

ENGLAND AND WALES / JUDGMENT

LBX v TT & Ors

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- ----- Between : LBX
- and - TT (By the Official Solicitor as her Litigation Friend) MJ JJ WT LT
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- ----- Applicant Respondents Alison Easton (instructed by Local Authority solicitor) for the Applicant John McKendrick (instructed by Bindmans, instructed by the Official Solicitor) for the First Respondent (TT) The Second Respondent (MJ) in person Philip Levy (instructed by Chesham & Co), pro bono, for the Third Respondent (JJ) Jennifer Oscroft (instructed by Miles & Partners LLP) for the Fourth Respondent (WT) The Fifth Respondent (LT) in person Rosina Cottage QC and Gary Dolby (Crown Prosecution Service) for the Crown Prosecution Service Hearing dates: 7-9 July 2014
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Judgment

The Honourable Mr Justice Cobb: 1. For ease of reference, I identify the protagonists in this judgment as follows: LBX The relevant local authority TT MJ JJ WT LT KK Subject of the proceedings The mother of TT and WT, wife of JJ, step-mother LT Step-father of TT, husband of MJ Sister (i.e. full sister) of TT, Half-sister of LT Half-sister of TT, Half-sister of WT TT's foster carer

Introduction

2. 3. 4. 5. 6. These proceedings concern a 19 year old young woman, with moderate learning disabilities and global developmental delay. Until November 2012, she lived at home with her mother, MJ, her step-father, JJ, and her sister WT. In November 2012, TT made allegations that JJ had sexually assaulted her, and forced her to watch pornographic videos.

The police were notified. TT left home, and, after spending two weeks living with her older half-sister, LT, she was placed in adult foster care with KK, where she remains. In November 2012, JJ was arrested; he was interviewed by the police under caution. He was initially bailed with a condition that he could not reside at the family home; that condition was relaxed in February 2013, and he returned. There remains a prohibition on JJ having any contact with TT. In June 2014 JJ was charged with a number of serious offences against TT. As he still awaits trial on those charges, I propose to say no more about them. In November 2013, notably one year after TT had left home, LBX made an application for orders in relation to TT; the authority sought declarations as to her capacity to make decisions and orders to give effect to what it contended would be in her best interests. The delay in making the application was not easily explained; I understand (in fact it was LT who volunteered this) that this arose because the social workers wanted to give MJ more opportunity to consider separation from JJ. The application has been case managed principally by District Judge Batten, but was transferred to me for hearing first on 21 May 2014. 7. 8. 9. 10. 11. By order dated 14 February 2014, DJ Batten fixed the hearing to commence on 7 July (with a 5-day estimate) for me to determine the factual issue of whether TT had indeed been abused by JJ as alleged, and to make orders (if time permitted) as to her best interests. Directions had previously been given on 13 December 2013 (DJ Batten) for the disclosure of police material generated during their enquiries, initially to the Official Solicitor acting for TT; the CPS and relevant police force objected to the wider disclosure of the material to the respondents until a charging decision had been made (possibly, it was said, until any trial, given that TT, WT and LT would all be witnesses). Plainly, for as long as the police material remained withheld from the respondents, no effective preparation could be made for a fact-finding hearing. In view of my frustration at the delays of the CPS and relevant police authority to make a charging decision, I arranged a hearing on 9 June 2014 to consider the viability of the fact-finding hearing. At that hearing the case took an unexpected turn; MJ and JJ (who were helpfully represented by counsel instructed by the Bar Council Pro Bono Unit) indicated that they intended to remain together as a couple, irrespective of the allegations &/or the outcome of any trial of the allegations, and did not propose to offer TT a home, now or in the long-term. Specifically, they conceded that: i) ii) iii) iv) MJ could not envisage a situation in which she would separate from JJ “even if findings were made against him”. TT should not return to live with MJ and JJ; she should remain living with KK (MJ: “we cannot offer her a home”). That the decision that TT should remain with KK is a “long-term decision” on the part of MJ; JJ was “is not willing to, and will not, have any contact with TT in the future. Contact is defined as direct and indirect contact and facebook/social media messaging”. He further agreed not to attempt to have any contact. At that same hearing, MJ indicated that she would “like unsupervised contact with TT and for longer periods of time”. The parties all agreed, and having considered the relevant factors in rule 2 and rule 5 of the Court of Protection Rules 2007 I concurred, that in light of those concessions, it was no longer necessary for me to conduct a full enquiry into the allegations of sexual abuse, but would proceed to a more limited factual enquiry which was principally directed to issues relevant to MJ’s contact. The Applicant therefore prepared and filed a document at the outset of the

case headed 'Proposed Findings of Fact sought by the Applicant at a hearing listed on 7 July 2014'. The document recorded the essence of the concessions made by MJ and JJ (§8 above), and then went on to propose nine discrete findings. They are summarised as follows: i) In November 2012, a safeguarding alert was received from the NSPCC which reported that TT been the subject of sexual abuse; ii) iii) iv) v) TT has told a number of professionals since November 2012 that JJ has had sexual intercourse with her on more than one occasion; TT has repeated the allegations set out in paragraph (ii) above and has been consistent in her account; Dr Theresa Joyce opines that TT lacks capacity to consent to sexual relations; MJ is unable to consider the possibility that JJ has had sexual relations with TT; MJ has put pressure on TT to retract her allegation; MJ has ignored a previous allegation by WT that JJ had behaved in a sexually inappropriate manner with her; MJ has shown a limited ability to protect TT; vi) MJ has caused TT to feel she is responsible for the breakdown of her family unit and has placed inappropriate emotional pressure on her; vii) MJ can become angry with TT and shouts at her which frightens TT; viii) MJ has spoken to TT in critical and derogatory terms about LT and WT which has caused significant distress to TT; ix) MJ is, at times, unable to understand and prioritise TT's emotional needs and has caused her emotional distress and harm during periods of contact with her. 12. Against the backdrop of significant concessions from TT's mother and step-father, and a proposed hearing to determine key ancillary facts, the Applicant Local Authority indicated that it sought the following relief in relation to TT: i) ii) iii) iv) v) vi) Declaration (under section 15 MCA 2005) that TT lacks capacity to litigate these issues; Declaration (under section 15 MCA 2005) that TT lacks capacity to make decisions about her care and residence; Declaration (under section 15 MCA 2005) that TT lacks capacity to make decisions about her contact with others; That there is reason to believe (section 48 of the MCA 2005) that TT lacks capacity to consent to sexual relations; That it is in TT's best interests that she should continue to reside with her foster carer KK (and that I should make this order under section 15 of the MCA 2005); That it is in her best interests to have no contact with JJ (and that I should make this order under either section 48 or section 15 of the MCA 2005); (Applicant maintains that it could be a final declaration, but accept that it could be an interim order). vii) That it is in her best interests to have restricted supervised contact with her mother; this order is to be made under section 48 MCA 2005; 13. 14. 15. 16. 17. 18. viii) That it is in her best interests to delay education on sexual issues relevant to the determination of her capacity until the conclusion of the criminal proceedings; this order is to be made under section 48 MCA 2005. As the outset of this three-day hearing, MJ and JJ were unrepresented; the Bar Pro Bono Unit could not offer continued support. On the first morning, they sought an adjournment to obtain legal representation. I refused that application indicating that I would give my reasons for refusal in this judgment (see the final section of this judgment: 'Application to adjourn / McKenzie Friends'). As it happens, and following my firm encouragement, JJ then managed to secure legal representation (pro bono) by 2pm on the first day through solicitors acting for him in the criminal proceedings. I was advised by counsel then attending that JJ wished to play no part in any fact-finding hearing. On the third day, MJ attended with a McKenzie Friend (again, see §112 below). As the stage was finally set for the hearing, MJ then indicated

