

IMPORTANT NOTICE

This judgment is covered by the terms of an order made pursuant to Practice Direction 4C – Transparency. It may be published on condition that the anonymity of the incapacitated person and members of her family must be strictly preserved. Failure to comply with that condition may warrant punishment as a contempt of court.

Citation: [2024] EWCOP 28

Case No: 13605371_

COURT OF PROTECTION

MENTAL CAPACITY ACT 2005

IN THE MATTER OF AB

Before: Her Honour Judge Hilder

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

Date: 19th April 2024

BETWEEN:

NHS South East London Integrated Care Board

Applicant

-and-

(1) AB (by her litigation friend, the Official Solicitor)

(2) M

(3) London Borough of Southwark

Respondents

JUDGMENT



Mr. J. Anderson (instructed by Capsticks) for the Applicant
Mr. Z. Nabi (instructed by Mackintosh Law) for the First Respondent
The Second Respondent was unrepresented and did not attend
The Third Respondent was excused attendance

The proceedings since August 2021 were conducted in public subject to a transparency order made on 2nd August 2021. The judgment was handed down at a hearing on 19th March 2024.

The purpose

1. The Court is concerned with the best interests of AB. Today is listed as the final hearing in respect of proceedings which have considered where AB should live and how she should be cared for. This purpose of this document is to record, in accessible format, the circumstances in which the position has been reached that no further attempts are required to return AB to living with her mother, M.
2. I have previously handed down a judgment in this matter, reported at [2020] EWCOP 47. In the interests of brevity, I will not repeat the background as set out in that judgment.

Summary of events since the 2020 judgment

3. Attempts were made to liaise with the US court. Ultimately by order made on 18th December 2020 the American proceedings were dismissed, leaving the proceedings in England to continue.
4. At a hearing on 29th January 2021, M no longer pursued her application for welfare deputyship but did seek AB's return to her care as soon as possible. The London Borough of Southwark was to a significant degree supportive of that approach but with the caveat that AB's long term best care option was to live with M in suitable accommodation and "if [M] is willing to work with professionals and subject to a trial period of this arrangement". There being no suitable accommodation then available, the Local Authority's position was that AB's *short* term best interests were served by "a move to a smaller nursing home ideally with residents of her own age." So, what had been listed as a 'final' hearing was adjourned, with directions focussed on addressing the housing need for M and AB together and also AB's medical needs.
5. By the time of the next hearing, in March 2021, the housing authority had reversed a previous decision and accepted a statutory duty to secure suitable accommodation

for M and AB together. Two potential interim placements had been identified for AB but further information was required about them. Having heard oral evidence, M's application that AB return to her care immediately was adjourned part-heard. It was resumed, and dismissed, on 17th March 2021. By then, two potential accommodation housing options for M and AB together had been identified. Directions were given with a view to a final hearing on 29th March 2021.

6. There was procedural delay, largely occasioned by the social worker's unfortunate ill-health. Then, in July 2021, NHS South East London CCG took over funding responsibility for AB's care and was joined as a party to the proceedings.
7. A newly built property at N Apartments had been reserved for M and AB but no formal offer had yet been made. The CCG needed time to consider its position but the outline of a trial period of care was agreed: over a period of 6 months, with weekly updates and a review half-way through. The Local Authority confirmed its willingness to reserve the property at N Apartments until 13th September, with recording of judicial encouragement to hold it for longer if necessary. Directions were given which would have facilitated any agreed move into the property.
8. By the time of the next hearing, on 16th September 2021, no move had taken place. 'Sign off' of the newly built N Apartments was in doubt, but an alternative property at L House had also been identified. At the round table meeting shortly before the hearing, the CCG had confirmed its willingness to fund the trial of AB living in M's care but only "if [M] gives her unequivocal consent to the terms of a revised working together agreement." Considerable time was spent by the Court going through that agreement, line by line, with M (who was unrepresented). She did then agree to and sign it. Directions were again given with a view to ironing out remaining practical issues to facilitate a move.
9. There were difficulties with compliance but the next hearing did take place, as planned, on 15th December 2021. By this time, property proposals had had to shift again but arrangements for a home for M and AB at C House were relatively secure. Progress of the planning for the trial return home was less secure. M had objected in correspondence to the presence of night carers during the transition phase of the trial period; and at the hearing she made a proposal that "a person with Christian beliefs" stay overnight instead.
10. M's proposal was not supported by AB's legal representatives. With some reluctance, M did accept that she would not allow any other person to stay at the property during the trial period without authorisation from the court. It was therefore ordered and directed that, after a transition period, the trial period of AB with M at C House should commence. AB's appointee was authorised to enter into a tenancy on behalf of AB. The London Borough of Southwark was discharged as a party from the date of

commencement of the tenancy. The next hearing was set for July 2022, by which time it was anticipated that the trial period would be in its final stages.

