Neutral Citation Number: [2019] EWCOP 8

Case No: 12995755

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF SJF

First Avenue House
42-49 High Holborn,
London, WC1V 6NP

Date: 12th March 2019

Before :

Her Honour Judge Hilder

London Borough of Hackney

Applicant

and

SJF (through her Litigation Friend the Official Solicitor)

First Respondent

and

JJF

Second Respondent

Hearing: 20th, 21st, 22nd November and 4th December 2018
and 29th January 2019

Ms. Walker (instructed by London Borough of Hackney) for the Applicant
Ms. Burnham (instructed by Guile Nicholas Solicitors) for the First Respondent
Ms. Hearnden (instructed by Campbell-Taylor Solicitors) for the Second Respondent

The hearing was conducted in public subject to a transparency order made on 19th December 2016. The judgment was handed down to the parties by e-mail on 12th March 2019. It consists of 28 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 issues

1. SJF is a 56 year old woman with a complicated matrix of physical and mental health issues. Apart from frequent hospital admissions, she is presently living in a residential placement. She wants to go home to live in her rented flat with her son. The Court is asked to determine:

    a. Whether she has capacity to make decisions about where she lives, how she is cared for, the contact she has with others (notably her son) and whether to terminate and enter into tenancy agreements; and
    b. If she lacks capacity in the relevant domains, where she should live, whether her contact with her son should be restricted and whether tenancy agreements should be terminated/entered into.

2. The capacity of SJF to manage her property and affairs has not been in issue in these proceedings. All parties agree that she has such capacity.

B. Matters considered:

3. Most of the documents were collated into a hearing bundle consisting of two lever arch files. Some were added during the course of the hearing. I have read all of them, including:

    a. Filed on behalf of the Applicant

    Position statements dated 17th March 2017 [**A15**], 17th May 2017 [**A22**]

    Statements by Landa George dated 16th December 2016 [**G1**], 28th February 2017 [**G25**], 15th August 2017 [**G57**], 17th May 2017 [**G133**], 28th June 2017 [**G151**], 23rd August 2018 [**G375**], 20th November 2017 [**G399**], 10th January 2018 **[G494**], 9th April 2018 [**G501**], 24th April 2018 [**G520**], 18th June 2018 [**G652**], 19th December 2018 [**G796**] and 11th January 2019 [**G802**]

    Statement by Olakunle Adeleye dated 17th October 2017 [**G395**]

    Sanjiv Luckhea (NELFT) dated 25th May 2017 **[I87**]

    Statements by Aleister Griffin, dated 21st November 2018, 28th November 2018 [**G767**]

b. Filed on behalf of the First Respondent

Position statements dated 2nd March 2017 [**A9]**, 16th May 2017 **[A34]** , 11th September 2017 [**A60**]

State**ments** by Nilufer Ozdemir dated 16th February 2017 **[G6**], 5th April 2017 **[G38],** 16th May 2017 **[G119**], 4th December 2017 [**G424],** 20th March 2018 [**G477**], 29th May 2018 [**G627**]

Statement by Rhea Taylor-Broughton dated 26th July 2018 [**G742**]

Statement by Maria Nicholas dated 16th November 2018 **[G758**]

Letters dated 13th and 18th December 2018

c. Filed on behalf of the Second Respondent

Position statement dated 18th November 2018

Statement by Alice Livermore dated 19th January 2018 [**G440**]

Statement by JJF dated 19th July 2018 [**G721**]

d. Expert and other reports

Dr Rippon (consultant developmental psychiatrist): reports dated 3rd May 2017 [**I63**], 6th June 2017 [**I94**], 13th June 2018 [**I98a**], 5th September 2018 [**I124**], 28th November 2018 [**I137**]

Emilia Abang (Learning Disabilities Nurse): 8th November 2017 [**I105**] and 9th January 2018 [**I123**]

DOLS Form 4 capacity assessments by Dr. Dinakaran dated 31.12.2016 [**F1**] and 3rd October 2018 [**F160**], by Dr. Kannabiran dated 14.11.2017 [**F92**] and 1st March 2018 [**F135**] and by Dr. Hanif dated 8th February 2018 [**F126**]

Denise Diggines (IMCA): report dated 24th August 2018 **[D96**]

e. Miscellaneous

Joint position statement of the parties dated 15th February 2018 [**A83**]

Letter from Barts Health NHS Trust dated 22nd November 2018 [**J342**]

Discharge Information summary from hospital admission on 23rd August 2018

Support plan dated 3rd January 2019

4. There were five further statements filed (by Landa George dated 11th December, by Adele Scott dated 11th December 2018, by Amelia Walker dated 17th December 2018, by Tom Lewenstein dated 13th December 2018 and by JJF dated 14th December 2018.) The parties agreed on the final

day of the hearing that these statements were not relevant to the Court's determination and should be disregarded. Although I read them in the course of proceedings, I therefore exclude them from present considerations.

5. I heard oral evidence from Dr. Rippon, Landa George, and Aleister Griffin. SJF and JJF both addressed the Court, as they preferred, from their chairs in the second row of the court room, with their Counsel asking questions to help them say what they wanted. Neither was sworn or subject to cross-examination by any other party.

C. Factual Background

6. SJF is not in robust health. She has a long-standing diagnosis of schizophrenia but it is common ground that her symptoms are substantially controlled by depot medication. More pertinent to these proceedings, she has mild learning difficulties. She has poorly controlled diabetes, which has led to impaired vision and chronic kidney disease, for which she receives dialysis three days a week. She is described as 'morbidly obese' and 'blind', and has limited mobility. At the outset of the hearing she required two sticks to mobilise. Since the commencement of this hearing, SJF has fallen on more than one occasion and has had three admissions to hospital (where she remains presently.) Her mobility is now further reduced to 'a few steps' and it is not clear whether or how much improvement on that may be regained.

7. For about 30 years before these proceedings started, SJF was living in a flat at 3TH in Hackney, which she rented initially from the Local Authority and latterly from Sanctuary Housing. The flat has three bedrooms. It is on the first floor but there is no lift. This is the flat to which SJF wishes to return.

8. SJF has one son, JJF, who is the Second Respondent in these proceedings. She is clearly devoted to him. He has difficulties of his own. He attended a Special Needs school and his ability to read and write is limited. He is represented in these proceedings, and considerable care has been taken by his representatives and the court to ensure that the matter has proceeded in a way which has not overwhelmed his ability to give instructions. In particular, most of the second morning of the hearing was taken up with clarifying whether or not JJF wished to part company with his representatives. Ultimately he decided to retain their services. I commend Ms. Hearnden and Mr. Lowenstein for the care they have taken to ensure that JJF's case is seen by him to have been fully presented to the Court.

9. The flat at 3TH is JJF's home too, and has been since he was about 5 years old. However he has no independent right of occupation of the flat. If SJF is permanently placed elsewhere and her tenancy terminated, JJF is likely to be dependent on temporary housing provision.

10. SJF has other family members who live in the Hackney area, including PM and JM. PM is SJF's brother. He was informed of the proceedings and attended on one day of the hearing but otherwise has taken no active part. JM is a cousin. Initially she was joined as party to the proceedings, speaking 'for all the family.' Separately she initiated judicial review proceedings. Permission to bring those review proceedings was however refused [**D71**] and subsequently JM asked to be discharged from these proceedings. Whilst she was involved in proceedings, JM visited SJF fairly frequently. Latterly there has been no contact, apparently because of the difficulties of distance.

