



Neutral Citation Number: [2022] EWHC 1890 (Fam)

Case No: RG22C50069 & RG22C50057

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Date: 8 July 2022

Before :

HHJ MORADIFAR
(SITTING AS A JUDGE OF THE HIGH COURT)

In the matter of:

Re K
and
Re R

(Unregulated Placement : Authorisation Pursuant to the Court's Inherent Jurisdiction :
Prohibition)

Re K

Edward Kirkwood (instructed by **The Joint Legal Team**) for the **Applicant Local Authority**
Polly Allison (instructed by **Riz Khan of Barrett and Thomson Solicitors**) for the **first Respondent Mother**

Ian Robertson (of Griffiths Robertson Solicitors) for the **child** through her guardian and Cafcass Legal

Re R

Edward Kirkwood (instructed by **The Joint Legal Team**) for the **Applicant Local Authority**
Andrew Bond (instructed by Sheila Dhanoya of MMA Solicitors) for the **first Respondent Mother**

Reena Ghai (of Reena Ghai Solicitors) for the **second respondent** **behalf of the father.**
Jasbinder Dail (of Rowberry Morris Solicitors) for the **child** through his guardian

Hearing dates: 8 July 2021

Approved Judgment

HHJ MORADIFAR:

Introduction

1. I am concerned with two unrelated cases that involve a local authority accommodating and placing each of the mothers together with their young child in an unregulated residential family placement (“the placement”). In both cases the local authority applies to the court to sanction these placements through the exercise of its inherent jurisdiction or alternatively by directing the assessment of each child pursuant to s38(6) of the Children Act (1989) (the ‘Act’). Given the common issue to both cases, I have heard them sequentially.
2. The first case concerns K who is almost eight weeks old. She has lived with her mother all of her life. She is the subject of applications by the local authority for public law orders. The court made her the subject of an interim care order when it approved the local authority’s interim care plan placing K and her mother in a residential unit where she and her mother would be assessed. Regrettably, following a serious incident in the placement, on 22 June 2022 it came to an abrupt end. The only available placement was an alternative residential placement where K and her mother reside to date.
3. On 28 June 2022, the case returned to court and questions were raised about the suitability of the placement. On further investigation, it transpired that the placement is not a registered or regulated placement and the matter was subsequently allocated to me. The local authority concedes that it should have made the necessary enquiries prior to the mother and child being placed there. However, it argues that this was the only available placement which ensured that K was not separated from her mother. The local authority has continued its searches of regulated placements and there are no immediate options available.
4. Pending the identification of a regulated placement, the local authority has applied to invoke the court’s inherent jurisdiction by seeking the court’s approval and authorisation for the continuing placement of K and her mother. Latterly, the local authority had applied in the alternative for directions for assessment of K pursuant to s 38(6) of the Children Act (1989). As its case has crystallised, the local authority’s primary application is the latter of the two applications. The mother supports any mechanism through which her continuing care of K is assured and supports the local

authority's applications. The guardian and Cafcass resist the applications. It is submitted on behalf K that it is an inappropriate use of the court's inherent jurisdiction or the statutory frame work to authorise an illegal placement where little is known about the suitability of the placement as a place of safety or as an assessment centre. It is further argued on behalf of K that this would be an inappropriate use of said provisions of the Act where the local authority has failed to demonstrate the unit's capacity to appropriately undertake an assessment. Subsequently, the guardian has been able to visit the placement and following the provision of further information, her position has softened but continues to argue that it would be contrary to general policy that the court should sanction a placement in the face of the relevant statutory frame work that otherwise renders the placement illegal.

5. The local authority now makes identical applications in the second case which concerns R who is eight weeks old. Following his birth, he and the mother have resided in the said placement after the mother gave her agreement to be accommodated pursuant to s20 of the said Act. Subsequently, on 13 May 2022, the local authority applied for public law orders in respect of R who was made the subject of an Interim Care Order on 19 May 2022.

The law

6. S4(2) of the Care Standards Act (2000) defines a residential family centre in England as any establishment where:

“ ...

(a) accommodation is provided for children and their parents;

(b) the parents' capacity to respond to the children's needs and to safeguard their welfare is monitored or assessed; and

(c) the parents are given such advice, guidance or counselling as is considered necessary.”

7. The Act requires the defined establishment including a residential family centre to be registered and s11 (and s26) of the said Act creates a criminal offence in this regard. Reg. 3 of the Residential Family Centres Regulation (2002) provides exemptions for some establishments by stating that:

“Excepted establishments

3. *For the purposes of the 2000 Act, an establishment is excepted from being a residential family centre if—*

(a) it is a health service hospital, an independent hospital, an independent clinic or a care home;

(b) it is a hostel or a domestic violence refuge; or

(c) the main purpose of the establishment is to provide accommodation together with other services or facilities to adults, and the fact that those adults may be parents, or may be accompanied by their children, is incidental to the main purpose of the establishment.”

