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Neutral Citation Number: [2021] EWCOP 44

Case No: 13641660

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/07/2021

Before :

MRS JUSTICE LIEVEN

Between :

A LOCAL AUTHORITY

Applicant

and

SE

(by her litigation friend the Official Solicitor)

Second Respondent

and

ME

Third Respondent

and

TB

Fourth Respondent

and

TE

Fifth Respondent

**Ms Sophy Miles (instructed by A Local Authority) for the Applicant
The First Respondent did not attend and was not represented (their attendance having been excused)**

**Ms Francesca Gardner (instructed by MJC Law) for the Second Respondent
The Third and Fifth Respondents represented themselves
The Fourth Respondent did not attend and was not represented**

Hearing dates: **30 June and 1 July 2021**

Approved Judgment
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MRS JUSTICE LIEVEN

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.

Mrs Justice Lieven DBE :

1. This is an application by A Local Authority for a series of orders in respect of SE who wishes to be called by [a name of her choosing]; I will call her SE throughout this judgment. The Local Authority invites me to:
 - a) Make declarations under s.15 Mental Capacity Act 2005 ('MCA') that SE lacks capacity to conduct these proceedings, and to make decisions about her residence, care, contact with others and finances.
 - b) Determine the disputed facts.
 - c) Make decisions under s.16 in relation to SE's residence, care and contact with her family. Specifically the court will be invited to approve the arrangements set out in the final care plan which give rise to a deprivation of SE's liberty; set an appropriate review period and make provision for SE to be represented whilst the deprivation of liberty continues.
 - d) Continue the injunctions against ME, SE's father.
 - e) Displace ME as SE's nearest relative pursuant to s.29(3)e Mental Health Act 1983 ('MHA'), on the basis that he is not a suitable person to act as such.
2. The Local Authority was represented before me by Ms Miles, SE through the Official Solicitor ('OS') by Ms Gardner, ME and TE, SE's parents, represented themselves and TE had the assistance of an Italian interpreter. The position of the parties is that the OS supports the orders sought and ME and TE largely resist them; I will set out ME's position in respect of the findings of fact sought when I come to them.

Background History

3. SE is 18 years old. She currently lives in supported accommodation having been detained under s.3 MHA between June 2016 and August 2020 with a diagnosis of Reactive Attachment Disorder. She was discharged from s.3 by the Hospital Managers shortly after her detention had been upheld by a Mental Health Tribunal. She was then deprived of her liberty under the inherent jurisdiction by the High Court. On 5 October 2020 SE moved from X Hospital to her current placement at Placement A.
4. SE has been known to the Social Services since an early age when she was on the Child Protection Register from birth until 9 months because of concerns about her Mother's ability to meet her needs. A referral was made when she was 2½ because of her behaviour. At the age of 6 or 7 there were references to her making statements of a sexual nature and concerns were raised about sexual abuse. She was made subject of a Full Care Order on the basis of being at risk of neglect, physical and emotional abuse by her family. She was in care for the rest of her childhood. There is a sad history of a large number of failed placements, including at one point in a Secure Children's Home under s.25 Children Act 1989.
5. Throughout this time there are references to issues around contact with her parents. In 2017 SE is recorded as saying she hated her parents, and that they subsequently attacked her, requiring staff to intervene. In 2019 SE made the decision to try to re-establish

- contact with her parents. However, by June 2020 there is a report of the Father threatening to burn down the hospital SE was in and encouraging her to do the same.
6. In 2016 SE was detained under s.3 MHA. The diagnosis appears to have changed at various points, but there are references to Reactive Attachment Disorder, Conduct Disorder. The papers refer to incidents of violence and aggression to staff and peers, self-harm and self-debasing behaviour.
 7. In November 2016 she was moved to the CAMHS Unit at X Hospital. In her time at X Hospital she was given a range of psychotropic drugs which, according to her then treating clinician, did her no benefit. I note that in 2017 she was assessed with an extremely elevated range for anger and disruptive behaviour.
 8. She has received a good deal of psychological work and her engagement has fluctuated. However, there is some evidence of her engagement improving over time.
 9. When SE turned 18 an issue arose at X Hospital because they considered that she would not benefit from a longer hospital admission, and the Managers sought to discharge her. However, the placement it was intended to move her to fell through and there was a period when she was detained at X Hospital under the Mental Capacity Act ('MCA'). There were a number of incidents of violence, including to staff, in September 2020.
 10. On 5 October 2020 SE moved to her current place of residence, Placement A, subject to a Guardianship Application under s.7 MHA. She initially lived in the house on her own with carers, but more recently another woman has moved in, and very recently a third resident.
 11. Overall, SE's time at Placement A has been positive, her behaviour has been on an upward trajectory and she has developed good and trusting relationships with the staff. However, there have been very considerable problems with contact with her family. The Local Authority contact plans prohibit face to face contact with SE's parents. However, on 18 October 2020 the Father contacted SE and said that the family was on their way to see her. SE told Mr H, the Manager at Placement A, that her Father had encouraged her to "kick off and abscond". Her Mother and two brothers did attend outside the property and spoke to SE through a window. Following the visit, SE's mental state deteriorated, and she was physically aggressive to staff

