands how he is feeling. L was emotional and upset when he was talking to me, I tried my best to give him emotional support. L said he can't wait for the weekend when he can go back and stay with his father. L said that its very hard for him to express how he feels. L was supported to the Library and he had lunch out, when he arrived back to the J placement he was in a better frame of mind. I advised L to talk to his key worker and staff if he is feeling down or unhappy. I will pass on information to his keyworker regarding how he is feeling.'
The record notes in the action column *'Pass on information to key worker.'*

20. It appears it was that contact with PC that resulted in K contacting his solicitor Ms Shah who reports in her statement that K informed her *'PC had expressed concern that L was unhappy at the J placement and wanted to return home. K asked me to contact PC.'* Ms Shah did contact PC on 6.2.12 and filed a statement setting out what PC told her. The statement records PC confirming that *'L had informed her of his views on a number of occasions. When asked specifically how many times she had had this conversation with L. She confirmed that she had had this conversation with L roughly 4 or 5 occasions.'* She told Ms Shah she always made a note of these conversations and the records would be at the J placement. When told there were no such recordings apart from the one on 23rd January she could not provide any explanation for that. She maintained that she had mentioned this to SV but he may have been distracted at the time doing something else. He said in his evidence that he did not recollect this.

21. PC gave oral evidence. She had known L before when she worked at a respite provision L attended when he was living at home. She described her dealings with L and accepted that there was only one written record when L states he is not happy at the J placement. There was a reference in an entry on 31.8.11 when L said he missed his family, but she agreed that was not surprising as it was early days in the placement.
22. Having considered her evidence carefully I consider it more likely than not that she did inform SV of the matters she recorded on 23rd January, he has simply forgotten that this took place. It is likely this is because it was not done in a way that would prompt further action and appears to have been mentioned by PC when SV was doing something else. I do not accept that there were 4 or 5 times when L said he was unhappy at the J placement in a way that caused PC concern. If he had then she would have recorded those events in the records, as she did on 23rd January.
23. Whilst the views expressed by L on 23rd January were as recorded by PC the weight to be attached to them is a different question. They have to be considered in the context of the recent return from Trinidad, they were made during and after a telephone call to his father that caused him some distress for reasons which are not clear and it was the only occasion when PC has felt the need to record and report these views. This is in the context of L having been at the J placement since 24.8.11. I considered PC lacked the necessary balance when giving her evidence about L's wishes. She said she was '100% confident' that L did not want to stay at the J placement, she readily relied on some of L's behaviours without considering alternative explanations. Whilst her position is understandable she has, in my judgment, been unable to step back and look at the wider picture that the court has been able to do. Perhaps with the benefit of hindsight if her comments had been picked up by SV and discussed with her, she may have had the opportunity to be informed about the wider picture. It is clearly important that the daily records are better monitored in the future so these issues are picked up and managed more effectively.
24. I consider it more likely than not that K latched on to what PC had said on the telephone on 23rd January and, in my judgment, gave it more significance than he should have. He contacted Ms Shah who in turn contacted PC. It is clear L picked up on this, probably from his father, by the comments made to others (e.g the OS representative on 10.2.12) that PC was going to support K and attend court. He could only have got that information from K.
25. The receipt by K of the updated evidence which reported K's wishes to remain at the J placement resulted, it appears, in Ms L phoning K on 7.2.12. In her statement she says '*I confirm I had telephone contact with L on 7 February. His father rang me and explained that L had told a staff member at the J placement that he wanted to stay there now. I was very concerned and rang [L].*' According to her statement she reports L informing her that he wished to live with K and she reports '*He told me he had messed everything up and had caused problems for a staff member called PC who he has always told he wants to go home. He said that a few times, so obviously was very concerned about it.*' She continues in her statement '*I did my best to not state that I wanted him at home, or to remind him he had always told me he wants to stay at home. I just kept asking him what he wanted to do and each time he said the same*

