Neutral Citation: [2023] EWCOP 49

Case No: FD23P00329 / 14122458

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/09/2023

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

GK and LK	**Applicant**
- and -	
EE (formerly known as RK)	**First Respondent**
-and-	
A Local Authority	**Second Respondent**

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The Applicants appeared in person
Ms Gemma Taylor KC and Mr Dorian Day (instructed by **Hecht Montgomery**) for the **First Respondent**
Ms Mavis Amonoo-Acquah (instructed by **the Local Authority**) for the **Second Respondent**

Hearing dates: 4 September 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Mr Justice MacDonald:

INTRODUCTION

1. In this matter I am concerned with an application under the inherent jurisdiction of the High Court and an application in the Court of Protection with respect to EE (formerly know as RK). EE will turn 18 years old during September 2023. EE identifies as non-binary and uses the pronouns they/them. EE is represented by Ms Gemma Taylor of Kings Counsel and Mr Dorian Day of counsel.

2. The applications are bought by EE's parents, GK and LK. The represent themselves at this hearing and have provided a detailed and comprehensive Position Statement setting out their case. EE is currently in the care of, and accommodated by, the local authority under an agreement pursuant to s.20 of the Children Act 1989, signed by EE on 30 November 2022. The local authority has been joined as a party to these proceedings and is represented by Ms Mavis Amonoo-Acquah of counsel.

3. The application by the parents under the inherent jurisdiction was issued on 27 June 2023. Whilst the relief sought by the parents in their application under the inherent jurisdiction was initially limited to seeking information from the local authority regarding EE, the parents now seek an injunction under the inherent jurisdiction preventing EE from undergoing any form of gender affirming medical treatment. By a C2 application issued on 10 July 2023, the parents further seek permission, pursuant to FPR 2010 Part 25, to instruct an expert psychologist and an expert psychiatrist in those proceedings.

4. The application made by the parents in the Court of Protection was issued on 12 July 2023. By their COP1, the parents seek an order appointing them as personal welfare deputies for EE. In their Annex B form, the parents seek an order "preventing surgery or medical treatment in respect of gender reassignment / removal of breast in the interim". The parents' witness statement in support of their application concentrates on the parents' assertion that orders should be made prohibiting EE from undergoing any form of gender affirming medical treatment, rather than on their application for appointment as welfare deputies. They adopted the same position in the hearing. The parents submit that the evidence before the court is sufficient to demonstrate that EE lacks capacity to make decisions with respect to any gender affirming medical treatment and justifies a final order at this stage. In the alternative, the parents submit that there is reason to believe, for the purposes of s.48 of the Mental Capacity Act 2005, that EE lacks capacity to make decisions concerning gender affirming medical treatment and that the court should grant interim relief accordingly and give permission for an expert assessment of capacity.

5. Against this, both EE and the local authority submit that the applications brought by the parents are driven by the inability of the parents to accept EE's gender identity and, as such, those applications are made for an oppressive collateral purpose. In the proceedings in the Court of Protection, both EE and the local authority invite the court to conclude that, in circumstances where there is no gender affirming medical treatment scheduled, a decision with respect to EE's capacity to make decisions in that regard would be inappropriate where there is currently no "matter" for the purposes of s.2(1) of the Mental Capacity Act 2005 to be decided. In any event, both EE and the local authority submit that the evidence currently available in this case is

plainly insufficient to rebut the presumption of capacity with respect to decisions concerning gender affirming medical treatment from which EE benefits pursuant to s.1(2) of the Mental Capacity Act 2005. In each of these circumstances, EE and the local authority contend it is not necessary for the court to have an expert report in the proceedings in the Court of Protection in order to determine the issue of capacity. Accordingly, both EE and the local authority invite the court to dismiss the proceedings in the Court of Protection. They further invite the court to dismiss the proceedings under the inherent jurisdiction.

6. In deciding this matter, I have had the benefit of reading the court bundles prepared in each set of proceedings, from reading the written submissions of the parents and counsel and from hearing oral submissions made by the parents, by leading and junior counsel on behalf of EE and by counsel for the local authority. Given the nature and extent of the issues in this matter, I reserved judgment and now set out my reasons for reaching the decisions I have.

BACKGROUND

7. There are a significant number of factual disputes in this case as between EE and their parents, particularly with respect to aspects of EE's homelife with their parents before they were accommodated by the local authority. It is clear that both EE and their parents have starkly different perceptions of what transpired during that period. It is not, however, necessary for the court to make findings on those disputed facts for the purpose of the applications currently before the court, having regard to the nature and extent of the issues that fall to be determined in this matter.

8. The parents moved to the United Kingdom from Country X when EE was three years old. In 2012, the mother and EE returned to Country X. The minutes of a Strategy Meeting held on 8 July 2022 state that the PNC for the father shows an assault by the father on the mother, threats to kill the mother and EE and the dragging of EE, causing her cuts and bruises in 2012. The police recorded this incident as one of domestic abuse. Against this, the parents contend that the incident was the result of the psychotic episode the father states he experienced in 2012, which resulted in the involvement of the police. As will become clear below, the father seeks to place this alleged psychotic episode into a wider paternal family history of poor mental health, which the parents allege EE is now manifesting. Following their arrival in Country X in 2012, EE attended school in that country before they and their mother returned to England in 2014.

9. In a child protection medical that took place on 14 July 2022 in circumstances that I will come to in more detail below, it is recorded that EE stated that the parents had known "she is LGBT" since EE was 11. EE contends that they had not wished to share that information with their parents because they considered they would receive only criticism rather than support. EE told the doctor that, latterly, they had tried to speak to their parents over the last couple of years about being LGBT but gave up trying to persuade them. The parents state that they were unaware of this information until July 2022.

10. EE contends that the parents have always been "very anti-LGBTQ+" and have stated that LGBTQ+ individuals "are evil and satanic" and that "LGBTQ+ is a cult which destroys mental health". The parents deny this. EE further alleges that they have

experienced physical and emotional abuse from their parents for many years. Again, the parents deny this.

11. The parents assert that EE displayed episodes of self harm in November 2019, when the mother noticed cuts on EE's shoulder that EE was posting pictures of online. The parents have exhibited to their statement in both the proceedings under the inherent jurisdiction and the proceedings in the Court of Protection, photographs of EE's injuries and extracts from their private diary explaining why they had been self-harming. The general practitioner referred EE to CAMHS. The local authority records that are before the court indicate that this referral was due to low mood but that there was no follow up from the parents and the case was closed. The local authority documents record that EE's GP records contain no diagnosis of mental illness in respect of EE.

