

IN THE WANDSWORTH COUNTY COURT

Case No: 1155000T

COURT OF PROTECTION

76-78 Upper Richmond Road  
Putney London  
England  
SW15 2SU

Friday, 5<sup>th</sup> February 2010

Before:

MR. JUSTICE HEDLEY

B E T W E E N:

LBB

Applicant

and

JM

BK

CM

Respondents

**Mr B McGuire** (instructed by the **Borough Solicitors**) for the **Applicant**

**Ms J Harrill** (instructed by **Mackesys**) for the **1<sup>st</sup> Respondent**

**Mr N Armstrong** (instructed by **Irwin Mitchell LLP**) for the **2<sup>nd</sup> Respondent**

**Mr A Bagchi** (instructed by **Fisher Meredith**) for the **3<sup>rd</sup> Respondent**

Transcript from a recording by Harry Counsell  
Cliffords Inn, Fetter Lane, London EC4A 1LD  
Tel: 020 7269 0370

JUDGMENT

(Approved)

MR. JUSTICE HEDLEY:

- 1 I have heard this case over the last four days and it seemed to me, if it were possible, that fairness to the parties and the ability to plan for the future required me to give a judgment at the end of the case if I could. As I reflected on this it seemed to me that I was in a position to express my views and therefore it seems desirable that I should do so rather than make the parties wait for a formal judgment in writing.
- 2 CM, known in these proceedings, as CM, was born on 4<sup>th</sup> May 1987 and is now therefore aged 22. Her mother is JM who apart from CM has one adult son called David who is himself married with four children of his own. CM's father has never played a serious role in her life, but the role of father has been taken by Mr. BK who has acted as her stepfather and who has provided for CM, the only paternal experience that she will have received.
- 3 The court is asked to determine issues relating to CM's capacity, which issues are uncontroversial. If she lacks capacity to decide as to her future care and the contact she should have with her family and in particular whether or not she should return to live with her mother. The reality is that she has not lived at home for the last two years and much of this trial has been focused on the issues as to why that has been.
- 4 CM herself has very extensive needs. She suffers from uncontrolled epilepsy which is a danger, indeed a mortal danger, to her health and she has often to be the recipient of strong medications which in themselves have adverse side effects. She suffers from significant global developmental delay and the view seems to be that she functions at a chronological age of somewhere around five or six. It is in those circumstances wholly unsurprising that local authority Social Services have been involved in CM's life really for the whole of its duration and certainly in October 1990 proceedings were instituted for a care order in which the court was confronted with recommendations for long term foster care or adoption. It

looks as though those proceedings were probably conducted within the context of wardship and within the context of applications under s.7(2) of the Act of 1969 now repealed by the Children Act. The outcome of those proceedings was that on 22<sup>nd</sup> October 1992 the mother and BK were granted a residence order with a one year supervision order to the LBB. The date of the order rather suggests that this was an order made at the end of transitional implementation provisions of the Children Act. The effect of such an order was to confer in practice if not in theory parental responsibility on BK. It is right to say that the local authority continued to be involved in CM's welfare and I have a chronology which details some of the significant events that occurred between 22<sup>nd</sup> October 1992 and 28<sup>th</sup> November 2003. Those matters have not been the subject of serious challenge either because they are accepted or because it is recognised that they are not relevant to the matters which I now have to determine.

5 The matters which have been the focus of attention over the last few days arise first in November of 2003 when JM notified the authorities of what looked as though it could have been sexual misconduct by BK towards CM. There were investigations undertaken at the time. The police decided not to pursue the matter. A s.47 investigation decided that no further action should be taken, and matters continued as before. JM and BK had in fact separated some time before this, but it is recognised on all sides that not only did relations between them remain reasonably good, punctuated undoubtedly by certain stormy episodes, but BK continued to have a significant input into the care and upbringing of CM.

6 Matters in 2003 were revived because in January 2008, as I will deal with shortly, CM made further complaints about potential sexual misconduct which she had received at the hands of BK. That enquiry resulted in CM not being permitted to return home and, indeed, as I have indicated she has not lived at home since that time. Indeed, it is the case that apart from one incident she has seen little or nothing of BK since that time.

