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[2022] EWHC 3572 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
SITTING AT SWANSEA FAMILY COURT

Caravella House
Quay West, Quay Parade
Swansea, SA1 1SP

Date: Monday, 15th August 2022

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Before:

MR JUSTICE FRANCIS

Between:

A COUNTY COUNCIL

Applicant

- and -

(1) A

Respondents

(2) B

(3) C

(4) THE CHILDREN

(Via their Children's Guardian)

MR D. PAXTON (instructed by **A County Council**) appeared on behalf of the **Applicant**
MS K. HANSON (instructed by **Welch & Co**) appeared on behalf of the **First Respondent**

THE SECOND RESPONDENT appeared **In Person**

THE THIRD RESPONDENT was not present and not represented

MS S. KNOX (instructed by **Hains and Lewis**) appeared on behalf of the **Children's Guardian**

MS FENELLA MORRIS QC also in attendance, on behalf of the **Hospital Board**

Approved Judgment

Digital Transcription by Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com

MR JUSTICE FRANCIS:

1. On 5 August this year, an application was made by the local authority for a deprivation of liberty order in relation to D. D is sixteen years old, having been born in 2006.
2. This is a case with a long history, which is set out in a very helpful case summary, already provided by Mr Paxton and which everybody has, and I am not going to set out those details, not least because I have ordered that this matter is to be heard in public. The Circuit Judge in Swansea properly referred this matter to me, he felt that it should be heard at High Court level, and as the Family Division liaison judge for Wales, it has therefore come to me.
3. I had a hearing last Friday in this matter, and I am grateful to all counsel, but particularly to the hospital board who have instructed Ms Fenella Morris QC because they had, in a sense, no obligation to be present at the hearing or to instruct counsel, but their involvement has been of immense help.
4. The situation is that when the matter came before me last Friday, D was and remains at the hospital concerned. A mental health assessment has been made in respect of D, and that assessment says, and nobody challenges this, at least at this stage, that D is not somebody who qualifies for medical attention pursuant to Tier 4 of CAMHS, nor section 3 of the Mental Health Act and that therefore, she should not be detained or resident in the mental health unit at the hospital where she is.
5. The problem here is that there is nowhere else for D to go. That is the shocking situation which caused me to decide to list this matter in open court today. In my order, I said that I required the attendance of the Welsh Minister for Health, and the Secretary of State for Health and Social Care (from the Westminster government), or a suitably instructed deputy or instructed representative to attend this hearing today.
6. I am extremely grateful to Ms Lisa Michael, from the legal services department of the Welsh government, for attending on behalf of the Welsh Minister for Health, and her input has been invaluable. Nothing has been received from the Secretary of State for Health and Social Care from the Westminster government. It is perplexing that I have not even had a response to the order which was served on them, but in the circumstances their attendance has not, in fact, been required.
7. Everybody now agrees that I am dealing here with a devolved responsibility, pursuant to the devolution settlement, namely health and that, therefore, the attendance of anybody from the Westminster Government would be otiose.
8. The dire situation in relation to the provision of registered secure accommodation has been something which has been a matter before the Family Division now for quite a long time. There have been other reported cases where judges had drawn attention to the chronic shortage of places. The information which I was given on Friday, and which has been confirmed to me today, is that in England and Wales there are currently sixty-two children or young people awaiting secure accommodation placements.
9. By definition, a child or a young person needing a secure accommodation placement needs it now, needs it urgently, and I am told that there is, at the moment, one place available. I asked Mr Paxton, the previous counsel who attended on behalf of the local

authority on Friday about the situation in Scotland. Of course, the law there and the rules there are different, but I was told there might be one place available in about two weeks' time. Unsurprisingly, Scotland gives priority to Scottish citizens. Of course, I make no comment on the Scottish system, because it is outside of my jurisdiction.

