Neutral Citation Number: [2024] EWCOP 33 (T3)

IN THE COURT OF PROTECTION **Case No: 14102739**

AND IN THE HIGH COURT OF JUSTICE

FAMILY DIVISION

Royal Courts of Justice
Strand, London
20 May 2024

Before

JOHN MCKENDRICK KC

(Sitting as a Deputy High Court Judge and a Tier 3 Judge of the Court of Protection)

SITTING IN PUBLIC

Between

LONDON BOROUGH OF HACKNEY

Applicant

-and-

(1) A

(by his litigation friend THE OFFICIAL SOLICITOR)

(2) B

(3) C

Respondents

Ms Handcock (instructed by Local Authority Solicitor) for the Applicant
Ms Miles (instructed by Bindmans) for the first respondent
The second and third respondents neither appearing nor being represented

APPROVED JUDGMENT

Hearing Date 20 May 2024

The Deputy Judge:

1. This is a short *ex-tempore* ruling on an issue which has arisen regarding the welfare of A, a young man aged 22 and who was born in April 2002. The note of the judgment was helpfully produced by the legal teams immediately after the hearing (given the urgency) and approved on the same day (in accordance with the guidance in *Shirt v Shirt* [2012] EWCA Civ 1029 (see paragraph 33)). It was subsequently amended to deal with corrections and anonymisation.

2. A is 'P' for the purposes of this application, made in the Court of Protection. The proceedings have a relatively long background and I need not set that out. The applicant is the London Borough of Hackney: they are the applicant because they exercise safeguarding responsibility to A and A lives in the area of Hackney. Hackney is represented through counsel, Ms Handcock. A is the first respondent to the underlying application in the Court of Protection and it has been assessed and determined that he lacks capacity to conduct these proceedings. At a much earlier stage the Official Solicitor was invited to act as his litigation friend, and she accepted. A is represented by Ms Miles of counsel and Mr Whitaker of Bindmans is also in attendance. The second respondent is B. B is A's mother. The third respondent is C and he is I believe B's partner.

3. I need not set out the full background but I understand, having asked questions in court this afternoon, that A is likely to be a Spanish citizen with a Spanish passport. What I am not clear on is whether he is also a British citizen but importantly for questions of jurisdiction it is my understanding from my brief reading that he has been residing in London for some considerable time. It seems clear he is habitually resident in England and Wales. Hackney will take steps following the hearing today to identify whether he is or is not a British citizen and will take steps to identify what travel documentation he may have and where they are.

4. The proceedings began some time ago because of serious safeguarding concerns raised by the applicant social work team. I note in the bundle the COP24 witness statement of A's social worker which sets out a number of concerns. These are concerns of a significant nature regarding the quality of care provided to when A in his mother's care. There was significant concern raised regarding overall how she engaged with professionals, the fact that A appears to have gone missing; concerns were raised regarding drug use and the written evidence states that police officers were called to B's home in August 2021 to exercise a section 23 Misuse of Drugs Act warrant. A number of adult males were present with B and A. Written evidence suggests police intelligence indicated drugs were sold from property. It

is important to note no drugs were found but drug paraphernalia was found, indicating drug use. The social work team also set out concerns regarding administration of A's risperidone – a psychotropic medication. There were also broader concerns regarding B's working together with professionals and compliance with the package of support including education provision for A.

5. That is what led to issuing of proceedings in the Court of Protection and I was very helpfully referred by Ms Miles to a report from A's treating clinician. This is an updating psychiatric review from 28 February 2024. It has been helpful to understand the extent of A's vulnerability as this makes clear he has diagnoses of severe learning disability, autism, microcephaly, and global developmental delay, He has been provided with Risperidone to deal with anxiety and agitation caused by his autism. The report from the psychiatrist makes clear whilst in February 2024, A was doing well, when his usual routine is not followed or when he is with unfamiliar staff, he can become agitated. He also has some other physical conditions that I need not deal with but it is clear from the psychiatric evidence and social work evidence that he is extremely vulnerable and that is added to because he is non-verbal.