- 7 The local authority regarded the position as sufficiently complex to seek to take proceedings under the Mental Capacity Act 2005. In my judgment, they were right to activate the jurisdiction of the court because there is no doubt that this case is not only difficult but in many ways unusual to the point of being unique. The local authority took the view that since the intervention of the court would engage a potential breach of the Article 8 rights of the parties, that it may be incumbent upon them to establish on a factual basis why it was that the court's jurisdiction should be exercised. Broadly speaking, I would endorse that approach and recognise that where an Article 8.2 justification is required then the case should not be dealt with purely as a welfare case if there are significant factual issues between the parties which might bear on the outcome of the consideration under Article 8.2 as to whether state intervention was justified.
- 8 The Mental Capacity Act does not contain provisions equivalent to the threshold provisions under s.31.2 of the Children Act. Nor should any such provisions be imported in it as clearly Parliament intended that they should not be, but an intervention with parties' rights under Article 8 is a serious intervention by the state which requires to be justified under Article 8.2. If there is a contested factual basis it may often be right, as undoubtedly it was in this case, that that should be investigated and determined by the court.
- 9 The local authority produced a schedule of allegations which has been refined over time. A group of allegations related to the failure of the mother and BK to comply with the advice as to medication and failing to take with a degree of seriousness that others thought should be taken the proper reaction to emergency procedures. Another group related to the social and educational needs of CM not being sufficiently addressed. Then there was a group of allegations of misconduct by BK towards CM which were dependent in part on repeated allegations made by CM to different people and on different occasions over a number of years and the complaints to which I have referred by JM in November 2003 which in

various forms has been repeated up to and including this trial.

- 10 As the trial itself unfolded, further consideration was given to the schedule of allegations. The court had the evidence of Professor Mark Richardson who, as it were, had oversight of CM's epileptic condition and the requisite medication. Whilst he may not entirely have approved of the variations that the parents, if I may so describe them, made from time to time or their reaction to emergencies, he did not regard those as matters calling for significant censure, and in those circumstances, other than the local authority reserving the right to allege the parents were somewhat cavalier in their approach to medication, it was decided that such allegations should not be pursued. Moreover it became apparent that those allegations that related to the social and educational needs of CM were either not of a sufficient magnitude to require determination or no longer had sufficient relevance to merit it, and they too were not further pursued, and so the focus of the evidence was very much upon the allegations of sexual misconduct that were alleged against BK and in my view the parties correctly discerned the gravamen of the case which the court should determine.
- 11 It is accepted by all parties and by me that the approach of the court to these allegations is governed by the approach that appears in the speeches of the House of Lords in the case of *In Re B Children [2008] UKHL 35* which is also of course to be found in the principal reports. The case has two important guide posts so far as trial judges are concerned. The first is to be found in paragraph 2 Lord Hoffman's speech which is in these terms:

"If a legal rule requires a fact to be proved, the fact in issue, a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt the doubt is resolved by a rule that one part or the other carries the burden of proof. If the party

who bears the burden of proof fails to discharge it a value of zero is returned and the fact is treated as not having happened. If he does discharge it a value of 1 is returned and the fact is treated as having happened.”

It is common ground in this case that the burden of proof is assumed by the local authority as the party that has made the allegations. It follows from that that in so far as each allegation is concerned, if the local authority succeeds in proving it, then that allegation becomes a matter of fact for all future purposes. If the local authority fails to prove it, that matter cannot be referred to again for any further purposes because in law it did not occur.

- 12 The second matter, the second guidepost is to be found in the speech of Baroness Hale of Richmond in a highly familiar passage between paragraphs 69 and 73. It is necessary only to quote from paragraph 70 in which the learned Baroness says this:

"My Lords, for that reason I will go further and announce loud and clear that the standard of proof of finding the facts necessary to establish the threshold under s.31.2 of the welfare considerations in s.1 of the 1989 Act is the simple balance of probabilities neither more nor less. Neither the seriousness of the allegations nor the seriousness of the consequences should make any difference to the serious of proof to be applied in determining the facts. The inherent possibilities are simply something to be taken into account where relevant in deciding where the truth lies.”

- 13 It is common ground between the parties, and I so find, that those principles apply as much to proceedings under the Mental Capacity Act [2005] as they do to proceedings under the Children Act 1989. The reference to the 1989 Act is of course to be found because that was the Act with which the House was dealing in the instant case but it is inconceivable and

would be wholly inconsistent with all practice for different standards to apply, for example, to the Adoption and Children Act 2002 or, as I find, to the Mental Capacity Act 2005. The determination of facts fulfils exactly the same purpose in each enquiry and, where it is common ground that facts fall to be determined, I approach this case on the basis that the question is whether the local authority have proved these allegations or any of them on the simple balance of probabilities. That is to say is it more likely than not that the allegation is true. None of that do I understand to be seriously contentious as between the parties in this case.