Evidence

12. I heard evidence from Miss Robinson, SE's social worker; Dr O'Donovan, the independent psychiatrist who was appointed to assess SE; and Mr H the Manager of Placement A. I also heard evidence from ME at some length and much shorter evidence from TE.
13. From ME and TE's perspective, the Local Authority has "stolen their daughter" and are now preventing her from coming home. Some years ago, the Local Authority also took into care ME and TE's two younger sons. ME perceives himself to have been the victim of a massive injustice and, from his point of view, he is only trying to protect and help his daughter.

14. When ME gave his evidence, it was clear that he was extremely angry, upset and hostile to the Local Authority. In my view, he wholly lacked insight into his daughter's problems and into the effect that his anger and hostility was having on her. However, it is right to record that in my view ME does genuinely care for his daughter and wants to help her. Although he was relatively well behaved in court, it appeared to me that he was a man who was virtually incapable of controlling his anger. Although ME probably thinks he is doing the right thing by SE, he is incapable of accepting that she has mental health problems and that on many and perhaps most occasions ME and TE are exacerbating those problems. One relatively small, but indicative matter, is that ME refuses to call his daughter [by her chosen name] but insists on calling her [by her name given at birth] even though she is absolutely clear that she finds that upsetting. ME is fixated on the past and, in particular, when his children were taken into care. It was a constant theme of the hearing that I had to bring him back to the current situation from his desire to talk about events in 2012.
15. TE gave much more limited evidence and it was extremely difficult to draw many conclusions about her position. However, she also appeared to have no insight into SE's needs, wishes or mental health problems. I noted that she did not seem able to even call SE by her name.
16. I also spoke to SE before the hearing and had spoken to her before a previous hearing.

Capacity

17. The issues around SE's capacity are complex ones. She has been assessed by Dr O'Donovan, Consultant Forensic Psychiatrist. Dr O'Donovan met SE remotely and has produced three reports. However, SE's engagement with Dr O'Donovan was very variable, on occasions refusing to speak to her. She considers that SE has emerging Emotional Unstable Personality Disorders (EUPD) as opposed to a mixed personality disorder. The effect of this is that when SE is in a state of arousal and dysregulation, she lacks capacity to make decisions about her residence. It is not possible to make a clear diagnosis of EUPD, or any other Personality Disorder, because SE is only 18 and her personality is still developing.
18. She considers that SE lacks capacity to make decisions regarding her care arrangements. She does have some insight into her need for support, but SE is unable to understand her current care needs or the risks to her if care were not available.
19. It is her opinion that SE is able to make capacitous decisions about her general use of social media. However, SE lacks capacity to have contact with her family via social media or in person. SE has a significant degree of internal conflict between feeling angry with her family but wanting their acceptance and affection.
20. Dr O'Donovan recommends that the Court use the inherent jurisdiction to authorise restrictions of SE's general use of social media and the internet because this would be in SE's best interests.
21. There is a complicated and conflicted picture around SE's contact with her family. She does not wish to have contact with her Father or her Mother. However, she does want to have contact with her siblings and has been consistent in this regard.

22. In Cheshire West and Chester Council v PWK [2019] EWCOP 57 Hedley J concluded:

“25. As I have said, PWK is a man with multiple disadvantages but who can and does function remarkably well within the constraints of his care package. Dr Rippon was clearly impressed by his abilities to think and express himself in interview, as I was by his ability to handle himself in Court. Yet there is another side to the picture when PWK is overwhelmed by anxiety and speaks and behaves in a way he rapidly comes to regret. That anxiety is often but not always predictable and is liable to affect every part of his life and not just the issue of the moment, whatever that may be. It is the unpredictability of that anxiety and the seriousness and breadth of its impact which is decisive in this case in overturning the legal presumption of capacity. Although in effect is principally in Section 3(1)(c), it does often extend to the earlier matters too. It is, in applying a longitudinal perspective to this, that highlights the incapacity.

