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Neutral Citation [2024] EWCOP 15

IN THE COURT OF PROTECTION

1397774T

Royal Courts of Justice
Strand
London
5 March 2024

Before:

JOHN MCKENDRICK KC

(Sitting as a Tier 3 Judge of the Court)

SITTING IN PUBLIC

Between:

LAURA WAREHAM

(By her litigation friend the Official Solicitor)

Applicant

And

(1) BETSI CADWALADAR UNIVERSITY HEALTH BOARD

(2) CONRAD WAREHAM

(3) ERICA WAREHAM

(4) ANGELSEY COUNTY COUNCIL

Respondents

Mr Ian Brownhill (instructed by Julie Burton Law) for the applicant
Ms Eloise Power (instructed by Browne Jacobson) for the first respondent

Mr Abid Mahmood (instructed by Lanyon Bowdler) for the second and third
respondents

The fourth respondent neither attended nor was represented.

Hearing Dates 19-21 February 2024

APPROVED JUDGMENT

**This judgment was handed down remotely at 14.00 on 5.3.2024 by circulation to
the parties or their representatives by e-mail and by release to the National
Archives.**

John McKendrick KC:

Introduction

1. Laura Wareham¹ is the subject of these proceedings and this judgment, concerning her capacity, follows a three day contested hearing listed to determine whether or not the first respondent's contention that Laura lacks capacity to conduct these proceedings and to make decisions about her (i) residence; (ii) care and support; and (iii) contact with others is correct.
2. Laura was born in 1988, she is 36 years old. It is agreed between the parties that Laura is correctly diagnosed with Ehlers Danlos Syndrome and autistic spectrum disorder. Other diagnoses are subject to disagreement. A reporting restriction/transparency order was made permitting the identification of Laura and her parents. The same order contains an injunction prohibiting reporting of the identity and location of any institution or home where Laura is treated or resides. The injunctions also prohibit the naming of treating clinicians or those who care for Laura². Laura and her parents sought for her to be identified in these proceedings,

¹ I checked with Laura how she wished to be addressed and her preference was to be addressed by her Christian name. (The family are practising Christians)

² The second and third respondents' counsel's position statement served on the morning of day one of the hearing sought to vary the reporting restrictions to provide for no reporting restrictions, which would have

and Francis J considered this matter carefully, and acceded to that application. There has been reporting of her situation.

3. These proceedings were issued by the first respondent, the Betsi Cadwaladr University Health Board (hereafter “the Health Board or first respondent”) pursuant to the Mental Capacity Act 2005 (hereafter “the MCA”) on 17 August 2022, seeking orders authorising medical treatment in Laura’s best interests. Laura was then an in-patient in hospital, placed in a medically induced coma.
4. The second and third respondents are Laura’s father and mother respectively. The fourth respondent has played a limited role to date in these proceedings and it has not been necessary for it to attend or be represented at this hearing.
5. At the conclusion of the evidence (including an address by Laura directly) and after hearing submissions from counsel, I made a remote judicial visit to Laura on the last day of the hearing for the purposes of explaining my decision to her first. I then announced the outcome in open court: namely that Laura lacks capacity to conduct these proceedings and to make decisions about: (i) her residence (including consenting to the deprivation of her liberty in her current placement for the purposes of being treated); (ii) her treatment and care; and (iii) her contact with her parents. Pursuant to section 21A MCA, I extended the standard authorisation of the deprivation of her liberty and listed the matter for a final hearing with a time estimate of two days. I dismissed the purported challenge to the mental capacity requirement of the standard authorisation. I made some interim best interests orders on Laura’s behalf and further directions. This judgment endeavours to set out my reasons for coming to these conclusions.

Judicial Visit

6. At previous hearings, prior to the start of the hearings, I have had the pleasure of conducting remote judicial visits to Laura. Such visits have been conducted with the agreement of the parties, consistently with Laura’s wish to meet the judge, and have taken place in compliance with the Practice Note on Judicial Visits found

permitted the naming of treating staff and the address where Laura resides. I refused to hear such an application without an application supported by evidence properly filed and served. Mr Mahmood accepted this.

at [\[2022\] EWCOP 5](#), dated 10 February 2022. The previous hearings have largely determined case management and interim best interests decisions.

7. I have been asked to meet with Laura in advance of this hearing. Her solicitor set out a written plan for Laura's participation in this hearing. It anticipated I would meet with Laura in advance of this contested three day capacity hearing. I indicated, in an email to the parties sent in advance of the hearing, that whilst I would welcome the parties' submissions on the issue, my preliminary view was that I would meet with Laura at the conclusion of this stage of the decision making process to explain the outcome and to permit her to engage with the person (me) who is making decisions on her behalf.
8. I was concerned that there was no directly meaningful purpose to meeting with Laura in advance of the hearing. It would not be to elicit her wishes and feelings, in a section 4 MCA sense for obvious reasons and I am aware her view is that she has capacity to make the decisions with which this application is concerned. Nor am I carrying out an assessment, formally or informally, of Laura's capacity. Instead I am required to read and hear the written and oral evidence on these issues and the apply the law to the evidence to reach determinations.
9. Not only was there no obvious reason to meet with Laura in advance, I was concerned a judicial visit with Laura may influence my decision making one way or another, based upon my own observations which could not necessarily be fully communicated in her solicitor's written note of the meeting. The non-verbal communication and observation undertaken may have provided additional information that would be incapable of being communicated in a written note. Not only is there a risk of unconscious bias; a visit may cause an unfairness to the parties who are deprived of the context and non-verbal communication. Whilst judges are used to hearing evidence and then excluding it, my experience is that a judicial visit can leave a lasting impression.
10. In terms of the law, I note that section 4 (4) of the MCA places a duty on the court:
"so far as reasonably practicable, [to] permit and encourage [Laura] to participate, or to improve her ability to participate, as fully as possible in any act

done for her and any decision affecting her." However this must be interpreted consistently with the language and purpose of the MCA. Section 4 (4) is set out within section 4 which is concerned with best interests. The heading to section 4 is 'best Interests'. I consider the qualified duty on the court to ensure Laura's participation in these proceedings is principally directed at best interests decision making. Sections 2 and 3 which deal with capacity do not provide for a similar qualified duty. Whilst I accept that the court's determination of the capacity issues is a "decision affecting [Laura]" the common sense reading of this duty is that it relates to best interests. The Practice Note on Judicial Visits does not envisage judges conducting remote visits to P in respect of contested capacity. That is not to say such visits are prohibited. They are not. However, the decision whether or not, or how, and when, a judicial visit to P should be carried out is a case management decision which should be undertaken consistently with the Court of Protection Rules and in particular in compliance with Rule 1.1 (the over-riding objective) which requires decisions to be made *inter alia* 'justly' and by 'having regard to the principles contained in the Act' which of course includes the qualified section 4 (4) MCA duty). Regard must also be had to Rule 1.2 which deals with the participation of P in the proceedings. This issue was largely dealt with by Cobb J in the normal way at the outset of the proceedings, but I have kept that matter under review.

11. I also remind myself that in the context of the Family Court³, there is an increasing focus on the concept that a meeting between a child and a judge is a visit for the child to meet the judge; and not for the judge to meet the child. There is something of a read-across of this concept into this adult welfare jurisdiction. For the avoidance of doubt, I did not meet Laura (or hear from her in open court) for the purposes of my need to meet her to consider her capacity, or otherwise.
12. I have not overlooked Laura's participation in these proceedings which determine decisions affecting her. First, she is a party. Secondly, I have already met her on at least three occasions (each at her request to meet the judge). I have that background firmly in mind. Thirdly, she is represented in these proceeding by experienced

³ See the learning of Peter Jackson LJ (with the agreement of William Davis and Elisabeth Laing LJJ) at paragraph 59 of *Re C (Child: Ability to Instruct Solicitor)* [2023] EWCA Civ 889.

solicitors and counsel. Fourthly, I have ensured there is a hybrid link so she is able to follow the hearing from her placement (and I delayed the start of the hearing for around an hour as various technical problems were worked through to ensure Laura could hear and see the proceedings). Fifthly, I determined to meet with Laura to explain my decision, although I emphasise this was for her to meet me to hear the outcome before others.

13. Lastly, I was persuaded to accede to Mr Brownhill's suggestion that Laura address the court at the conclusion of the evidence. Laura wanted this opportunity and no party opposed it. She spoke in public with members of the public watching her. She was not daunted by this although I do harbour doubts about the appropriateness of an incapacitated person choosing to address the court from her hospital bed in respect of intimate aspects of her life. As was apparent, whilst she was mostly calm, she appeared distressed before the short adjournment on day three and I quickly rose to provide her with a break. As I communicated to the parties after the adjournment, I was giving active thought, of the court's own motion, to making the case management decision to sit in private for the purposes of protecting Laura⁴. I indicated I would hear submissions from the parties and from any member of the public observing before making such a decision. Thankfully, this was unnecessary and Laura presented as calm and collected.

