



Neutral Citation Number: [2011] EWHC 2853 (Fam)

Case Nos: FD08D04907 and 11836029

**IN THE HIGH COURT OF JUSTICE**  
**FAMILY DIVISION**

**AND IN THE COURT OF PROTECTION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/08/2011

**Before :**

**Mr Justice RYDER**

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**Between :**

**London Borough of Tower Hamlets**  
**- and -**  
**[1] BB**  
**(by her litigation friend, the Official Solicitor)**  
**-and-**  
**[2] AM**  
**-and-**  
**[3] SB**  
**-and-**  
**[4] EL Trust**

**Applicant**  
**Respondents**

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**Mr Harrop-Griffiths** (instructed by **the Borough Solicitor**) for the **Applicant**  
**Ms Helen Knott** (instructed by **John Street Solicitors**) for **AM** and **SB**  
**Ms Fenella Morris** (instructed by **Steel and Shamash** on behalf of **the Official Solicitor**) for  
**BB**

Hearing dates: 13, 14, 15, 16, and 17 June 2011  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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This judgment is being handed down in private on 31 August 2011. It consists of 65 paragraphs and has been signed and dated by the judge. The judge hereby gives leave for it to be reported.

The judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of their family must be strictly preserved.

**Mr Justice Ryder :**

1. BB is a 32 year old woman who suffers from schizo-affective disorder. She was born on 18 January 1979 and was first diagnosed with an acute personality disorder in 1989. By 1993 she had been diagnosed with early onset schizophrenia. She has severe communication difficulties and is and was pre-lingually profoundly deaf. Within these proceedings it has also become common ground that she has a learning disability. Her father is AM and her mother is SB. BB is married to but separated from MA. Prior to the commencement of proceedings, for most of her childhood and for the whole of her adult life BB had lived with her extended family in London in an area in which the local authority and the EL Trust provide services. By the time this hearing began BB was living at a specialist residential unit in Birmingham known as Polestar.
2. There are two sets of proceedings which concern BB. In the first, her litigation friend, sought guidance from the court under sections 16 and 18(k) of the Mental Capacity Act 2005 (MCA 2005 or ‘the 2005 Act’) about the conduct of proceedings concerning BB and declarations that she a) lacks capacity to conduct those proceedings and b) it is in her best interests that, in the event that her marriage to MA is a valid marriage, it be annulled or that there be a declaration that it is not recognised by the law of England and Wales. In the second, the local authority as substituted applicant seeks declarations that BB a) lacks the capacity to litigate, b) lacks capacity to decide where she should live, with whom she should have contact, who should provide her with care, what care should be provided to her and the medical treatment she should receive for her mental disorder. The court is asked to make decisions on her behalf as respects those questions which the court determines she is incapacitated to answer.
3. The background to the proceedings is as follows. On 10 February 2000 BB went through a ceremony of marriage with MA in Bangladesh. At the time MA was living and resident in Bangladesh and BB was resident in England but on a family holiday in Bangladesh. There are no known children of the marriage although BB has periodically referred to children who may have been born to her. MA joined BB in London in 2001 and they lived together until 2004. On 9<sup>th</sup> November 2007 MA filed a petition for divorce citing BB’s unreasonable behaviour and in that way matrimonial proceedings first came before the court.
4. In April 2010 a support worker, Ms TR, alleged that BB had been assaulted in the family home by her mother, SB. A report was made to the police on 19<sup>th</sup> April 2010 and there is written evidence that on being taken to the police station BB was refusing to return home. The consequence was that BB was not permitted to return into the extended family home but instead was cared for at the Mile End Hospital. BB did not have any contact with her family and the family were not made aware of BB’s whereabouts. BB was subsequently transferred to the Old Church Hospital which is the site of the Adult Team National Deaf Services. She was placed in a specialist psychiatric ward for the hearing impaired where she is reported to have been happy and able to communicate with others. Emergency steps were taken while BB was at the Mile End Hospital to deprive her of her liberty by the grant on 6 May 2010 of a standard authorisation under schedule A1 to the 2005 Act. A separate standard authorisation was made on the 7 June 2010 in respect of her care arrangements at the Old Church Hospital. That authorisation subsequently lapsed in circumstances where there was a disagreement between assessors as to BB’s eligibility for detention under

the 2005 Act or treatment under the Mental Health Act 1983 and confusion as to which health service body was by then responsible for BB.

