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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Plaintiff

-v-

A MOTHER AND A FATHER

Defendants

IN THE MATTER OF ZQ (A MALE CHILD AGED 14 YEARS and 11 MONTHS)

Mr A Montgomery BL (instructed by the Directorate of Legal Services) for the Trust
Ms G Brady BL (instructed by Larkin Cassidy Solicitors) for the mother and the father
Mr T Ritchie BL (instructed by Sheridan Leonard Solicitors) for the Guardian ad Litem on behalf of the child

McFARLAND J

Introduction

[1] This judgment has been anonymised to protect the identity of the child. I have used the cipher ZQ for the name of the child. These are not his initials. Nothing can be published that will identify ZQ.

[2] ZQ is now approaching his 15th birthday. His first involvement with social services was in or about 2016. In 2020 the Trust obtained interim secure accommodation orders and on 1 June 2020 applied for a care order. The proposed threshold (Article 50(2)(a) and (b)(ii) of the Children (NI) Order 1995 ("the 1995 Order")) was that ZQ was likely to suffer significant harm as he was beyond parental control. No issue is taken by the parties that the Trust can prove this threshold to the requisite standard.

[3] Given the current relative stability in ZQ's life the Trust no longer wishes to pursue its care order application and seeks leave to withdraw the application. The parents and the guardian ad litem ("GAL") oppose the granting of leave to withdraw, although they accept that there is no need for an order.

The Law

[4] Rule 4.6(1) of the Family Proceedings Rules (NI) 1996 ("the 1996 Rules") provides that:

> "An application may be withdrawn only with leave of the court."

[5] The granting of leave involves the exercise of judicial discretion. Even when all the parties consent to a withdrawal, it is still necessary for the court to exercise its discretion if "it thinks fit" (see rule 4.6(4)(iii) of the 1996 Rules). McFarlane J in *Re DP, RS & BS* [2005] EWHC 1593 at [19](ii) stated:

> "[The Rule] expressly provides that a precondition of withdrawal is that 'the court thinks fit.' There is thus a judicial discretion and it does not therefore follow as night follows day that the court's jurisdiction to continue with the proceedings would end simply because the parties all agree that the proceedings should be withdrawn. The withdrawal provisions (and indeed the guardian system in public law itself) came into existence as a result of child care tragedies in the 1970's and 80's. The court's role in such matters is not to be that of a neutered 'rubber stamp' for the parties' requests."

[6] The purpose of the discretion was explained by Cobb J in *Re J, A, M & X* [2014] EWHC 4648 at [22] – [26] and it is worthwhile to consider this section of his judgment in full:

> "22. *Once properly-constituted care proceedings have been* commenced within the statutory context of the [1995 Order Part V], they remain lawfully established unless and until they have been either concluded or withdrawn.
>
> 23. Leave is required before such an application can be withdrawn … This rule … does not in my judgment derive from what was commonly viewed as a paternalistic role of the court (a characteristic of wardship, less commonly associated with post-1995 Order proceedings), but from the fact that proceedings of this

nature are essentially inquisitorial.

> 24. Where the proceedings before the court are Public Law (Part [V]) proceedings, the importance of ensuring that the decision to withdraw is child-focused is even more obvious. A decision of a [Trust] to launch proceedings under Part [V of the 1995 Order] in the first place will never (certainly should never) be taken lightly; no one should underestimate the impact of such proceedings in themselves (quite apart from their outcome) on all concerned, particularly on the families, and the subject children.
>
> 25. Assuming, as I believe that I am entitled to do for the purposes of this exercise, that [Trusts] only bring proceedings when they regard it as proper and necessary to do so (given the significant repercussions for all involved, above), then once in the Court arena, an objective and dispassionate check should be brought on whether the [Trust] should be entitled to disengage from that process.
>
> 26. On such an application, the Court has a unique perspective on the material marshalled before it; unlike the parties to the litigation, it has no (or no potential) interest in the outcome of the proceedings (or in the application to withdraw) other than to secure the best interests of the child, and it is able to evaluate whether the decision to withdraw is truly welfare-based."