- (1) There is no doubt as to Ms L's views on what L should do; in her previous statement before me in July 2011 she said moving L was a *'preposterous and ludicrous idea. L wants to stay at home with his family. He does not want or need to go through a move again.'* L would have been aware of her views or at least aware that they accorded with K.
 - (2) Even making all due allowance for her understandable wish to get clarity, doing so by way of long phone calls with repetitive questions was unhelpful. No details are available of the first call other than what is recorded in her statement but it is very clear, having listened carefully to the recording of the second call that L is, at the very least, confused. The account he gives of the meeting that took place on 8.2.12 is not supported by any other evidence, which undermines the reliance the court can place on what he says during that call.
 - (3) Mr Armstrong seeks to place reliance on the fact that L's initial answers in the second call were in response to non leading questions. The difficulty with that is that they can't be looked at in isolation from the call the previous day (which was very likely to have been conducted in the same way as the call we have the transcript of); so when Ms L says at the start of the second call *"OK and you weren't really looking forward to it were ya?"* that has to relate back to their discussion the previous day and in his response to what happened at the meeting L is stuttering which is very likely to be a manifestation of the anxiety the call gave him. Ms L's response *'You did?'* was with an (understandably) encouraging tone to her voice. There then follows a number of leading questions (e.g. *'Right okay. Dear o dear. So how many times did you tell them you wanted to live with your dad and your brother or, you know, at home?'*). Many of Ms L's responses continue to be in overtly encouraging tones which L will undoubtedly have picked up.
26. I am satisfied that the recordings undertaken by Ms L were done without L's knowledge. I do not accept her evidence that she obtained L's consent to record the first phone call. She does not refer to this in her statement and she did not seek his consent to record the subsequent calls. The OS did not object to the court reading the transcript of the second phone call but did object to me listening to the recording as it was done without L's consent or knowledge. I considered it was important that I listened to this recording, as it provided the fullest picture as to the way this call was conducted.
27. The evidence from Mr S was limited in its assistance of what L's current wishes are. He has only seen him twice since the placement at the J placement and when he asserts in his statement that L *'unequivocally states that he would like to stay at home*

28. K and D set out in their statements what they report L has told them. I accept what they report is what L has told them; that is not surprising. L is very clear as to what their views are about what he should do. I am satisfied that K has discussed matters with L and that, in part, is what has caused him to report his confusion to Advocate B. The likely source of the information L gave to Advocate B and the representative from the OS about PC's role in this matter would have come from K. The only reason K would have wanted L to know was to re-enforce his (K's) view about what he considers L's wishes should be. The fact that K latched on to the phone call from PC and, in my judgment, elevated it to have more significance than it did when he reported it to his solicitor is a good indicator of the steps he will take to make sure his view of what L's wishes are should prevail. This is understandable from the point of view of K, but from the court's point of view it means it needs to look for other sources of evidence when considering what L's wishes are.
29. Advocate B, in her two reports, outlines the support she has given L. She sees him for about 8 hours per month. The meetings are instigated by L and he decides where they should meet. She said they often meet away from the J placement and that is at L's request. She considers L sees her as being distinct from the J placement and understands her role as being able to communicate his wishes to the court. It is clear from her report that K has discussed with L his reported wishes and what he has said. She reports on a number of occasions K overriding L's wishes (e.g. the decision to go to Mencap instead of the dinner dance with M; her report records L saying '*My dad chose me to go to Mencap instead.*' She continues in her report stating '*We had a long discussion about this, and it is very clear that L is still finding it very difficult to make his own choices and to express his own opinion and wishes, even though he is living at the J placement.*'). Her report describes during the meetings in November L saying he is happy living at the J placement and feeling settled and likes spending 5 days at the J placement and 3 days with K. It is of note that she saw him on 23.1.12 (the same day as PC) and records L as being able to say he wants to stay at the J placement but acknowledging the reasons why K may want him to live at home. At the end of her first report she states '*..L is growing in self confidence and beginning to develop some very basic self advocacy and assertiveness skills. L is now not only expressing himself eloquently but is also able to reflect a little on his life and on his relationships. This is real progress and indicates that L's self esteem is improving.*' She continues describing how L is caught between the influence of his father and to a lesser extent his aunt, as she states '*I feel that L is often stuck between these two very strong characters and their powerful presence in his life....I am concerned that L will struggle to be more independent and to have control over his own life unless this influence is limited.*' She records the positives about L's placement at the J placement and comments that it would be '*..empowering for L if the team could work a little more creatively to assist him with his day to day planning and communication.*' She reports, from her contact with L, that he has been consistent about his wishes and feelings.
30. Her second report deals with her contact with him on 8.2.12. She said he had contacted her and asked her to come early, prior to the arranged review. When she got

