Neutral Citation Number: [2020] EWHC 3280 (Fam)

Case No: PR20C01113/PR20C000547

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Sitting Remotely

Date: 2 December 2020

Before:

THE HONOURABLE MR JUSTICE MACDONALD

- -

Between:

Lancashire County Council	**Applicant**
- and -	
G	**First Respondent**
- and -	
N	**Second Respondent**

- -
- -

Ms Louise Boardman (instructed by **Lancashire County Council**) for the **Applicant**
Mr Michael Jones (instructed by **Roland Robinson and Fenton**) for the **First Respondent**
The Second Respondent did not appear and was not represented

Hearing dates: 27 November 2020

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Approved Judgment

I direct that 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 was handed down remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be at 10.30am on 2 December 2020.

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MR JUSTICE MACDONALD

This judgment was delivered in private. The Judge has given permission for this anonymised version of the judgment (and any of the facts and matters contained in it) to be published on condition always that the names and the addresses of the parties and the children must not be published. For the avoidance of doubt, the strict prohibition on publishing the names and addresses of the parties and the children will continue to apply where that information has been obtained by using the contents of this judgment to discover information already in the public domain. All persons, including representatives of the media, must ensure that these conditions are strictly complied with. Failure to do so will be a contempt of court.

Mr Justice MacDonald:

INTRODUCTION

1. On 23 October 2020 I gave judgment in this matter authorising the deprivation of G's liberty in an unregulated placement. G is 16 years old. The decision was published as *Lancashire CC v G (Unavailability of Secure Accommodation)* [2020] EWHC 2828 (Fam). On 18 November 2020 I gave a further judgment continuing the authorisation with respect to the deprivation of G's liberty. That decision was published as *Lancashire CC v G (No 2)(Continuing Unavailability of Secure Accommodation)* [2020] EWHC 3124 (Fam). This is the third judgment I have been required to give in this case within the space of a little over a month.

2. At this hearing G remains represented by Mr Michael Jones of counsel, through her Children's Guardian. The local authority remains represented by Ms Louise Boardman of counsel. As at the previous two hearings, the local contends at this hearing that G is in urgent need of a secure placement. As has been her position at previous hearings, the Children's Guardian remains opposed to that course of action, favouring a regulated non-secure placement where therapeutic input can be provided to meet G's welfare needs. However, as at previous hearings, it remains the case that no such placements of either type are available for G anywhere in the United Kingdom.

3. Within this context, G remains in an unregulated placement that is sub-optimal having regard to G's highly complex welfare needs and one that is not prepared to apply to Ofsted for registration. This despite many hours of further hard work by the dedicated social work team in this case and a countrywide search.

4. The sub-optimal nature of this situation is now further compounded by a marked deterioration in G's behaviour. In my last judgment I noted that G had remained relatively settled in her placement but that there had been some worrying signs that this period of calm was fragile and would be temporary. Those portents proved correct. As I detail below, G's behaviour has become much harder to regulate and manage. Ms Boardman informed the court that there is now a very real risk that the placement, which is not designed to meet and address the highly complex needs that G has, will reach crisis point, resulting in a further unplanned move for G to another temporary emergency placement which, likewise, will not be designed to meet and address the highly complex needs of G. The cycle will start again.

5. In these circumstances, at this hearing the local authority not only once again finds itself compelled to advance an unregulated placement as being the *only* option available to safeguard G's welfare but compelled to advance a placement that all parties acknowledge is increasingly struggling to contain G. Within this context, the *fait accompli* presented to the court, and that I described in my initial judgment, is now rendered in even starker relief.

6. As I also noted in my previous judgments, whilst G remains in an unregulated placement outside the statutory regime laid down by Parliament under s 25 of the Children Act 1989, it is necessary for the court to monitor closely the extent to which the unregulated placement continues to be in G's best interests. That is the task that falls to the court again today. It is a task that also, of course, adds to the total of some £17,000 of public funds already spent without appropriate result for G. As I have

observed previously, this is the cost of placing the High Court in what is, essentially, a regulatory role by reason of the acute shortage of clinical provision for placement of children and adolescents requiring assessment and treatment for mental health issues within a restrictive clinical environment, of secure placements and of regulated non-secure placements.