6. At some stage in summer 2023, after careful case management by District Judge Mullins at First Avenue House sitting in the Court of Protection, best interests decisions were made and A was moved from B's home to care to reside at Placement X, an independent supported living accommodation. Within the proceedings, after having the benefit of significant written evidence, DJ Mullins concluded pursuant to s15 of the Mental Capacity Act 2005 that A lacked capacity to make decisions about residence, care and support, and contact with others. As I say, best interests decisions were made that he reside at Placement X and orders were made restricting his contact with his mother and her partner – the second and third respondents. Certain provisions were put in place that those arrangements regarding residence, care, and contact could only be altered with authority of Hackney or by agreement of Hackney. My understanding is that DJ Mullins arrived at those conclusions on a best interests analysis and that it was not necessary for there to be any fact finding and he made no findings regarding drug use or otherwise by the second and third respondents. It is important I emphasise that.

7. A has therefore been residing at Placement X supported by a professional care team for some several months. For reasons not clear to me at this urgent hearing, the situation became more challenging and I am told on 16 April without permission A was removed from his supported living placement for some considerable hours which caused anxiety and concern. Thereafter on 25 April 2024 he was removed from Placement X and did not return until 30 April 2024.

Concerns were raised about where he had been, what his living arrangements had been and the applicant formed a view he had had insufficient medication during that time. Shortly thereafter, on 4 May, A was removed again without authority, by his mother B. He has as I understand it not been seen by social services' team since 4 May 2024. Entirely rightly Hackney issued an application seeking injunctive relief for the return of A As I understand it, that application supported by a witness statement, was considered by DJ Mullins who, on the papers, made a raft of injunctive orders requiring B and C to return A to his supported living home, discharged previous contact orders and required others to cooperate and asked police for assistance.

8. My understanding is that personal service of the 8 May 2024 order was provided for by the local authority. A copy of the order was given to B, who I am told ripped up the order. I understand a copy was given to C as well. It appears from what I have read and been told, that the requirement to return A following DJ Mullins' order has been made clear to them. I am told B says she has removed A because she is concerned about unexplained bruises on A's body. Notwithstanding those orders made by DJ Mullins, by 13 May 2024, A had still not been found and had not been returned to his supported living home. DJ Mullins therefore directed a hearing to take place and directed parties to attend and required the second and third respondents to attend that hearing.

9. His order carefully set out the background that proceedings began in 2023, interim declarations were made in August 2023, A moved to Placement X in September 2023. He made injunctive orders on 13 May 2024 requiring the second and third respondents to return A immediately, cooperate with the applicant, permit the social worker and police to enter B's home. The orders were backed up by penal notices. Permission was given to vary or discharge the order. It is not clear whether that order has been served on B or C, largely driven by the fact that the local authority do not know where they are.

10. Towards the end of last week, proceedings were transferred from First Avenue House to be heard by a Tier 3 Judge. I am told that at the hearing on 13 May, by Ms Handcock, District Judge Mullins was very concerned for A's safety. This morning on 20 May 2024, the Vice President of the Court of Protection, Mrs Justice Theis made a series of directions seeking updating evidence and a short notice hearing to be listed at 2pm before me and ordered service of the order on Hackney and the Official Solicitor on behalf of A. That order has not been provided to B and C– again because their whereabouts are not known. The hearing before me then was without notice and I am mindful that is a serious step to make orders

without notice to parties to proceedings. But the hearing must proceed without notice being given, as the respondents have wholly failed to engage in recent proceedings and the court must proceed to hear the application for further relief to protect A notwithstanding the second and third respondents have had no notice. It is important I add that I am sitting in public, and an order restricting reporting of this matter been made as set out in the transparency order of 28 June 2023 in these proceedings.