- 14 What then is the evidence that falls to be considered for the purposes of answering that question? First of course are the allegations that CM herself has made over a significant period of time and to significantly different people. Secondly, there is the expert appraisal of those allegations. There was an appraisal undertaken some time ago by an organisation called Triangle, but for the purposes of this case I have focused upon the evidence of Miss Spence of Respond and of Dr. Halstead, a distinguished consultant forensic psychiatrist, instructed on behalf of BK. It is right to say that the independent social worker instructed by the Official Solicitor, Mr. O'Meara, found himself drawn into an expression of views about the allegations but he was careful to observe that that had not been part of his instructions and his views were not to that extent views that ought to weigh with the court.
- 15 The third aspect of evidence that the court ought to consider is the complaint made by the mother in November 2003. It varied in repetitions up to and including the evidence that she gave before me in this trial; and the fourth is the evidence of BK given to me which constituted a forthright denial of any misconduct in relation to CM.
- 16 I indicated before speeches were delivered that my practice in assessing contested evidence was to see whether a framework of uncontentious evidence could be created within which the contentious allegations could be considered and measured against the probabilities that the

uncontentious might suggest. There is in fact a significant amount of relevant uncontentious evidence in this case. First, there is the evidence that relates to the degree of physical care that CM has required throughout her life and which has in preponderance been exercised by the mother and BK. That has included in it physical and indeed intimate care which would go well beyond what would normally be required by a child or young person of the age of CM as she gradually grew over the years. In cases in which sexual touching is alleged the role of the carer and the functions of the carer may be of particular importance because what may be wholly impermissible in relation to most children may be simply necessary in the case of one who requires an unusual degree of care.

- 17 The second set of evidence is that which establishes that BK was an essential ingredient in the provision of the care that was given to CM over those years, whether or not he was actually in a partnership with the mother. The mother had always recognised that for reasons, to which I will come in due course, she was unable to provide exclusive care for CM, and indeed I think one ought to add to that it would be very difficult to imagine that there would be a single individual who could provide for all her needs bearing in mind her need for 24 hour care.
  
- 18 The third aspect of the uncontentious evidence is that, although there were criticisms about the care that BK gave from time to time, the very strong preponderance of the evidence is that he made a very important and beneficial contribution to the care of CM and many people speak well of his contribution to her care. Fourthly, there is, within the evidence, and unhesitatingly accepted by me, a very generous tribute paid by David M to the role that BK played in his, David's, upbringing. I have no reason to doubt the truth of that, nor any reason to doubt the commitment and human kindness that would have motivated BK to do as he did.



19 It is accepted on all sides that CM has repeatedly over the years made allegations of misconduct and essentially sexual misconduct against BK to a whole range of people. Next, it is accepted on all sides that some of those allegations could not have been true. Two examples which emerge immediately from the evidence was an allegation that she had been scratched by BK or an allegation that BK had in some way interfered with David's children when the evidence was that because of certain family differences those children had not in fact seen BK for a considerable number of years. It is also uncontentious that the mother made the allegations that she did in 2003, that she dealt with those allegations with the police, the educational authorities, with Social Services, that she discussed those allegations with Miss Spence and with Mr. O'Meara and she has given evidence about the matters in front of me. That she has done those things is beyond dispute. The truth or otherwise of their contents is another matter. Now that, as I indicated, constitutes a relatively substantial body of uncontentious evidence which the court must have fully in mind as it addresses the allegations made against BK and, indeed, as it addresses questions as to what is to happen in the future. Whatever findings the court may make against BK cannot and should not obscure those good things to which the court has made reference.

20 I turn then to the expert evidence and by that I mean my appraisal of the evidence of Miss Spence of Respond and Dr. Halstead. It is common ground between those witnesses that the allegations elicited from CM by Miss Spence were elicited in accordance with best practice and they were obtained in a way which provided the best opportunity for making an assessment of their credibility. Secondly, it was agreed between Miss Spence and Dr. Halstead that those allegations were potentially credible in the sense that they merited careful consideration and examination. Dr. Halstead criticised two aspects of Miss Spence's work. First, he said that it was clear, from a reading of her report, that although she had recognised that CM had made some allegations which could not have been true, that fact does not seem

to have weighed significantly in her assessment of the credibility of the allegations generally. Secondly, he was of the view that Miss Spence was inclined to ascribe to each matter the most negative interpretation that it would bear and not, as it were, to give proper weight to innocence or beneficent interpretation.