11. AB did move to C House on 21st January 2022. Unfortunately, by February 2022 issues had already arisen which required “a further working together agreement in relation to the appointee”. AB’s representatives felt compelled to make an interim application and on 9th May 2022 I made an order:
 - that M “shall not obstruct, and is required to use her best endeavours to facilitate, assessment of AB in her own home by attending care providers”; and
 - requiring M “to co-operate with the CCG and any other assessors attending AB’s home for the purposes of such assessments.”

12. The trial of AB’s care at home continued but with difficulty. As recorded in an order made on the papers on 26th July 2022, the funding health body (now renamed the ICB):
 - “expressed concerns about M’s approach to care staff and other professionals, and her failure to establish a functional and trusting working relationship with many professionals working with AB”; and
 - expressed its view that it “was not possible for the arrangements to be managed in a manner that was proportionate, given the amount of time required of professionals in administering, managing and providing the care package, and risks of breaking down.”

The ICB made a commissioning decision not to continue funding care for AB with M as a long-term plan. It agreed to continue only whilst alternative arrangements were being finalised.

13. The next hearing took place on 19th August 2022. M was, as she always had been to date, unrepresented. In view of the ICB’s public law decision, there was only one option before the court – a nursing home placement for AB at KL. Important practical details like a care plan, transition plan and contact arrangements were not yet in place but there was a marked sense of heightened concern because M “has refused to allow the carers to enter the property.”

14. M informed the Court at that August 2022 hearing that, in light of the ICB’s decision, she was no longer prepared to act as second carer to AB. Effectively this forced the ICB to expedite transition arrangements and put in place emergency second carer provision. M also informed the Court that she would not have face to face contact with AB when she was at KL.

15. An order was made which required M to allow KL personnel and carers access to AB unimpeded. A best interests determination was recorded that AB should move to KL but not before a final care plan and transition plan were approved by the Court, and the matter was relisted just 5 days later, with a view to the Court then being able to authorise AB's transition.
16. On 24th August 2022, it was ordered that AB should move to KL. She did so on 31st August 2022. So, a trial period of living with her mother had lasted for just over 7 months and ended in failure because it proved impossible to establish satisfactory working relationships between M and the paid care support.
17. Thereafter, at her choice and despite constructive proposals to ensure that such choice was not financially determined, M's only contact with AB was remote.
18. AB did not entirely settle at KL. In particular, her legal representatives were concerned by reports of AB's distress when she was left alone. Issues arose as to implications for AB and M of AB no longer living at C House, where she had a tenancy. The proceedings continued to address these and other issues, but on the basis that AB was now living at KL.
19. By December 2022 AB's legal representatives were seeking to address AB's apparent distress by at least a trial period of increased 1:1 care. M still declined to have face to face contact with AB. Consideration was given to whether AB could travel to see M at her home. Directions were given to address these concerns.
20. By the next hearing on 24th February 2023, M had made a complaint about KL to the CQC, such that KL gave notice of its intention to terminate the placement. There was no other option before the Court. Directions were given to a further hearing on 27th March.
21. Meanwhile, M obtained representation. On 3rd March 2023 a pre-action protocol letter was sent to the ICB on behalf of M, seeking to challenge its decision not to commission a care package for AB at C House with M. The ICB responded that it maintained its decision and the challenge was out of time. Nonetheless, at the March hearing, where M was represented and in the knowledge that the KL placement was not secure, there was a renewed engagement between the parties. The ICB agreed to convene a meeting to address contact issues, to undertake a transport assessment, and to review AB's care plan. The parties were granted permission jointly to instruct Dr. Poz, a neuropsychologist, to address the concerns about AB exhibiting distress. AB was able to stay at KL pending the next hearing, which was listed in June 2023.
22. At the hearing on 21st June 2023, M was still represented. A new working together agreement was in progress but not concluded; a transport assessment had been

undertaken but left gaps; and care plans required more detail. Two potential alternative placements had been identified but the ICB had also made an *in principle* decision that it would again consider commissioning a package of care with M. In that respect, M confirmed to the Court that:

- she understood that the proposal under consideration by the ICB was for a package of domiciliary care delivered at home to meet AB's assessed needs;
- that this proposal envisaged care being provided by domiciliary care providers and not by M alone without support, oversight and monitoring; and
- she did not have any particular requirements or specifications for any prospective domiciliary care providers.

23. AB's legal representatives reserved their position as to where AB should live and receive care. The parties were given permission to instruct Ian Gillman-Smith, an Independent Social Worker, to consider placement options. A further hearing was listed in September 2023.

24. At the hearing on 26th September 2023 M was still represented. Mr. Gillman-Smith had concluded that it would be in AB's best interests to have a further trial of living at C House with a package of domiciliary care. KL had confirmed that it would continue accommodating AB to enable transition either to live with M or to an alternative residential placement, but not as a long-term option. Three potential residential placements had been identified, and also a domiciliary care provider.

25. The option of a further trial period of living with M was undoubtedly being seriously developed. As well as having identified the care agency, funding was agreed subject to completion of documents, final costs and the court's decision as to AB's best interests. A meeting between the ICB, M and the proposed domiciliary care provider was scheduled for 27th October. M confirmed her understanding that the proposal did not involve her delivering care to AB during the initial period of any trial. M had attended one session of face to face contact with AB at KL, and indicated a wish to continue such visits on a monthly basis.

26. Directions were given, including the listing of a 2 day hearing in December 2023 to determine specifically if it was in AB's best interests to have a trial of care with M at C House, or if not, where else she should live.

The end of attempts to trial care of AB with M

27. On 13th December 2023, at what was expected to be the first day of the hearing, when M was still represented, her representatives informed the Court that M no longer wished to pursue the trial of care of AB at home, and applied for her discharge

as party to the proceedings. That decision brought an end to efforts to arrange a second trial of AB living with her mother, and explains the need for this written record.

28. M's own account of *why* she withdrew from the second attempt to trial AB's care with her is as follows, drawn from the position statement of her legal representatives for the hearing on 13th December 2023:

"7. At the RTM [on 8th December 2023], a redacted report from a Verve care worker was shared with the parties. The report alleged that [M] had been difficult to deal with when the Verve care worker was on shift on 1 December 2023. Consequently the care worker stated that they wished to withdraw from the care package.

Verve care worker withdrawal

8. While [M] has visited [AB] 5 times at [KL] in the past three months, this was her first interaction with a Verve care worker. As set out in the transition plan, it had been envisaged that [M] would undertake four shadowing sessions with Verve care staff at [KL]. The transition plan noted that "*exact dates and start times will be discussed and agreed with [M] as she has identified that she may have difficulties with transport in order to attend for full shifts.*" The transition plan also provided for visits to the flat (which have not yet taken place.)

9. The contents of the report shocked [M] as she felt it in no way reflected the casual interaction she experienced with this carer. It is unfortunate, as the witness statement of Glinnis Goldring dated 17 November 2023 noted that the ICB had been satisfied that visits by [M] to [AB] at [KL] had been going well and that they appeared to be interacting well.

10. Following the withdrawal of the Verve carer in question from the care package, the ICB indicated at the RTM on 8 December that Verve required some positive interactions between staff and [M] before they would consider supporting a visit to the flat. [M] considers that this is akin to a trial before the trial.

[M'S] POSITION

11. [M] desperately wishes for [AB] to come home to live together in the flat, however, she is concerned that another Verve carer may also misperceive, misunderstand or misrepresent [M's] behaviour. [M's] primary concern is to secure and maintain stability in [AB's] residence and care package. Given the previous distressing experience of a failed trial for both [AB] and [M], [M] does not wish to risk commencing a trial home for [AB] only to have the trial ended abruptly.

12. Given [M's] clear position that the care worker has misperceived or misrepresented her behaviour, she instructed her representatives to inform the RTM that she was concerned that it did not bode well for the chances of success of the trial and that she no longer wished to pursue a trial home for [AB].

