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| **Neutral Citation No: [2021] NIFam 9**<br><br>*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Ref:* **KEE11459**<br>*ICOS No:* **2021/0015**<br>*Delivered:* **18/03/2021** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**OFFICE OF CARE AND PROTECTION**

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**IN THE MATTER OF AK (INHERENT JURISDICTION: PATIENT: MOVE TO RESIDENTIAL CARE: CONTACT)**

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**Mr Michael Potter (instructed by DLS Solicitors) for the Applicant**
**Ms Moira Smyth QC with Ms McCrissican (instructed by Joseph F McCollum Solicitors) for the Respondents**
**Ms Louise Murphy (instructed by the Official Solicitor) for AK**

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**KEEGAN J**

**Introduction**

[1] This case relates to a young woman who has severe disability and who is now aged 18. She has been represented by the Official Solicitor throughout these proceedings. A Health and Social Care Trust have brought an application for declaratory relief. This is opposed by the mother and stepfather of AK. These proceedings have been anonymised to protect the interests of AK, nothing should be published which would identify her or any of the other adults in this case.

[2] AK is a young woman who was born prematurely at 28 weeks. She has cerebral palsy, is PEG fed and has severe learning disability. AK is also wheelchair bound and has mobility issues which have clearly developed as she has got older. She is a Statemented child who attends a special school at present and can continue to do so until June 2022. The application for declaratory relief is threefold:

(i) To declare that AK should now be placed in residential care rather than return home after a hospital stay. That residential care placement has been identified.

(ii) To authorise the deprivation of liberty.

(iii) To regulate contact between AK and her family should residential care be the preferred option.

**Preliminary Case Management Issues**

[3] At the outset I asked the parties to address me on the application of the Mental Capacity Act 2016 given that I was being asked among other things to authorise a deprivation of liberty. I received some helpful skeleton arguments in relation to this. The Mental Capacity (Northern Ireland) Act 2016 ("The Mental Capacity Act") whilst enacted in 2016 was not implemented at that time. It was partially implemented in 2019 by virtue to the Mental Capacity (2016) Act (Commencement No.1) (Amendment) Order (Northern Ireland) 2019. This provision implemented, *inter alia*, the deprivation of liberty provisions from 2 December 2019. In December 2019, the Mental Capacity (Deprivation of Liberty) No.2 Regulations (Northern Ireland) 2019 were introduced to supplement the primary legislation as regards application and operation of the deprivation of liberty provisions.

[4] The broad consensus of counsel is that the issue of deprivation of liberty is a matter which can be dealt with under the Mental Capacity Act and as such I was informed during the course of these proceedings that the necessary application has been brought. Thus, whilst in his written argument Mr Potter raised an interpretation issue I do not need to determine that any further as I have not been asked to.

[5] The court also enquired as to whether or not there was jurisdiction to deal with the remaining issues and, if so, under what auspice. In this regard, I have also been assisted by the written submissions of counsel. In particular, I note the case of *Hillingdon London Borough Council v Neary* [2010] 122 BMLR which is authority for the proposition that declaratory relief is required regarding the question of whether or not it is in the best interests of a person to be in residential care at all. Such a consideration engages Article 8 of the European Convention on Human Rights ("ECHR") and in *Hillingdon*, the court also said at paragraph [33]:

> "Significant welfare issues that cannot be resolved by discussion should be placed before the Court of Protection, where decisions can be taken as a matter of urgency where necessary. The DOL scheme is an important safeguard against arbitrary detention. Where stringent conditions are met, it allows a managing authority to deprive a person of liberty at a particular place. It is not to be used by a local authority as a means of getting its own way on the question of whether it is in the person's best interests to be in the place at all. Using the DOL regime in that way turns the spirit of the Mental Capacity Act 2005 on its head, with a code designed to

> protect the liberty of vulnerable people being used instead as an instrument of confinement. In this case, far from being a safeguard, the way in which the DOL process was used masked the real deprivation of liberty, which was the refusal to allow Steven to go home."

[6] I was also referred to a case of *C v A Care Home Blackburn with Darwin Borough Council* [2011] EWHC 3321 COP where Mr Justice Peter Jackson said at paragraph [37]:

> "On the other hand, it is not in my view appropriate for genuinely contested issues about the place of residence of a resisting incapacitated person to be determined either under the guardianship regime or by means of a standard authorisation under the DOLS regime. Substantial decisions of that kind ought properly to be made by the Court of Protection, using its power to make welfare decisions under s16 MCA."

