[2010] EWHC B31 (Fam)

Case No. FD08P01576

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Court 18
The Royal Courts of Justice,
Strand, London WC2A 2LL

15 October 2010

B e f o r e :

THE HONOURABLE MR JUSTICE HEDLEY
B E T W E E N:

B (A Local Authority)

v

RM

MM

AM

Transcript from a recording by Ubiqus
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Ian Peddie QC and Rachael Rowley-Fox of Garden Court Chambers for RM, MM and AM
David Vavreka for the Local Authority
Andrew Ward for CG

HTML VERSION OF JUDGMENT

MR JUSTICE HEADLEY:

1. This case raises the question of whether and if so, on what basis a Court considering an application for a care order in respect of a young person with lifelong disabilities should transfer the case to the Court of Protection to be dealt with under the Mental Capacity Act, 2005, rather than the Children Act, 1989. The question only arises as a practical issue where the child at the date of the hearing is aged at least 16. It follows that only a few cases are likely to be involved.

2. I am concerned with a young woman called AM. She was born in November 1993 so that she is nearly 17. Her mother lives in the B area. The mother has five other children all older than AM, one of whom has a disability of her own. Those children are now all adult but live in or near the mother's home. AM's father works and usually lives in Morocco and AM, like the rest of the family, is a Moroccan Muslim whose first language is Arabic. Until July 2008, AM spent the greater part of her life at home with her family. She is a young woman with multiple disabilities which impact dramatically upon her capacities in life and, consequently, upon her family.

3. As a result of an in-patient assessment at the P Hospital in early 2009 the Court has a report from Dr Lisa Rippin, a consultant psychiatrist for young people with a learning disability and that report is dated the 5th May 2009. The condition of AM is described in paragraph 6.1 of that report, part of which says this,

> 'AM has a diagnosis of severe learning disability, autism and Tourette Syndrome. AM's disability will be lifelong, she will never be able to live independently and will require a high level of support from the adults around her in order to ensure that her day-to-day needs are met. AM's autism will also be a lifelong condition, she will

always require a highly structured, predictable environment. In addition, she will always have difficulties in managing change and transition. As noted, AM has a complex sensory processing difficulty as a consequence of her learning disability and autism. These impairments will be lifelong and result in her having ongoing difficulties in making sense of her environment and processing sensory information. AM has been diagnosed as suffering from Tourette syndrome; this is a condition characterised by multiple motor and vocal tics. AM has a particularly severe form of the condition which results in her exhibiting motor tics almost constantly throughout the day. It is more difficult for me to predict the course which AM's Tourette Syndrome will take. However, it would be my opinion that those professionals caring for AM should assume that her self injurious behaviour will not improve and she will require a high level of support for the foreseeable future in order to reduce the risk which she poses to herself.'

4. As I have said, AM spent her early life at home. However, by 2008 her difficulties had escalated, as indeed had the difficulties inherent in caring for her and there was evidence of self-inflicted physical injury. At that stage it was proposed that she required a full in-patient assessment. In the event in July 2008 she was taken by the mother to Morocco. Wardship proceedings were instituted and orders made for her prompt return to the jurisdiction. In the events that happened, she was not, in fact, returned until the 29th January 2009. I have not enquired into the reasons for the delay but the fact is there to be seen. On her return she was admitted to the R unit of the P Hospital as a result of which there came the report from Dr Lisa Rippin to which the Court has already referred. On the 6th May she was transferred to U School in K where she has remained ever since. Notwithstanding the fact that AM is in K and the family is in B, there has been regular weekly contact for two or three days at a time which has taken place in K.

5. I turn then to consider the issues of threshold. Every care case is an invasion of family privacy and such an invasion is not permitted unless the Local Authority are able to prove the required threshold for intervention as stipulated in Section 31(2) of the Children Act 1989. In fact, threshold has been conceded in this case and thus there is no profit or need in dwelling on the past as, if ever there were a case in which Local Authority and family must work together in the future, this is it.

