

**IN THE COURT OF PROTECTION  
IN THE MATTER OF s.21A MENTAL CAPACITY ACT 2005  
AND IN THE MATTER OF AB**

**B E T W E E N:**

**GLOUCESTERSHIRE COUNTY COUNCIL**

**Applicant**

**and**

**AB [1]**

**(by her litigation friend, the Official Solicitor)**

**SB [2]**

**NHS GLOUCESTERSHIRE INTEGRATED CARE BOARD [3]**

**Respondents**

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**ORDER**

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**BEFORE** Her Honour Judge Hilder sitting as the Senior Judge of the Court of Protection

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

**ON** 28 and 29 September 2022

**ISSUED ON** 3 October 2022

**UPON HEARING** counsel for the Applicant (Mr. Baldwin), counsel for the First Respondent (Mr. Brownhill), SB in person, and counsel for the Third Respondent (Ms. Sharron)

**AND UPON** the Court noting that on 1 July 2022, pursuant to the Health and Care Act 2022 and The Integrated Care Boards (Establishment Order) 2022, NHS Gloucestershire Clinical Commissioning Group was abolished and replaced by NHS Gloucestershire Integrated Care Board ('the ICB'). The CCG's relevant commissioning functions under Section 3A of the NHS Act 2006 (as amended) have transferred to the ICB.

**AND UPON** it being recorded that:

- a) These proceedings began by application made on form COPDOL11 dated 24<sup>th</sup> June 2021 under the streamlined procedure to authorise the deprivation of liberty which arose from AB's care and support arrangements when she was 17. The matter was taken out of the streamlined procedure by order made on 30<sup>th</sup> June 2021.
- b) When AB reached the age of 18, her care and support arrangements at Placement A were authorised under schedule A1 of the Mental Capacity Act 2005 and these proceedings were reconstituted as a challenge to such authorisation pursuant to section 21A of that Act.
- c) On 26 September 2022, Gloucestershire County Council granted a further Standard Authorisation in respect of AB's care and support arrangements at placement A.
- d) On AB's behalf, the Official Solicitor:
  - i) challenged whether the mental capacity requirement was met;
  - ii) challenged whether the best interests requirement was met;
  - iii) asked the Court to consider the period during which the standard authorisation is to be in force;
  - iv) asked the court to consider the conditions subject to which the standard authorisation is given.
- e) In the course of proceedings, the challenge to the mental capacity requirement has fallen away, the parties accepting the conclusions of the jointly instructed independent expert, Dr Ty Glover, in this regard.
- f) The case was listed for a final hearing on 28 and 29 September 2022. The parties and the Court had identified the issues for determination as follows:
  - i) does AB have capacity to access the internet and social media?
  - ii) if AB lacks the capacity to access the internet and social media, what is in her best interests in this regard?
  - iii) is the best interests qualifying requirement met in respect of AB's care and support arrangements?
- g) On 21 September 2022, AB's solicitors reviewed a very recently disclosed tranche of records from AB's placement. During that review, two issues were identified:

- i) from May 2022 AB was being permitted by Placement A to self-harm significantly, and to retain sharp items in her possession. These sharp items included razor blades. This amounted to a significant change in care arrangements to those which had previously been authorised by the Court. An undated care plan was produced by the registered mental health nurse from Placement A in May 2022 but it was not provided to the Applicant local authority, the ICB or any of the clinicians employed by NHS Gloucestershire Health and Care NHS Foundation Trust (the Trust).
  - ii) AB was being subject to significant levels of restraint when her self-harm concerned the nursing staff who care for her. The records indicate that restraint had included AB being held on the floor in a supine position. This amounted to a significant change in care arrangements, the Court previously having specifically refused to authorise the use of physical restraint.
- h) There was an incident on 18<sup>th</sup> August 2022 where AB self-harmed by cutting her neck region and was restrained. A “Safe Self Harm Care Plan (Cutting)” dated 19<sup>th</sup> August 2022 was drawn up by the care provider. It sets out that AB “has been safely cutting using razor blade since 13.05.22...” and stipulates that “if there is a need to restrain [AB] this should be done in the lounge area.” The “date of review” is stated to be 1st September 2022. Neither the Official Solicitor nor the ICB was alerted to this significant change in AB’s care plans. The Court was *not* alerted to this either.
- i) AB’s solicitors asked for an explanation. In summary:
    - i) the Care Co-ordinator stated that she was not aware of the change in care planning. In a witness statement dated 26 September 2022, she stated *inter alia*: “[The Placement] is a CQC registered, private care provider which employs its own qualified nurses. They do not require authorisation from the Trust to implement their own care plans. However, as part of the MDT, the placement [sic], and the Trust endeavour to collaborate as far as possible on care planning issues”.
    - ii) the previous personal advisor from the local authority was no longer in role. She had been replaced as personal advisor by a student social worker who was not aware of the change in care plans (and neither was Applicant’s solicitor until the disclosure). (There was no consultation with or authorisation by the Applicant local authority of the care plan.)

