



Neutral Citation Number: [2022] EWCOP 35

Case No: 1395733T

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/08/2022

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

Between :

SOUTH GLOUCESTERSHIRE COUNCIL

Applicant

- and -

DN

1st Respondent

(by his litigation friend, the Official Solicitor)

and

S Residential School

2nd Respondent

Alec Small (instructed by **South Gloucestershire Council**) for the **Applicant**
Benjamin Harrison (instructed by **Irwin Mitchell LLP**) for the **1st Respondent**
Poonam Bhari (instructed by **Stone King Solicitors LLP**) for the **2nd Respondent**

-Hearing-dates: 15 July-2022-

Approved Judgment

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

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THE HONOURABLE MRS JUSTICE JUDD DBE

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the incapacitated person and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

The Hon Mrs Justice Judd :

Introduction

1. The court has before it two applications. First, an application on behalf of DN, by his litigation friend the Official Solicitor, for welfare orders under the Mental Capacity Act 2005. Second, an application by the local authority for orders under the inherent jurisdiction, authorising DN's deprivation of liberty in an unregulated placement.

Events leading to these proceedings

2. DN is 17 years old. He has a diagnosis of Autistic Spectrum Disorder, severe learning difficulties, and Tourette's Syndrome. He has significant communication difficulties and complex sensory and behaviour needs. He has been living at S residential school, an independent school in the West Country since February 2019 with the agreement of his parents. The expert in the bundle suggests that there is reason to believe that he lacks capacity to make decisions for himself as to his residence and care.
3. DN made considerable progress at S school, although there were periods when he was unable to manage his emotions and became dysregulated. There were incidents in March and May 2022 where staff had been injured when he became aggressive. He required 2:1 staffing and waking night staff to keep him safe and on occasion was given diazepam and aripiprazole.
4. The precipitating event to these proceedings was an incident on 16th May 2022 in which DN attacked three members of staff leaving them with significant injuries. There was very little warning, and the incident was distressing and frightening for all. S home stated that his behaviour had become unpredictable and challenging. Following this incident they gave notice six weeks' notice (as provided for in the contract) that his placement should come to an end by 8th July 2022.
5. Following this, the local authority began a search for another placement for DN. Despite very extensive efforts they have not been able to find anything suitable. Following DN's mother seeking legal advice, an accredited legal representative was appointed to represent DN and on 4th July an application was made on his behalf in the Court of Protection to address deprivation of liberty arrangements (the local authority had not obtained any orders with respect to this) and arrangements for DN to be found suitable alternative arrangements. On 12th July the local authority followed with an application of their own under the inherent jurisdiction.

6. The case came before Her Honour Judge Cronin on 8th July, and was immediately transferred to His Honour Judge Wildblood QC on the same day. S school was joined as a party to the applications and on that day they agreed to extend the placement by seven days whilst further enquiries were made. DN's deprivation of liberty was authorised under the inherent jurisdiction in the interim. The Official Solicitor was invited to act as DN's litigation friend. The case was then listed before me.

Searches for another placement

7. No matter how hard the local authority has searched, they have been unable to find anywhere suitable. They, and those acting for DN have tried to persuade S school to keep DN at least for another four weeks on the basis of a careful plan, which they say should ensure the safety of DN and all those who care for him or come into contact with him.
8. The local authority has found an agency, GreenStaff Medical who will provide trained staff, round the clock, to care for and supervise DN in a property on the premises of S school. The staff have enhanced DBS clearance, and are fully trained to care for someone with DN's needs and in the use of restraint should it become necessary. The provision is for 3:1 care during the day and 2:1 during the night. With such a wrap around package, the local authority and DN's representatives argue, there is minimal risk to anyone either working at, or attending S school, or even making use of the facilities and grounds.

Available options

9. Despite the local authority proposals, S school will not agree to extend the placement beyond another three days over the weekend of 16th/17th July.
10. Ms Bhari, representing S school says that, whether the proposal is for 28 days or 365 days (as was initially misunderstood by S school) the local authority proposals are still not safe. Although the applicant and 1st Respondent say that paragraph 268 of Keeping Children Safe in Education 2021 (KCSIE) suggests that written confirmation from the local authority that the staff working on their premises have been fully DBS checked should suffice, the school disagree with this interpretation of the wording from KCSIE and state that it is their responsibility to make separate DBS (rather than identity) checks with all the staff coming onto the site. This is obviously difficult and time consuming.