BACKGROUND

7. The background is as set out in my first judgment in this matter. Whilst, again, it is not necessary to repeat it in detail here, it is important to deal in some detail with the efforts that have been made to locate a placement for G, and the with the extent to which G's behaviour has deteriorated, since this matter was last before the court.

8. Since 18 November 2020 the local authority has continued its search of a placement for G. As at 25 November 2020 there were eight projected available beds in the secure estate in England and Wales for a total of twenty-six live referrals. There were no vacancies in Scotland, one secure placement in Scotland also confirming that, in addition to having no current vacancies, it would be unable to meet G's needs. With respect to regulated non-secure placements, once again no suitable placement has been identified for G. Within the foregoing context, what is now coming into sharper focus is that the situation for G is consequent upon not only the acute shortage of secure and regulated non-secure placements *per se*, but also because of the even greater shortage of the subset of such placements that equipped to cope with children with the multifaceted and highly complex needs demonstrated by G. Thus, even those very limited number of secure or regulated non-secure placements that have opened up over the course of the past 14 days have declined to offer a place to G on the grounds that they consider the risk to be too high to be able to provide their services to her. On behalf of the local authority, Ms Boardman referred during this hearing to the social worker's experience of certain children in G's position becoming "known" within the system, with such children facing repeated refusals with respect to placements that become available given the sheer extent and complexity of their needs. Such is becoming the experience for G.

9. At this hearing Ms Boardman was able to identify only one placement that has indicated that it is willing to *consider* G, contending that it is equipped to meet her complex needs. Investigations in respect of that placement continue. However, the unit in question is one that specialises in children with learning disabilities. In addition to no confirmation regarding the position in respect of that placement being available in time for this hearing, and more fundamentally, G does not have a learning disability. The local authority is also now, as a last resort, exploring the viability of purchasing a building in which to set up a bespoke placement for G, although planning in this regard for what will be a very expensive option is in its very early stages.

10. With respect to G's recent behaviour, and as I noted in my previous judgment, whilst G had remained relatively settled in her unregulated placement, there had been some worrying signs that that period of calm was fragile in nature and limited in duration. Within this context, in her updating statement the social worker had noted that:

> "It is highly likely that [G] has had a settled period but that she is beginning to struggle at this time. This again has been a pattern observed by the professionals as [G] escalates and then presents in crisis."

11. This prediction was, sadly, accurate. Since the matter was last before the court the following incidents detrimental to G's welfare have occurred:

    i) G has now begun to restrict her food intake and is reporting that following her evening meal she is making herself sick.

    ii) At midnight on 12 November 2020 G absconded from placement. G later apologised.

    iii) On 21 November 2020 G punched the car, the car door and the window.

    iv) On 24 November 2020 G walked off from staff on two occasions.

    v) Over four evenings prior to 25 November 2020, G barricaded her bedroom door shut.

    vi) On 25 November 2020 G attempted to strangle herself with a belt like item and disclosed that she had self-harmed by cutting herself on her legs and arms, using the glass from a picture frame. G made repeated threats to kill herself. These threats culminated in G tying string / laces tightly around her neck, necessitating these being cut from her neck with a ligature knife and an ambulance being called. G repeated these actions later on the same evening. Whilst the ambulance was awaited for a second time, G again attempted to strangle herself with a sock. G then smashed up her bed.

    vii) On 26 November 2020 G handed over a number of items she had secreted in order to self-harm, admitting again that she had engaged in self-harm. G then tried to strangle herself with a dressing gown rope, which staff again had to cut from her neck with a ligature knife. On this occasion it was not necessary to call an ambulance.

