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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
[2021] EWHC 3303 (Fam)

No. FD21P00920

Royal Courts of Justice
Strand
London, WC2A 2LL

Wednesday, 1 December 2021

Before:

MR JUSTICE HOLMAN

(**In public**)

B E T W E E N :

A COUNTY COUNCIL — Applicants

- and -

(1) A MOTHER
(2) A FATHER
(3) A CHILD (by her guardian)
(4) LEWISHAM & GREENWICH NHS TRUST — Respondents

(Refusal to make a DOLS order)

MR A. LORIE (instructed by Legal Services, a county council) appeared on behalf of the applicants.

THE FIRST RESPONDENT MOTHER did not attend and was not represented.

THE SECOND RESPONDENT FATHER did not attend and was not represented.

MS K. CANN (instructed by Reeds LLP) appeared on behalf of the child's guardian.

MS A. AHMED (instructed by Clyde & Co) appeared on behalf of the fourth respondent.

JUDGMENT

(As approved by the judge)

MR JUSTICE HOLMAN:

1 This case concerns a deeply troubled girl aged almost 14 and a half. She is, and has been, in the care of a local authority pursuant to a care order made as long ago as January 2014. There is absolutely no doubt on the evidence in this case that the criteria under section 25 of the Children Act 1989 for making a secure accommodation order are satisfied. However the local authority have been unable, and remain unable, to identify suitable regulated premises where she can be accommodated pursuant to such an order. Accordingly, such an order cannot currently be made and the local authority have not applied for one. So, instead, they apply for a so-called DOLS order in a way that has, frankly, become far too frequent in recent years.

2 As I have already made clear, I decline today to renew such an order on the facts and in the circumstances of this case. By this *ex tempore* judgment, I will give my reasons for declining to do so. I wish, however, to make very clear indeed at the outset that I perfectly understand the acute difficulty that the local authority face in the present case and I am, frankly, very sympathetic to them. The fact of the matter is that there is a grave, and now scandalous, shortage of suitable establishments in this country where very troubled children such as this child can be kept safe whilst respecting their dignity and, so far as possible, their liberties. However, it needs clearly to be understood by this local authority, and by all local authorities, that the court itself does not have any resources at all available to it, nor a cheque book. I cannot myself find or create any solution in this case; but I am, frankly, not prepared simply to rubber stamp what the local authority and the other parties all know to be an unlawful situation at the moment in the present case.

3 The essential factual background is that this child was born in 2007. She was removed from her mother's care in March 2013 and, as I have said, a full care order was made in January 2014. In February 2015 the child was placed with a foster family in the same

county in which she had been living with her mother, and the county of the present applicant local authority. For about six years there appears to have been a period of some stability. Very sadly, in March 2021 that foster placement broke down, and the foster family felt that they could no longer keep her. Initially, their own adult daughter offered to try to care for the child. She lived some distance away in another county, but it was to her that the child moved. That arrangement seems to have survived for about three months, but in June 2021 that foster carer also said that she simply felt unable further to cope.

4 In July 2021 the child was moved to a residential home within the applicants' county. Here, she displayed considerable self-harming behaviour. This included banging her head against a wall, running away, stating that she wished to die, and damaging property. In September 2021 she self-harmed again and was admitted to hospital. During that admission, the residential home in which she had been living gave notice that they would not have her back. She remained in hospital for some time until a second residential home was identified for her in south London, a quite considerable distance from the area of the local authority in which she had previously lived.

5 During her period in hospital the child had been assessed as being on the autistic spectrum and this particular residential home is experienced in caring for such children. She moved there during September 2021. Initially she appeared to be reasonably settled, but in early November 2021 there was a marked deterioration in her behaviour. That may or may not have been triggered by her mother making contact with her for the first time in several years. At all events, she resorted again to head banging, cutting her limbs, much verbal and physical aggression, damage to the property, and attempts to abscond. In the period between 5 and 8 November 2021 she was admitted three times to hospital under forms of police restraint. I have been told that on one occasion while she was in hospital, no less than seven police officers were required to restrain her. The second residential home has now refused to have her back.

6 On 9 November 2021 the child was assessed by a consultant child and adolescent psychiatrist attached to the CAMHS team for the area in which the second residential home is located. There is a report dated 11 November 2021 from that consultant child and adolescent psychiatrist, Dr HM. She says in that report that she was asked to assess the child as a duty psychiatrist on 9 November 2021 in the A&E unit of the hospital to which she had been taken. She says that the child had absconded while on a trip to a supermarket and that this was her third presentation to the A&E unit in three days. The formal diagnosis of Dr HM is:

> "Emotional dysregulation secondary to developmental traumas and attachment/abandonment issues on a background of autistic spectrum disorder, moderate learning difficulties, and probable attention deficit hyperactivity disorder."