8. The inherent jurisdiction of this court is wide ranging and has stood the test time. It has been the subject of commentary and jurisprudence that has guided us over many decades. More recently, the courts have recognised the pressing need for authorisation of placing vulnerable children in unregulated or unregistered placements where they are likely to be deprived of their liberty. In so doing, the court has invoked its inherent jurisdiction to authorise such placements to safe guard the welfare of these vulnerable children. In Re M & N (Minors) [1990] 1 All ER 205 (at 537) Waite LJ defined the court’s inherent jurisdiction as follows:

“the prerogative jurisdiction has shown striking versatility throughout its long history in adapting its powers to the protective needs of children, encompassing all kinds of different situations. Although the jurisdiction is theoretically boundless, the courts have, nevertheless, found it necessary to set self-imposed limits upon its exercise, for the sake of clarity and consistency and of avoiding conflict between child welfare and other public advantages.”

9. Lord Donaldson MR in Re J (A Minor) (Wardship: Medical Treatment) [1991] (Fam) 33 (41D) observed that;

'The parents owe the child a duty to give or to withhold consent in the best interests of the child and without regard to their own interests.

The Court, when exercising the parens patriae jurisdiction, takes over the rights and duties of the parents, although this is not to say that the parents would be excluded from the decision making process. Nevertheless, in the end, responsibility for the decision, whether to give or withhold consent, is that of the Court alone”.

In Re M (Children) (Wardship: Jurisdiction and Powers) [2015] EWHC 1433 (Fam)

The former President of the Family Division, Sir James Munby P. most helpfully stated that:

“32. This is not the occasion, and there is no need for me, to explore the range of circumstances in which it may be appropriate to make a child who is outside the jurisdiction a ward of court. I merely observe that cases such as this demonstrate the continuing need for a remedy which, despite its antiquity, has shown, is showing and must continue to show a remarkable adaptability to meet the ever emerging needs of an ever changing world. I add that the use of the jurisdiction in cases where the risk to a child is of harm of the type that would engage Articles 2 or 3 of the Convention – risk to life or risk of degrading or inhuman treatment – is surely unproblematic. So wardship is surely an appropriate remedy, even if the child has already left the jurisdiction, in cases where the fear is that a child has been taken abroad for the purposes of a forced marriage (as in Re KR and Re B) or so that she can be subjected to female genital mutilation or (as here) where the fear is that a child has been taken abroad to travel to a dangerous war-zone. There is no need for me to go any further, so I need not consider whether there are other kinds of situation where a child who is already abroad should be made a ward of court or whether wardship is an appropriate remedy where the risk to the child is of harm falling short of harm of the type that would engage Articles 2 or 3 of the Convention.

33. *In the Tower Hamlets case, Hayden J recognised (para 11) that the relief he was being asked to grant arose in circumstances without recent precedent, but rightly saw that as no obstacle. He said (paras 57-58), and I entirely agree:*

“57 The family court system, particularly the Family Division, is, and always has been, in my view, in the vanguard of change in life and society. Where there are changes in medicine or in technology or cultural change, so often they resonate first within the family. Here, the type of harm I have been asked to evaluate is a different facet of vulnerability for children than that which the courts have had to deal with in the past.

58 What, however, is clear is that the conventional safeguarding principles will still afford the best protection.”

34. *For these reasons, I concluded, therefore, that I had jurisdiction to make the children wards of court, because they are British subjects, notwithstanding the fact that they were at the time out of the jurisdiction.*

35. *Having jurisdiction, it was plain that I must exercise it, for the children's future welfare demanded imperatively that I do so. And in exercising the jurisdiction, I sought to apply the well known words of Lord Eldon LC in Wellesley v Duke of Beaufort (1827) 2 Russ 1 , at 18: “it has always been the principle of this court, not to risk the incurring of damage to children which it cannot repair, but rather to prevent the damage being done.”*

These words are as apposite today as they were over 180 years ago: see M v B, A and S (By the Official Solicitor) [2005] EWHC 1681 (Fam), [2006] 1 FLR 117 , para 108, and Re SA (Vulnerable Adult with Capacity: Marriage) [2005] EWHC 2942 (Fam), [2006] 1 FLR 867 , para 103.”

10. More recently, Lord Justice Stevens in Re T (2021) SC 35 provided that;

“168. As Lady Black has set out, the inherent jurisdiction of the High Court in relation to children is wide: it is the ultimate safety net (see paras 64-68 above).

To my mind the central focus of this aspect of the inherent jurisdiction is on the welfare and safety of children rather than on the potential commission of a criminal offence under section 11 of the Care Standards Act 2000 by others. Obviously, that central focus requires the court to give anxious and detailed consideration to the risks to the child in respect of a placement in which such an offence may be committed. However, the High Court is not required to determine whether an offence will be committed or whether the individual has an available defence. It is sufficient for the court to be aware of the potential that such an offence may be committed by another and to examine how that impacts on the best interests of the child. It is no part of the court's function to "authorise" the commission of any criminal offence. Any order under the inherent jurisdiction does not do so. Rather, if the inherent jurisdiction is used, then the court "authorises" but does not "require" the placement by a local authority of a child in an unregistered children's home despite the potential that a person may be prosecuted for and convicted of an offence under section 11 of the Care Standards Act 2000. If a prosecution is brought, which it can be, then it is a matter for the criminal courts to determine whether an offence has been committed and if so, as to the appropriate sentence to impose.