12. In late 2019, parents state that they contacted a psychiatrist in Country X who is described as being "aware of the family history from [EE's] father's side". There is a document in the bundle that purports to be a report from that psychiatrist dated 11 December 2019. It is one sentence long and purports to diagnose a schizotypal personality disorder in EE. The parents contend that all psychiatric reports in Country X conform to this highly truncated format. EE states that they do not recall speaking to a foreign psychiatrist. EE further states that they have never had medication for mental health issues. There is no evidence before the court of a prescription being given to EE for medication to address a schizotypal disorder or any other mental health issue.

13. EE contends that they realised that they identified as transgender in 2021. EE states that they did not inform their parents given the parents' stated views about LGBTQ+ individuals. During 2021, the parents allege that EE became more aggressive and impulsive, breaking two laptops and a phone, and exhibited a "gradual degradation of empathy" and "catatonic states". The parents ascribed this alleged behaviour to schizophrenia. The parents contend that EE had what they refer to as a "psychotic episode" in May 2022 when EE refused to leave the house of a friend, gave mono-syllabic answers and presented in a "catatonic state". EE states that they had run away from home after an argument with their parents and denies being in a 'catatonic state'. Rather, EE says they simply did not want to speak to their father.

14. On 7 July 2022, the police attended the family home and removed EE after a friend had contacted the Police and alleged that EE had been assaulted by the parents. The Strategy Meeting held on 8 July 2022 records EE as having told the police that they were "LGBT" and that they believed their parents did not like this. EE stated that their parents had held them down as they wanted to see their phone and tried to force them to open it, during which they sustained an injury to their thumb. EE further alleged that their father had knelt on their chest and that their mother had hit their head against a wall. During the subsequent child protection medical, EE asserted that following the assault their mother had been "ranting" about "the evils of LGBTQ". The parents deny these allegations.

15. As I have noted, the parents assert that EE informed them for the first time on 7 July 2022 that EE was a lesbian and identified as non-binary. By contrast, and as I have set out above, in EE's subsequent child protection medical it is recorded that EE stated that the parents had known about the former since EE was 11, when the parents

discovered LGBT material on EE's tablet. EE told the doctor that they had tried to speak to their parents over the last couple of years about "being a LGBT" but gave up trying to persuade them when they were 13 or 14.

16. A subsequent child protection medical dated 14 July 2022 concluded that the injuries to EE were non-accidental. As I have noted, the parents denied injuring EE and alleged that EE has severe mental heath difficulties and was having a psychotic episode on 7 July 2022. When EE gave their own history to the doctor on 14 July 2022 however, EE made no mention of difficulties with their mental health. The child protection medical records contain no evidence suggesting that EE was suffering from a psychotic episode at that time. As I have noted, the local authority documents further indicate that EE's GP records contain no diagnosis of mental illness in respect of EE and there is no evidence before the court of a prescription being given to EE for medication to address a schizotypal personality disorder or any other mental health issue. The child protection medical report further states as follows:

> "[EE] gave written consent for medical examination photography to be used, to support clinical evidence of injury and shared with other doctors to help interpret clinical findings, and court proceedings or teaching and training other professionals. [EE] gave written permission for photographs to be used at peer review and information sharing with GP, school nurse, Police and other professionals, to coordinate care support and investigations. No interpreter was used [EE] was able speak in English fluently. I felt that she clearly understood about the child protection process and reasons for it."

17. EE returned home on 9 July 2022 to collect some personal belongings, prior to a prearranged holiday with their college. The parents were interviewed on 13 July 2022 in respect of an injury to EE's hand and again denied culpability. The police thereafter determined that no further action would be taken. The parents allege that on 15 July 2022 EE refused to talk to them when they returned from the college holiday. In their statement the parents again attribute this to an "ongoing psychosis". EE states that their parents had not told EE they were coming to meet them. EE further states that they therefore ran away in order make sure the parents were not following EE back to their placement.

18. The local authority held a child protection conference in respect of EE on 5 August 2022. At that conference, the parents continued to assert that EE was undergoing a psychotic episode and again denied harming EE, asserting that EE's injuries were either self harm or were caused by someone else. EE's school was, however, unaware of any mental health issues (the parents contended they had not wished to share the information with the school given the stigma attached to mental health difficulties) and EE was described at the child protection conference by their then headmaster as follows:

> "[EE] is a very bright and strong minded young individual. [EE] has good school attendance and academically is doing very well too. Socially [EE] has some good strong friendship groups which [EE] relies on for support. [EE] is well integrated into the school socially and academically and [EE] contributes well in all aspects of school life. [EE] has an important place in

> their community and is keen to continue on at the Sixth Form at the school. [EE] currently has an unconditional offer to continue with them."

19. A further child protection case conference was held on 29 July 2022. The report of that conference records that EE had told social workers that their parents claim that they are a "troubled child having episodes" and that their parents claim they are "bipolar". EE stated, however, that they had never been diagnosed with any mental illness and asserted that their parents considered being a lesbian to be a "mental condition".

20. EE returned home on 12 August 2022. EE asserts that they agreed to return home after their parents assured EE that there would be no emotional or physical abuse. The parents contend that upon returning home, EE shared with their parents their desire to undergo gender reassignment surgery by way of 'top surgery' (i.e. the process of removing or augmenting breast tissue) and hormone treatment. The parents contend that this was unexpected and suggested that EE postpone any decision until they were twenty five years of age. EE describes this period at home as follows:

> "11. All my actions were controlled by my parents after my return. Not only did they make me retract my allegations to the police, but they also made me distance myself from the Social Worker and at first, I started to comply. In August 2022, they insisted that I engage in therapy because they thought this would stop me from identifying as transgender. The therapy sessions were around an hour long every week with a therapist in [Country X] and these sessions would take place online. The therapist insisted that I speak to her in [the language of Country X] and was in constant communication with my mother. These sessions continued for the whole time that I was at home until I left in November 2022. When my mother would make homophobic comments to me, I would get upset and frustrated and my mother would take videos of me and send them to the therapist.
>
> 12. There was a lot of control during this time, and I was being emotionally abused by my parents constantly because they would always make comments to me about how identifying as transgender means I am mentally ill and they would constantly make homophobic/ transphobic comments towards me and say things such as the reason LGBTQ+ is normal in the UK is because they are trying to reduce the population."

