

**IMPORTANT NOTICE**

This judgment is covered by the terms of an order made pursuant to Practice Direction – Transparency Pilot. It may be published on condition that the anonymity of the incapacitated person and members of his family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

**Neutral Citation Number:**

Case No: 12732573

**COURT OF PROTECTION**  
**MENTAL CAPACITY ACT 2005**  
**IN THE MATTER OF: AJ**

Date: 30<sup>th</sup> April 2019

**Before :**

**Her Honour Judge Hilder**

HARROW CCG

Applicant

and

IPJ

First Respondent

and

IJJ

Second Respondent

and

AJ

(by his litigation friend, the Official Solicitor)

Third Respondent

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Hearing: 24<sup>th</sup> April 2019  
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Ms. Fiona Scolding QC (instructed by Mills & Reeve Solicitors) for the Applicant  
The First and Second Respondents appeared in person  
Ms. Nageena Khalique QC (instructed by Bindmans LLP) for the Third Respondent by his  
litigation friend, the Official Solicitor

**The hearing was conducted in public subject to a transparency order made on 23<sup>rd</sup> February 2016. The judgment was handed down to the parties by e-mail on 30<sup>th</sup> April 2019. It consists of 17 pages, and has been signed and dated by the judge. The numbers in square brackets and bold typeface refer to pages of the hearing bundle.**

A. The Issue

1. AJ is a young man of 24 who lives in his family home with his parents and sister. He has autism, with learning disabilities and sometimes challenging behaviour. It is common ground that he lacks capacity to conduct these proceedings and to make decisions about where he should live, with whom he should live and the package of care and clinical treatment he requires. Final declarations were made to that effect on 5<sup>th</sup> December 2016 [D58].
2. The Court is asked to determine where AJ should live and how he should be cared for. The applicant CCG has proposed an extensive package of care at the family home, with (most of) the financial arrangements managed by a third party broker. JA's parents, who are the Second and Third Respondents, do not agree the proposals and seek the dismissal of the application.

B. Matters considered

3. I have read all of the documents collated into the hearing bundle, including:

a. Filed on behalf of the Applicant:

Position statements dated 15<sup>th</sup> September 2015 [A1], 23<sup>rd</sup> October 2015 [A20], 22<sup>nd</sup> March 2016 [A121], 29<sup>th</sup> November 2016 [A128], 23<sup>rd</sup> April 2017 [A146], 13<sup>th</sup> June 2017 [A161], 6<sup>th</sup> November 2017 [A170], 11<sup>th</sup> October 2018 [A181], 5<sup>th</sup> December 2018 [A191] and 12<sup>th</sup> April 2019

Statement by Andrew Pointer dated 18<sup>th</sup> August 2018 [G1]

Statements by Nicky Yasoumi dated 17<sup>th</sup> July 2015 [G44], 24<sup>th</sup> April 2017 [G197], 6<sup>th</sup> June 2017 [G242] and 9<sup>th</sup> November 2017 [G270]

Statement by Dr. Dene Robertson dated 8<sup>th</sup> November 2017 [G263]

Statement by Tara Smith dated 31<sup>st</sup> July 2018 [G287]

Statements by Amanda Markiewicz dated 21<sup>st</sup> September 2018 [G313] and 15<sup>th</sup> March 2018 [G331]

Statements by Susan Grose dated 11<sup>th</sup> October 2018 [G421], 12<sup>th</sup> November 2018 [G464], 11<sup>th</sup> December 2018 [G475] and 9<sup>th</sup> April 2018 [G576]

Statement by David Corcoran dated 15<sup>th</sup> February 2019 [G565]

b. Filed on behalf of the First Respondent

Position statements dated 18<sup>th</sup> September 2015 [A7], 25<sup>th</sup> September 2015 [A15] and 11<sup>th</sup> December 2015 [A33]