Brief Background

14. Laura comes from a close knit family. Her mother and father have been married for a long time. Dr Wareham is a consultant intensivist/anaesthetist. Mrs Wareham is a retired nurse. They met on the Isle of Wight, where Dr Wareham was training. They then moved to the north east of England. Then the family lived in Sheffield. There was a further move to Southampton. Then the family moved to Oxford and moved again back to the Isle of Wight. When Laura was sixteen the family moved to Australia. In 2015 the family moved back from Australian to Rotherham. I am told these moves were in furtherance of Dr Wareham's medical career. Laura was initially educated in the state sector but moved to an independent special school

⁴ See CoP Rules Practice Direction 4C at paragraph 2.5 where the "need to protect P" is listed as a good reason to sit in private (amongst others).

with a specialism in dyslexia and learning difficulties. When the family moved to the Isle of Wight she went to school, then to a tuition centre and was then home educated and obtained some GCSEs. As part of the background, I note Dr Camden-Smith states: “[o]wing to the family’s multiple moves and her parents’ reluctance to allow her current treating team to access past records, it has not previously been possible to go through all her notes to develop a clear sense of which diagnoses have been substantiated and which not.”

15. Laura was seen by an educational psychologist in 2018. She carried out psychometric testing and reported a verbal comprehension score on the 96th percentile, whilst Laura’s working memory and processing speed were on the 3rd and 1st percentile respectively. Reference appears to be made that this amounts to a learning disability, but I have not seen these underling reports.
16. For around the last four years Laura has been bed bound for reasons related to her neck which are said to be related to her Ehlers Danlos Syndrome. She considers she is in too much pain to stand. Her treating clinicians do not agree with this. She is dressed in a hospital gown. She refuses to go to the toilet or use a commode. Laura has been consumed with researching Ehlers Danlos Syndrome and has spent a very significant amount of time researching it and contacting specialists about it. She is reported to have no friends outside of a small circle of people with a shared interest in Ehlers Danlos Syndrome. No mention is made in the written evidence of her having had significant partner(s) in her life. She has lived with her parents until her admission to hospital in 2022.
17. Laura is her parents’ second child. Their first child died of sepsis in 2020. Laura was admitted to hospital as an emergency patient in April 2022. She required to be treated in critical care. She was then nursed in the high dependency unit. It follows that at the point of admission to hospital, from her parents’ care, she was extremely ill. It is not necessary to detail the extent of Laura’s over-medicalisation in the run up to April 2022: not only would it take a very considerable amount of time to do so, it would also publicly provide too much detail. However some context is necessary as it underpins the risks to Laura from her parents’ medical views as to what they think she needs. She was repeatedly being admitted to Leeds General and

Doncaster Royal Infirmaries because of complications with ‘parenteral nutrition’. She was receiving large amounts of parenteral antiemetics and antihistamines. When her former GP retired, I am told, from an expert report dated 5 May 2023 in the (nearly 2000 page) bundle, the other GPs in the practice refused to continue to prescribe IV fluids. Clinicians at Leeds General had also withdrawn the intravenous nutrition. For reasons that are not clear, but clearly in a poor state of health, Laura was taken to north Wales. When she was admitted to hospital she was “*on an exceptional amount of parenteral nutrition (x8-9) as well sublingual fentanyl and inhaled methoxyflurane..*”

18. In July 2022 Laura had some form of seizure and her behaviours were described as manic with psychotic symptoms. On 14 August 2022 she was intubated and sedated to manage serious respiratory failure due to infection. She was extubated on 29 August 2022. She seen by a psychiatrist who considered she had bipolar type disorder and as a result she was detained for treatment pursuant to section 2 of the Mental Health Act 1983 for a short period. Contact restrictions were then shortly after put in place restricting the hitherto unrestricted contact between Laura and her parents. Significant concerns were raised about Dr and Mrs Wareham’s conduct towards treating staff.

19. Since then the Health Board have been attempting to “de-medicalise” Laura. They believe they have made slow but effective process in this regard over the last 18 months or so. They have “been able to rationalise her very bizarre analgesic regime to one that is less dangerous...” Laura believes she has significant difficulties swallowing but has refused any assessment. I understand notwithstanding the bizarre hydration and nutritional regime that appears to have led to her urgent hospitalisation, through the hard work of her treating team, Laura is eating and drinking well (see the 9 October 2023 witness statement from Dr S). Laura continues to believe she needs complex and expensive spinal surgery in Barcelona. Some form of on-line campaign has been launched to fund this. Her treating team are not in agreement. They have undertaken MRI scans of her neck which have revealed no injury. Laura considered the scanner is “inadequate” and the clinicians interpreting the results are “unqualified” and have failed to listen and understand the research that she has carried out.

20. Her parents now live in north Wales in a rented home that Laura has never visited. Whilst challenged in these proceedings, it is important to record the views of treating clinicians is as follows (taken from the October 2023 evidence):

“Dr and Mrs Wareham’s ...[...] behaviours are potentially causing Laura to be confused or very anxious about her state of health to the extent that she appears to have developed a false self-view of being sick and this is now driving her own erroneous beliefs of her own sickness along with the role of unhelpful own peer groups on social media which can potentially encourage each other to remain ill.

...

There is a complete agreement on the continuing need for de-medicalization including reducing /stopping unnecessary medication (which has already been done with full oversight of the MDT) and offering graded physical rehabilitation.

....

In terms of the current contact arrangements; these are in place to ensure that the clinical approach to deal with the issues as outlined above i.e. de-medicalisation plan is successful Our ongoing concern is that Dr and Mrs Wareham continue to believe that Laura requires medical treatment and support, which is not made out in her presentation.”

21. It is clear that the treating clinical team have devoted (probably) hundreds of hours to considering Laura’s diagnoses, symptoms and treatment. It has been complex and challenging. They have been tested by her and her parents, who do not accept the passages from the witness statement I have quoted above. Laura’s personal preferences around her care regime have made for a very difficult situation.

22. In summary there is a challenging safeguarding background. I record from the outset that I am in agreement with Dr Camden-Smith’s description that Laura is *uniquely and particularly vulnerable*.

23. The application was issued on 17 August 2022 and came before Cobb J on 18 August 2022. His Lordship granted permission to the Health Board to bring the application, joined Laura as a party and appointed the Official Solicitor (who had accepted the court's invitation to act) as her litigation friend. At that stage an injunction was made prohibiting the identification of Laura and her family. His Lordship concluded there was reason to believe Laura lacked capacity to conduct the proceedings and make decisions about her medical treatment. He made an interim order that the "sedation and intubation care plan" provided by the Health Board was in her best interests. A series of evidential and disclosure directions were made and the matter was listed for a further hearing.
24. On 14 September 2022 Francis J relaxed the reporting restriction order to only prohibit the naming of clinicians and the address of any location where Laura is being treated or residing. Laura and her family have been publicly named since. This accords with their wishes. His Lordship was required to determine whether to consent to urgent medical treatment for Laura. He heard oral evidence from a treating clinician who was questioned by the parties. He heard submissions from the parties. I note Dr and Mrs Wareham appeared in person and contributed throughout the hearing. He made a finding of fact in these terms: "*Dr Wareham and Mrs Wareham are interfering with Laura's medical treatment to the extent this is detrimental to her.*" He further found that: "*The medical knowledge of Dr Wareham, in particular, is a hindrance as opposed to it helping the progression of this case.*" Consent was provided to a series of medical procedures pursuant to a section 16 MCA order. The matter was listed for a final hearing in November 2022. Directions were made.
25. A standard authorisation was granted by the relevant supervisory body on 21 September 2022.
26. The matter returned to be heard by Francis J on 9 November 2022. Orders were made restricting contact between Laura and her parents. Further evidential directions were made. A further hearing took place before Francis J on 16 December 2022. A recital noted that: "*The parties agree that it is in Laura's best interest to be discharged from hospital to a suitable placement which meets her needs as soon*

as practicable, and the expedited timetable set out within this order seeks to achieve that.” Further capacity evidence was provided to the court and it was accepted there was reason to believe Laura lacked capacity to conduct the proceedings and make decisions about her residence, care and treatment and contact. Dr Camden-Smith was instructed. In the light of the standard authorisation the proceedings were reconstituted as a section 21A MCA challenge to the standard authorisation depriving Laura of her liberty. Arbuthnot J heard the matter on 22 February 2023 and made further directions for medical evidence. Francis J heard the matter again on 12 June 2023. The order noted that between 2 May 2023 and 24 May 2023 Laura was detained pursuant to section 2 of the Mental Health Act 1983. Contact restrictions were continued between Laura and her parents. Further directions were made. The matter was again listed for a final hearing to determine issues of capacity, with a time estimate of 4 days, in October 2023.