11. The application before me as against that background is Hackney's application for a collection order and for an order against two telephone companies to provide for disclosure of information which will assist in identifying the whereabouts of the second respondent, B. The local authority's position is that they are extremely concerned for A's welfare and safety and that these orders are necessary and in A's best interests. Initially the jurisdictional base for the orders was s16(5) of the Mental Capacity Act 2005. Initially I was invited make orders under s16(5) but I am now also invited to make orders under the court's Inherent Jurisdiction. It is important to pause to note that the applicant has not filed an application for relief under the Inherent Jurisidction but the urgency of the proceedings required them to seek a hearing before a Tier 3 judge and I will come onto my conclusions in a moment but I will require - and I received an undertaking from Ms Handcock – that Hackney will issue an application for relief under the Inherent Jurisdiction by no later than 2pm tomorrow.

12. Ms Miles on behalf of the Official Solicitor agrees this matter is very serious and agrees on A's behalf that the relief sought by Hackney is necessary, given concerns raised and given the background chronology.

13. I then turn to questions of law. Previous declarations have been made that A lacks capacity in respect of residence, care and contact and so it is entirely clear that the court has jurisdiction to make best interests orders under the Mental Capacity Act and those orders under s16(2) have been made by DJ Mullins.

14. Section 16(5) of the Act provides: "*The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).*" That is the principle jurisdictional basis for the orders sought.

15. In Ms Handcock's helpful position statement she makes reference to an older case of *HM and PM and KH* [2010] EWHC 870 Fam – a decision of Munby LJ (as he then was) – sitting as a

judge of the Family Division. He was concerned, under the court's Inherent Jurisdiction, with HM, a vulnerable young woman who lacked capacity. Proceedings had begun prior to the Mental Capacity Act 2005 coming into force and continued under the Inherent Jurisdiction despite the coming into force of the Mental Capacity Act and the creation of the Court of Protection (see paragraphs 67 and 68 and his Lordship's puzzlement at being 'statutorily incompetent' to exercise powers pursuant to the MCA following his elevation to the Court of Appeal). The purpose of the judgment was to explain a series of orders Munby LJ made to locate the incapacitous adult at the centre of proceedings. His Lordship held:

> "34. None of these various orders would be thought surprising or unusual by those familiar with the practice of the Family Division when trying to locate and retrieve missing or abducted children. But before turning to consider the appropriateness of such orders being made in a case, such as this, where the abducted person is not a child but a vulnerable adult, there are two aspects of the jurisdiction which, however familiar to expert practitioners specialising in this field, merit some further elaboration.
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> 35. The first relates to the power of the court to order third parties to provide information.
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> 36. It has long been recognised that, quite apart from any statutory jurisdiction (for example under section 33 of the Family Law Act 1986 or section 50 of the Children Act 1989), the Family Division has an inherent jurisdiction to make orders directed to third parties who there is reason to believe may be able to provide information which may lead to the location of a missing child. Thus orders can be made against public authorities (for example, Her Majesty's Revenue and Customs, the Benefits Agency, the DVLA, local authorities or local education authorities, etc, etc) requiring them to search their records with a view to informing the court whether they have any record of the child or the child's parent or other carer. Similar orders can be directed to telephone and other IT service providers, to banks and other financial institutions, to airline and other travel service providers – the latter with a view to finding out whether the missing child has in fact left the jurisdiction and, if so, for what destination – and to relatives, friends and associates of the abducting parent. In appropriate cases, though this is usually confined to relatives, friends and associates, the court can require the attendance at court to give oral evidence of anyone who there is reason to believe may be able to provide relevant information. Compliance with such orders can, where appropriate, be enforced by endorsing the order with a

penal notice and then, in the event of non-compliance, issuing a bench warrant for the arrest and compulsory production in court of the defaulter.

37. Since, for obvious reasons, it is important that the abducting parent is neither alerted to the investigations being carried out by the court nor informed of the identities of those from whom information is being sought nor informed of their answers, such orders are almost invariably made, and oral evidence taken, at hearings held in private from which the abducting parent's representatives are excluded and of which, typically, they will be wholly unaware, the applications being made ex parte and without notice. Moreover, and for the same reason, the orders themselves typically provide that they are not to be served on the abducting parent, just as they typically forbid those to whom the order is directed from informing the abducting parent of the existence of the order. Accordingly, and for reasons which in the nature of things are compelling, this small, discrete and necessarily discreet part of the Family Division's jurisdiction is, in distinction to the vast bulk of the Division's work, carried on not merely in private but typically in secret. The justification is that explained by Sir John Donaldson MR in *R v Chief Registrar of Friendly Societies ex p New Cross Building Society* [1984] QB 227 at 235, namely that unless it adopts this particular procedure in this particular type of case the court will be unable to achieve its paramount object of doing justice according to law; for abjuring secrecy in such circumstances is likely to lead, directly or indirectly, to a denial of justice and, not least, justice for the innocent child.