31. In her oral evidence Advocate B said she was not certain that what L had told her were his genuine wishes but she was clear he understood her role as his advocate. She said he has a real sense of what a judge is and understands the link between what he wants and the judge, and who makes the decision. She said she has told him to tell her what his views are because she needs to tell the judge. She acknowledges he is suggestible and does not want to upset his father, not because of fear but because, as a good son, he does not want to let him down.
32. I found Advocate B to be an impressive witness; she is experienced in the role she undertakes. She was measured and realistic in the evidence she gave. I am satisfied that she has been able to establish with L an understanding of her role and provide opportunities whereby he can freely express his wishes. The fact that he turned to her in the confusion and turbulence he felt on 8.2.12 speaks volumes. I accept her evidence that L has consistently said to her that if he had his own choice he would like to stay at the J placement and wants to continue to see his family.

The law and the parties' submissions

33. The determination of a person's best interests is governed by section 4 of the Mental Capacity Act 2005; the material parts are

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

(3) He must consider—

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

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

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

...

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

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

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

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

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

...

(b) anyone engaged in caring for the person or interested in his welfare,
...
as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

...
(11) "Relevant circumstances" are those—
(a) of which the person making the determination is aware, and
(b) which it would be reasonable to regard as relevant.

34. I have received full written closing submissions from the parties. I have summarised each of their position below.

35. The LBX's submissions can be summarised as follows:

- (1) L has borderline capacity.
- (2) L has become better able to articulate his views and express his wishes during the trial period and this has continued to grow.
- (3) L is more likely than not to have expressed his true wishes to Advocate B that he wishes to stay at the J placement and continue to see his family.
- (4) There is no other evidence (for example by way of L's behaviour) that contradicts his expressed wishes to remain at the J placement.
- (5) L has grown in confidence as evidenced by the report from the occupational therapist, SV and Advocate B. Ms P's evidence was that she considered the greatest benefit for L was the development of his ability to make choices for himself. A recent example being the way Advocate B said L conducted the review meeting (setting the agenda and leading the meeting). Advocate B found him happier and more relaxed.
- (6) There is agreement between the parties that L should move to independent accommodation, the question is when.

36. The submissions on behalf of K can be summarised as follows:

- (1) L clearly expresses different things to different people. There is no proper basis for accepting the evidence of Advocate B over the other witnesses and the court should be cautious in accepting the evidence of L's views expressed prior to what was said by L to PC and AL. Advocate B has no relevant expertise and weighing up what L says would be a question for a psychiatrist or psychologist. All the evidence relating to L's wishes is non-expert expressions of opinion. However, Mr Armstrong does go on to submit as many of K's witnesses have known L for longer '*...there is a powerful case for believing K's witnesses over the others.*'
- (2) There is no evidence that L would come to harm living at home, the importance of family life provides a powerful factor to be weighed in the balance. Reliance is placed on the evidence from K's witnesses that L is happy at home and participates in various activities, such as cycling. All these relationships are based on love and friendship, not on professional care.
- (3) There is evidence that L remaining at the J placement carries risks that living at home does not. For example, risk of weight gain, lack of supervision regarding inappropriate behaviour. Whilst accepting that there will inevitably