21 I have reflected on these matters. In my judgment those criticisms are not without force, but of course I need to consider what the implications of them are given that Dr. Halstead acknowledged that the allegations generally made by CM were potentially credible. It seems to me that those criticisms have two important functions within this case. The first is that they should caution me against relying on the evidence of Miss Spence beyond the agreed assertion of potential credibility, and secondly they should serve as warnings to me as to matters to be taken into account in my evaluation of the evidence, for it is the position in law that it is a matter for the court and the court alone to determine whether potentially credible allegations actually stack up to proof in the instant case.

22 Well, now what are the nature of the allegations that the court is required to consider? It is this which makes this case somewhat unusual. According to Miss Spence the allegations fundamentally amounted to being tickled over the body area, including the private area, being kissed on the mouth and being touched on the breasts. It is of significance that the only conduct alleged below waist level was that of tickling and it is noteworthy that no allegation of penetrative conduct, whether of mouth or elsewhere, has ever featured in the allegations subject to one matter that I will come to in just a moment.

23 It is perhaps worth looking at the allegations that gave rise to the local authority taking action at the beginning of 2008. Those were allegations which emerged in discussions between CM and her then carer Mavis Agimane, known to all as Mia and referred to as such in this judgment. Between pages 126 and 129 are four entries, two before the local authority took action and two afterwards. There are references by CM to Mia as to complaints by CM.

They are worth incorporating into the judgment not only for the way in which they emerge but because they are a fair representation of the sort of allegation which CM has made but they contain one or two other matters about which the court ought to express a view.

24 On 9<sup>th</sup> November 2007 Mia's note reads as follows.

"After lunch CM went to the toilet, came out and started giggling while washing her hands. CM said to me the water tickles. I then said to CM if she was ticklish, and she said: 'Yes, daddy tickles me'. CM then started to walk away. I asked CM: 'Really where does he tickle you?' She then said while pointing to all of the areas: 'He tickles me on my legs, my back my tummy and my bum' and then she put an index finger up in an authoritative fashion and I say: 'Stop, naughty daddy but he doesn't'. Then she carried on laughing and we continued to the leisure room."

On 8<sup>th</sup> January there is this entry:

"CM was in art and craft today when she started telling Kadur..."

I interpose to say another carer:

"... about her 'boyfriend'. I asked her if she had one and she said: 'Yes'. I asked his name and she said BK. I asked what do you do with him. Then she puckered her lips. I said: 'Kiss?' She said 'Yes'. I asked her what else and she signed 'Sleep'. I then said 'Sleep together?' and she said 'Yes'. Kadur asked her 'Do you play' and then said: 'Yes' she added: 'With Lamore, Banny and with Bonzo'."

I interpose to say Bonzo was the dog.

25 The third was on 19<sup>th</sup> June 2008 which was in these terms:

"CM was sitting in the cab on the way home after Respond and she seemed really quiet. I asked her if she was okay and said: 'Daddy punched me'. I asked her where and rubbed the left side of her stomach. I asked her how it made her feel and she said 'Hurt'. She then said: 'Daddy'. I asked her what about him and she said 'He shouts at her'. I asked her 'What about?'. She said 'When he is angry he swears and says fuck, fuck, fuck'. CM then looked really disturbed when she said this, so I did my best to console her and stopped talking about it. After a while she was back to normal."

Then lastly this on 25<sup>th</sup> June 2008:

"At Kentwood Centre today CM was sitting on a chair sobbing. I asked her what the matter was and she said she was upset and I asked her why and she said 'Daddy' and I asked her 'Why?' and she said 'Daddy did this' moving her index finger up and down while pointing to her vagina. I asked her what else and she told me he kissed her cheek and her lips. She then said 'He kissed my boobies'. At this point she cradled both her breasts and hunched forward. By this time she was getting really upset so I did my best to comfort her and told her it was over. She calmed down and fell asleep."

26 There are three observations about those. For the most part they form a pattern with other allegations of tickling, kissing and handling breasts. I am not prepared to infer from the fourth of those entries that she was seeking to convey digital penetration, that is wholly

inconsistent with anything else that exists and I do not regard it even as an allegation much less as one to be dismissed, but one does note that the third of those contains what one might call physical allegations that have not played a particularly significant part in the enquiry until Mr. O'Meara had interviewed CM about contact and her reactions had raised that question again. The reality is that it is very difficult to latch onto any significant allegations of physical abuse. It may not be desirable but it is I am afraid quite unrealistic to regard swearing and shouting at CM, undesirable as it may be, as abuse unless it is seen in the context of a campaign of intimidation of which there is no evidence in this case. It is really very difficult to locate, and nor do I think the court should locate or attempt to locate, individuals incidents that could probably be constituted as physical abuse but, what may not be proper to describe physical abuse, does not mean to say that that conduct does not have a real and genuine impact on the child. Children are radically different in their resilience and their ability to withstand adult anger and that is simply a factor that has to be recognised which of course may be relevant to welfare issues, but does not form any further part of my determination of the facts.