7 Dr HM describes how in recent times the child had absconded, had self-harmed by head-banging, had assaulted staff, and had run into traffic saying she wants to die.

8 On 8 November 2021 she had run off in a supermarket, possibly into traffic. The police were called and she had been taken to A&E. Dr HM reports that while in hospital she has been prescribed a number of essentially sedating drugs, including risperidone, promethazine, and lorazepam. Dr HM records that on examination the child was fidgety, and her conversation was limited and very rigid and concrete. There was no evidence of any new major mental disorder. She did not appear to be depressed. She talked about wanting to die, but did not indicate any actual plans to kill herself, although she is an impulsive person. She was not psychotic. She was oriented in time, place, and person, but showed no insight. Dr HM records that she:

> "...is not Gillick competent to consent to treatment plans, including medication."

9 The overall impression of Dr HM is recorded as being that the child:

> "...is a 14-year-old presenting with distress following review in new placement and contact with parents. She has attachment/abandonment issues upon a background of neurodevelopmental conditions of ASD and LD - she also shows signs of ADHD - and her presentation should be seen in this context rather than the onset of a new acute mental disorder. Her current location in A&E is not particularly therapeutic and there is no indication she requires admission to a general adolescent unit. With her current profile, this would increase her risk and be another placement..."

10 Dr HM identified the risks to herself as:

> "...high through absconding and impulsive self-harm when distressed - requires to be managed with high staff ratio in short term and medication/secure transport."

Her risk to others is "high" and her level of vulnerability is "high".

11 In her report, Dr HM gave as a plan that the child should return to the residential home in which she had been living in south London with three to one observation 24 hours a day. As I have mentioned, however, not long after that the residential home made plain that it would not have her back. So, essentially, she has remained in the hospital in east London ever since.

12 She has, on occasions, absconded from the hospital and been taken back by police, and on at least one occasion handcuffs were required to be used. While in the hospital she has frequently locked herself in the bathroom, lain on the floor, and banged her head. She has broken her bedroom window and attempted to harm herself with a piece of broken glass.

She has frequently been sedated with some of the oral medication to which I have referred, and also olanzapine.

13 So the current situation is that this troubled young person is not physically ill. She does not require any form of physical hospital treatment in the specialist paediatric unit in which she is currently being detained. I am told that during the course of last week there was an exercise of powers under section 5(2) of the Mental Health Act 1983 under which it was lawful to detain her for up to 72 hours, which were due to expire last Saturday, 27 November 2021. Up until that time, neither the local authority, nor the relevant NHS trust, nor anybody else have sought recently to engage this or any court.

14 At about 9.00 p.m. last Friday evening, 26 November 2021, I was contacted as the duty out of hours judge and asked to make a so-called DOLS order declaring that it was lawful and in her best interests for the child to be deprived of her liberty at the hospital in which she was then being detained. Frankly, even at that time, I had very grave misgivings about doing so, but it was 9.00 p.m. on a Friday night. As everyone knows, apart from emergency services, this country more or less goes to sleep over the weekend. I was told that the local authority and, importantly, the hospital trust itself, and also importantly, the duty Cafcass guardian who had been approached (being the area manager for the area of the applicant local authority), all agreed to such an order being made. So I did make it, but I expressly ordered that it would cease to be of any effect after 6.00 p.m. today, Wednesday 1 December 2021, unless renewed at the hearing which I fixed for today. So another four and a half days have now elapsed between the time I was asked to make that DOLS order last Friday evening and this hearing here in a proper open court room at the Royal Courts of Justice today. Frankly, very little has happened during those four and a half days.

15 The guardian who had acted as the child's guardian in the care proceedings back in 2013 and 2014 has been re-appointed as guardian for the child and she, in turn, has instructed the

same solicitors who acted on behalf of the guardian in those care proceedings. The guardian has had a video communication with the child yesterday afternoon. I have been told in a short position statement made by Ms Kara Cann, counsel on behalf of the guardian, that during that video call:

> "She was only able to sustain engagement for a very limited period. It was apparent that she was agitated. She made little eye contact and spent the majority of the call off camera or with her back turned and walking around the room. When she was able to engage, she did so through what she described as her pet dog. This is a stuffed toy animal. When asked what her wish would be, she was able to say that she wished to be 'on my own' to 'feel safe' and 'not to be scared anymore'. She was very reluctant to engage in any deeper or meaningful conversation."

16 As a result of that contact, I am informed in the position statement that her solicitor and guardian:

> "...are very clear in their assessment that she is not competent to provide instructions directly."

17 The position of the local authority today is described by their team manager in a second statement dated 29 November 2021. She says in that statement that:

> "The placement team confirm that searches for accommodation began on 22 November 2021. To date, several hundred placements have been explored and no offers have been received."