26. For the reasons that already appear sufficiently in this judgment, I am satisfied that PWK lacks capacity to conduct these proceedings to determine his residence or care or his contact with other or his management of his own affairs. It is not appropriate for me to give detailed directions under this head under Section 4. It is enough to say that the detailed care package provided under Section 117 of the Mental Health Act 1983 is, as it seems to me, entirely in his best interests and that is further both proportionate and in his best interests to deprive him of his liberty to the extent implicit in that package. The details are matters to be worked out on the ground on the basis of decisions made in accordance with Section 4 by those responsible for his care.”

23. In Wakefield MDC v DN and MN [2019] EWHC 2306 (Fam) Cobb J was considering a case where P, who had severe autism, general anxiety and EUPD, had a “meltdown”. He made anticipatory declarations as to P’s capacity and best interests, saying:

“51. ... to cover occasions when he has ‘meltdowns’ and is at that point (it is agreed) unable to make capacitous decisions. It seems to me that the outcome of an anticipatory declaration would provide a proper legal framework for the care team, ensuring that any temporary periods of deprivation of liberty are duly authorised and therefore protecting them from civil liability.”

24. I accept Dr O’Donovan’s evidence on capacity. Although SE has some insight into her condition, it is apparent that she finds it very difficult to weigh up the information she is given, particularly when she is stressed.

Findings of fact sought

25. The Local Authority asks me to make a series of findings of fact in relation to matters largely to do with SE’s contact with her father. The approach to fact finding was set out by Mostyn J in Re D (A Child) [2014] EWHC 121 (Fam) at [31]:

“31. ...

i) *The local authority must prove its allegations on the balance of probabilities, no more, no less: Re B (Care Proceedings: Standard of Proof), [2009] 1 AC 11, [2008] 3 WLR 1, [2008] 2 FLR 141, at paras [2] and [70].*

ii) *The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the court is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened: Re B (Care Proceedings: Standard of Proof), at para [2] per Lord Hoffmann.*

iii) *The more serious or improbable the allegation the greater the need for evidential ‘cogency’: Re Dellow's Will Trusts; Lloyd's Bank v Institute of Cancer Research [1964] 1 WLR 451 at 455; Re H (Minors) (Sexual Abuse: Standard of Proof) [1996] AC 563, [1996] 2 WLR 8, [1996] 1 FLR 80; Re S-B (Children) (Care Proceedings: Standard of Proof), [2010] 1 AC 678, [2010] 2 WLR 238, [2010] 1 FLR 1161 at para [13]. Evidential cogency is obviously needed where the harmful event is itself disputed. However, where there is no dispute that it happened the improbability of the event is irrelevant: Re B (Care Proceedings: Standard of Proof), at paras [72] and [73].*

iv) *Sometimes the burden of proof will come to the judge's rescue: the party with the burden of showing that something took place will not have satisfied him that it did. But generally speaking a judge ought to be able to make up his mind where the truth lies without needing to rely upon the burden of proof: Re B (Care Proceedings: Standard of Proof) at paras [2] and [32]; Rhesa Shipping Co SA v Edmond and Another: The Popi M [1985] 1 WLR 948.*

v) *It is impermissible for a judge to conclude in the case of a series of improbable causes that the least improbable or least unlikely is nonetheless the cause of the event: Rhesa Shipping Co SA v Edmond and Another: The Popi M; Ide v ATB Sales Ltd; Lexus Financial Services t/a Toyota Financial Services (UK) plc v Russell [2008] EWCA Civ 424 at para [4].*

vi) *There is no pseudo-burden or obligation cast on the respondents to come up with alternative explanations: Lancashire County Council v D and E [2010] 2 FLR 196 at paras [36] and [37]; Re C and D (Photographs of Injuries) [2011] 1 FLR 990, at para [203].*

vii) *The assessment of credibility generally involves wider problems than mere ‘demeanour’ which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. With every day that passes the memory becomes fainter and the imagination becomes*

more active. The human capacity for honestly believing something which bears no relation to what actually happened is unlimited. Therefore, contemporary documents are always of the utmost importance: Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403 , per Lord Pearce; A County Council v M and F [2011] EWHC 1804 (Fam) [2012] 2 FLR 939 at paras [29] and [30].”

