WESTGATE
CHAMBERS

A brief update in respect of Deprivation of Liberty applications under the Inherent Jurisdiction involving children and young people.

Louise Walls

Introduction

For a more detailed look at Deprivation of Liberty applications please refer to the handout from the Tea Time Training Session held on 12.01.2022 by Andrew Judge and Louise Walls. The handout prepared for that Tea Time Training is available to download: Care Proceedings and Child Arrangements - Westgate Chambers (westgate-chambers.co.uk)

Re J (Deprivation of Liberty: Hospital) [2022] EWHC 2687 (Fam)
https://www.bailii.org/ew/cases/EWHC/Fam/2022/2687.html

Background

J 13 year old girl with complex needs including Autistic Spectrum Disorder, Attention Deficit Hyperactivity Disorder, problems with attachment, aggressive behaviour, absconding and self harming. J was made subject to a Care Order on 20.07.2022 and had been admitted to hospital on a number of occasions including being detained under s.136 of the Mental Health Act 1983 and s.2 of the Mental Health Act 1983. J was discharged from hospital on 05.07.2022 only to be re-admitted on the same day and detained under s.2 of the Mental Health Act 1983.
Key paragraphs of Mr Justice Poole's Judgment:

5. J has been assessed as not being Gillick competent to make decisions about her treatment and care. Her detention under s. 2 MHA 1983 was rescinded on 11 July 2022. In a statement to the court dated 7 July 2022 a Consultant Child and Adolescent Psychiatrist at the Trust said that J,

> "is not presenting with a mental illness that would require inpatient admission … admission to a CAMHS inpatient bed would be inappropriate and an appropriate discharge location, understanding of her difficulties, needs to be identified as soon as possible."

In a further statement dated 18 August 2022 he wrote,

> "J remains on the … ward which is not a suitable environment for a child with complex developmental and attachment needs. She requires an environment that is calm and predictable where she can develop healthy and trusting relationships with adults who are attuned to her needs. Frequent staff changes are not conducive to develop trusting relationships. The hospital environment is not conducive to the therapeutic environment J urgently needs."

6. Due to the inability of the Local Authority to find anywhere else to accommodate J, she has remained in hospital. Remarkably, she attends school daily and there have been no problems at school. However, whilst living in the hospital there has been a series of incidents of damage to property, threats and assaults on staff, and self harm including by cutting. Following a particularly troubling assault on staff in late August 2022, J was moved to another hospital where she now remains.

7. At seven previous hearings, including three before me, the court has authorised the deprivation of J's liberty in a hospital setting. This is the eighth hearing. I have listed this hearing to be heard in public but with a Reporting Restrictions Order ("RRO") in place to protect J's anonymity. I shall consider the terms of the RRO later in this judgment. I considered it appropriate to conduct this hearing in public because it was in the public interest to do so. Very sadly this case is not unique. J's plight highlights an ongoing problem that is blighting the lives of many children with complex needs whose behaviour presents very significant challenges to those who are caring for them:

   i) The number of available suitable placements for these children is far below the number needed; therefore

   ii) Local Authorities with responsibility to accommodate and care for these children cannot find suitable places for them. To be clear, as this Applicant has done, Local Authorities search around the country for suitable accommodation, not just in their own areas. This is a national problem seemingly affecting all Local Authorities; therefore

   iii) These children - children who are the most in need of support from skilled and experienced carers in safe and suitable placements - are accommodated in unsuitable places, such as holiday accommodation, homes that are not subject to any regulation, and sometimes, as in this case, even in hospitals where they do not belong.

   iv) The care regimes designed to keep these children safe often involve depriving them of their liberty; therefore

   v) The High Court is asked to authorise the deprivation of these children's liberty in unsuitable placements.

8. Recently a national DOL court was established to hear new applications for authorisation of the deprivation of liberty of children. The Nuffield Family Justice Observatory has recently reported that in July and August 2022 there were 237 applications to that court. In some of those cases children will have been placed in suitable accommodation from the outset, but in many, as here, there are great difficulties in finding suitable placements.