18 She attaches a schedule in which numerous organisations and establishments are referred to. She says, in summary, that no provider has been willing or able to offer a placement for a range of reasons. These include that they are unable to meet the child's needs within their

establishments, and/or that placing her alongside the children currently in the respective home is likely to break down existing placements, and/or that she needs “a solo residential home”, and/or that they have no educational facilities attached to their homes, and/or, most generally, that she has special needs which they are unable to meet within their facilities, or simply that they have no vacancies.

19 So the blunt position of the local authority is that they simply have no solution at all with which to provide and care for this child. As I have said, I am sympathetic to the dilemma of the local authority, but the fallacy in so many of these DOLS applications is some sort of misguided or desperate belief that, somehow, the court can provide that which the local authority themselves cannot provide. So the position of the local authority today is simply that she must continue to remain where she is in this paediatric unit of a general hospital and that I, the court, must give some spurious veneer of lawfulness to that by the rubber stamp of making a DOLS order. It is now necessary, however, to consider the position of the hospital.

20 There are two statements from Mr RC, the head of nursing there. In his statement, he first refers to the unit in which the child is currently being detained. He says that this is a 24-bedded ward providing care for children and young people with a variety of medical conditions such as asthma, bronchiolitis, diabetes, sickle-cell, epilepsy, and surgical and orthopaedic conditions. It also has a dedicated oncology unit for children. It also has two high visibility rooms near the nursing station for acutely unwell children who require close observation and nursing care. He continues that:

> “Since her admission to hospital, there has been an escalation in her aggressive behaviour to others and visible self-harm on the ward. The impact of this upon she herself, staff, and patients should not be

underestimated. It is now impossible to manage safely and is having a seriously detrimental effect on everyone."

21 Mr RC then refers to some of the more serious of the:

"...numerous incidents of aggression and absconding since the child was first admitted to the ward."

As I have already mentioned, these have included absconding, from which as many as seven police officers were required to bring her back. She has tried to bite and kick staff and police officers, which:

"...was very distressing to the staff and unwell children in the hospital."

22 She has absconded again and again. On 25 November 2021 she:

"...became agitated, punching the glass panel of the ward entrance door. Security were called as she was shouting and hitting her head on the floor. She spat at staff and had to be restrained by security in line with Trust protocols."

23 On Friday 26 November 2021 she:

"...attempted to wrap the sheet around her neck and later a wire from her bed. She was moved to a different room due to the distress which was being caused to oncology child patients. She locked herself in the bathroom. A thermostat fixed to the wall was pulled down by her and security were again called. She was restrained and administered the sedative promethazine."

24 On Monday 29 November 2021 she was:

> "...agitated and screaming and attempted to run to the front doors of the ward to abscond. Security were called and she was restrained by five security members. During this time, she was biting the staff."

25 Mr RC then describes the impact that all of this is having upon other children in the hospital. He says:

> "As this is an acute hospital, the children's ward is caring for and providing medical treatment for a range of serious medical conditions including surgical, oncology, and palliative care. She has been held on the paediatric ward, although she has no medical need for hospital treatment. This is having a severe impact on the children and families who do require inpatient acute hospital treatment."

He says that:

> "This is having an effect on people throughout the main ward from whom they are unable to shield the current inpatients and their carers and families who are witnessing the violent behaviour and the subsequent physical restraint."

26 Very tragically and movingly, Mr RC describes that:

> "Two of our oncology patients now wish to leave the hospital due to this child being in close proximity. They have been in tears and have been observed clinging to their parent out of fear and lack of understanding of the situation. One 17-year-old child is in hospital for palliative care and has not been able to die with dignity due to the loud sounds and witnessing this child headbanging and shouting. Unfortunately, this dying child also saw

staff in tears and with superficial marks after they had been harmed by the subject child. His distress was very visible and also that of his parents."

27 Mr RC goes on to say:

> "Staff are now apprehensive in providing care for her as they have been assaulted and frequently spat at... Most days, parents request to take their children home as they do not feel safe on the ward. Their children should not have to be witnessing such incidents, especially when they are acutely unwell or have a life limiting condition."

28 The overall conclusion by Mr RC at the end of his statement is as follows:

> "The child has been held in this acute hospital for eleven days now despite being medically fit for discharge, which she has been since shortly after admission on 18 November 2021. It is not in her best interests, and the severe restrictions on her life are resulting in increased acts of absconding and aggression, the incidents of restraint, both physical and sedative, and now frequent, which is damaging for her and her future."

29 So there is there the expression of an opinion from a senior professional person, who daily witnesses these events, that her continuing detention in this hospital and the restrictions that they are having to impose upon her are not only "not in her best interests" but are positively "damaging for her and her future". The position of the hospital is, bluntly, that it has reached the end of the road. It has said that unless I do renew or extend the DOLS order beyond 6.00 p.m. today, it will discharge her.