26. The Local Authority seek the following findings of fact:
- a. ME and TE display abusive, aggressive, manipulative and inappropriate behaviour towards SE;
 - b. ME and TE have failed to show respect for SE, her personal autonomy and identity and failed to have regard for her welfare;
 - c. MS encourages SE not to comply with her medication regime and/or reasonable healthcare or welfare advice;
 - d. SE's mental state deteriorates after contact with ME, TB and TE, and her behaviour is characterised by self-harm, aggression and violence to staff and serious emotional dysregulation;
 - e. ME has encouraged SE to abscond prior to injunctive measures being imposed on 30 October 2020;
 - f. ME has encouraged SE to abscond after injunctive measures were imposed on 30 October 2020;
 - g. ME has used threatening and abusive language and behaviour towards members of SE's care team;
 - h. ME's threatening and abusive language and behaviour towards members of SE's care team has continued after the injunction imposed on 3 December 2020.
27. In support of those findings, the Local Authority has produced a detailed schedule of evidence to support its position. In respect of the majority of the findings, the evidence in support from the Local Authority consists of records made by staff at Placement A, recorded in various different forms. There is one incident, where there is a voice message, which I have heard. There is one incident where the evidence is what SE has told the staff, and there is no direct evidence.
28. On 18 December 2020 there is a voice message left by ME calling SE, in which he says: *“Local Authority take you because you're Muslim” “they put evil in your head” “you saying your body is yours, where you get it from?” “your body comes from mama and dad” “your body is not yours, Local Authority is criminal number one”*. There is no doubt this conversation took place and that ME spoke the words alleged.
29. There are also a number of occasions where care workers at Placement A have heard phone conversations between SE and her Father where ME has called SE by her birth name despite her clear request for him not to do so; has described SE as fat; has told SE not to take her medication; and has sought to persuade her to abscond from Placement

A and come home. In all those instances, I fully accept the record of the conversations given by the care workers whether in incident reports or phone logs.

30. There is further evidence in both incident forms and evidence from Mr H that after talking to her Father, SE has become very seriously upset and dysregulated. There are a number of records of occasions where SE has become violent and aggressive or threatened self-harm after speaking to her father. Again, I accept the evidence in the form of reports and Mr H's evidence and Miss Robinson's evidence of conversations she has had with SE which support a finding that those incidents occurred, and that SE has indeed become very upset.
31. Further again, there are clear records of ME, certainly up to April 2021, persistently ringing SE even when she said she didn't want to talk to him. There are two incidents I should refer to specifically; one is on 18 October 2020 when despite telling Mr H that he would not come and see SE, he and the mother and two brothers did come to Placement A and TE and the brothers spoke to SE and she became extremely upset. This incident undoubtedly occurred.
32. On the schedule I have been given, it is recorded that on or around 28 October 2020 SE told Miss Robinson that her father had said to her that he would "turn up with a gun" once she turned 18 and that he could then take her away. The only report of this conversation is from SE to Miss Robinson. ME denies that he made that threat. I do not think that on the balance of probabilities that that threat was made, or at least was not made in quite that form. The only report of it comes from SE, who is not always an accurate narrator of events, and given that it would be easy for the words to have been misunderstood or misconstrued.
33. In respect of all the other incidents set out in the schedule, ME did not specifically deny that he had said the things recorded and it would be very difficult for him to do so given the nature of the records. Therefore, with this one exception, I make the findings of fact sought.
34. Mr H gave evidence about the degree to which SE becomes upset and dysregulated when having to deal with contact with her family. This was entirely supported by Miss Robinson, who was a very careful witness who was palpably trying to do her best by SE in very challenging circumstances. I therefore accept those parts of the findings of fact which relate to SE's response to contact.

Best interests

Care and Residence

35. In respect of her care and residence, SE has told Miss Robinson, the representative of the Official Solicitor and me that she likes Placement A and wishes to stay there. It is clear both from my conversation with SE and from Mr H's evidence that SE has a very good and positive relationship with Mr H. There is clear evidence that in the time that SE has been at Placement A she has become calmer, more insightful and more capable of coping with day to day issues. SE has recently completed a nail course.
36. The Local Authority's position had been that SE should move from Placement A to a placement on her own. I am pleased to record that this plan has now changed, and it is

intended that SE remain at Placement A. There has been one other resident there for some time whom SE gets on with. Another resident has recently moved in and Mr H is confident that he will be able to foster good relations between them.