27. The matter returned to Francis J on 20 July 2023 who made further directions on the papers on the basis of an agreed order which had been the subject of discussion at an advocates’ meeting. His Lordship then heard the matter again on 1 September 2023 to determine several COP 9 applications made by Laura’s parents. Permission was granted for Dr Eccles to be instructed as an expert witness to report to the court on Laura’s capacity on the basis of the sole instruction of Dr and Mrs Wareham. The direction there was to be a final hearing was discharged and the 4 day hearing was reduced to a one day hearing to determine issues in respect of Laura’s supra-pubic catheter.
28. I heard this matter on 17 October 2023 for the first time and made directions. The matter returned before me on 17 November 2023. The application in respect of the catheter was not pursued by any party, as evidence was filed that purported to show Laura had capacity to make decisions about its removal. I made directions for a hearing to determine Laura’s discharge from hospital. At a hearing on 13 December 2023 I was in receipt of detailed written evidence in respect of the options for discharge from hospital and the best interests opinions in respect of discharge. Dr and Mrs Wareham, represented through leading counsel, submitted she should be discharged to their home. I determined it was in Laura’s best interests to be discharged from hospital to a rehabilitation unit as it was less restrictive, but safe. I

gave an *ex tempore* judgment explaining my reasons in some detail. I extended the standard authorisation until 12 January 2024, on the understanding Laura would be discharged before then. I ordered an increase in contact with her parents including supervised face to face and Christmas contact. I made further directions for the contested capacity hearing. Laura was eventually discharged from hospital to a step-down rehabilitation unit in February 2024.

The Evidence

Dr Camden-Smith

29. Dr Claudia Camden-Smith is the jointly instructed expert psychiatrist. Her specialist field is Neurodevelopmental Disability Psychiatry. She has produced three reports: 2 February 2023; 16 July 2023; and 30 January 2024. For the purposes of her first report she met with Laura on 11 January 2023 on the high dependency unit of her psychiatric hospital. For the purposes of her second she did not require to meet with her and for the purposes of her third report she met again with Laura at the de-escalation suite at the psychiatric hospital. This interview was recorded by MS Teams. For the purposes of each report, Dr Camden-Smith received a letter of instruction agreed by the parties. No written questions were asked of Dr Camden-Smith by the parties.

30. I need not address Dr Camden-Smith's methodology as there was no criticism of it. Her evidence is that:

“Ms Wareham's verbal skills are greatly at odds with her other skills. She has marked executive dysfunction (often a feature of those with autism). This can mean that her vocabulary and expressive language skills mask a poor level of understanding, poor memory, poor retention of information and difficulty with manipulating information. Her autism makes her thinking linear and extraordinarily rigid. She has great difficulty holding opposing viewpoints in mind and in thinking hypothetically.”

31. Dr Camden-Smith clearly diagnoses autism. She opines:

“Ms Wareham has a diagnosis of autism made based on the administration of a validated assessment by a trained professional. I have not seen the reports of this assessment, however Ms Wareham’s presentation is entirely in keeping with that of someone with autism, and it is my opinion that her primary diagnosis is one of autism.”

32. She accepts the treating team’s clinical historical diagnosis of Bipolar Affective Disorder. She makes a diagnosis of Bodily Distress Disorder (ICD-11 6C20.2). She states that this condition “*causes severe impairment in personal, family, social, educational and occupational activities with narrowing of interest to focus solely on their bodily symptoms and the negative consequences of this.*” Dr Camden-Smith carefully considers whether Laura’s presentation meets the diagnosis of Factitious Disorder Imposed On Another (ICD-11 6D51) but does not find “clear and unequivocal” evidence to support this although she is of the opinion that the parents “contribute materially and substantially to Ms Wareham’s illness behaviour and help-seeking behaviour.....[and] often obsessively seek out medical professionals who reinforce they own (erroneous) illness beliefs.”
33. Directly addressing her instructions, Dr Camden-Smith sets out her opinions on Laura’s capacity to make the decisions the subject of these proceedings. She states that: “*Throughout my conversation with Ms Wareham, she used legal terminology and phrases that gave the superficial appearance of an understanding of legal principle, but was consistently incapable of expanding on these, entering into discussion around these or demonstrating any real world, pragmatic, practical understanding of the words and phrases she was using.*” She concludes that Laura is unable to understand the nature of the proceedings, the role of the court and the role of her legal representation. She opines this is due primarily to her autism. This causes extreme rigidity which affects her abstract thinking. She considered any form of meaningful discussion was not possible in the light of her anxiety and highly aroused state caused by her autism.
34. Dr Camden-Smith concluded that Laura lacked capacity to make a decision in respect of her residence caused by an inability to understand and use and/or weigh

the relevant information. She describes Laura's fixation with living with her parents at their home albeit she has never visited this home. She finds: "*Ms Wareham is incapable of holding more than one option in her mind so as to be able to compare them and project forwards hypothetically. Her thinking is concrete and linear. This is due to her autism, exacerbated by her pathological beliefs about her illness.*"

35. Dr Camden-Smith's January 2023 conclusion was uncompromising in respect of care and support, finding that: "*Ms Wareham is completely incapable of understanding that there may be different explanations for her experience. She is unable to understand that those treating her (in various healthcare settings) are genuinely reporting to her the results of their objective findings and are not deliberately or negligently ignoring what she perceives her diagnosis to be. She cannot understand that her parents (and the internet) may be wrong and that there may be even the tiniest grain of truth in what medical and other professionals are saying. Ms Wareham clings to her understanding of her needs in the face of incontrovertible proof that her beliefs are medically impossible, for example her belief that she cannot swallow...*" It is recorded that Laura's views of the (effective) treatment she has been given amounts to "*crimes against humanity.*" Against this background it is unsurprising that Dr Camden-Smith's opinion to the court is that Laura lacks capacity to make decisions about her care and support because she is unable to understand the relevant information, notwithstanding the fact she is cognitively capable. Her concrete and linear thinking and inability to hold more than one option in her mind is caused by her autism and this precludes her understanding the necessary care and treatment options.

36. Lastly, she considers Laura's capacity to make decisions about contact with others. It is recorded Laura has contact with her parents and treating clinicians and some form of social media contact with others. Dr Camden-Smith focused on contact with her parents. She found that: "*Ms Wareham could not understand that her parents could be both loving and well-meaning and wrong. She could not understand that her parents' strongly held beliefs about her medical conditions could possibly be contributing to her distress.*" As a result of her autism, it is considered Laura has no theory of mind and cannot understand the motives of others. Dr Camden-Smith considers she lacks capacity to have contact with others because she is unable to

understand “*all the ways in which she is uniquely and particularly vulnerable.*” For similar reasons in respect of how her autism alters her thinking, this diagnosis is the cause of her inability to understand this information and her vulnerabilities.

37. It is not necessary to summarise the second report which focused on how contact could be developed with her parents.
38. In her third report she was instructed to re-visit her opinions on capacity. The report was delayed largely because Dr and Mrs Wareham failed to comply with the direction to pay their portion of her fees on time as directed by the court. It is not necessary to set out the background or the methodology as again there is no challenge to how Dr Camden-Smith gathered information to provide her opinions to the court, although I note Laura’s view that being required to speak with the expert was done “under duress” and was a form of “torture.” Laura considered Dr Camden-Smith’s interview was also conducted in breach of the terms of the Equality Act 2010 and the ‘United Nations Convention on Torture’. Dr Camden-Smith reported: *Ms Wareham’s preoccupations continued to be of the Human Rights Act (HRA), the Equality Act, the UN Convention on Torture, the Montreal Convention, and various other UN Conventions. She was particularly upset that she felt I hadn’t previously given her the opportunity to expand on her views as to how the Human Rights Act underpins her complaints...*”
39. Her diagnostic formulation remained unchanged although she added a diagnosis of opioid dependence brought about by her long term wish for analgesia.
40. Dr Camden-Smith’s opinion on capacity to conduct the proceedings remains unchanged: she lacks that decision making capacity. In terms of residence Dr Camden-Smith framed the options as remaining in hospital or living in her parents’ rented home without a care package. She opined that: “*due to her inability to recognise and understand the realities and practicalities of her circumstances and her inability to use and/or weigh the relevant information to come to a realistic decision. This is fundamentally due to the impairments of her mind associated with her autism.*” In particular Dr Camden-Smith drew from the records and her conversations that Laura failed to understand the difficulties putting together a care package for her; would return without a care package; failed to understand why

earlier care packages had failed. Her ideal would be to live in London and see medical specialists although “*she would be willing to live anywhere else where she could live with her parents and receive the care she believes she should receive*”.