6. The essential case for the Local Authority is an assertion that the mother has never really appreciated or accepted the difficulties caused by these profound disabilities and, despite all the evidence, the mother has adhered to the belief that this child could be cared for at home. There may well be something in that assertion, as it is not unusual for families when faced with disability of this magnitude to find it difficult to acknowledge the full extent of it. Moreover, the mother sees it in any circumstances as her cultural, religious and family duty personally to care for AM for life and would find it impossible in public to say otherwise.

7. There have been many differences between the parties and much unhappiness expressed by the family as to AM's care at U. However, I think it neither helpful nor necessary to investigate further let alone resolve these matters as there are usually differences of perception or degree in circumstances where caring for AM is seriously demanding in any setting. It is sufficient to record acknowledgment and acceptance that on the basis of the evidence, AM was at the relevant date beyond parental control and at a high risk of suffering significant harm, thus the threshold for intervention is satisfied.

8. The Court is now called upon to consider AM's future subject to Section 1(1) of the Children Act 1989, having in mind those matters set out in Section 1(3) to which I will come back in a moment. In so doing, the Court is required to adopt an approach of least intervention, that is to say that a care order is the order of final resort. I propose to consider her welfare needs and then and only then address the question of what if any order should be made in order the meeting of those needs.

9. The perspective that the Court is required to take under Section 1 of the 1989 Act is the perspective of a young person's minority. There are a number of matters which are uncontroversial as between the parties. First, that AM should remain where she is for the time being. Secondly, that the family have a central role to play in her welfare, as to which I shall say a bit more in a moment. Thirdly, that if practicable a move to somewhere much nearer the family home would be in her best interest. Fourthly, that she should only have one

move and that that move must succeed and must be her last move. Fifthly, it is acknowledged on that basis that that necessarily involves transitional planning, the involvement of adult disability services and a number of funding decisions to be made, not least because the present charge on the public purse for the care of AM is about £1,000 per day. Lastly, it is common ground between the parties that all these things have to be got right first time.

10. At present, there are two fundamental issues in respect of AM's welfare which are controversial. The first is the actual quality of care that she receives at U and the second is the speed at which any move down south is planned or carried into effect. As I observed in the argument, this case poses a tension between the commitments and obligations of family life as perceived by the family and the rather more individually focused assessment which is required of the court by Section 1 of the Children Act.

11. Section 1 requires that the child's welfare shall be the Court's paramount consideration. Section 1(3) raises a number of other matters, not all of which are relevant in every case but in respect of which the Court ought at least to give consideration. It is not possible to ascertain the wishes and feelings of AM because it is not possible for her to understand the implications of the position in which she finds herself but it is common ground that she is delighted to see members of the family and they are clearly extremely important to her.

12. AM has very serious physical, emotional and educational needs and it is unlikely in my view that all those needs are going to be met from the same source. This is a case in which those who meet physical needs may well have to cooperate with those who fundamentally meet emotional needs, who in their turn may have to cooperate with those who meet educational needs. The Court has to consider the likely effect on AM of any change in her circumstances. Again, it is common ground that her condition is such that any change is likely to induce considerable anxiety and to be difficult; that is why everybody agrees that there must only be one move.

13. I need say nothing more I think about her as a person that has not already been said, nor I think is it necessary to say very much about the harm that she is at risk of suffering because it is self-evident on the evidence. In this case principally as far as physical harm is concerned it is of self-inflicted harm and as far as emotional harm, of as it were being left without serious long-term connections with other people. It is common ground that the mother, left entirely to herself, would be unable to meet all those needs; there needs to be a significant involvement of specialist assistance.

14. It is important in this context to say something about the role of the family and these matters are entirely uncontroversial and fully acknowledged by the Local Authority. There is no doubt that this family have demonstrated beyond argument a serious commitment to AM. Indeed, some of the complaints about the mother is that she appeared over-involved or over-committed and unable to recognise that others may have to share in the care. Secondly, by the faithful adherence to highly inconvenient contact arrangements both at hospital and U, there has been the clearest demonstration, to AM's considerable advantage, of the family's commitment to her.

15. The second thing that is important to say is that AM will be dependent on other adults for the whole of her life. That, of course, will mean that she would need an input of care for the whole of her life but more importantly in my view, she will require the life-long emotional commitment essential for her welfare which is, of course, likely only to come from the family themselves and that of course is where both the mother and AM's brothers and sisters have a central role to play. Hence, it is vital that they are kept on side, it is vital that they feel that they participate fully and it is vital that they are not subject to any unnecessary discouragement. In short, they have a central role to play in her future.

