Neutral Citation Number: [2020] EWHC 1827 (Fam)

Case No: FD20P00367

IN THE HIGH COURT OF JUSTICE
FAMILY COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2020

Before :

THE HONOURABLE MRS JUSTICE JUDD DBE

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Between :

London Borough of Sutton	**Applicant**
- and –	
X ('the Mother)	**1st Respondent**
-and-	
Y ('the Father')	**2nd Respondent**
-and-	
Z(A Child)	**3rd Respondent**

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Z (A Child) (DOLS: Lack of Secure Placement

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Ms Morgan QC and Mr. Barnes (instructed by the South London Legal Partnership) for the local authority
Mr. Momtaz QC and Mr. Butterfield (instructed by Heald Nickinson Solicitors) for the mother
Ms King QC and Mr. Stevenson (instructed by McMillan Williams Solicitors) for the father
Ms Fottrell QC and Ms Gartland (instructed by TV Edwards Solicitors) for Z
Mr Holborn (instructed by the GLD) for the Secretary of State for Education (in attendance on 29th June 2020)
Ms Longmore on behalf of the Children's Commissioner (in attendance on 1st July 2020)

Hearing dates: 29th June and 1st July 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment will be handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down will be deemed to be 10:30am on 10 July 2020. A copy of the judgment in final form as handed down will be automatically sent to counsel shortly afterwards

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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 children 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.

Mrs Justice Judd:

Introduction

1. This is an application by the local authority for an order under the inherent jurisdiction for a deprivation of liberty authorisation. The case came before me in the urgent applications list last week. The situation is so pressing that another hearing was arranged on Monday morning, 29th June, and I give this short judgment on 1st July.

Background

2. This is a very troubling case concerning a young person (Z) who is just thirteen years old. Until last October Z was living at home with the mother and father. Z came to the attention of the local authority as a result of absconding from school, and also failing to return home.

3. Matters quickly escalated, and Z needed to be accommodated by the local authority. Three placements broke down because it was impossible to meet Z's needs or to manage the behaviour associated with those needs. It is not necessary here to detail that behaviour but only to record that it included serious actual and threatened physical harm to others, self harm, and damage to property. The seriousness of the situations arising had led to involvement by the police. At one point Z was handcuffed to the bed.

4. Unsurprisingly, the local authority commenced care proceedings and an interim care order was made on 14th November together with a secure accommodation order which was renewed on 9th December. Z was placed at a Secure Unit ('the Unit') and remains there to date.

5. On 5th March the Secure Accommodation order was extended by His Honour Judge Atkins for a period of 6 months until 5th September. That order remains in force. I note it was made on the grounds that the child had a history of absconding and that if Z did abscond was likely to suffer significant harm. The order was unopposed by the parents and supported by Z's guardian.

6. Hopes that Z's presentation would improve in the secure environment of the Unit have sadly not been borne out. If anything Z's behaviour has escalated . Again it is not necessary to recite the detail here but rather to record that the episodes involving actual and threatened physical harm both in relation to self harm and harm to others have been at a more serious level than those referred to above at paragraph 3. Managing Z's needs has also become more difficult and it is a matter of real concern that on one occasion when restraint was required, Z sustained physical injury requiring hospital treatment as a result. Another consequence of the escalating situation is that Z had not been able to have the opportunity to spend time with peers at the unit

7. This is a really troubling situation for such a young child. Z has been assessed by Dr T , a Consultant Clinical Psychologist, and also by a Consultant Psychiatrist, but it is not considered that Z is suffering from a mental illness. The underlying reasons for Z's extremely dysregulated behaviour are unknown, but it may well be due to some sort of trauma, characterised as developmental trauma. Z has intrusive thoughts, hyperarousal, and avoidant behaviour.

8. Throughout the time at the Unit, Z has expressed a wish not to have contact with the parents.

9. On 27th May, the Unit gave notice to the local authority that they wished to terminate the placement as they did not consider they were able to meet Z's needs or to keep Z safe.

10. Since that time the local authority has made very extensive searches to find a suitable secure placement for Z. Over 30 institutions have been approached (including in Scotland) via a central agency, but despite daily calls and updates, nothing is available. It is said that there are some 40 children awaiting secure placements at the current time. The local authority has not confined itself to regulated secure accommodation but has also enquired with unregulated homes, to which they would propose adding a suitable support package. Nothing has borne fruit.