41. Dr Camden-Smith’s opinion on care and treatment was unchanged: Laura lacks that decision making capacity. She notes: “*The extraordinary and harmful care previously provided to Ms Wareham cannot be underestimated; I cannot comprehend how a situation arose in which Ms Wareham was receiving the medical interventions that she was without any clear medical evidence of need or benefit, however it did arise and the risk remains that this pattern will be repeated, particularly if the Warehams move to a new area.*” Laura is unable to recognise and understand the realities and practicalities of her circumstances. She is also unable to weigh this information. This is ‘fundamentally’ due to her autism.
42. On contact her expert opinion remains unchanged: Laura lacks that capacity. Dr Camden-Smith acknowledges, as not unreasonable, Laura’s argument that her family circumstances are not ‘usual’ and that autism runs in the family. Neurotypical standards should not therefore be applied to them and they function differently. Contact restrictions violate her human rights, believes Laura. At the bottom of page 14 of her January 2024 report Dr Camden-Smith becomes somewhat distracted into considering best interests decision making, commenting on the need for contact restrictions to protect Laura from her parents. I discount that evidence in my assessment of Laura’s capacity. However she is clear Laura is unable to use and/or weigh relevant information to come to a ‘realistic’ decision and this is ‘fundamentally’ due to her impairments of mind associated with her autism.
43. Dr Camden-Smith and Dr Eccles met and produced a short report of their meeting dated 16 February 2024. I quote from the report:

“We are in agreement, that we believe, on the basis of the available evidence, that Laura’s functional capacity (to conduct these proceedings, make decisions regarding her residence, her care and support arrangements and her contact with others) has not been optimised. We understand that Laura has not been definitively informed of her team’s working diagnosis, prognosis, specific care plan and treatment goals relating to this, nor reasons for restricted access to

others, the telephone, the internet or social media. If this has been explicitly discussed with Laura, what information was she told and was it accessible? If this has not been discussed with Laura explicitly what are the plans to do so? We do not consider it appropriate for us to divulge this information to Laura as we do not have clinical responsibility and are not in a position to manage the clinical consequences.

As a consequence we do not believe that Laura is able to weigh information in the balance in any of these domains as she does not have access to all the information at hand. We believe as such any assessment of capacity is currently imperfect.”

44. In oral evidence Dr Camden-Smith began by confirming that autism was the primary diagnosis. She said that whilst the opinion set out in the joint report was her understanding at the time, she had since checked her notes and the records. She told me: “I have more information than I did when I met Dr Eccles.I discussed her [Laura] with the treating team....a lot of information has been given to Laura about her needs. ...”. She told me Laura is aware of the findings made by Francis J. She gave evidence that: “she lacks capacity. It is clear on reflection she has been given the information. She has been able to access it.” She said there was a difference between “Laura not knowing and Laura not being told”. Ms Power comprehensively took Dr Camden-Smith through each item of the information set out in the joint report that it is said Laura had not been told. Dr Camden-Smith clarified that after checking her notes and looking at records that Laura had been provided with this information. It was clear from her evidence that Laura has been provided with her care plan. In answer to questions from Mr Mahmood, she gave evidence that Laura is “extremely distressed by the proceedings....the longer it goes on the more distressing it is....”. She accepted the term ‘opioid dependence’ may not be accurate but said that Laura was dependent on pain relief. She said that Laura’s “ability to understand is incredibly impaired by her autism”. She repeated that the proceedings are “counter-therapeutic” and that Laura is focused on demonstrating her capacity not developing a therapeutic relationship..”. She said the proceedings were sufficiently traumatic that they “may very well” stand in the way of her regaining capacity.” In answer to questions from Mr Brownhill she said

that Laura is “fixated” on ‘the correct form of treatment’ and ‘specialist treatments’. She said Laura “cannot use or weigh the need to de-medicalise”.

45. In answer to a question from me about whether she had considered the witness statement from the treating urologist who opined in November 2023 that Laura had capacity in respect of her supra-pubic catheter, she accepted she had not. No party dissented from my suggestion she consider this and comment by email the next day, with all parties having the opportunity to ask her further questions in writing. In the event Dr Camden-Smith set out her opinion in an email the next day and no party sought to ask her questions. She wrote:

“I accept his (and the court's) conclusion that Ms Wareham had capacity in November 2023 to make this decision. However, this was a single concrete decision with a binary choice and a limited (albeit complex) amount of medical information for Ms Wareham to consider. These are the kinds of decisions that people with autism, and Ms Wareham in particular, can find more readily accessible. The information is concrete and scientific, there is no nuance, what uncertainty there is can be quantified, and there is a single decision to be made. When it comes to more nebulous decisions with multiple viewpoints and information to be taken into consideration, and where Ms Wareham is required to make decisions about what weight to place on the different components and aspects of the relevant information, it remains my opinion that Ms Wareham lacks capacity. Decisions of this kind are those such as conducting proceedings and making decisions about residence, contact with others, and her medical care and treatment taken as a whole.”

Dr Eccles

46. Dr Eccles is a GMC registered psychiatrist and a fellow of the Royal College of Psychiatrists. Currently she is a Reader in Brain-Body Medicine at the University of Sussex. Her specialist fields are described as Neurodevelopmental psychiatry (non-learning disability) and research into hypermobility and related syndromes such as Ehlers Danlos Syndrome. She was instructed by Laura’s parents with the permission of the court. Francis J made a direction that permission be given for her

to be instructed by Dr and Mrs Wareham pursuant to COP Rule 15.12 on 1 September 2023. She has produced two reports, dated 11 December 2023 and 24 January 2024. She met with Laura for the purposes of her instruction she met with Laura in person on 27 October 2023 at the intensive care unit; and met with her again by MS Teams on 8 and 15 November 2023. Her addendum report was written to respond to several questions the parties had asked her. She met again with Laura ‘virtually’ on 18 January and 23 January 2024. She was provided with a letter of instruction from Lanyon Bowdler (which I have not seen).

47. She states that: “[t]he interplay between Autism and Ehlers Danlos Syndrome is central to this case and to Laura’s very identity, I believe.” She emphasised the physical problems Laura experiences brought about by Ehlers Danlos Syndrome and opined that in this context Laura’s strong interest in medical issues was understandable. She doubts the treating psychiatrist’s developing theory of Factitious Disorder Imposed By Another (FDIoA) given Laura is not a child and given she has not feigned illness. She notes that the treating clinical team have emphasised that they are keen not to apply “labels” to Laura. Dr Eccles found no evidence of affective or psychotic illness. She could not assess the historical diagnosis of bipolar disorder. She also took issue with the formulation of Bodily Distress Disorder. She was clear: “*I believe autism is the predominant psychiatric diagnosis..*”

48. She dealt with capacity to make decisions about contact with others first in her report. She stated Laura could describe and weigh advantages and disadvantages of contact with family and friends and could retain and communicate this. In her written report she does not appear to traverse the issue of whether Laura can understand and use and weigh the relevant information. She does not mention in her written report the finding of Francis J. She concludes: “*Laura could not identify any specific harm or risk associated with contact with her parents. I believe Laura has capacity to make decisions regarding contact with others.*”

49. In terms of residence, Dr Eccles’ written evidence considered three options: remaining in psychiatric intensive care/rehabilitation/home with a package of care. Dr Eccles was of the view that Laura could retain information relevant to these three

options and weigh it in the balance. Dr Eccles' written report is light on the actual discussion she had with Laura and what Laura said to her in the context of the relevant information.

50. On care and support, Dr Eccles' written evidence concludes Laura can make decision in this area as she "seemed able to weigh up" treatment options. She relied on Laura's parents' views as to her capabilities.

51. In respect of conducting the proceedings, Dr Eccles "*could discern no reason why Laura*" lacked this decision making capacity and noted she would be aided by a word processor/scribe/Dictaphone/email.

52. She engaged with Dr Camden-Smith's reports. She questioned the reliance on "rigidity and monotropism". She considered Laura had not been given all the necessary relevant information and in particular she was not clear about the treatment pathway in the light of her diagnoses and prognoses. She emphasised the Autistic SPACE framework to assist Laura going forward and opined with the correct support Laura "*has capacity to undertake proceedings, make decisions about care, residence and contact.*"

53. Her second report was prepared to answer written questions posed by the parties. She accepted that she had assessed Laura's diagnosis ahead of her functional ability and felt it wise to consider that first. She confirmed autism was the primary diagnosis but took issue with Dr Camden-Smith's opinion that rigidity was a significant factor in concluding Laura was unable to make decisions; rather she wrote that she observed Laura "*hold in mind differing accounts and come to [a] conclusion..*".