Statements by IPJ undated [G183] and dated 10<sup>th</sup> May 2017 [G220], 18<sup>th</sup> May 2017 [G238], 12<sup>th</sup> June 2017 [G255] and 21<sup>st</sup> August 2017 [G259]

c. Filed on behalf of the Third Respondent

Position statements dated 25<sup>th</sup> October 2015 [A25], 22<sup>nd</sup> March 2016 [A124], 3<sup>rd</sup> December 2016 [A135], 27<sup>th</sup> April 2017 [A154], 14<sup>th</sup> June 2017 [A165], 10<sup>th</sup> November 2017 [A177], 11<sup>th</sup> October 2018 [A187], 5<sup>th</sup> December 2018 [A200] and 17<sup>th</sup> April 2019

Statements by Laura Hobe-Hamsher dated 26<sup>th</sup> October 2015 [G161] and 1<sup>st</sup> December 2016 [G175]

Statement by Will Whitaker dated 27<sup>th</sup> April 2017 [G210]

Statement by Charanjit Toor dated 21<sup>st</sup> September 2018 [G414]

d. Assessments and reports

Sanjay Nelson, psychiatrist 19th June 2016 [I1]

Margherita Tazarella, psychiatrist undated [I64]

Sara Rad, clinical psychologist 27th February 2017 [I59]

SLT: Kimberley Reynard 1st March 2017 [I61], Helen Coucher 12th December 2017 [G364], Dina Corcoran 30th September 2018 [G435]

OT: Hayley Goodwin 6th March 2017 [I63], Lynn Thompson 18th September 2018 [G439]

Functional assessment: David Corcoran 7<sup>th</sup> October 2018 [G429]

4. In the course of the hearing a further statement (by Sinead Brophy) was handwritten, copied to all parties and filed on behalf of the Applicant. The Second Respondent also provided to the Court a letter sent to him by the Applicant's solicitors, dated 16<sup>th</sup> October 2014.

5. I heard oral evidence from Susan Grose, David Corcoran, Sinead Brophy and IPJ.

C. Factual background

6. AJ was born on 6<sup>th</sup> February 1995. From the age of 5 he attended a specialist school for autistic children and young adults on weekdays. As he got older, in response to challenging behaviour, there appears to have been quite extensive use of “ground holds” (for example on 32 occasions in 2012). AJ’s school attendance came to an abrupt end in July 2014, since when he has lived with his parents and sister in the family home full-time. It is common ground that since AJ finished school, there have been no occasions when restraint has been used and no safeguarding concerns have arisen.
7. AJ is now a physically able young man, 6’3” in height. He is described by those most closely involved in his care as “happy, friendly, cheeky, engaging and charismatic...sociable, fun-loving, determined and very much his own man” [H1]. However his communication abilities are severely limited and his behaviour can be very challenging to manage.
8. In November 2013 it was determined that AJ was eligible for NHS Continuing Healthcare funding. Later assessment (October 2014) reached a different conclusion but, taking a pragmatic approach to the need to avoid further complications in this case, the CCG has continued to provide all funding to date. It is possible that funding arrangements may change in due course after further review.
9. In the circumstances of AJ’s school attendance ending abruptly,  

“the CCG, as an interim arrangement, agreed to pay [AJ’s] parents £2 800 per week to care for their son. This is calculated on the basis of 32 hours of care between them in each 24 hour period (224 hours per week at an hourly rate of £12.50). In addition, in recognition of the fact that there is a shortfall, the CCG has agreed to pay for additional carers to a maximum of 112 hours per week.” [G13]
10. Under this arrangement and to date, payments of £4 816 per week are made by the CCG directly to AJ’s parents on receipt of an invoice from him. AJ’s parents arrange the care and make the payments to the carers, including themselves.

11. Neither the family nor the CCG were happy with this interim arrangement. AJ's father pursued various avenues of complaint, including to the Ombudsman. The CCG commenced these proceedings.

D. Proceedings to date

12. By COP1 application dated 20<sup>th</sup> August 2015 [D1], the CCG applied for orders to provide for review of AJ's capacity, needs, care plan and options for residence and care. It was said in the Statement of Grounds attached to the application form that

- the relationship between the CCG and AJ's family has broken down
- there are no clinicians involved in AJ's care and the CCG has no oversight of the care provided or the outcomes for AJ
- the financial arrangements cannot continue because they are not in accordance with direct payment regulations
- AJ's parents have been reluctant to consider anything other than direct payment.