5. In accordance with directions made by the President on 9 June 2010 and because no lawful authorisation for deprivation of liberty was in place the proceedings were restored before Baker J on 7 July 2010. On that day a declaration was made that the placement at Old Church Hospital was a deprivation of BB's liberty. On 29 July 2010 the President decided that it was in BB's best interests for her to move to a specialist residential placement known as 'Polestar' which is in Birmingham. No equivalent facility was identified in London which had a vacancy and a declaration was again made that the circumstances of BB's care at Polestar would be a deprivation of her liberty. The President noted in judgment that the organisation which operates Polestar has facilities in London which may become available and which may be suitable in the longer term. He also decided that it was in BB's best interests for supervised contact with her parents to take place in Birmingham.
6. This hearing was intended to be the opportunity for long term resolution of best interest decisions relating to BB. That has not been possible in circumstances which I will relate but which in essence are because this court will not exclude the option of an incapacitated adult being cared for in and by her family without evidence which allows the court to compare the assessment of benefits and detriments of all of the options rather than just those which the local authority seek to pursue.
7. BB has been known to the local authority since she her profound deafness was first confirmed when she 4 months old. In 1993 when aged 14 she was made the subject of a care order as a consequence of her not attending a school or other educational establishment. She has been known successively to the deaf team, the disabilities team, the children and families team and since 1999 the community mental health team in her local area. Despite this, at the end of this hearing, it is still not clear what coherent plans were made to provide support services including children and vulnerable adult protection plans for BB with her family.
8. The court has been made aware that there is a history of unsubstantiated allegations relating to BB. For example, there have been 26 safeguarding allegations relating to BB over the last 14 years, 25 of which are in the last 8 years. The allegations have been made by BB or are interpretations of communications she has made to the effect that she has been abused in the family home and by professionals and support workers, including sexual abuse by male members of her family and professional workers. Serious allegations were made as late as 15 June and 7 July 2010 to a jointly instructed psychologist within these proceedings. The allegations have all been strongly denied. Until the alleged incident in April 2010 there had never been any independent evidence to corroborate what she had alleged and, it is clear, there had often been contextual information which contradicted her allegations.

#### The Issues

9. Despite the reliance placed upon the April 2010 allegation and the consequences which immediately flowed from it, this court agrees with the local authority and the Official Solicitor that the court's welfare determination is no longer dependent upon it in the sense that the welfare issues are significant and free standing and fall to be determined by the court whether or not an assault occurred. Having heard the

evidence and having regard to the serious consequences which followed, I shall make a decision about the allegation before turning to the welfare issues which arise which are:

- i) Whether it is in BB's best interests to be married
- ii) Whether BB's liberty is deprived at Polestar
- iii) Where BB should live
- iv) Whether and if so when she should have contact with her extended family if she is not living with them.

#### Capacity

10. It is common ground that BB lacks capacity to conduct this litigation or to make any of the decisions which need to be made about her life including where she should live, with whom she should have contact, who should provide her with care or the nature of care to be provided including her medical care and her marriage. Furthermore, she lacked that capacity at the time of her marriage. That was confirmed in the evidence of Dr Appleford, Consultant Psychiatrist and is not disputed by anyone.

#### The Marriage

11. I can deal with the marriage issue relatively shortly. All parties are agreed that it is in BB's best interests for her marriage with MA to be annulled pursuant to section 12(c) of the Matrimonial Causes Act 1973 on the ground that she did not validly consent to the marriage as she lacked capacity to consent at the relevant time. MA has agreed through solicitors to an annulment and accordingly, this court will dismiss the prayer in his petition for divorce and allow the petition to proceed on the basis that the marriage is to be annulled. The court will give BB leave to issue an application for an annulment pursuant to section 13(4) of the 1973 Act and will in exercise of its powers under Part 18 Family Procedure Rules 2010 [FPR 2010] dispense with the procedural steps to be taken before the grant of such leave by agreement and in furtherance of the over-riding objective as set out in the Rules. Having regard to requirements of Part 7 FPR 2010, the court will direct that the application be listed before a District Judge of the Principal Registry for pronouncement of a decree nisi and that the hearing shall be in private pursuant to rule 7.16(3)(d) FPR 2010.
12. With the agreement of the parties, the court has given leave for the present proceedings to be treated as an application for a forced marriage protection order and for such an order to be made as being demonstrably in BB's best interests.

#### The alleged assault

13. It transpired during the hearing that at least since a safeguarding conference held by the local authority on 6<sup>th</sup> October 2010, no professional other than the support worker who witnessed the incident has been of the opinion that the allegation could be proved on the balance of probabilities. The local authority come before the court at this hearing with the very clear submission that their welfare recommendations are not dependent on a finding being made. That said, the incident precipitated significant

14. It was agreed evidence (as between the support worker, TR and BB's mother, SB) that the support workers arrive at the same time on the same day each week. Accordingly, it is clear that they are expected and arrangements are made to ensure that BB is ready to go to college with them. BB has a history of being difficult about taking her medication at least in pill form which is all that was available to her when living in the family. I accept she was being difficult on the morning in question. There is a dispute between SB and TR about whether the internal door from the common parts of the block to the family's accommodation was open on the day in question. I have concluded that I prefer the account of SB to that of TR, not least because SB is consistent whereas TR was not. SB said that she leaves the internal door open once the external door buzzer is pressed. Whoever pressed the external door buzzer on the day in question is immaterial, it led in my judgment to the usual practice of the internal door to the accommodation being left ajar by SB.
15. That circumstance is important in considering what happened next. On this day, TR was alone and she came to the internal door of the accommodation as SB was attempting to get BB ready. As SB said, the door to the accommodation was already open and TR saw movement inside. It is not in dispute that BB was angry and distressed, she was shouting about having to take her medication. Something TR could not have known about although the local authority would have known that that is a recorded reaction to her being asked to take her medication, to which she is resistant. She remained resistant in this manner until her medication was changed to liquid medication only after she had become a resident at Polestar. It matters not that TR had not previously observed that problem. SB would have known in leaving the door ajar that one or more of the support workers would imminently arrive at the accommodation and be able to enter without knocking on the door: that was her intention.
16. The alleged incident then happened very quickly. TR is herself deaf and she was very careful to describe the contextual information she relied upon in coming to her conclusion that SB assaulted BB by striking her on the back of the head. She saw her arm raised, she saw her hand on BB's hair as if she had struck her hard twice on the back of the head or neck and she saw BB's distress. She also said in oral evidence that the slaps as she described them were to BB's back. TR could not of course hear the assault nor the context of the distress in the sense of any qualitative difference in sound e.g. a sharp cry between the earlier distress caused by the administration of medication and what TR then observed. Importantly, in my judgement, TR never reported that BB's head moved forward in response to the alleged assault and BB never described an assault to her. In fact, BB did not confirm back to TR that she had been assaulted when TR told her what she had seen and asked her if she was OK. According to TR, BB refused to engage in a discussion about the alleged incident.
17. The two elements which were conclusive for TR were BB's distress and what she described as SB's non-caring attitude towards BB. TR is entitled to have regard to these two factors but the court notes that BB was already distressed and that is something TR would not have known and there is no evidence from TR or anyone