16. It is clear that there have been differences as to the care of U but as I say, I think it unhelpful to investigate those matters. There are pronounced differences of perceptions and the fact of the matter is that care is extremely difficult to deliver to AM and there will always be room for criticism and improvement. AM will always be at risk of some injuries with resultant arguments about how they came about and whether they could have been prevented.

17. I also accept that there have been frustrating restrictions placed on the mother, both in relation to intimate care issues, for example, showering and also in respect of trips out in the

car. It is, of course, not for the Court to dictate to U as to how they are to organise their affairs but it is, in my view, vital that the mother is included as far as possible in the care of AM and is not simply left as a spectator to intimate care.

18. All that said and all that recognised, I am satisfied that U currently meets sufficiently AM's present needs and it would be seriously contrary to her welfare if she were moved before the next and final move has been properly planned and not only properly planned but has been agreed to by all parties, including family, and that the requisite funding is in place.

19. The second area of disagreement is the speed at which AM may be able to leave U. I recognise at once that the family will not be the first family to be frustrated at the speed at which the wheels of Local Authority Bureaucracies tend to turn and I think it highly likely in this case that they will get frustrated because things will not move at the speed they would like them to. However, the fact of the matter is that the needs of AM require careful planning, that a move that did not work would be a disaster and it would, in short, be foolish to cut corners.

20. In those circumstances, I am satisfied that the welfare of AM requires two things: a) that a permanent move to B needs to be fully and timeously explored with the early involvement of the adult disabilities team and (b) that in the practicalities that are considered in respect of a move the need for lifelong family involvement is weighed as a significant factor. I am further entirely satisfied that until that is in place and done she should stay where she is on the basis of continuing regular and frequent contact.

21. Having thus addressed AM's needs in terms of her welfare, the Court then passes to the difficult question in this case of what is the correct order in order to secure the implementation of the meeting of those needs. The mother submits that no order is necessary in this case; it would be sufficient for there to be a Section 20 agreement subject perhaps to a two-month notice period, on the basis that she stays where she is and says Mr Peddie of Queen's Counsel on behalf of the mother, the mother has demonstrated a capacity to work with the Local Authority. I say in passing that I am much more interested as I look at this case in how the family have behaved rather than what they have said in terms of cooperation and there is a real case for saying that cooperation has, when it has been needed, been readily forthcoming.

22. The Local Authority supported by the Guardian says that the Court should make a care order. It is submitted that the concessions on which Mr Peddie has relied as demonstrating insight have come very late in the proceedings. It is submitted that there is a real risk in the future of disagreement, even of seeking to remove and thus it is essential, so it is submitted, that the Local Authority must share parental responsibility in the planning of AM's future life. They say that the order must be made now because the effect of Section 31(3) of the Act is that the Court could make no care order, whether interim or final, at all as from the 19th November 2010, and the Local Authority maintain that such a care order should be made even though its effect is necessarily limited to the 18th November 2011.

23. I must confess to having serious doubts about either approach. On the one hand, I do not think AM's welfare will be advanced by simply making no order. The agreement that she should stay at U is fragile. The planning required is likely to take longer than the family is comfortable with and that will make the U agreement even more fragile. Given my view that there should only be one more, a view which I understand to be uncontroversial, I take the view that that should somehow be enshrined in a Court order and the family proposal does not admit of that. On the other hand, I have serious reservations about a care order in circumstances where first, there is a proved commitment over time and in devotion to contact and secondly, that the family remain the key constant for the future of this young person. If one asks oneself who will still be in her life in 10 years' time, the probabilities are the answer will be family members only. Thirdly, this is a family driven not by a sense of perversity or resistance to authority but one of moral and religious duty. It is a family which everyone recognises is committed to the welfare of AM. I would have no difficulty in understanding a sense of rebuff and feelings of marginalisation were a care order to be made, even one that only lasts for 12 months and no more. That does not mean that a care order should not be granted if AM's welfare so demands. The question is, does it?