her agreement to the orders and declarations sought by the Applicant set out in §12. Specifically, MJ indicated that, for the time being at least (until the conclusion of the trial of her husband), she accepted that her contact with TT should be supervised and for restricted periods. WT and LT also agreed the Applicant's proposed orders. The Applicant, MJ, WT and LT collectively proposed that I could proceed to make orders at this hearing founded upon an agreed basis of facts (largely findings of the likelihood of harm in the event that MJ conducted herself in the future in relation to TT in a manner which was not consistent with her welfare), which did not require any resolution of the issues raised in the 'Proposed Findings' document referred to above. The Official Solicitor on behalf of TT took a different stance, not prepared to agree the form of all of the proposed orders; he accepted that any order for contact between MJ and TT should be expressed as an interim order (section 48), but signalled a concern that MJ's stance on contact would be likely to change (having regard to her stated position on 9 June: see §9 above) following her husband's trial. Mr. McKendrick on TT's behalf urged me therefore to conduct a fact-finding hearing. In the meantime, and on the first day of this hearing, a representative from the CPS appeared and sought disclosure of documents (generally) from these proceedings. There was no formal written application, as – I consider – there should have been (rule 17(2) Court of Protection Rules 2007). By consent of all parties (save for JJ who expressed no view), I permitted the Local Authority to disclose to the CPS the index of documents filed in these proceedings; I further directed that if the CPS wished to make an application for sight of any of the documents, they should do so within 24 hours, and I would hear submissions on the application 24 hours later – all designed to resolve the issues within the compass of this three-day hearing. No party demurred from this tight time-frame. In the event, it was impossible to determine the CPS application on the third day of the hearing. When the arguments supporting the application were developed, it became apparent that the CPS was unclear precisely for what purpose the material would be used, and whether disclosure to the CPS for the purposes of pursuing their investigation would irreversibly open the door to the defence use of the material within the trial itself. It was agreed that the issue should be adjourned for reflection and further argument; a plea and case management hearing in the Crown Court was to take place on the following day. Counsel instructed for JJ indicated that he would discuss with counsel for the Crown whether enhanced reporting restrictions could be sought. I adjourned the CPS application to 29 July, and after hearing limited argument, authorised limited disclosure of redacted material by consent. This judgment 19. 20. By this judgment, I therefore consider four issues. First, I consider the evidence relevant to the capacity of TT to litigate, to make decisions about residence, contact and her package of care, and her capacity to consent to sexual relations, and make findings in that regard. 21. Secondly I consider: i) ii) How I should approach a 'best interests' decision at an interim hearing, (section 48 of the Mental Capacity Act 2005) which has been set up for the calling of reasonably extensive oral evidence; What factors should influence the exercise of the court's discretion in deciding whether there should be a finding of fact hearing at an interim (or final) hearing? Having heard oral argument (and received written submissions overnight following the first day), I indicated on the morning of the second day that I would hear

evidence limited to four of the proposed findings in the ‘Proposed Findings...’ document (see §11(vi)-(ix) above). On the second and into the third day, I heard evidence limited to those issues. Thirdly, therefore, I set out below my findings of fact. Fourthly, and finally, I reach my conclusion on the issue of best interests, and consider the declarations sought. 22. 23. 24.

- (1) Capacity 25. 26. 27. TT has a moderate learning disability which impacts on her ability to understand and remember more complex information. She was assessed in relation to her capacity to consent to sexual relationships by Dr. Abigael San, Chartered Clinical Psychologist, at the outset of the proceedings, and more fully and recently by Dr. Theresa Joyce, clinical psychologist Dr. Joyce opines that “she is likely to be in the lowest 1% of the population in terms of her intellectual functioning”. In Dr. Joyce’s opinion, TT lacks capacity in respect of litigation, decisions about her care and residence, and on the issue of with whom TT has contact. No party takes issue with Dr. Joyce’s conclusion, and although Dr. Joyce was available for cross- examination on the first day of the hearing, no-one wished to question her. The parties’ concessions are important to, but not decisive of, the evaluation which I must undertake before satisfying myself on the balance of probabilities that TT does indeed lack capacity in relation to the various specific ‘matters’ in issue here. Of course, I start with the assumption that TT does have capacity (section 1(2)) in the relevant respects. 28. The evidence of Dr. Joyce, set out in altogether three reports, is compelling. She has met with TT on two occasions, in March and May 2014, met with family members, and carefully considered the documents. She is clear in her view that TT lacks capacity in the relevant respects: i) Capacity to litigate: “TT lacks the capacity to litigate these proceedings. She does not understand the court process, the role of the judge or the role of her solicitor. In my opinion she does not have the capacity to make the decisions that the court is considering. She would find it very difficult to participate in the process, understand what is going on, concentrate on the matters being discussed and would not be able to instruct her solicitor or take their advice. These difficulties in understanding, concentration and integrating information (so that she could consider it in order to instruct her solicitor) are a consequence of her learning disability. She does not understand all the relevant information, and therefore would be unable to weigh it and use it to make a decision” ii) Capacity to decide on residence, contact and care: “TT lacks the capacity to decide about where she should reside, her care and what contact to have with others. In relation to residence, she states consistently that [she] wants to go home to live with her Mum, but is not able to weigh up the risks and benefits to herself of this course of action. She has very limited awareness that her mother might be upset with her following the allegations and has not considered the ways in which her current lifestyle and options might change. This includes contact with her sisters and JJ. She does not consider all the relevant information and is therefore unable to use it or weigh it as part of the decision-making process. In relation to meeting her care needs, TT is aware that she does need help and support, but is not aware of the full extent of her needs and is not able to consider independently how to meet them. She is aware that she needs other people to help her, and is clear that she could not (and would not want to) live alone. TT does not understand all the information that