54. I set out one question and answer in full:

"13) With regard to each area in respect of which capacity has been assessed can you please confirm the following:

- i) The relevant background information you provided to Laura including any perceived advantages and disadvantages of the available options.
- ii) The questions you asked Laura in respect of each relevant area.

iii) Laura's responses to those questions and why these indicated to you that Laura was able to a) understand the relevant information; b) retain the information; c) use/weigh the information; and d) communicate a decision.

This question requires a particularly lengthy answer. I apologise to the court and parties but I will have to furnish my response at a later date. Since receiving my instructions to report on these questions I have suffered a bereavement and making appropriate arrangements, organizing and attending the funeral have had a considerable impact on the time I have available to furnish this report."

55. She clarified that she has not seen the judgment of Francis J where he made his finding against the parents. Otherwise she sought to further explain and defend her earlier written evidence.

56. By way of a direction I made in December 2023, the experts were required to attend the Royal Courts of Justice in person to give evidence. I was informed around 10.15 on the second day of the hearing that Dr Eccles planned to give evidence remotely. No application had been made by Dr and Mrs Wareham to vary the earlier direction made. No proper reason was given to the court. I invited counsels' submissions. Mr Mahmood invited me to hear from her remotely. I sought to understand why Dr Eccles was giving evidence remotely and whether she had been informed of the December 2023 direction by her instructing solicitors. I was told she had been made aware but that she was busy and had other meetings. Ms Power submitted she was in flagrant breach of a clear direction and she should be required to attend in person later that day. Mr Brownhill submitted the position was unacceptable but left the matter within the ambit of the court's case management discretion. Given the clear evidence from the previous day that the proceedings are distressing for Laura I was focused on resolving the outstanding issues without delay. I was told a link was available and Dr Eccles could join and would clear her diary. It is unacceptable for a direction to be disregarded by an expert for no good reason. There is a real risk that should an expert not attend as directed, they will not be permitted to give oral evidence and as a result less weight will be attached to their evidence. Alternatively,

an adjournment may be required, with cost consequences for the expert and/or the instructing party. No public apology was made to Laura or her parents, who had gone to the expense of instructing Dr Eccles. Looking at all the matters in the round and having regard to the over-riding objective contained in the CoP Rules, on this occasion, justice, having regard to Laura's welfare, dictated that I vary the earlier direction and permit to Dr Eccles to attend remotely. This was, on balance, necessary. I publicly directed myself that the inconvenience and time wasted would not *prima facie* impact my assessment of Dr Eccles and her evidence.

57. Dr Eccles was politely and rigorously cross-examined by Ms Power. She accepted this was the first time she had acted as an expert witness, although she had given evidence as a witness of fact before in an inquest. This was the first time she had written an expert report. She had not seen the order of Francis J in which he records the court had made findings against Dr and Mrs Wareham although she says she was aware of it. She confirmed she did not discuss this with Laura. She accepted she may be wrong in respect of what information Laura has been told. Ms Power sought to establish that Dr Eccles relied too much on what Laura told her without any adequate method of triangulating this information with clinical staff. Dr Eccles said she had discussed matters with staff but accepted her report was very light on the details of any such conversations: she said: "There is no explicit information about the contents of that interview". She challenged Dr Camden-Smith's reliance on Laura's rigidity. She attempted to give examples of Laura holding different opinions in her mind and choosing between them. She said: "I accept she lacks capacity to conduct the proceedings pending more work being done". In respect of decision making about residence, Ms Power established that Dr Eccles accepted that the risks to her from her parents was relevant information that had to be considered. She said in evidence: "She [Laura] is not fully aware of the risks of contact with her parents". She ultimately accepted: "I can't say whether she can use/weigh the relevant information to decide on residence". She also said: "I don't know if she has capacity in respect of care". In terms of contact with her parents, Dr Eccles opined that it was not her role to explain why some think she should not have contact with her parents. Dr Eccles was not aware as to whether Laura knew of the reasons why contact restrictions with her parents had been made. I understood her evidence to be that ultimately she would need further information before

opining as to whether Laura has capacity to made a decision to have contact with her parents.

58. I add that Ms Power asked about the missing information identified above in respect of question 13 in her addendum report. I observed at the time that whilst sympathetic to the bereavement and understanding of why this was not provided in the addendum report, this detailed factual information could and should have been provided: (i). in the original report; or (ii) otherwise in a further written report as Dr Eccles stated would take place (a month passing between the addendum report and the hearing). I was not prepared for large swathes of factual information which could and should have been presented in writing in reports to be elicited in oral evidence at the hearing. This would have been unfair to the parties and to the court. Furthermore such a disjointed presentation would have been of limited forensic value and ultimately would have been evidence in respect of which little weight should be attached. It would also have been time consuming and extended the evidence well beyond the reasonable allocated time. It would likely have required the parties to seek further time to obtain instructions in respect of the new factual information. Experts must set out their core opinions with reasons in their written reports in advance of trial. The purpose of cross-examination is to challenge the written evidence provided. Ms Power accepted this and no counsel suggested such an approach was unfair or wrong.

59. In answer to questions from Mr Brownhill she accepted she had not presented all the relevant information to Laura as she did not think it was her place to do so, suggesting this was for the clinical team.

The DOLS Assessor Evidence

60. As Laura moved from the hospital to the rehabilitation setting earlier this year, a request was made for a standard authorisation for the deprivation of her liberty. This led to a capacity assessment being carried out by a registered nurse. The assessor carried out a detailed assessment process, contacting multiple people with knowledge of Laura. The assessment took place on 8 January 2024 after the assessor had taken the trouble to call the ward to ensure an understanding of Laura

beforehand to ensure the assessment took place when Laura would be most able to engage. The assessor states all practicable steps were taken to maximise Laura's involvement in the assessment. She found that Laura could not understand relevant information, incorrectly believing she required treatments contrary to the views of the clinicians. Furthermore, she was over-focused on her own 'narrative' about breaches of human rights law. Whilst she wished to leave hospital she engaged in no activities to help herself and believed her needs should be met by others "at a time she demands it". She concludes that:

I have been able to read all of the medical and nursing notes and gain the views of the professionals currently looking after Miss Wareham. I have also been able to meet with Miss Wareham on the 08/01/2024. From this, I have concluded on the balance of probability that Miss Wareham lacks the capacity to make an informed decision regarding her accommodation in hospital and her treatment. This meets the 'functional test'. Miss Wareham's inability to understand, use or weigh up the relevant information is because of her cognitive impairment secondary to episodes of Mania and traits of autistic spectrum disorder. This is considered to meet the 'causative nexus' of any Mental Capacity Assessment.

61. No party sought to call the assessor to question her.

Dr Conrad Wareham

62. Dr Wareham has provided four witness statements. None of them evidence Laura's capacity in February 2024, although they provide helpful background information. He said in his oral evidence that Laura was kind, empathetic and thoughtful, that she is evidence driven, wants to verify the facts and does not change her mind easily. He strongly believes Laura has capacity. He said that how she processes information is different from the non neuro-diverse but remains valid. He referenced her grasp of current affairs. He told me in answer to a question from Mr Brownhill "*We don't accept we were interfering with Laura's care*"

Laura

63. As set out above, whilst Laura did not give evidence, she addressed the court directly in public. She told me a lot of information, which I briefly summarise. Laura said she was tired and concerned she had an infection. She made reference to paragraph 1.2 of the MCA Code of Practice and said there was an assumption she has capacity whilst all steps are being taken to maximise this and it was necessary to look at the least restrictive options. She wanted a care package at her parents' home because it would reduce the human rights infringements. In respect of her current placement she was making an application under Article 34 to the European Court of Human Rights for breaches of her Article 2 and 3 rights. Her transfer to the unit had caused harm. She had received poor care. She held religious views. There was a lack of female staff to carry out her care regime. She was unwell with increased inflammatory markers and wanted antibiotics. She was very concerned about being de-medicalised and raised issues with the General Medical Council obligations on doctors. She disputed some diagnoses made. She said she would not weigh up medical advice if it was "based upon hearsay" as this was not "valid evidence". She said she needed facts. She made reference to a lasting power of attorney. She said: "*I don't think my parents were interfering in my care*". She referenced her current situation as "dystopian" and made reference to the 'optional protocols' of the UN Convention on Disabled People. She had been denied a word processor. She wanted to be "moved to a place of safety" so she could demonstrate her capacity. She was most looking forward to having good food when she meets with her parents for her imminent birthday.