27 Now, it seems to me that one must then turn to the evidence of JM. It is apparent from the daily contact records as to the nature of the allegation made and it is summarised in the social worker's typed records which appear on p.D30 and this particular part of the record should be read into this judgment:

"On 29.11.03 JM telephoned Basildon House, CM's residential unit at NCYPE to say that she was concerned that her ex-partner BK, may have been abusing CM as the previous evening, 28.11.03 she had found them in the bedroom together and that BK was wearing only his underpants and that he was leaning over CM who was lying on the bed. NCYPE reported this telephone call to me promptly on the

following Monday, 1.12.03 and I met with JM later that day and she clarified that information already given. She stated that on that evening she did go into the bedroom and found BK and CM together as described above. She removed CM from the room and later questioned her. CM said that she and BK had been playing hide and seek together and that BK had kissed her nipple and touched her Minnie. JM asked BK about the allegation which he did not deny and he said that he had been out of it, which JM took to mean that he was drunk at the time. JM kept CM in her bedroom at night. I told JM how serious this allegation was and that I would need to refer the matter to the referral and assessment team in Orpington which she accepted.”

- 28 In due course, or indeed pretty promptly in fact, JM endeavoured to retract that allegation and there is a typed version of what was probably a handwritten original of the 13<sup>th</sup> December 2003. The first two paragraphs should be read in this judgment:

"I wish to retract my statement.

"On Friday I saw CM and BK in bed, a two foot six inch bed. CM was on her back and BK had his arm across her top half. She said she was playing hide and seek. I went down and went straight in and he was in the same position and said he was ‘out of it’ meaning drunk. I called CM back into her room and she came back carrying her pyjama bottoms. I said I wanted to talk and got in beside her. I told her I was not cross and she had not done anything wrong. She said: ‘Daddy kissed her’ and I said: ‘What else?’ and do it to me and she touched my breast. I asked if she told him to stop and she said ‘No’. I asked if he did anything else and she said: ‘No’ but she

said 'Willie'. I said: 'Daddy shouldn't touch [her]' and she said: 'Police, naughty, put him in a cage'."

- 29 It is right to observe that the allegation as it is relayed does change in certain details, but it is apparent to me that JM is seeking to describe on each occasion the same incident. She described it to the police. She described it to Miss Spence, she described it to Mr. O'Meara and she described again something similar in her evidence to me, though on this occasion she was anxious to point out that BK was at all times clothed and that CM was wearing her pyjamas. She was variable in her evidence about where his hands were around CM but seemed to include the fact that his hands rested on her breasts, though she was careful not to say, nor indeed has anyone said, that he was fondling her breasts. At the same time it is fair to observe that Mr. Armstrong demonstrated in his cross-examination that JM is suggestible to questions that carry with them an answer implicit in them and that is a matter of course that one must bear in mind. I have no doubt and I find that she said what the social worker, the police and others have reported her to have said. That specifically includes saying that she saw BK in his underpants and CM carrying pyjama bottoms and seeing a hand on CM's breasts and the reference to CM's subsequent complaints. She does not wish to confirm all those matters to me because no doubt she appreciates the implications that that evidence may have. I do accept that at time, that is to say in November 2003, she was very stressed, unwell. She was very angry with BK having just had a row with him but I reject any assertion that what she said was purely the product of malice or delusion. She reported it no doubt because she was angry with BK, but I have no doubt that she also reported it because she believed it to be essentially true and she was concerned for CM's welfare.
- 30 The evidence of BK was essentially a forthright denial. He could identify the incident which it was believed JM was describing but in his evidence he was dressed at all material times

that CM was around. He certainly was not in bed with CM and any contact with her was a consoling arm around her while both were standing in the room. He said there was simply no truth in any other matter. I have to say that save in one important respect I found BK's evidence wholly unconvincing. That conclusion stems from the consideration of his evidence in the light of the other evidence in the case, of his police interview and his early witness statement and from seeing and hearing him. That conclusion of course does not prove any case against him but it is a factor to be taken into account in the overall assessment of whether or not any of these matters are true.