169. *The Secretary of State for Education, in his post-hearing submissions dated 3 June 2021 submits "that the High Court's inherent jurisdiction can be used to authorise an unregistered placement, but only in circumstances ... where a defence to the crime in section 11 of the [Care Standards Act] 2000 can be made out" (emphasis in the original). The defences postulated are "necessity/duress of circumstances". I agree with the submission of the Secretary of State that the inherent jurisdiction can be used but reject the proposed qualification as to the circumstances in which it can be used. The existence of a defence to a criminal charge misplaces the focus of the inherent jurisdiction which at all times is on the child. The inherent jurisdiction is available despite the potential that a person may be prosecuted for and convicted of an offence under section 11 of the Care Standards Act 2000: that possibility does not abrogate or restrict the inherent jurisdiction. The jurisdiction exists to protect children, not to decide issues of criminal liability.*

170. I agree with Lady Black, at para 141, that it is “unthinkable that the High Court, with its long-established role in protecting children, should have no means to keep these unfortunate children (and others who may be at risk from them) safe from extreme harm, in some cases death”. I also agree that where “there is absolutely no alternative, and where the child (or someone else) is likely to come to grave harm if the court does not act” that it is “a permissible exercise of the inherent jurisdiction to authorise a local authority to place a child in an unregistered children’s home in relation to which a criminal offence would be being committed” (para 145 above with emphasis added). In this context, as in the context of section 31 of the Children Act 1989 (see Lord Nicholls in *In re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563, 585), “likely” should be taken to mean a real possibility, that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case. Accordingly, the courts, in the exercise of the inherent jurisdiction, must only authorise such a placement where there are “imperative considerations of necessity” and where there has been strict compliance with the matters contained in the Guidance issued by the President of the Family Division on 12 November 2019 in relation to placing a child in an unregistered children’s home (“the Guidance”) (see para 147 above) and with the addendum dated 1 December 2020 to the Guidance. Furthermore, if a placement is authorised in an unregistered children’s home then the court must monitor the progress of the application for registration in accordance with the Guidance and, if registration is not achieved, the court must rigorously review its continued approval of the child’s placement in an unregistered home.

171. I set out below the matters which must be considered in compliance with the Guidance and the addendum prior to a court authorising a placement in an unregistered children’s home. I do so to emphasise the importance of those matters, in addition to any other matters which are relevant on the particular facts of an individual case. The information made available to the court is to be seen in the context of the parties’ obligation to bring all matters of relevance to the welfare of children to the attention of the court to enable the court to decide the issues on an adversarial basis, or to direct further evidence or enquiries in accordance with its inquisitorial role. The matters in the Guidance are as follows:

- (a) *The applicant must make enquiries with either Ofsted or the Care Inspectorate Wales (“CIW”) as to whether the home is registered. That process of enquiry means that either Ofsted or CIW are informed as to whether a home is being carried on or managed without registration.*
- (b) *The applicant should make the court explicitly aware of the registration status of those providing or seeking to provide the care and accommodation for the child.*
- (c) *The court should be made aware of the reasons why registration is not required or the reasons for the delay in seeking registration.*
- (d) *The court will need to be satisfied that steps are being taken to apply for the necessary registration.*
- (e) *The court will wish to assure itself that the provider of the service has confirmed that it can meet the needs of the child.*
- (f) *The court will need to be informed by the local authority of the steps the local authority is taking in the meantime to assure itself that the premises, those working at the premises and the care being given are safe and suitable for the accommodated child.*
- (g) *Where an application for registration has been submitted to Ofsted or CIW, the court should be made aware of the exact status of that application.*

This is a summary of the matters contained in the Guidance. It is the Guidance to which reference should be made. At para 167 above I set out how the issues in the present case developed, such that certain factual findings were lacking. The Guidance post-dates the decisions of the High Court in this case but going forward any decision to place a child in an unregistered children’s home must make factual findings in relation to these matters.

172. *If a court authorises a placement in an unregistered children’s home, then the addendum to the Guidance provides that the court must include in any order a requirement on the local authority that it should immediately notify Ofsted - if the placement is in England - or the CIW - if the placement is in Wales - that*

the child has been placed in an unregistered placement. The requirement extends to the local authority providing a copy of the order and the judgment of the court to either Ofsted or the CIW. In this way Ofsted or the CIW will be aware of the unregistered children's home so that immediate steps can be taken to register. Thereafter, the aim of the Guidance is to work expeditiously towards registration, so as to comply, as soon as possible, with the requirement to register under section 11 of the Care Standards Act 2000 or section 5 of the Regulation and Inspection of Social Care (Wales) Act 2016. The Guidance requires the court to monitor the progress of the application for registration and, if registration is not achieved, to review its continued approval of the child's placement in an unregistered unit. Paragraph 21 of the Guidance provides that if registration is refused or the applications for registration are withdrawn, the local authority should advise the court as a matter of urgency. It further provides that the court will take this into account when deciding whether the placement of the child in the unregistered children's home continues to be in the child's best interests. It is unnecessary to envisage all the sorts of factual situations that might arise which would still call for an order authorising a placement where the children's home remains unregistered except to say that the test of necessity should be applied all the more strictly and that there will be a heightened level of anxious enquiry and scrutiny. In any event, the Guidance primarily envisages that the children's home will become registered so that a criminal offence is no longer being committed by others. The Guidance must be followed so that, in practice, within a short period of time the children's home is registered. This process of registration should continue to be energetically and pro-actively monitored by the courts."