[7] An application under rule 4.6(1) involves determination of a question with respect to the upbringing of a child and therefore the child's welfare is the court's paramount consideration (see Article 3(1) of the 1995 Order). However, as an application for leave to withdraw a care order application is not a circumstance set out in Article 3(4) of the 1995 Order, the court is not obliged to have specific regard to the 'welfare checklist' set out in Article 3(3) of the 1995 Order. However Waite LJ in *London Borough of Southwark v Y* [1993] 2 FLR 559 at 572H stated that a court was free, when assessing the considerations affecting the welfare of the child, to make specific use of the Article 3(3) 'welfare checklist' if it wishes, but that it "cannot be criticised if it omits to do so."

[8] The critical issue for the court to consider when exercising its discretion is the wording of Article 3(5) of the 1995 Order, the so called 'no order principle':

> "Where a court is considering whether or not to make one or more orders under this Order with respect to a child, it

> shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."

The question is therefore whether the Trust's withdrawal is consistent with ZQ's welfare such that no order is necessary.

[9] Before leaving the provisions of the 1995 Order it is necessary to note that ZQ is a 'child in need' as defined by Article 17, and the Trust therefore has a general duty under Article 18(1):

> "(a) to safeguard and promote the welfare of children within its area who are in need; and
>
> (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of personal social services appropriate to those children's needs."

The specific powers and duties of a Trust in this context are set out in Schedule 2 to the 1995 Order.

[10] Lord Nicholls in *ex parte G* [2003] UKHL 57 at [118] and [119] commented on the equivalent provision in section 17 of the Children Act 1989 in the following terms:

> "[118] Most of the specific duties imposed on local authorities under Part 1 of Schedule 2 are expressed in proportionate rather than absolute terms. Thus, paragraph 4(1) requires every local authority to "take reasonable steps … to prevent children within their area suffering ill-treatment or neglect." Paragraph 7 requires every local authority to "take reasonable steps designed …" to benefit the children in various specified ways (emphasis in each case added). Paragraph 8 requires every local authority to "make such provision as they consider appropriate …" for specified types of services to be made available to children in need who are living with their families. Paragraph 10 requires every local authority to "take such steps as are reasonably practicable …" to enable a child in need living apart from his family to live with his family (emphasis again added). It is plain, in my opinion, that in relation to each of these specific duties the local authority can take into account among other things, its overall financial resources and, in particular, the cost of

> taking a specific step that, if taken, would benefit the child and meet some need. Whether the taking of a particular step is "reasonable" or "reasonably practicable" cannot be divorced from the financial implications of taking the step.
>
> [119] Viewed in the context of these specific duties imposed on local authorities under Part 1 of Schedule 2 to the Act it would be odd to find that the section 17(1) general duty had imposed on a local authority a mandatory obligation to take some specific step in relation to the child irrespective of the local authority's financial resources and of the cost of the step in question. But that is the result for which counsel for the appellants in these three appeals contend."

Ryder LJ more recently in *Re C, T, M & U* [2016] EWCA Civ 707 at [12] summarised the correct approach in the following terms:

> "It is settled law that the section 17 scheme does not create a specific or mandatory duty owed to an individual child. It is a target duty which creates a discretion in a local authority to make a decision to meet an individual child's assessed need. The decision may be influenced by factors other than the individual child's welfare and may include the resources of the local authority, other provision that has been made for the child and the needs of other children."

[11] The objection from the parents and GAL in this case flows from a desire that the court do not release the Trust from the court's control so that the parents can achieve a desired commitment from the Trust to make certain provision for the care of ZQ. Gillen J in *Re T and R (Child) (Discharge of care order)* [2001] NIFam 5 was dealing with an application by a mother for the discharge of a care order which she then wanted leave to withdraw. The guardian wanted to retain involvement in the care planning for the child and opposed the application for leave to withdraw. At page 10 of the judgment, Gillen J dealt with this point which relates to tactical approaches to achieve an outcome. Leave applications should not "be used as a platform by the court and the Guardian Ad Litem to provide a continuing control over the actions of the Trust."