- (4) There is insufficient justification for interfering with L's family life at home. The Court of Appeal in its judgment in the appeal from my decision in July re-emphasised L's family life is an important part of the court's analysis (*K and LBX and others [2012] EWCA Civ 79* per Black LJ para 52; Davis LJ paras 63 and 65).
- (5) There is insufficient evidence for the court to be satisfied that placement at the J placement is better for L than placement at home. The court should be cautious about relying on evidence, particularly in a finely balanced case, from witnesses who rely on their professional experience and ask the court to accept their judgment. There is, it is submitted, a risk in such circumstances of overestimation by such witnesses; the professionals are engaged in the task of developing independence, they value that and are therefore likely to believe that what they are doing makes L happy. Reliance is placed on an article from the Journal of Intellectual Disability Research. It is submitted this was important as K and the court are dependent on the evidence from those who work at the J placement. It shows, it is submitted, a lack of balance in the way the evidence is given. There is evidence that the LBX and the OS overstate the benefits of the J placement and downplay or dismiss out of hand evidence that may point the other way. For example: (i) SV's failure to remember the conversation with PC about her recording on 23.1.12 and his conversation with L on 8.2.12. (ii) Ms P's downplaying of the coat incident, the late reference to K having friends; (iii) the reaction to the evidence from PC focussing on procedure rather than the content of what PC was saying; (iv) overestimation of the evidence from the occupational therapist which on closer analysis show no more than the progress that would have been expected over a 3 ½ year period.
- (6) The LBX and OS assert that L appears more confident, more assertive and happier at the J placement. Those are subjective assessments and difficult to measure, the court should be cautious in considering that evidence particularly when balanced with the evidence of L's distress on at least two occasions (23.1.12 and the coat incident).
- (7) The court cannot properly conclude that the J placement offers any advantages over life at home. In those circumstances as the move to the J placement represents an interference with family and private life (not limited to L but also K and D) any doubt about where the balance falls the default ought to be 'do not impose' as that is what Article 8 means. Mr Armstrong submits '*That is what Article 8 means, with its protection from interference. Article 8 is certainly about autonomy, but the true autonomy is to be left alone by state authorities who think they know better*'.
- (8) Even if the court finds there are some advantages to living at the J placement those are at too great a cost. The balancing exercise the court has to undertake is between two competing realities not a means by which the court tries to create, over perhaps a long period, a better solution. The LBX is too quick to dismiss K's views and, even when under the spotlight of the court proceedings, have not arranged or have cancelled meetings with K. The court can have little confidence that things will improve. The balancing exercise has to be conducted on realities rather than hope, if the court imposes an arrangement the likelihood is it will continue to create conflict, which is felt

37. The submissions on behalf of the OS can be summarised as follows:

- (1) There is no starting point or assumption as regards the weight to be accorded to family life; all relevant considerations must be identified and weighed in the balance when reaching a decision.
- (2) L's family life is of significant benefit to him. The evidence points to more work that can be done to ensure L has a more fulfilling life at the J placement; there is no reason why K, D and their wider circle of friends could not play a fuller part. The evidence points to benefits to L in breaking down the differences between 'home' and 'the J placement' and in helping L to have more control. This requires more regular reviews (three monthly as proposed by SV) and for K and D to be a part of them.
- (3) L's wishes are capable of ascertainment by a careful analysis of the context in which his views are expressed. In considering L's ability to express his views it is submitted the evidence of Advocate B should be preferred to the evidence of PC, Ms L and K on the issue of L's wishes. Advocate B is an experienced advocate whose evidence shows she has not taken sides or fallen into the trap of thinking that whatever L says necessarily reflects his true views. She has made conscientious efforts to help L make his own choices and express his preferences and her evidence should be preferred to those who felt that whatever L told them was correct or that L is not capable of making any choices of his own. There is tangible evidence that supports her view that L treats her differently and understands her role to convey his wishes to the court; L initiates contact with her and turns to her to discuss matters that are troubling him (e.g the confusion he felt about PC and his father telling him she was helping him in court to get L home); he has not always expressed the same view to her which suggests he does not feel there is a particular answer she expects him to give. Her evidence is that since the trial period began '*L has consistently said that if he had his own choice he would like to stay at the J placement*', he has told her he likes spending Friday to Sunday with his father and he would like to spend only one night at home in the week. PC's view that L should return home followed the incident on 23.1.12, she said she was '*100% confident*' that L did not want to stay at the J placement but was unaware of L's difficulty in expressing his wishes to K due to his wish to please and his awareness of K's views that he should not live there. She went on to attribute a wide range of behaviours by L as demonstrating his unhappiness at the J placement without considering alternative explanations (e.g wishing to eat his dinner at a time of his choosing). The totality of her evidence suggests that she was strongly influenced by what took place on 23.1.12; she had not raised any concerns previously or recorded any of the other incidents she recalled in her conversation with Ms Shah when L had said he wanted to go home. The attendance note made by the OS on 10.2.12 shows that L had, for whatever reason, clearly formed the view that PC had had a lot of contact with K and he had also clearly become confused by discussions with PC about where he should live (as reported by Advocate B on 8.2.12). Ms L was someone who L would understandably associate with his father. She had strong views that the placement at the J placement was not appropriate. Her immediate reaction to being told by K that L was saying he wanted to stay