would be relevant in order for her to make decisions on this issue. In relation to making decisions on contact, in my opinion TT lacks capacity to make decisions about contact. She understands that there may be some risks in relation to contact with her stepfather (she might have sex with him again, she might not be able to say no, but it is not right to have sex with him), but is not able to weigh them up as part of her decision-making” iii) Capacity to consent to sexual relations: “In my opinion, SS lacks the capacity to consent to sexual relations. She is able to describe the sexual act (i.e. she knows what happens); and knows that pregnancy can result from having sex. Her knowledge in this area is very basic. She did not understand the risks, in terms of STI's. She is aware that you can say "yes" or "no", but it is not clear that she would be able to exercise her choice; her learning disability makes her vulnerable to being acquiescent to the wishes of others” 29. 30. Having reviewed this expert evidence, supported as it is by a range of surrounding material, I find that that TT lacks capacity in relation to litigation, residence, contact and care. In one respect, capacity remains in issue for final declaration in these proceedings – namely, TT's capacity to consent to sexual relations. This question cannot properly be determined until steps have been taken to assist TT to acquire capacity by providing her with sex education, having regard to the provisions of section 1(3). It is accepted that this cannot properly take place until TT has given evidence in the criminal proceedings concerning her step-father. For present purposes, I can confirm that there is reason to believe, for the reasons set out in §28(iii) above, that TT lacks capacity to consent to sexual relations.

- (2) Interim orders and fact-finding hearings 30. I turn now to the questions identified in §21 above, namely: i) ii) My approach to a ‘best interests’ decision at interim hearings, under section 48 of the Mental Capacity Act 2005; What factors should influence the exercise of the court's discretion in deciding whether there should be a finding of fact hearing at an interim (or final) hearing? 31. 32. In a fact-finding hearing in the Court of Protection, as in other civil litigation, the burden of proof lies with the party who makes the allegation, in this case it is LBX. It is not for MJ to prove anything. The standard of proof is the ordinary civil standard, the balance of probabilities. As Lord Hoffman described this test in *Re B (Care Proceedings: Standard of Proof)*

[2008] UKHL 35 at §2: “If a legal rule requires a fact to be proved (a ‘fact in issue’), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened”. 33. Accordingly, only if I find that it is more likely than not that the allegations are made out as LBX contend, will it be treated hereafter within these proceedings as the basis on which further decisions (about contact in particular) and assessments are made. 34. 35. 36. Findings of fact in these cases must of course be based on evidence, including inferences that can properly be drawn from the evidence, but not on suspicion or

speculation. The evidence is to be taken as a whole; in this case, there are multiple strands of material to weave together to create the factual tapestry. It was acknowledged that the 'findings' sought and adumbrated in §11(i)-(iv) above were essentially matters of record, requiring no determination, as such. In the circumstances, the focus of attention (and argument) was drawn on the allegations set out in §11(v)-(ix) inclusive. The Local Authority and WT submitted that in light of the agreement about the orders to be made at this hearing, and the concessions about TT's future residence and care, I should not in the circumstances hold a fact-finding hearing at this stage. They contend specifically that: i) ii) iii) iv) v) I can reach appropriate and relevant conclusions sufficient to form a view on best interests on the statements and reports filed; There is no purpose in a fact-finding relevant to past events at this stage given that the restrictions on future contact between MJ and TT in the period prior to the criminal trial can be justified by the risk (however slight) that MJ may deliberately or even unwittingly say or do something which has the effect of putting pressure on TT to retract her allegation against a man with whom MJ has made clear she intends to remain in a relationship; Once the criminal process has concluded (whether it leads to an acquittal or conviction), the issue of contact will have to be re-examined, and any findings made now would inevitably have to be re-considered at that stage; That the court should exercise caution before making findings of fact at an interim stage; It is undesirable to subject WT and LT to cross-examination on their allegations at this hearing given that: a) b) They are likely to be required to give evidence at the forthcoming criminal hearing; it is undesirable that their evidence should be given twice if this can be avoided; MJ is unrepresented in these proceedings; it is likely to be awkward (at least) and distressing (at worst) for WT and LT to be cross-examined directly by their mother/step-mother.