- 11.S school also state that they are responsible for those who use their premises (including children who they say are using the property in which it is proposed that DN lives, which seems to be a matter of some dispute) and also for members of the public using the land. They are also responsible for their staff. Despite the proposal that DN has constant 3:1 supervision from trained agency staff, they do not feel that this is sufficient.
- 12.S school finally say that allowing DN to use the property on the site would, albeit with care and support provided by Greenstaff Medical put their OFSTED registration at risk, as the placement itself would be unregistered and unregulated within a registered setting. Although submissions have been made to me to the effect that (a) the placement according to the local authority's proposals would be akin to a holiday placement it only for 28 days and therefore would not likely fall foul of OFSTED; and (b) that OFSTED are unlikely to deregister a body which has allowed a vulnerable young man with nowhere else to go to stay on their property for a relatively short period of any deprivation of Liberty is authorised by this court, S school maintain their position, namely that whether or not DN has somewhere suitable to go, he must leave by Monday 18th July.
- 13.The only other realistic possibility for DN is for him either to go into a hotel room or back to his family home, to be supervised and cared for by the agency workers. The home is cramped, and so some of the family at least will have to move out to other accommodation. I note that Judge Wildblood last week described this option as 'wholly unworkable'. The difficulty for this court and for DN, his parents and the local authority, is that there is no workable option available at all. It may be possible in time for the local authority to find an entire property to rent, but there is nothing available now or by Monday.

Discussion and conclusions

- 14.It was plain when the case came before me that feelings were running very high. The local authority and those representing DN submitted that the school were putting up unnecessary barriers and hiding behind regulations in circumstances where it was entirely unwarranted and at the expense of the wellbeing of a young man they had cared for for three years. I believe that feelings were running high amongst those responsible for S school as well, as it was pointed out to me that some staff had been off work for weeks as a result of the stress of the incident in May and there had been resignations too.

15. This has been an urgent hearing, put into the court list at short notice. This is not the place to decide who (if anyone) is at fault, or whether the school are being rigid and hiding behind 'health and safety' regulations at the expense of a vulnerable young man. There are questions to be asked as to why the local authority did not bring this case before the court earlier, not least to regulate DN's deprivation of liberty and why staff caring for this vulnerable young man were not trained in or familiar with the use of restraint. These are all, however, for another day.
16. What is not in doubt is that this case is one of many that have been before the courts where very vulnerable young people with a high level of need have nowhere to go because there are no places available. The irony is that many places say they are not equipped to meet such a high level of need for care and supervision, with the effect that, on the ground, their needs are not properly met at all. DN was doing well in the placement. Going into a new situation where he is at home, being cared for by people he does not know, will be damaging for him. Nonetheless, with the alternatives being on the street or in a hotel room, it is better than those.
17. Very sadly, I cannot wave a magic wand and find a placement that does not exist. At the end of the hearing, there was no change in the position of any of the parties. In those circumstances, and with the greatest of reluctance, the local authority, those representing DN and the parents consented to the application for me to authorise a move for DN from S school to the home of his parents with the level of supervision set out in the care plan (which constitutes a deprivation of his liberty).
18. It is accepted that there is reason to believe DN lacks capacity to make decisions as to his residence and care. Likewise, it is agreed that the care plan amounts to a deprivation of his liberty. I have to determine whether the proposals are in his best interests. Section 4 MCA 2005 sets out the checklist of factors which must be considered in order to reach a determination.
19. DN is not able to express his wishes and feelings, but those that know him consider he is likely to be unhappy and disturbed as a result of the move, as he does not like change and finds it difficult. He is not likely to understand why this is happening. All concerned will do their best to reassure him, but he cannot be fully protected from the effects of what is going to happen. All that can be hoped is that the situation will be temporary. DN's mother said that she would remain in the property, which will be likely to make things a little easier. Both his mother and father are very unhappy with the behaviour of the school, and have

mounted a complaint. Nonetheless, they recognise that there is no other realistic alternative.

20. There have been cases under the inherent jurisdiction where judges have refused to grant the necessary authorisations to place children and young people in wholly unsuitable placements. No doubt it would be open for me to take the same course either under the inherent jurisdiction or the Mental Capacity Act but in all the circumstances and on the facts of this case, I think it would be even more harmful to DN if I were to do that. He cannot look after himself and needs a high level of care in all matters of daily living. He is going to be living at home and I think that there needs to be a structure surrounding that, given third parties are going to be providing him with care. Although it is very sub-optimal at least he will have somewhere to live, and people able to keep him physically safe. His mother will be living in the property and other family members will be able to visit.
21. I can only implore all those concerned to keep looking for a suitable placement for DN and to hope that something will become available very soon. I express my greatest sympathy to him and his parents, who were clearly very distressed at what is happening. I am also acutely aware that the incident of 16th May was very difficult and worrying for the staff involved as well as DN himself.
22. The case will be listed again before a section 9 judge within two weeks, to consider how the plan is working and what steps are under way to find something that will meet DN's needs. In the meantime, the parties have liberty to apply to the court in case of urgency.