11. By the summer of 2016, SJF was receiving a package of care consisting of four visits a day, each of approximately 45 minutes to one hour duration. JJF provided support at other times but he was finding it difficult to cope. An incident occurred which prompted SJF's GP (Dr. Carter) to raise a safeguarding alert. JJF's conduct towards Dr Carter subsequently meant that she could no longer continue as SJF's GP. JJF pleaded guilty to an assault on his mother. As a result, and because he was on licence for other offences, on 8th June 2016 JJF was recalled to prison.

12. Whilst her son was detained SJF continued to live in the flat at 3TH, and the care package was supplemented by the introduction of a waking night carer from 10pm until 8am – a total of 100 care hours per week [**G68**].

13. When JJF's release from prison looked imminent, the Local Authority began these proceedings.

D. <u>Proceedings to date:</u>

14. By COP1 application dated 16th December 2016 [**D11**], London Borough of Hackney sought urgent interim orders to move SJF to live at HV Care Home, for her contact with her son to be supervised, and for authority to terminate her tenancy. A standard initial directions order was made on 19th December 2016 [**D18**]. Meanwhile London Borough of Hackney also made a without-notice application out of hours. On 21st December 2016 Francis J made an order providing that SJF be moved to HV Care Home before 30th December 2016 (when her son was expected to be released from prison) and for her contact with her son to be supervised.

15. Attempts to move SJH to HV Care Home on 23rd December 2016 were not supported by her wider family and the police did not attend as planned so the attempt was aborted with an agreement to try again after Christmas. On 28th December, SJF's transport from a hospital appointment was diverted to take her directly to HV Care Home. Carers subsequently went to collect P's clothes and medication but family members denied them access to P's flat. On 31st December 2016, JJF was released from prison and returned to 3TH.

16. On 24th January 2016 [**D28**], Francis J transferred the matter back to the Court of Protection central registry, where directions were given **[D30**] for a Case Management Conference on 3rd March 2017. At that hearing SJF's niece, JM, informed the court that she wanted to be party to these proceedings and that Judicial Review proceedings had been lodged to challenge the process by which SJF had been moved. She was joined as party; the proceedings were reconstituted as a s21A challenge to the SA granted on 10th January; provision was made for the joint instruction of a consultant psychiatrist; and a further hearing was listed on 17th May 2018.

17. Shortly before the hearing SJF was admitted to hospital with very high blood sugar levels. At the hearing on 17th May 2017 [**D49**] the Local Authority's position was that, because of the need to administer insulin injections three times a day, it would not be in SJF's best interests to live in supported or residential placement and nursing placement would be required. Further directions were given, with provision for a final hearing on 16th October 2017.

18. The difficulties of administering three insulin injections a day lead to further interim hearings to establish which health authority bore statutory healthcare responsibility. Not without some persistence, it was finally established that the relevant body was (and is) NELFT.

19. At a hearing on 12th September 2017 [**D65**] the expert evidence was that SJF may regain capacity in certain relevant domains if some further educative work was done with her. It was agreed that

Emilia Abang would undertake that work and visit alternative placements with SJF so that she may have a more concrete understanding of the options. Both JM and her daughter offered to undergo carers' assessments. To allow time for all this to be done, the final hearing was relisted on 11th December 2017.

20. Shortly after that hearing SJF was again admitted to hospital, this time with an infected leg ulcer [**I110**]

21. By the time of the December 2017 hearing, SJF's visits to various placements under consideration had not been completed. The matter was adjourned with further directions, including for the discharge of JM as party and the joinder of JJF. The final hearing was subsequently rescheduled to the first available date after 28th August 2018.

22. In the meantime, there was a series of applications and orders culminating in a further interim hearing on 5th April 2018, to address issues concerning the Standard Authorisation. At a hearing on 5th April 2018 the Standard Authorisation then in place was extended to 11pm on 30th August 2018, so as to cover the remaining period until conclusion of the final hearing.

23. Unfortunately the August hearing had to be vacated because of judicial non-availability. SJF's representatives informed the Court that they had been informed that a fresh Standard Authorisation had been granted. In fact, this was incorrect because the assessing doctor had come to the conclusion that SJF had capacity to decide whether to live in the care home. On 21st October 2018 the Applicant made a COP9 application, asking the Court to authorise the deprivation of liberty. That application was only referred for judicial consideration on 16th November, when I made an order providing for it to be considered at this hearing.

24. By the end of the third day of this hearing, it was apparent that gaps in the information available needed to be addressed before final submissions could be made. Directions were given for Dr Rippon to answer some further questions, for a statement from Aleister Griffin to address JJF's housing position, and for the Local Authority to set out a plan of how SJF's needs could be addressed on a trial return to 3TH.

25. Those documents were all filed but in the meantime SJF had again been admitted to hospital, this time suffering sepsis in a leg ulcer. She was discharged to HV Care Home but was "too weak" to attend the fourth day of the hearing on 4th December. On behalf of JJF, Ms. Hearnden asked that the hearing be adjourned so that SJF could attend when recovered. Both the other parties opposed that application, with Ms. Burnham pointing out on behalf of SJF that she had wanted the matter concluded as soon as possible. The application to adjourn was refused and the parties made closing submissions on 4th December. After some discussion, I indicated that a written decision would be given, within an anticipated timescale of one week.

26. Unfortunately, the following day the Local Authority informed the Court that there had been further developments after the conclusion of the hearing, about which it wished to make representations. I gave directions on paper to provide for the Court to consider any objections to this; or, in the absence of objections, for all parties to file such representations as they wished to make.

27. The further information placed before the Court was of two types – firstly narrative evidence (which is now agreed to be excluded from my consideration) and secondly information that SJF's health had significantly deteriorated. She had fallen from her chair and been unable to get to her room. An ambulance had been called and she was admitted to hospital. By letter, SJF's

representatives asked for further directions to provide for filing of updating medical evidence as to SJF's current state of health and likely prognosis before the Court determined the matter. On 17th December I made that order, providing for further consideration on the papers.

28. On 27th December I made an order which recited what seemed to be the current position:

> "a. SJF is presently an in-patient in hospital;
>
> b. SJF's mobility is presently reduced such that she 'cannot manage the stairs' to a first floor room 'Despite support from two staff' and the medical expectation is that her mobility is limited to 'taking a few steps to be able to stand and transferring between bed/chair/commode;"
> c. It would appear that SJF's needs (which include leaving her home to attend kidney dialysis 3 days a week) cannot any longer be met at 3TH, which is on the first floor;
> d. …."

The order required the Local Authority Applicant to provide to all parties no later than 4pm the following day outstanding information about how quickly a care package at the Official Solicitor's preferred placement could be implemented, and listed the matter for attended hearing on 8th January.

29. SJF's representatives subsequently made a COP9 application to vacate that hearing, which was supported by the other parties. The order made on 8th January 2019 in response included recitals setting out the information now before the Court, namely that:

> "a. following SJF's recent stay in hospital and discharge back to [HV] it has been reported that her mobility has been seriously affected;
>
> b. that SJF's mobility is so compromised at the moment that [HV] feel unable to attempt to support her to attend the hearing listed for 8 January;
>
> c. that SJF is reported to be no longer able to sit up in a chair or to access the toilet and SJF being assisted to use a commode instead;
>
> d. that SJF is spending her time in bed, and only sitting up for meals;
>
> e. that SJF is still attending dialysis three times a week, but is assisted up and down the stairs on a stretcher;
>
> f. ….
>
> g. that it is the Official Solicitor's view that the court will require clear and reliable indications as to the future clinical picture before it makes its decision on a move."

The hearing on 8th January was vacated, with directions for the filing of an updated support/care plan, a statement setting out details of SJF's current health condition and prognosis, and responses. The matter was relisted on 29th January.