38. There are three further aspects of this jurisdiction which it is convenient also to mention. First, that legal professional privilege is no answer to such an order: *Burton v Earl of Darnley* (1869) LR 8 Eq 576n, *Ramsbotham v Senior* (1869) LR 8 Eq 575. Second, that the court's powers in this kind of case – where it is seeking to locate a missing child – are *not* subject to the limiting principles of the *Norwich Pharmacal* jurisdiction: see *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133. Thus there is no need to establish that the person against whom disclosure is sought has, albeit innocently, been involved in the abducting parent's wrongdoing. The jurisdiction can be exercised against someone who is not merely wholly innocent but also a 'mere witness'. It is enough for the court to exercise jurisdiction that the person from whom information is being sought may have information (however acquired) which may lead to the location of the missing child. "Possibility" is enough; there need not be probability: *Ramsbotham v Senior* (1869) LR 8 Eq 575 (where the order was made to produce certain documents

which, as Sir Richard Malins VC put it at page 578, "it was just possible (I did not think it all probable) … might lead to the discovery of … her residence, or where she is absconding with the wards."). Third, that in aid of this jurisdiction the court can make a variety of orders directed to the Tipstaff, including, in addition to location, collection and passport orders, an order authorising the Tipstaff to enter private residential property, if need be using force to open doors, with a view to searching for, removing and taking into custody anything (for example, a computer or a mobile phone, blackberry or other similar device) which there is reason to believe may contain information throwing light on the missing child's whereabouts: see *Re S (Ex Parte Orders)* [2001] 1 FLR 308 at page 320."

16. I also note paragraph 45:

> "In my judgment, and consistently with previous authority, the court has exactly the same power to make orders of the type referred to in paragraphs [32]-[40] above when it is concerned with an adult who lacks capacity as it undoubtedly has when concerned with a child. In particular, the court has exactly the same powers when it is concerned to locate the whereabouts of a missing or abducted adult lacking capacity as it has when concerned to locate the whereabouts of a missing or abducted child."

17. It is clear therefore from Lord Justice Munby's judgment delivered in characteristically learned and comprehensive style that if the court is concerned with the welfare of an adult who lacks capacity, a significant range of orders can be made under court's Inherent Jurisdiction against others to locate that person if their welfare demands it.

18. It is a curious feature of the Court of Protection that, as far as I am aware, a judgment of similar nature has not been produced since the Mental Capacity Act came into force. But it is clear that the court can make injunctions and orders to support best interests decisions made – this flows from s16(5) and should there be any doubt about it (which there is not), this was an issue comprehensively considered by Lord Justice Baker in *Re G (COP Injunction)* 2022 EWCA Civ 1012. In that erudite judgment Lord Justice Baker (with the agreement of two other Lord Justices) was clear that the court can make injunctions pursuant to s16 (5) Mental Capacity Act, but they must meet the just and convenient test by way of consideration of s47 Mental Capacity Act and s37 of the Senior Courts Act. The reasoning is set out in a passage of *Re G* which Baker LJ helpfully summarises – at paragraph 82:

*"*82. We can summarise our conclusions on this aspect of the appeal as follows. The Court of Protection does have power to grant injunctions under s.16(5) of the 2005 Act, bothin the case where a deputy has been appointed under s.16(2)(b) and in the case where the Court has made an order taking a decision for P under s.16(2)(a). In doing so, it is exercising the power conferred on it by s.47(1) and such an injunction can therefore only be granted when it is just and convenient to do so. This requirement is now to be understood in line with the majority judgment in Broad Idea as being satisfied where there is an interest which merits protection and a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something. In the present case, as is likely to be the case wherever an injunction is granted to prevent the Court's decision under s.16(2)(a) from being frustrated or undermined, those requirements are satisfied because G's interest in the December order being given effect to is an interest that merits protection, and the principle that the Court may make ancillary orders to prevent its orders being frustrated is ample justification for the grant of injunctive relief if the facts merit it."