31 I have found this a difficult case. In my sadly very wide experience of trying cases of this sort, it is I think unique and I have reflected upon it with anxious care in respect of all the evidence that I have heard. In the end I have reached two clear conclusions. The first is that I am satisfied that unacceptable physical contact has occurred between BK and CM and it has done so on much more than an isolated occasion but I use the slightly odd phrase 'unacceptable physical contact' not as a euphemism but quite deliberately. Secondly, I am quite satisfied that what occurred was not in my view sexual abuse in the sense that that phrase is commonly understood. Sexual abuse as commonly understood connotes the use of a child as an adult female substitute or use for the gratification of adult fantasy and adult sexual desire. I find here that there was a regular tickling of CM including in intimate areas, kissing on the lips (in the mouth was never alleged) and touching in the area of the breasts. There is no suggestion of penetration nor of adult sexual behaviour. That is in part why it is not in my view sexual abuse as usually that term is understood.

32 To understand what has happened here, and why, it is necessary to understand the situation of a carer. Much, if not all, of the conduct established will in many circles be unremarkable as between a parent of a young child. A carer of a learning disabled youngster is in many ways dealing with a child long after adolescence or even young adulthood. Intimate care means



that conduct which would otherwise be wholly unacceptable remains in fact necessary. In those circumstances a carer may wholly fail or simply refuse to appreciate the implications of the onset of adolescence and adulthood in a person still requiring dependant and perhaps intimate care. Their judgment may be deliberately perverse or may be disturbed by drink or simply may be plain wrong and ill-considered. In my view that is the position here. The thrush incident is a good illustration. Society today would generally disapprove of a stepfather applying cream in the vaginal area of a young woman whether he was gloved or not. Whereas BK, who undoubtedly did this, claimed that there was nothing wrong, and in my judgment was entirely genuine in making that claim.

33 I am not prepared to find that that particular behaviour was in fact abusive, but it illustrates his failure or refusal to grasp the implications of adolescence or adulthood. He treated her as he might have done when she was five years old. He was inexcusably wrong to do so but he did not do so principally for sexual gratification though no doubt it he found it enjoyable and even exciting. I spell this out because, although BK must accept blame for what he did, that blame should not exceed his real culpability which in my view is very much less than usually in these circumstances it would be. The one part of his evidence that did convince me was that he retains a real paternal affection for CM and I am satisfied that he does indeed broadly want what is best for her. She is not to him simply an object to be used and this may be important in considering his role in her future.

34 That then provides the factual matrix within which the court now turns to consider the exercise of its jurisdiction under the Mental Capacity Act 2005. I am satisfied on the psychiatric evidence that CM entirely lacks capacity to litigate, to decide where or with whom she should live or where or with whom or in what circumstances to have contact. As I indicated at the outset of this judgment those findings are entirely uncontroversial.

35 What are the principles then upon which the court exercises the jurisdiction which it now has? Crucially the court starts with s.1(5). A decision made under this Act for or on behalf of a person who lacks capacity must be made in his best interests. Section 4 deals with best interests and provides a sort of checklist for a decision maker, in this case the court considering what to do. Section 4(2) provides that a person making the determination must consider all the relevant circumstances and in particular must take the following steps.

Section 4(4) provides:

"He must so far as is reasonably practicable permit and encourage the person to participate or to improve his ability to participate as fully as possible in any Act done for him or decision affecting him."

Section 4(6) provides:

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

Then not unimportantly in the context of this case by s.4(7) he must take account if it is practical and appropriate to consult the views of anyone named by the person as someone to be consulted on the matter in question or on matters or on matters of that kind anyone engaged in caring for the person or interested in his welfare, and the other two do not apply.

- 36 Now the first issue to be considered is where and with whom CM is now to live. There is no doubt, applying s.4(6) that CM's wishes would be to live at home with her mother although undoubtedly she enjoys her present accommodation. There is no doubt pursuant to s.4.7 that the mother would express the view that she would like CM to come home and live with her and there is no doubt that BK, who undoubtedly comes within this section, would share and support that view. I have therefore considered that matter with some care, but I find that I must reject that approach as being entirely inconsistent with CM's best interests which of course have to be the lodestar by which any decision is guided. There are a number of reasons that impel me to that conclusion. The first is that the needs of CM are extremely complex. The consequences of failing to meet those needs may be extremely serious and could in certain circumstances be fatal. It is the fact that she requires 24 hour care in circumstances where it seems to me that it would be impracticable for any one person to care for CM without very substantial support by day and perhaps by night.
- 37 Secondly, the mother has always recognised that she has not been able to care for CM on her own. That was, as she expressed on many occasions, the reason why BK remained significantly involved in CM's care after the separation of their own relationship. Thirdly, JM is undoubtedly afflicted at the present time with considerable ill-health. She is an insulin dependant diabetic. She has a history of mental health difficulties and, although those are well controlled at the present time, she does continue to take some albeit modest medication for them. She had at the beginning of this year, unhappily, a heart attack which resulted in her being hospitalised for some 11 days. Of course at this very early stage it is quite impossible to say what the implications for the future of that heart attack are even though at the moment happily she is feeling well within herself. Those matters merely underline her own acknowledgement of an inability to care on her own and have to be seen in the context of the needs of CM.