11. Most helpfully, the President of the Family Division Sir Andrew McFarlane P. stated in A Mother v. Derby City Council [2021] EWCA Civ 1867 guides us by providing that:

“... ”

82. *Over and above the regulatory framework there is a higher order of requirement and duty arising from the positive obligations placed upon the State, in the form of a local authority and the court, by ECHR, Art 2 and Art 3, and upon a local authority by CA 1989, s 22(3) and 22A. It was to those duties*

that Lady Black must have been referring when she encapsulated the rationale justifying such placements at paragraph 145:

"How can a local authority fulfil these duties in the problematic cases with which we are concerned if they cannot obtain authorisation from the High Court to place the child in the only placement that is available, and with the ability to impose such restrictions as are required on the child's liberty?"

And earlier at paragraph 141:

"Cases such as those to which to I have alluded early in this judgment demonstrate, it seems to me, that it is unthinkable that the High Court, with its long established role in protecting children, should have no means to keep these unfortunate children (and others who may be at risk from them) safe from extreme harm, in some cases death."

83. *It is, however, not necessary for this court to traverse territory that has already been comprehensively covered by the Supreme Court in Re T in a decision which is plainly binding upon us. Once it is established that placement in an unregistered children's home is not within s 22C(6)(d), the legal context is unchanged from that which was before the Supreme Court and there is no question of a deprivation of liberty order cutting across the statutory scheme. The judgments of Lady Black and Lord Stephens expressly dealt with placement in an unregistered children's home, which was the category of home in which T had been first placed. It is to such placements that the President's Guidance, which was seen as central to the legal context by the Supreme Court, is addressed. The judgments in Re T endorse the exercise of the inherent jurisdiction to authorise deprivation of liberty with respect to a placement in an unregistered children's home, where imperative conditions of necessity justify doing so and there is no alternative available.*

84. *Approached in this manner, Mr Drabble's submission that a placement that is prohibited by the statutory scheme, and therefore not 'prescribed by law', as is required by ECHR, Art 5, falls away. The Supreme Court has held that the*

exercise of the jurisdiction of the High Court in these cases is lawful under the common law. The exercise of the jurisdiction is therefore 'prescribed by law' and an order made by the High Court authorising DOL is a 'lawful order' of the type required by Art 5(1)(d). There is no basis for distinguishing this case from that considered in Re T.

12. The inherent jurisdiction of the High Court is not infinite and subject to limitations. The limitation can be through self-regulation and through statute together with connected relevant formal rules. PD12D of the Family Procedure Rules 2010 provides important guidance in the exercise of the court's inherent jurisdiction in the following terms:

“1.1 It is the duty of the court under its inherent jurisdiction to ensure that a child who is the subject of proceedings is protected and properly taken care of. The court may in exercising its inherent jurisdiction make any order or determine any issue in respect of a child unless limited by case law or statute. Such proceedings should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989 (see below).

1.2 The court may under its inherent jurisdiction, in addition to all of the orders which can be made in family proceedings, make a wide range of injunctions for the child's protection of which the following are the most common –

- (a) orders to restrain publicity; orders to prevent an undesirable association;*
- (b) orders relating to medical treatment*
- (c) orders to protect abducted children, or children where the case has another substantial foreign element; and*
- (d) orders for the return of children to and from another state.*

1.3 The court's wardship jurisdiction is part of and not separate from the court's inherent jurisdiction. The distinguishing characteristics of wardship are that –

- (a) custody of a child who is a ward is vested in the court; and*
- (b) although day to day care and control of the ward is given to an individual or to a local authority, no important step can be taken in the child's life without the court's consent”*

13. Importantly, s100(3) of the (1989) Act provides that;

“(3)No application for any exercise of the court's inherent jurisdiction with respect to children may be made by a local authority unless the authority have obtained the leave of the court.

(4)The court may only grant leave if it is satisfied that—

(a)the result which the authority wish to achieve could not be achieved through the making of any order of a kind to which subsection (5) applies; and

(b)there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

(5)This subsection applies to any order—

(a)made otherwise than in the exercise of the court's inherent jurisdiction; and

(b)which the local authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted)”

14. S38 of the Act is titled ‘ Interim orders’ and s38(6) and (7) state:

“...

(6) Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment.

(7)A direction under subsection (6) may be to the effect that there is to be—

(a)no such examination or assessment; or

(b)no such examination or assessment unless the court directs otherwise.

(7A)A direction under subsection (6) to the effect that there is to be a medical or psychiatric examination or other assessment of the child may be given only if the court is of the opinion that the examination or other assessment is necessary to assist the court to resolve the proceedings justly.