37. MJ told me that she did not wish there to be a fact-finding hearing, and did not want to give evidence. 38. LT (acting in person) fairly indicated that she could see the arguments on both sides, and was prepared to leave the decision to the court. She nonetheless raised an understandable concern that this long-awaited hearing may conclude without there having been resolution of any important issue; she nonetheless recognised that the fact that JJ had recently been charged with offences, and would now stand trial, may make a difference. 39. The Official Solicitor, on behalf of TT, contended that I am under a duty, or, if not under a duty should nonetheless exercise my discretion, to hear oral evidence in order that I can determine a solid factual basis for establishing TT's best interests orders, even on an interim basis. Mr. McKendrick referred me to *Re W* [2008] EWHC 1188 (Fam) where McFarlane J held at paragraph 72: "It is important that the planning in the future for these children, particularly C, is based upon as correct a view of what happened to R as possible. It is not in the children's interests, or in the interests of justice, or in the interests of the two adults, for the finding to be based on an erroneous basis. It is also in the interests of all of the children that are before this court for the mother's role to be fully understood and investigated." He contended that the principles outlined above could be appropriately transported from the Family Division to the Court of Protection. I interpolate here to say, as will be apparent later,

that I agree. 40. The Official Solicitor's argument was developed further thus: i) ii) iii) iv) v) Section 48 provides jurisdiction to make interim 'best interests' orders where it is necessary to make those orders "without delay"; this phrase in section 48(c) imports into the section a degree of expectation that this provision should be used very much as an interim measure; While the evidential bar is lower on determination of capacity in section 48(a), there is no qualification to the court's approach on 'best interests'; therefore unless the case is urgent, there ought to be a reasonable and proportionate enquiry into best interests; That I should endeavour to resolve the facts so far as I can at this stage; many of the issues will need to be grappled with at some point in time and it is better to do so while the events are fresher in people's minds; this hearing was set up for that purpose, and the witnesses are available; MJ has expressed a wish for unsupervised contact in the future: see §9 above. Indeed, the Official Solicitor observes that the Applicant itself accepts that "it is ... foreseeable that [MJ] will seek unsupervised contact in the future, after the conclusion of the criminal trial"; That 'best interests' decisions should be made on the most secure evidential footing; this is particularly so where a) b) interim orders are expected to last for a considerable period (the criminal trial may not be for many months); interim orders are inconsistent with TT's expressed wishes (see §95-98 below); vi) Prolonged interference with TT's Article 8 ECHR rights for unrestricted contact without a clear determination of facts is not proportionate; vii) That particular caution is required before the Court proceeds to make determinations largely on the basis of concessions offered by an unrepresented party (MJ), particularly where that party is plainly distressed by the issues. 41. There are many cases which come before the Court of Protection on an urgent basis, sometimes even without notice to the proposed respondents, when the court is invited to make declarations of capacity and best interests decisions on an interim basis. Such applications are generally supported by evidence (in accordance with the Court of Protection Rules 2007, rule 96). 42. Applications are made for orders under section 48 Mental Capacity Act 2005, which states as follows: "The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if—

- (a) there is reason to believe that P lacks capacity in relation to the matter,
 - (b) the matter is one to which its powers under this Act extend, and
 - (c) it is in P's best interests to make the order, or give the directions, without delay."
43. 44. Often there is not the time, or opportunity, to have the evidence tested orally; indeed rule 96 provides that "any fact which needs to be proved by evidence of a witness is to be proved ... by their evidence in writing" if not at a final hearing. This is a case, potentially, at the other end of the spectrum where three days have been set aside for a hearing of the facts, witnesses have made themselves available, and there are clear issues to be tried, even if ultimately only for the making of an interim order. In deciding how to proceed, I have been conscientious to ensure that I followed the overriding objective set out in rule 3 to the Court of Protection Rules 2007 – including the obligation to deal with the case "justly", "expeditiously and fairly" (rule 3(3)(a)), and ensuring that P's (here, TT's) interests and

position are properly considered. I have endeavoured to deal with the case in ways which are proportionate to the nature, importance and complexity of the issues.

45. My duty actively to manage cases (rule 5 CoPR 2007) includes (rule 5(2)): i) ii) iii) a duty to “decide promptly” which “issues need full investigation and which do not”, “considering whether the likely benefits of taking a particular step justify the cost of taking it”; “dealing with as many aspects of the case as the court can on the same occasion”. 46. I have had the relative luxury of three days of court time set aside to determine these issues; the court will however often be constrained by sheer practicalities of time and opportunity for an oral hearing. In each situation, the Judge surely has to make a determination – often under pressure of time – as to how far he or she can go to test the material. By analogy with the position in family law, the judge would in my judgment be well-served to consider the guidance of Butler-Sloss LJ in the family appeal of *Re B (Minors)(Contact)* [1994] 2 FLR 1 in which she said as follows: “There is a spectrum of procedure for family cases from the ex parte application on minimal evidence to the full and detailed investigations on oral evidence which may be prolonged. Where on that spectrum a judge decides a particular application should be placed is a matter for his discretion. Applications for residence orders or for committal to the care of a local authority or revocation of a care order are likely to be decided on full oral evidence, but not invariably. Such is not the case on contact applications which may be and are heard sometimes with and sometimes without oral evidence or with a limited amount of oral evidence.” It is acknowledged that the ‘spectrum’ may now be narrower than that described in 1994 following the revisions to rule 22.7 of the Family Procedure Rules 2010, but the principle nonetheless remains, in my judgment, good. 47. Butler-Sloss LJ went on to define the questions which may have a bearing on how the court should proceed with such an application (adapted for relevance to the Court of Protection): i) ii) iii) iv) v) vi) whether there is sufficient evidence upon which to make the relevant decision; whether the proposed evidence (which should be available at least in outline) which the applicant for a full trial wishes to adduce is likely to affect the outcome of the proceedings; whether the opportunity to cross-examine the witnesses for the professional care or other agency, in particular in this case the expert witnesses, is likely to affect the outcome of the proceedings; the welfare of P and the effect of further litigation – whether the delay in itself will be so detrimental to P’s well-being that exceptionally there should not be a full hearing. This may be because of the urgent need to reach a decision in relation to P; the prospects of success of the applicant for a full trial; does the justice of the case require a full investigation with oral evidence? 48. In deciding whether to conduct a fact-finding hearing at all, I consider it useful to consider the check-list of considerations discussed by McFarlane J in the case of *A County Council v DP, RS, BS (By their Children’s Guardian)* [2005] EWHC 1593 (Fam) 2005 2 FLR 1031 at [24]. Following a review of case-law relevant to the issue he stated that: “... amongst other factors, the following are likely to be relevant and need to be borne in mind before deciding whether or not to conduct a particular fact finding exercise:

- (a) the interests of the child (which are relevant but not paramount)
 - (b) the time that the investigation will take;
 - (c) the likely cost to public funds;
 - (d) the evidential result;
 - (e) the necessity or otherwise of the investigation;
 - (f) the relevance of the potential result of the investigation to the future care plans for the child;
 - (g) the impact of any fact finding process upon the other parties;
 - (h) the prospects of a fair trial on the issue;
 - (i) the justice of the case.” 49. 50. There is some (but not universal) acknowledgement at the Bar in this case that this list (with modifications as to (a) to refer to the best interests of ‘P’ rather than ‘the child’) provides a useful framework of issues to consider in relation to the necessity of fact finding in the jurisdiction of the Court of Protection. Having listened carefully to the arguments, and approached the question by reference to the factors discussed above, I concluded that it would not be appropriate to hear evidence relevant to the finding sought at §11(v) above. I so concluded for the following reasons (in combination): i) ii) It was not entirely fair to MJ to consider findings about her failure to protect when the substance of the allegations of abuse were not be tested; In seeking to evaluate the allegation, there was a risk of traversing some of the territory covered by the criminal prosecution; iii) WT would be required to give evidence on matters of particular sensitivity, and be subject to cross-examination by her unrepresented mother; 51. I did however consider it appropriate to conduct a fact-finding hearing limited to the matters in §11(vi)-(ix) above. In so concluding, I attached importance to the following points: i) ii) iii) That it would be likely to achieve greater clarity for TT in the months ahead, and even after the criminal trial of JJ; It is a more secure evidential basis for a best interests decision than proceeding on the basis of untested evidence; Mr. McKendrick’s submission that prolonged interference with TT’s Article 8 ECHR rights for unrestricted contact without a clear determination of facts is not proportionate; iv) There was no prejudice to the criminal trial by holding such a hearing; v) vi) vii) As a matter of practicalities, it was feasible; all the witnesses are at court; I considered that there may be a saving of court time, and cost, down the line; The relevant events are fresher in everyone’s minds than they would be if I deferred decision-making until after the criminal trial.
- (3) Findings of fact 52. It is important that I should set a context for my review of the detailed proposed findings, and highlight here four considerations: i) ii) iii) iv) Hearsay evidence; TT’s understanding of truth and lies; MJ’s reactions to the key events; Assessment of the witnesses. 53. 54. 55. 56. Hearsay: The factual allegations which I have been required to investigate rely very extensively on what TT has reported to third parties. She has not been called to give evidence at this hearing (no party proposed that she should), and I have

therefore had to rely on a range of hearsay accounts, and on records, and interpretations, of her behaviours. Hearsay evidence is plainly admissible in proceedings of this kind; as McFarlane J made clear in *LB Enfield v SA* [2010] 1 FLR 1836. While ruling (at §29-30) that proceedings in the Court of Protection under the MCA 2005 must fall within the wide definition of 'civil proceedings' under section 11 of the CEA 1995, they are civil proceedings before a tribunal to which the strict rules of evidence apply. He went on to conclude (§36) that: "COPR 2007, r 95(d) gives the Court of Protection power to admit hearsay evidence which originates from a person who is not competent as a witness and which would otherwise be inadmissible under CEA 1995, s 5. Admissibility is one thing, and the weight to be attached to any particular piece of hearsay evidence will be a matter for specific evaluation in each individual case. Within that evaluation, the fact that the individual from whom the evidence originates is not a competent witness will no doubt be an important factor, just as it is, in a different context, when the family court has to evaluate what has been said by a very young child" In all the circumstances, I guard against accepting without careful consideration of the evidence as a whole, the hearsay evidence of what TT told LT and WT as proof of the substance of what is alleged against MJ; this is particularly so given the unchallenged evidence of Dr Joyce that TT has a "very limited understanding of the oath". TT's understanding of truth and lies: That said, Dr. Joyce has undertaken an assessment of TT's ability to understand the difference between truth and lies. She reached the conclusion that "SS did show some understanding of the difference between telling the truth and telling a lie" finding it easier to talk about concrete events than abstracts. Dr. Joyce believed that TT "knows that she should tell the truth". In respect of the allegations which I have considered (quite apart from the more serious allegations which are the subject of the criminal process) I have considered what reasons TT may have had for making up the allegations; it is difficult to understand why she would do so if they were not true given that she knew or reasonably must have believed that her allegations would cause further problems for her family. 57. LT made the point (which I accept) that in giving an account of an event, while TT may not deliberately set out to lie, she may (because of her intellectual limitations) only give a partial account which may (because it is incomplete) be misleading; TT has no concept of time, does not always provide a full picture, and unless asked specific questions may not explain matters fully.

58. MJ's reactions to the key events: I bear in mind that at the time of JJ's arrest, and the disintegration of her family in November 2012, MJ may well have been shocked, struggling to make sense of the evolving situation. I expect that she found it extremely hard to cope; if she made unguarded comments at the time, she may be entitled to mitigation. 59. In the period since November 2012, MJ says that she has been "continuously stressed, moody, upset and very depressed. Being separated from TT has created tensions and further stress which has led to further problems in my everyday life". I accept that this is likely to be so. However, I find that she has from time to time allowed her emotions to spill over into her communications with TT which have in turn upset TT.