30. On 24th January JJF made a COP9 application to vacate the hearing on 29th. Both of the other parties opposed the application, which was refused on the papers on 28th January. At the hearing on 29th January Ms. Hearnden was permitted to make the application for adjournment again. After

hearing submissions from each party, the application was refused for reasons given orally at the time.

31. At the conclusion of the hearing on 29th January I indicated the Court's decision in simple terms – that SJF lacked capacity in relevant terms, and it is in her best interests that she lives at L Flat – with a written judgment to follow. I acceded to the request of SJF's representatives that they be allowed further time to consider their position in respect of termination of her tenancy.

E. The available options

32. There have been four options for SJF's residence and care before the Court. The details of each have shifted somewhat over the course of the hearing but I understand the options to be as follows:

Option 1 - Return to 3TH: After a frustrating lack of clarity, the Applicant explicitly confirmed at the outset of the hearing that SJF's return to 3TH is an available option, even with JJF continuing to live there too. In order to facilitate that arrangement, the Local Authority agrees to fund 4 care visits a day of 45 minutes to 1 hour duration, plus a sleep-in support worker.

Option 2 – SZ Supported living placement: SZ is a house which can accommodate up to 5 residents, and SJF would be the fourth. There are 2 staff on duty during the day and one at night ('on a 'responsive basis' only). The Local Authority has not confirmed whether district nurses would visit or be required to visit given the staffing levels but, according to Ms. Walker's submissions, it "does not anticipate difficulty" in that regard.

SJF would have her own bedroom and bathroom, accessed through a communal front door, with a shared sitting room, kitchen and garden. Residents are supported to prepare their own meals or staff "would provide meals" if that is what the resident's needs required. The only limitations on contact with JJF would be that there would be 'light touch' supervision from the daytime staff and it could not take place after 8pm.

Option 3 – remaining at HV Care Home: There can be up to 6 residents at HV Care Home, with 2 staff during the day and one at night. SJF has her own room on the first floor and SJF is able to visit for contact with 'light touch' supervision.

Option 4 – L Flat: L flat is self-contained within a block of similar flats. It is on the ground floor and all on one level. The flat has a kitchen, dining area, wet room, small garden and two bedrooms. There are two ways in which this accommodation could be used. Either the flat could be exclusive to SJF, with the second bedroom used for a sleep-in carer; or a second "service user" could "share" the flat with SJF, sleeping in the second bedroom. If SJF were to have exclusive occupation of L flat, the Applicant would provide 4 visits a day plus a night support worker. If the flat was to be shared with a second person, a waking night support worker would be funded. Ms. George's latest statement refers [**G809]** to 4 care visits in the

daytime and a "Waking Night-Support worker," which suggests that "sharing" the flat with another resident is very much envisaged.

Initially the Applicant had suggested that contact would have to take place away from the L flat. By the start of the hearing, the position had changed to being willing to facilitate contact at L flat during one of the 4 care visits, with a second support worker being provided for that session (ie contact limited to 45 minutes to one hour a day). Ms. George's latest statement refers [**G809**] to twice weekly contact at the flat for a period of 2 hours. Ms. Walker confirmed that this is an error and the intention of the Local Authority is to enable contact at the flat three times per week, with both the usual support worker and an additional support worker present; and additionally 3 hours per week of 'community access', with support from one support worker. Ms. Walker confirmed that the community contact sessions could be facilitated at weekends.

F. The parties' positions

33. The Applicant Local Authority contends that SJF lacks capacity in all relevant domains. It has throughout the hearing vigorously opposed a return to 3TH, even on a trial basis. Its preferred arrangement has consistently been Option 2 – SZ Supported Living placement. It's 'second best' arrangement would be for SJF to remain at HV care Home – Option 3.

34. SJF herself considers that she can make her own decision about where she lives and what care/treatment she receives, and she has been consistently clear that she wishes to return to live with her son at 3TH. When it was suggested that she was 'settled' at HV, she loudly interjected to refute that idea. There is no indication before me that she has changed her mind since the outset of the hearing.

35. SJF's Litigation Friend takes a different view. The Official Solicitor accepts the expert evidence that SJF lacks capacity in relevant domains. At the outset of the hearing, the position statement filed on behalf of the Litigation Friend supported Option 4, but this seemed to be on the assumption that SJF would have exclusive occupancy of the L flat. By the end of the third day of the hearing, the Litigation Friend was minded "not to stand in the way of" a trial of Option 1, and that remained the position until after the 4th December hearing. However, by 13th December [**J358**] the Litigation Friend's position was that the deterioration in SJF's health and mobility now meant that a trial home would not be in her best interests, and Option 4 was preferred.

36. JJF contends that his mother has capacity to make for herself decisions about where she lives, how she is cared for and the treatment she receives. He supports her wish to return to 3TH, and furthermore that is what he wishes as well. Ms. Hearnden's submissions on the final day of the hearing were initially that JJF did not offer a preference as between the Local Authority's preference (Option 2) and the Official Solicitor's (Option 4), regarding them both as "equally problematic." However, having heard the Official Solicitor's closing submissions, when offered again an opportunity to express a preference as between Options 2 and 4, he indicated a preference for Option 4, although "ideally living there by herself."

G. The Evidence

37. The evidence before the Court is extensive. SJF's unstable health and changing treatment regimes mean that some factors which appeared to be of great significance in the earlier part of the hearing carry less significance now but throughout there have broadly been two themes: firstly, SJF's health needs and secondly, the extent to which JJF's behaviour impacts on the ability to meet those needs.

38. The Local Authority's evidence is that:

    a. Aside from episodes of acute illness, SJF does not require 24 hour nursing care but does require daily professional assistance with diabetic medication and ulcer care:

        i *Diabetes medication:* In her April 2018 statements Ms. George described SJF's blood sugars as "well controlled" [**G503**] with Novorapid injections administered by healthcare professionals [**G525**].

        That was still the position in time of the June 2018 statement [**G653**] but it emerged during the hearing that Novorapid was no longer being given, that SJF was taking only oral medication, and that her blood sugar levels were significantly high.

        In oral evidence Ms. George suggested that the Novorapid was stopped at the time when dialysis started (September 2018) and that the high blood sugar levels may be caused in part because the hospital dialysis staff "offer her cups of tea and biscuits."

        The current position according to Ms. George's latest statement [**G806**] is that SJF "is now back on Novorapid injections twice a day morning and evening meals, which are administered by [HV] staff. SJF also has Lantos insulin injections in the morning, which are administered by District Nurses. This has resulted in better managed blood sugars since her discharge from hospital in December 2018."

        ii *Ulcer care:* When giving oral evidence, Ms. George orally confirmed that SJF's ulcers are dressed daily at HV Care Home by District Nurses.

    b. With three hospital admissions during the course of the hearing, SJF's health has taken a downturn:

        i After discharge from the second hospital admission, there was said to have been "deterioration of her mobility, which has impacted other areas of her life" [**G807**] in that SJF is now using incontinence pads and can no longer have a shower because of the distance to the facilities.

        ii SJF is said to spend the majority of her time in bed; and in order to leave HV on dialysis days "it now requires up to 4 ambulance staff to support SJF up and down the internal stairs" at HV.

        iii A referral to a re-ablement service has been recommended but not yet made in view of the current (third) hospitalisation. If such a referral is made, it "will take 4 weeks"

and last for "up to 6 weeks". As to the effect of any such programme, "It is hoped this will be of benefit however, there is no guarantee that SJF will revert to her baseline mobility."