(7B)When deciding whether to give a direction under subsection (6) to that effect the court is to have regard in particular to—

(a)any impact which any examination or other assessment would be likely to have on the welfare of the child, and any other impact which giving the direction would be likely to have on the welfare of the child,

(b)the issues with which the examination or other assessment would assist the court,

(c)the questions which the examination or other assessment would enable the court to answer,

(d)the evidence otherwise available,

(e)the impact which the direction would be likely to have on the timetable, duration and conduct of the proceedings,

(f)the cost of the examination or other assessment, and

(g)any matters prescribed by Family Procedure Rules.”

15. The interpretation, scope and the application of these important provisions have been the subject of debate and guidance. Notably, the jurisdiction of the court to direct an assessment of a child was further clarified by the Supreme Court’s decision in Re C (Interim Care Order: Residential Assessment) [1997] 1 FLR 1, where Lord Browne-Wilkinson) stated:

“Mr Harris sought to develop the argument by saying that, if the court could order residential assessment at a specified place, that would override the duties of the local authority as to the placement of children within their care imposed under s 23(2).

The conditions under which such placement can be made are further regulated by regulations made by the Secretary of State. I do not accept this submission. Section 23 and the regulations made thereunder are concerned with placements made by local authority with foster-parents and others: s 38 is not dealing with that issue at all. It is providing for the assessment of the child for the purpose of assisting the court in its assessment of the child's best interests. An order specifying where and with whom that assessment is to take place is not 'a placement' within s 23 at all."

16. In 2009, Mr Justice Munby (as he then was) in *A (A Child), Re* [2009] EWHC 865 (Fam) provided a characteristically helpful analysis of the scope and application of the said provisions. He set out the legal frame work in the following terms:

"23. It is a 'cardinal principle' of the 1989 Act that, once a final care order has been made, it is for the local authority, and not the court, to decide how to meet its parental responsibilities for the child: see the speech of Baroness Hale of Richmond in Re G (Interim Care Order: Residential Assessment) [2005] UKHL 68, [2006] 1 FLR 601, at para [44], referring to the speech of Lord Nicholls of Birkenhead in Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) Care Order: Adequacy of Care Plan) [2002] UKHL 10, [2002] 1 FLR 815.

24. The same principle applies in relation to interim care orders. As Lord Browne-Wilkinson said in Re C (Interim Care Order: Residential Assessment) [1997] 1 FLR 1 at page 6:

"Under the interim care order the decision-making power as to the care, residence and general welfare of the child is vested in the local authority, not in the court."

25. The existence of a care order does not, of course, prevent the court exercising its jurisdictions in judicial review or under the Human Rights Act 1998. But that apart, the court has no power to interfere with the local authority's exercise of the parental responsibility conferred on it by section 33(3) of the 1989 Act except where the 1989 Act itself so provides, that is, in matters of contact (by virtue of section 34), or on an application under section 39 for the discharge of the care order, or, consistently with section 9(1), upon the making of a residence order (which has the effect, by virtue of section 91(1), of discharging any care order). In the case of an interim care order

the court also has power to interfere with the local authority's exercise of parental responsibility by virtue of section 38(6).

26. It is that power which is here in issue and it is accordingly to section 38(6) that I now turn. It provides as follows:

“Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment.”

Section 38(7) provides that:

“A direction under subsection (6) may be to the effect that there is to be –

(a) no such examination or assessment; or

(b) no such examination or assessment unless the court directs otherwise.”

27. The dividing line between the local authority's decision-making powers under an interim care order and the court's powers under section 38(6) was delineated by Lord Browne-Wilkinson in Re C (Interim Care Order: Residential Assessment) [1997] 1 FLR 1 at pages 6-7:

“the context in which s 38(6) has to be considered is this. The child is in the care of the local authority under an interim care order pending the decision by the court whether or not to make a final care order. Under the interim care order the decision-making power as to the care, residence and general welfare of the child is vested in the local authority, not in the court. However, for the purpose of making its ultimate decision whether to grant a full care order, the court will need the help

of social workers, doctors and others as to the child and his circumstances ... Section 38(6) deals with the interaction between the powers of the local authority entitled to make decisions as to the child's welfare in the interim and the needs of the court to have access to the relevant information and assessments so as to be able to make the ultimate decision.

... the dividing-line between the functions of the court on the one hand and the local authority on the other is that a child in interim care is subject to control of the local authority, the court having no power to interfere with the local authority's decisions save in specified cases. The cases where, despite that overall control, the court is to have power to intervene are set out, inter alia, in s 38(6) and (7). The purpose of s 38(6) is to enable the court to obtain the information necessary for its own decision, notwithstanding the control over the child which in all other respects rests with the local authority. I therefore approach the subsection on the basis that the court is to have such powers to override the views of the local authority as are necessary to enable the court to discharge properly its function of deciding whether or not to accede to the local authority's application to take the child away from its parents by obtaining a care order. To allow the local authority to decide what evidence is to go before the court at the final hearing would be in many cases, including the present, to allow the local authority by administrative decision to pre-empt the court's judicial decision."