60. When forming a view of MJ I bear in mind that she has participated in these proceedings, which must be extremely painful for her, unrepresented. She has done so with considerable composure and respect for the court and the legal representatives. When WT and LT gave evidence, I assisted MJ to ask her questions in cross-examination, essentially channelling them through me. 61. 62. 63. That all said, on the evidence which I have read and heard, I find that MJ can be volatile and occasionally she speaks out in an intemperate way. This was WT's evidence, and I accept it. MJ is currently adamant that JJ is innocent of the allegations raised by her daughters; her inability or unwillingness to entertain the possibility that her daughters may be telling the truth is concerning. She is jealous of TT's relationship with WT and LT, and has spitefully attacked TT for consorting with them. She has, at times, been shown to be thoughtless in her interactions with TT (such as the reference to prison at the meeting on 8 June 2014), but at other times, I find that she has been manipulative in speaking inappropriately with TT at times when she will have known that others will not be able to observe her behaviour. That all said, in the witness box, she made a number of relevant admissions, providing plausible explanations to some of the allegations. She demonstrated some insight and, when pressed, an ability to consider her actions with hindsight. Assessment of the witnesses: I heard evidence from the social worker, from WT, LT and MJ. 64. 65. 66. 67. 68. The social worker's evidence was of limited forensic value at this hearing; she had had little direct contact with the protagonists and could not speak on any of the key factual issues from first-hand experience. I found WT to be a careful and essentially credible witness; she seemed to me to be very concerned about her sister's (TT's) welfare. She appropriately in my judgment made due allowance for the fact that her mother will have been stressed when the allegations came to light in November 2012 but believed that her mother's reactions more generally were not explicable by reference to the acute incident. WT drew a clear causative link between the conflict generated by MJ and TT's distress. I thought that WT gave her evidence calmly, not criticising her mother unfairly. She was in my judgment, honest and reliable. LT, too, was an honest and genuine witness, clearly motivated by a desire to protect TT and advance her welfare. Her evidence was given with clarity and thought. Both WT and LT gave evidence which was in my judgment balanced and fair. Finding 6: "MJ has caused TT to feel she is responsible for the breakdown of her family unit and has placed inappropriate emotional pressure on her"; Evidence to support this finding focused on a telephone call which the mother made to TT on Christmas Day 2012. MJ herself described how she was extremely distressed as she called. Unsurprisingly, as I find, TT absorbed her mother's distress. MJ's distress was tinged also, I believe, with anger that TT was with WT and LT; in my judgment, MJ allowed her emotions to run away with her, and on balance I accept that she told TT that she was planning to kill herself. This was not the only time MJ articulated this intent.

69. Moreover, MJ accepted that recently (June 2014) she had inappropriately told TT that she would “go to prison” if she told TT what had happened in the court hearing; this was a thoughtless comment, which MJ – if she gave it half a thought – must have realised would be deeply upsetting to TT. It would be bound in my judgment to cause TT to believe that she continues to heap misfortune on the family.
70. MJ confirmed that she had told TT that WT and LT “do not exist for her”; this was further inappropriate comment, with the indirect effect of placing emotional pressure on TT. 71. I find that MJ has allowed TT to know or understand that MJ believes in JJ’s innocence – underlining for TT that (a) her mother does not believe her, and that (b) she (TT) has created a schism in the family which places her mother on the other side of the divide.
72. MJ was asked about a contact session in October 2013 when she organised a telephone call to her sister abroad. She asked TT not to tell her aunt where she was living; it appeared that MJ has withheld from her family the current circumstances of the family. I find that MJ effectively asked TT to lie to her aunt and had been under orders from her mother not to “tell them about the problem”, and if asked, to say that she was still living at home.
73. MJ accepted that she may have said to TT that she would never see TT again; having regard to the general tone and content of much of the communications between mother and daughter, I find that she did say this, and that this would have been upsetting for TT. 74. In summary, I find the allegation set out in §11(vi) above to be amply proved on the evidence. 75. Finding 7: “MJ can become angry with TT and shouts at her which frightens TT”
76. When assessed by Dr. San on 4 December 2012, it is recorded (and I have no reason to doubt the accuracy of the same) that “her mother can become angry with her which she finds very frightening. She said that sometimes she can ‘stop talking’ for several days after being berated by her mother”. This allegation is confirmed by WT who has observed this at the family home. 77. TT told Dr. Joyce that her mother shouted at her, and when this was checked by TT’s solicitor instructed by the Official Solicitor, TT is reported to have confirmed that she (TT) would be ‘worried’ about living with her mum if her stepfather wasn’t there, “as her mother might ‘shout’”.
78. WT described how her mother regularly shouted at TT, long before the allegations came to light in 2012: “this was not out of character”.
79. MJ told me that she does not shout, but speaks loudly. I do not accept this. Having heard and seen MJ, I consider that she could indeed be brusque with her children; she conceded that she may at times have had a ‘sharpness’ of tone in her voice. I believe that from time to time she has shouted at TT; her acceptance of having lost her temper in the family home only once (with WT and TT together) did not in my judgment reveal the whole story.
80. WT gave an account of an occasion when TT went to visit her father’s third wife; when MJ became aware of this, she contacted TT and was furious. I find that she let TT know of her anger. 81. 82. 83. 84. It is possible that TT now describes her experience of her mother’s

sharp and brusque tone as 'shouting', because the impact this has on her is more or less the same - i.e. fear and intimidation. MJ accepts that she may have spoken to TT in a way which would have made her frightened; I find that TT is fearful of her mother at times, caused by the manner in which her mother addresses her. In summary, I find the allegation set out in §11(vii) proved on the balance of probabilities. Finding 8: "MJ has spoken to TT in critical and derogatory terms about LT and WT which has caused significant distress to TT" LT and WT told me that they have been criticised and insulted by MJ over a period of time; WT spoke with sadness about the very difficult relationship with her mother, describing extended periods when her mother did not speak with her while they all lived under the same roof. This difficult relationship was exposed as the evidence played out in court; MJ was at times acerbic in her criticisms of WT, and to a lesser extent LT. It was disturbing to observe WT and LT sitting in court listening to MJ speaking of them in such deprecating terms.

85. MJ accepted that she had described LT and WT as 'snakes' to TT, a point confirmed by TT when she spoke with TT's solicitor instructed by the Official Solicitor: "She explained that sometimes her mother would also talk about her sisters, saying that they were "snakes". [TT] said that that had been "a long time ago". LHH asked whether, when her mother said these things, it made her sad. [TT] said that it did." 86. I have seen a number of examples in the documents of TT becoming distressed when MJ has spoken about LT and WT in critical and derogatory terms. Given MJ's low regard for LT and WT, and her uninhibited style of sharing her thoughts with TT, I accept the evidence of repeated unguarded criticisms of LT and WT. There are some general allegations in the papers, which are not sufficiently particularised to be of value; but specific among the examples of this to which I have had regard are: i) ii) A report by one of LBX's social workers of her meeting with TT in which TT stated that she loved her mother, and then her eyes "swelled" with tears when she said that she felt sad when "her mum and sisters [say] horrible things about each other". A further note by another social worker of a meeting on 24 May 2013 where TT was present with WT and LT, KK and others, at which KK set out her concerns that MJ called TT late at night and made her cry, and that she keeps saying "how evil her sisters and [KK] is and that they don't really care for her".
87. MJ gave evidence about WT; none of it was positive. MJ told me that WT offered nothing to TT as a sister. It seems to me likely that TT has picked this view up from her mother. It is probable that she had said to TT that her sister did "not exist". MJ accepted that TT "would feel bad about it, if I talked badly about her sisters". 88. 89. 90. 91. I find the allegation set out in §11(viii) proved on the balance of probabilities. Finding 9: "MJ is, at times, unable to understand and prioritise TT's emotional needs and has caused her emotional distress and harm during periods of contact with her" This finding draws together the findings summarised in §11(vi) to (viii) above. There is much evidence that TT has been upset, but not very much evidence that this upset has been caused during periods of contact, save for what TT has told KK. It also invites consideration of what MJ has said to TT about the foster carer [KK]. I note from a meeting between TT and TT's solicitor instructed by the Official