21. Within the foregoing context, during the course of September, October and November 2022 the parents contend that EE had a number of what they describe as "psychotic episodes". On 9 September 2022 the parents assert that EE shouted at them, tried to attack them and threw things. Whilst the police were called, the parents state that that call was rescinded when EE calmed down. On 8 October 2022, the parents allege that EE had another "episode" and on 21 October 2022 had headaches, vomiting and high blood pressure. In their statement in the Court of Protection proceedings, the parents assert that they tried to persuade EE to see a psychiatrist but that EE refused. The parents assert that EE was assessed by a clinical psychologist on 28 October 2022 and that the psychologist did not consider EE demonstrated gender dysphoria and that their desire for top surgery was "likely to be equivalent to self harm". It is unclear whether this is a reference to the therapy EE contends they were forced to undergo on

returning home in August 2022. In any event, there is no copy of such an assessment in the bundle and no further details of this alleged assessment have been provided.

22. By contrast, the Children and Family Assessment completed by the local authority in October 2022 states as follows with respect to EE's presentation, they having been seen by a number of professionals:

> "[EE] has been seen by a number of professionals during this assessment period and all have agreed that [EE] presents as a mature independent teenager who can articulate their feelings and emotions positively. Despite the concerns from the parents the social worker has not observed [EE] to be in a psychotic state. The social worker acknowledges they are not a mental health professional however from the communication, interactions and observations by social care, police and medical professionals this has never been raised as a concern and instead [EE] has been reported to have capacity to give consent and understand the process of the Section 47 enquiries and Section 17 assessment of The Children Act 1989."

And

> "Throughout this assessment a number of professionals have observed and spoken to [EE] at length about her history and current concerns. At no point have any professionals shared a concern for [EE] and her mental health and although its acknowledged the social workers and police officers are not mental health professionals [EE] has never been observed to have a psychotic episode or showing any symptoms of an episode which have been regularly witnessed with other young people of [EE]'s age. [EE] has been clear and concise throughout all her discussions she has been consistent with her story and she has been open and honest about her feelings which would have been uncomfortable and upsetting not knowing the professionals for long. During the CP medical the Dr reported no concerns for [EE] needing to be seen by a psychiatrist or psychologist and did not recommend any assessment of her mental health after completing a full body examination."

23. On 28 November 2022, the parents allege that EE had another "episode" in which EE allegedly attacked the father, cutting his eye, which bled extensively, and tried to leave home undressed. EE contends that this incident occurred after they had decided to leave home and after their parents came in their room, turned over their suitcase, causing all of their belongings to fall out. EE states that the parents again started making homophobic comments. EE alleges that their father attempted to restrain them from leaving. EE concedes that they did hit him at this point. EE denies being naked when leaving the property, stating they were likely dressed in pyjamas. The parents again state that, as a result of this incident, they were concerned that EE was suffering from schizophrenia. The parents offered to show to the court a video of this episode, and of other alleged "psychotic" episodes. I was, however, content to rely on the parents' detailed descriptions of these alleged "psychotic" episodes and declined to view the videos proffered by the parents in the hearing.

24. Following the incident on 28 November 2022, on 30 November 2022 EE did not return to the family home after school. As I have noted, on that date EE consented to

being accommodated by the local authority pursuant to s.20 of the Children Act 1989. The parents criticise the local authority for not consulting them before accommodating EE and describe having "no real contact" with EE after this date. The local authority submit that, in light of EE's age as at 30 November 2022, s.20(11) of the Children Act 1989 applied and that therefore, as made clear in *London Borough of Hackney v Williams* [2017] 2 FLR 1216, the parents right to object pursuant to s.20(7) was not engaged and that EE's welfare required safeguarding at the time the s.20 agreement was entered into. As I have noted, in both their application under the inherent jurisdiction and in the Court of Protection, the parents invite the court to "terminate" the s.20 agreement. Whilst the decision of the local authority to accommodate EE *may* be amenable to judicial review, I am satisfied that this court has no jurisdiction to "terminate" the s.20 agreement, either in the Court of Protection or under the inherent jurisdiction of the High Court.

25. Following accommodation by the local authority, EE left their private school. EE has nonetheless recently obtained a Maths GCSE and an English GCSE and is due to begin studying for a BTEC. The parents allege that EE has engaged in harmful behaviour whilst in the care of the local authority, including the abuse of "drug like substances" (the parents rely on statements by EE on social media that they are have used cough medicine and amphetamines), returning home late and terminating contact with their extended family. The parents further allege that the local authority has supported EE with respect to gender reassignment, wrongly determined that EE is mentally well and convinced EE that their family home is unsafe. The parents contend that the local authority referred EE to the charity Mermaids without informing the parents or seeking their consent. The parents express scepticism in respect of the local authority's denial that it has encouraged EE to take testosterone. In their statement in support of the applications under the inherent jurisdiction and in the Court of Protection, the parents go so far as to ascribe the death of EE's great grandmother to the actions of the local authority in respect of EE.

26. A further medical assessment was completed in respect of EE in the form of an initial looked after health assessment on 28 February 2023. That medical recorded that EE had suffered from low mood and self-harm in the past while living in their parents' care and confirmed that the CAMHS referral initiated in January 2020 was due to EE's low mood and thoughts about self-harm and life not being worth living. However, the medical undertaken in February 2023 raised no concerns regarding any psychotic episodes and recorded a significant improvement in EE's mood and outlook since living semi-independently and following the wider acceptance of their identity. In the Independent Reviewing Officers CLA review minutes of 15 March 2023, there is likewise no mention of any ongoing mental health difficulties (EE did allege that their mother had threatened to have them sectioned under the Mental Health Act 1983 if they did not return to their old school). In her most recent statement the social worker asserts as follows:

> "As far as the local authority is concerned there has been no evidence of a lack of capacity in EE, or any very serious mental health concerns raised from interactions with numerous social workers, social work managers, education professionals, both in their previous and current establishments, and medical professionals."

27. Whilst during the medical undertaken in February 2023 EE expressed gender dysphoria and stated that they considered themselves non-binary, there was no suggestion of an intention to engage in gender affirming medical treatment at this point in time. Gender affirming medical treatment also did not appear in the list of EE's current wishes and feelings. In the Independent Reviewing Officers CLA review minutes of 15 March 2023, there is likewise no mention by EE of an intention on the part of EE at this point to seek gender reassignment treatment.

28. The parents issued their application under the inherent jurisdiction of the High Court on 27 June 2023. Following that application coming before the court on 11 July 2023, in circumstances I will come to below, the parents issued their application in the Court of Protection on 12 July 2023.