Local authority proposals

11. The end of the placement should have come about by last week, 24th June, but the Unit has permitted an extension of a few days. This has now almost come to an end. The local authority has come to the conclusion that the only possible contingency plan is to place Z in a council home rented, by them, together with four members of staff who are available to care for and contain Z at all times. The restrictions that the local authority ask the court to sanction are set out in the statement of the assistant team manager, and further in a local authority document filed by counsel on 30th June. The proposal is that Z is not allowed out at all, save for appointments when there will be an escort of three staff. Z is to be locked into a bedroom at night, and the house will be locked at all times. Z will be stripped of all loose items, and restrained in the event of attempted self-harm, attempts to harm others, or to escape. All furniture within each room will be secured to the floor or wall.

12. There is no doubt that these are draconian restrictions, and that this can be no more than a holding position until a suitable placement becomes available. There is no provision here for education or therapeutic support, although a plan is to be drawn up in the next four weeks. The local authority does not pretend that this proposal is anything approaching ideal for Z, but they find themselves simply unable to identify any other placement.

13. The parents are understandably extremely concerned about Z, and how nothing on offer from the local authority has seemed to improve Z's presentation over a lengthy period of secure accommodation – now seven months. They have pointed out through counsel that the present plan, as approved by the Guardian, constitutes an even greater deprivation of liberty than originally set out. Through counsel they have applied to discharge the interim care order and for Z to come back home.

14. The Guardian has filed a detailed analysis and a position statement. She is clear that a secure placement is necessary to keep Z safe, and that there is a requirement for physical and emotional containment before any meaningful trauma focussed therapy can begin. She is very firmly of the view that Z's needs are far beyond the parents' ability at this moment and that they would not be able to keep Z safe or ensure the safety of others. She set out a number of gaps that she believes are in the contingency care plan which she asked to be addressed. They are practical ones, but hugely important, such as how the property itself will be kept fully secure, and what

will happen if, for example there are staff shortages. Following on from her request, she has been taken on a virtual tour of the property, and has had time to discuss and consider the practical details of the plan with the social work team. In her most recent position statement she has stated that she considers the present plan to be sufficiently safe and secure.

15. Before the hearing started I spoke to Z over the phone via BT meet me. Z expressed a wish for life to return to being as normal as soon as possible, and that time should be given for any move of placement, so that Z could meet the new staff and for them to get to know one another. It is clear that Z does not really wish to move, but understands that there is little option.

The law

16. There are numerous reported cases as to the making of Deprivation of Liberty orders in circumstances where no properly registered secure accommodation is available.

17. Perhaps first and foremost so far as this case is concerned is the principle that the absence of available accommodation does not lead to the structure imposed by section 25 being avoided. The terms should be treated as applying to the same effect as when an order under that section is being sought; *Re T* (Secure Accommodation Order) [2018] EWCA Civ 2136; [2019] 1 FLR 965, Per McFarlane P at paragraph 79.

18. The matters set out by Baker LJ in paragraphs [98] to [101] in the case of *Re B* [2020] 2 WLR 568 when determining whether the criteria section 25 (3) and (4) are satisfied, are therefore also relevant here:-

'[98] Having analysed the roles played by welfare and proportionality in the decision-making process under s.25, I conclude that, in determining whether the "relevant criteria" under s.25(3) and (4) are satisfied, a court must ask the following questions.

(1) Is the child being "looked after" by a local authority, or, alternatively, does he or she fall within one of the other categories specified in regulation 7?
(2) Is the accommodation where the local authority proposes to place the child "secure accommodation", i.e. is it designed for or have as its primary purpose the restriction of liberty?
(3) Is the court satisfied (a) that (i) the child has a history of absconding and is likely to abscond from any other description of accommodation, and (ii) if he/she absconds, he/she is likely to suffer significant harm or (b) that if kept in any other description of accommodation, he/she is likely to injure himself or other persons?
(4) If the local authority is proposing to place the child in a secure children's home in England, has the accommodation been approved by the Secretary of State for use as secure accommodation? If the local authority is proposing to place the child in a children's home in Scotland, is the accommodation provided by a service which has been approved by the Scottish Ministers?
(5) Does the proposed order safeguard and promote the child's welfare?
(6) Is the order proportionate, i.e. do the benefits of the proposed placement outweigh the infringement of rights?