12. G's behaviours have been such that the local authority have sought further support from the community mental health team. The local authority and the placement are also now considering how to keep G's door open, either with a wedge or possibly by removing it. If G's current placement breaks down then, self-evidently in light of the background I have set out, G will have to be placed in a further temporary crisis placement, assuming one could be found.

LAW

13. The relevant law is set out in detail in my first judgment in this matter and, once again, I do not repeat it here. In deciding whether to continue to authorise the deprivation of G's liberty in her current, unregulated placement at present the court may grant such an order under its inherent jurisdiction if it is satisfied that the circumstances of the placement constitute a deprivation of liberty for the purposes of Art 5 of the ECHR and if it considers such an order to be in the child's best interests.

DISCUSSION

14. As time goes on it is difficult to think of new ways to describe the stark and unacceptable position that G continues to be in. As when this matter has been before me on previous occasions G, a vulnerable young woman with multifaceted difficulties

and at high risk of serious self-harm or suicide still only has available to her a sub-optimal placement that is not equipped fully to meet her complex welfare needs, that will not seek registration and which the Children's Guardian remains unable to endorse as being in her best interests. As I observed in my first judgment, whilst the local authority contends that this is an appropriate case for a secure accommodation order pursuant to s 25 of the Children Act 1989 and the Children's Guardian contends that a non-secure regulated placement would best meet G's needs, there is also a cogent argument that what is in fact missing for G is a restrictive *clinical* environment short of detention and treatment under the Mental Health Act 1983. The brutal reality however continues to be that *none* of these resources are available for G.

15. Having regard to the information I have summarised above with respect to the ongoing placement finding process, an even more difficult and complex picture is emerging as to why these difficulties pertain for G. With respect to secure accommodation and non-secure regulated placements, it is clear that, for G, the acute shortage of such placements *per se* is further exacerbated by the nature and extent of her needs, with the limited number of secure placements that are available being reluctant to take G given the scope and complexity of those needs. In addition, and as I have previously noted, there is inadequate provision in this jurisdiction for children with G's complex needs who do not meet the criteria for detention and treatment under the Mental Health Act 1983 but nonetheless require assessment and treatment for mental health issues within a restrictive clinical environment. Thus, G is placed in a *triple* bind by the acute shortage of secure and regulated non-secure placements *per se*, by the fact that her multifaceted and highly complex behavioural and welfare needs exclude her from consideration by those small number of such placements that are available and by the fact that those multifaceted and complex needs to do not bring her within the ambit of the Mental Health Act 1983. To repeat, this is the genesis of the gap through which highly vulnerable children like G continue to fall.

16. Once again therefore, the choice forced upon the court is to refuse the continued authorisation of the deprivation of G's liberty in an unregulated placement, which will result in her discharge into the community where, I continue to be satisfied, she will almost certainly cause herself possibly fatal harm, or to authorise the continued deprivation of G's liberty in an unregulated placement that all parties agree is sub-optimal, from the perspective of her welfare, that the evidence suggests is increasingly struggling to contain G and in which the therapeutic input required so urgently by G cannot begin.

17. Within this context, I must again endeavour to apply the legal principles set out in my first judgment in this matter. First, on the basis of the evidence before the court, I remain satisfied that in the unregulated placement in which G is currently placed she is deprived of her liberty for the purposes of Art 5 of the ECHR. The restrictions that will continue to be imposed on G in that placement remain as they did when I last considered this case, namely:

    i) Locked car doors when being transported to and from the placement with three to one supervision.

    ii) Three to one supervision at all times when in the placement.

iii) The doors in the placement will be locked where there may be a risk to G and staff and due to the risk of arson.

iv) G will be escorted whenever she is away from the placement.

v) Staff will use reasonable and proportionate measures to ensure that she does not leave the placement and to return her to the placement if she does leave.

vi) Reasonable and proportionate measures may be used to restrain G when she is distressed.

vii) G will not be permitted access to her mobile phone.

viii) G will be subject to a 'waking watch' every ten minutes during the night.