[12] Gillen J's reasoning for this approach is then set out in page 11:

> "Just as a court does not have power to impose conditions on a care order under the 1995 Order (even if such course of action was perceived to be in the bests interests of the

> child) (see *Re T (a minor) (Care Order: Conditions)* 1994 2 FLR 423), so I do not believe that it will be consistent with a purposive construction of the order to permit the policing of this care plan and care order by the Guardian Ad Litem through the medium of adjourning the application to withdraw the application to discharge the care order. I do not consider that the order can be sufficiently widely construed to embrace such a possibility.
>
> The withdrawal of an application is a matter which has to be considered by the court as carefully as any other application under the 1995 Order (see *Re: F (a minor) (Care Order: Withdrawal of Application)* 1993 2 FLR page 9). Having afforded the Guardian Ad Litem the opportunity to consider the application to withdraw and to report and give evidence before me, I have come to the conclusion that whilst the Guardian Ad Litem has acted entirely responsibility and conscientiously in this case, the basis of his application to me amounts to an attempt to police and supervise two care orders. The mother in this case has made an application to discharge the care orders and she is no longer in a position to deal with that application or does not wish to proceed with it. However well-meaning the intention, I cannot permit that opening created by the mother's application to afford an opportunity to the Guardian to remain in the case and supervise the continuing care plan indefinitely. I believe that the Trust is fully aware of the risks in this case and of the appropriate steps which require to be taken to secure the best interests and welfare of the children."

[13] Ultimately, the decision to grant a Trust leave to withdraw care proceedings should be an objective and dispassionate check on whether the Trust should be entitled to disengage from proceedings (see *Re J, A, M & X* and *Re X, Y and Z* [2017] EWHC 3741).

Diagnosis and background

[14] Since 2013 ZQ has had an umbrella diagnosis of autism spectrum disorder. He has presented with extremely challenging behaviour which his parents, despite their best efforts, have struggled to deal with. There was a serious incident on 5 March 2020 when ZQ was arrested for assaulting his parents and attempted criminal damage to the home. At the time the parents did not consent to placement in a residential unit and a police protection removal under Article 65 of the 1995 Order was put in place. On his release after further incidents at home the parents on

9 March 2020 consented to ZQ being accommodated in the residential unit.

[15] ZQ returned to the family home on 20 March 2020 but police were called after allegations that he had assaulted his mother and sibling. The Family Proceedings Court declined to make an emergency protection order after the father advised the court that he would provide 24 hour supervision. At that stage the main concern was ZQ's self-harming and suicide ideation to the extent that he had on several occasions tied items around his neck.

[16] On 3 April 2020 ZQ was made the subject of a secure accommodation order, the concerns at that stage being physical violence towards his mother, his father and siblings, daily physical and verbal abuse towards his mother, anti-social and criminal behaviour, risks associated with his erratic behaviour, and suicidal ideation.

[17] There was a degree of stability and in due course he returned to live at home in August 2020. He has remained at home since then with evidence of improved engagement, but with him still presenting with the most challenging of behaviour.

[18] Professor Andrew McDonnell, a clinical psychologist, prepared a report on 21 April 2021. Professor McDonnell made certain recommendations, one of which was the main issue of contention between the parties.

[19] This is the provision of an outdoor space, referred to as a 'garden room' or 'cabin' within the curtilage of the family residence. In the report at page 28, Professor McDonnell states:

> "I would recommend that [ZQ] remains in residence in his family home, however, alterations would need to be made to the property."

Later in the report at page 33, he deals with this topic under a heading – 'Living Environment.' He notes that ZQ is now well regulated within the home with only two incidents in the previous nine months. He then makes reference to an indoor space in the garden, stating that ZQ could have his own area that is separate from the family home. Professor McDonnell does not appear to comment on the desirability of such an indoor space in the garden as compared to existing 'space' available in ZQ's bedroom, but does state that the parents "believe that with a space of his own, such as this, he would be happy to remain in the family environment." The report continues that ZQ needs somewhere to withdraw if he becomes overwhelmed or if he needs time to himself. Professor McDonnell also states that "ZQ has indicated that he would like his own designated area inside the house or on the home property." The cost of such a unit, based on internet research, is stated by Professor McDonnell to be in the region of €15,000 - €20,000. (It is unclear why euro was chosen for the estimate. The sterling equivalent would be £12,500 - £17,000.) It is also suggested that the unit be equipped with a couch/bed, desk, game console and video games, area for meals and should be soundproofed.