(In the rare circumstances of the child being aged under 13, Regulation 4 of the 1991 Regulations require that the placement must also be approved by the Secretary of State.)

[99] If the relevant criteria are satisfied, s.25(4) obliges the court to make an order under the section authorising the child to be kept in secure accommodation and specifying the maximum period for which he or she may be so kept. In its submissions to this court, the ALC was rightly anxious to preserve the use of what it called "imaginative arrangements" – the arrangements characterised by Hayden J in Re SS as "the creative alternative packages of support" – and was concerned they would be squeezed out by too wide a definition of "secure accommodation". The recasting of the interpretation of the relevant criteria under s.25 suggested in this judgment preserves the flexible approach advocated by the ALC. If the court determining an application under s.25 is obliged to conduct an evaluation of welfare and an assessment of proportionality, and in doing so applies the principle that a secure accommodation order should always be a last resort, the court will be under an obligation to consider alternative arrangements.
[100] In my view, the date at which the relevant criteria must be satisfied is the date of the hearing. I reject Mr Feehan's submission that the time for assessment as to whether the relevant criteria are satisfied is immediately before emergency protective measures are taken. That interpretation would have the consequence that, once a court was satisfied that the criteria had been met at the point where the application under s.25 was filed, the court would be obliged at a subsequent hearing to make an order under s.25 even if the likelihood of absconding and/or significant harm had abated. Such an interpretation would be plainly contrary to the terms of s.25 itself which prohibits a child being kept in secure accommodation unless the statutory criteria are satisfied.

[101] S.25 does not cover all circumstances in which it may be necessary to deprive a child of their liberty. As Lady Black observed in Re D, at paragraph 100:

"The children who require help will present with all sorts of different problems, and there will be those whose care needs cannot be met unless their liberty is restricted in some way. But by no means all of these children will fall within the criteria set out in section 25(1)(a) and (b), which are the gateway to the authorisation of secure accommodation. It seems unlikely that the legislation was intended to operate in such a way as to prevent a local authority from providing such a child with the care that he or she needs, but an unduly wide interpretation of "secure accommodation" would potentially have this effect. It is possible to imagine a child who has no history, so far, of absconding, and who is not likely actually to injure himself or anyone else, so does not satisfy section 25(1)(a) or (b), but who, for other good reasons to do with his own welfare, needs to be kept in confined circumstances."

It is well established that a judge exercising the inherent jurisdiction of the court with respect to children has power to direct that the child be detained in circumstances that amounts to a deprivation of liberty. Where the local authority cannot apply under s.25 because one or more of the relevant criteria are not satisfied, it may be able to apply for leave to apply for an order depriving the child of liberty under the inherent jurisdiction if there is reasonable cause to believe that the child is likely to suffer significant harm if the order is not granted: s.100(4) Children Act. As I have already noted, the use of the inherent jurisdiction for such a purpose has

recently been approved by this court in *Re T (A Child) (ALC Intervening)* [2018] EWCA Civ 2136. In *Re A-F (Children) (Restrictions on Liberty)* [2018] EWHC 138 (Fam), Sir James Munby P, in a series of test cases, set out the principles to be applied. It is unnecessary for the purposes of this appeal to revisit those principles in this judgment. Last week, Sir Andrew McFarlane, President of the Family Division, published guidance, focusing in particular on the placement under the inherent jurisdiction of children in unregistered children's homes in England and unregistered care home services in Wales".

Discussion

19. There is no question here but that Z is being looked after by the local authority; indeed Z is the subject of an interim care order. The regime proposed by the local authority most certainly does constitute a deprivation of Z's liberty, for the level of supervision and restrictions proposed are far beyond what would be expected for a thirteen year old child.

20. There can also be no doubt, in my judgment that Z has a history of absconding and would be likely to abscond from any other description of accommodation. This was undoubtedly the case in March of this year when the order under s25 was made for a period of six months. Given the incidents of violence to staff as well as self-harm, it also appears clear that the criteria under s 25(1)(b) are met as well.