The Law On Capacity

64. Section 1 to 3 of the MCA are well known and I have them firmly in mind. These provisions should be understood in the context of Lord Stephens' analysis in *A Local Authority v JB* [2021] UKSC 52; [2022] AC 1322 where the Supreme Court gave guidance as to the approach to be taken to capacity. The first question to be asked is whether P is unable to make a decision for himself in relation to the matter (para 67). If so, the second question is whether that inability is "because of" an impairment of, or a disturbance in the functioning of, the mind or brain (para 78). The second question "looks to whether there is a clear causative nexus between P's

inability to make a decision for himself in relation to the matter and an impairment of, or a disturbance in the functioning of, P's mind or brain". The court was clear that the two questions "are to be approached in that sequence" (para 79).

65. At paragraph 74 of *A Local Authority v JB* the Supreme Court emphasised the importance of identifying "serious grave consequences" when assessing P's ability to understand information relevant to a decision:

"The importance of P's ability under section 3(1)(a) MCA to understand information relevant to a decision is also specifically affected by whether there could be "serious grave consequences" flowing from the decision. Paragraph 4.19 of the Mental Capacity Act 2005 Code of Practice provides: "If a decision could have serious or grave consequences, it is even more important that a person understands the information relevant to that decision." This again illustrates the importance of "the specific factual context of the case."

66. MacDonal J set out the relevant capacity principles in the light of the Supreme Court decision in *A Local Authority v JB* in *North Bristol NHS Trust v R* [2023] EWCOP 5. I have particular regard to paragraphs 43 and 46, which state:

"The foregoing authorities now fall to be read in light of the judgment of the Supreme Court in *A Local Authority v JB* [2022] AC 1322. The Supreme Court held that in order to determine whether a person lacks capacity in relation to "a matter" for the purposes of s. 2(1) of the Mental Capacity Act 2005, the court must first identify the correct formulation of "the matter" in respect of which it is required to evaluate whether P is unable to make a decision. Once the correct formulation of "the matter" has been arrived at, it is then that the court moves to identify the "information relevant to the decision" under section 3(1) of the 2005 Act. That latter task falls, as recognised by Cobb J in *Re DD*, to be undertaken on the specific facts of the case. Once the information relevant to the decision has been identified, the question for the court is whether P is unable to make a decision in relation to the matter and, if so, whether that inability is because of an impairment of, or a disturbance, in the functioning of the mind or brain.

In *A Local Authority v JB* at [65], the Supreme Court described s.2(1) as the core determinative provision within the statutory scheme for the assessment of whether P lacks capacity. The remaining provisions of ss 2 and 3, including the specific decision making elements within the decision making process described by s.3(1), were characterised as statutory descriptions and explanations in support of the core provision in s.2(1), which requires any inability to make a decision in relation to the matter to be because of an impairment of, or a disturbance in the functioning of, the mind or brain. Within this context, the Supreme Court noted that s.2(1) constitutes the single test for capacity, albeit that the test falls to be interpreted by applying the more detailed provisions around it in ss 2 and 3 of the Act. Again, once the matter has been formulated and the information relevant to the decision identified, the question for the court is whether P is unable to make a decision in relation to the matter and, if so, whether that inability is *because of* an impairment of, or a disturbance, in the functioning of the mind or brain."

67. The cases of *Re P* [2021] EWCOP 27; [2021] 4 WLR 69 at paragraph 33 and the decision of *Re Q* [2022] EWCOP 6; [2022] COPLR 315 at paragraph 22 set out the court's approach to capacity to conduct the proceedings.
68. I have had regard to the well-known learning of Theis J in *LBX v K and Others* [2013] EWHC 3230 (Fam) in which her Ladyship set out – on the facts of that case – relevant information. Relevant information in respect of residence was set out at paragraph 43; in respect of contact at 45; and at care in paragraph 48 (and at paragraph 15). Also of assistance on identification of the relevant information on contact in the decision of Williams J in *re EOA* [2021] EWCOP 20.
69. I accept the issue of residence is distinct from the decision in respect of the mental capacity qualifying requirement in Schedule A1 - namely whether the person has capacity "*in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment*" – see paragraph 15 of Schedule A1, MCA. In *A Primary Care Trust*

v LDV & Ors [2013] EWHC 272 (Fam) Baker J (as he then was) indicated that the relevant information in answering the DoLS test includes – in essence – the core elements of the confinement to which the person is subject.

70. Ms Power referred me to the decision of Poole J in *AMDC v AG And Others* [2020] EWCOP 58 at paragraph 28 where helpful guidance is provided in relation to experts in this jurisdiction. Whilst Mr Brownhill placed reliance on Sir Andrew McFarlane P in *Re C (Parental Alienation: Instruction of an Expert)* [2023] EWHC 345 (Fam); [2024] 1 WLR 1 where the President held at paragraph 98:

“The current rules and guidance are clear and contain an element of flexibility. The question of whether a proposed expert is entitled to be regarded as an expert remains one for the individual court, applying, as it must, the principles reiterated by the Supreme Court in *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6 (adopting the approach in *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579) that

"if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

This is not, however, an open house and there is a need for caution.”

The Submissions

71. Ms Power on behalf of the Health Board submitted that Laura lacked capacity in respect of all the decisions which fall to be determined. I was invited to make section 15 MCA declarations. I was invited to prefer the evidence of Dr Camden-Smith over Dr Eccles. I was referred to the decision of Poole J in *AMDC* and COP Rule 15. Ms Power made submissions around six areas where the first respondent was critical of Dr Eccles.

- a. First, Dr Eccles' non-attendance in person could not be ignored as it was 'part and parcel' of the lack of seriousness and the lack of rigour she had demonstrated in carrying out her role reporting to the court. The issue was not a narrow procedural matter.
- b. Secondly, she had a limited understanding of what it means to be an expert in the Court of Protection specifically and more generally. Reliance was placed on the answers to Ms Power's cross-examination which demonstrated Dr Eccles was giving expert evidence for the first time.
- c. Thirdly, she submitted the specific context matters in the assessment of capacity and Dr Eccles had failed to undertake a detailed capacity assessment. She was asked specific questions (see question 13 to the addendum report and the some applies to question 19) and Dr Eccles had failed answer then or in the four weeks since and before the hearing. This was not acceptable.
- d. Fourthly, Dr Eccles lacked familiarity with key MCA concepts. Ms Power recalled when Dr Eccles asked her to explain what was meant by 'relevant information'. Whilst she was expert in Ehlers Danlos syndrome this was of limited relevance to the issues before the court.
- e. Fifthly, Dr Eccles had changed her position on key issues. She accepted there can be sound reasons why an expert changes position but submitted sound reasons were not given. Dr Eccles' opinions changed or evolved in each key matter.
- f. Lastly, Dr Eccles placed great weight on facts reported by Laura but failed to carry out an inquiry to obtain sufficient information from those treating Laura.

72. Ms Power submitted she agreed with Mr Brownhill's written list of relevant information, however added that the risk of interference by Dr and Mrs Wareham in respect of Laura's medical treatment is further relevant information for the decisions in respect of residence and care. She submitted that was supported Dr Camden-Smith's evidence and the decision of Theis J in *LBX* where her Ladyship references fact specific risks at para 43 (9).

73. Mr Mahmood on behalf of Dr and Mrs Wareham relied on Lord Stephens' judgment in *JB* and in particular paragraphs 48-53. He submitted I should not be overly critical of Dr Eccles and that it was difficult to encourage new experts to give

evidence in the Court of Protection. He told me Dr and Mrs Wareham apologise for their behaviour at the hearing before Francis J. They accept communication in the past has been difficult. I was asked to accept that the parents have turned a corner and have acted honestly and genuinely. His fundamental submission was that I should conclude that Laura does not lack capacity and in the alternative, that she required further assistance to ensure all practicable steps were taken. Mr Mahmood agreed with Mr Brownhill's list of relevant information.

74. Mr Brownhill on behalf of Laura submitted I should be cautious in respect of Dr Eccles' evidence and that in reality she had not carried out a capacity assessment, rather she has used her expertise and suggested how communication could be improved. He submitted this was helpful regarding best interests. He submitted that Dr Eccles accepted she had not put the relevant information to Laura and this was contrary to the MCA Code of Practice. He questioned whether she was in reality an expert on mental capacity.

75. He submitted Laura lacked capacity in respect of all relevant decisions. He said that the decision in respect of contact was whether Laura had capacity in respect of contact with her parents and not contact with others generally. He very helpfully identified in a written document the relevant information for each decision.

