

Court of Protection Case Law Update



RE: KL (A MINOR: DEPRIVATION OF LIBERTY) [2022] EWCOP 24

- KL - 17 years old; diagnosed with autistic spectrum disorder and severe learning difficulties.
- Known to social services since birth; subject to a care order since he was around two years old.
- Had lived with the same foster carers since he was four years old.
- Bolton Council made an application for authorisation of KL's deprivation of liberty under the streamlined procedure (i.e., on form COPDOL11).

RE: KL (A MINOR: DEPRIVATION OF LIBERTY) [2022] EWCOP 24

- HHJ Hilder considered the application on the papers; made an order that took the application out of the streamlined procedure; invited the Official Solicitor to act as KL's litigation friend. Reasons given:
 1. KL was just 17 years old;
 2. he had been the subject of a care order since 22 March 2006;
 3. he had no family contact;
 4. there would be transition to adult services within 12 months;
 5. he should be independently represented.

RE: KL (A MINOR: DEPRIVATION OF LIBERTY) [2022] EWCOP 24

- Bolton Council made an application seeking reconsideration of the decision to take the matter out of the streamlined procedure.
- Application considered at first hearing by which stage the OS had accepted the court's invitation to act as litigation friend and so both parties agreed the issue had become 'otiose'.
- HHJ Hilder nevertheless agreed to set out in a written judgment an explanation of the approach taken by the court, to be published for wider consideration.

RE: KL (A MINOR: DEPRIVATION OF LIBERTY) [2022] EWCOP 24

- Court 'unlikely' (para 87) to consider that the streamlined procedure set out in Practice Direction 11A Part 2 (CoP Rules 2017) is appropriate for authorisation of deprivation of liberty in the living arrangements of 16 and 17 year olds.
- Court would be slow to criticise an applicant seeking such authorisation by the standard COP1 procedures, even where no apparent dispute (e.g. because the applicant thought the arrangements needed to be probed more actively than the paperwork procedure envisages.)
- Equally, court would be slow to criticise an applicant for seeking such authorisation by way of a COPDOL11 application, unless 'obvious disregard for the intentions of the streamlined procedure (for example, a clear dispute, or a failure to undertake the consultations required to identify whether or not there is dispute)' (para 58).

RE: KL (A MINOR: DEPRIVATION OF LIBERTY) [2022] EWCOP 24

- 16 and 17 year olds lacking capacity and being deprived of their liberty factually distinguishable from other cases that pass through streamlined procedure because:
 - at a critical stage of their development;
 - at the unavoidable cusp of transition from children's services to adults' services;
 - much more common than for other age groups that authorisation is sought for the use of restraint and/or sedation;
 - many, of the 16 and 17 year olds who appear before the court already have a lengthy history of family breakdown, challenging needs and broken placements;
 - alternative provision for that age group elsewhere: outside the CoP, if a 16- or 17-year-old is to be lawfully deprived of their liberty, authorisation from a judge of High Court level is required;

RE: KL (A MINOR: DEPRIVATION OF LIBERTY) [2022] EWCOP 24

- care orders, or accommodation under Children Act (CA) 1989 s20, add an additional layer of complexity to 16 and 17 year old cases, due to the overlap between the MCA 2005 and the CA 1989;
- an extant care order *is* a marker of *unsuitability* for authorisation of deprivation of liberty by the streamlined procedure;
- *absence* of care order is *not* a marker of suitability of the streamlined procedure for applications concerning 16- and 17-year-olds.
- Given these features, it would generally be unlikely for the court to appoint an Accredited Legal Representative in cases concerning 16- and 17-year-olds.
- Cases will be heard by HHJ Hilder or one of the other Tier 2 judges sitting on rotation at First Avenue House.

16-AND-17-YEAR-OLD CASES – THINGS TO THINK ABOUT:

- Consider seeking transfer to Tier 2 judge if the application is before a Tier 1 judge.
- The Official Solicitor should be invited to act as litigation friend if they have not already (cases not considered to be suitable for ALR scheme).
- Initial disclosure should include disclosure of education file and education and healthcare plan (EHCP), if there is one.
- Case will require input from children’s services and adult services; potentially CAMHS and adult mental health services (if there are mental health challenges).
- Ask for a transition to adulthood social worker to be allocated, if not already.
- Multiple moves sometimes necessary (pre-18 and post-18).