else of any previous example of SB having an uncaring attitude or of there being an uncaring attitude during the incident. TR's evidence was that she had not seen SB being supporting or caring to BB: that is rather different from SB being uncaring. Furthermore, because of what TR thought had happened she was appropriately concerned for her own safety and her recollection is that as a consequence she did not make eye contact with BB's mother. Despite this, TR's oral evidence was that SB was smiling at her and attempting to put BB's coat on, something BB would not permit: she was saying 'No' to her mother at that point. It is clear that BB was angry and distressed but not in my judgement as a consequence of the alleged incident. BB and TR then went to BB's college and BB made no separate report of the allegation or any concern.

18. Having regard to the evidence the court has heard, I have concluded that there is quite insufficient evidence to prove on the balance of probabilities that an assault occurred. The exercise conducted by the court is essentially that conducted by the safeguarding meeting 6 months after the alleged incident. That meeting likewise concluded that there was insufficient evidence to support a conclusion that an assault had occurred. The material necessary to come to such a conclusion was available almost immediately and could and should have been collated within a very short time so as to enable those involved to come to an agreement that an assault had not occurred or in default of agreement, to ask a court to make a decision. The allegation has hung like a cloud over the family who as a consequence have been placed in an adversarial position as respects the more important welfare issues which relate to BB.

The evidence on other issues

19. No party sought to place reliance upon the reports of a specialist clinical psychologist who had received information from BB through BSL interpretation that she had given birth to 2 baby boys and that she had been the victim of sexual abuse. Although these issues may re-arise with the benefit of more investigation and analysis, at the moment the information disclosed appears to have no reliable or credible basis and there is no sufficient material for this court to find as a fact that what BB has said has happened. I record the information lest it become of significance again.
20. The same psychologist records the obvious joy BB demonstrates when in company with other deaf people and a similar emotional reaction to the possibility of living in company with those who sign.
21. Ms Walshe is the independent social worker instructed in these proceedings. She has carefully analysed the history and has seen BB. She has been told by BB that she is happy to be where she is and that she wants to stay there because it is better than home. In the same discussions BB has made it clear that she is positive about and wants to see members of her family and visit them in London. At one point she cried because she wanted to see her parents. Ms Walshe has independently observed the benefits to BB of her present environment and the improvements in her communication. She has concluded that BB needs 24 hour support within a professionally led environment because of her hearing impairment and mental illness. She supports improved contact for the family but is of the opinion it should be supported so as not to interfere with the prospects for BB's continuing development.

22. Dr Appleford is the consultant psychiatrist who has assessed BB. He has seen BB and has concluded that some of the information she provides appeared incorrect and may be delusional. He says that she is not yet fully fluent in BSL and he confirmed the diagnoses that I have previously recorded. His opinion is that the nature of BB's mental health difficulties is such that she requires a high level of support which includes 24 hour care, treatment and support in a signing environment. He recommends engagement with BB's family to improve their understanding of her condition and to involve them in its management. Dr Appleford agrees that Polestar are able to provide for BB's needs. His opinion is that BB's best interests need to be secured by a multi-disciplinary team approach which enables the family to work with professional support. A family placement is possible in the future if this can be organised and if the family accept the support that is needed. He says it is not just this family who at the moment cannot provide that which BB needs but any family without an agreed multi-disciplinary team and co-ordinated plan. The same applies to a move to an alternative supported placement in London.
23. Ms Patel is a jointly instructed cultural expert. She advised the court about the cultural implications of BB's marriage and the ways in which that ought to be brought to an end. There is agreement about that aspect of her advice. She went on to consider BB's cultural and religious background and the importance of the same to her identity. Again, there is no issue as to this aspect of BB's welfare. Where the court has expressed a difficulty about Ms Patel's evidence is as to the hypotheses proffered by Ms Patel about BB's family and the community in which they live. Although Ms Patel gave evidence of matters that are well within the knowledge of the court (which might of course have suggested to the parties that the evidence was neither necessary nor admissible) it was not cross referenced to the attitudes and practices of this particular family or the community in which they live because Ms Patel was not instructed to perform that task. Without any criticism of Ms Patel and however sound her hypotheses may be, in the absence of any instruction to Ms Patel to undertake that work, that evidence remains purely hypothetical.
24. Although the implication of the many documents filed with this court is that the previous living and care arrangements for BB at the family home were not optimal and may not have been in her best interests, it is clear that this centres on two issues. The first is the perception that the family lack understanding of mental health and deaf issues including critically the importance of signing i.e. BSL and the second is the difference between the actual support arrangements for BB at Polestar and the arrangements which were made for BB in her own family home and local community.
25. Ms Wong is a senior social work practitioner who gave evidence about BB's best interests. She acknowledged that it was not possible to regard the allegation of abuse of BB as being capable of proof. It would seem she was of that view as long ago as 21 September 2010 when she interviewed BB. Ms Wong told me that BB was settled, happy and thriving at Polestar in Birmingham. She has developed some independence albeit that she is not capable of independent living. She has a flat which has 2 bedrooms, a bathroom and an open plan kitchen and living area. She has purchased an item of furniture for herself about which she is justifiably proud and has selected and purchased clothing and shoes which she proudly displays to her visitors.
26. She has not been enrolled at BSL classes because the exposure to BSL communication at Polestar is all encompassing and because of the staffing which