24. A further anxiety for me is my own assessment and understanding that issues may very well not be resolved by the time of AM's 18th birthday. Her disabilities are both grave and permanent, the demands made by her needs will be no less as she becomes an adult. Indeed, she may present even greater challenges to carers. The period of 12 months is wholly arbitrary in her life and in dealing with the needs that she has.

25. It was in the light of this that I ventured the view that perhaps this case might be best managed and dealt with in the Court of Protection, notwithstanding that litigation has been running for more than two years. The Local Authority resisted it on the basis that it was not necessary and were it to be so in 12 months' time, it could then be activated. I have to say that in this case on the basis of my understanding of it, I find that argument unpersuasive, not least because it seems to me most unlikely that everything will have been resolved in that timescale and most unlikely the Court could conclude that no Court involvement will thereafter be required. The family do not particularly resist this approach. The Guardian does not support it but recognises her own unfamiliarity with the jurisdiction and practice of the Court of Protection. Counsel say that so far as they can ascertain this question of transfer has not before been considered by the Court.

26. It is perhaps important to say something about the Court of Protection and its jurisdiction. The Court of Protection is a creature of statute having been set up by the Mental Capacity Act, 2005. By Section 2(5) of that Act the Court may not exercise jurisdiction in respect of any person under the age of 16.

27. In respect of any person over the age of 16, jurisdiction is engaged where a person lacks capacity and the jurisdiction so engaged is to act in accordance with that person's best interest. Clearly, some interplay between the Children Act 1989 and the Mental Capacity Act 2005 was envisaged as there came into force on the 1st October 2007 the Mental Capacity Act 2005 Transfer of Proceedings Order, SI2007/1899. The relevant Article for our purposes is Article 3 which is entitled 'Transfers from a Court having jurisdiction under the Children Act to the Court of Protection.' As this is central to this issue, I propose to incorporate the whole of the Article into the judgment -

> '1) This Article applies to any proceedings in a Court having jurisdiction under the Children Act which relate to a person under 18.
> 2) A Court having jurisdiction under the Children Act may direct the transfer of the whole or part of the proceedings to the Court of Protection where it considers in all the circumstances it is just and convenient to transfer the proceedings.
> 3) In making a determination, the Court having jurisdiction under the Children Act must have regard to,
>
> a) Whether the proceedings should be heard together with other proceedings that are pending in the Court of Protection,
> b) Whether any order that may be made by the Court of Protection is likely to be a more appropriate way of dealing with the proceedings,
> c) the extent to which any order made as respects a person who lacks capacity is likely to continue to have effect when that person reaches 18 and,
> d) Any other matters that the Court considers relevant.
>
> 4) A Court having jurisdiction under the Children Act,
>
> a) May exercise the power to make an order under paragraph 2 on an application or on its own initiative and,
> b) where it orders a transfer it must give reasons for its decisions.
>
> 5) Any proceedings transferred under this Article are,
>
> a) to be treated for all purposes as if they were proceedings under the Mental Capacity Act, 2005 which had been started in the Court of Protection and,
> b) are to be dealt with after the transfer in accordance with directions given by the Court of Protection.'

28. That raises the question particularly under Article 3(3)(d) as to what matters the Court should take into account in deciding whether to exercise these powers and to adopt this approach. An ex tempore judgment in a case on its own facts is no basis for attempting an exhaustive analysis of these issues; nevertheless, a number of matters suggest themselves, matters which may often be relevant in the relatively small number of cases in which this issue is likely to arise. One, is the child over 16? Otherwise of course, there is no power. Two, does the child manifestly lack capacity in respect of the principal decisions which are to be made in the

Children Act proceedings? Three, are the disabilities which give rise to lack of capacity lifelong or at least long-term? Four, can the decisions which arise in respect of the child's welfare all be taken and all issues resolved during the child's minority? Five, does the Court of Protection have powers or procedures more appropriate to the resolution of outstanding issues than are available under the Children Act? Six, can the child's welfare needs be fully met by the exercise of Court of Protection powers? These provisional thoughts are intended to put some flesh on to the provisions of Article 3(3); no doubt, other issues will arise in other cases. The essential thrust, however, is whether looking at the individual needs of the specific young person, it can be said that their welfare will be better safeguarded within the Court of Protection than it would be under the Children Act.