RE: G (INJUNCTIONS) [2022] EWCA CIV 1312

- G - 27-year-old woman who had spent her entire adult life living in a children's hospital
- Judgment in substantive proceedings ([\[2021\] EWCOP 69](#)) - Hayden J concluded that G should move from hospital to 'A House', a specialist residential unit, following which – it was hoped – a care package could be put in place so that she could move home with her parents.
- After substantive judgment in December 2021, relationship between G's family members and treating clinicians deteriorated significantly, with the family members impeding their efforts to formulate a care plan to facilitate G's move to A House.

RE: G (INJUNCTIONS) [2022] EWCA CIV 1312

- The public bodies therefore filed an application seeking an injunction against all three of G's family members (her father, mother and grandmother).
- Sought numerous restrictions to be imposed against the family members, including obligations on the conduct of the three individuals (for example, that they *"must at all times treat the staff, servants [sic] and employees of the hospital and care home with courtesy and respect"*).
- After a hearing in June 2022, Hayden J handed down a judgment ([2022] EWCOP 25) in which he granted the injunction sought against all three family members, for a duration of 12 months.
- All three family members sought and were granted permission to appeal against the order by Baker LJ.

RE: G (INJUNCTIONS) [2022] EWCA CIV 1312

- Court of Appeal: the CoP does have power to grant injunctions under s.16(5) of the Mental Capacity Act 2005;
- Both in the case where a deputy has been appointed under s.16(2)(b);
AND
- in the case where the court has made an order taking a decision for P under s.16(2)(a).
- Where the court has made an order under s.16(2)(a) MCA 2005 and taken a decision on P's behalf, s.16(5) enables the court to make such further orders as it thinks necessary or expedient to give effect to, or otherwise in connection with, that order.

RE: G (INJUNCTIONS) [2022] EWCA CIV 1312

- When making injunctive orders, the court is exercising the power conferred on it by s.47(1) of the Mental Capacity Act 2005;
- This provides that the CoP *“has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court”*;
- As such, the test for the grant of such an injunction includes the requirement in s.37(1) of the Senior Courts Act 1981 that it be **just and convenient**.



RE: G (INJUNCTIONS) [2022] EWCA CIV 1312

- ‘**Just and convenient**’ test - to be understood in line with the majority judgment of the Privy Council in *Convoy Collateral Ltd v Broad Idea International Ltd* [2021] UKPC 24;
- Satisfied where two requirements are met:
 - (1) the person protected by the injunction has an interest which merits protection; and
 - (2) a legal or equitable principle which justifies exercising the power to order the defendant (/respondent) to do or not do something.

RE: G (INJUNCTIONS) [2022] EWCA CIV 1312

- In G’s case, **as is likely to be the case wherever an injunction is granted to prevent the court’s decision under s.16(2)(a) from being frustrated or undermined**, those requirements are satisfied because:
 - (1) G’s interest in the substantive order (that it was in her best interests to move to A House) being given effect to is an *interest that merits protection*; and
 - (2) section 16(5) MCA 2005 contemplates that the court may make “*such further orders ... as it thinks necessary or expedient for giving effect to*” its order under s.16(2)(a), which by itself justifies granting an injunction to protect G’s placement as decided in December 2021.
- The general principle that a court may grant ancillary orders, including injunctive orders, to ensure that its orders are effective is ample justification for the grant of injunctive relief if the facts merit it.



RE: AC AND GC (CAPACITY: HOARDING: BEST INTERESTS) [2022] EWCOP 39

- Her Honour Judge Clayton considered the relevant information for an assessment of P's capacity **to make decisions regarding their items and belongings:**
 - (1) *Volume of belongings and impact on use of rooms:* the relative volume of belongings in relation to the degree to which they impair the usual function of the important rooms in the property for you (and other residents in the property) (e.g. whether the bedroom is available for sleeping, the kitchen for the preparation of food etc). Rooms used for storage (box rooms) would not be relevant, although may be relevant to issues of (3) and (4).
 - (2) *Safe access and use:* the extent to which you (and other residents in the property) are able or not to safely access and use the living areas.

RE: AC AND GC (CAPACITY: HOARDING: BEST INTERESTS) [2022] EWCOP 39

- Relevant information for an assessment of P's capacity **to make decisions regarding their items and belongings:**

(3) *Creation of hazards*: the extent to which the accumulated belongings create actual or potential hazards in terms of the health and safety of those resident in the property. This would include the impact of the accumulated belongings on the functioning, maintenance and safety of utilities (heating, lighting, water, washing facilities for both residents and their clothing). In terms of direct hazards this would include key areas of hygiene (toilets, food storage and preparation), the potential for or actual vermin infestation and risk of fire to the extent that the accumulated possessions would provide fuel for an outbreak of fire, and that escape and rescue routes were inaccessible or hazardous through accumulated clutter.