29. In their statement in the Court of Protection proceedings, the parents assert that they "strongly object to our daughter accessing medical intervention to change her body". They contend that EE wearing a breast binder is a form of self-harm and a form of medical treatment with adverse health consequences. The parents express particular concern about the prospect of EE undergoing gender affirming treatment in the form of top surgery in circumstances where they submit that this would be an irreversible procedure for EE. In particular, the parents object to EE "wishing to present as male" in light of the revised NHS Service Specification based on the Cass Review, which they submit makes clear that any form of social transitioning in adolescents should not be seen as a neutral act but an active intervention that should only occur with the intervention of qualified clinicians (as set out above, it is apparent that EE does not, in fact, wish to "present as male" but rather identifies as non-binary).

30. Within the foregoing context, the parents submit that the evidence now before the court is sufficient to demonstrate conclusively that EE lacks capacity to take decisions concerning gender affirming medical treatment, having regard to the gravity and irreversibility of that decision, and justifies a final declaration and consequential orders. The parents rely on the following matters as demonstrating that EE lacks capacity to make decisions with respect to gender affirming medical treatment:

    i) The paternal family history of mental health difficulties to which I have already referred, which are set out in the parents evidence and which the father described in detail during the course of his submissions to the court. The parents contend that the father's great grandmother suffered from acute schizophrenia and that the his grandfather suffered a milder form of the condition. The father further contends that his own father suffered from acute schizophrenia. In their statement, the parents contend that, as a result, the paternal grandfather spent a large part of his life involuntarily confined to a mental health institution. However, the parents also set out in their statement, and the father stated during his submissions, that the condition rarely had any impact on the paternal grandfather's cognitive capacity, and that during his career as a mathematician and physicist he taught extensively and published many books. As I have noted, the father states that he himself suffered a psychotic episode in February 2012, albeit the police recorded this as an incident of domestic abuse. The parents contend that schizophrenia results in a distorted view of reality and is very difficult to diagnose.

ii) A purported diagnosis of EE of schizotypal personality disorder by a psychiatrist in [Country X] (who had also treated the father in 2012) dated 11 December 2019. As I have noted, the unsigned document is one sentence long and contains no details of the nature and extent of the consultation that led to it, the presentation of EE that underpins the diagnosis or the reasons justifying that diagnosis. Again as I have noted, the parents contend that this is the format for all psychiatric reports in [Country X]. The parents also exhibit to their statement a short report from Dr S, consultant psychiatrist, based on a discussion with the parents. Very properly, Dr S indicates that it is not possible for him to confirm any diagnoses in EE circumstances where he has not examined EE.

iii) What the parents describe as "psychotic episodes" exhibited by EE from July 2022 to November 2022 as summarised above.

iv) EE's difficulties with self-harm. The parents also characterise EE's current body piercings as a form of self-harm and, as I have noted, consider their use of a breast binder as self-harm. The parents further point to an entry on social media in which EE states that whilst on a plane for a holiday they wished it would crash.

v) EE's alleged abuse of alcohol and drugs. In their statement in the Court of Protection proceedings, the parents allege that whilst in the care of the local authority EE has started to abuse "drug like substances".

vi) EE's failure to achieve their predicted academic grades.

vii) EE's cutting off of contact with all other family members.

viii) EE's move from identifying as a lesbian and non-binary in July 2022 to now wishing to "present as male" (again, as set out above, it is apparent that EE does not, in fact, wish to "present as male" but rather continues to identify as non-binary).

ix) What they contend is the inability of EE to retain, use and weigh information when the parents have attempted to discuss with them what they consider to be the dangers of gender affirming medical treatment. In their statement in support of the application in the Court of Protection, the parents state that "from a cognitive and intellectual point of view [EE] is doing very well but for her ability to make informed decisions, consider, balance and weight up we do not consider she has capacity."

31. As I have noted, if the court is not persuaded that the evidence currently before the court demonstrates that EE lacks capacity to make decisions in respect of gender affirming treatment, and justifies a declaration and consequential orders at this stage, the parents seek an interim declaration pursuant to s.48 of the Mental Capacity Act 2005 to that effect and permission to instruct an expert psychologist and an expert psychiatrist. The parents further submit that the court should grant an injunction under the inherent jurisdiction of the High Court prohibiting EE from undergoing any gender affirming medical treatment and, again, should permit the instruction of an

expert psychologist and an expert psychiatrist in the proceedings under the inherent jurisdiction.

32. The basis for the parents' applications for expert evidence is most comprehensively articulated in their C2 application for permission pursuant to instruct experts in the proceedings under the inherent jurisdiction pursuant to FPR 2010 Part 25. The application in those proceedings is accompanied by two draft letters of instruction to a psychologist and psychiatrist respectively. Those letters of instruction are drafted in partisan terms.

33. The draft letter of instruction to the psychologist accompanying the C2 application in the proceedings under the inherent jurisdiction invites an assessment of EE's capacity to conduct proceedings; a full cognitive assessment of EE; advice on effective methods of communication with EE; and an indication of whether EE requires a full psychological assessment. The draft letter to the psychiatrist accompanying the C2 application in the proceedings under the inherent jurisdiction invites an opinion on whether EE has a mental illness, a personality disorder or other emotional difficulty; an opinion on whether EE is suffering or has suffered from schizophrenia; advice on treatment or therapy for any psychiatric condition or drug and alcohol dependency and the duration of such treatment; an opinion on whether EE has gender dysphoria or whether "her desires to undertake treatment [are] a form of self-harm or other condition"; advice on EE's understanding of the short, medium and long term consequences of the treatment proposed; an assessment of the "risk of suicidal tendencies"; and assessment of the likelihood of EE's "present wishes continuing into adulthood" and "the prospect of reversing the psychiatric / psychological / physical effects"; and an opinion on the options for therapy and EE's "capacity to participate in therapy". The draft letter of instruction to a psychiatrist also requests an assessment of EE's capacity to conduct litigation. Those representing EE are satisfied that EE has litigation capacity, noting their duty to notify the court and make appropriate arrangements if this were not the case.

34. In their COP1 application form, the parents state that they consider EE "does not have the mental capacity to make such decisions [with respect to top surgery] and seek that they are assessed by a psychiatrist and psychologist". Whilst no draft letters of instruction accompanied the application for permission to instruct experts in the proceedings in the Court of Protection, during the course of the parents' submissions the parents confirmed that, in addition to the matters set out in the draft letters of instruction provided in the proceedings under the inherent jurisdiction, they sought an expert assessment of EE's capacity to make decisions with respect to gender affirming medical treatment.