10. It is, I am afraid to say, a national scandal that there are so few places available for these children or young people in need. People who are the subject of deprivation of liberty orders and/or secure accommodation orders are in a state of crisis. D, the child with whom I am concerned is in a state of crises. As I have said, I am not going to go into the details of her very difficult life, but the fact is that everybody here agrees that D's behaviour, wellbeing and life are potentially at risk if she is not suitably accommodated. It is the responsibility of the local authority to accommodate her, because they have parental responsibility for her pursuant to the care order that has been made.
11. I am satisfied, having heard from Mr Paxton, that the local authority in this case has done all that it reasonably can to provide a secure accommodation place for D. They have conducted all possible research in trying to find a suitable placement. I have already referred to the statistics of the numbers of such places that are available. Technically and, in fact, I suppose as a matter of simple law, the local authority is in breach of its statutory duty to provide secure accommodation, but it really is not that simple.
12. Ms Michael, on behalf of the Welsh government, has made it very clear that it is not the Welsh government, and I do not disagree with this for the moment, but the local authority who has to supply these secure accommodation places. It is not for me to make any comment on or give any judgment about the duty of funding for these placements. That is a matter that may well be between government and local authority, and is completely outside the ambit of a judicial commentary or judgment. The simple fact is that I have been told there is only one establishment in Wales which provides secure accommodation, and that is Hillside near Neath/Port Talbot, itself an area with very difficult social and financial difficulty issues.
13. The fact is, there is a central hub where England and Wales share these places, and very often I have made orders in Wales placing children in secure accommodation in England, and obviously the local authority concerned in Wales has to pay for that.
14. I do not know how many of the sixty-two children currently awaiting secure accommodation places are Welsh. I do not know whether it is even possible to find out and, in a sense, it does not matter. What is absolutely clear is that there is a national, by which I mean Welsh and English, shortage of these places which is threatening the wellbeing and the lives of young people. Clearly, there is a fault somewhere, but as I said, it is not for me to analyse whose fault that is. However, it is, as I have said, a scandal that these people in a state of absolute crisis are not being properly provided for.
15. What am I to do in this case? When I heard the matter on Friday, Ms Morris on behalf of the hospital was persuaded by me, and I think she referred to it then as "begging" to see whether the hospital could keep D in this thoroughly inappropriate mental health ward, because I took the view (I think we all took the view) that D is safer there than just being put out into the community, where she of severe risk to herself and to the risk of exploitation by others.

16. Ms Morris persuaded the hospital to agree to that, and they agreed to allow Kaci to stay at this hospital placement until one o'clock today. As a matter of complete irony, it is now exactly one o'clock today, and so technically, that placement should have expired at this very second.
17. Having had a debate as we had this morning, I made it clear I was no longer going to beg. On Friday I wanted a holding position until today. Ms Morris has, on behalf of the hospital board, agreed that D can stay in this placement until a week today, and I am assuming it is going to be one o'clock, a week today. In fact, what I am going to say, unless Ms Morris tells me this is a problem, I am going to say until 4.30 p.m., a week today, because these hearings have a habit of lasting longer sometimes than we expect, and I do not want to find they suddenly discharge her just as I am about to give a judgment.
18. The hospital board, through Ms Morris, attached conditions to being able to look after, or rather, accommodate D in this hospital wing. Some of those conditions are the same as those which were in place on Friday, I am not going to need to repeat them now, because we all know what they are, and they are set out in the orders. It is essentially the provision of proper care by the local authority for D whilst she is in this hospital.
19. I am also asked by the local authority to order that a transcript of this judgment be provided. I think it should be expedited, and I am going to order that the cost of that be a cost to be shared amongst the parties, with it being a reasonable charge on the legal certificate, where appropriate. I am going to invite counsel to anonymise the transcript as soon as they get it, so that there is no reference or risk to identification or jigsaw identification in this case.
20. Ms Morris asks on behalf of the hospital board that a transcript of my judgment and a copy of my order be provided to the Children's Commissioner for Wales. We canvassed whether they should be ordered to attend this hearing, but I think, on balance, the view we took was that they should not. However, Ms Morris does require on behalf of the Health Board that the Welsh Minister is again required to attend this hearing.
21. I canvassed with Ms Michael whether that was necessary, and I was slightly leaning to the view that it was not. I was trying to save the Welsh government the cost of instructing their own advocate again. However, put bluntly, the hospital board are saying through Ms Morris, "it is a condition we insist upon because we think there is more chance of achieving resolution if everybody is actually here."
22. I do need to make it clear that Ms Michael, on behalf of the Welsh government, has said the government cannot get involved on behalf of individual cases, and I accept the force of that submission, and I am not asking the Welsh government to do anything it does not want to do in that regard. However, the fact is that we do have a situation where there is this chronic shortage of places, and it needs to be sorted.
23. D will therefore remain in this inappropriate place for another week. She is on a mental health ward, where there are mental health patients, most of them adults, some of them with risky behaviour as far as D is concerned. It is tragic and unacceptable that this young person should be in such an inappropriate setting but, as I have said, that is a better option than just putting her out into the community. I have already indicated the hospital is under no obligation to keep D there.