13. Since initial directions were given, there have been no fewer than seven attended hearings and four orders made on consideration of the papers before – in October 2018 – the CCG was able to say that it “has now obtained sufficient information and assessment from a range of clinicians to be able to formulate a care plan...” There have been a further two attended hearings after that before the matter was listed for this final hearing.

14. It is not helpful at this stage to ascribe blame for such protraction of proceedings but such history itself amply demonstrates the absence of a co-operative, flexible working relationship between AJ's family and the funders of his care. It cannot be overlooked that the various orders made include the following provisions:

- a. 23<sup>rd</sup> February 2016 [D38]: “...the expert, Dr Nelson, has confirmed that in order to complete his assessment and report, he will need to assess [AJ] alone at a neutral venue (in the absence of the first and second respondents), with the assistance of a Makaton interpreter, and to meet with the second respondent and the third respondent's carers alone, at a neutral venue”
- b. 25<sup>th</sup> May 2016 [D55]: “...although two attempts have been made by the expert to undertake his assessment of the third respondent, these have been unsuccessful

due to [AJ] being unwilling or unable to engage...AND UPON the expert confirming that in order to carry out his assessment successfully, it will be necessary for [AJ] to be accompanied on the day of the assessment by a support worker or other individual who is familiar with [him], but that [AJ] should not be so accompanied by the first or second respondent”

- c. 5<sup>th</sup> December 2016 [D57]: “...the issues before the court are (a) whether or not AJ requires further multi-disciplinary assessment...and if so, whether or not the first and second respondents should act upon the recommendations of those individuals. (b) Whether or not AJ should be made available so that the continuing healthcare review and reassessment can take place”
- d. 13<sup>th</sup> November 2017 [D143]: “...any proposed variation to the timetable must be the subject of a prompt application in form COP9...”
- e. 5<sup>th</sup> April 2018 [D175]: “AJ is to be made available for assessment by any professional appointed or employed by the Applicant CCG...IPJ and IJJ must take all reasonable steps to ensure that AJ is available at the agreed location for any appointment...for the duration of the appointment”
- f. 16<sup>th</sup> October 2018 [D198]: “The application of the first and second respondent to prevent the report from the South London and Maudsley NHS Foundation Trust (“SLAM”) and Magic Words Speech and Language Therapy dated January 2018 from being sent to other professionals or to be prevented to being part of these proceedings is dismissed with permission to disclose the reports to relevant professionals.”

15. At the conclusion of this hearing, I indicated to the parties that I was willing to give an ex tempore judgment, inviting the represented parties to take a note for subsequent approval, with the intention of concluding at least this stage of proceedings as soon as possible. Ms. Scolding QC and IPJ both asked for a written judgment. In view of the history of these proceedings, I acceded to that request.

#### E. The parties’ positions

#### 16. The Applicant CCG

“wish to fund a package of care for AJ which is on the same basis as he receives at present in terms of quantity of care from carers, but which also includes services directly commissioned by the CCG by way of Occupational, Speech and Behavioural therapy. They wish to provide the monies for the carers and to have care

management oversight by the use of a brokerage organisation to deliver the Personal Health Budget.”

17. The broad terms of the care plan are set out in two documents: the ‘Personal Health Budget Care Plan’, otherwise referred to as “the framework” [H22], and the “Positive Behaviour Support Plan” [G542]<sup>1</sup>. It is proposed that this package of care is introduced as an immediate but interim measure. After a period of time and further assessment, there will be a review of AJ’s care needs.
18. The CCG has decided that it will not continue to fund the proposed care package by direct payments because “an additional layer of CCG commissioned clinical governance and oversight is an essential and non-negotiable part of any future care package.” [G468]
19. The CCG acknowledges that its proposed care package “will only be successful if it is accepted by IPJ and IJJ and they are open-minded and cooperative with both the clinicians commissioned to deliver care to AJ and My Support Broker.” [G483] If that cooperation is not forthcoming “then the CCG will have no option but to treat the offer of a personal health budget as having been rejected [and]...will cease funding the present arrangement..” [G483]
20. It was clear at the outset of the hearing that AJ’s parents do not agree with the CCG’s proposals, and have given no indication of intention to cooperate with it, so I sought clarification from the Applicant’s Counsel as to whether this option was really still available. Ms. Scolding QC confirmed that it is. Further she confirmed that continuing the current arrangements is not an option before the Court, so the only alternative options are that AJ remains in the care of his parents with no support funded, or that alternative residential placement is found for him.
21. IPJ and IJJ were unrepresented and have filed no statement since August 2017, although they have attended every hearing. IJJ expressed a preference throughout that her husband should speak for both of them. At the outset of the hearing I invited IPJ to explain his position and (in summary) understood him to be saying that:

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<sup>1</sup> This document was apparently the subject of further annotation by the District Judge at the hearing on 12<sup>th</sup> December 2018. A copy of that annotated version has been provided but on the basis that “due to time constraints, the Applicant and those acting for the Third Respondent did not have the opportunity to respond.” The current position is that these annotations are not agreed by any party, and so I consider the matter on the basis of the version in the hearing bundle.

- He does not agree to the care package proposed
- He is critical of the process by which the care plan was settled
- He is insistent that some things ought to be incorporated into the proposed budget but are not (he gave examples of holidays, swimming sessions, driving expenses when used as therapy, and cultural activities)
- He objected to AJ's parents being paid at a lower hourly rate than commercial carers
- He considered that overall the proposed package does not meet AJ's needs
- He objects to use of a third party broker.

22. By the end of the hearing, IPJ confirmed his agreement with the declarations of incapacity but urged me to “dismiss this case” because “there are better ways of solving the problem of the care budget”. In particular, he wished to pursue his complaint with the Ombudsman, and produced a letter confirming the Ombudsman's decision not to investigate his complaint until court proceedings were concluded.

23. On behalf of AJ himself, the Official Solicitor accepts that current arrangements “clearly can't go on.” Ms. Khaliq QC identified that the transparency, the opportunity for review, and the accountability of the CCG's proposal “have to be in [AJ's] best interests”, and submitted that the CCG's proposal is the only viable and realistic option before the Court, even if AJ's parents do not agree with it.

#### F. The evidence

24. The approach to AJ's care which his parents have adopted since his school attendance came to an end is explained in a document headed “[AJ] PERSON CENTRED PLAN (last edited: 01/09/2015) WRITTEN BY HIS CIRCLE OF SUPPORT” in the following terms (with emboldened type as in the original):

“We use the ‘traffic light system’ – red, amber, green – to assess his mood and determine how to communicate and interact with [AJ]. **All of his abilities and cognitive functions are severely impaired if he is in amber or red.** In addition, the general ‘settings’ of the environment can very easily trigger his mood to change from green to amber to red. **Thus the environment must be constantly assessed and monitored to establish if it is upsetting [AJ]. Just because “he was fine last time” does not mean that he will be the same today or tomorrow...**” [H1]

**[AJ] chooses his daily schedule himself, his choice has to pass 3 tests and then it must be honoured.**

#### 1. Is it legal?

2. **It must not be ridiculously dangerous (positive risk taking must be encouraged). Activities not regarded as dangerous (after reasonable adjustments) include: sailing, skiing, quad biking, jet skiing, large gatherings/festivals.**
3. **Can he afford it? (He can't afford a convertible Ferrari, but he can afford to go out in his car whenever he desires.)**

AJ likes to be given plenty of opportunities across the day to make choices and engage in activities he enjoys (these may be suggested or presented). However he chooses if he will follow through with the choice. **If you have driven to a pool or park and he says NO, then you move on and find an alternative choice.** He finds it difficult to engage in tasks for any length of time and sometimes to transition between tasks. **Never try to insist that [AJ] completes a task if he decides to walk away half-way through.** This is a choice he makes to help manage his own feelings and self regulate himself and prevent himself from exhibiting challenging behaviour." [H3]