18. Within the foregoing context, I also remain satisfied that G is unable to consent to the deprivation of her liberty, is subject to continuous supervision and control and is not free to leave the placement.

19. Further and once again with profound misgivings, I remain satisfied, albeit on an increasingly narrow balance, that it is in G's best interests to authorise the deprivation of her liberty in her current placement even though it remains, notwithstanding the hard work of those who are caring for G, sub-optimal from the perspective of meeting G's identified global welfare needs and is an unregulated placement. Again, in the absence of an appropriate secure placement (on the local authority's case) or regulated non-secure placement (on the case of the Children's Guardian) or an appropriate placement within a restrictive clinical environment short of detention under the Mental Health Act 1983, the current placement continues to represent the *only* option for keeping G safe in the broadest sense.

20. In determining that on, as I say, an increasingly narrow balance the current unregulated placement remains in G's best interests, I have again in particular borne in mind the following information concerning the safeguarding arrangements for the placement, which information is central to my feeling able to maintain the authorisation:

i) There remains a multi-disciplinary team around G comprising a Home Treatment Team, the [support team], the adult Mental Health Team, the Children Looked After nurse, the police and Children's Social Care.

ii) To seek to avoid the need for any crisis management, the multi-disciplinary team have compiled and distributed risk management plans which are geared at managing risky behaviours. As I noted in my last judgment, the completed documents have been shared with all parties and the Mental Health and Home treatment team.

iii) G has a self-harm management plan.

iv) The local police officer has completed a trigger plan for officers when an emergency call is made and how best they deal with G in a crisis situation and health services and the local authority have supported this work.

v) The police, the local NHS Health Trusts and the North West Ambulance service have been alerted regarding the significant risk G poses to herself and others and alerts have been placed on their systems.

vi) Weekly multi-agency meetings are held to review the risk management plans in place with respect to G and to reflect and respond to the changes in her behaviours and presentation.

vii) Forensic CAMHS began a detailed assessment of G on the 2 November, the completion of which is due in 10 weeks.

viii) Whilst G declined to see and speak with Dr O 20 November 2020, she will prepare a report on the papers with a view to assisting those caring for G.

21. Whilst welcome, the necessarily *ad hoc* nature of these safeguards (in contrast to the statutory scheme provided by s 25 of the Children Act 1989, with the regulation and review that underpins that statutory scheme, and the regulatory regime governing registered placements) serves to emphasise once again that the effect of the acute shortage of secure and regulated non-secure placements is to render the welfare test that I must apply merely transactional. By reason of the acute shortage of placements, the price of G's safety from self-harm or, worse, suicide must be paid by an acceptance of a placement that is not designed to meet her welfare needs and, beyond the implementation of basic measures to keep her safe, cannot meet her welfare needs holistically assessed. To put it another way, the acute shortage of secure and regulated non-secure placements risks moving the test applied by the court further from welfare and closer to necessity, bleeding from the best interests principle all but the starkest considerations of safety, rendering it barren of the other factors that ordinarily comprise the considered welfare analysis that is so essential to maintaining the integrity of the best interests principle.

CONCLUSION

22. Within the foregoing context, and for the reasons set out above, I again consider that I have no choice but to renew the authorisation for the deprivation of G's liberty at her current unregulated placement. The local authority continues doggedly its unstinting and assiduous work to try and find G a placement that will meet fully her highly complex needs. In the circumstances, I will list the matter for a further hearing in 14 days in the hope that such a placement will have been found or, failing that, to once again review the authorisation to deprive G of her liberty at her current, unregulated placement.