RE: AC AND GC (CAPACITY: HOARDING: BEST INTERESTS) [2022] EWCOP 39

- Relevant information for an assessment of P’s capacity **to make decisions regarding their items and belongings:**
 - (4) *Safety of building*: the extent to which accumulated clutter and inaccessibility could compromise the structural integrity and therefore safety of the building.
 - (5) *Removal/disposal of hazardous levels of belongings*: that safe and effective removal and/or disposal of hazardous levels of accumulated possessions is possible and desirable on the basis of a “normal” evaluation of utility.

A (COVERT MEDICATION: CLOSED PROCEEDINGS) [2022] EWCOP 44

- A was 23, mild LD, Asperger's, epilepsy, primary ovarian failure and vitamin D deficiency
- Mother B had not sought investigation into fact that A did not go through puberty
- 2019 proceedings found A lacked capacity and in best interests to have “100%” effective hormone treatment (significant health risks without this).
- A to reside away from B, limited contact due to B's influence

A (COVERT MEDICATION: CLOSED PROCEEDINGS) [2022] EWCOP 44 -2

- September 2020- closed hearing of which no one was aware
- Judge approved plan for covert medication if (which was anticipated) A refused treatment.
- Contact A and B by telephone only – but other family members visited.
- A was covertly treated and went through puberty.
- B sought return in 2022
- Speculation in Open Justice Court of Protection Project – what had been the purpose of the last two years?
- Case allocated to Poole J

A (COVERT MEDICATION: CLOSED PROCEEDINGS) [2022] EWCOP 44 -3

- Closed hearing before Poole J
- Covert treatment only to be approved in “exceptional” circumstances”
- A still lacked capacity and did not want hormone treatment (believed to be B’s influence)
- Treatment in best interests but now she had gone through puberty – risks did not justify covert medication. Plan to be prepared to transition to “open” medication
- B informed of this at start of “open” hearing – court eventually authorized continued residence away from B, but with face to face contact, covert medication till transition to open plan
- RRO discharged but restrictions to prevent identification

A (COVERT MEDICATION: CLOSED PROCEEDINGS) [2022] EWCOP 44 -4

- Judge acknowledged public interest in fact that court occasionally authorizes covert medication and that on this occasions family excluded.
- Recognised that potential for Court to have allowed observers/press to attend, but then restricted reporting till later date
- Did not consider possibility of “Special Advocate” procedures as suggested in Re P (Discharge of Party) EWCA Civ 512
- Sub-Committee of COPRC “considering” closed hearings
- Approach to covert medication in RM v St Andrews Healthcare [2010] UKUT 119 (AAC)

RE EM [2022] EWCOP 31

- Without notice removal of 74 year old man with malignant melanoma and brain metastases
- Second hearing also without participation by P
- Mostyn J expressed concern but made order moving EM to nursing home
- Judgment of court's own motion
- Considered participation; anonymization; and Transparency orders



RE EM [2022] EWCOP 31 (2)

“ Throughout these judgments, rules and practice directions runs a golden thread pronouncing that the parties and the court must ensure that the participation of P is given careful consideration and promoted as far as possible. While the exigencies of a given situation may dictate the making of interim orders in the absence of representation for P, this power is to be exercised with especial caution. The court must review the "completeness" of the information transmitted to it with "a healthy scepticism", since such information will be provided by those seeking authorisation for P's deprivation of liberty, and therefore comes with the risk of confirmatory bias.”

RE EM [2022]EWCOP 31 (3)

“Fundamental rule”

- (1) **Subject to the exception in (2), where an application is made which seeks the deprivation of P's liberty, P must be joined as a party to the proceedings and a litigation friend (or an accredited legal representative) must be appointed to act for P.**
- (2) **The exception referred to in (1) is where an interim order is very urgently needed and there is just not enough time to secure P's representation before the hearing. But at the hearing P's representation at future hearings must be enabled.**

An unjustified failure by the court to secure such representation when making a non-urgent deprivation of liberty order **will very likely render the order unlawful.**”

RE EM [2022] EWCOP 31 (4)