Solicitor (Ms Hobey-Hamsher 'LHH') in February 2014 that TT is said to have been upset by what MJ is reported to have said: "LHH said that she understood that [TT] had been upset. [TT] said that she had been, as her mother had been talking about [KK], "saying that she was stupid, and not very nice things". LHH asked whether she could explain what kinds of things her mother had said. [TT] said that her mother had said that "[KK] was nasty and stupid and stuff like that". LHH asked if she knew why her mother had said that. [TT] said that she did not know. LHH asked whether it had made her sad. [TT] said that it had. LHH asked whether she had asked her mother to stop. [TT] said that she had, but that her mother "still carried on". She said that "after that, we got into a little argument. I tried to tell her not to say those things, and she wouldn't listen." 92. As indicated above, and to an extent by way of re-cap: i) ii) iii) I was given more than one example of occasions when MJ has not given thought to what she goes on to say (obvious examples being her saying that she would be "going to prison" and "[WT] does not exist for me") and has given little thought to the probability that TT would receive and/or interpret the information literally. I accept that MJ will have spoken sharply to TT; MJ will have raised her voice (MJ accepted this). The tone and volume of these utterances would understandably have caused TT to feel that she had been shouted at. There is bad feeling between MJ and her daughter (WT) and step-daughter (LT). It seems likely that MJ does not contain her feelings in a number of respects to TT. She does so recklessly as to the impact this will have had on TT. When MJ heard that WT had taken TT to another relative's home, she was angry, and let TT know this. iv) She is unable to contain her emotions – MJ tells her that she feels lonely, and cries on the phone; that would have been upsetting to TT. 93. I find the allegation set out in §11(ix) proved on the balance of probabilities.

- (4) Determination of best interests 94. 95. 96. In this concluding section of the judgment, I deal with the best interests determination and consider the declarations and orders sought. TT's wishes and feelings: In considering the declarations sought I must have regard to the wishes of TT (see section 4(6) MCA 2005). The helpful and detailed attendance notes of Ms Hobey-Hamsher from Bindmans, TT's solicitor instructed by the Official Solicitor, represent a rich fund of information concerning TT's views: [5 June 2014] "LHH said that what she wanted to know was whether she would like to see her mother more or less. [TT] replied that she would like to see her mother "more". LHH asked why she would like to see her more. [TT] replied: "because we go out together. I want to go out with her more". LHH asked whether her mother also talked about what had happened. [TT] replied, "not really, she gets stressed out as well". [5 June 2014] "LHH asked [TT] what she would say to the judge if he asked her where, if she could live anywhere, she would want to live. [TT] replied that she would say that she wanted to live with her mum and stepdad. LHH asked her why she wanted to live with her mum and stepdad. [TT] replied: "because they look after me". LHH asked whether [KK] also looked after her. [TT] said that she did". [5 June 2014] "LHH asked [TT] how happy she was at the moment out of 10. [TT] replied that she was a '2'. LHH asked how happy she would be out of 10 if the judge said that it would be best for her to go live with her mum and stepdad. [TT] replied that she would be a '9'. LHH asked how happy she would be out of 10

were the judge to say that she should stay with [KK], but still see her mother. [TT] replied that she would be an '8'. LHH asked why she was currently a '2', asking whether it was because she was 'stressed'. [TT] replied that it was.” 97. 98. 99. The theme which emerges strongly from Dr. Joyce’s reports is that TT feels very positively about, and towards, her mother, step-father and sisters; she has been consistent in this. She told Dr. Joyce that she wanted to go home “and be around her Mum”, and live also with her “stepdad”; indeed she said “she wouldn’t want to go home if her stepfather wasn’t there, and that she would feel scared in case her mother shouts “or something””. A further important passage summarises TT’s view from her 10 May 2014 report namely: “it was clear that [TT] loves her family and wants to see them. She expressed a wish to see her mother, her step-father and her sisters, and it seems that these wishes are genuine. She is also very happy with [KK]. She seemed to like the idea of staying with [KK] but also being able to see more of her Mum...” It appears from the reports of Dr. Joyce, and otherwise, that TT continues to want to have a relationship with JJ, and to see him. As to the weight to be attached, Munby J (as he then was) in *ITW v Z* [2009] EWHC 2525 (Fam) set out the approach to be adopted to an incapacitated person’s wishes and feelings (emphasis added):- “First, P’s wishes and feelings will always be a significant factor to which the court must pay close regard: Secondly, the weight to be attached to P’s wishes and feelings will always be case-specific and fact-specific. In some cases, in some situations, they may carry much, even, on occasions, preponderant, weight. In other cases, in other situations, and even where the circumstances may have some superficial similarity, they may carry very little weight. One cannot, as it were, attribute any particular a priori weight or importance to P’s wishes and feelings; it all depends, it must depend, upon the individual circumstances of the particular case. And even if one is dealing with a particular individual, the weight to be attached to their wishes and feelings must depend upon the particular context; in relation to one topic P’s wishes and feelings may carry great weight whilst at the same time carrying much less weight in relation to another topic.”

100. Best interests in light of the findings: In reaching conclusions as to the best interests for TT, I have had regard to the range of considerations discussed above. Given the stance of MJ and JJ there is little dispute between the parties about the appropriate

orders.

101. 102. In reaching my own conclusions, I have paid particular attention to the reports of Dr. Joyce, whose guidance on issues of future welfare has been of particular assistance to the court. It is evident from all that I have read and heard that TT requires a placement away from the family which will give her considerable support. It seems to me that KK amply fulfils that objective; TT seems to be well settled there, and KK appears delighted to offer TT a home.

