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# Kings CoP Bitesize CLF [2024] EWCOP 11

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# Facts

- CLF
- Learning disability, Autism, ADHD and possible Emotional Unstable Personality disorder
- Application in the COP issues March 2020
- Assessment unit 1:1 support at all times
- Feature of her circumstances were (1) constant absconding, (2) placing herself at risk with unsavoury individuals, (3) constant sexual partners, and (4) found these individuals using social media

# Issues

Parties agreed that CLF lacked capacity to:

- Conduct litigation
- Make decisions about care
- Make decisions about contact with others
- Make decisions about internet and social media

Parties disagreed about whether CLF had capacity to

- Make decisions about residence
- Make decisions about engaging in sexual relations
- Make decisions about contraception

# Relevant information



## Residence

- *LBX v K* [2013] EWHC 3230 (Fam)

## Sexual relations

- *A local Authority v JB* [2021] UKSC 35

## Contraception

- *A Local Authority v Mrs A and Mr A* [2010] EWHC 1549 (Fam)
- *Mental Health Trust and ors v DD (No.2)* [2014] EWCOP 13

# The practical implications of determinations as to capacity – a recap

Re B (By her Litigation Friend the Official Solicitor) v A Local Authority [2019] EWCA Civ 913

*[63] The Local Authority says that the Judge’s conclusion on B’s capacity to make decisions on residence, in particular whether to move to Mr C’s property or to remain at her parents’ home or to move into residential care, was fundamentally flawed in (1) failing to take into account relevant information relating to the consequences of each of those decisions, and (2) producing a situation in which there was an irreconcilable conflict with his conclusion on B’s incapacity to make other decisions, and so (3) making the Local Authority’s care for and treatment of B practically impossible [...]*

*[64] We agree with the local authority.*

# Residence

*[37] I can see that if care decisions could be removed from decision-making about residence, then a declaration that CLF had capacity to make decisions about residence provided that the care arrangements for each available residential option were made for her, would not necessarily be incompatible with a declaration that she lacks capacity to make decisions about her care.*

*However, my concern is that the position is more complex than Dr Rippon has assumed. As well as compatibility with the declaration of incapacity to make decisions about care, I also have to consider compatibility with my finding that CLF lacks capacity to make decisions about contact with others and to use the internet and social media.*

*[...] What might seem an attractive solution in theory, could not be possibly to put into practice. Much of the information relevant to a decision about residence, even with a care package determined for her, will be relevant to care, contact with others and the use of the internet and social media. [...] Care is not simply a “given”: the choice of residence will itself determine the level and kind of care required.*

# Sexual relations and contraception

*[41] The bar should not be set too high for capacity in relation to sex. There are practical limits on what should be envisaged by the individual concerned. There is a danger in imposing requirements on their decision-making that are higher than those attained by many capacitous people making the same decisions.*

*A lack of understanding about a particular method of contraception or birth control, should not deprive a person of being found to have capacity to engage in sexual relations.*

*It is unhelpful to break down decision-making in relation to a particular area, here sexual relations, into sub-divisions such as the decision to engage in sex whilst relying on the man withdrawing before ejaculation to avoid pregnancy. Firstly, that route will often lead to a result that is “practical impossible” to manage: how can anyone manage a situation in which a person has capacity to engage in sex using a condom but not have capacity to engage in sex using the withdrawal method? Secondly, many otherwise capacitous individuals might be found to lack capacity to make very specific decisions. Thirdly, and related to the second objection, the more one breaks down an area of decision-making into sub-divisions, the more complex the relevant information within that area becomes, and the more difficult it will be for people with a learning disability or other cognitive impairments, to avoid conclusions that they lack capacity.*

# Questions?



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