[7] Finally, I was reminded that the contact issue also engages Article 8 of the Convention and so requires declaratory relief in the absence of agreement. Therefore, it is quite clear from the submissions that the court has an ongoing role in dealing with this vulnerable person insofar as the placement is disputed and also to consider contact. The Trust now accepts that any deprivation of liberty can be dealt with under the Mental Capacity Act. The inherent jurisdiction may be utilised to deal with the two issues whether residential care is in the best interests of AK and contact.

**The Substantive Application**

[8] Therefore, applying the principles of law to an application of this nature for declaratory relief under the inherent jurisdiction I must decide on a number of matters. I discussed the legal tests in the case of *NS* [2016] NI Fam 9 and at paragraph [46] I set out the relevant questions as follows:

> "(i) Is the patient incapable of making a decision regarding the particular issue put before the court?
>
> (ii) If so is the plan/treatment proposed in the best interests of the patient?
>
> (iii) Is the intervention necessary and proportionate pursuant to Article 8 of the ECHR?"

[9] In this case the first question is not controversial. AK is very severely disabled. The medical evidence is clear in relation to this and nobody disputes that.

So I am quite clear that AK is incapable of making decisions in relation to this particular issue put before the court. It is the second question which is disputed namely whether or not AK should now move from hospital to residential care rather than return to the home that she shares with her family. In deciding this issue, I have heard evidence from Dr Larkin who is a Consultant Community Paediatrician and the social worker Ms Ross. The mother and stepfather have filed statements dated 11 March 2021 however they decided not to give evidence. The Official Solicitor, Ms Holder, has filed a report of 10 March 2021 and that was also put before the court without the need for formal proof. At the initial directions hearing, I also required the Trust to file a proper options paper to make sure that all matters were considered before the court. As a matter of practice going forward, when this type of application is before the court an options paper should be filed as part of the application.

**The Evidence**

[10] In her evidence, Dr Larkin explained that she had known AK for some time. She also described the trigger event for AK's admission into hospital as follows. Dr Larkin told me that AK was admitted as an emergency patient to the Ulster Hospital on 12 February 2021. She was attended on that afternoon as a result of the actions of a community nurse, Ms Dean, who noted that AK presented as unwell, with significant dehydration and abdominal pain. Ms Dean was visiting the home to change the gastronomy tube which had been causing difficulties to AK but in the course of the visit Ms Dean was sufficiently concerned to request that AK be taken into hospital.

[11] Ms Dean has filed a report for the court in which this issue is explained. In this report, Ms Dean also sets out that the family were not receptive to the advice she gave or fully supportive of the admission of AK into hospital.

[12] Dr Larkin also explained that on admission to hospital AK was severely dehydrated with very abnormal electrolytes. Her sodium was over 180 and her urea 19.7. These figures Dr Larkin said were "extremely worrying" and "life threatening." Dr Larkin explained that high serum sodium can cause difficulties with consciousness and can be extremely dangerous to correct. She also said that urea of 20 represents severe dehydration. Dr Larkin was of the view that this condition was extremely serious. She said, "in my career I have not seen a serum sodium of greater than 180." Dr Larkin was also of the opinion that this condition needed days to develop.

[13] Dr Larkin told me that after a week of intravenous management, AK improved in hospital. It took 7-10 days to manage the impaction in her bowel which had caused her constipation. Dr Larkin also noted baldness at the back of AK's head which meant that she was not being moved. Dr Larkin told me that AK appeared happy in hospital and good progress in hospital meant that she was ready for

discharge. Finally, Dr Larkin was clearly of the opinion that AK needs residential care at present.

[14] Ms Ross also gave evidence. First, she adopted her report of 26 February 2021 which sets out the social services history in this case. Ms Ross confirmed in evidence that the family were known to social services and that there was a child protection registration between November 2017 and June 2018 on the basis of confirmed neglect. Ms Ross also explained the support services in place. She told me that the mother has a learning difficulty herself, the stepfather has a serious lung condition.

[15] I also note from the grounding reports the serious housing issues which were evident until a move on 10 December 2020. This appears to have led to better conditions but prior to that the house was clearly in a very unsatisfactory state and there were other family members living in the house. The historic concerns relate to difficulties with management and, in particular, hygiene and maintenance of proper care. AK has a younger sibling aged 7 who also lives in the property.