24. We had a debate about whether I could take into account the fact that other people need this hospital placement, because my duty under the Children Act is of course that the welfare of the child is my paramount consideration. I have been persuaded by Ms Morris that it would be very unlikely that I could have ordered the hospital board to continue to hold this place for her.
25. Given it is not a requirement under the Mental Health Act that the hospital hold her, and all of us agree it is not in her best interest to be there, and that other people need this hospital bed, and then when I take into account the proper allocation of resources, I think I would have been likely to accede to Ms Morris' case that I could not compel the hospital. In a sense, I have not needed to make that decision because, as I have said, the hospital has agreed, I know with considerable reluctance, to continue to place D there for another week.
26. I have been persuaded that I need to bring this matter back to court again next week, and we will debate the timing of that in a moment. I am bound to say I think it is pretty unlikely, if not extremely unlikely, that the hospital will want to keep D any longer, and so the pressure is on the local authority to find somewhere.
27. I am going to have it said in the order that I require the local authority to continue to use its best endeavours, as a matter of urgency, to find an appropriate placement for D. I am not in any doubt that this local authority knows only too well what its duties are, and will continue to do all it can to find a placement. My hope is that it will and what I will, in fact, then get is an agreed order, and if there is agreement as to what should happen, then I can deal with that administratively.
28. I need to say I have been assisted here, first of all, by Ms Hanson on behalf of the mother. The mother is not very well, and Ms Hanson's position on behalf of the mother is simply that she agrees with the words I have used to describe the current situation, which is that it is the "least worst" option I can choose.
29. The father, B, has attended the hearing both on Friday and today. He is not represented, which is unfortunate, but he told me on Friday (and I accept) that he has tried to secure representation and has not been able to. This is peak holiday season, and I know that all Legal Aid lawyers dealing with this sort of work in Wales are extremely busy. However, he has very clearly articulated his situation and I am bound to say, I do not think he has been disadvantaged in these hearings by not being represented, because he has said what he has needed to say. He and the mother both agree with each other about this, which is that I should take this option of a hospital placement.
30. The Guardian has been represented by Sharon Knox, and I am grateful too for her assistance. I said to her that normally in these cases I look to the Guardian for help to try and resolve things if we have not been able to, and the Guardian is in the same position as the rest of us, which is that she wants to help but she cannot, because there is this shortage of places which I have called "a national scandal".
31. So it is that we will come back on Monday, unless the position can be resolved. D will continue to reside at this hospital until then, with the current conditions in place from my previous order. I wish to say that I find it incredibly upsetting for everybody, but particularly for D's parents, that she is unable to be looked after in accordance with the duties that are placed on public bodies in the way they should be.

32. I also am bound to say that the cost of hearings like this is immense. We have the hospital board instructing highly experienced Queen's Counsel. We have a solicitor on behalf of the mother, we have a solicitor on behalf of the Guardian, counsel for the local authority. It is an extremely expensive business. I look at this screen and I have something like sixteen people attending this hearing, most of them being paid for by public bodies. I do not think that the NHS, Wales, the Local Authority or, frankly, Welsh government want to be spending money on instructing lawyers like this, and they would not need to if these places were available. There is no disagreement in this case at all about what this young person needs. The only reason she cannot have it is because of these failures by public authorities, and that leads to extraordinary harm, potential harm, to this child and extraordinary cost to these public bodies, both of which could be avoided if these places were there.
33. As I have said, it is not within my remit, and it would be quite wrong for me to make a judgment as to why there are not enough places. My job is to say that the fact there are not enough places is causing harm in this case. I know from my experience on the bench it is causing harm in other cases as well.
34. I want to end by thanking everybody, but particularly those who stepped into this case really at the last minute. Indeed, the Welsh government was not served with this order until sometime on Friday, and Ms Michael has come here thoroughly well-prepared to deal with this today, albeit she has not been able to help. I do not mean that as a criticism, she has been helpful to the court, but unable to unravel this problem. I thoroughly accept her submission that they cannot get involved in individual cases
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(This judgment has been approved by the Judge.)