- 38 It is right to say that other reasons why CM could not be returned home have been advanced. They relate to her medication, to the willingness of the mother to take seriously the question of emergency treatment or ambulance cover, the question of whether the mother would fully reintroduce BK into CM's life and so on. All those various supplementary reasons either singly or in the aggregate are not sufficient of themselves to prevent a return home because they could be met by a written and monitored agreement with which I am reasonably sure JM would comply. Decisive in my view is the combination of CM's needs and the mother's difficulties and, indeed, in the course of her evidence I believe the mother with great reluctance and sadness recognised that that was probably the case. In my judgment it is the case and it would be seriously contrary to CM's best interests, for the reasons that I have indicated, simply to discharge her home to her mother's care albeit with such support as the local authority would be able to provide.
- 39 In the event of the court making such a finding, all parties in fact agree as to what then should happen. It is common ground that the present placement is not suitable. There is no doubt that the present placement has done well. CM enjoys it. JM was kind enough to indicate that they had looked after her well but it is a respite placement and there is a great deal of coming and going and one of the most important things for CM is that there shall be a degree of consistency of her life, particularly consistency in relationships and so all parties are agreed that in those circumstances what she needs is a small residential care establishment with a stable population and it is very greatly to be hoped that immediate steps will be taken to implement that kind of proposal.
- 40 That leads me to the question of contact with JM. It is important to remember and to recognise that JM is the single most important adult in CM's life and it is essential for CM's best interests both that that relationship is fostered and maintained and that JM is fully kept on board in terms of the future planning for CM, for her encouragement and support of the

proposals for CM will be important factors in enabling CM to make the transition that she will need to make from where she is into a more permanent setting. JM told me in evidence that she would be willing to keep written agreements about medication and about restricting contact with BK and so forth. I am entirely willing to accept her assurances on that, and I shall continue to accept those assurances unless and until by her actions she establishes the contrary which I hope will never arise.

41 What about staying contact? In my judgment for the very reasons that prevent a return home staying contact in itself is not a practicable proposition at the present time, but it is of the utmost importance that very substantial contact is maintained between CM and her mother. It does run to three or four days a week at the moment, and that seems to me the least really that should be the position. I very much hope that all parties will be willing to be flexible over contact arrangements, and in particular will be willing to be flexible at holiday times and other special occasions in CM's life. I also think that subject to the position of BK, which I will come to in a moment, that contact should be able to include other members of the family, in particular one has in mind her brother, David and his family. In my judgment, JM continues to have a vital role in CM's life. Not all her past actions may have been well judged or always for CM's actual benefit but I do not doubt her love and commitment for CM, who I believe senses that and it is of great importance and value for CM that she is so regarded by her mother.

42 Let me then turn to the question of contact between CM and BK. CM has not seen BK other than for a chance encounter for a couple of years, but undoubtedly expressed the desire from time to time to do so and has sent affectionate cards as late as Christmas just gone. On the other hand she has in an interview either side of Christmas with Mr. O'Meara seen photographs of BK and has evinced a very negative reaction to contact with him. This I think came as something of a surprise. Certainly its impact on Mr. O'Meara was both surprise and

shock. In his view she evinced fear and a strong desire not to see BK. There is no doubt that it was BK that she was referring to. Mr. O'Meara said that in his view this was genuine and deep-seated and she should not be required to see him. He expressed himself with some vigour; indeed, I think incurring the risk of criticism along the lines of 'me thinks he doth protest too much'. But on the other hand Mr. O'Meara is highly experienced in this field and was recognised by Dr. Halstead as having achieved a good rapport with CM. The origin of CM's fears in relation to Mr. O'Meara's interviews seemed to be physical rather than sexual and Mr. O'Meara, as I have indicated, was convinced that they were real and genuine. As will have appeared, I am unable to make any specific findings that would explain her reaction. At the same time I reject any suggestion that her reactions were faked or based on delusion. Something real is happening here though I do not know precisely what it is. It is contrary to the philosophy of best interests under s.4 of the Act to require an incapacitous person to have contact with someone she does not want to unless to accede to her views is in itself at variance with her best interests because, for example, her expression of views are not in fact a reflection of her genuine thoughts. But as things stand at the moment, I am satisfied that it would be wrong to compel CM to have direct with BK and I say that not because of any findings I may have made against BK but because of CM's reactions and whatever it is that lies behind it but I fully recognise that she may express a different view about seeing BK in the future and I ought to express some views about that, and in any event it begs the question as to indirect contact. It is right to record that her views have not been consistent in that she has sometimes expressed a wish to see BK and on those occasions with Mr. O'Meara has evinced a very strong desire not to. But I do not rule out for a moment the possibility that at some stage she will firmly and persistently make it clear that she wishes to have contact with BK.