10. There is no dispute that the restrictions imposed on J deprive her of her liberty. They amount to her continual confinement, she does not and could not consent to them and they are imputable to the state. As the authorities establish, the court may only authorise the deprivation of a child's liberty if it is necessary, proportionate and in her best interests. In *Re T* (above) Lady Black said,

> "145. I have been particularly concerned as to whether it is a permissible exercise of the inherent jurisdiction to authorise a local authority to place a child in an unregistered children's home in relation to which a criminal offence would be being committed. Ultimately, however, I recognise that there are cases in which there is absolutely

> no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act. I also have to recognise that there are other duties in play, in addition to those which prohibit carrying on or managing an unregistered children's home. I gave an idea earlier (see para 30 et seq) of the duties placed upon local authorities to protect and support children. How can a local authority fulfil these duties in the problematic cases with which we are concerned if they cannot obtain authorisation from the High Court to place the child in the only placement that is available, and with the ability to impose such restrictions as are required on the child's liberty? It is such imperative considerations of necessity that have led me to conclude that the inherent jurisdiction must be available in these cases. There is presently no alternative that will safeguard the children who require its protection."

11. A hospital is not a children's home and cannot not fall within Ofsted's regulatory regime. A hospital is at least subject to regulation by the Care Quality Commission and it is not a criminal offence to place a child in a hospital, as it is to place a child in an unregistered children's home. By Section 27A of the Care Planning, Placement and Case Review (England) Regulations 2010, as amended in 2021, it is lawful for a Local Authority to place a child in a hospital. However, the court has still to be satisfied that it is necessary, proportionate and in J's best interests for the authorisation to be given. As *Re T* establishes (see for example the first sentence of [145] above) the court must consider whether to authorise the deprivation of liberty in the setting where the child is being accommodated or is going to be accommodated.

12. At the seven previous hearings of this application the court has found that it was necessary, proportionate and in her best interests to authorise the deprivation of J's liberty in hospital. The reason for so concluding, certainly on the three occasions I have done so, has been that there has been no alternative place for J to live and that restrictions amounting to the deprivation of her liberty have been needed to keep her safe whilst living at the hospital. At each hearing, the court has been told that the Local Authority is actively searching for alternative accommodation but, in three months, its searches have been in vain. The court is unable to find alternative placements and so, if the deprivation of a child's liberty is authorised, judges are limited to trying to ensure that the child is kept safe and is well cared for, and to cajole others to act to find suitable accommodation and care arrangements. At previous hearings I have insisted on regular review hearings, I have ordered the attendance of the Director of Children's Services, and I have directed that details of the case be provided to the Secretary of State for Education and the Children's Commissioner. All to no avail.

13. In *Re T*, Lord Stephens referred at [166] to the,

> "enduring well-known scandal of the disgraceful and utterly shaming lack of proper provision for children who require approved secure accommodation. These unfortunate children, who have been traumatised in so many ways, are frequently a major risk to themselves

> and to others. Those risks are of the gravest kind, and include risks to life, risks of grievous injuries, or risks of very serious damage to property. This scandalous lack of provision leads to applications to the court under its inherent jurisdiction to authorise the deprivation of a child's liberty in a children's home which has not been registered, there being no other available or suitable accommodation"

Here, since early July 2022, there has not been any home for J, either registered or unregistered, and she has been left to live within a hospital which is effectively being used as a space in which to accommodate a child when it should be a valuable resource for patients who require hospital care.

17. I am told that the Local Authority has nevertheless identified a private landlord who will provide a property, to be rented by the Local Authority, at which care could be provided for J. There will be a delay in J being able to move to the placement because the core staff would need to undergo restraint training. The aim is for J to be able to move into the placement by the end of October 2022. The Trust is prepared to delay J's discharge until the training has been completed and the placement is ready for J. I have been provided with a proposed multi-agency transition and support plan which is a carefully drafted, structured plan for J's introduction and move to the proposed bespoke placement. The plan should ensure education provision is maintained at J's present school, that there is input from the Child and Adolescent Mental Health Service, that J is introduced to the new care team whilst she is still at the hospital, that K is involved, and that J is introduced to the new placement and has some input to preparing it for her move there.