would be required for college visits. However, BB has been able to integrate into the local Asian and deaf communities in Birmingham including the deaf mosque. It is planned that she will begin college in September. Adjacent to her placement is a nationally renowned resource which will provide integrated family support for her communication and mental health needs.

27. That is all very impressive but the sadness is, as acknowledged by Ms Wong, that it was not her role to liaise with the family so that neither her conclusions about the allegation nor her opinions about best interests have been passed on to them. Furthermore, it became clear during the hearing that the family position had fallen between the spaces of the grid. No-one had consulted them about the recommendations being made to this court, indeed the paragraphs of her report which were intended to be completed as to the family's wishes and feelings were missing. No-one had even noticed their omission from the document filed with the court. That is far from being good practice.
28. That BB had a complex care package before Polestar which involved support from a commercial provider so that carers were employed to assist BB getting to and being at college is not in doubt. What became clear in the hearing is that this is where the support ended. Whatever may have been provided historically, there was no integrated plan for the support of BB's needs in the home environment at the point where she was effectively removed by the state. Specialist but nevertheless basic services, for example, integration into Asian women's deaf groups, the deaf community generally or co-ordinated work with the sensory impairment and mental health teams seemed to have fallen by the wayside. The inability of BB's parents to master BSL is an important issue which they say they are trying hard to address but it is not an excuse for the lack of co-ordination of services for the family. If it is said that the family have refused the support which BB needs and which is available then it is incumbent on the local authority to prove that. If that was the intention of the local authority it soon became lost when in oral evidence Ms Wong said that there were no resources for the deaf with mental health needs in the community. Bearing in mind that the witness was referring to a part of a capital city which has among its resources some of the international and leading facilities in the world, their lack of availability in the community and at local level if correct is worrying. Furthermore, Ms Wong conceded in cross examination that all of the resources which are made available to BB at Polestar are also available in the community in London.
29. No attempt was made in evidence before this court to prove any lack of capability on the part of the parents other than the fact that at a time when their adult daughter is aged 32 they are still saying they will master the form of communication that everyone in this case agrees is important for BB if she is ever going to maintain relationships outside her family and have even a modicum of independence. Whatever previous assessments have been undertaken of this family, Ms Wong conceded that no relevant family work had been done relating to the best interests decisions this court is asked to make and the family needed support but had not received it before BB went to Polestar. The analysis of anything other than the benefits of Polestar is missing and needs to be undertaken so that the court might effectively balance the benefits and detriments of the options available for BB.
30. This is not a critique of previous work undertaken by many professionals in the community for BB nor is it to ignore the reported problem which is that it is said that

the local authority and the community mental health team have tried to reach out to the family but have been rebuffed to the extent that services have been refused. What is missing is a global assessment for this court which analyses the materials which are available in an evidential context and identifies options which are and are not available including a placement at home or a placement in London as well as the placement in Birmingham.

31. Another problem with the management of services for BB is that her placement, no matter how good, is time limited and there is no concrete care plan which provides for that and identifies what the future options are and the criteria by which any decision to move at the end of the placement or earlier should be considered. Neither the options nor the inevitability of a move have been discussed with BB's family.
32. Ms Paula Williams is the team leader at Polestar. She gave evidence of the impressive support that BB receives, the improvements in communication, behaviours and autonomy that have been achieved and the prospect of further benefits in the medium term i.e. over the next 1 to 2 years. She confirmed that BB will never be fully independent but having listened carefully to Ms Williams it seems likely that BB could thrive in a supported placement such as the unit in London if the move were to be properly assessed, planned and supported. She said that a move whether to the unit in London or to home with a new supported living package would be and should be a slow planned process if it is to be successful. She agreed with a proposition put by the court that it would be better if the support and care package available in Birmingham could be provided in London so that BB could maintain and develop her family and community ties. With respect to the other witnesses who dealt in hypotheses, this witness dealt in realities and the court accepts what she says.
33. Kathy Kohler is the team leader of the Sensory Impairment Team in BB's local area. She recommended a review in 6 months in order to plan for the future. I agree. She made specific recommendations about the parents' capabilities which are also very sound: their improved use of and commitment to BSL and engagement with both specialist mental health and sensory services as well as spiritual and culturally appropriate advice so as to use BB's identity to best effect in and with her local community. The essence of the latter point is that the parents' view of their spiritual destiny needs to be harnessed to good effect for BB: a duty to care has to be exercised in a multi-disciplinary environment so that BB is able to obtain the most advantage from the services which are on offer.
34. Stephanie Diffey is the associate director of community mental health services. In the absence of a formal assessment of BB's home environment or of suitable and available London placements, Ms Diffey stepped into the breach to provide the court with an analysis of benefits and detriments which the court has used as the basis for its own analysis. The court is very grateful to her. Ms Diffey acknowledged that the court should be provided with a detailed analysis of the services available for BB in the family home and of any other London option that is suitable and available.
35. AM is BB's father and SB is her mother. They both gave oral evidence to the court. They remain of the very firm view that BB should return home straight away. They recount numerous meetings where they understood that the support which BB needs (and now has at Polestar) was discussed and then said to be either too expensive or 'not possible'. This aspect of AM's evidence rang true and I accept what he said.