25. In his oral evidence, IPJ wanted "to reaffirm" that the arrangement now proposed by the CCG "does not cover all aspects of care"; and stated that "if [AJ] is in receipt of PiPs and DLA, it is to be used for [him], not for the CCG care budget." He explained that he has "no problem with any therapy as long as it doesn't cause [AJ] harm". He described it as "a fact overlooked" that "not a single appointment for therapy has been made by the CCG – they have all been for assessment." He was aggrieved that "a constant theme of the court case has been that I have made appointments difficult" when "not a single appointment has been missed – we have always attended." He considered that "the whole reason" for these proceedings was the complaint he had made to the Ombudsman – "the moment those papers hit the desk, this application was made."
26. In respect of the extent of the care package proposed, IPJ said that the current arrangements "began after the Ombudsman complaint...were never discussed with myself or my wife...have never covered [AJ's] needs...and it's the same package now which the CCG is trying to push forward." IPJ did accept that not all aspects of social care would be part of the CCG care package ("food, rent, restaurants..") but he was emphatic that "when it is being used as a therapy, it has to be part of the basics, for example swimming, being driven in a car, holidays, insurance all need to come out of the CCG package."
27. In respect of the use of a third party broker IPJ stated, with obvious strength of feeling, that "I do not need the help of a broker to manage my bank account." He pointed out that he has 25 years experience of managing a business and "know[s] how to manage

staff requirements.” In his view he is “just asking the CCG to provide what they are supposed to.”

28. When asked by Ms. Khalique QC if he would cooperate with the proposed arrangements, he answered “in the short term. I’ll seek advice about going back to the Ombudsman and on appeal. I’ll consider the impact on implementation. If after 6 -8 weeks I’m not happy, if it goes back to court, the other option is that he lives in a care home.” He acknowledged that the CCG proposal would be the least disruptive arrangement for AJ but said “it won’t stop there. I will look at ways of circumventing it.”
  
29. On behalf of the CCG, Ms. Grose’s evidence was that the proposed package was “a common approach” and the “most appropriate” where the package of care is substantial and involves a significant number of people. She explained that the CCG “is a commissioning body” and it “can’t offer micro-management for any patient” because it “does not have the workforce” to do that. The current arrangements predate Ms. Grose’s involvement, and she expressed concern that – having been introduced only as an emergency measure – their continuation contravenes NHS guidance. So, the use of a third party brokerage service “facilitates due governance of public money” and enables the CCG to ensure that the arrangements for the delivery of “safe effective care” are “robust.” Ms. Grose said that she has written two letters to AJ’s parents explaining “why this approach is necessary.”
  
30. In terms of the extent of care provision included in the package, Ms. Grose explained that the intention was “to replicate current arrangements” and to “enhance it by the addition of specialist therapists.” In the longer term, the CCG will review the level of care, in particular to identify “key aspects of care which will enable [AJ] to develop” and for that, the involvement of external professionals is required.
  
31. When asked about IPJ’s criticism that parental care is paid at a lower hourly rate than other care providers, Ms. Grose explained that AJ’s parents “have considerable expertise but no qualifications” and that in discussions they had accepted the hourly rate offered. She pointed out the “very large number of hours” of parental care calculated as part of the care package - 112 hours per week to both IPJ and IJJ, making £1 400 per week for each parent. Her view was that this total payment of £2 800 per week for parental care “compensates” for any difference in hourly rate.

32. Ms. Grose emphasised that the CCG wishes “to work collaboratively with the parents, and for it not to be adversarial.” She described the proposals as “an opportunity” for AJ and confirmed that the CCG was “unquestionably” committed to working with IPJ and IJJ. She “offered correction” to IPJ’s assertion that they had not been involved in the development of the care plan, acknowledging that she had been “welcomed to their home” and wanted that to continue. Ms. Grose was positive that the proposed care package can be delivered, and would be “greatly enhanced if [carers] work closely and collaboratively with the parents, whose commitment is very much respected.”
  