- (4) L's autonomy had been enhanced. Advocate B reports that he is more relaxed, confident, assertive and able to make and express choices since the move to the J placement. It is submitted that it is easier for L to develop his autonomy at the J placement than it would be at home. The incident of L's attendance at Mencap or the dance to which M invited him is a clear example of the potential for L's choices to be overridden because of the conflict. The evidence shows that it is more likely than not that it was K's reaction to the invitation by M that caused L to say he did not want to attend. It is apparent that shortly after being informed of the invitation and realising that it clashed with Mencap K emailed Ms P to say L did not want to attend. K's evidence that this was as a result of overhearing a conversation between Mr S's son and L is not supported by the timing of the email to Ms P. The more likely explanation is that L realised K did not want him to attend the event with M and so decided not to go. When he saw Advocate B in person he said '*my Dad chose me not to go*' which reflects the reality for L. In his oral evidence K expressed the view that L should attend Mencap rather than the disco and was unwilling to accept that these sorts of decisions were ones that L could make for himself.
- (5) Whilst not placing determinative weight on the benefits of supported living giving greater potential for independent living skills to be acquired there is evidence (from Ms P) that there is something qualitatively different about learning the necessary skills (e.g. budgeting, cooking, cleaning) in his own home than in the family home. The greater opportunity for making and expressing choices will feed into the practical elements of L's care plan.
- (6) L does not require 24 hour supervision and is able to exercise a significant degree of independence. However he does need people around him to help with prompting him to attend planned activities, keep him occupied and avoid boredom or isolation. There are certain aspects of L's care plan which require improvement to ensure L's assessed needs are properly met. For example, more stringent mechanisms for ensuring K and D are involved in reviews and care planning; L's need for an independent advocate should be part of his care plan as it is required to meet his assessed need to develop his independence and make his own choices not just in the context of these proceedings. For example, Advocate B's input has included identifying ways for the J placement to avoid a repeat of the incident in which L ripped his coat and pointing out ways to improve communication with L. Further activities and/or individual support may be required to ensure L is not bored or lonely. L has

- (7) It is accepted by all parties that L should move to independent accommodation at some point; the issue is when that should take place. The OS submits that it is in L's best interests to try to encourage the success of the present arrangements, than to go through the process again at some unspecified point in the light of the other factors identified in support of L remaining at the J placement.