103. Contact between TT and MJ has generally been positive experience, though not without its problems. MJ told me in her closing submissions at the end of the three day hearing: “I love her (TT) and miss her so much. I want to see my daughter” (by which I understand, “want to see her as often as I can”). LBX propose to increase the Saturday contacts in duration, and to offer a degree of flexibility as to the venue for the Wednesday contact. This seems to me to strike the right balance between respecting TT’s wish for more time with her mother, while ensuring a degree of control on the arrangements. As indicated above, there remains potential for the contact to be upsetting, and this needs carefully to be kept under review. The Official Solicitor has suggested a “light touch” to the supervision of TT’s contact with her mother. In view of my findings as to MJ’s capacity to upset TT, and the potential for her to disrupt the placement, and particularly given the imminent criminal trial, I do not feel that I can authorise that sort of relaxation at this stage.
104. It is plainly in TT’s interests that she currently has no contact with JJ. This is in any event prohibited by JJs bail conditions, and he does not seek contact. Given, in the particular circumstances, that:- i) In relation to the central allegations of abuse, there has been no finding against JJ in the Court of Protection, and that he still awaits trial in the Crown Court, but that ii) TT has expressed a reasonably consistent wish to see him, I consider that it would be right to make the declaration that it is in her best interests not to have contact with him under section 48 of the MCA 2005 as an interim rather than a section 15 final order.
105. For the time being, it is in TT’s interests that she does not have sex education pending the criminal trial; plainly at that trial, her evidence ought not to be affected by her having received education on sexual issues. I will declare that it is lawful that this be deferred for that reason.
- Deprivation of liberty
106. I must consider whether the circumstances of TT’s residence and the provision of her care in the foster home amounts to deprivation of liberty. In my judgment TT’s situation is indistinguishable (particularly given the restrictions on contact with MJ and JJ) from the situation of MiG in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* *P&Q v Surrey* [2014] UKSC 19, [2014] 2 WLR 642 see Hale B at paras 52-57 esp 53-54, and I therefore conclude that it is (“If the acid test is whether a person is under the complete supervision and control of those caring for her and is not free to leave the place where she lives, then the truth is that both MIG and MEG are being deprived of their liberty” §54).
107. These arrangements for the care of TT, and her contact with others are nevertheless in my judgment in her best interests; the deprivation of liberty is hereby authorised for the purposes of section 4A Mental Capacity Act 2005.
- Conclusions
108. Having regard to the matters listed above, I propose to make the following orders/ declarations: i) ii) iii) iv) v) vi) vii) viii) For the reasons fully set out above at §25-29, I declare (under section 15 MCA
- 2005) that TT lacks capacity to litigate these issues; For the reasons fully set out above at §25-29, I declare (under section 15 MCA
- 2005) that TT lacks capacity to make decisions about her care and residence; For the reasons fully set out above at §25-29, I declare (under section 15 MCA

- 2005) that TT lacks capacity to make decisions about her contact with others; For the reasons fully set out above at §28 and §30, I declare that there is reason to believe (section 48 of the MCA 2005) that TT lacks capacity to consent to sexual relations; For the reasons fully set out above at §30 and §105, I declare that there is reason to believe (section 48 of the MCA 2005) that it would be in TT's best interests for any education about sexual relations to await the outcome of the criminal trial (in which JJ is a defendant); For the reasons fully set out above at §8(ii), and §100-102, I find that it is in TT's best interests that she should continue to reside with her foster carer KK (and that I should make this order under section 15 of the MCA 2005); For the reasons fully set out above at §8(iv), §100 and §104, I find that it is in TT's best interests to have no contact with JJ (and that I make this order under section 48 of the MCA 2005); For the reasons fully set out above at §100 and §103, I find that it is in TT's best interests to have restricted supervised contact with her mother; this order is made under section 48 MCA 2005; I propose that this should be at a frequency of about twice per week, although with a degree of flexibility. For the time being, the contact should be supervised at least until the conclusion of the criminal trial. At the conclusion of the criminal trial, urgent consideration will be required in relation to whether on-going supervision of contact is in SS's best interests. Application to adjourn / McKenzie Friends
109. At the outset of the hearing on 7 July, MJ and JJ made an application to adjourn the proceedings to obtain legal advice. They told me that they had been advised that they did not qualify for legal aid (on grounds of means) and did not have funds to instruct a solicitor privately. They had tried, without success, to obtain a litigation loan from the bank. I had been advised at the pre-trial hearing that the Bar Pro Bono Unit could not offer counsel for this hearing. I recognise the considerable disadvantage to someone in the position of MJ and JJ appearing unrepresented in proceedings of this kind; their article 6 ECHR rights are imperilled. However, as there seemed no realistic prospect of MJ or JJ obtaining representation in these proceedings, and given the need to reach conclusions at this hearing, I refused the application to adjourn. I was advised that JJ had solicitors acting for him in the criminal proceedings. I caused a message to be communicated to those solicitors over the short adjournment expressing my hope that they would be able to offer JJ some advice. I was very pleased to see Mr Levy at 2pm appearing on a pro bono basis. 110. 111.
112. On the third day of this hearing, MJ attended court with a McKenzie Friend. I considered it appropriate to allow this gentleman to assist MJ, and in doing so, applied the Guidance offered by the McKenzie Friends Practice Guidance Civil and Family Courts (12 July 2010): this Guidance is said to apply to civil and family proceedings in the Court of Appeal (Civil Division), the High Court of Justice, the County Courts and the Family Proceedings Court in the Magistrates' Courts. I have assumed, and unless advised to the contrary will continue to conduct hearings in my court on this basis, that it applies to proceedings in the Court of Protection. 113. 114. LT appeared in person at this hearing. I would like to commend her for the clarity of her submissions, and her assistance to me generally, particularly given the difficult issues engaged for her by these proceedings. Finally, I would like to pay tribute to

the high quality of the advocacy, the written submissions, and the expertise which counsel has brought to the determination of the issues in this case. Even though this judgment does not fully reflect the full range of submissions, in my review of the material for the purposes of this judgment I have considered each with care. 115. That is my judgment. 290714

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