28. He added at page 8:

"what the interests of justice require is ... a power in the court to override the powers over the child which the local authority would otherwise enjoy under the interim care order."

29. *In Re C* the House of Lords specifically rejected the proposition, asserted on behalf of the local authority in that case, that the court had no power under section 38(6) to specify the place at which the assessment was to take place. As Lord Browne-Wilkinson said at page 9:

“Mr Harris sought to develop the argument by saying that, if the court could order residential assessment at a specified place, that would override the duties of the local authority as to the placement of children within their care imposed under s 23(2). The conditions under which such placement can be made are further regulated by regulations made by the Secretary of State. I do not accept this submission. Section 23 and the regulations made thereunder are concerned with placements made by local authority with foster-parents and others: s 38 is not dealing with that issue at all. It is providing for the assessment of the child for the purpose of assisting the court in its assessment of the child’s best interests. An order specifying where and with whom that assessment is to take place is not ‘a placement’ within s 23 at all.”

30. Lord Browne-Wilkinson concluded with this observation at page 9:

“s 38(6) and (7) of the Act are to be broadly construed. They confer jurisdiction on the court to order or prohibit any assessment which involves the participation of the child and is directed to providing the court with the material which, in the view of the court, is required to enable it to reach a proper decision at the final hearing of the application for a full care order.”

31. *In Re B (Interim Care Order: Directions)* [2002] EWCA Civ 25, [2002] 1 FLR 545, the Court of Appeal reiterated that the court’s powers under section 38(6) override the local authority’s management of the child in accordance with sections 33(1) and (3) of the 1989 Act. (The fact that the decision of the Court of Appeal in this case was subsequently questioned by the House of Lords in *Re G (Interim Care*

Order: Residential Assessment) [2005] UKHL 68, [2006] 1 FLR 601, at paras [12]-[13], on the ground that what was directed by the Court of Appeal was simply not an assessment within the meaning of the 1989 Act at all, does not invalidate the Court of Appeal's analysis of the inter-relationship between the court and the local authority, the point with which I am here concerned.)

32. The remaining question, therefore, is, precisely what is it that the court has power to direct pursuant to section 38(6)? The answer to that question is provided by the decision of the House of Lords in Re G (Interim Care Order: Residential Assessment) [2005] UKHL 68, [2006] 1 FLR 601. It is fundamental that, apart from a "medical or psychiatric examination", all the court can authorise or direct under section 38(6) is something that can properly be described as an "assessment" and, moreover, an assessment "of the child". Hence, the need for the primary focus to be on the child, and hence, also, the familiar distinction between an "assessment" of the child (which is permissible) and a programme of therapy or treatment for the parent (which is not).

33. Whether a particular programme involves permissible assessment, or some other thing which is impermissible, depends upon an evaluation of the 'primary purpose' of what is proposed and whether any otherwise impermissible elements are merely 'ancillary' to what is permissible: see the analysis of Thorpe LJ and Simon Brown LJ in Re D (Jurisdiction: Programme of Assessment or Therapy) [1999] 2 FLR 632, approved in Re G by Lord Scott of Foscote at para [11]. According to Thorpe LJ at page 637:

"a programme may be an assessment within s 38(6) even if there is an ingredient of ancillary therapy, but ... a programme which is substantially therapeutic does not fall within s 38(6) even if it involves some element of assessment as it proceeds."

The question, as Thorpe LJ put it at page 638, is: what is the "primary purpose" of the programme? Simon Brown LJ made essentially the same point at page 641:

"a programme for assessment, can encompass within it an element of therapy or treatment. If, however, the programme is essentially one for treatment rather than one for assessment

it falls foul of the principle established by this court in Re B (Psychiatric Therapy for Parents) [1999] 1 FLR 701 and must be held to be outside the court's powers to order. I recognise, of course, that that principle will not always be easy to apply. The antithesis between assessment on the one hand and therapy and treatment on the other is at best an imperfect one. Essentially, however, as Thorpe LJ has explained, the court will be concerned to determine what is the primary purpose of the programme proposed and whether the element of therapy treatment can properly be regarded as merely ancillary to it."

34. *Baroness Hale of Richmond expressed the same point more succinctly in Re G at para [69] when, having said that what is directed under section 38(6) must be an examination or assessment of the child, she added:*

"Any services which are provided for the child and his family must be ancillary to that end. They must not be an end in themselves."

35. *Various descriptions were given by their Lordships in Re G of programmes that are within the proper ambit of section 38(6). Lord Scott of Foscote at para [7] used the following phrases to describe the permissible:*

"be, or include, an assessment of the child with his or her parents, or otherwise in a family context"

"for the purpose of seeing whether or not [the child] and her mother had become satisfactorily bonded with one another"

"for the purpose of assessing her parents' behaviour towards her."

36. *Lord Clyde at para [27] contemplated an assessment as extending to:*

"the child in the context of his or her family, so that the investigation may extend to considering the capacity of a parent to care for the child."