c. Even before this deterioration, the Local Authority expressed concerns that JJF would not be able to cope with the demands of living with and providing care to SJF.

   i Ms. George orally referred to "inherent stresses around being a carer" and historical experience of breakdown in living arrangements, leading her to be "not sure JJF is able to ask for support when he needs it."

   ii More specifically, Ms. George expressed concerns about how SJF's dietary needs could be managed in JJF's care. She referred to an occasion when staff at HV found SJF with Guinness and sausages after her son's visit, although when cross-examined, she did accept that SJF's blood sugar levels were now raised "constantly, not just when JJF visits." Even with improved explanation such as pictures, and with carers generally around at mealtimes Ms. George was "still concerned about SJF asking for 'bad' foods and [JJF's] ability to resist if she continued to ask."

d. The Local Authority accepts that JJF 'generally got on well' with his mother's carers. However as regards other healthcare professionals the Local Authority maintains that JJF's behaviour means that it would not be possible to meet SJF's need for professional care at 3TH, and if she lives at either SZ or L Flat, initially at least contact would have to be supervised:

   i In her written evidence [**G31**] Ms. George states that "Nurses who tend to SJF at home report a history of threats of violence, verbal assaults and threatening behaviour from [JJF] towards members of the care team. SJF's previous GP – Dr Carter, was verbally threatened by [JJF] and as a result is no longer SJF's GP. [JJF] has also threatened SJF's learning disabilities nurse and Housing Worker. On 8th June 2016 learning disabilities integrated team received a report that Dr Carter who had been SJF's GP for many years was threatened whilst on a visit to SJF's flat. Dr Nelson her psychiatrist at the Integrated Learning Disabilities team reported that [JJF] had threatened to stab SJF, pack his bags and abandon her. Professional attending a multi-disciplinary meeting on 01 December 2016 described [JJF's] behaviour as unpredictable. Reports from nursing management state that staff are intimidated by [JJF] and have stated that they do not feel safe…"

   ii There is exhibited to Ms. George's third statement [**G105**] an e-mail from the Learning Disabilities Service dated 28th December 2016 confirming that SJF's then GP "reported they will not go into her home address without a police escort."

   iii Another exhibit [**G533**] is a table listing 9 incidents between 30th March 2016 and 28th March 2018 when JJF is said to have demonstrated aggression, verbal abuse, swearing, shouting, spitting, making threats to kill, making verbal threats, harassing staff, making false allegations, causing a disturbance, or causing intimidation.

   iv There is included in the hearing bundle [**J346**] an e-mail from the Lead Nurse of the Adult Community Nursing Service explaining that "based on [SJF's] clinical need in any

other situation we would treat her at home….however despite our safety policy and risk reduction measures I feel that the son is of significant risk to staff that home visits would not be an option."

39. For SJF, her legal representatives have filed 8 attendance notes:

    a. In February 2017, SJF clearly expressed a wish to "go home." Her account of why she was not there at present was that she "had an argument" with her son: "I told my doctor about the incident and they arrested him." She said that JJF "has never hurt me, he hit me but he never hurt me. I want to go home and I want to live with him." [**G14**]

    b. In April 2017 "she was consistent in her wish to live in her own home with [JJF]" [**G48**]

    c. In May 2017 SJF became tearful expressing her wish to return to her flat [**G126**] but also said that could live there "temporarily and then move to a ground floor flat." [**G128**]. She said she "would be very upset" if JJF could not live with her.

    d. In December 2017 SJF explained that she "just [didn't] like" the placements she had visited [**G431**]. She said she liked being at HV but she wanted to return home "because I like my own independence and you can't be independent in a care home."

    e. In March 2018 SJF was asked about moving to a ground floor room at HV which had become available. She "confirmed several times that she wanted to remain in her room on the first floor." [**G487**] She asked if she could go home for weekends.

    f. In May 2018, when considering possible placements, SJF was clear that she wanted "my own flat" [**G634**]. She wanted to go home and she wanted to live with her son. The attendance note records several matters on which SJF disagreed with JJF, even telling him to moderate his behaviour: "you need to cool down…it doesn't help." [**G641**]. SJF denied that her view of the possible placements was affected by JJF, saying "I just want to be in Hackney and I want to have my own place" [**G648**] She rejected both SZ and the L Flat.

    g. In July 2018, SJF again rejected both SZ and L Flat. She was clear that she "would only live in Hackney because that's where my family is" [**G754**].

    h. In November 2018, SJF could recall the placements she had visited but "didn't like none of them." [**G764**] She avoided expressing a preference as between SZ and L Flat. She wanted to live with her son.

40. When she addressed the Court directly, SJF said "my mind is alright…I do understand risks…I do want to live with my son." She said that she had never seen JJF be rude to anyone except the doctor: "he was shouting but not violent to the doctor." She said she wanted to live in her own flat or a ground floor flat in hackney. She didn't like the L Flat "because it's uncomfortable" but

when asked to choose between SZ, HV and the L Flat, she said "I'd choose [L Flat.]" That was immediately followed by her asking "Why don't I get a flat with [JJF]? …I'm used to it. He's my child. We'd be better off together."

41. JJF remains hopeful that his mother's health will improve again:

    a. In respect of his ability to care for SJF at home, JJF's evidence is that that he would be able to help her to use the stairs, as he had before, so it would not be unsafe. He suggested that the bathroom could be improved by the addition of a shower over the bath, as he thought had been provided for some neighbouring properties. He did not regard it as a problem that SJF preferred to sleep on the sofa. He felt that he could "get along with carers", and that the proposal of an overnight carer would be "OK" although he would not need such help.

    b. In respect of SJF's dietary management, JJF's written evidence was that he was not given any explanation of her dietary needs until sometime after 2013, when she had already lost her sight [**G727**]. He was willing to learn and thought that the provision of picture guidance might help. He denied that he had "been sneaking food in" to HV Care Home but accepted that on one visit (April 2018) he had taken with him food from the chip shop he had just visited and when his mum asked for a bit of saveloy, he gave her "just a little bit". He admitted this to the HV Manager and has since stopped taking food for himself to HV because he does not want to argue with his mum. When he takes food into HV now, he gives it to the carers to put in the kitchen [**G730**]. He says that in the future he'd "say no" to requests for unsuitable foods "even if she badgered me. I'd walk out or eat before. I'll eat the same food as she eats."

    c. JJF expressed surprise that district nurses would not be willing to attend to SJF if he lived with her [**G740**]. His account is that he "really liked the district nurses who used to attend her when we lived together" but he offered to go out when the district nurses or the GP want to visit, or to stay on the balcony "even for half an hour."

    d. JJF only partly accepts the Local Authority's description of his behaviour or its consequences:

        i He says that the incident of assault in June 2016 was really just roughness in care [**G727**]: "I was cleaning up and I moved her leg so I could clean the food around it. I did these things quite roughly and I can see how she might have thought that I was punching her leg or placing my hand over her mouth to hurt her but this was not the case." He accepts that he "said some really mean things to her."

        ii JJF does not accept that he shouted or became angry with Dr Carter when she arrived at the flat on that occasion. He says that he has seen Dr Carter in the community since without any difficulty [**G731**].

iii JJF accepts that he shouted at Emilia Abang in March 2016 but explains that he was on that occasion extremely upset about his grandmother's death and difficulties he was experiencing with passport renewal to enable him to go to her funeral. [**G732**].