Analysis

The Applicable Principles

76. Before turning to the evidence it is helpful to summarise the relevant principles:
- a. A purpose of the MCA is to promote autonomy and this applies to both the concepts of capacity and best interests⁵.
 - b. There is a statutory presumption Laura has capacity unless it is established otherwise.⁶

⁵ *A Local Authority v JB* paragraph 51

⁶ MCA s. 1 (2).

- c. Laura is not to be treated as unable to make a decision unless all practicable steps have been taken to help her to do so without success⁷.
- d. Laura is not to be treated as unable to make a decision merely because she makes unwise decisions⁸.
- e. It is for the Health Board to prove on the balance of probabilities that it is more likely than not Laura lacks capacity in respect of each identified decision. Laura and her parents need not prove anything.⁹
- f. Whilst two experts have opined, the decision is mine having regard to all the evidence, attaching what weight I consider appropriate¹⁰.
- g. I am assessing Laura’s capacity as against the identified decisions in February 2024¹¹.
- h. The assessment of Laura’s capacity is decision specific which requires formulations of the matters to evaluate whether Laura is unable to make the decisions¹².
- i. I should first identify the decisions which fall to be considered.
- j. In respect of each decision it will generally be necessary to identify the relevant information¹³.
- k. The identification of relevant information must be made “within the specific factual context of the case.”¹⁴
- l. The information relevant to the decision includes information about the “reasonably foreseeable consequences” of a decision, or of failing to make a decision¹⁵
- m. I should not overlook Laura’s ‘values and outlook’ and the weight she attaches to relevant information in the decision making process, if I consider she is able to weigh and use the information¹⁶

⁷ MCA s. 1 (3)

⁸ MCA s. 1 (4) and as expanded upon by Peter Jackson J in *Heart of England NHS Foundation Trust v JB* [2014] EWHC 342 (COP) at paragraph 7. Particularly relevant in the context of Laura’s disagreement with medical opinion and reliance on other ‘experts’.

⁹ MCA s. 2 (4)

¹⁰ See Baker J (as he then was) in *PH v A Local Authority* [2011] EWHC 1704 (COP) at paragraph 16.

¹¹ MCA s 2 (1)

¹² MCA s. 2 (1) and *JB* at paragraphs 67 and 68.

¹³ MCA section 3 and *JB* at paragraph 69.

¹⁴ *JB* at paragraph 70 applying *York City Council v C* [20] EWCA Civ

¹⁵ MCA s. 3 (4) and *JB* at paragraph 73.

¹⁶ See MacDonald J in *King’s College Hospital NHS Trust v C and V* [2015] EWCOP 80; [2016] COPLR 50 at paragraph 38.

- n. The previous case law identifying relevant information is a useful guide but each case turns on its own facts and previous lists should be appropriately tailored to the decision in question on the facts of the case¹⁷.
- o. It is then necessary to consider whether Laura can make a decision in respect of the matter for the purposes of section 3 – by understanding, retaining and using and weighing the relevant information¹⁸.
- p. It is not necessary for Laura to understand and/or use and weigh all peripheral information but only the salient information¹⁹.
- q. If Laura is unable to make a decision in respect of the matter, it is necessary to consider whether Laura has an impairment and/or disturbance of the mind or brain²⁰.
- r. Thereafter I must consider whether this impairment and/or disturbance causes Laura to be unable to make the decision²¹.
- s. It is not necessary for the court to have a formal diagnosis or to formulate precisely the underlying condition(s) to consider the causative question between the inability to make a decision and the impairment/disturbance. This it is a question of fact for the court to consider against all the evidence²².

Diagnoses

77. The Supreme Court has made clear the assessment of capacity should begin with the functional test. However, it seems helpful to consider Laura’s diagnoses. There was no dispute between the parties, or the experts, that Laura has a diagnosis of autistic spectrum disorder or autism. It causes Laura to have rigidity of thought and poor theory of mind. The latter creates a difficulty for her to understand people’s motivations and in particular, her parents’ motivations in respect of her over medicalisation. This is made worse by the significant discrepancy between her

¹⁷ See Cobb J in *Re DD* [2014] EWCOP 11

¹⁸ *JB* at paragraphs 76 and 77.

¹⁹ *LBL v RJI* [2010] EWHC 26665 (COP); [2010] COPLR Con Vol 795 at paragraphs 24 and 58.

²⁰ MCA section 2 (1)

²¹ *JB* at paragraph 78.

²² MacDonal J in *R* supra at paragraphs 47 and 48.

verbal comprehension and her working and memory. I accept Dr Camden-Smith's evidence on the effect of her autism and its symptoms.

78. I need not go on to consider specifically whether any of the other diagnoses made are correct. It is not suggested Laura currently has Bipolar Disorder. There was a dispute between the parties and the experts in respect of Bodily Distress Disorder and Factitious Disorder Imposed On Another. I need not resolve this issue as I am satisfied that where Laura is unable to make a decision in respect of a matter this is caused by her autism. I need not go on to consider whether it is caused by other contested diagnoses. And for the avoidance of doubt in as much as it could be said (although no party made this submission) that my decision not to resolve this issue may cast doubt on the causative link between functional decision making and autism, I am not persuaded by this. Laura's autism is clear and pervades her thought processes. I understood both experts to accept that autism is the primary psychiatric diagnosis. In any event, after having surveyed all the evidence, and without making a finding of a formal diagnosis beyond autism, Laura's autism, taken together with her highly fixated preoccupations about her medicalisation and disorders, amounts to an impairment and/or disturbance of the mind or brain. That is my finding after having considered all of the evidence.

The Decisions

79. In my judgement, the decisions that fall to be determined in respect of Laura's capacity on the facts as they present in February 2024 are:

- a. whether she can conduct these proceedings;
- b. whether she can decide whether to live in her current placement or live at her parents' home without a care package;
- c. whether she can consent to receive care and treatment generally (other than specific medical procedures);
- d. whether she can consent to be accommodated in her current placement for the purpose of being given the relevant care or treatment;
- e. whether she can decide whether to have contact with her parents.

80. Ultimately there was little dispute between the parties on these issues. The need to identify, in the evidence, consideration of the Schedule A1 mental capacity requirement was not clear, but on the facts of this case, it very much forms part of the overall evidence in respect of residence and care and treatment. Secondly there was something of a debate as to whether the decision in respect of contact was with ‘others’ and indications this included Laura’s attempts to contact medical specialists, the Food Standards Agency, the Office of the Public Guardian and the Equality and Human Rights Commission. However, the evidence does not deal with these wide body of ‘others’ and does not deal with Laura’s aunt or an identified friend. In any event, I would need some considerable persuasion that the Court of Protection should be making declarations that P lacks capacity to contact others to grant itself a best interests jurisdiction to make an order that it is not in P’s best interests to contact regulatory agencies. That issue seems very much a matter for the agencies to manage and not the court. In any event, the evidence filed does not support further consideration of this issue. On care and treatment all parties accepted this did not include specific medical procedures (which will need to be assessed as and when by treating clinicians) but rather relates to the routine level of care and support provided to her by her caring team.

The Relevant Information

81. As I have stated, Mr Brownhill filed a helpful document setting out the relevant information on the last day of the hearing. I gratefully rely on his written work, with some minor amendments. His document was agreed by Mr Mahmood and Ms Power only disagreed on one issue: submitting the risks from Laura’s parents was relevant information not only for contact, but also for residence and care and support.

82. On residence:

- (a) The two (or more) options for living (Laura’s current placement or her parents’ home).
- (b) Broad information about the areas.
- (c) The difference between living somewhere and just visiting.

- (d) The activities that the person being assessed would be able to do if she lived in each place.
- (e) Whether and how the person being assessed would be able to see friends and family if she lived in each place.
- (f) Who they would be living with at each placement.
- (g) The sort of care they would receive in each placement.

83. On care and support:

- (a) With what areas the person under assessment needs support;
- (b) What sort of support they need;
- (c) Who will provide such support;
- (d) What would happen without support, or if support was refused;
- (e) That carers may not always treat the person being cared for properly, and the possibility and mechanics of making a complaint if they are not happy.

84. On contact:

- (a) Whom the contact will be with.
- (b) In broad terms, the nature of the relationship between the person under assessment and the contact in question;
- (c) What sort of contact the person under assessment could have with each of the individuals with whom they may have contact.
- (d) The positive or negative aspects of having contact with each person.
- (e) What a family relationship is and that it is in a different category to other categories of contact
- (f) Whether the person with whom contact is being considered a risk to the protected party.

85. On DOLS/the mental capacity requirement the DOLS Code of Practice was relied on:

In the context of the deprivation of liberty safeguards, the capacity is specifically the capacity to decide whether or not to consent to care or treatment

which involves being kept in a hospital or care home in circumstances that amount to a deprivation of liberty, at the time that decision needs to be made.