AM says that he does not understand a lot of the medical things and again this would appear to be correct. AM and SB would have liked to discuss the possibility of supported living for BB with significant co-ordinated support from the family and from a multi-disciplinary group of professionals but, they say, no-one has as yet had that discussion with them. AM sought to reassure the court that whatever Ms Patel's generic hypothesis about his family and cultural norms, he personally would never seek to hide BB away. Far from it, he wants as many things for her to do as possible. As to communication, he acknowledges that the family have developed their own idiosyncratic communication but points to the significant steps he and his wife have made in their successful use of BSL.

36. AM and SB described the significant family upheaval and fear occasioned by the immediate protective steps taken after BB made her escalating allegations. However important it was to ensure that BB was safe, I make the observation that the lack of multi-disciplinary analysis and expedited decision making caused these steps to be at the very least heavy handed. Even with the existence of a police investigation, more could and should have been done to reassure the family about BB's circumstances.
37. Where AM's evidence falls short of BB's needs is in his lack of overt acceptance of the need for specialist professional support. It is not just that BB's family need help: in my judgement they have to accept that they will not be able to provide for BB on their own and the help BB needs will be intrusive and ever present no matter how skilled individual family members may become.
38. AM describes the family's commitment to continuing contact with BB in Birmingham but rightly points out the huge logistical issues this presents. For BB's family, Birmingham might just as well be in another country. That said, I came to the clear conclusion they would do their utmost to maintain the frequency of contact BB needs. I have some sympathy with AM when he describes how contact is compromised by over supervision and multiple interpreters. Now the allegation has been put to one side by the court, this level of supervision is not required and steps can and should be taken to move contact on to more visiting contact in London and staying contact in Birmingham (with at least the prospect of staying contact in London). That contact should continue to be monitored because of the need to ensure that communication in BSL is maintained and BB's needs are met: not least because the overwhelming impression AM leaves with the court which comes from what he said in evidence: "I do not know what is expected of me". That said, there is a world of difference between monitoring and close supervision.
39. As will become clear in this judgment, the court is able to conclude that BB's needs are being very well met at Polestar in the short term and while further assessments and analyses are prepared. That conclusion is with this clear caveat: it is conceded that family relationships are weakening because of the distance between BB's family in London and BB's placement in Birmingham and steps must be taken to address that. What the court cannot do is to examine in any detail the relative benefits and detriments of a return home or an alternative placement in London because these have yet to be analysed. That must come back to the court relatively soon. I accept the evidence of the professionals that BB's complex needs require significant professional support. That is being provided at Polestar: it is an open question whether it can be provided in London or at the family home but without doubt it should be if an appropriate care package can be put together with which the family demonstrate they

will co-operate: whether in a home placement or in a supported living placement close to the family home.

40. The following balance sheet analysis has been used by the court to arrive at the determination I have set out in summary form.

#### Deprivation of liberty

41. I have had regard to the decision of the Court of Appeal in *P and Q v Surrey CC & Ors* [2011] EWCA Civ 190 and the Deprivation of Liberty Safeguards Code of Practice 2008. I have reviewed the authorities provided to me in particular those helpfully identified by Baker J in *Cheshire West and Chester Council v P and M* [2011] EWHC 1330 (Fam).

42. The following factors tend to support a finding of deprivation of liberty:

- i) BB is not able to consent to her accommodation at Polestar which has been for more than a negligible period of time (approximately 12 months);
- ii) BB has stated a determination to leave and the attendance of the police was threatened as a consequence; in any event, she does not consistently express the wish to remain there and her wishes and feelings are differently expressed to family and professionals;
- iii) Dr Appleford's advice, if followed, is that restraint would be appropriate to ensure that BB receives treatment, care and rehabilitation;
- iv) A request by the family that BB be discharged to their care would be refused;
- v) A request by the family for contact with BB if not agreed by staff can be refused i.e. her contact with her family is intensively controlled and supervised;
- vi) BB is supervised at all times and is accompanied outside her accommodation at all times;
- vii) BB has a 2:1 staffing ratio when taking medication and when outside of her accommodation and 1:1 when in the common areas of the building;
- viii) There is day to day regular supervision and control of BB's anti-psychotic medication, diet and behaviours;
- ix) BB's medication is likely to have the effect of reducing her attempts to leave Polestar;
- x) The plan put forward by the local authority is for the continuation of the placement for a further indeterminate period of 'rehabilitation' outside of her family home, at least within a defined maximum period of 3 years
- xi) The decision that she stay at Polestar is one made by the state.