18. This plan would provide an alternative to J remaining in hospital for a further unspecified period. It is therefore to be welcomed. However, it would be an unregistered placement and the Local Authority anticipates that Ofsted may serve cease and desist notices on the provider and the property owner. Those notices highlight the risk of prosecution. The provider and/or the landlord might then withdraw. The President of the Family Division issued guidance on 12 November 2019 - Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales - together with a later addendum dated 1 December 2020, which must be followed, requiring the Local Authority to inform Ofsted of any order authorising the deprivation of a child's liberty in an unregistered children's home, and application for registration being made within a prescribed timetable. Whatever monitoring requirements the court might impose on the Local Authority as a condition of authorising deprivation of J's liberty in an unregistered placement, the court is not a regulator and cannot replace the level of oversight that a regulator provides.

19. I cannot be certain that the proposed arrangements will be implemented but the Local Authority expects that they will be and they are currently the only hope for J to be able to move out of hospital.

20. One factor in this case that is important to J's welfare is that daily she attends her school. It would be contrary to her best interests for her to move to a

placement that would disrupt her schooling. However, the search for alternative placements has been fruitless even when that condition has not been applied, i.e. there are no available placements within the region or nationally. The proposed placement will allow her to continue at her school.

21. J's mother, K, the Trust and the Guardian support the plan to move J to the proposed bespoke placement.

22. I shall also take the precaution, given the history of this case, of listing it before me for review on 26 October at 10.00 am for one hour, to be heard remotely. If the transfer to the new placement is going to be effective, there are no further issues for the court to consider, and all parties agree, I can vacate that hearing administratively.

23. This case, as do many others involving the care of children with complex needs, calls into question the court's role. Very often the court is told that there is only one place where the child can be accommodated. The court's role is therefore very limited. There are no real choices for the court to make. The court cannot direct that placements shall be made available. The court is not a regulator and cannot inspect potential placements or oversee care regimes. On the other hand, even when there are no other placement options, the court does not merely provide a rubber stamp for the restrictions sought, and there are decisions to be made about the extent of the restrictions that are necessary and proportionate and in a child's best interests. However, the courts, like the parties, continue to be confined by the consequences of what Lord Stephens called a "scandalous lack of provision" for which it appears that there is no end in sight.

Reporting Restrictions

37. Having decided that the hearing today should be in public, I made, of the court's own motion, a reporting restrictions order dated 4 October 2022. That order did not include anonymisation of the applicant Local Authority. Identification of the Local Authority places J in a specific location. The Local Authority applied for the RRO to be varied to prohibit publication of any information that would identify the location where J lives, including the name of the Local Authority. On 11 October 2022 I so ordered on an interim basis only pending representations at this hearing.

46. The court has to be very mindful of the risk of identification of J. It would be contrary to her best interests for her to be identified as the subject of this case. What is the extent of that risk? Manchester is a large city with a population of over half a million and several hospitals within the Greater Manchester area serving the population of the city of Manchester and beyond. The risk of identification is therefore much lower than it would be if the Local Authority covered a smaller population. To reduce the risk of identification via knowledge of location, I can order that there shall be no information that would identify or be likely to identify the hospitals where J has and is living, the staff working there, or the location of her family home, or the location of the hospitals within Greater Manchester. My RRO of 4 October prohibited

identification of the Trust that is responsible for the hospital where J is. No objection is taken to that reporting restriction.

47. In my judgement, the public interest in knowing the identity of the Applicant Local Authority comfortably outweighs the risk of identification of J by the Applicant Local Authority being identified. That risk is extremely small. As to the suggestion that J herself would be harmed or distressed by knowing that the Council was being identified, I reject that. I don't believe that she would consider that identification of the Council would jeopardise her anonymity. That is speculation. It is also very speculative to suggest that potential providers would be put off offering services because the Council was named. I do not believe that that is a realistic suggestion.

48. I am aware that there has been a recent Court of Appeal decision allowing an appeal against a decision of HHJ Wildblood KC in a similar case to allow the Local Authority to be named. That judgment has not been published. I do not know when it will be published and I do not know what the facts of that case were. None of the parties have asked me to defer my decision on the application to vary the RRO and I do not consider it necessary to do so. There have been many cases in which Local Authorities have been named even when the identity of the child or children involved have been protected. Cases are fact sensitive. For the reasons given I shall not vary the RRO to prohibit naming Manchester City Council, but I shall vary it to protect the identity of those who have worked with and cared for J and who will do so at the proposed placement. The hospitals where J has lived must not be named but it can be reported that they are in the Greater Manchester area. The full RRO is available on request.