- iii) the ICB was not consulted in respect of the change of care plans and had not authorised this.
- j) On 28 September 2022, the Court heard oral evidence from:
- i) the registered mental health nurse from Placement A (“the RMN”) who had implemented the new care plan;
  - ii) Dr Ty Glover, the independent expert.
- k) In the course of his oral evidence, the RMN stated that he had implemented a new plan in respect of AB’s self-harming. His rationale for this was that the previous plan, to prevent AB from having access to sharp objects, was not workable. The new plan was *not* to remove razor blades (and other sharp objects) from AB, but to provide emotional support to her and use de-escalation techniques when she was using them. However, AB has used the sharp objects in attempts to sever significant vessels, including the jugular vein. The RMN therefore instructed the other mental health nurses providing care and support to AB to use restraint in circumstances when AB attempted to self-harm in significant ways such as this and on high-risk areas such as the neck, wrists and old deep wounds where there was a significant amount of blood loss. During cross examination by counsel, the RMN accepted that this change in AB’s care and support required the involvement of the MDT including a psychiatrist and/or a psychologist.
- l) During oral evidence, Dr Glover queried whether AB’s medication regime had been optimised and gave details of treatment options he considered should be attempted, in order to stabilise her mood and maximise AB’s ability to demonstrate capacity. The Senior Judge requested that the psychiatrist who had last reviewed AB’s medication attend the hearing remotely the following day (29 September 2022) to give evidence.
- m) The psychiatrist from the Trust who had reviewed AB’s medication in June 2022 gave evidence on 29 September 2022 as to why she considered AB’s medication regime to be appropriate. However, she agreed that it was necessary to review AB further in light of recent developments and was open to convening a meeting with Dr Glover, to discuss the issues he had raised further. With the consent of the Trust, the Court joined the Trust as a party to the proceedings.
- n) On 29 September 2022, the Senior Judge spoke with AB via MS TEAMS. AB’s solicitor was present in the Court with the Judge for the meeting; AB was at Placement A, with a carer present. During the course of that conversation, AB expressed confusion about the lack of

consistency in how she was permitted to self-harm and when she was not, and a feeling that she was not properly supported whilst at the same time overly restricted.

- o) Following the evidence, the Court was informed that the ICB and the Trust, having become aware of the extent of the practices introduced by the RMN at the placement, agreed that the following steps were required and would be urgently undertaken:
- i. a risk assessment of the practices in place regarding AB's self-harm (with multi-disciplinary input, to include input from clinicians with physical health expertise) and for a clear set of plans and protocols to be produced addressing how AB should be supported in this regard;
  - ii. immediate review of the practices in place regarding restraint by the Physical Intervention Team in order to inform a clear set of plans and protocols regarding the use of restraint at the placement;
  - iii. a period of review and assessment, as to whether the practices of tolerating a degree of self-harm from AB, is clinically appropriate and in her best interests. This period of review would be subject to oversight from AB's multi-disciplinary team which involves psychiatry and psychological expertise from the Complex Emotional Needs team (CEN).
- p) On the afternoon of 29 September 2022, the Official Solicitor submitted that an operational duty had arisen under article 2 of the European Convention on Human Rights for the public bodies to take reasonable steps to protect AB from a real and immediate risk to her life. This conclusion was not simply in the context of the recent change in policy as to self-harm and restraint but also events in August 2022 where AB had consumed both noxious substances and medication which required her to attend hospital.
- q) The Official Solicitor submitted that:
- i) the position put forward by the Care Co-ordinator that the placement could implement their own care plans was clinically, ethically and legally unsustainable;
  - ii) it was legally questionable as to whether the self-harm arrangement could be authorised by way of schedule A1;
  - iii) the current arrangements in respect of self-harm are so unplanned and risky that they ought not continue;
  - iv) exceptionally, the care and support arrangements should be authorised by the Court and not by the processes set out in Schedule A1 of the Mental Capacity Act 2005.