29. As I said at the end of submissions, where a judge finds that his or her view of a case is at variance with all the parties in the case, alarm bells should sound and the judge should reflect again on that view. This case needs urgent resolution; nevertheless, I have taken overnight to reflect again on my views of this case. Having done so, I must confess myself wholly satisfied that the welfare of AM will be better protected within the Court of Protection, my reasons are as follows.

30. A) I think that there should be a Court determination as to U and the need for AM to stay there. B) I think the Court door should remain open during those delicate planning stages and potentially difficult decisions over the placement, even if the Court does not actively intervene in that process unless it is specifically invited so to do. C) I am far from satisfied that these matters will be resolved by the time of AM's 18th birthday. D) Her disabilities and acute care needs are lifelong. E) Declarations in the Court of Protection avoid all the negative consequences as I see them of making of a care order whilst at the same time, setting the necessary framework within which AM's needs can be addressed. F) Her lack of capacity on all relevant issues for decision is manifest. It follows, that I propose pursuant to Article 3(4)(a) to transfer on my own initiative having as required given my reasons for so doing. Accordingly, I propose to reconstitute as the Court of Protection and it would be quite unnecessary in these circumstances to have a separate hearing in the Court of Protection, because all the evidence and all the issues are before me and I am myself a judge of the Court of Protection. Therefore, I propose to restrict myself to considering how what I have said in this judgment, can properly be given effect to by an order of the Court of Protection.

31. First, I am satisfied on all the evidence but particularly the evidence of Dr Rippin that a) AM lacks capacity to litigate and b) AM lacks capacity to decide where she should live or with whom, what medical treatment she may require, the nature and extent of her care needs and how they should be met and when and with whom she should have contact. The order should contain the recitals that the parties were willing to insert in a care order if made. There should thereafter be the following declarations.

32. 1) It is lawful as being in her best interests that AM should remain at U and should not be removed without the agreement of the Local Authority and the mother or other order of the Court. 2) It is in the best interests of AM that the Local Authority should explore and if practicable, implement a plan to move AM to a setting near B. 3) It is in the best interests of AM that the mother and other members of the family should have regular and frequent contact with her. 4) It is lawful as being in her best interests that AM should receive such medical treatment including medication as may be advised by medical practitioners retained by U.

33. Certain procedural orders need to be made. Either the Local Authority or the mother need to be constituted as applicant to the Court of Protection proceedings and I propose to invite the Local Authority to elect as to whether they wish to be applicant or respondent. In the Court of Protection proceedings, the Local Authority will be known as the 'B Local Authority', the mother as 'RM' and [AM] as 'AM'. AM should be a party to those proceedings and I would invite the Guardian to consider accepting appointment as litigation friend until AM's 18th birthday. In the meantime, the Official Solicitor should be notified of these proceedings and given leave to intervene if so advised. I propose further to direct that all the formalities of instituting proceedings be dispensed with and that the evidence in the care proceedings shall stand as evidence in the Court of Protection proceedings.

34. Should I make any other substantive order? I think not. I think the best interests of AM are served by allowing the parties within the framework of this order to get on with planning and if

possible, implementing those plans for AM's future care. The parties shall have liberty to restore this matter, reserved to me but are not encouraged to do so unless and until they are deadlocked on a matter of substance. This is a case in which AM's interests are not served by conflict. The Local Authority must proceed with reasonable expedition and the family with patience. The outcome which all seek is a prize well worth negotiation, compromise and patience and I believe it well within the capacity of this Local Authority and this family to see the matter through on their own without the direction of the Court.

35. The function of the Court is to provide the framework, which the declarations establish, and within that framework to leave the parties to do what they do best, which is to plan and implement plans for AM's future. Some orders need to be made within the Children Act proceedings. I propose to order first that pursuant to Section 1(5) there will be no order save a transfer to the Court of Protection under the relevant transfer of proceedings order. Secondly, that there be a detailed assessment of publicly funded costs and thirdly, that a transcript of this judgment shall be obtained at the joint and equal expense of the parties, it being a reasonable charge on any publicly funded parties' certificate. That is the judgment I propose to give.