43. Although the Official Solicitor is of the opinion that there is a temporary deprivation of liberty, he submits that there are other factors which tend to support a finding that BB is not deprived of her liberty:
- i) BB is happy at Polestar and for most of the time wishes to live there;
  - ii) BB may achieve greater autonomy in the longer term as a consequence of her residence at Polestar i.e. the arrangements for her care are benign;
  - iii) The control and supervision to which she is subject are an indissoluble part of her daily care needs (albeit not assessed in the family home context);
  - iv) BB is not subject to restraint despite the opinion of experts who would support that;
  - v) BB has her own flat which is a supported living arrangement;
  - vi) There is no less restrictive option which will permit BB to make the therapeutic gains including in her communication abilities that are predicted based upon the gains made so far.
44. I agree with the Official Solicitor that although the plan to relax the intense control around contact and the re-introduction of college attendance may tip the balance so that a new arrangement might not be a deprivation of liberty, at the moment the objective and subjective tests are clearly satisfied and the deprivation which is more than a restriction is imputable to the state. Accordingly, it requires the court's authorisation for so long as that situation remains.
45. Having come to this conclusion I must decide not only whether it is in BB's best interests for her to reside at Polestar, at least until any more comprehensive examination of the options can occur but also whether such residence and the arrangements made there are a necessary and proportionate interference with her liberty. The local authority and the Official Solicitor submit that on the basis that there are global benefits in BB remaining at Polestar which are not at the moment available in the family home, that there are *prima facie* risks in her returning home and that the strictures that underlie the deprivation of liberty are intended to be relaxed in the next few months by less controlled and supervised contact and by attendance at college, such a conclusion is justified. BB's parents deny that there is risk in a return home and point to the fact that delay continues to harm the relationship BB has with them and vice versa which in the context of the significant logistical difficulty contact presents justifies an immediate return home.

#### Welfare

46. There are three options before the court which are to be considered in light of the conclusions to which I have come about deprivation of liberty:
- i) A return to the family home
  - ii) A move to another placement
  - iii) Remaining at Polestar.

47. I remind myself that the separation of BB from her family is an interference with her article 8 ECHR rights. By way of example and to emphasise the role of the court, which is to make decisions, and that of the local authority where court proceedings are necessary, which is to bring all of the relevant materials to the court so that a best interests decision can be made: in Re S (Adult Patient) (Inherent Jurisdiction: Family Life) [2002] EWHC 2278 Fam Munby J observed:

“[115] I am not saying that there is in law any presumption that mentally incapacitated adults are better off with their families: often they will be; sometimes they will not be. But respect for our human condition, regard for the realities of our society and the common sense ... surely indicate that the starting point should be the normal assumption that mentally incapacitated adults will be better off if they live with a family rather than in an institution – however benign and enlightened the institution may be, and however well integrated into the community – and that mentally incapacitated adults who have been looked after within their family will be better off if they continue to be looked after within the family rather than by the State.

[116] We have to be conscious of the limited ability of public authorities to improve on nature. We need to be careful not to embark upon 'social engineering'. And we should not lightly interfere with family life. If the State – typically, as here, in the guise of a local authority – is to say that it is the more appropriate person to look after a mentally incapacitated adult than her own partner or family, it assumes, as it seems to me, the burden – not the legal burden but the practical and evidential burden – of establishing that this is indeed so. And common sense surely indicates that the longer a vulnerable adult's partner, family or carer have looked after her without the State having perceived the need for its intervention, the more carefully must any proposals for intervention be scrutinised and the more cautious the court should be before accepting too readily the assertion that the State can do better than the partner, family or carer.”

48. Likewise in LLBC v TG, JG and KR [2009] 1 FLR 414 McFarlane J said:

“[30] The fact that the assessment of the option of a family placement was not given top priority is a matter of concern. Placement in the family should be at the top of any priority list before non-family placements are considered.”

And very recently in LB Hillingdon v Neary & Anor [2011] EWHC 1377 (CoP) Peter Jackson J held:

“[24] Decisions about incapacitated people must always be determined by their best interests, but the starting point is their right to respect for their family life where it exists. The burden is always on the State to show that that an incapacitated person's welfare cannot be sustained by living with and being looked after by his or her family, with or without outside support.”

49. The local authority in this case have not yet done more than to set up a *prima facie* case as to the best interests in BB remaining at Polestar. That case requires consideration against the actual benefits and detriments of the other options in

particular a return home. These proceedings will require further consideration when that evidence is ready to be put before the court. Despite the body of evidence heard and read this judgment can be no more than interim in nature.