- r) The Applicant local authority submitted that:
- i) a social worker will now be appointed for AB urgently;
  - ii) the Best Interests Assessor and, as a corollary, the DOLS signatory, were not aware of the support arrangements around self-harm and restraint. Further that although the incidents of self-harm of August and September 2022 were recorded in the DOLs documents the document of the 19.8.2022 supplied by Placement A was unsigned by AB and was described as temporary, and the support arrangements did not form part of the renewal of authorisation. It follows that the standard authorisation ought not continue;
  - iii) given the very recent disclosure, they did not have a position as to whether the self-harm care and support arrangements should revert to how they were previously or should follow the new approach implemented by Placement A but that any care plan would require court authorisation.
- s) The ICB's position was that:
- i) there was a significant risk that AB may react negatively to a change back to the previous care and support arrangements which may actually increase the risk to her, pending the urgent risk assessment and multi-disciplinary review of the practice that was intended within the next 7 days;
  - ii) the balance of risk lay in favour of the status quo (ie the "Safe Self Harm Care Plan") being maintained, pending such review, but on the basis that if AB self-harms in a way that crosses a "red line" (ie cutting to her neck, wrists, major vessel, opening a wound so it bleeds heavily, or the use of fixed ligatures) carers are authorised to use 2:1 seated restraint to stop the act of self-harm;
  - iii) the Court should authorise the current arrangements, in light of the article 2 issues engaged, and the lack of knowledge on the part of the DOLs signatory, of the extent of the current practices in place.
- t) SB submitted that:
- i) he, and AB's mother, were of the view that any restriction on AB's ability to self-harm may lead to her to abscond from the placement and self-harm without the staff supervision, or to harm herself by suspension;
  - ii) they did not support reverting to the previous arrangements as AB may see the reversion as punitive, which itself would increase the risks of significant further self-harm;
  - iii) the core issue in their view was AB being able to access appropriate psychiatric and psychological support.

- u) The Senior Judge invited the parties to consider a hybrid approach, to which the parties and the provider subsequently agreed, namely that:
  - i) those caring for AB will use all best endeavours to ensure implements for self-harm do not come into AB's possession in the first place. (This shall include searching her post and asking her about any item they suspect she has hidden on her person.)
  - ii) if those caring for AB are aware she has an implement to self-harm, they will not leave her alone;
  - iii) if AB starts to use an item to self-harm, those caring for her will ask her to hand the item to them;
  - iv) if AB refuses to give the item to carers, they will remain with her and encourage to hand the item over.
  - v) if AB self-harms in a way that crosses a "red line" (cutting to her neck, wrists, major vessel or opening a wound so it bleeds heavily) carers are authorised to use 2:1 seated restraint to stop the act of self-harm.
  
- v) With regard to AB's capacity to access the internet and social media, the Official Solicitor suggested and the other parties agree that, in the particular circumstances of AB, the relevant information is:
  - i) some people you meet or communicate with ('talk to') online, who you don't otherwise know, may not be who they say they are ('they may disguise, or lie about, themselves'); someone who calls themselves a 'friend' on social media may not be friendly;
  - ii) in particular, some people on the internet will encourage you to commit serious acts of self-harm or suicide;
  - iii) there are opportunities to purchase objects on the internet which can be used to facilitate self-harm;
  - iv) there is content on the internet which promotes self-harm;
  - v) there is content online which may trigger your drive to self-harm, even if you do not intentionally access it, for example songs or descriptions of illness;
  - vi) there are graphic images and videos of self-harm and suicide online.
  
- w) To that list, the ICB suggest and it is agreed by all parties and the Court that it is added:

- i) people you have contact with, or material you can access online, may negatively impact your mental state and encourage or otherwise exacerbate the desire to self-harm or attempt suicide.
- x) The parties agree and the Court is satisfied that there is reason to believe for the purposes of section 48 of the Mental Capacity Act 2005 that AB lacks capacity to make decision about where she lives, how she is cared for and use of the internet and social media. No party sought for the Court to make a final declaration as to AB's capacity to access the internet and social media in light of Dr Glover's queries as to whether AB's medication had been optimised to support her to demonstrate capacity, and the agreement of AB's psychiatrist to explore this issue further, as summarised at paragraphs k and l above.
- y) The Official Solicitor's position as to the costs of these proceedings remains reserved. She has indicated to the public bodies that it is her expectation that AB ought not be expected to make any financial contribution to her legal representation considering the procedural and substantive history of this matter.
- z) In light of the exceptional circumstances of this case, the public interest and to provide a sufficient element of public scrutiny considering the Official Solicitor's submissions as to Article 2 of the ECHR, the Senior Judge has ordered that this order is published in this, anonymised, form.

**IT IS ORDERED PURSUANT TO SECTION 21A OF THE MENTAL CAPACITY ACT 2005:**

1. The standard authorisation dated 26 September 2022 is terminated.

**IT IS ORDERED AND DIRECTED IN THE INTERIM PURSUANT TO SECTIONS 16 AND 48 OF THE MENTAL CAPACITY ACT 2005 AND AS A RELEVANT DECISION WITHIN THE MEANING OF SECTION 4A (3) AND (4) OF THE MENTAL CAPACITY ACT 2005 THAT:**

2. AB shall reside at Placement A pursuant to arrangements made by the local authority and the ICB and set out in the suite of care plans prepared in September 2022 ('the Care Plan'), namely:
  - a. Risk assessment dated 20 September 2022
  - b. Community Crisis and Contingency Plan dated 21 September 2022
  - c. CPA Cluster Care Plan dated 21 September 2022