86. The court has already found that Laura's parents have interfered in her medical treatment to her detriment. The parties accept this is relevant to contact. I prefer Ms Power's submission that this underpins a risk to Laura which she should understand, retain, weigh up and use, in respect of the decisions related to where she lives; how she receives care and support; and in respect of consent to the deprivation of her liberty. If she were not placed and deprived of her liberty at her current placement, the other option would be to live with her parents and receive some care and support from them. It is therefore relevant information for each distinct decision on the facts of this case. Dr Camden-Smith agreed with this position and I accept her evidence. However, should I be wrong about that and it is not relevant information, other than for contact with her parents, it makes no difference to the outcome as, for reasons explained below, Laura is unable to understand the other aspect of the relevant information.

The Functional, Diagnostic And Causative Tests

87. At the end of the cross-examination much of Dr Eccles' earlier evidence that Laura had capacity to decide about her residence, contact with others and care and treatment had significantly evolved. She accepted she had not put all the relevant information to Laura. Her view was that this was for the treating team to do. She accepted she had overly relied on what Laura had told her and had not triangulated this with treating clinicians. She accepted her reports did not set out in writing the conversations she had had with Laura when discussing the functional tests in any detail. She also accepted that her conversations with treating clinicians had not been set out in any detail in her reports. As I have set out above, on each decision, she ultimately was not asserting that Laura had capacity.

88. Where there are remaining differences of opinion I prefer Dr Camden-Smith's opinions on capacity for a number of reasons. First, her methodology was not questioned or challenged. Secondly, her report provides details of her conversations with clinicians and with Laura which evidences the rigor with which she assessed

whether the functional test was met or otherwise for each decision. Thirdly, she had a very firm, indeed expert, understanding of the MCA and her report was reasoned and structured around the appropriate tests. Fourthly, whilst Dr Eccles is experienced in the overlap between psychiatric matters and hypermobility, her expertise in capacity was less apparent in her written and oral evidence. Lastly, Dr Camden-Smith's evidence was supported by the written evidence from several treating clinicians and was consistent with their various opinions on capacity over the course of these proceedings. Seen overall, I place greater weight on Dr Camden-Smith's evidence than on Dr Eccles'. I had regard to Dr Wareham's written and oral evidence but as Laura's father I place limited weight on it. He is keen for her to be assessed as capacitous and for her to return to his home and to his, and his wife's, care. It is also the case that whilst he is a doctor, he has not carried out a capacity assessment of the identified decisions and his evidence did not purport to do so.

89. In respect her of residence, Laura is unable to understand and therefore to use and weigh the relevant information to decide whether to remain at her placement or live with her parents. I accept Dr Camden-Smith's evidence and the evidence of the DOLS assessor. Dr Camden-Smith's conclusion is clear and preceded by well set out reasoning, with which I agree:

“It remains my opinion that Ms Wareham lacks capacity to make decisions about residence due to her inability to recognise and understand the realities and practicalities of her circumstances and her inability to use and/or weigh the relevant information to come to a realistic decision. This is fundamentally due to the impairments of her mind associated with her autism.”

90. The inability to make this decision is caused by her autism, which is plainly an impairment and/or disturbance of the mind or brain. I am satisfied as of February 2024 all practicable steps had been taken. The pervasive nature of her autism, her rigidity of thought and lack of theory of mind mean that no further steps could have been practically taken to assist her. I am satisfied that Laura has been given the relevant information and Dr Camden-Smith was correct to draw back from her opinion expressed in the joint report. Furthermore whilst it is not for Dr and Mrs

Wareham to prove Laura has capacity to make a decision about her residence, Dr Eccles accepted that *“I can’t say whether she can use/weigh the relevant information to decide on residence”* an evolution of her opinion that she accepted, given she had not put all the relevant information to Laura and her written report did not set this out.

91. In respect of her care and treatment I reach a similar conclusion in respect of the functional test. Laura cannot understand or weigh up and use the relevant information identified above. Dr Camden-Smith has carefully and recently considered this issue with Laura in detail in her third report, where she reports:

“She [Laura] was adamant that there are many highly qualified professional nurses ready and willing to move to whatever area in the country to provide her with care despite multiple failures of care packages, and no objective evidence that this is the case. Additionally, she believes that her parents would provide her with adequate care (whilst recognising that this would take a big toll on them) without recognising that her parents’ fragile physical and mental health would make this impossible.”

92. I accept Dr Camden-Smith’s nuanced and careful analysis provided, that capacity in respect of the narrow issues around the catheter are quite different and there is therefore no inconsistency in her evidence. I accept Dr Camden-Smith’s evidence this is caused by her autism for the reasons she gives, as summarised above. Her wider care and treatment, as opposed to specific medical interventions, involves more complex information which involves Laura understanding what has happened to her over recent years in her parents’ care and why she was admitted to hospital, why contact restrictions had to be put in place and what might happen if she were discharged home. I accept Dr Camden-Smith’s evidence that:

“It remains my opinion that Ms Wareham lacks capacity to make decisions about care and support due to her inability to recognise and understand the realities and practicalities of her circumstances and her inability to use and/or weigh the relevant information to come to a realistic decision.”

93. For similar reasons that have been provided above in respect of residence, care and treatment I am satisfied Laura lacks capacity to consent to her placement for the purposes of receiving her care and treatment and the deprivation of liberty that this entails.
94. In respect of her contact with her parents, I also accept she is unable to understand and use/weigh the relevant information. I accept Dr Camden-Smith's evidence on contact that "her inability to recognise and understand the realities and practicalities of her circumstances and her inability to use and/or weigh the relevant information to come to a realistic decision" and that this inability is caused by her autism, again for the reasons she gives. Dr Eccles accepted that Laura was required to understand the risks from her parents, that Laura was unaware of this, and she had not raised this relevant information so would need to ask Laura about that to fully assess her capacity to decide about contact with her parents, and had not done so.
95. On litigation capacity both Dr Eccles and Dr Camden Smith ultimately agreed Laura lacked capacity in this area of decision making. In light of my conclusions above that Laura lacks capacity in respect of the decisions which underpin this litigation, this is not a surprising conclusion.
96. I have accepted that Laura's own values result in her placing greater weight than others might on legal and wider safeguarding issues in respect of each distinct decision. However, this is to a fundamentally rigid degree, caused by her autism, which means she cannot understand or use/weigh the information. Her autism renders her unable to make the decisions.
97. Therefore, having identified the principles, and considered each decision at the relevant time, by identifying the relevant information, the evidence demonstrates Laura is functionally unable to take each decision, and this is caused by her autism. No further practicable steps can be taken at this time.

Interim Social Media Use

98. Neither expert opined on social media and internet use, notwithstanding it was ordered by the court in previous directions. Dr Camden-Smith is instructed to forthwith assess this area of decision making and report on this issue. The parties shall agree the relevant information and in default of agreement I will rule on the papers on any disagreement. In the meantime, given the background and context, I am satisfied there is reason to believe Laura lacks capacity in this area of decision making, albeit nothing has yet been proved by the Health Board. I did not understand any party to dispute this. It is necessary to make an interim declaration pursuant to section 47 MCA and make an interim best interests order pursuant to section 48 MCA, providing for supervision, without delay, to protect Laura until this matter can be determined.

Interim Best Interests

99. The purported challenge to the best interests criterion of the standard authorisation is adjourned to the final hearing. In the meantime the deprivation of Laura's liberty is authorised and pursuant to section 21A MCA the standard authorisation is extended. This matter shall be determined before the end of April, subject to confirmation with the Clerk of the Rules, to avoid any further delay, given the matter involves the deprivation of Laura's liberty.

100. There are no restrictions on Laura's contact with the identified friend or her aunt.

101. I record I also made some further best interests decisions regarding various on-line applications (Pinterest and food delivery applications) and access to an on-line bible at Laura's request to make her as comfortable as possible. No party properly opposed this.

Conclusion

102. I therefore make declarations pursuant to section 15 MCA that Laura lacks capacity to:

- a. conduct these proceedings;

- b. make a decision where to reside;
- c. decide whether or not to consent to be accommodated in her current placement for the purposes of being given care and treatment;
- d. consent to her care and support regime;
- e. decide whether to have contact with her parents;

103. The purported section 21A (2) MCA challenge to the mental capacity requirement of the standard authorisation is dismissed.

104. I also make an interim declaration pursuant to section 47 MCA that there is reason to believe Laura lacks capacity to use internet based social media for the purposes of contacting others and make an interim best interest order to supervise such use pursuant to section 48 MCA.

105. I thank all solicitors and counsel and ask that an order is drafted to give effect to these conclusions.