33. When asked about the advantages of the CCG proposal, Ms. Grose explained the need for sustainable care arrangements, and the risk that excessive burden on the parents “may trigger an acute situation needing emergency placement.” By encouraging development of AJ’s independence, with external support, she considers that the proposed package “can endure for the long-term.” She further pointed out that AJ has a full life expectancy and so, in the normal course of events, may outlive his parents, so it is “incumbent on the CCG to make decisions now which prepare the way for [AJ] as he gets older.”
  
34. When asked about IPJ’s assertion that the care package proposed omits provision for things it should include, Ms. Grose pointed out that the package envisages “365 days a year of care at home” but “we could and would consider respite funding in an alternative location, enabling the parents to have some respite...it would need to be considered and worked out through the broker.” Other issues “can and should be discussed on an issue by issue basis.”
  
35. When asked by IPJ “why is it appropriate for a third party to have discussions with carers?” Ms. Grose explained that “management is essential to have an overview of carers’ wishes....it is important that carers have an opportunity to raise concerns.. [and] have access to a body which is not [AJ’s] family or the commissioning body, to ensure a level of objectivity and due governance.” She explained that the CCG has an established record of working with the particular broker proposed, and described them as offering “the gold standard” of management for a care package of the type proposed.
  
36. When I asked Ms. Grose if parents who have been so closely involved with their child’s needs may find the introduction of oversight as somewhat frightening, Ms. Grose acknowledged that “they may find it unnerving” but emphasised that present arrangements were not sustainable and “I trust that my actions to date have demonstrated that” there is no intention to exclude them: “I have chaired meetings

personally... the CCG has a proven commitment to seek to maintain young patients in the community...We have a track record of credibility.”

37. Mr. Corcoran gave evidence about the delivery of the proposed Positive Behaviour Support Plan (the PBSP”). He was at pains to acknowledge how well AJ’s parents have supported him, and that his role is “to work with the family... to embed best practice, slowly and carefully introduce new strategies so [AJ] remains safe and has opportunities for development and growth.” In respect of the approach to AJ’s care needs, he described the current strategy as “focus[ed] on what leads to challenging behaviour” and contrasted the PBSP as a “multi-element model,” including the environmental factors which lead to stress but also development and growth. He agreed that restraint “should be the absolute last resort, where the safety of [AJ] or others is at risk.” He added that, if it is required, restraint should only be by carers properly trained by an appropriately qualified training provider.
  
38. When IPJ put to Mr. Corcoran that some of the parents’ disagreement with the PBSP was because they knew from experience that such an approach would provoke AJ, Mr. Corcoran emphasised the intention to “work closely with you, not to make life at home any more difficult.” He described the PSBP as “a roadmap,” with no element meant to be set in stone. He summarised the two principles behind both the parents’ approach and the PSBP as “if it causes challenging behaviour, stop; if it prevents it, carry on,” with the added intention of the PBSP being “to establish a steer to see if development can be achieved.”
  
39. Ms. Brophy is the Chief Executive of My Support Broker. She explained that her organisation works with over 3 500 people with state or private funding, across 35 local authorities and 15 CCGs, and the nature of the involvement ranges from simply setting out a support plan to putting all those services in place with full management. The money management service includes quarterly audits across a range of issues including carers’ contracts, DBS checks, right to work checks and insurances. She explained that “we work on behalf of the person with the budget, with their parents, in a way which gives the public body the assurance they need, whilst also allowing a personalised approach.”
  
40. Ms. Brophy had not met AJ’s family before the hearing. Although initially not interested in doing so, IPJ did take up my invitation to speak to her whilst the court adjourned for a short period. Afterwards he informed the Court that they had “had a frank discussion” and he “still doesn’t need them to be part of the services.”

41. IPJ wanted clarity about who would employ the carers. In her handwritten statement Ms. Brophy explained that:

“There are several different options:

1. [IPJ and IJJ] can remain as employers.
2. A limited company by guarantee can be set up through which to employ the carers.
3. They could be self-employed.
4. They could be employed via an agency.

For current care staff, I need to know:

- A. Who to pay.
- B. Where to pay them.
- C. How much to pay them.”