Decision

38. As stated in my judgment in July the issues raised by this case are difficult and complex; that remains the position. The central issue I have to determine is whether it is in L's best interests to remain in supported living accommodation or return home.
39. Having considered all the written and oral evidence the court has to stand back and consider what is objectively in L's best interests. That approach was endorsed by the Court of Appeal; it rejected the submissions on behalf of K that ECHR Art 8 respect for family life requires the court in determining issues under the inherent jurisdiction or the Mental Capacity Act 2005 to afford a priority to the placement of an incapacitated adult in their family life. They concluded that family life is one of "the relevant circumstances" which under the MCA 2005 s4 the court must consider. Thorpe LJ stated at paragraph 30

"...Simply stated the principle for which Mr Armstrong contends is not made good by the authorities which he cites and is in any event altogether too crude. In practice, as in the present case, there may well be a conflict between the incapacitated person's right to family life and that person's right to private life. Nor is a tentative move towards supported accommodation necessarily a termination of, or a significant interference with, the incapacitated adults' family life. As in this case the family has every opportunity to be an essential contributor to the trial."

At paragraph 35

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

40. 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 interests, considering all the relevant circumstances when it undertakes that exercise.
41. I bear in mind the Article 8 rights that are clearly engaged in this case that everyone, namely L, K and D, have a right to respect for their private and family life and there should be no interference by a public authority with the exercise of those rights except in accordance with the law as necessary and proportionate.

42. As described in my judgment in July I remain satisfied that both K and D have a fear that what is being proposed will replicate what happened in 2006 and 2007, when L lost contact with his family. From K's and D's perspective there remains a real sense of injustice about the events that they allege took place during that period, and the consequent interference in their family life. Within that context it is all the more understandable that they fiercely guard against any further disruption in their and L's family life. That position was evident during this hearing, as it was in July. It remains an important context in which to consider their position.

43. In my judgment the relevant considerations in conducting the balancing exercise can be summarised as follows; many of the considerations that were relevant to my decision in July are equally applicable in the decision being made now:

- (1) L's family life at home with K and D is a significant benefit to L. The standard of care he received when he lived there and during his visits home whilst he has been at the J placement is very high and the emotional attachments and relationships are very strong. This includes the wider family social network, family friends such as Mr S and Ms L who clearly have shown such commitment to L and his family. Any interference with that will need to be justified as being proportionate.
- (2) L is borderline capacity. In my judgment the evidence demonstrates that during the course of his placement at the J placement his ability to be able to articulate his views and express his wishes has been enhanced. The evidence shows he has grown in confidence and been able to make choices. He still requires support to enable him to do that.
- (3) L's need and right to a private life, which includes steps being taken to help him achieve personal autonomy are still relevant. Woven into this is supporting him to enable him to make decisions and choices as to what he wants to do.
- (4) L's wishes have crystallised, having had the opportunity to experience living at the J placement. On the evidence, it is more likely than not, that the views he has expressed to Advocate B reflect his wishes. They are that he wishes to remain living at the J placement and continue to see his family. As before, the views he has expressed to K and his witnesses are likely, in my judgment, to be heavily influenced by L's knowledge of their views and his wish to please them and K.
- (5) The J placement is physically close to the family home which enables L to continue to maintain his contact with his family.
- (6) The court has been alert to the danger of witnesses called by the LBX and the OS seeking to present the evidence in a way that may lack balance and overestimate their position. I am satisfied that that is not the case here. The evidence from those witnesses has been fairly presented. For example, the list in the report from SV of responses to complaints received from K's solicitor. The friends referred to by Ms P were in response to questions from Mr Armstrong, on any view L was at a relatively early stage in forming friendships. It is clear from the emails exchanged between K and SV they have been able to maintain a constructive dialogue. Advocate B, whose evidence I accept, has not detected any signs from L that he is unhappy at the J placement. As she said she has experience of such situations and is alert to those matters.

- (7) There have been legitimate concerns expressed on behalf of K about some aspects of the support plan. For example, the failure to arrange separate meetings with K at the time of L's reviews. That should have been done so there was an effective forum to take into account K's views.
- (8) There is broad agreement about the need for L to live independently in due course, the issue is when. L has had the opportunity to experience the J placement and having tried it wishes for that placement to continue. That is the first step on the road to independent living. It is likely to be a staged process, during which L will require support to help him make the relevant decisions.
- (9) L does not require 24 hour supervision. He has shown a relative increase in his independence and an ability to acquire skills to help him move towards more independent living, providing he has the necessary support. He is not at any unnecessary risk at the J placement.
- (10) Whilst many of the facilities he has been able to access would be available to him if he lived at home his choices in relation to them and what other activities he undertakes is likely to be influenced by the views of K in a way that risks L not being able to make the decision himself. The circumstances surrounding L not attending the dinner dance with M clearly illustrate this. The evidence clearly points to it being more likely than not that K sought to influence L's decision about this; that is supported by what L told Advocate B and the timing of the email to Ms P.