Useful links and Resources
Re T (A Child) [2021] UKSC 35
https://www.bailii.org/uk/cases/UKSC/2021/35.html

Nuffield Family Justice Observatory
Deprivation of liberty: A review of published judgments
https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/03/nfjo_summary_DoL_case_review_final-1.pdf

https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/03/nfjo_report_dol-case-review_20220318_final.pdf

Deprivation of liberty: Legal reflections and Mechanisms. Briefing
https://www.nuffieldfjo.org.uk/wp-content/uploads/2022/02/nfjo_briefing_DoL_final_20220203.pdf

Threshold Documents

Re A (a child) [2015] EWFC 11
https://www.bailii.org/ew/cases/EWFC/HCJ/2015/11.html

In Re A Sir James Munby the President, as he was then, set out clear and fundamental principles regarding the Threshold document and how this should be drafted. Key paragraphs of Judgment:

8. The first fundamentally important point relates to the matter of fact-finding and proof. I emphasise, as I have already said, that it is for the local authority to prove, on a balance of probabilities, the facts upon which it seeks to rely. I draw attention to what, in Re A (A Child) (No 2) [2011] EWCA Civ 12, [2011] 1 FCR 141, para 26, I described as: "the elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation."
This carries with it two important practical and procedural consequences.

9. The first is that the local authority, if its case is challenged on some factual point, must adduce proper evidence to establish what it seeks to prove. Much material to be found in local authority case records or social work chronologies is hearsay, often second- or third-hand hearsay. Hearsay evidence is, of course, admissible in family proceedings. But, and as the present case so vividly demonstrates, a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it. As I remarked in my second View from the President's Chambers, [2013] Fam Law 680:
"Of course the court can act on the basis of evidence that is hearsay. But direct evidence from those who can speak to what they have themselves seen and heard is more compelling and less open to cross-examination. Too often far too much time is taken up by cross-examination directed to little more than demonstrating that no-one giving evidence in court is able to speak of their own knowledge, and that all are dependent on the assumed accuracy of what is recorded, sometimes at third or fourth hand, in the local authority's files."
It is a common feature of care cases that a local authority asserts that a parent does not admit, recognise or acknowledge something or does not recognise or acknowledge the local authority's concern about something. If the 'thing' is put in issue, the local authority must both prove the 'thing' and establish that it has the significance attributed to it by the local authority.

10. The second practical and procedural point goes to the formulation of threshold and proposed findings of fact. The schedule of findings in the present case contains, as we shall see, allegations in relation to the father that "he appears to have" lied or colluded, that various people have "stated" or "reported" things, and that "there is an allegation". With all respect to counsel, this form of allegation, which one sees far too often in such documents, is wrong and should never be used. It confuses the crucial distinction, once upon a time, though no longer, spelt out in the rules of pleading and well understood, between an assertion of fact and the evidence needed to prove the assertion. What do the words "he appears to have lied" or "X reports that he did Y" mean? More important, where does it take one? The relevant allegation is not that "he appears to have lied" or "X reports"; the relevant allegation, if there is evidence to support it, is surely that "he lied" or "he did Y".

11. Failure to understand these principles and to analyse the case accordingly can lead, as here, to the unwelcome realisation that a seemingly impressive case is, in truth, a tottering edifice built on inadequate foundations.

The second fundamentally important point is the need to link the facts relied upon by the local authority with its case on threshold, the need to demonstrate why, as the local authority asserts, facts A + B + C justify the conclusion that the child has suffered, or is at risk of suffering, significant harm of types X, Y or Z. Sometimes the linkage will be obvious, as where the facts proved establish physical harm. But the linkage may be very much less obvious where the allegation is only that the child is at risk of suffering emotional harm or, as in the present case, at risk of suffering neglect. In the present case, as we shall see, an important element of the local authority's case was that the father "lacks honesty with professionals", "minimises matters of importance" and "is immature and lacks insight of issues of importance". May be. But how does this feed through into a conclusion that A is at risk of neglect? The conclusion does not follow naturally from the premise. The local authority's evidence and submissions must set out the argument and explain explicitly why it is said that, in the particular case, the conclusion indeed follows from the facts. Here, as we shall see, the local authority conspicuously failed to do so.