19. I cite one other case which is helpful, a decision of HHJ Hilder in the case of *EG and DG against AP and others* [2023] EWCOP 15. That was a case of which Her Honour was considering an application for injunctions in the context of the court's Property and Affairs jurisdiction and was an appeal of a District Judge preventing a capacitous person disposing of assets which others alleged the protected person had a beneficial interest in She allowed the appeal and made some helpful comments about the scope of injunctive relief in the context of the Court of Protection.

20. I note paragraph 2:

"A Deputy District Judge granted injunctions prohibiting capacitous persons from disposing of assets in which others allege a protected person has an interest. This judgment sets out the basis of my conclusion that the Court of Protection has no jurisdiction to make such orders."

21. Paragraph 41:

"Notable milestones to this conclusion [in *Re* G] were:

a. (at paragraph 38) that, where the Court has made an order under section 16(2)(a) of the Act, s16(5) enables the Court to make such further orders as it thinks necessary or expedient to give effect to, or otherwise in connection with, that order;

b. (at paragraph 43) that, among other orders that the Court might make under s16.(5) of the Act, are injunctive orders;

c. (at paragraphs 49 and 50) that, although the Court can indeed grant injunctions for the purposes specified in s16(5) of the Act, when it does so "it is exercising its ordinary injunctive powers which it has by virtue of s.47". Therefore the requirement in s37(1) of the Supreme Court Act 1981 applies and the test for granting an injunction is that it be "just and convenient.";

d. (at paragraph 55) that the two requirements of "just and convenient" are (i) an interest of the claimant which merits protection and (ii) a legal or equitable principle which justifies exercising the power to order the defendant to do or not do something;

e. (at paragraphs 67 and 68) that there was no doubt why the Vice-President's injunctions were imposed, namely "to protect the decision he had made…that G should move to A House." There was a risk that otherwise the family's conduct would sabotage the placement at A House. This "plainly" met the just and convenient test.

f. (at paragraph 69) that G's interest which the injunctions sought to protect was "self-evidently…an interest in seeing that the decision [that she move to A House] was given effect to."

g. (at paragraph 71) that the principle which justified exercise of injunctive powers was "the general principle that a Court may grant ancillary orders, including injunctive orders, to ensure that its orders are effective."

22. And paragraph 45 states:

> "As to how the power to grant injunctions is squared with the limit of the Court of Protection's jurisdiction to making only decision for P that he could make for himself if capacitous, it was said (at paragraph 79):
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> "…although we accept of course that decisions made for P by the Court under s16(2)(a) are limited to the available options, we do not think this limits the power of the Court under s16(5) to grant injunctions *to give effect to those decisions* (something that P could of course not do for himself.)" (emphasis added)"

23. I need not say much more about the law in this judgment other than to observe that if there is a statutory scheme, then the court must follow that scheme as Parliament set down and resort to the Inherent Jurisdiction only in those limited circumstances where a true statutory gap exists and where it is necessary to do so. I paraphrase. Whilst I observed that in *HM* the court relied on the Inherent Jurisdiction, that is because proceedings were issued prior to the Mental Capacity Act coming into force and related jurisdictional issues. As is known the Inherent

Jurisdiction continues notwithstanding the coming into force of the Mental Capacity Act 2005.

24. Turning then to orders I am considering making today: it is entirely clear that I have the very highest level of concern for A's safety and wellbeing. As I have indicated at the outset, he is an extremely vulnerable, autistic young man in respect of whom a change of routine and people can cause significant degrees of anxiety. He was removed without planning or consent on 16 April, 25 April and again on 4 May. He may be bewildered, anxious and upset. Those are very serious matters and there are clear reasons why the best interests decisions made by DJ Mullins requires him to reside in a supported living placement and have carefully calibrated contact. In their actions the second and third respondents set aside that carefully calibrated series of living and contact arrangements which were ordered as in his best interests and to his protect wellbeing.