35. Following the issue of proceedings under the inherent jurisdiction on 27 June 2023, the parents' application was listed for a without notice hearing on 11 July 2023. It is unclear from the papers why a hearing was listed without notice to EE, who is 17 years old, in circumstances where it was given a fixture on a date some 14 days after issue and, as such, was plainly not considered urgent. On 11 July 2023, Moor J directed that a representative attend from the local authority attend the next hearing listed on 18 July 2023. Moor J prohibited the local authority from informing EE of the proceedings. Again, it is not clear from the papers on what basis it was determined that the proceedings should continue for a further period without notice to EE. In a Position Statement dated 8 July 2023, leading and junior counsel for the

parents articulated an unparticularised "concern on the part of the parents as to how [EE] is told about their application" and that "They would want careful consideration to be given as to how she is told about their application, by who and with what support". There appears however, to have been no evidence before the court, beyond these bare assertions by the parents, that notice of the proceedings would be detrimental to EE, justifying the continued lack of notice to EE. On 18 July 2023, I made EE a party to the proceedings and required notice of the proceedings to be given to them.

36. On behalf of EE, Ms Taylor and Mr Day informed the court that, as EE had stated to the medical examiner in February 2023 and to the IRO in March 2023, EE is not currently receiving any gender affirming medical treatment nor is any such treatment currently scheduled. EE states as follows with respect to their future aspirations in this regard:

> "[29] It is incredibly difficult to get put on testosterone before the age of eighteen and it is also extremely expensive. To be put on testosterone I would have to go to GenderGP, which is the only private clinic for individuals under eighteen and is one of the most expensive clinics in the United Kingdom. I cannot afford to be put on testosterone and Mermaids Charity do not prescribe Testosterone.
>
> [30] I have thought about gender reassignment for many years, and it is something that has always been on my mind. I feel quite strongly about this, and I am of the view that my real life would begin once I undergo Bilateral mastectomy, also known as top surgery. The waiting list in the NHS is 10+ years and private costs are anywhere between £3,000 to £8,000. I cannot afford this surgery at the moment, and it will probably be a while before I am able to fund this."

37. In these circumstances, both EE and the local authority submit that where EE is not currently undertaking any form or treatment arising out of their gender identity, and no such treatment is scheduled, the matter for decision for the purposes of s.2(1) of the Mental Capacity Act 2005 is not capable of sufficient definition for the court to determine the question of capacity under the 2005 Act and that, accordingly, it would not be appropriate for the court to make any declaration or order on the parents' application at this time, whether final or interim.

38. In any event, both EE and the local authority submit that the applicants could not, on the current evidence before the court, come close to rebutting the presumption of capacity to make decisions in respect of gender affirming medical treatment from which EE benefits under the Mental Capacity Act 2005. Both EE and the local authority submit that there is not even *prima facie* evidence before the court capable of rebutting the presumption of capacity in the proceedings in the Court of Protection such that the court could make orders under s.48 of the 2005 Act.

39. In the foregoing circumstances, both EE and the local authority submit that it cannot be said that it is necessary to instruct an expert psychologist and an expert psychiatrist for the purposes of Part 15 of the COPR 2017 on the issue of capacity. On behalf of EE, Ms Taylor and Mr Day characterise the parents' applications in each set of proceedings for permission to instruct experts as an oppressive attempt to find an

expert who will confirm their fixed belief that EE is mentally ill because they wish to identify as non-binary. Both EE and the local authority further submit that there is no basis for granting an injunction under the inherent jurisdiction of the High Court preventing EE undergoing gender affirming medical treatment and that it is not necessary to permit the instruction of expert evidence in those proceedings. In the foregoing circumstances, both EE and the local authority invite the court to dismiss both sets of proceedings.

THE LAW

40. In circumstances where EE is 17 years of age, both the inherent jurisdiction of the High Court in relation to children and the jurisdiction of the Court of Protection under the Mental Capacity Act 2005 are engaged. However, in circumstances where the court's jurisdiction over EE under the inherent jurisdiction of the High Court comes to an end during September 2023, I concentrate below on the relevant legal principles under the Mental Capacity Act 2005.

41. Within the context of this case, the court has jurisdiction in respect of EE under the Mental Capacity Act 2005 only if EE lacks capacity to make a decision in respect of the matter identified as falling for decision. Sections 1 to 3 of the Mental Capacity Act 2005 provide as follows in so far as relevant in this case:

> "**1 The principles**
>
> (1) The following principles apply for the purposes of this Act .
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (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.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> …/
>
> **2 People who lack capacity**
>
> (1) For the purposes of this Act , 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 the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
>
> (3) A lack of capacity cannot be established merely by reference to—
>
> (a) a 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 his capacity.

> (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
>
> …/
>
> **3 Inability to make decisions**
>
> (1) For the purposes of section 2 , 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).
>
> (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).
>
> (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.
>
> (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.

42. Having regard to the particular facts of this case, a number of the foregoing cardinal statutory principles require further illumination for the purposes of determining this matter. I start with the point at which capacity falls to be determined for the purposes of the 2005 Act.

43. In *A Local Authority v JB* [2022] AC 1322, the Supreme Court held that in order to determine whether, in relation to "a matter" for the purposes of s. 2(1) of the Mental Capacity Act 2005, a person lacks capacity, the court must first identify the correct formulation of "the matter" in respect of which it is asserted the person is unable to make a decision. Once the correct formulation of "the matter" has been arrived at, it is then that the court moves to identify the "information relevant to the decision" under section 3(1) of the 2005 Act. That latter task falls to be undertaken on the specific facts of the case. Once the information relevant to the decision has been identified, the question for the court is whether (having appropriate regard to the principles set out in Part 1 of the 2005 Act) the person is unable to make a decision in relation to the matter and, if so, whether that inability is because of an impairment of, or a disturbance, in the functioning of the mind or brain. In *North Bristol NHS Trust v R* [2023] EWCOP 5 I summarised the position thus at [57]:

> "There are four questions for the court to answer when deciding if R has capacity. First, what is the "matter", i.e. what is the decision that R has to make. Second, what is the information relevant to that decision. Third, is R unable to make a decision on the matter. Fourth, if R is unable to make a decision on the matter, is that inability caused by a disturbance in the functioning of her mind or brain."