50. The court heard evidence about the availability of a placement in London managed by the same organisation as Polestar and which it was said could provide the same care package for BB. In the event, the evidence from Ms Wong was clear that Longley Road in London is a supported living placement which necessitates a degree of independence not yet attained by BB. That is not to say that she will not continue to develop sufficiently to be able to benefit from the placement which also has the clear advantage of its proximity to her family. If Longley Road will take BB then the potential advantages of such a move as described at the conclusion of this judgment will need to be considered. At the moment, this is an un-assessed possibility and it is not available to BB. It was Ms Wong's evidence that the local authority would support a move back to this unit in London and in opening the authority said that a timescale for a move was about 12 months. That transpired to be an unsupported opinion in that the London unit were not involved until the court asked them to be during the proceedings and they cannot commit to taking BB until it is assessed to be in her best interests and they have the staff to manage her needs.
51. In considering the options that remain and with the limited information that exists, I have adopted the balance sheet approach recommended by Thorpe LJ in *Re A (Medical Treatment: Male Sterilisation)* [2000] 1 FLR 549 CA as endorsed in *Re S (Sterilisation: Patient's Best Interests)* [2000] 3 WLR 1288 CA and in relation to the 2005 Act in *City of Westminster v IC & Ors* [2001] EWHC 3096 (Fam). The propositions summarised below are extracted from the oral and written evidence which is largely un-contradicted save as to the discretionary analysis of its effect.
52. The benefits of BB living at Polestar are:
  - i) her very significant gains in relation to communication, functioning and behaviour;
  - ii) her potential to make further gains in these areas, particularly in the next 2 years;
  - iii) the availability of an intensely supported environment which is providing a very effective package of care;
  - iv) her personal happiness and self esteem;
  - v) the substantial infrastructure available to those with impaired hearing in Birmingham e.g. the deaf mosque, the deaf cinema and multi-disciplinary family therapy.
53. The detriments of BB living at Polestar are:
  - i) That for the time being the circumstances of that placement are a deprivation of her liberty;
  - ii) There will be a continuing disruption to BB's family life;

- iii) Save for the deaf mosque and any multi-disciplinary family work that is yet to be organised, there are fewer opportunities in Birmingham for the family to be involved in the care and support of BB;
- iv) The obstacle created by distance will tend to militate against regaining normality in family life by way of more flexible contact;
- v) There is a real risk that the pressure placed on the family to maintain reasonable contact with BB cannot be sustained.

54. The benefits of BB living at home are:

- i) The close association, love and care of her parents, sisters and extended family with whom she has lived from the time she returned from her educational placement in 1999 at the age of 19 until 19 April 2010;
- ii) Were BSL communication to be taught to BB and her family together that would have the benefit of enhancing their existing idiosyncratic communication that is nevertheless very effective as between themselves and whether enhanced or not by BSL needs to be maintained;
- iii) Were holistic support arrangements including BSL signing, community mental health provision and sensory integration of the type deliverable at Polestar to be provided in the home environment, that would have the inestimable benefit of doing so in such a manner where respect for BB's family life is maximised and interference with her article 8 ECHR rights minimised;
- iv) The detrimental impacts of separation from family i.e. relative estrangement are avoided;
- v) It is unlikely that BB will ever achieve sufficient independent living and will always require support. In the absence of an assessed long term care plan, the local authority's proposal is no more than short term education not a substitute for rehabilitation;
- vi) The benefits of participation in an Islamic and Bangladeshi culture and community with her family would be provided for.

55. The detriments of BB living at home are:

- i) Loss of the gains she has made in communication, functioning and behaviour;
- ii) Failure to achieve the anticipated further gains in these areas, particularly in the next 2 years;
- iii) The lack of the intense and consistent expert support available at the moment only at Polestar;
- iv) The lack of insight of BB parents into BB's need to have the benefits of participating in deaf culture and community;
- v) The use of idiosyncratic communication rather than BSL;



- vi) A theoretical proposition given in evidence by the cultural expert commissioned by the parties who had not analysed or assessed BB or her family that it was likely that the local community and their religious practices would be antithetic to her objective best interests. That was not established in evidence as being relevant to BB's family and accordingly I reject it as no more than an hypothesis at this stage.
56. At home BB would not at the moment receive the intensity and consistency of expert provision necessary to maintain and add to the gains already achieved. Although BB's family are able to communicate with her, that communication has been idiosyncratic so that it does not have the characteristics necessary to allow BB to communicate with others. BB's family are making significant efforts to learn BSL but even with these efforts which are to be commended it is not likely that they will be in a position to communicate in a consistent way with BB and others outside the home for some 3 years.
57. It is not a criticism of BB's family that the court has regrettably come to the conclusion that whatever the good faith of the many people who have been involved with BB over the last few years, the coherence and consistency of their specialist support is simply missing. I have no doubt that, as alleged, there is an element of the family not being willing to engage with and accept some of the support and advice which is available, but there is a tangible difference between the casual assistance which is in fact available to BB and her family in the family home and the specialist service which is being provided for her at Polestar.
58. There is also an argument that the development in BB's autonomy and independence has only been possible by putting some distance between her and her family. While the family continue to demonstrate such an admirable commitment to contact, the benefits of association and separation are available to BB. There is no evidence that BB will be able to develop sufficient autonomy and independence so as to be able to thrive in independent or even semi-independent accommodation: the indications at the moment are that she will always need a supported environment with significant protections not least in relation to her mental health vulnerabilities. That said, she has been able to develop genuinely positive features
59. On balance I have come to the conclusion that for the time being BB's best interests are safeguarded by her remaining at Polestar. The most critical features in that determination are the positive developments she has made as a consequence of the intense expert alliance which is available there and the fact that such an alliance is not at the moment capable of being replicated at the family home or in London. The Official Solicitor submits that this interim conclusion should, subject to deprivation of liberty review, be maintained for up to 15 months: that being a period which would allow sufficient time for adequate planning of a move to a new placement and consideration of the then available options. BB's parents profoundly disagree. They submit that in the event I make the determination that I have the court's review should be limited to 3 months.
60. I have come to the conclusion that neither submission is right having regard to BB's interests. The further investigations this court requires will take more than 3 months if the next hearing is not to be anything other than a mere repetition of this. That said, a period as long as 15 months does not provide for adequate scrutiny of the existing

deprivation of liberty unless there are to be further interim hearings and this court has expressed its dissatisfaction with the analysis of options that exists. Accordingly the proceedings should come back before the court within a reasonable time so that the existing contact between BB and her family does not break down and to monitor the enhancements in that contact that are a pre-requisite to the deprivation of liberty being proportionate. In my judgement the proceedings should be listed for a further hearing 6 months hence and the collation of evidence should be timetabled to that event.