37. *Baroness Hale of Richmond at paras [43], [66] and [89] variously described an assessment as:*

embracing “a joint assessment of the child and the parents, including the parents’ attitude and behaviour towards the child”

“to observe the parents looking after the child at close quarters for a short period in order to assess the quality of the child’s attachment to the parents, the degree to which the parents have bonded with the child, the current parenting skills of the parents, and their capacity to learn and develop”

“an examination or assessment of the child, including where appropriate her relationship with her parents, the risk that her parents may present to her, and the ways in which those risks may be avoided or managed.”

38. *I detect no difference of opinion or approach in these various formulations. They are merely different ways of describing the same essential thing.”*

He continued by stating:

“ ...

59. *... there are two preliminary points about section 38(6) that need to be made. In the first place, although, perhaps because they are the most protracted and expensive and most likely to cut across a local authority’s planning, and thus most likely to be controversial, we tend to think of section 38(6) assessments in terms of residential assessments in the kind of institutional settings of which the Cassell is a well-known example, section 38(6) is much wider and more general in its scope. It applies to any “examination” (medical or psychiatric) or any “assessment”, whether short or long, and in whatever setting. Secondly, subject only to the requirement that the assessment be “of the child”, section 38(6) is not expressed as imposing any restrictions at all on what can be directed by the court. The court can direct any “assessment of the child.” The only further restriction is that suggested by Lord Browne-Wilkinson’s*

reference in Re C to the purpose of section 38(6) as being “to enable the court to obtain the information necessary for its own decision ... to enable it to reach a proper decision at the final hearing of the application for a full care order.” But those words, far from narrowing the scope of section 38(6) merely serve, as it seems to me, to bring out and emphasise the potential breadth of its ambit.

60. The other preliminary observation is this: It is quite plain that, given the reasons why the guardian was arguing for it and, indeed, the reasons the Justices gave for directing it, the assessment directed by the Justices in the present case fell comfortably within the parameters of the permissible as described in Re G in the various passages anthologised in paragraphs [35]-[37] above. Moreover, in carefully directing themselves that “The court requires evidence of how A settled in with aunt and grandmother before it will make a Special Guardianship Order”, the Justices were, in my judgment, acting properly in accordance with the approach set out in Re C.

...

62. The argument that section 38(6) does not confer any power to order that a child be placed, whether for the purpose of assessment or otherwise, in a particular placement, that being a matter for the discretion of the local authority once the care order (interim or final) has been made, is, with all respect to those propounding it, quite hopeless, being concluded against them by the decision of the House of Lords in Re C. And Re R (Care: Plan for Adoption: Best Interest) [2006] 1 FLR 483, to which I was referred, is simply not authority for any such proposition.

63. The argument ... that where a residential assessment is directed in accordance with section 38(6), the only kind of place which can lawfully be specified is a ‘residential family centre’ registered and regulated in accordance with the Care Standards Act 2000 and (in Wales) the Residential Family Centres (Wales) Regulations 2003, is also, in my judgment, lacking in substance. It involves reading into section 38(6) words of restriction which are simply not there – hardly surprisingly, perhaps, since the 1989 Act long predated the legislation ... And it involves limitations on the scope of section 38(6) which, in my judgment, would cut across the statutory purpose as explained by Lord Browne-Wilkinson in Re R and,

indeed, might well prevent many illuminating and forensically useful assessments of the kind envisaged by their Lordships in Re G.

...

65. Where, one asks, is the vice in what the Justices did here, always bearing in mind the purpose of section 38(6) as explained in Re C and Re G? I can see none. On the contrary, given the scope and purpose of section 38(6), it would, if anything, be most unfortunate if what the Justices did was unlawful, because it would, to repeat, make it legally impossible for any court, without the agreement of the local authority, ever to direct an assessment in a family setting under the umbrella of an interim care order. And what is the vice in that?

66. Ms Henke provides two answers to that rhetorical question. The first is that the setting is unregulated and thus potentially unsafe. The response to this is that provided by Mr Jonathan-Jones: the setting is not unregulated; it is regulated by the court. The court, as I have said, will first have assured itself both that a section 38(6) assessment is appropriate on the facts of the particular case and, importantly, that the particular assessment envisaged is not merely appropriate but safe. And the court will no doubt take steps to ensure that the assessment is appropriately monitored or supervised as it proceeds – as it was in the present case, for, after all, the very purpose of what the Justices directed was that A should be observed in the family setting by both the guardian and the social worker.

67. Ms Henke's second answer is that such an order leaves the child in a legal 'no man's land'. My response is that it does not. The child is placed, as A was placed here, in accordance with a tightly defined legal framework – an interim care order coupled with a section 38(6) order and other appropriate directions – and under the continuing control of the court."

17. Finally, I do not intend to rehearse the well established common law principles that are also enshrined within the Family Procedure Rules 2010, that the instruction of any (expert) assessment must be necessary to assist the court to resolve the proceedings.