44. Having stood back and considered all the evidence I have reached the clear conclusion that L's best interests are met by the court authorising L's continued placement at the J placement. I have reached this conclusion for the following reasons:

- (1) It remains in L's best interests 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 make informed choices and decisions. The steps he has been able to take whilst at the J placement have demonstrated that he has been able to make progress in that direction.
- (2) Having the opportunity to experience the placement at the J placement has enabled L to make an informed choice about his continued placement there.
- (3) The interference in family life is justified and proportionate due to the proximity of the J placement to the family home, the level of support offered as well as the flexibility in the regime for future contact. L will be able to maintain significant aspects of his family life if he remains at the J placement.
- (4) The feared risks in relation to his personal and other care are managed by the support L has at the J placement, both from the staff and his advocate Advocate B. He does not require 24 hour supervision and will be supported in attaining greater autonomy in relation to many aspects of his day to day living. The support K and D can give to L during the time he spends with them at home and at the J placement will help to enhance some of those aspects of his day to day life.
- (5) The evidence establishes that it is more likely than not that his wishes are to remain at the J placement and continue to have contact with his family. Despite the concerns expressed at the last hearing about the court's ability to have reliable evidence about L's wishes I am satisfied that the court has had the benefit of having available to it reliable evidence from Advocate B to

- (6) L clearly benefits from having the opportunity to live in the J placement and maintain contact with his family; he wants and his best interests are met if he benefits from both worlds.
 - (7) The submission that L's return home would end conflict is too simplistic, it would merely move the focus of the conflict to the family home in relation to the LBX, contact with M, risk (bearing in mind the history) L's access to an independent advocate and adversely impact on the progress L has made in gaining more autonomy.
45. Turning to the question of contact between L and his family. The provisions for M's contact should remain the same. The 5 hour period is a minimum and can be kept under review, having considered L's wishes. The decision by M to unilaterally stop the contact in the way she did was not helpful for L and, yet again, put L in the centre of the ongoing conflict between M and K, which shows no sign of abating.
46. In relation to contact between L and K and D it is clearly in L's interests that they continue to have substantial contact. That is not in dispute. There is an issue as to how the framework should work. I prefer the formulation of the declaration advanced by the OS save for the last sentence in (iii) which I will hear submissions on when I hand down the judgment if the parties are unable to reach agreement. My reservation about that aspect is it perhaps provides too much uncertainty about when L should return to the J placement and may need further consideration by those who will be operating this on the ground.
47. Turning to the support plan submitted by the LBX I would like to see further amendments to it to incorporate the following:
 - (1) A firm commitment for ongoing assessment by the occupational therapist;
 - (2) The issues raised by the OS in paragraph 11 of their written submissions;
 - (3) A commitment to funding for an advocate for 12 months;
 - (4) A clear structure for regular reviews at the J placement and K (and D's) involvement in that, the frequency of reviews and how any changes to the support plan are to be communicated;
 - (5) A structure for any enhanced involvement and/or communication between K and D (and the wider family friends) and the J placement which benefits L.
48. In relation to the LBX's application for financial deputyship the solution suggested by the OS in his written submissions is the most proportionate in the circumstances, and those arrangements should be put in place.
49. I know the decision I have made does not accord with K's wishes. He has shown throughout these proceedings unfailing and unconditional love and commitment to L. As he told me in his oral evidence, he accepts that I have to make the decision. He has shown, despite his feelings about the decisions that have been made, he has been able to maintain his commitment to L and I have confidence that he will continue to do so. K, D and their friends are and will remain an important and integral part of L's life.