- Anonymisation is “a terrible practice....utterly demoralizing as well as patronizing and insulting.”
- Orders should use real names and have reference to injunction in Transparency orders included
- Transparency orders- does this require a balance between the Article 8 rights to privacy and Article 10 rights in all cases?
- Or is this a “defensible work around”? See <https://www.mentalcapacitylawandpolicy.org.uk/transparently-clunky-mostyn-j-and-transparency-orders-before-the-court-of-protection/>

SECTION 49-UPDATE

Section 49 MCA:

- (1) *This section applies, where, in proceedings brought in respect of a person (P) under part 1, the court is considering a question relating to P.*
- (2) *The court may require a report to be made to it by the -Public Guardian or by a -Court of Protection Visitor.*
- (3) *The court may require a local authority or an NHS body to arrange for a report to be made:-*
 - (a) *by one of its officers or employees; or*
 - (b) *by such other person (other than the -Public Guardian or a - Court of Protection Visitor) as the authority, or the NHS body, considers appropriate.*
- (4) *The report must deal with such matters relating to P as the court may direct.*
- (5) *The Court of Protection Rules may specify matters which unless the court directs otherwise must also be dealt with in the report.*
- (6) *The report may be made in writing or orally, as the court may direct.*

WHAT'S THE PROBLEM?

Exemplified in Re RS [2015]

- Trust ordered to prepare a report about a patient it had no knowledge of
- Trust asked to resolve a significant issue with far-reaching consequences
- Not a joint instruction so leaves open a dispute
- Clinicians not medico-legal experts
- Pressure on consultants who may have to cancel clinics
- No provision for payment

PRACTICE DIRECTION 14E

- Introduced a filter I para 3 as to when the court is likely to give permission
- Requirement for party seeking report to give Trust advance notice
- Letter of instructions for approval by Court

- BUT concern about over –use
- <https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2023/01/Section-49-Guidance-December-2022.pdf>

GUIDANCE

“Instructions under Section 49 should be clearly focused with tight identification of the issues. It should be expected that the reports will be concise and will not require extensive analysis across a wider range of questions than those contemplated in the Practice Direction. **Reports requiring that kind of response should be addressed to an independent expert.**”

Guidance emphasises key aspects to the PD:

- Cases where public body has knowledge of P or should do so
- Importance of advance notice
- Importance of letter of instructions accompanying application
- Structure of the report.

A best interests move to Jamaica:

XX (by his ALR, Stephen Cardinal) v West Northamptonshire Council & AA
[2022] EWCOP 40

- Lieven J
- 89yo man with Alzheimer's, living in care home
- Originally from Jamaica, in UK since 1960s
- Wife died 2016
- 2 step-sons in UK + step-grandchildren
- Step-granddaughter held LPA for p&a
- “considerable extended family” in Jamaica – 2 sisters, nieces, nephews

Wishes & feelings – past and present

- Visits to Jamaica since 2005 on 2/3 occasions
- Registered with Jamaican Returning Residents Association
- When in Jamaica, XX had talked about living & returning to stay there
- With s.49 author, XX did not understand about family in Jamaica
- Staff reported did not know family when they called, but derived pleasure from calls + seems to know they are family
- Did not currently express wish to move or go to Jamaica
- Appeared content at current care home

Practical issues

- Would require air ambulance to travel
- Family proposed detailed care package in Jamaica – family + professional care – cheaper than in UK
- Care home in UK £40,000/year
- Family proposed air ambulance at £100,000
- Capital of £150,000

Lieven J: “ *This is not a case where, in my view, money is the critical feature as it could be said to cut both ways... current care home is around £40k a year and that will be used up fairly quickly, but if he goes back to Jamaica, care is cheaper and there is more family support. There is enough money for his travel to be paid for and for there to be a pot of capital remaining for paid care in Jamaica.*” (para 21)

Parties' positions

- ALR: finely balanced, but came down on side of XX remaining at current care home
- LA: “surprisingly firm stance” should stay at care home
- AA (for family in Jamaica): should move to Jamaica, relying on past wish to travel to Jamaica before lost capacity to decide + strong benefits of cultural and emotional needs surrounded by loving family, music, culture and religion

Law

- *Re UR* [2021] EWCOP 10 – Hayden J
 - Cautions against overly paternalistic approach
 - *Re MM (An Adult)* [2007] EWHC 2003 (Fam) – Munby J (as he then was):
“A great judge once said, ‘all life is an experiment’... The fact is that all life involves risk, and the young, the elderly and the vulnerable, are exposed to additional risks and to risks they are less well equipped than others to cope with. But just as wise parents resist the temptation to keep their children metaphorically wrapped up in cotton wool, so too we must avoid the temptation always to put the physical health and safety of the elderly and the vulnerable before everything else... What good is it making someone safer if it merely makes them miserable?”