[20] The GAL in her report of 18 November 2021 at 5.27 refers to the recommendation of Professor McDonnell and states that should the Trust pay for this it would greatly reduce the risks to ZQ. The GAL also suggests that it would be more cost effective when balanced against the risk of a potential for escalation and then placement outside the home.

Discussion

[21] The main thrust of the submissions on behalf of the the parents and the GAL to the court was that the court should not grant leave so that the court could maintain a monitoring role. The parents and GAL wished the court to support their approach by recommending the provision of the garden room/cabin, and then exert pressure on the Trust to fund it.

[22] Whether a Trust makes provision for a child in need under Article 18(1) of the 1995 Order is a matter for the Trust, which in turn can, if the parents or child decide to commence judicial review proceedings, be the subject of review by the Queen's Bench Division of the High Court.

[23] I do not consider that it is appropriate for me to express an opinion on whether the Trust should fund a garden room/cabin. This will involve weighing up the various factors raised by Professor McDonnell in his report. It may involve further discussion with him as he makes no mention in his report of the existing facilities within the home and the adequacy of ZQ's bedroom as a private space for him. Further, it will involve the issue of cost, cost-effectiveness and priorities within the Trust's overall budget. It will also involve a risk assessment in relation to ZQ potentially living in this garden room/cabin on his own, particularly in light of his previous suicide attempts with a ligature and the reported absconding. The reported incidents on 3, 4 and 5 November 2021 (see the parents' statement of 16 November 2021 at [31]) suggest that leaving ZQ alone in a self-contained unit independent from the family home may raise certain safe-guarding issues.

[24] These are all matters for the Trust to consider, and it is that body, and not the court, that needs to make the decisions. As both Lord Nicholls and Ryder LJ have said the Article 17 duty is a target or general duty placed on the Trust to be exercised at its discretion. It is not for this court to comment specifically on the desirability, or otherwise, of a garden room or cabin.

Conclusion

[25] This is a case which the Trust would have little difficulty in proving threshold. The Trust no longer considers that it requires to exercise parental responsibility for ZQ. There have been significant improvements since the Trust's first involvement in 2016. In the words of the Trust report of 20 October 2021 at page 29 – "[ZQ] has come a long way." The Trust's intention is to continue to work with

ZQ and his family with a transfer of the matter to the Intensive Adolescent Team from which the family, and ZQ, will receive ongoing social work assistance. The level of that support will be for the Trust to determine at its discretion and in accordance with its statutory duties.

[26] In the circumstances, and bearing in mind the Article 3(5) 'no order' principle, I consider that it is appropriate that leave should be granted to the Trust to withdraw its care order application. The argument of the parents and the GAL is commendable and understandable in the circumstances. To paraphrase Gillen J in *Re T & R* (at page 11), however well-meaning the intentions of the parents and the GAL, the court cannot permit the opening created by the Trust's application to afford an opportunity to press for a provision of services for ZQ which should be properly dealt with under Article 17 of the 1995 Order. Even if the court were to refuse leave, and then grant a care order to the Trust, the court could still not order the Trust to make the provision that the parents and the GAL desire. As Butler-Sloss LJ, in another context, stated in *Re L (Sexual Abuse: Standard of Proof)* [1996] 1 FLR 116 at 124, this is not an abdication of responsibility by the court, but rather it is acting in accordance with the intention of the legislation.

[27] For the reasons stated above, the Trust will be granted leave to withdraw its application for a care order. There will be no order as to costs, save that legally assisted parties will be entitled to the usual taxation order. The GAL is discharged as the proceedings have now concluded.