- d, Integrated Narrative Assessment Plan dated 23 September 2022
- e. Police Trigger Plan dated September 2022
- f. Placement Care and Pathway Plan dated September 2022
- g. Least restrictive approach to therapeutic observations plan dated September 2022
- h. Self-Harm Protocol dated September 2022

3. AB's access to the internet and social media may be restricted as per the care plan for internet and social media entitled "AB Safe use of Internet and Social Media when in distress."
4. AB's access to implements with which she is able to self-harm shall be limited as per recital s) above.
5. The restrictions in place pursuant to AB's Care Plan above and recital s) above are a deprivation of AB's liberty. These arrangements are hereby authorised as being in her best interests, necessary to prevent harm to her and proportionate to the likelihood of her suffering harm and the seriousness of that harm, notwithstanding that it amounts to an interference with AB's rights under Article 5 and Article 8 of the European Convention on Human Rights.
6. The local authority, the ICB and the Trust must seek further authorisation from the Court if any changes to the Care Plan make it more restrictive for AB. Such application must be made before any changes take effect if they are not urgent, and must be made as soon as practicable thereafter if they are implemented as a matter of urgent necessity to ensure AB's safety.

**AND IT IS ORDERED THAT:**

Procedural

7. These proceedings are reconstituted as proceedings under s 16 of the Mental Capacity Act 2005.
8. NHS Gloucestershire Integrated Care Board shall replace NHS Gloucestershire Clinical Commissioning Group as Third Respondent.
9. The NHS Gloucestershire Health and Care NHS Foundation Trust is joined as party to these proceedings, to be identified as Fourth Respondent.

### Additional evidence

10. By no later than 4pm on 07 October 2022, the NHS Gloucestershire Health and Care NHS Foundation Trust shall file and serve:
  - i. minutes of the MDT meeting convened on 4 October 2022 to discuss the approach which is taken to AB and her self-harm behaviours;
  - ii. a risk assessment in relation to the issue of self-harm and any accompanying protocols or parameter recommend.
  
11. By no later than 4pm on 11 October 2022, the NHS Gloucestershire Health and Care NHS Foundation Trust shall file and serve a witness statement which outlines the view of treating clinicians as to whether:
  - (i) Dr Glover's proposal in respect of mood stabilisers is clinically indicated;
  - (ii) the treatment offered should be changed in light of reports of AB having visual hallucinations;
  - (iii) further clinical input can be offered from a psychiatrist and/or psychologist in light of AB's recent repeated attempts at suicide and significant self-harm; and
  - (iv) summarising any arrears of agreement or disagreement as between the views of AB's treating psychiatrists and Dr Glover
  
12. By no later than 4pm on 11 October 2022, the NHS Gloucestershire Health and Care NHS Foundation Trust shall file and serve (i) any recommendations of the Physical Intervention Team following a review of the restraint being used at the placement (ii) a risk assessment and plans for the use of physical restraint to be prepared by the placement, in collaboration with the Trust, the ICB and the local authority.
  
13. By no later than 4pm on 11 October 2022, the local authority will file and serve a witness statement which outlines the progress of the section 42 enquiry which has been initiated as a result of the evidence heard in court on 28 September 2022.
  
14. By no later than 4pm on 12 October 2022, AB's solicitors, if so advised, shall file and serve a witness statement which outlines AB's wishes and feelings in respect of the draft care plan which has been prepared with regard to her self-harm.

### Next hearing

15. The matter shall be listed for a further case management hearing on **14 October 2022 at 2pm before HHJ Hilder at First Avenue House with a time allocation of 2 hours**. The parties shall convene pre-hearing discussions in the 48 hours prior to the meeting. The following directions shall apply to the hearing:

- a. The Applicant shall lodge an electronic bundle by 4pm on 12 October 2022 containing only those documents essential for the hearing. At the same time, the applicant shall serve a copy on the parties, including a hardcopy on SB.
- b. The Applicant, ICB and the NHS Gloucestershire Health and Care NHS Foundation Trust shall file and serve position statements by 12pm on 13 October 2022.
- c. The Official Solicitor shall file and serve a position statement by 10am on 14 October 2022.
- d. The new Care Co-ordinator shall attend remotely as may the RMN from AB's placement;
- e. The new social worker appointed by the local authority and the social work professional employed by the NHS Gloucestershire Health and Care NHS Foundation Trust who is leading the work in respect of care planning around AB's self-harm shall attend in person.
- f. The attendance of the Head of Integrated Commissioning at the ICB is excused, providing that there is an officer of the ICB authorised to give instructions available remotely.

16. Costs reserved.

17. Permission for this order and information relating to these proceedings to be shared with the placement and JB.