iv JJF accepts shouting at Emilia Abang again in October 2017 when she arrived to take SJF to visit some placements under consideration. He explains that this was because of general distrust arising from the manner in which SJF was first removed from her home. He says he "did get upset and started shouting but never had any intention of hurting Emilia." [**G732**]

v JJF also accepts that sometimes (February 2018, March 2018, May 2018) he has "become upset about things whilst…at HV" and "got angry" [**G733**]. He says that he "never has any intention of hurting" anybody and points out that if he had anger management or counselling it might help him to remain calmer.

vi JJF also accepts that in May 2018, when visits to care homes were supposed to be happening, he "said lots of really bad things to my mum's solicitor." He acknowledges that the frustration he experienced with the plans for the day "wasn't an excuse to shout at her so much." [**G734**]

e. When addressing the Court directly JJF was asked by his Counsel to explain why he wanted SJF to return to 3TH. His response was that she has "been living there all her life," so that "family can visit" and because "I want to live here too." He explained that a cousin had stayed in the property whilst he was in prison but the cousin could no longer do that "because Mum is in a care home." In respect of the other placement options he thought it was important for SJF to be in Hackney so that family and friends could visit. He was worried that if another resident was moved into the L Flat with SJF he would "get back in trouble because they are trying to control me and my mum's life." He felt that SJF "wouldn't like having someone else there." He said that SZ was "too far" and he "wouldn't go – I don't know how to get there."

42. In respect of capacity, the 'expert' evidence before the Court comes from the process for granting Standard Authorisations of deprivation of liberty in a care home, from the joint instruction of an independent expert within these proceedings, and from steps taken in the light of the independent expert's recommendations.

43. Within the Standard Authorisation process there have been differing conclusions reached:

a. On two occasions, SJF's IMCA has challenged an assessment of lack of capacity (Safina Ali on 3rd May 2017 [**I01**] and Denise Diggines on 24th August 2018 [**D96**]);

b. On 31st December 2016 and 14th November 2017 respectively Drs Dinnakaran [**F1**] and Kannabiran [**F92**] concluded that SJF lacked capacity to make her own decision about accommodation in a care home.

c. On 8th February 2018 Dr Hanif [**F126**] found that SJF

i "showed understanding" that she was in a care home;

ii had sufficient retention "to engage in the decision-making process…. could recall pertinent details of the interview and retain information relating to restrictions imposed on her by virtue of being in the home;

iii was able to "weigh up the pros and cons of remaining in the home versus elsewhere" and was clear that "she would not manage by herself; and

iv was able to communicate her wishes.

He concluded that SJF had capacity to make her own decision about being accommodated in a care home.

b. A second opinion was sought from Dr. Kannabiran. On 1st March 2018 [**F128**] he found that SJF was unable to use or weigh relevant information:

> "…she was not able to appreciate the concerns expressed regarding her returning to her fat and living with her son….She acknowledged the information about the risks but was not able to use or weigh the information about this risk."

He concluded that SJF lacked capacity to make her own decision about accommodation in a care home.

c. On 3rd October 2018, Dr Dinakaran [**F160**] noted that:

i SJF's "comprehension of information presented to her seemed adequate" and she "nodded and confirmed that she was able to understand the concerns expressed by professionals regarding her potential vulnerability to abuse and exploitation by her son, especially due to her declining health and increasing dependence on others for her day to day needs;"

ii Her retention of information was "adequate" and she was "able to recall that she takes medication for diabetes and is also undergoing regular dialysis due to kidney problems." She initially informed him that she had suffered damage to her eye "as she had hit her head" but "after some prompting" SJF was able to acknowledge that diabetes could have contributed to her sight problems. SJF "also reluctantly admitted that [her son] shouts at her…" She acknowledged that "she may not be able to protect herself should he become abusive to her, as she is physically weak". She admitted that she needed help, is willing to accept it and "reluctantly admitted the difficulties that professionals could face in visiting her at home or delivering appropriate care for her should he son become obstructive or abusive towards them."

He concluded that SJF had capacity to make her own decision about being accommodated in a care home.

44. The jointly instructed independent expert is Dr. Rippon, a consultant developmental psychiatrist with particular experience in the assessment and treatment of individuals with learning difficulties and developmental disorders. She has filed five written reports and gave oral evidence. She interviewed SJF in person on 6th April 2017 and 19th May 2018; and by telephone on 28th April

2017. She answered supplementary questions to address issues which arose in the course of the hearing.

45. Dr Rippon is clear in her conclusion (accepted by all parties) that there is no evidence of delusional beliefs impacting on SJF's capacity but that SJF's learning disability meets the diagnosic part of the Mental Capacity Act test [**I98p**]. As to the functional test, Dr. Rippon concludes that SJF lacks capacity in the following domains:

    a. capacity to conduct these proceedings:

        In her first report, Dr. Rippon 'could find no evidence that SJF understood the nature of the proceedings themselves or the potential outcomes of the proceedings.' [**I78**]

    b. Capacity to make decisions about her residence, care and treatment:

        First report: Dr. Rippon concluded that SJF did not understand:

        i the risks associated in returning to her flat; or

        ii the impact of:

            a. not being able to access the community on a frequent basis;
            b. being in an environment which would make it difficult for emergency services to reach her quickly;
            c. having a package of support which did not afford her 24 hour staffing; or
            d. her own deteriorating health on her increased need for support in the future.

        and was therefore unable to weigh up the positives and negatives of a particular type of residence or package of support.

        In respect of medication and broader diabetic management, Dr Rippon's view was that SJF's understanding was "extremely basic" and "not at a level required to understand the information necessary to make an informed decision regarding her medical treatment."

        Second report: Dr Rippon was asked about potential for SJF to achieve capacity with support. She confirmed that such possibility existed "if further work was done" and suggested that SJF be shown concrete examples of the residence options.

        Third report: Dr Rippon "found no evidence that [SJF] could consider a particular placement and think about how it might meet her own needs" and "no evidence that she can think through the consequences of returning to her first floor flat to live with her son." [I98s] She further found "no understanding of why she takes a diet which is low in fat and sugar" and concluded that SJF "does not understand the nature of [her diabetes] or its potential impact on her physical health should her diabetic control not be appropriate

        Fourth report: Dr Rippon confirmed her earlier conclusions.

        Fifth report: Given the information which emerged in the hearing that SJF is not presently prescribed four times daily administration of Novorapid, Dr Rippon noted that SJF still needs daily input from healthcare professionals and carers for other matters. She maintained her view that SJF "does not understand the implications of failure to receive

appropriate care" and identified the risks of such "impact on her physical well-being…deterioration in her diabetic control…impact on the dialysis."

In her oral evidence, Dr Rippon was asked to consider Dr. Dinakaran's conclusion that SJF appeared to have adequate comprehension of her need for help and support. She did not agree : "when you ask her 'do you require help' she says 'yes' consistently….but she doesn't understand the reasons why she needs help or the consequences of not having that help on her physical and emotional wellbeing. She's pleasant and co-operative – she nods and agrees, without actually understanding."

c. Capacity to make decisions about contact with others:

Dr Rippon identified that SJF "would need to understand the benefits of contact with a range of individuals…includ[ing] the information that family members can provide her with emotional support, day to day support in her everyday life and some degree of advocacy for her" but also "the risks that family members… may pose to her."

First report: Dr Rippon concluded that SJF "under-estimated the potential risks which her son may pose to her, over-estimated her ability to keep herself safe and could not think through the long-term implications should she live with an individual who is potentially aggressive."

Second report: Dr Rippon thought it "unlikely" that SJF could develop capacity around contact with other people "even with work".

Third report: Dr Rippon confirmed her earlier conclusions.

d. Capacity to terminate/enter into a tenancy agreement :

Dr Rippon found that SJF understood the nature of a tenancy agreement and the implications of not upholding it.