42. Ms. Brophy was clear in her oral evidence that, whether they are employed or self-employed, if My Support Broker was managing the payments, the broker would have direct communications with the carers. She understood the proposal for AJ to be focused on third party management of funds, so that if all necessary checks and certificates in respect of the carers already engaged were in place and provided for the first audit, there would be no need for further involvement by My Support Broker with those arrangements.

43. Ms. Scolding QC subsequently confirmed the CCG’s position as being open to discussion of engaging the services of carers in any legally proper manner. Those discussion could be conducted between the parents and the broker, who would liaise with the CCG. Ultimately if no acceptable agreement could be reached, the CCG would have to stipulate requirements.

#### G. The Law

44. I have regard to the principles set out in section 1 of the Mental Capacity Act 2005, in particular:

(4) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.

(5) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action.

45. In respect of AJ's best interests, I have regard to section 4 of the Mental Capacity Act 2005, in particular:

- (1) In determining ...what is in a person's best interests, the person making the determination must not make it merely on the basis of –
  - a. the person's age or appearance, or
  - b. a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

....

- (6) He must consider, so far as is reasonably ascertainable –
  - a. The person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
  - b. The beliefs and values that would be likely to influence his decision if he had capacity, and
  - c. Other factors that he would be likely to consider if he were able to do so.

- (7) He must take into account, if it is practicable and appropriate to consult them, the views of –
  - a. Anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
  - b. Anyone engaged in caring for the person or interested in his welfare...

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

46. Ms. Scolding QC referred in her position statement to the decision in *N v. ACCG & Others* [2017] UKSC 22 in which Lady Hale set out an exposition as to how and why "the jurisdiction of the Court of Protection....is limited to decisions that a person is unable to make for himself" (*para 24*). The practical effect of this is described as follows:

"So how is the court's duty to decide what is in the best interests of P to be reconciled with the fact that the court only has power to take a decision that P himself could have taken? It has no greater power to oblige others to do what is best that P would have for himself. This must mean that, just like P, the court can only choose between the "available options." (*para 35*)

As a result

“What may often follow such an application will be a process of independent investigation...coupled with negotiation and sometimes mediation, in which modifications are made to the care plan and areas of dispute are narrowed....”  
(*para 39*)

47. Decisions of the CCG as a public body can of course be challenged on the usual judicial review principles but elsewhere, not in the Court of Protection.

#### H. Determination

48. There is in reality only one substantive option before the court in this matter. Although the CCG has identified alternatives to its proposal for funding care – care at home with no support package, or residential placement - it is manifestly obvious that both of those “options” carry significant risk of failing to meet AJ’s extensive needs, and neither scenario has been set out in any detailed form for the court’s consideration. No party actively promotes either of them; and the history of his parents’ commitment to AJ to date gives grounds for concluding that they would not be likely to conduct themselves so as to bring either of them about.

49. Continuation of existing arrangements is not an option which the CCG is prepared to fund and is therefore not an option open to the court to consider. If, when he asks the court to “dismiss these proceedings,” IPJ is assuming that the absence of proceedings would mean the continuation of existing arrangements, unfortunately he has not taken on board the CCG’s position.

50. Where IPJ and IJJ have raised objections to the CCG’s current proposals, I am satisfied that full and proper consideration has been given to their objections in the sense that the process of “independent investigation...coupled with negotiation ... in which modifications are made to the care plan and areas of dispute are narrowed” has been fully pursued. Within these proceedings, it is apparent that IPJ and IJJ have been offered as much opportunity for discussion and contribution as in reality they were willing to take up. Appropriate efforts to facilitate concord between the parties have been made, including even line by line consideration of the PBSP at the last hearing and today inviting (and being given) from the CCG explicit assurances of their intentions in respect of collaborative working with AJ’s family.

51. It is not practically possible to ascertain any views from AJ himself. However, it would seem clear that his family relationships are fundamentally important to him and, if he were able to do so, he would be likely to consider opportunities for engagement in wider community and personal development important. On his behalf, the Official Solicitor supports the CCG's proposals. As compared to the existing arrangements, in my judgment the CCG's proposals offer considerable advantages to him. They are built around him continuing to live with his family, in a setting with which he is familiar. They include all that is currently provided, and also additional therapeutic input and opportunity to consider further provision on an issue by issue basis as the need arises. It is a very extensive package, which goes beyond merely 'coping' with AJ's needs and focusses on his future development and growth.
  
