



IN THE HIGH COURT OF JUSTICE

No. FD07P00104

FAMILY DIVISION

2013 EWHC 4170 (Fam)

Royal Courts of Justice

Friday, 15th November 2013

Before:

MRS. JUSTICE THEIS

(In Private)

BETWEEN :

LBX

Applicant

- and -

(1) K

(2) L (by his litigation friend, the Official Solicitor)

(3) M

Respondents

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J U D G M E N T

(As approved by the Judge)

APPEARANCES

MR. H. HARROP-GRIFFITHS appeared on behalf of the Applicant.

MS. K. BRETHERTON appeared on behalf of the 1st Respondent.

MS. V. BUTLER-COLE appeared on behalf of the 2nd Respondent

THE 3rd RESPONDENT appeared In Person.

MRS. JUSTICE THEIS:

- 1 I am giving this ex tempore judgment at the end of a hearing where I have given a hand-down judgment earlier today determining issues relating to capacity for L, who was born on 21st December 1983 and is now 30 years of age.
- 2 In the judgment I handed down this morning I concluded that L has capacity in relation to decisions about where he should live, the care he receives and contact with his family. Having made that decision I then considered the question as to whether I should invoke the inherent jurisdiction as L was a vulnerable adult. I made that determination in para. 54 of my judgment and I relied, in particular, on what the Court of Appeal said in the case of *DL v A Local Authority* [2012] EWCA (Civ) 1022 where it endorsed the approach taken by Munby J (as he then was) in *Re SA* in 2005.
- 3 The issue that I considered to be most important in supporting the court invoking the court's inherent jurisdiction was to be able to protect L who, even though I have determined has got capacity, is still borderline; he has only just got capacity and in the circumstances of this particular case I considered orders may be required to enable him to retain that capacity in an environment that enabled him to do so. This was as a result of the findings that I made in para. 55 of that judgment as a result of history and the particular personalities in this case, and also the concerns, having looked at the evidence in relation to L's needs for emotional safety to maintain capacity so that he is not subjected to overwhelming emotional issues, which Dr. Halstead identified some years ago and which still remain relevant. If he is so exposed to such overwhelming emotional issues there is a very real risk he would lose, or would be very likely to lose capacity.
- 4 As I mentioned at the end of that judgment, the parties had indicated during the course of the hearing that there was some prospect of agreement in relation to those matters. I felt it was appropriate that an opportunity was given for that discussion to take place to see whether they could reach agreement before I was invited to make any orders. That discussion has taken place and whilst there is some measure of agreement I am invited by the local authority, supported by the Official Solicitor, to make orders under the inherent jurisdiction.
- 5 In relation to what is agreed M has agreed to a recital in the terms of paras. 1 and 2 of the order that has been put before me and amended this morning. That is an extremely helpful step taken by M. It helps provide a structure that will be of benefit to L to ensure that he retains the capacity that I have determined he has.
- 6 In relation to K's position, L's father, he agrees to para. 3 of the draft, but does not agree to the provisions in paras. 1, 4 and 5. Those provide, first, that he will not

have any contact with L unless it is offered to him by L through his social worker or her manager, and then only to the extent that as regards, nature, location, duration, and whether or not it is supervised it is so offered. There is a caveat at the end that this is not intended to prevent K from speaking to L should he see him by chance in the street. The second matter that is in dispute is a requirement for K not to contact L's support worker providers where he is at his present placement.

- 7 The final matter is in relation to restrictions regarding K taking L to his home address. What is sought is an order that he will not take L to his home address, irrespective of what L may say to him, without first having spoken to L's social worker or her manager, so that an assessment of L's capacity to decide to return home, where temporarily his son would be, can be conducted with the involvement of his advocate and/or support worker in advance of him being taken there. In the event that L otherwise attends at his home address, K will immediately contact the local authority so that a capacity assessment, as set out above, can be conducted in a neutral location.
- 8 Those matters are objected to and I have heard oral submissions from the parties. Ms. Bretherton, on behalf of K, relies on three matters.
- 9 First, in relation to the position regarding L's support providers, that there is already a regime under civil law, in particular under the Protection from Harassment Act, that provides a statutory framework that would be able to meet what is sought in that paragraph.
- 10 Secondly, she submits it is not in accordance with the law under Article 8. She draws an analogy with the 'Bournewood gap'; that case concerned the question of whether the procedure for detention was 'in accordance with the law' for the purposes of Article 5. Equally in order for the state to breach Article 8 rights to a family life such interference must be 'in accordance with the law' and proportionate. She did not accept that the gap filled by the inherent jurisdiction complies with the requirement of being in 'accordance with the law' for the purposes of Article 8. She submitted, because there is a statutory regime, it would be wholly inappropriate for the court to consider any interference in terms of Article 8 because it would not be in accordance with the law as there is a statutory regime, so there is no 'gap' to be filled. If she is right, she submits, I do not get to any kind of balancing exercise.
- 11 Thirdly, Ms. Bretherton says, even if I get over those two hurdles, the orders that are sought are unnecessary. They are disproportionate in terms of meeting the needs in this case, although she accepts that that is a matter of fact I will need to determine.