[16] Ms Ross was very clear that the family have managed to look after AK now for some time but as she has got older her needs have changed. Ms Ross was also open in pointing out that during the Covid-19 period there was a gap in services to some extent and this may have led to issues arising in relation to care. Also, Ms Ross confirmed that AK was not attending school for a period and she thought that may have led to some further difficulties at home.

[17] The Options Paper completed by Ms Ross sets out two options for AK going forward. Option 1 is a move to residential care (for immediate and short-term care, while period of assessment takes place). This could become a long-term plan should assessment of parents indicate that a longer term care is necessary and in her best interests. Option 2 is a return home to the care of her mother.

[18] The report also sets out the short medium and longer term proposals as follows:

***Short-term option***

The Trust believes a move to residential care is in AK's best interests. AK has spent an extended period of time in hospital recovering from a serious medical issue. To maintain AK's health and wellbeing, it is the Trust's view that she should be discharged to a safe and secure environment where we can be confident her medical and care needs are met.

***Medium Care***

The Trust would like AK to remain in residential care with her parents and home environment being assessed. There are extensive home renovations currently being undertaken in a joint venture between the Trust and NIHE. These renovations are to

meet the needs of AK and her stepfather who has complex health needs. The family are currently residing in temporary accommodation. Given the seriousness of AK's presentation upon admission to hospital, the Trust need to be confident that her parents and carers are medically competent to meet her needs. This needs further explored with the parents via educative work and training alongside a reassessment of capacity particularly given the learning and physical needs of both parents.

***Longer Term***

The Trust can recognise that there is a strong bond between AK and her parents however they need to be sure that if rehabilitation at home is to be considered that it is done so following a robust and protracted risk assessment. Given that the Trust have previously opened up discussions with the parents regarding the longer term care options for AK, it is the Trust's view that a full placement in the residential home with an assessed level of contact is the best outcome for AK and one that will mitigate the risks identified by both health and social care professionals.

[19] In addition, Ms Ross gave evidence about the supports and services that were available to the parents and the difficulties in the run-up to AK's admission. She also gave evidence that there was a lack of understanding of the position of AK in the past and some difficulties with engagement with the family.

[20] Overall, Mr Ross summarised the Trust's position as being one of concern that the family are not able at present to adequately take on AK following her discharge and that the Trust should be seriously concerned that if this happened AK could be at risk of coming to further harm, through neglect. The Trust's position was that the family have not been able to deal with AK's needs appropriately and the previous social work records point out serious issues with deterioration in the housing situation, in particular, hygiene and a lack of acknowledgement on the part of the family of the issues involved.

[21] The Official Solicitor's report deals with the issues in this case and, in particular, sets out that the Official Solicitor spoke with the school which was very helpful. In this, the Official Solicitor confirms that the school felt it would be good for AK to continue to attend school and she is able to do so until June 2022 and that she can do so if placed in residential care. The Official Solicitor also spoke to the staff at the facility. She points out at paragraph 24 of her report that she is conscious that at present Covid-19 restrictions require that any new resident undertake a 14 day isolation period within room at the residential placement and as such safeguards are necessary to protect the health and wellbeing of all residents.

[22] The Official Solicitor also spoke to Dr Larkin and had a meeting over Zoom with AK on 9 March 2021. In conclusion, the Official Solicitor made the following comments:

"AK is an exceptionally vulnerable young adult who has significant needs. She has presented with a high level of complex needs from birth and undoubtedly presents particular challenges to care for. There is no doubt that her mother and stepfather love her very much and have tried their very best to maintain her at home, which to their credit has been achieved until a matter of weeks ago.

AK needs safe and consistent care to ensure that her basic daily needs are met, for example, positioning, feeding and hydration. The enquiries I have made suggest to me that unfortunately this became too much of a challenge and struggle for the family both in the context of Covid-19 restrictions, their desire to protect AK from that risk, and the deteriorating health of the stepfather. It rather appears that the hospital admission on 12 February 2021 was the culmination of a long period of AK being too static in bed, leading to her having been severely constipated over such a period, likely weeks, that her sodium levels became raised to a life threatening level. While I accept that there were other professionals that had seen AK during that period and did not raise an alarm, it is also true to note that concerns had been raised with the mother and stepfather, that they must have had an awareness of how long it had been since AK had properly passed a bowel motion, yet they were unable to seek the necessary medical advice which would likely have avoided the crisis developing for AK.