First and third reports: Dr Rippon concluded that SJF has capacity to enter into a tenancy agreement.

Fourth report: Having been referred to case law, Dr Rippon's position changed. She considered that SJF's decision to terminate her tenancy agreement "is linked to her decisions in respect of residence and care and treatment." Concerns about her lack of capacity in those domains "would result in a lack of capacity to make a decision as to whether or not to terminate her tenancy." Dr Rippon further thought that the same link applied to decisions to enter into a new tenancy agreement.

Oral evidence: Dr Rippon confirmed her conclusion that SJF lacks capacity both to terminate and enter into a tenancy: "she'd understand the document – the concrete ideas of tenancy. She'd be reluctant to sign because of her lack of understanding of why she'd need to move from her flat."

46. In relation to each of these domains of capacity, Dr Rippon's opinion is that SJF's difficulties "are secondary to her underlying learning disability and the impact which this has on her ability to understand particularly complex and abstract pieces of information and her ability to weigh up the positives and negatives of a particular course."

47. Dr Rippon was asked to consider the impact of SJF's relationship with her son:

a. In her third report she said that:

"It is my opinion that the relationship between SJF and her son is complex. He is obviously an individual who can present with challenging behaviour towards his mother, but also towards carers and professionals. …the main motivator for SJF as to where she should live was to be with her son…I believe she is incredibly worried about what would happen should she move into a placement without her son. It is my opinion that her learning disability makes it difficult for her to think that there may be other services and placements available for her son, which would mean that he didn't have to live with her. Although I believe that it is SJF's learning disability which directly impacts on her decision-making capacities, her worries and concerns about her son are certainly one of the drivers for any decisions which she makes." ***[I98w]***

b. In her fourth report, Dr Rippon further explained that

"SJF will place her son's needs before herself…it is a priority to her when she considers where she should live and how she should use her resources, that the needs of her son are put first. Any parent places the needs of their children before themselves but it is my opinion that SJF's learning disability results in her being unable to think through the consequences …." [**I134**]

but specifically in respect of care and treatment decisions, Dr Rippon further confirmed that SJF's inability to understand relevant information is "because of her mild learning disability…I do not believe that her motivation to be with her son impacts on this particular issue" [**I130**].

c. In her oral evidence, Dr. Rippon phrased it a bit differently: "she believes as a mum that her son's behaviour is going to improve. That's not necessarily because of her learning disability – many people in difficult relationships have a positive outlook of their relative's behaviour. Bur she does not understand the impact of him not being able to provide good enough care…[or] the impact it has on her access to professionals and support mechanisms."

Asked whether in fact SJF had "just acquiesced, rather than being unable to" understand/use/weigh relevant information, Dr Rippon refuted the suggestion: "it's not that she'd put up with abuse because that is her preference…she didn't adequately understand the risks of living with her son." Dr Rippon identified that SJF's learning disability has "several different effects – it prevents her from understanding the consequences of living with JJF, [it means] she is not able to appreciate the risks of not having appropriate care, [and] it prevents her from generating other possibilities for her son, other than living with her." When questioned by Ms. Hearnden, Dr Rippon said "[SJF] is in a difficult position. I've reflected a lot about whether her wish to return [to 3TH] is a lack of capacity or the concerns of a mum. On the balance of probabilities, I believe that learning disability impacts on her decision-making…. I don't believe that she understands the impact in the care she'll receive if she lives with her son – and that's secondary to the learning disability… I don't think she adequately understands the impact on her physical health."

48. Dr. Rippon was asked in oral evidence to consider what the effect on SJF might be of a decision not to return to 3TH. Her view was that "it would depend on what would happen to her son. If she was assured that he'd be looked after, she could be supported to live elsewhere. If she had concerns about him, there would potentially be negative effect on her mental state, her mood, potentially her psychotic disorder, increased anxiety could lead to positive symptoms. There could be a deterioration of her psychotic condition…. She'd find it disturbing. It's impossible to predict if she'd develop mood disorder or psychotic relapse."

49. The further work which Dr Rippon envisaged may help SJF to achieve capacity to make the decisions under consideration was undertaken by Emilia Abang, a Learning Disabilities nurse. Ms. Abang met SJF on 27th September 2017 and 25th October 2017. Her written report noted that:

    a. Diabetes: SJF "was able to say that diabetes was as a result of excessive sugar in her blood but….she could not relate to the fact that her diet could be causing her sugar levels to go up." Ms. Abang concluded that SJF was "unable to understand the effect of her diet on her blood sugar level. Therefore she was unable to weigh up the information about the impact of her diet on her diabetes" and lacks capacity around diabetes treatment. This appeared to be the same across both visits.
    b. Residence: Ms. Abang recounted the difficulties experienced with arranging the visits to potential placements. SJF was initially willing to go but on the day of the visits, JJF rang whilst they were preparing to leave [**I114**]. SJF then said that they should wait for him to arrive. When he did arrive he wanted to know why the visits were being undertaken without his knowledge and he became abusive. No visits took place that day. Further arrangements were made for visits on 25th October. Ms. Abang noted that SJF "was not really engaging" with the first visit but she "insisted she wanted to carry on with the viewing." [**I115/6**] By the third visit (SZ) she "appeared a bit more relaxed and was more engaging". Back at HV, SJF was heard to tell JJF by telephone not to worry as she was not going to take any of the places. SJF then did tell Miss Abang that she was not going to take any of the flats. She was unable to give any reason other than "I do not want them."

    Miss Abang concluded that SJF "shows some level of understanding of her care needs" but failed to understand the risks associated in returning to her flat; and was unable to weigh up either the benefits or disbenefits of being in a setting which was staffed 24 hours a day or the potential impact of her own deteriorating health on her increased need for support in the future." [**I120**]. She concluded that SJF lacks mental capacity to make decisions with regards to care and residence.

H. The Law

50. I remind myself of the fundamental principles of the Mental Capacity Act 2005, in particular that:

    a. pursuant to S1(2) a person must be assumed to have capacity unless it is established that he lacks capacity. The burden of proof is therefore on those who assert that capacity is lacking;
    b. pursuant to S1(3) a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success. The Code of Practice states at paragraph 4.16 that "It is important not to assess someone's understanding before they have been given relevant information about a decision. Every

effort must be made to provide information in a way that is most appropriate to help the person to understand."

c. pursuant to S1(4) a person is not to be treated as unable to make a decision merely because he makes an unwise decision. The outcome of a decision made is not relevant to the question of whether the person making that decision has or lacks capacity to make it.

51. I further remind myself that:

(1) pursuant to S2(1) a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to a matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. There must be causative link between the impairment/disturbance and the incapacity;
(2) pursuant to S2(3)(b) a lack of capacity cannot be established merely by reference to a condition which might lead others to make unjustified assumptions about his capacity. Lack of capacity cannot simply be inferred from particular diagnosis; and
(3) pursuant to S2(4) any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.

52. The test for determining whether a person is unable to make a decision is set out in section 3 of the Mental Capacity Act 2005:

"*S3(1): a person is unable to make a decision for himself if he is unable —*

(a) To understand the information relevant to the decision,

(b) To retain that information,

(c) To use or weigh that information as part of the process of making the decision, or

(d) To communicate his decision (whether by talking, using sign language or any other means).

S3(2): A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

S3(3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.

S3(4): The information relevant to a decision includes information about the reasonably foreseeable consequences of

(a) Deciding one way or another, or

(b) Failing to make the decision.