- 12 Mr. Harrop-Griffiths, on behalf of the local authority, in relation to the other remedies point, says that that cannot be sufficient. The importance of this jurisdiction, when it is invoked in the circumstances of this case, where one is looking at a vulnerable adult, is to provide and maintain a stable environment to best enable him to be able to maintain his capacity. The fact that these other remedies are there are insufficient to be able to maintain that requirement that is provided for in the exercise of the inherent jurisdiction in these circumstances.
- 13 Regarding the Article 8 point, Mr. Harrop-Griffiths submits it is permissible for the court because there is, in fact, a proposed interference in accordance with the law; it is not only the Article 8 rights of K but it is also the Article 8 rights of L. The court needs to balance the relevant considerations in relation to the interference that is sought, and he submits that it tips quite clearly in favour of L, being a proportionate measure because it is protection for him as a vulnerable adult; to enable him to be able to maintain his capacity. When balanced against the interference with K's rights it comes down very clearly in favour of L.
- 14 In relation to the suggestion that it is unnecessary, it has quite clearly been established in the judgment I have given that it is required to give the structure to enable L to retain his capacity as I have determined.
- 15 Ms. Butler-Cole on behalf of L submits that the Court of Appeal, not only in *Re DL*, but also in the earlier case of *Re G*, did not consider the inherent jurisdiction could not be invoked even though there were other civil remedies available. The important consideration is that the court considers that the person involved who is the subject matter of the inherent jurisdiction, is a vulnerable adult and does need the protection required; then that protection should be provided. The "goal", as she put it, is to enable L to exercise capacity unencumbered and for him to be able to have capacity for making decisions and the court, if it steps in and makes this order, it does so in a proportionate and necessary way.
- 16 I have considered very carefully the submissions that have been made by all parties. I accept this is a difficult balance but, in this case, I am entirely satisfied that because of the vulnerability that this particular person has, and the very clear psychiatric evidence dating back to Dr. Halstead's report in 2007, endorsed by the various witnesses that gave evidence earlier this week, that he remains vulnerable to overwhelming emotional issues which could compromise his capacity. He needs to be able to retain his capacity in circumstances where he has emotional safety. That can only be where there is a proportionate structure in place that enables him to be able to maintain his capacity in a relatively calm environment, and free from the emotional maelstrom, as I have described it, resulting from the relationship that he has with his father in particular, and the relationship the father has with those who support L in the care that he has.

- 17 I am entirely satisfied that, despite the civil remedies that are available, that what is necessary for this case, for this particular young man, is to be able to have the orders in place that have been sought. I am also satisfied that Article 8 is involved and invoked in relation to both K and L, but I am again entirely satisfied in the circumstances of this case that, when one balances the interference in their respective rights, that it comes down very clearly in favour of L because if that structure is not there, there is a real risk that his capacity will be compromised. I am also entirely satisfied on the facts of this case that it is necessary on the evidence that I have already outlined that that protection is put in place.
- 18 For those brief but cogent reasons in relation to the matters that remain in dispute, (subject to one matter I am going to raise in a moment) I will make orders against K in terms of paragraphs 1, 4 and 5.
- 19 I have made it clear the order should also recite the position in relation to contact between K and L in the nature I have outlined with Mr. Harrop-Griffiths, with the addition suggested by Ms. Butler-Cole. I sincerely hope that contact will begin to take place, and it will provide a route through which relationships can start to be rebuilt. I also agree the order will record the arrangements for K to be able to communicate with the local authority through Miss Gilbert, and/or her manager so that there is a clear route by which K can contact the local authority, particularly in relation to matters of concern he may have in relation to L.
- 20 The relevant parts of the order made are set out below:

AND UPON the Court invoking its inherent jurisdiction to make orders in order to protect vulnerable adults, as recognised by the Court of Appeal in DL v. A Local Authority [2012] EWCA Civ 1022

IT IS DECLARED THAT L has for the purposes of the Mental Capacity Act 2005 the capacity to make decisions about residence, care and contact.

IT IS ORDERED THAT:

1. K shall:

- (1) Not have any contact with L unless it is offered to him by L through his social worker or their manager and then only to the extent that (as regards, nature, location, duration and whether it is supervised) it is so offered.*
- (2) Not contact L's support providers.*
- (3) Not take L to his home address, irrespective of what L may say to him, without first having spoken with L's social worker or their manager, so that an assessment of L's capacity to decide to return home, whether*

temporarily or permanently, can be conducted, with the involvement of his advocate and/or support worker, in advance of him being taken there.

- (4) *Contact LBX immediately in the event that L otherwise attends at his home address, so that an assessment of WD's capacity to decide to return home, whether temporarily or permanently, can be conducted, with the involvement of his advocate and/or support worker, at a neutral location.*