25. There is added significant concern that he needs risperidone, it is not at all clear that A has that medication and when he was removed in April, there was insufficient medication and that is likely to have a significant impact on his mental health. Also on that occasion he was without sufficient pads to assist with his personal hygiene. A number of personal items including his iPad were not returned to the placement after they removed him. If that situation was not of concern enough, the third respondent may well have an infectious and serious disease for which he must take medication. I am saying a limited amount about it as I am sitting in open court but this adds to the risks to A's safety and wellbeing. There is also the background concern of allegations of drugs use by the second and third respondents. When the court considers all matters in the round, this is a highly vulnerable young man whose living and care arrangements, access to medication, and education have all been fundamentally disrupted by the second and third respondents, and on a repeated basis over the last month.

26. As against that background and their non engagement with the order of 8 May 2024 it is necessary, proportionate and overwhelmingly just and convenient to make a collection order to locate and safeguard A by returning him to his home. I am aware that I am making this on without notice. I am aware it is a draconian order and authorises the Tipstaff and Police to enter into third party properties to seek and remove A, but such are my concerns for his safety, it is in his best interests for that to take place.

27. Insofar as that is a form of injunctive relief under s16(5) of the Mental Capacity Act, it is obviously an order in connection with the court's jurisdiction and the earlier orders to require

A to live at a supported living placement and to have prescribed contact. Therefore the *Re G* test set out by Lord Justice Baker is met in these circumstances. A's interests require protection, for his own safety and wellbeing, and the fact that he has been removed from his own home it is right that the court should make ancillary orders to prevent frustration of the orders made by DJ Mullins previously. It is necessary for an order to be made for enforcement of those orders to be made by Tipstaff under the direction of a Tier 3 judge (I leave aside the potential debate as to whether a Tier 1 or Tier 2 judge could make these order in reliance on s. 47 MCA). Without this further order, DJ Mullins earlier orders would be ineffective in the face of the actions of the second and third respondents.

28. Should there be any doubt as to whether I can make these order pursuant to s16(5), for avoidance of doubt at this short hearing and with the limited time I have had to give this ruling, I will also make an order under the court's Inherent Jurisdiction. Although I repeat my initial view – A lacks capacity, an order has been made as to his best interests, that order has been frustrated by the second and third respondents, and so this order can be made under the Mental Capacity Act. To avoid uncertainty I am also invoking the Inherent Jurisdiction to provide further and wider jurisdiction should it be necessary.

29. I also make an order against two telephone companies – Lyca and Telefonica - to assist in locating A so he can be safely returned and receive medication and other support given the traumatic events of the last few weeks. Whilst of course these are not decisions A could make, I am satisfied they are orders made in connection with the Court of Protection's jurisdiction and DJ Mullins' earlier best interests order in respect of A's residence. There is an interest in identifying the location of B to locate A to end his state of abduction and for him to be returned to his home in accordance with DJ Mullins earlier best interest analysis and order. This order is made to end the frustration of the earlier orders carried out by the actions of the second and third respondents.

30. In as much as any of these order interfere with the second and third respondents' Article 8 ECHR rights to private or family life, they are entirely proportionate and necessary to safeguard A's welfare in the circumstances described above.

31. It also seems to me I should give permission to Hackney to disclose the orders made today, and a note of this judgment, to the Metropolitan Police so they can take action to assist to return A to his home. I repeat for their purposes: the second and third respondents had no authority to take him, and have acted in contravention of orders of judges of this court.

32. It is also necessary to have a further hearing with a time estimate of 1 hour by the end of this week by which point I hope A has been located and returned. Those are my reasons for making orders I have been asked to make today. I am very grateful to the Tipstaff for their adroit assistance. I will now deal with any matters arising.

Postscript

A was returned to Placement X some days later.