44. Within this context, it has long been established that determination of capacity under Part 1 of the Mental Capacity Act 2005 is always decision specific and time specific, having regard to the clear structure provided by ss 1 to 3 of the Act (see *PC v City of York Council* [2014] 2 WLR 1 at [35]). Capacity thus falls to be assessed in relation to the specific decision at the time the decision needs to be made, not in relation to a person's capacity to make decisions generally. It is clear from the judgment of the Court of Appeal in *PC v City of York Council* that, in endorsing the submission that removing the specific factual context from some decisions leaves nothing for the evaluation of capacity to bite upon, the Court of Appeal rejected the notion that the requisite specificity can be derived from categories of matter:

> "[37] The central provisions of the MCA 2005 have been widely welcomed as an example of plain and clear statutory language. I would therefore deprecate any attempt to add any embellishment or gloss to the statutory wording unless to do so is plainly necessary. In this context the reference within the Official Solicitor's argument to 'domains' of decision-making is unwelcome and unnecessary. The court is charged, in relation to 'a matter', with evaluating an individual's capacity 'to make a decision for himself in relation to the matter' (s 2(1)); no need has been identified for grouping categories of 'matter' or 'decision' into domains, save where to do so has been established by common law or by the express terms of the MCA 2005 (for example, capacity to marry)."

45. In the foregoing circumstances, in order to determine the question of capacity under Mental Capacity Act 2005 in accordance with the legal framework set out above, there must first be before the court a correctly identified and formulated "matter" that falls for decision proximate in time to the point at which the court determines the question of capacity. Absent this being the position, the court is unable to satisfy itself with respect to the remaining cardinal steps of the exercise of its jurisdiction under Part 1 of the 2005 Act as summarised in the previous paragraph. Namely, what is the information relevant to the decision, is the person unable to make a decision on the matter and, if the person unable to make a decision on the matter, is that inability caused by a disturbance in the functioning of their mind or brain. It is in this context that EE and the local authority submit that any determination of their capacity with respect to consent to gender affirming medical treatment would be inappropriate in circumstances where there is no current gender affirming medical treatment scheduled, whether top surgery or otherwise.

46. Dealing next with the presumption of capacity in more detail, if the court is satisfied that there is a matter on which a decision falls to be taken, the presumption of capacity enshrined in s.1(2) of the Mental Capacity Act 2005 Section 1(2) of the Mental Capacity Act provides that EE must be assumed to have capacity to make decisions in respect of that matter unless it is established that they lack capacity. In circumstances where the matter or matters falling for decision in this case (in so far as

they can be sufficiently defined at this stage having regard to the points set out above) concern medical treatment of a person over the age of 16, a further presumption with respect to capacity is engaged in this case until September 2023.

47. Section 8 of the Family Law Reform Act 1969 provides as follows with respect to children over the age of 16:

> "**8. Consent by persons over 16 to surgical, medical and dental treatment.**
>
> (1) The consent of a minor who has attained the age of sixteen years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian.
>
> (2) In this section "surgical, medical or dental treatment " includes any procedure undertaken for the purposes of diagnosis, and this section applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment.
>
> (3) Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted."

48. In an *NHS Trust v X* [2021] EWHC 65 (Fam), the court made clear that s.8 of the Family Law Reform Act 1969 deals with legal capacity, as distinct from mental capacity, which is now dealt with by the Mental Capacity Act 2005. In this context, in *NHS Trust v X*, Sir James Munby observed as follows with respect to the intersection between the Family Law Act 1969, 'Gillick' competence and the Mental Capacity Act 2005:

> "In the light of this elaboration, we can now refine the Donaldson analysis so it may be summarised as follows: (1) Until the child reaches the age of 16 the relevant inquiry is as to whether the child is Gillick competent. (2) Once the child reaches the age of 16: (i) the issue of Gillick competence falls away, and (ii) the child is assumed to have legal capacity in accordance with section 8, unless (iii) the child is shown to lack mental capacity as defined in sections 2(1) and 3(1) of the Mental Capacity Act 2005."

49. Accordingly, unless the presumption of capacity from which EE benefits under s.1(2) of the 2005 Act is rebutted, whilst under the age of 18 EE is able to give effective consent to lawful gender affirming medical treatment pursuant to s.8 of the Family Law Reform Act 1986 in circumstances where they are over the age of 16 (see also *Re D (A Child)(Residence Order: Deprivation of Liberty)* [2019] UKSC 42 at [49]). Once over the age of 18, unless the presumption of capacity under s.1(2) of the 2005 Act is rebutted, EE is able to give effective consent to lawful gender affirming medical treatment as a capacitous adult.

50. Turning next to declarations and orders in the interim, s. 48 of the Mental Capacity Act 2005 enables the court to make an interim order where the court is satisfied that there is *reason to believe* that EE lacks capacity with respect to the relevant matter:

> "**48 Interim orders and directions**
>
> The court may, pending the determination of an application to it in relation to a person ("P"), make an order or give directions in respect of any matter if—
>
> (a) there is reason to believe that P lacks capacity in relation to the matter,
>
> (b) the matter is one to which its powers under this Act extend, and
>
> (c) it is in P's best interests to make the order, or give the directions, without delay."

51. In *DP v LB Hillingdon* [202] EWCOP, Hayden J held that the question falling for consideration under s.48 of the Mental Capacity Act 2005 should be formulated as "is there reason to believe that P lacks capacity?", a question that falls to be answered by reference to a broad survey of all of the available evidence. At [59] in *DP v LB Hillingdon*, Hayden J observed as follows with respect to the position where there is an absence of "professional evidence" as to lack of capacity:

> "It is manifest that the section permits the court to make an interim order where professional evidence as to lack of capacity is not yet available. It should also be noted that the section is permissive, providing that the court "may" make an order, but not requiring it to do so. This provides the crucial safeguard in those cases where reasonable grounds for believing that P may lack capacity, on a given issue, can be identified but where the plans or proposed arrangements that are contemplated on the making of an order appear to the judge to be disproportionate or to represent an unjustifiable interference with P's autonomy."

52. In this case, there is no "professional evidence" that EE lacks capacity to take decisions with respect to gender affirming treatment (this again being a function of the fact that there is currently no such medical treatment scheduled). The burden of proof lies on the person or body asserting a lack of capacity, in this case the parents, and the standard of proof is the balance of probabilities (see the Mental Capacity Act 2005 s. 2(4) and see *KK v STC and Others* [2012] EWHC 2136 (COP) at [18]). In this context, the only current evidence with respect to capacity is the assertion of the parents, based on their interpretation of events as set out above. As I have noted, if the court does not accept their submission that this demonstrates conclusively that EE lacks capacity to undergo gender affirming medical treatment, the parents contend an expert report as to capacity is necessary.