53. In respect of a decision about where to live, I have been referred to the decision of Theis J in *LBX v. K & Ors [2013] EWHC 3230.* At paragraph 43 she identified the relevant information as being:

    1. What the two options are, including information about what they are, what sort of property they are and what sort of facilities they have;
    2. In broad terms, what sort of area the properties are in (and any specific known risks beyond the usual risks ….);
    3. The difference between living somewhere and visiting it;
    4. What activities P would be able to do if he lived in each place;
    5. Whether and how he would be able to see his family and friends if he lived in each place;
    6. [factors regarding payment of bills]
    7. Who he would be living with at each placement;
    8. What sort of care he would receive in each placement in broad terms;
    9. …

54. To what level must such information be understood? In general terms, I have regard to the observations of Macur J (as she then was) in *LBL v. RYJ [2010] EWHC 2664 (Fam*) at paragraph 24 that

> "it is not necessary for the person to comprehend every detail of the issues...it is not always necessary for a person to comprehend all peripheral detail." What is required is that the person can "comprehend and weigh the salient details relevant to the decision to be made" (paragraph 58).

55. As I have noted on other occasion, in the complicated business of being human, there may be a number of factors operating on one's decision-making processes at any particular time. The Mental Capacity Act is so framed that, unless the Court is satisfied on the balance of probabilities that impairment/disturbance of mind or brain itself causes an inability to perform the thinking processes set out in section 3, the statutory test for incapacity is not made out:

> "...for the Court to have jurisdiction to make a best interests determination, the statute requires there to be a clear causative nexus between mental impairment and any lack of capacity that may be found to exist (s2(1)). "
>
> "The core determinative provision within the statutory scheme is MCA 2005, s2(1)....The remaining provisions of s2 and s3, including the specific elements within the decision making process set out in s3(1), are statutory descriptions and explanations which support the core provision in s2(1)… Section 2(1) is the single test, albeit that it falls to be interpreted by applying the more detailed description given around it in ss 2 and 3."
>
> Per McFarlane LJ in *PC & NC v. City of York Council* [2013] EWCA Civ 478 at paragraphs 52 and 56 to 58.

56. To determine whether, at the date on which the court is considering the matter, the person has or lacks capacity to make the decision in issue, the Court must consider all the relevant evidence, including but not limited to evidence from an independent expert:

> "Clearly the opinion of an independently-instructed expert will be likely to be of very considerable importance, but in many cases the evidence of other clinicians and professionals who have experience of treating and working with P will be just as important and in some cases more important In assessing that evidence, the court must be aware of the difficulties which may arise as a result of the close professional relationship between the clinicians treating, and the key professionals working with, P.,....in cases of vulnerable adults, there is a risk that all professionals involved with treating and helping that person — including, of course, a judge in the Court of Protection — may fee/ drawn towards an outcome that is more protective of the adult and thus, in certain circumstances, fail to carry out an assessment of capacity that is detached and objective."
>
> Per Baker J in *PH v. A Local Authority* [2011] EWHC 1704 (COP) at 16

57. Where lack of capacity is established, the other two principles of the Act are engaged:

> S1(5): 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.
>
> S1(6): 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.

58. Section 4 sets out a now familiar list of factors which must be considered in the determination of a person 'best interests', including:

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of –
   a. 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.

(2) The person making the determination must consider all the relevant circumstances and, in particular take the following steps.

(3) He must consider –
   a. Whether it is likely that the person will at some time have capacity in relation to the matter in question, and
   b. If it appears likely that he will, when that is likely to be.

(4) He must, so far as 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 and any decision affecting him.

(5) …

(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. The 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. …
b. Anyone engaged in caring for the person or interested in his welfare,
c. ..
d. …

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

59. Ms. Hearnden contends that, even if it is concluded that SJF lacks relevant capacity, her clearly expressed wishes and feelings should be given considerable weight; and has set out in her position statement a lengthy extract from the decision of HHJ Marshall QC in *S and S (Protected Persons)* [2010] 1WLR 1082, paragraphs 51 to 58 inclusive. It is an extract which well merits consideration in full but for present purposes it is sufficient for me to set out three parts of it:

> "52….. The statute now embodies the recognition that it is the basic right of any adult to be free to take and implement decisions affecting his own life and living, and that a person who lacks mental capacity should not be deprived of that right except in so far as is absolutely necessary in his best interests.
> …
> 55. ….the views and wishes of P in regard to decisions made on his behalf are to carry great weight. What, after all, is the point of taking great trouble to ascertain or deduce P's views, and to encourage P to be involved in the decision-making process, unless the objective is to try to achieve the outcome which P wants or prefers, even if he does not have the capacity to achieve it for himself?
> ….
> 57. ….in my judgment, where P can and does express a wish or view which is not irrational (in the sense of being a wish which a person with full capacity might reasonably have), is not impracticable as far as physical implementation is concerned, and is not irresponsible having regard to the extent of P's resources….then that situation carries great weight, and effectively gives rise to a presumption in favour of implementing those wishes, unless there is some potential sufficiently detrimental effect for P of dong so which outweighs this."

I. Discussion

60. On the question of incapacity, it is common ground that the diagnostic limb of the test is met but the only operative diagnosis is mild learning disability. Ms. Hearnden submits that this is not

sufficient for the Court to be satisfied that SJF lacks relevant capacity. Instead, she says, this is a paradigm example of a case where professionals are "harshly judging what they see as an unwise decision as being one which betrays a lack of capacity." Family dynamics are variable and personal to the individuals involved – some families are simply "more shouty" than others. It is, she says, for SJF to say whether she finds her son's behaviours intolerable or to be overlooked in large part as a product of his own difficulties. Rather than being unable to understand, use or weigh information about risk to her health if she lives with him, SJF's clearly stated wishes simply give greater weigh to her family life and her wish to be with her son, in her own home of many years. Ms. Hearnden suggests that this interpretation is borne out by the differing conclusions of professionals within the Standard Authorisation process, by Dr Rippon's initial position in respect of the tenancy, and by other domains in which SJF is treated as having capacity. She suggests that Dr. Rippon overinflates "what might happen" and attaches undue weight to that risk, to the detriment of other considerations.

61. Ms. Hearnden's submissions are well-made but, taking all the circumstances of this matter into account, I am not persuaded by them. I am satisfied that Dr. Rippon has carefully considered the complexities of SJF's health conditions and her relationship with her son. I accept her conclusion that it is SJF's underlying learning disability which directly impacts on her decision-making capacity and results in her being unable to understand, use or weigh relevant information about her treatment needs and the risks to her ability to have those needs met if she returns to live with her son at 3TH.

62. I am satisfied that Dr. Rippon has considered practicable steps to help SJF to make a capacitous decision, and that those steps have been taken. Having taken the recommended steps as far as practicable, I note that Ms. Abang reached the same conclusion as Dr. Rippon as to SJF's ability to make the relevant decisions.

63. In so far as Dr. Rippon's conclusions differ from those of Dr. Hanif and Dr. Dinakaran, I note that their reports were made in a more limited context, and have not been subject to testing in oral evidence. Even with those limitations, I note that Dr. Dinakaran has come to differing conclusions at different times, and Dr. Hanif's conclusion was not shared by the second opinion doctor at the time. Overall, I prefer the evidence of Dr. Rippon.

64. I am satisfied on the basis of Dr. Rippon's evidence that SJF lacks capacity to make decisions about where she lives, how she is cared for, the contact she has with others (notably her son) and whether to terminate and enter into tenancy agreements. It follows that the Court jurisdiction to make those decisions on her behalf and in her best interests is engaged.