I am concerned that for many families, who have undoubtedly tried their best, that caring for such a complex, challenging child as they grow older becomes too much. As AK moves further into adulthood, and particularly out of education, then her needs for her primary carers to be vigilant and alert, and able to meet all her daily needs, will increase. AK's condition is such that it may mask just how ill AK is – I note that it was only two experienced medical professionals who picked up on the potential seriousness of AK's condition on this occasion.

While I have no doubt that AK would want to be able to return home, for that to be in her best interests I suggest that the court would need to be satisfied that this wish would not jeopardise her welfare. As a result of my enquiries, at the present time, I harbour considerable

> reservations as to whether AK would be kept safe. I am concerned about whether the parents are able to fully and properly understand why all of the careful and attentive care that AK requires, such as sitting up regularly, or being out of her bed, are so important for her overall wellbeing at it appears during the recent challenges of Covid-19 these have not been promoted for her. I am also concerned that as the people that know AK best, that having heard concerns about AK's presentation that week, and being able to access direct paediatric advice if required, that no contact was made even with AK's GP until Friday. AK's needs are so complex that she requires carers who will be attuned to her presentation, and any changes in same, to ensure timely medical advice is taken."

[23] The Official Solicitor also required some clarity in relation to the form of any order should I decide on residential care, and in particular, she raised some issues about contact.

[24] I have also considered the statements provided by AK's mother and step-father. In these statements they stress the love that they have for AK. They also refer to the fact that they have looked after her and her sister for some time. They accept that they have needed supports, however, they point out that some supports were not fully available during Covid-19. They also maintain that other professionals missed AK's condition and that she was not in any distress until 12 February 2021. They therefore say that the court should be slow to proceed to residential care when AK has a loving home and they would prefer her to come back to her home. In the alternative, the parents also made the case that the Trust's proposals for contact were inadequate.

**Conclusion**

[25] I have considered the evidence of the Trust in this case and, in particular, the evidence of Dr Larkin and Ms Ross. I have also considered all of the available options for AK. I have also considered the statement of the family members and I note their objections to residential care. Finally, on behalf of AK I have considered the points made by her representatives. I start from the proposition that where possible a person like AK should live at home with her family if that is feasible. I am also cognisant of the Article 8 rights which are engaged and so I must make a decision which is proportionate bearing in mind AK's rights and also those of her mother and step-father.

[26] AK is incapable to decide herself whether it is in her best interests to be discharged from hospital into residential care. I have decided that an immediate move home would not be in her best interests and that she should be placed in

residential care as the Trust and Official Solicitor recommend. I make this decision having considered all of the facts and, in particular, the very serious event which led to her hospitalisation which, in my view, clearly pointed to inadequate care and attention at home. I appreciate that the mother and step father have their own vulnerabilities but nonetheless I must focus on AK and her best interests. AK's presentation is complex and her needs have developed as she has got older. In my view, the time is right to have a conversation about what is best for her in the longer term.

[27] This decision is only for the short term to allow for a period of assessment. That assessment should be whether or not she needs longer term residential care, whether or not there could be any form of shared care, how respite would work if AK went home, whether it is realistic to have AK return, how the home environment of the family meets AK's needs and how the family are attuned to AK's needs.

[28] I have therefore decided to make a declaratory order allowing the transfer of AK to residential care for a period of 8 weeks. I will return to the case at that stage. I direct that the Trust file a comprehensive report dealing with the medium and longer term having assessed AK's position in residential care and the position of her parents.

[29] I am not satisfied with the contact arrangements as set out in the Trust papers. It will be difficult for AK to be in isolation upon entering residential care and as such I consider that the parents should be allowed to visit the facility and even be at the window of AK's room until she comes out of isolation. After she is out of isolation, I do not agree that she should only have contact one day a week and I have asked the Trust to file a report on this within two weeks and for the parties to discuss greater contact which should be a number of times a week. The Official Solicitor should be involved in this process and I hope that matters can be agreed, if not there is liberty to apply on the contact issue. I will ask Ms Murphy to take the lead in drafting up an appropriate declaratory order given what I have said. I will not make any order in relation to deprivation of liberty given that this is under the auspices of the Mental Capacity Act.

[30] Finally, in making my decision I recognise the care and attention the mother and stepfather have paid to AK during her life. It cannot have been an easy task to look after AK but the family clearly love her and want to keep her within that environment. AK is herself a very challenging young woman who, I was told, operates at the level of a very young baby between 10 months and 1 year old. Her needs are going to get greater as she gets older and so there should be a realistic conversation about what is best for her going forward.

**Conclusion**

[31] Accordingly, an interim declaratory order is made.