53. With respect to expert evidence, Part 15 of the Court of Protection Rules 2017 deals with expert evidence in proceedings under the Mental Capacity Act 2005. Rule 15.3 of the COPR 2017 provides as follows:

> "**Duty to restrict expert evidence**

> 15.3.—(1) Expert evidence shall be restricted to that which is necessary to assist the court to resolve the issues in the proceedings.
>
> (2) The court may give permission to file or adduce expert evidence as mentioned in rule 15.2(1) and 15.5(1) only if satisfied that the evidence—
>
> (a) is necessary to assist the court to resolve the issues in the proceedings; and
>
> (b) cannot otherwise be provided either—
>
> (i) by a rule 1.2 representative; or
>
> (ii) in a report under section 49 of the Act."

54. Accordingly, with respect to applicant's application to instruct an expert to assess EE's capacity, the question for the court is whether such evidence is *necessary* to assist the court to resolve the issues in these proceedings. The current issue being, subject to the difficulties I have referred to with respect to identifying the "matter" for the purposes of s.2(1) of the Act, whether EE lacks capacity to take decisions with respect to gender affirming medical treatment.

DISCUSSION

55. I am not satisfied in this case that there is currently before the court a sufficiently formulated "matter" for the purposes of s.2(1) of the Mental Capacity Act 2005 for the court to determine the question of capacity. Within this context, I am further satisfied that that expert evidence as to capacity is not necessary to resolve the issues in the proceedings and that it would not be appropriate to grant relief under s.48 of the Mental Capacity Act 2005. In circumstances where the court's jurisdiction under the inherent jurisdiction ceases during September 2023, I am satisfied that it is not necessary for the court to permit jointly instructed expert psychological and psychiatric evidence in order to determine the proceedings under the inherent jurisdiction and I decline to grant an interim injunction under the inherent jurisdiction. My reasons or so deciding are as follows.

56. Once again, in circumstances where the court's jurisdiction with respect to EE under the inherent jurisdiction of the High Court as it relates to children will come to an end during September 2023, all parties agreed that it is the jurisdiction of the Court of Protection that constitutes the operative jurisdiction in respect of EE moving forward. In the circumstances, I will deal first with the proceedings in the Court of Protection.

57. As I have noted, by their original COP1, the parents sought to be appointed as welfare deputies for EE. In the Annex B to the COP1, the parents state they seek an order "preventing any surgery or medical treatment in respect of gender reassignment/ removal of breast in the interim". That formulation is repeated in their Position Statement. During the course of the hearing, it was apparent that in this context the parents sought, at a minimum, to establish that EE lacks capacity to consent to "surgery or medical treatment in respect of gender reassignment/ removal of breast" and that the court should make interim declarations and orders accordingly under s.48 of the Mental Capacity Act 2005.

58. The decision of the Supreme Court in *A Local Authority v JB* makes clear that before the court determines the question of capacity under the Mental Capacity Act 2005, it must identify the correct formulation of "the matter" in respect of which the court is required to evaluate whether the person is unable to make a decision. That exercise is antecedent to the court being in a position to complete the further steps required by the Mental Capacity Act 2005 to reach a decision as to capacity. Namely, identifying the information relevant to the decision EE is required to take, determining whether EE is unable to make a decision on the matter identified and determined whether, if EE is unable to make a decision on the matter, that inability is caused by a disturbance in the functioning of their mind or brain. As confirmed in *PC v City of York Council*, the determination of capacity under Part 1 of the Mental Capacity Act 2005 is always decision specific and time specific, which requires the court to engage with the specific factual context of the decision at the time the decision falls to be taken. In the circumstances, in identifying in this case the matter for the purposes of s.2(1) of the 2005 Act, the court needs to needs to do so with sufficient particularity to allow evaluation of EE's capacity to make a decision for themselves in relation to that matter. Further, the court needs to be satisfied that the matter so identified is one that falls for decision at this point in time.

59. In the circumstances, in order to be in a position to determine EE's capacity to consent to gender affirming medical treatment in this case, the court would in my judgment need to be in a position to identify the *specific* gender affirming medical treatment falling for decision *and* to be satisfied that the decision as to capacity with respect to that specific gender affirming treatment is being taken at the time the treatment is to be undertaken. In this context, I am satisfied on the evidence before the court that it is not possible to identify the matter for the purposes of s.2(1) of the 2005 Act with sufficient particularity, and sufficiently proximate to the point at which the decision falls to be taken, to permit the court properly to determine the question of capacity that the parents submit falls for determination in this case.

60. EE has made clear, and I accept, that whilst they aspires to undergo gender affirming medical treatment, including top surgery, there is no gender affirming medical treatment currently scheduled and nor will there be for some time. Whilst EE has expressed a desire in the future to undergo testosterone treatment and to undergo a mastectomy, these intentions are not yet confirmed. Within this context, the range gender affirming medical treatments is wide and evolving. What comprises EE's stated intention now, may not be their intention at the point at which they choose, or not, to undergo treatment. In the absence of any gender affirming treatment being proposed at this time, the court does not have before it any evidence as to what such treatment involves, what the potential dangers and side effects of such treatment are, the nature and extent of the preparatory counselling with respect to the decision to have, and the consequences of, gender affirming medical treatment and any assessment of the treating clinicians of EE's capacity to consent to such treatment. In these circumstances, I am satisfied that it is not possible in this case at present to identify the "matter" for the purposes of s.2(1) of the 2005 Act with any greater particularity than the formulation used in the parents' Annex B form, namely "surgery or medical treatment in respect of gender reassignment/ removal of breast." In my judgment, that formulation of the matter is not a sufficient basis on which to assess capacity having regard to the principles I have set out above. Further, and of equal importance, the absence of any scheduled gender affirming medical treatment

necessarily means that the court would not be assessing EE's capacity in that regard sufficiently proximate in time to the decision falls to be made. For the court to make what, in effect, would be anticipatory declarations as to EE's capacity with respect to a broad category of medical treatment would run entirely contrary to the cardinal principles of the 2005 Act.