65. Although SJF is presently receiving in-patient care in hospital, and notwithstanding the Local Authority's position earlier in these proceedings, it is presently no party's case that SJ requires 24 hour or nursing care upon discharge from hospital. If the hospital clinicians take a different view, this matter will have to come back to court again. I have taken the view that a decision between the currently available options needs to be taken now, notwithstanding some uncertainty in the

medical picture, because of the reality that at least two of these options (2 and 4) are likely to be lost within days if no decision is made today. It is imperative that SJF has the most appropriate placement to be discharged to, if and when she is well enough.

66. In my judgment, the balancing exercise in respect of each of the options before the Court can be summarised as follows:

Option 1 – return to 3TH

Advantages	Disadvantages
In accordance with SJF's strong and consistent wishes and feelings	
Allows daily company of her son, JJF	Has broken down before, with assault admitted within criminal proceedings. Concerns about JJF's ability to manage dietary needs and his own frustrations are unresolved.
Long familiarity with the flat and area	On first floor, with no lift so SJF would have limited ability to access the community and difficulty with emergency access to her (currently requires 4 ambulance staff to leave a first-floor setting). Bathroom facilities not accessible to wheelchair use.
Only 1.7 miles from previous dialysis hospital (4.9 miles from current dialysis hospital.)	District Nurse service unwilling to attend so necessary healthcare would have to be delivered in the community. The only opportunities for dressing ulcers (currently done daily) clash with dialysis arrangements and no alternatives identified. Would require registration with a new GP.
	Has not been confirmed that any care agency would be willing to supply an overnight carer.

Option 2 – SZ supported living placement

Advantages	Disadvantages
	Against SJF's wishes.
Ground floor room, with accessible bathroom next door	Unfamiliar area to SJF. Distance from Hackney will limit visits by family members, including JJF.
Social activities available, with more support to access the community and a more appropriate age-range of other residents	
Staff willing to be trained to provide insulin and support dialysis	15 miles from previous dialysis hospital (9.4 miles from current dialysis hospital)
Staff can supervise contact with JJF with minimal restriction during the daytime	

Option 3 – HV care home

Advantages	Disadvantages
Familiarity – SJF has lived there for approximately 2 years now	Against SJF's wishes
JJF is able to visit	Distance from Hackney limits visiting by family members.
	Room is on the first floor (SJF having declined to move to a ground floor room when one became available.)
	SJF does not engage in organised social activities or access the community other than for medical appointments.
24 hour care available. District nurses visit daily to dress ulcers. 4.1 miles from current dialysis hospital	10 miles from original dialysis hospital

Option 4 – L flat

Advantages	Disadvantages
In so far as SJF and JJF have expressed a preference as between the ground floor options, this is the preference of both	Against SJF's wishes
In Hackney – closer to family members to enable visits	Opportunities for contact with JJF would be limited by requirement for additional support worker, at least pending review after 6 weeks
Self-contained flat	Not clear that SJF would have exclusive use of the flat. The LA may seek to introduce another person to live in the second bedroom.
Only 4 miles from original dialysis hospital (2.9 miles from current dialysis hospital)	No confirmation that nursing service would be available, or any co-ordination of meals and fluids after dialysis
	No indication of what social activities would be available

67. In my judgment, the magnetic factor in this matter is SJF's need for healthcare by professionals. She is once again taking Novorapid injections, administered twice a day by care home staff; and Lantos injections, administered each morning by district nurses. Additionally her ulcers require frequent dressing and she attend dialysis three times a week. There is no realistic prospect that these healthcare needs could be met adequately or at all if she lives in first floor accommodation or with her son. The effect of failure to meet these needs will clearly be, at best, further and rapid deterioration in her health, and increased hospitalisation.

68. In the early stages of the hearing I expressed some concern at the Local Authority's account of the position of healthcare professionals in respect of delivering healthcare to SJF in her own home at 3TH. It is axiomatic that healthcare district nurses and GPs should be able to carry out their important community work in safety and without fear. However, it was not apparent to me that the reported decision to refuse to attend 3TH because of risks posed by JJF was reached on the basis of full information. There appeared to be an element of "institutional echo" of JJF's failings, possibly without proper consideration of countervailing positive factors such as his track record

of co-operation with carers, or the prospect that he may now receive some support in his own right.

69. Ms. Hearnden submits that JJF's admissions of shouting and using aggressive language could be viewed by professionals through a sympathetic lens, and the Local Authority could revisit ways in which healthcare providers may be supported to take a different approach. I have considerable sympathy with that submission but the Local Authority has now filed further documentary confirmation of the healthcare professionals' position, and there is no indication that such position may change. JJF's suggestion that he leave the property whilst healthcare is provided is considered impracticable and unsustainable. I must therefore consider the options on the basis that necessary healthcare services could not be delivered to SJF with Option 1.

70. SJF's need for kidney dialysis requires her to leave her home and attend hospital three days a week. Those days are long and tiring for her. The process of getting there and back is an important aspect of her ability to cope with the treatment; and level entry to her home is an important aspect of the process of getting to and from the treatment. I agree with the Official Solicitor that it is not acceptable or sustainable on anything more than a temporary basis for SJF to be able to leave her home only with the assistance of 4 ambulance staff. JJF's expectation that he will be able to help his mum with the stairs at 3TH as he did before is sadly no longer realistic. In my judgment Option 1 and Option 3, SJF's long-term home and her current placement, are therefore both now unsuitable for her needs.

71. This conclusion of course goes against SJF's wishes. Unfortunately, it is in my judgment now impracticable to give effect to those wishes, even on a trial basis. The imperative towards implementing SJF's clear preference is outweighed by the equally clear potential for detrimental effect to her health. Were she to return to 3TH without services from healthcare professionals at home, and with extremely restricted ability to leave that property, it seems to me inevitable that care arrangements would break down very quickly and, at best, SJF would be back in hospital again.

72. The only remaining options are therefore SZ or L Flat. Neither of them is ideal. As between them, the comparison is that at SZ would have her own room within a shared house, some 15 or 9.4 miles away from dialysis; whereas at L Flat she would have her own flat (at least until another resident is identified) and be only 4 or 2.9 miles away from dialysis. On the face of it, contact would be *less* restricted at SZ but in reality, it is likely to be *more* limited simply because JJF feels unable to travel there. The deciding factor between them however is that both SJF and JJF have expressed a preference for the L Flat.

73. I am satisfied that the arrangements proposed for contact between SJF and JJF if she is living at L Flat are appropriate and in the best interests of SJF for an initial 'settling in' period of 6 weeks, after which the Local Authority intends to review them. Much will depend on how JJF conducts himself in those six weeks but, just as he will need to remember his responsibilities to his mother and those who provide her with care, professionals may be expected to allow some appreciation of how difficult JJF is likely to find adapting to the new situation. I will give any party permission to bring the matter back to court if necessary for further consideration of contact arrangements at the six week review point.

74. The evidence is that a care package at L Flat can be implemented between 7 – 10 days of the decision being made. JJF has raised concerns about how best to deal with SJF's belongings in the

event of a move. I encourage all parties to consider the practical arrangements in this regard co-operatively.

75. In respect of SJF's tenancy at 3TH, parties shall file such written representations as they wish to make by 4pm on 15th February. I will consider them on the papers in the first instance.

76. Finally, I invite the professional parties to give further consideration to steps which may be taken to improve the co-ordination of SJF's healthcare. When asked (in the context of 'tea and biscuits' at kidney dialysis sessions) about cross-disciplinary awareness of SJF's various health conditions, Ms. George suggested that SJF "really needs a health co-ordinator," and acknowledged that the responsibility for taking steps to put that in place would be hers.

HHJ Hilder

2nd February 2019