23. Since I handed down judgment on 20 November 2020 the Children's Commissioner for England has published a further report entitled *Who are they? Where are they? 2020 – Children Locked Up* (Children's Commissioner for England, November 2020), the conclusions of which echo loudly the experience of the court in this case. In particular, I note the following points made by the report:

i) There continues to be a group of children who are being deprived of their liberty in settings which are not deemed appropriate. These children are in need of a placement that can manage the high level of risk that they present whilst holding them securely but there are no such placements available.

ii) There is no official data on the numbers of children who find themselves in this position but it would appear that at there are a significant number of extremely vulnerable children who professionals have decided are in need of a bed in a secure accommodation unit but who are instead are placed in unregulated placement.

iii) There is evidence that, with high numbers of children waiting to be placed, perverse incentives exist for placements to take the children who pose the least risk rather than the children who have the most need.

iv) There are a group of children who fall between the gaps of all placement settings, children for whom secure accommodation is not available or appropriate but who also do not meet the criteria under the Mental Health Act 1983 for admission to a mental health ward.

24. Within this context, G's case is very far from being the only one in which a court is driven by necessity to make an order authorising the deprivation of a child's liberty at an inappropriate unregulated placement, is very far from being the only case where such a placement is the solitary placement available, is very far from being the only case where the court harbours profound misgivings about the course it is compelled by circumstance to adopt and is very far from being the only case where the court is forced to undertake a narrow, transactional best interests analysis by reason of their being but a single option available.

25. Within the foregoing context, and whilst it is an action that has not yielded any positive change in the position for G to date, I shall once again direct that a copy of this judgment be sent forthwith to the Children's Commissioner for England, to the Rt Hon Gavin Williamson CBE MP, Secretary of State for Education, to Sir Alan Wood, Chair of the Residential Care Leadership Board, to Vicky Ford MP, Minister for Children to Isabelle Trowler, the Chief Social Worker and to Ofsted. I will also direct that a copy of the judgment is sent forthwith to the Lord Chancellor and to Alex Chalk MP, Parliamentary Under Secretary of State for Justice.

26. Finally, given the continuing situation I have described above, I feel compelled to make the following additional observation. As I noted in my first judgment, three years ago in the case of *Re X (A Child)(No.3)* [2017] EWHC 2036 (Fam) at [37] Sir James Munby observed as follows with respect to what he characterised as the nationally shaming lack of appropriate placements for highly vulnerable children and adolescents who do not meet the requirements of the mental health legislation but require assessment and treatment for mental health issues within a restrictive clinical environment:

> "[37] What this case demonstrates, as if further demonstration is still required of what is a well-known scandal, is the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with. We are, even in these times of austerity, one of the richest countries in the world. Our children and young people are our future. X is part of our future. It is a disgrace to any country with pretensions to civilisation, compassion and, dare one say it, basic human decency, that a judge in 2017

> should be faced with the problems thrown up by this case and should have to express himself in such terms."

27. Amongst the fundamental principles reflected in the foregoing passage is that the development of children and the development of society are intrinsically and inseparably linked. As was recognised in the American case of *Brooks v Brooks* 35 Barb at 87-88 in 1861, the sound development of the child in all aspects is indispensable to the good order and the just protection of society. Human society benefits from the addition of the child as a member of that society, but the child *and* society will also suffer if society then fails to safeguard and promote the welfare of that child where the parents have proved, by reason of circumstance or inclination, unable to do so. G's welfare is the court's paramount consideration. But amongst the *reasons* that this is so is that the wellbeing of our society is dependent upon the physical, emotional and educational health of our children, *including* G.

28. Within this context we have a responsibility primarily to G but also to ourselves to ensure her physical, emotional and educational welfare is safeguarded and promoted. This is an imperative course not only in order to maintain dutiful fidelity to the principle that G's best interests are paramount, but also in order to ensure that society endures and develops for the benefit of each and all of its members, *including* G. At present, society, our society, is failing in that course with respect to G. As recognised by Sir James Munby in *Re X (A Child)(No.3)*, that failure is, and can only ever be, a self-defeating mark of shame for us all.

29. That is my judgment.