61. It follows from my conclusion that it is not possible in this case at present to identify the "matter" for the purposes of s.2(1) of the 2005 Act with any greater particularity than the formulation used by the parents, that an expert report as to capacity having regard to the terms of COPR 2017 Part 15 is unnecessary to resolve the issues in these proceedings. An expert instructed to undertake such an assessment would be in *precisely* the same position as the court. Namely, assessing EE's capacity to consent to a matter defined only in general terms to the extent set out above and at a point divorced in time from the point of decision.

62. The foregoing conclusions must, in my judgment, be determinative of the parents' applications under the Mental Capacity Act 2005 and for permission to instruct an expert to assess capacity. Where there is no matter to be determined, the antecedent questions of what is the information relevant to that decision, is EE unable to make a decision on the matter and, if EE is unable to make a decision on the matter, is that inability caused by a disturbance in the functioning of their mind or brain, do not arise. However, on the facts of this case, I consider it important also to address briefly in this judgment the parent's firm contention that the evidence before the court demonstrates conclusively that EE lacks capacity to make decisions concerning gender affirming medical treatment. In doing so, I again acknowledge my conclusion that it is not possible in this case to identify the "matter" for the purposes of s.2(1) of the 2005 Act. In such circumstances, I confine myself to the following observations.

63. The parents submit that the evidence before the court demonstrates that EE is a vulnerable young person with mental health difficulties, comprised in some formulations adopted by the parents of a schizotypal personality disorder and in other formulations as schizophrenia, who has demonstrated periodic psychotic episodes. I am satisfied that the evidence before the court is not capable of supporting that submission and, in fact, actively undermines that submission.

64. Whilst the parents pray in aid a family history of mental health difficulties in the form of schizophrenia, there is no evidence before the court to corroborate that assertion. Although the father contends he suffered a psychotic episode in 2012, there is no independent evidence corroborating that assertion and the local authority records indicate that the police recorded that incident as one of domestic abuse. With respect to the purported report from a psychiatrist in Country X dated 11 November 2019, the court cannot place any weight on that document. As I have noted, the report it is one sentence long, gives no indication of the area of expertise of the author, makes no reference to the questions the psychiatrist was asked to address nor to the materials to which the psychiatrist had regard in reaching the stated diagnosis and does not deal with the issue of capacity at all, whether by reference to gender affirming medical treatment of otherwise. As noted above, EE states they have no recollection of seeing a psychiatrist in [Country X]. EE does make reference to being compelled to engage in therapy in August and September 2022, the description of which bears some of the hallmarks of so called 'conversion therapy'.

65. I further note that the evidence available from this jurisdiction with respect to EE's presentation paints a *starkly* different picture in respect to EE's mental health to that contended for by the parents based on their account of family history and the purported psychiatric report from November 2019. The local authority records available to the court indicate no medical record of EE having suffered from or having been diagnosed with mental health difficulties in this jurisdiction. There is no evidence before the court of EE having been prescribed medication for mental health difficulties, whether with respect to schizophrenia or otherwise. This position accords with EE's own accounts provided in their child protection medical and their looked after medical. Further, none of the extensive number of professionals who have come into contact with EE have raised any concerns regarding their mental health, whether with respect to signs of a psychosis or otherwise. Neither of the medical examinations that EE following the incident in July 2022 and following their reception into care in November 2022 considered that a mental health referral was warranted. The reports provided from EE's school depict an intelligent, well integrated individual who exhibits no difficulties or discomfort with social interactions and relationships with peers.

66. Within the foregoing context, I am satisfied that the court cannot treat the behaviour alleged by the parents as occurring between November 2019 and November 2022 as evidence of an schizophrenic psychosis. As I made clear at the beginning of this judgment, it is not necessary court to determine the competing accounts of these events. However, it is clear from the accounts of both the parents and EE that during this period family life was highly dysfunctional, with significant stressors acting on EE arising both out of the deterioration of the relationship with their parents and their conclusion that they must keep their gender identity concealed from their parents. In these circumstances, and in the absence of any other cogent evidence that EE labours under a schizotypal personality disorder or schizophrenia and given evidence the positive evidence to the contrary, I am satisfied that the behaviour alleged by the parents cannot be taken as evidence supporting a conclusion that EE has a schizotypal personality disorder or schizophrenia.

67. Having regard to the foregoing matters, and again acknowledging that I have concluded in this matter that it is not possible in this case at present to identify the "matter" for the purposes of s.2(1) of the 2005 Act, I am satisfied that there is at present no cogent evidence demonstrating that EE is a young person who suffers from schizophrenia or a schizotypal personality disorder or is a young person who has issues with respect to their capacity generally. In this case the parents' evidence as to capacity amounts simply to a bare assertion by them that EE is mentally ill with a schizotypal personality disorder or schizophrenia. For the reasons I have set out above, there is no cogent evidence to support that bare assertion. Further, and as also described above, there is positive evidence before the court that EE does not suffer from a schizotypal personality disorder or schizophrenia, despite the urging of the parents to the contrary. These conclusions arise in the context of EE having asserted that their parents consider them to be mentally ill by reason of their previously stated sexuality and their identification as non-binary, a charge denied by the parents. Whilst it is not necessary to make findings with respect to that dispute, the totality of the evidence before the court does leave the court with the distinct impression that the parents have sought, falsely, to paint EE as mentally ill in response to EE having

indicated, initially, that they are a lesbian and, subsequently, that they identify as non-binary.

68. With respect to the proceedings under the inherent jurisdiction, I am satisfied in the foregoing context that it is not necessary for the purposes of Part 25 of the FPR 2010 to give permission for expert psychological and psychiatric evidence. In circumstances where the court's jurisdiction in respect of EE under the inherent jurisdiction comes to an end during September 2023, I am in any event satisfied that it would be wholly disproportionate to permit the instruction of an expert in the proceedings under the inherent jurisdiction. Having regard to the matters set out above, I further refuse to grant an injunction under the inherent jurisdiction preventing EE from undergoing gender affirming medical treatment.

CONCLUSION

69. In conclusion, for the reasons set out in this judgement, I refuse the parents' application under the Mental Capacity Act 2005 for "An order preventing any surgery or medical treatment in respect of gender reassignment / removal of breast" and refuse their application pursuant COPR 2017 Part 15 for an expert assessment of EE's capacity to consent to gender affirming medical treatment. Whilst not actively pursued by the parents, either in their evidence or at the hearing, in the context of the matters set out above I also refuse the parents substantive application under the Mental Capacity Act 2005 for appointment as welfare deputies for EE. I likewise refuse the parents' applications under the inherent jurisdiction, which jurisdiction in any event comes to an end during September 2023.

70. I will invite the parties to draft and submit an order accordingly.