30 When the case was called on this morning I was told that the hospital would very reluctantly keep her until some time on Friday 3 December 2021 if I were to extend the order; but it is

clearly very reluctant to do so, and it does not, in any way, resile from its position that it is not in her interests to be detained there and that it is damaging to her to be detained there.

31 Mr Andrew Lorie, who appears on behalf of the local authority, pleaded with me this morning to renew or extend the existing DOLS order for a further period. He himself submitted that I should do so for another fourteen days to give to the local authority some further time to make some alternative and more lawful arrangements for this child. His fallback position was to plead that I should extend it at least until Friday. Frankly, I cannot see the utility in doing so.

32 This child has now already been in that hospital for eleven days. The local authority have been well aware for many, many weeks now that they have a very troubled child on their hands who is going to need a very high level of care and supervision. They obtained the order from me last Friday night. They have had another four and a half days to come up with some alternative plans. I broke off at about 12 noon today to give them yet further time to see what proposals they could come up with. I was told at 2.00 p.m. and again at 3.00 p.m. that they still do not have any establishment in which they can place her. I was told in the most vague and general of terms that the local authority feel that they may be forced to, and may be able to, rent some accommodation somewhere within their county and may, in due course, be able to employ and supply three trained workers to care for her. However, all this lacked any specificity or detail whatsoever. I have absolutely no information (nor, indeed, do the local authority) of the address, or facilities of any proposed rented accommodation. I have absolutely no names of any proposed carers, nor their qualifications or experience. However, the local authority plead with me to make some sort of DOLS type order to give a veneer of legality to what they seek and propose.

33 In my view, there has to be some limit to these repeated applications to this court for DOLS type orders. In her position statement for today, Ms Amina Ahmed, counsel on behalf of

the hospital trust, has drawn my attention to two recent authorities in which High Court judges have, in fact, refused to make DOLS type orders. One is a decision of Poole J in *Nottinghamshire County Council v LH (A child) (No. 1)* [2021] EWHC 2584 (Fam) in which he declined to make a DOLS type order in circumstances not dissimilar to the present. He said in that case:

> "Depriving her liberty in that setting would not provide her with a safety net - it would not keep her safe or protect her. To the contrary every hour she is deprived of her liberty on this unit is harmful to her."

34 The other authority is a decision of MacDonald J in *Derby CC v CK & Ors (Compliance with DOL Practice Guidance) (Rev1)* [2021] EWHC 2931 (Fam). In that authority, which concerned unregistered placements, he said:

> "I am satisfied that the court should not *ordinarily* countenance the exercise of the inherent jurisdiction where an unregistered placement makes clear that it will not or cannot comply with the requirement of the Practice Guidance to apply for registration."

35 As Poole J said in the *Nottinghamshire County Council* case:

> "...although the inherent jurisdiction must be available in these troubling cases, it cannot be treated as a rubber stamp to authorise the deprivation of a child's liberty whenever the court is told that there is no other option available..."

36 That is exactly the situation with which I am faced in the present case. I have been told that "there is no other option available" but I am also clearly told, most clearly through the evidence of Mr RC, that the situation in which this child is currently being held not only "is not in her best interests" but is positively "damaging for her and her future."

37 I do not have a solution to this case. Clearly, it is the duty of the local authority to whose care this child was entrusted over seven years ago to keep her safe. Provided they act in good faith and do the very best they can, the lawfulness of what they do may be justifiable by a doctrine of necessity. I make crystal clear, as I have done many times during the course of this hearing, that I am not in any way whatsoever indicating to the hospital trust that it MUST now discharge this child, still less ordering it to do so. It must make its own decisions. If it does decide to keep her longer, then it also may be able to justify such a decision by a doctrine of necessity. But I am sorry to say that, at the end of this long day, I am simply not willing myself to apply a rubber stamp and to give a bogus veneer of lawfulness to a situation which everybody in the court room knows perfectly well is not justifiable and is not lawful.

38 For those reasons, I will not extend further the order and declaration which I made on 26 November 2021 which will now expire in just under two hours' time (it is now 16.05) at 18.00. So far as I am concerned, the proceedings themselves may remain in being as a legal framework within which the local authority may, if they think fit, later apply for a DOLS type order if and when they have made proper arrangements for this child which they can demonstrate to the court are objectively in her best interests. I will transfer the application to the family court sitting in the city in which the care order was made and which is the county city of the local authority.

39 I have not named the local authority or that court in this judgment because there is going to be a transcript of the judgment, but, of course, they will be named in the order. I will direct that a transcript of this judgment is made urgently at the expense of public funds and made publicly available. I have taken care not to include any identifying information of any kind within it.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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