37. It is ME's position that SE should return home and live with the family. He told me that SE had said to him that she wanted to go home. Dr O'Donovan explained that SE is highly conflicted in her relationship with her family and it was Dr O'Donovan's view that it is perfectly possible that SE has told her father that she wants to go home. SE wishes to maintain a relationship with her family and therefore may well say things which she believes her father wishes her to say. In my view, it is plainly in SE's best interests to remain at Placement A. She has done very well there in the last few months, she has a good relationship with Mr H, and she is receiving excellent care.
38. Having heard evidence from ME and TE and considered their complete lack of insight into SE's needs, I have no doubt that SE's best interests are served by her remaining at Placement A.
39. It is common ground between the Local Authority and the Official Solicitor that SE's care arrangements at Placement A deprive her of her liberty. I authorise the deprivation of SE's liberty as being necessary, proportionate and in her best interests and set a review period of 6 months.

Contact

40. The position that SE has stated to me and the OS is that she does want to have contact with her two younger brothers, aged 16 and 13, but she does not want to have contact with her parents. This has caused considerable difficulty because whenever SE tries to have video or phone contact with her brothers, ME has interrupted. This has then led to SE becoming very upset and sometimes angry.
41. In my view, it is extremely important to take every possible step to maintain SE's contact with her younger brothers. It is apparent from the history that SE has been highly isolated over the years and has had very little stability in her life. She has had frequent moves of placement and in those circumstances having a relationship with her siblings must be particularly important. The Local Authority together with the OS have gone to considerable lengths to draw up a contact plan by which SE will ring her siblings with the phone on speaker phone and if her father interrupts, she will be encouraged to terminate the call. If she does not do so, then ultimately the support workers will terminate the call.
42. Dr O'Donovan was concerned that the contact with the younger siblings placed them in a very difficult and potentially unsafe situation, because they might be having to go against the position of ME. In those circumstances, Dr O'Donovan's evidence was that it was better for the younger siblings to order no contact at the present time.
43. There is no evidence as to the impact of contact with SE on the younger siblings and Dr O'Donovan's concerns are wholly speculative. I do not consider it is appropriate to limit SE's contact, and thus act contrary to her best interests, on the basis of pure speculation as to the impact on her brothers.

44. In order to promote contact with the younger brothers, but without ME and TE interfering, I suggested to ME that he and his wife should agree to leave the house at a fixed time when contact occurred. In court ME agreed to this course and it was agreed that contact would take place on Friday afternoons at 5pm remotely. I very much hope that ME will stick by this arrangement.
45. In those circumstances I will approve the contact set out in the detailed contact plan as being in SE's best interests.

Social media

46. It is Dr O'Donovan's view that SE has capacity in respect of decisions in respect of social media and internet use. In those circumstances I need say no more about it.

Nearest relative application

47. The Local Authority applies for ME to be displaced under s.29(3)(e) of the Mental Health Act 1983 as SE's nearest relative on the basis that he is considered not to be suitable to act under s.29(3)(e). ME has not formally responded to this application, but it is understood that he objects to it. I have had regard to the Code of Practice and to *Lewis v Gibson* [2005] EWCA Civ 587.
48. The Code of Practice to the MHA gives a non-exhaustive list of circumstances which may give rise to an application for displacement on the grounds of unsuitability which includes: "*any reason to think that the patient has suffered or is suspected to have suffered abuse at the hands of the nearest relative (or someone with whom the nearest is in a relationship), or is at risk of suffering such abuse*".
49. ME is, in my view, unsuitable to act as SE's nearest relative. SE does not want to see or speak to her father, she has said that she wants contact with him to cease, she has made allegations of sexual, physical and emotional abuse against him and, as set out above, I have made a number of findings against ME in relation to his abusive and controlling behaviour towards SE. It necessarily follows that ME is not suitable to act as SE's nearest relative.
50. I will make this order for an indefinite period, as it is in SE's interests to have stability and not to be worrying about the role of her parents.

Injunctive relief

51. There is currently an injunction in place granted on 30 October 2020 to restrain ME from removing SE from Placement A or encouraging anyone else to do so. I have found that it is in SE's best interests to remain at Placement A and not to move to live with her parents.
52. There is evidence that ME has sought to encourage SE's to leave Placement A and has at least threatened to try to remove her. In those circumstances I consider it appropriate to continue the injunction to restrain him from doing so. The injunction will last until 1 July 2022.