61. So far as contact is concerned, it is common ground that contact should be changed and improved so as to maximise its potential benefits and minimise the negative aspects of B's separation from her family while taking care not to have a negative impact of the benefits so far obtained for BB at Polestar. I agree with the local authority and the Official Solicitor that contact should continue to be supported to maximise the benefits of BSL communication and a consistency of approach to that communication. I am less convinced that the interpretation facility is necessary because the cumulative effect is oppressive. Support is not the same as intense supervision which was only appropriate in a circumstance of unproved vulnerability. One limb of that concern has now been removed by the court's determination; that leaves the other which is aptly summarised as whether the parents will co-operate with the understandable desire of the staff and experts at Polestar to provide a diverse range of activities for BB underpinned by her increasing use of BSL. If the parents do co-operate then in my judgement the care plan for contact proposed by the local authority should be regarded as a minimum and the court will expect it to be developed. If they do not co-operate then the contact proposed will be a maximum. On this basis I accept the submission that contact should be left in the discretion of the local authority but in consultation with the Official Solicitor who must bring the question back to court if the court's expectations are not being met. For the avoidance of doubt, the developments that the court is expecting to see if co-operation is demonstrated are staying contact and visits for BB to the family home and her community and family in London.
62. Finally, there is a need to develop a greater understanding on everyone's part of BB's complex needs in each of the fields of psychiatry, learning disability and deafness. Polestar is located near to a centre of excellence for such integrated family work. It is possible that this could be integrated into the proposed visits that BB's family are asked to make to Birmingham.
63. This case demands further assessment over the next 6 months. It requires a broad best interests assessment of BB's needs and a comparison of those needs as against local services having regard to expert advice as to what the court has been told by Dr Appleford is available, namely the National Deaf Service in London working with the local CMHT. The options available to the court, beginning with home placement, London placement, continuation of the Polestar placement and in any event a plan for the inevitable move from Polestar should be presented to the court as a benefits and detriments analysis. In so far as home placement would involve supporting family members as well as BB, that support should be identified and assessed. Part of the work recommended out of Polestar is the use of a nationally recognised facility in Birmingham for family engagement with professionals who work with those who suffer from schizophrenia. That option must be investigated and analysed as must the use of equivalent resources in London.

64. This court has not been able to consider alternative supported living options in London because they were not assessed. Further enquiries about the suitability of either the facility run by Polestar which is for people with more independence skills than those possessed by BB or elsewhere will need to be urgently made. For the avoidance of doubt the following advantages of a placement in London need to be analysed:
- i) Proximity to family. It was acknowledged by all the professionals that BB's relationship with her family is a very important to her. Ms Diffey in her oral evidence spelt out the significance of BB being able to participate in family life not just with her parents but her nephews, sisters and aunt. If BB were living closer to her family she may be able to obtain the asserted benefits of 24 hour professional support and normal family relationships;
  - ii) It would reduce isolation: AM and SB were clear in their evidence that they could not keep up the present level of contact travelling each week in the long term, and as a consequence BB's family life is likely to be further compromised;
  - iii) There would be increased opportunities for other significant family members to visit BB, for example Mrs MC. The importance of them being able to spend more time together has been identified by Polestar staff, Ms Wong and Ms Walshe. It is unrealistic to expect MC to stay at Polestar given that she is shortly to have another baby and has 2 other small children to care for;
  - iv) There would be the possibility of BB resuming her attendance at college which all reports confirm she enjoyed and to be reunited with her friends from college;
  - v) The placement at Polestar is time limited and a move is inevitable.;
  - vi) Paula Williams agreed in her oral evidence that it would be better for BB to move now so there could be arrangements which include the family rather than being geographically divorced from them;
  - vii) A placement in London would enable her parents and other family members to be involved in BB's treatment and rehabilitation;
  - viii) Ms Diffey raised in her oral evidence the difficulties that may ensue if BB were to become more integrated into the community in Birmingham and the possibility that BB would remain in Birmingham long term "by default."
  - ix) The Local Authority is presently committed to making resources available to support a placement in London, for example additional staffing. That may not still be the case in future years. If those additional resources are to be secured by way of recruiting additional staff the process should commence without delay.
  - x) BB has not had the opportunity to express any wishes and feelings about a possible placement in London as she has not been presented with any information about it. Her wishes are therefore unknown.

- xi) BB has unfortunately had several moves since 19.4.10 but has been able to form relationships with staff. It is predictable she will be able to do so again and that the process will be easier with the support of her family.
  - xii) Ms Walshe's view was that the possibility should be explored without delay as if the potential Polestar placement at Longley Road in London is lost one may not be available for some time.
  - xiii) Such a placement would assist with the objective of shared care .
65. I will invite the parties to discuss the declarations which the court is asked to approve on the basis that these proceedings are to be reviewed in 6 months time with the benefit of new assessment material. Those declarations will include as to capacity, a best interests placement at Polstar, deprivation of liberty and enlarged contact.

Judgment ends.