13. [M] has reflected upon her position over the weekend and is firm in her decision that she does not wish to pursue a trial home for [AB] at her flat. This is not a decision that [M] has taken lightly. [M] wishes to withdraw from the proceedings and an application under Rule 9.16 of the COPR 2017 and a COP9 and COP24 application was filed earlier today.

14. Going forwards, [M] will continue to have her weekly video contact with [AB] on Mondays, and to send weekly voice messages to her on Thursdays. While [M] would also like to see [AB] in person, she is not currently in a position to commit to in-person visits at [KL] or for [AB] to come visit in person at the flat. These depend on how [AB] may tolerate in person visits in the light of the news that she will not be returning home after all, and where mother and daughter will respectively live. [M] will keep the issue of in-person visits under review.”

29. In light of [M's] position, the Court has not made any findings of fact as to what may or may not have occurred between M and the Verve carer. However, it was beyond doubt M's decision to end the proposed trial, not anyone else's. As set out in the position statement from AB's legal representatives for the hearing on 13th December 2023:

“35. The withdrawal of the carer was not itself fatal to the proposed trial, because Verve Homecare were still willing to continue with other carers, and the ICB still supported the trial. However, during the RTM, [M] instructed her solicitor to formally inform the meeting that she was no longer seeking a trial.

37. [M] subsequently e-mailed [KL] on 8 December 2023 cancelling her face to face meeting with AB scheduled for Monday 11 December 2023, stating that she would now call AB via Whats App. On 11 December [M's] solicitor confirmed [M's] position remained unchanged and that she wanted to withdraw from the proceedings; and, in particular, she did not wish to proceed with the trial at home.”

30. Since then, the focus of the proceedings has been to find a 'final' residential placement for AB. She moved to HH on 2nd April 2024 and is reported to settled well. Today's hearing was listed to conclude any outstanding issues, by submissions only.

31. M did not attend today's in-person hearing. She had latterly made a COP9 application to attend remotely but it was refused by order made on 5th April 2024, because the date had been fixed in her presence, there was no persuasive explanation as to why remote attendance was now appropriate, and because of past experience of M's difficulties with effective engagement remotely. M did, however, engage in the round table meeting a few days before the hearing, when the contact plan and working together expectations document were discussed. She then confirmed her receipt and understanding of those documents. She did not agree them but declined an invitation to suggest any helpful changes, or to engage in further discussion of them. In all the circumstances, I was satisfied that final orders could and should be made in M's absence today.

32. There are now green shoots of a settled future for AB, which should be protected. At present, further attempts to consider AB's return to M's care would be unreasonable. It is clear from all needs assessments of AB undertaken to date that her care requires more than a single person. It is not realistic for M to consider that she can meet AB's needs alone.

33. There have now been two serious, credible attempts to facilitate a trial of AB returning to live with M and a support package. Each attempt will have raised AB's expectations, in so far as she is able to understand proposals. Certainly each attempt has meant a change in AB's experience of care arrangements, and her experience of contact with her mother. It seems likely that, if she were able to express a view, AB would want settled security over disappointed hopes. AB's own legal representatives were in December 2023, and remain now, of the view that it is not in her best interests that any further attempts to trial care at home with her mother be made. I accepted that position in December 2023, and I record it now.

34. Each of the attempts to trial home care were, I am satisfied, undertaken in a genuine spirit, with the intention to promote AB's interests. M was not 'set up to fail' and yet **both** attempts to trial AB's return home have failed amidst allegations of inability to establish satisfactory working relationships between M and paid support. Each attempt has taken up a significant amount of time and resources. It is reasonable that public bodies who bear the resource burden of such trials have clarity as to expectations going forwards. Having been her choice to end the second attempt to trial home care, it is also reasonable that M understands that she cannot expect unlimited, repeated exertions. The Court does not expect from the public bodies any further attempt to trial AB's return to living with M.

Conclusion of proceedings

35. Accordingly, I have today made final orders that :

- AB shall not be removed from England and Wales without further order of the court;
- AB shall continue to live at HH (where a Standard Authorisation for deprivation of her liberty is in place); and
- Contact between AB and M shall be in accordance with a contact plan and 'working together expectations' document.