Discussion and analysis

18. Save for the difference in the position of each of the guardians in the two cases, there are no material relevant factual differences that require my attention. At first, R and his mother were accommodated for a short period pursuant to the mother's agreement under s20 of the Act. No one has sought to raise any issues about this and I have not heard any submissions on this issue. I consider this to fall outside the remit of this judgment. As the position of each of the parties has crystallised, the provisions of s38(6) of the Act have gained greater prevalence. For entirely correct reasons, it is common ground that the placement is a residential family centre that falls within the definition of the 2004 Act. As such it must be registered with Ofsted. The principal issue is whether the court can sanction the placement of the families in the face of noncompliance with the statutory requirements.
19. This court's inherent jurisdiction can be applied in many varied circumstances. The authorities that are cited above are but a limited number of examples of circumstances in which this jurisdiction has been utilised. The Supreme Court's decision in Re T and subsequent cases such as A Mother v. Derby City Council clearly illustrate the court's jurisdiction being invoked to protect some of the most vulnerable children in our society. It is not surprising that at first the local authority in these two instant case sought to follow an analogous path as set out in the two aforementioned authorities. However, this jurisdiction is not without limits and in this instance the combination of two important statutory provisions, namely s100(3) and s38(6) of the Act make an insurmountable prohibition on the use of the court's inherent jurisdiction. This prohibition is further fortified by PD12D. It follows that in the face of the available statutory means through which such a placement may be directed, the use of the court's inherent jurisdiction is inappropriate.
20. Therefore the principal issue remains, namely, can this court sanction the placement of each child and parent in the face of statutory provisions that render the placement illegal? In my judgment, the answer is clearly set out in A (A Child), Re [2009] EWHC 865 (Fam) as detailed above. To accept a submission that the court cannot make such a direction in these circumstances, would involve "*reading into s38(6) words of restrictions which are simply not there ... [and] would cut across the statutory purpose ...*". Cafcass and the guardian in the first case (Re K) appear to tacitly accept that the door is open to the court to give directions for the assessment of K in the placement, but they argue that this case is distinguishable where unlike A (A Child), Re [2009] EWHC 865 (Fam), the placement is a commercial entity and

fall outside the circumstances of the 2009 case. Furthermore, it would be against (public) policy for the court to direct such a placement knowing that it falls foul of the statutory framework.

21. At first blush these concerns are entirely logical and well placed in the circumstances that may be said that the two statutory regimes may be potentially in conflict. However, in my judgment such an approach is fundamentally flawed and unsustainable. Whilst not a commercial placement, this point was addressed head on in A (A Child), Re [2009] EWHC 865 (Fam). The terms of s38(6) provide for one of the few examples where the court can interfere with the local authority's exercise of its parental responsibility under the terms of an Interim Care Order. Indeed these are squarely within the circumstances that Lord Browne-Wilkinson in Re C saw as in "*in the interest of justice*" for the court to retain such a power. The purpose of making such a directions under the said provisions, is to enable the court to have available the necessary information to make a decision on what best serves the subject child's welfare. Furthermore, although the said authority was concerned with the Welsh Regulations, the assessment of the courts powers as set out in paragraph 63 of the said judgment is clear and has equal application to the two cases before me. Therefore, as a matter of law and policy it is an essential part of the courts function and duties to be able to direct such assessments in settings that are judged to be appropriate for the relevant child and necessary to inform the outcome of the case.
22. Once the court's power to make directions under s38(6) of the Act are engaged, the court must then assess whether it is appropriate to give such a direction. Latterly, the arguments as to whether the current placement falls within the ambit of these provisions have not been pursued with great zest. However, for completeness, given the authorities that I have cited above, in my judgment this placement is clearly a residential placement whose function in assessing the children is part fulfilled and in other parts are ancillary to the fulfilment of the assessment of each of these children. Therefore it falls well within the ambit of s38(6). There is no dispute between the parties that each of these families should be the subject of a residential assessment and without hesitation I endorse this accord which is founded in the premise of necessity to provide the court with important and essential information to be able to make decisions about the welfare of each of these children.

Conclusion

23. Save for the element of costs which are met by the local authority, having considered the provisions of s38(6) and (7), I am satisfied that the placement should continue with an assessment of each of the children and I accordingly direct it so. Furthermore, the local authority's applications to invoke the court's inherent jurisdiction are dismissed.
24. Where the local authority plans to place a family in a residential family centre, it is essential that it first ascertains the placement's registration status and the qualification of the staff who will be interacting, supporting and assessing the family. The parties and the court must be given the appropriate information to understand the purpose and length of any proposed assessment. If such a placement is to assess the relevant child, such a placement may be directed pursuant to s38(6) of the Act and the use of the court's inherent jurisdiction is not appropriate regardless of the placement's registration status. The provisions of s38(6) are one of the limited circumstances in which the court may interfere with the local authority's exercise of parental responsibility for a child who is the subject of an interim care order. Its provisions are widely construed and are not limited to residential settings. They include medical or psychiatric assessment of the child as well as other elements of assessment that are ancillary to the primary assessment of the child.
25. An application pursuant to the said provisions of the Act must be made in writing and supported with a statement that addresses the criteria that is set out in s38(7) of the Act together with any additional relevant information, including the necessity of such an assessment. Such an application and supporting documents give important notice to all of the parties, allowing them to respond and to properly participate in the proceedings. In cases of emergencies such the first instant case and subject to the court's case management powers to make specific directions in this regard, all of these steps must be completed as soon it is practicable.
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