52. AJ's parents contend however that the package does not go far enough, that it should include payments for other therapeutic and cultural expenses. I accept the position of the CCG as explained in the hearing – that the framework document is capable of extension for additional expenses if they are found to be appropriate in the context of AJ's needs and his other state benefit entitlements; and I accept the CCG's assurances that they are willing to engage in such discussions, through the third party broker.
  
53. IPJ expresses particular opposition to the engagement of third party broker services but the only reason he has given as to why he objects to them is that he "does not need" such assistance. He appears not to have considered whether there may be any other 'need' for the administrative arrangements proposed. In my judgment, mechanisms of transparency and governance are obviously reasonable expectations of the CCG, irrespective of IPJ's personal administrative skills. It seems to me unarguable that public funds not far short of £5000 per week should be administered in any way other than on an open, transparent and impartial basis; and that is not the case if AJ's parents both manage such funds and use a large part of it to pay themselves, without any system of oversight. It is right and proper that such expenditure should be transparent, traceable and demonstrably well-founded. The CCG's unwillingness to continue financial arrangements which were adopted as an interim response to a crisis situation is in my judgment entirely understandable.
  
54. Moreover, as Ms. Khalique QC submitted in closing, the "transparency, ability to review and accountability" of the proposed package are directly in AJ's best interests. The brokerage arrangements as described by Ms. Brophy will make a significant contribution to ensuring that care provided to AJ is appropriate for his needs and carers providing it are qualified for the task.

55. It is of course important to acknowledge that, for parents who have been as closely engaged in care arrangements as have IPJ and IJJ, and successfully so, the introduction of a brokerage service now may be experienced as an unwelcome intrusion, or even a threat. If IPJ and IJJ have such fears (which they have not expressed), it is to be hoped that the hearing has gone some way to addressing them. Ms. Grose, Mr. Corcoran and Ms. Brophy all struck me as genuine in their expressions of commitment to work with AJ's family, collaboratively and for AJ's benefit. Any fears IPJ and IJJ have about ceding control will only be addressed if, in an equal spirit of cooperation, they give the CCG's proposals an opportunity to work, for the long-term benefit of AJ. I encourage IPJ and IJJ to see the brokerage part of the proposals not as a criticism of them, but rather as the appropriate scaffolding of extensive financial support for them.
56. Taking all the circumstances of this matter into consideration, I am satisfied that the care arrangements proposed offer extensive support for AJ, calibrated to meet his needs as far as they have been ascertained after multi-disciplinary assessment, and offering scope for further provision as issues arise. Notwithstanding the dissatisfaction of AJ's parents with various aspects of the care package, the CCG's submission that it can operate the package is plausible in the light of arrangements to date. Of the narrow range of options available, it is very clearly the approach which is in the best interests of AJ.
57. It may perhaps be too much to hope that IPJ and IJJ will alter their outlook completely and embrace the new arrangements for AJ's support package wholeheartedly, but they are obviously dedicated to AJ's interests. Choosing not to engage with the new arrangements would only serve to undermine his wellbeing and security. IPJ and IJJ have amply demonstrated that they care too much about their son to let that happen. I encourage them instead to build on the assurances of collaborative intention which accompany the formal parts of the care package.

### Conclusion

58. I am satisfied that it is in the best interests of AJ to continue to live at his family home with a package of care as set out in the framework, the PBSP and the oral evidence at the hearing. There is deprivation of AJ's liberty in such arrangements but I am further satisfied that it is appropriate to authorise that, for a review period of 12 months. If the Official Solicitor wishes his appointment as litigation friend to be discharged on the conclusion of this application, there must be an alternative, appropriate person identified to act as R1.2 representative to monitor arrangements for the review period.

59. I invite the parties to submit a draft order to give effect to this decision, agreed as far as possible.

HHJ Hilder

30th April 2019