21. The placement at the Unit will come to an end within 48 hours, and it seems that, absent a last minute miracle, the choices faced by the court are either that Z is placed as proposed by the local authority contingency plan or is returned to the care of the parents. I accept the recommendation of the local authority and guardian that returning Z to the care of the parents is simply not a safe or sensible option. Z has refused to see the parents for many months. Moreover, it is hard to see that they could possibly keep Z from running away, self harming, or harming other people (including themselves). This is what Z has repeatedly being doing over many months. This is how Z came to be the subject of care proceedings and then a secure accommodation order in the first place. I appreciate how worried the parents are, but to make an order that permitted a return home would be reckless with Z's safety and welfare. I should say too that there are no creative, or other, solutions either which would not place Z at an unacceptable risk of harm.

22. The more difficult question is as to whether or not the proposed order safeguards and promotes Z's welfare. The truth is that it is sub-optimal. It would be much better for Z to be placed in properly registered, regulated secure accommodation with specialised staff who can manage the worrying and unregulated behaviour so as to be able to get to a situation emotionally where Z can benefit from therapy and education.

23. This, however, is not the choice that I have. Because of the dire circumstances of this case the Secretary of State for Education was invited to attend this hearing by counsel to see if there was any possible assistance or suggestions that could be offered in circumstances where such a young and vulnerable person is without a suitable placement. I am very grateful that the Secretary of State arranged for Mr. Holborn of counsel to attend, but the response was quite clear. There is nothing that can be done and the local authority will have to keep searching.

One query is as to whether or not there are any free secure beds usually earmarked for children via the criminal justice system which could be re-designated for a child in the 'welfare' system. As of today, the answer to that is apparently that there are not, or at least no institutions that consider they can manage the extent of Z's behaviour.

24. In all the circumstances, it seems to me that the proposed order safeguards and promotes Z's welfare better than any of the other available options. The Guardian required further assurances from the local authority as to this contingency plan which the local authority has now responded to as best it can, which should enhance Z's safety and security. Certainly depriving Z's liberty in this way is necessary and proportionate in that it should keep Z physically safe, and also prevent Z from harming others. Nothing can be done to assist Z to address the root cause of Z's presentation without this. Hopefully it will be possible to 'hold' Z in this position until a suitable placement becomes available and the long process of being able to allow the necessary therapeutic assistance to be fully engaged.

25. The local authority has informed the Children's Commissioner as to the circumstances of this case, and I am extremely grateful to her for arranging attendance, through a representative, at the judgment. I hope that the judgment will also be passed to the Secretary of State. It is less than three months since Cobb J published a judgment in the case of *Re S (Child in Care: Unregistered Placement)* [2020] [EWHC] 1012 expressing concern about the placement of a 15 year old girl in a holiday cottage with three members of staff because there were no placements available for her in regulated accommodation. He referred to a recently published DfE consultation paper on reforms to unregulated provision which reads in its introductory section:

"We are particularly concerned that increasing numbers of children under the age of 16 are being placed in situations where either the provider is only offering support and not care, or care is being provided but the provider is operating illegally (an unregistered setting). It is unacceptable for any child or young person to be placed in a setting that does not meet their needs and keep them safe, for any amount of time".

26. Cobb J stated "I share these concerns. Regulation of our children's homes offers an essential safeguard to the delivery of appropriate care for our young people, many of whom, like Samantha, are damaged through their own life experiences".

27. All that I can do is to add my voice to this in this very worrying case.

28. In all the circumstances, and with significant misgivings, I therefore make the declaration sought. I grant permission for the local authority to make the application and find that the circumstances set out in s100(4)(a) and (b) apply. It does not seem to me that what I am doing is making a contingent order, given that the new regime is due to start in about 48 hours and in any event, Z is already subject to a deprivation of liberty albeit under a different legal regime.

29. This situation should not be allowed to drift, however, and I consider that the case should be brought before me or another High Court judge within 14 days. I would ask that the local

authority provide me with updating information by the beginning of next week, and invite the matter to be restored to court within 14 days if any further issues arise.

30. I would like to thank the local authority for the hard work they have done to try and help this vulnerable and damaged child, even if it has not borne fruit as yet, and also extend my gratitude to the guardian. I know that the parents will be very worried for Z's welfare, and we can but hope that things will improve very soon.