43 Now, as Mr. Armstrong reminded me BK entirely responsibly only seeks supervised contact with CM at the present time. I make it clear that the findings that I have made should in no way impede supervised contact if otherwise it is in accordance with CM's wishes to have it. Nor do those findings, for the reasons that I have endeavoured to express when making them, rule out a role for BK in CM's future. Supervision is of course necessary unless and until BK can recognise and respect CM's physical integrity. But I do accept as I have indicated what BK said about his love and commitment to CM as being entirely genuine and, indeed, in my view it would be good for her to know that she is cared about by BK and it would be good for her to know that BK respects her present wishes if on mature reflection he is in due course able to say that though that of course is entirely a matter for him. It would in my view be in CM's long-term interests were BK to be able to have some role in her future.

44 What then should the court say about indirect contact? All the matters to which I have just made reference inform my view about indirect contact. That said, given the intensity of her reactions to Mr. O'Meara it may be that some pause is required before the matter is readdressed and, indeed, if she is about to make a move a pause may be necessary for that reason because I suspect that both the reintroduction of BK and a move will make very significant emotional demands on CM and they should not be confused with each other. She needs to undertake the move and settle before this other matter can sensibly be addressed with any prospect of progress. She should, however, be encouraged to continue to give and receive cards at appropriate times as she has been doing. She should I think be prepared in due course to receive a video from BK, a video which should be low in emotive content and advice should be available to BK, if he is willing to receive it, as to the content of any such video. Only those who care for CM on the ground are going to be in a position to make a sensible judgment about precisely when and how to do this. I do no more than say it should be on the local authority's agenda as something to be addressed once CM has settled into new

accommodation. They should review all her reactions to this form of indirect contact and that will inform the views of the local authority about direct contact. I hope I have made it clear that, my findings notwithstanding, the question of BK's contact with CM should be dealt with on the basis of her current welfare needs and without regard to history save in so far as the question of supervision is concerned.

45 That leaves a number of short miscellaneous matters to which I need to make reference. The parties have raised and I have considered whether this is a deprivation of liberty case. No-one seems at present to argue that it is. I do not think, for the reasons that I have indicated, that it is and I do not think that in truth there is any serious resistance to the proposals for CM to be accommodated in a small care home. But clearly this issue will have to be kept under review. I think a transcript of this judgment should be obtained at the joint and equal expense of the parties, it being a reasonable charge on the certificate of publicly funded parties, and that the transcript should be available to anyone who has decision making responsibilities in relation to CM. I propose in a moment to rise to give the parties an opportunity to consider whether agreement on the terms of an order to implement this judgment can be made. I do not think an order should actually be drawn this afternoon but I simply want the parties to be able to consider whether they can agree to the terms and the order can then be drawn in due course.

46 The reason I do not think it can be drawn this afternoon is because I accede to the views of all the parties that this matter should be reviewed by the court. There is no point in having a review in early course but there is a real point I think in having the review once CM has made the move and once there has been an opportunity for proper consideration to be given to the longer term role that JM is going to play and to the question of the contact and the development of contact between CM and BK. My own view is that a review in the latter part of the year, November-ish time will be time enough. But I am entirely willing to hear the



views of the parties once they have had an opportunity to consider matters between them. I want to provide an opportunity in rising for the parties to consider whether there are any other matters in respect of which the court ought to have made a ruling and finally to express my appreciation to all counsel for the way in which the case has been managed and presented so as to enable an extremely difficult case to be considered and dealt with within a reasonable period. For that I am extremely grateful.

47 I propose to rise at the moment for a few moments. The principal purpose is to see whether the parties are confident they can reach agreement on the form of an order to implement the judgment and also to give any party an opportunity to reflect on whether any other matters ought to be raised with me now. I will rise for say 15 minutes and then we will reconvene and see where we are.

---