Decision

- Lieven J: not an easy decision
- Delay has somewhat diminished ability to gain from being in Jamaica
- But, still in best interests to move to Jamaica
- Refused the proposal for further evidence on cost and ability to fly before deciding: “*I have reached the view that the principle should be decided first and then we can consider what orders need to be made to expedite the move.*” (para 29)

Decision (2)

- Reasons:
 - XX's wishes and feelings when he had capacity – to move to Jamaica for his final years once dealt with affairs in UK
 - Some risk from travel but can be mitigated, + some physical risk to XX
 - Family visiting England would not meet benefits of move to Jamaica
 - “intangible benefits that lie in the nature of human feeling and experience for XX to spend those last years with a loving family around him rather than being cared for by strangers in a care home... However good staff in a care home are, they are not the same as being cared for by a loving family for whom the individual is special and has particular connections. What most people would want is to be with their family around them for their later days.” (para 32)
 - Other intangible benefits – being in the place of his childhood, smells, food, religion

Delay

- *“ this case is another illustration of the human cost of delays that have built up in family court and Court of Protection both before and during the pandemic... It is common to refer to the impact of delay in Children Act cases but the serious it on Ps in Court of Protection proceedings such as XX, whose condition has deteriorated during the lifetime of these proceedings, is also of great importance.” (para 5)*

Collection and Storage of Sperm:

Re X (Catastrophic Injury: Collection and Storage of Sperm) [2022] EWCOP 48

- Poole J
- Urgent out of hours application
- X unconscious in intensive care following sudden collapse: “virtually no prospect that he will recover”
- X’s parents applied for declaration of lawfulness for Dr to retrieve sperm and store after his death
- Would later need to deal with use after collection and storage, if application allowed

Wishes and feelings

- X's parents gave evidence that X had spoken about wanting children
- “we would wish very much to fulfil that wish”
- No evidence from X's girlfriend
- No advance decision
- No evidence of X's wishes and feelings to the *relevant* decision
- “*It is one thing to have a consistent and heartfelt desire to be a living, caring father. It is quite another thing to wish to have one's sperm collected and stored when unconscious and dying, with a view to the possibility of the sperm being used for conception after one's death, and without having expressed any view when living about how the sperm should be used.*”

Human Fertilisation and Embryology Act 1990

- Letter from Human Fertilisation and Embryology Authority
- Consents under 1990 Act – central to effective regulation in this area
- OS & HFEA opposed application
- NHS Trust neutral

Decision

- Application refused
- Poole J:
- *“If the Court of Protection were routinely to authorise the collection and storage of gametes in cases where there is no or little evidence that the incapacitous, dying person would have consented, then it would undermine the regulatory provisions within the 1990 Act which require actual consent.”*
- Considered allowing application on interim basis but dismissed as invasion of privacy and interference with X’s Art.8 rights not necessary/proportionate or in best interests

Compare: *Y v A Healthcare Trust* [2018] EWCOP 18

- In *Y*, Knowles J allowed application for declaration that was lawful and in BI of applicant's husband for sperm to be retrieved and stored prior to death.
- Evidence that *Y* had contemplated issue before the court.
- Distinguished by Poole J in *X*:
- *"The application before me is brought by X's parents not his life partner. X has a girlfriend, but I have no evidence of any discussions he has had with her or others about whether he would want his sperm to be collected and stored in the event of his becoming unconscious with a very limited life expectancy. There is no evidence that X and his girlfriend were in the process of trying to conceive nor that they have tried in the past. There is no evidence of the nature of their relationship. X may have wanted one day to have children, but that is not the same as wishing for his sperm to be collected and stored when unconscious and dying. I cannot know what his wishes and feelings about that decision would be. Unlike in Y v A Healthcare Trust, there is no direct evidence that X ever contemplated the issue. Nor do I have any evidence as to his values and beliefs from which I could infer what his decision would have been. I cannot infer from the fact that he wanted one day to be a father that he would have wanted his sperm collecting and storing with the potential that it could be used for the conception and birth of a child he would never know."* (para 25)

Coercive control:

Hull City Council v KF (by her litigation friend, AI) [2022] EWCOP 33

- Poole J
- KF 34yo woman with LD
- Long-term relationship with KW; coercion & control including taking KF's money, overbearing decision-making + violence.
- Violent sexual assault by KW against KF – convicted and awaiting sentence, likely imprisonment.
- Issue for court: KF's contact with KW in period whilst awaiting sentencing

KF's circumstances

- KF residing in care home placement under interim court orders
- KF diagnosed with metastatic breast cancer with poor prognosis – 18 months or less
- KW's prison sentence might exceed KF's lifetime
- KF's fervent + consistent wish to spend time unsupervised overnight with KW before sentencing
- “misses him and that she wants to hug and lay next to him”
- No conditions on KW's bail

Capacity

- Reports from expert Dr Mynors-Wallis
- Initially: lacks capacity re contact with others & residence but *has* capacity to engage in sexual relations
- Further report: whilst KF has capacity to decide whether to have sexual relations in general, *lacks* capacity to make person-specific decision re KW

Capacity (2)

- Poole J determined the relevant decisions before the court were:
 1. To spend private, unsupervised time with KW, including overnight.
 2. To engage in sexual relations with KW.

“I am concerned that KF’s wishes and feelings are still influenced by her long relationship with KW during which he has coerced and controlled her and overborne her decision-making... Her might again become angry and take that out on KF. There is at least a risk that this might happen.” (para 20)

Capacity (3)

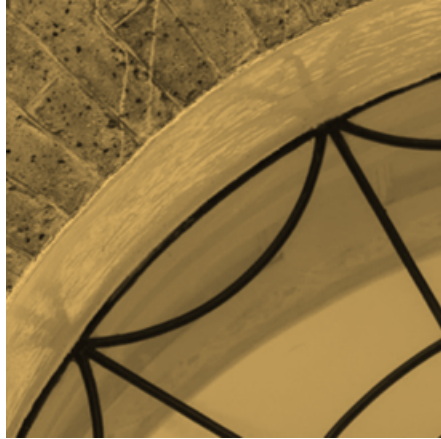
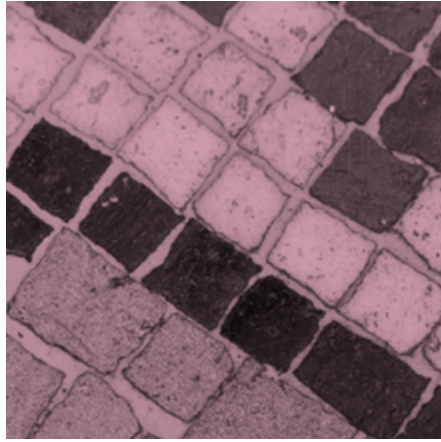
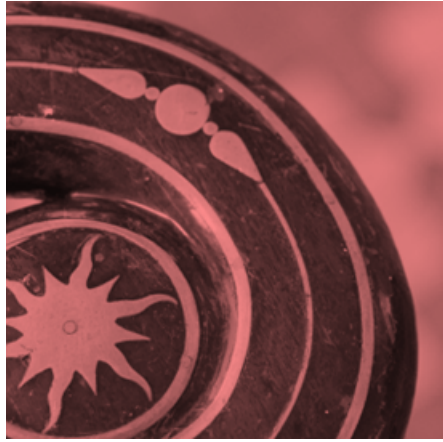
- Framed as contact with KW, Poole J had “no hesitation” concluding KF lacked capacity to make that decision
- Dr Mynors-Wallis: *“KF has not retained information about the assaults and the risks that she might be assaulted by KW again.”*
- Dr MW: *“KF is not able to weigh up the reasonably foreseeable consequence that she might be assaulted by KW if she has contact with him or be the victim of financial and emotional abuse.”*

Capacity (4)

- Poole J commented on separating contact & sex
- *“It is difficult to see how a person who lacks capacity to decide to have contact with a specific person could have capacity to decide to engage in sexual relations with that person. Sexual intimacy is a form of contact with another or others.” (para 24)*
- In this case, decision was person-specific.
- Distinguished *A Local Authority v TZ (No.2)* [2014] EWCOP 973: where P has capacity to decide to engage in sexual relations and the court may consider whether P has capacity to decide what support they may need when having contact that may lead to sexual relations.

Best interests

- [no BI decisions on sex]
- Any form of unsupervised overnight contact would *not* be in her best interests



COMING UP

- LAG updates Feb & March 2023
- DSC CoP seminars