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**Neutral Citation Number: [2020] EWHC 1098 (Fam)**

**Case No: G00BH310**

**IN THE HIGH COURT OF JUSTICE  
FAMILY DIVISION SITTING AT BOURNEMOUTH  
IN THE FAMILY COURT SITTING AT BOURNEMOUTH**

**Case No: BH20C00387**

**In the matter of the Inherent Jurisdiction of the High Court  
and the Children Act 1989**

**Courts of Justice**

**Deansleigh Road**

**Bournemouth**

**BH7 7DS**

**Date: 05/02/20**

**Before:**

**HIS HONOUR JUDGE DANCEY**

**Sitting as a Deputy Judge of the High Court in the DOIs application and as a section 9 Judge in the family court in the care and secure accommodation proceedings**

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**Between:**

**Dorset Council**

**Applicant**

**- and -**

**AB**

**1<sup>st</sup> Respondent**

**-and-**

**CD**

**2<sup>nd</sup> Respondent**

**-and-**

**E**

**3<sup>rd</sup> Respondent**

**(by his children's guardian Zoe Hambleton-  
Lord)**

**Roberta Holland (instructed by Dorset Council Legal Services) for the Applicant**

**Jodi Street on 1/5/20, David Beatson on 4/5/20 for the 1<sup>st</sup> Respondent**

**Emily Davies on 1/5/20, Gareth Bishop on 4/5/20 for the 2<sup>nd</sup> Respondent**

**Nigel Hawkins (instructed by the children's guardian) for the 3<sup>rd</sup> Respondent**

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**JUDGMENT**

**His Honour Judge Dancey:**

**Introduction**

- 1) This case concerns E, an extremely vulnerable young man aged 16. On 24 April 2020 Dorset Council applied under the inherent jurisdiction for authorisation of deprivation of liberty in respect of E. Dorset also applied to the family court for an interim care order in respect of him on the ground that he is beyond parental control. The applications were issued on 28 April and, Roberts J having on that date allocated the DOLs application to me to hear, I listed both applications for hearing on Friday 1 May.
- 2) At that hearing it was apparent that everybody had grave concerns about E's risk-taking behaviour to the point that all agreed (E's parents, AB and CD, included) that he needed a secure placement. He was at that point in an unregulated placement in Southampton which was unable to manage him. The children's guardian said in her position statement, "*It is by no means an exaggeration to say that [E] has and remains very much at risk of killing himself, being killed or coming to serious harm*". Nobody disagreed with that assessment of the situation.
- 3) Dorset's position was that as, when they made a referral on 30 April 2020 for a secure accommodation welfare bed, there were 46 live referrals for secure accommodation placements, there was no point in applying for a secure accommodation order. I was told that Dorset had made a referral and would, if needed, use the 72-hour provision under section 25(2)(a) of the Children Act 1989 and apply at that point.
- 4) I could not see the logic in that position and said so. It seemed to me that if the test for the making of a secure accommodation order was made out and it was common ground that E required a secure placement, then Dorset should make an application for a secure accommodation order. I was concerned that the social work evidence and interim care plan filed with the applications referred only to placement in an unregulated placement while Dorset sought a more suitable long term residential placement for E, which seemed to be at odds with their acceptance that E needed a secure placement. The case summary filed on behalf of Dorset referred to the need for a secure placement, but that was not the evidence, nor their application at that stage.
- 5) Dorset agreed to make an application for secure accommodation which I agreed to hear at 10am on Monday 4 May, abridging time for service. In the meantime, I made the interim care and DOLs orders sought.
- 6) Dorset issued its secure accommodation application shortly before the hearing on 4 May.
- 7) By the time of the hearing on 4 May there had been further developments. First, there had been further incidents over the weekend, escalating the risks to E. Secondly, an alternative short-term placement had been found for E in a rural setting in East Dorset starting at 12 noon on 4 May. This placement, albeit again unregulated, was thought by all to be safer for E than his current inner-city placement where risks around absconding and drug culture were higher.
- 8) I gave permission to Dorset to amend its existing DOLs application to cover the proposed restrictions at the new placement. I made the secure accommodation and amended DOLs orders sought with the agreement of all parties, save that (a) E had not been prepared to speak to his solicitor, Mr Hawkins, or his guardian, Ms Hambleton-Lord to establish his competence to instruct Mr Hawkins separately or to ascertain his wishes and feelings; (b) while Ms Hambleton-Lord agreed that the new placement was likely to be a better option for E she was, because of Cafcass policy, unable to expressly support DOLs in an unregulated placement.
- 9) Mr Hawkins proposed that a written judgment might add some weight, albeit only fractional, to the prospects of Dorset finding a secure placement for E and so could only benefit E. Over the weekend the list of live referrals for secure placements had increased to 50. Placements are secured based on central assessment of

suitability and risk. Mr Hawkins suggested that, as E's risky behaviours have not included the use of weapons, he may well not yet have placed himself above the threshold for acceptability for secure accommodation. There is some hope therefore that, as the risks to E are high but he may be suitable for secure accommodation, a place may be found.

- 10) The second reason I am giving this written judgment is to add to the continuing concern about under-resourcing of secure placements. On 28 April Cobb J gave judgment in not dissimilar circumstances in *Re S (Child in care: Unregulated placement)* [2020] EWHC 1012 (Fam) concerning the lack of regulated residential placements. As Cobb J did in that case, I intend that this judgment be sent to the Secretary of State for Education, Gavin Williamson MP and to the Children's Commissioner.

### **E's circumstances**

- 11) E and his twin sister were adopted at 13 months. His adoptive parents attended both the hearings by Skype. They are naturally worried about E. Everyone agrees they have done everything they could to support E.
- 12) In his report for CAMHS of 20 April 2020 Dr Kayode Fagbemi, psychiatrist, set out that E has been diagnosed with Attention Deficit Hyperactive Disorder, Autistic Spectrum Disorder and mild intellectual impairment (he has an IQ of 65) all associated with possible Foetal Alcohol Spectrum Disorder after his mother used drugs and alcohol during pregnancy (although there has been no formal diagnosis of FASD). FASD results in mental disability through brain injury rather than mental disorder and requires a rehabilitation model of care. Although he has not had a brain scan to enable a diagnosis of FASD, many of his difficulties match that condition.
- 13) I asked E's parents about his sister, as there was no information about her in the papers. She is doing well, although she is somewhat shy and withdrawn. She was removed into foster care soon after birth, whereas E remained with his mother for some time and they thought that was traumatic for him.
- 14) As Dr Fagbemi reports, since prepubescence E has struggled with significant emotional and behavioural difficulties escalating now he has reached full adolescence. Over the last five years he has been seen by paediatricians, psychologists and psychiatrists. There has been multi-agency involvement including children's services, CAMHS, police, the Youth Offending Team and education to try and contain the risk to E from his behaviours. Identified difficulties include persistent levels of over activity and high energy, impulsive behaviours, impaired decision making, risky behaviours (including running away from home), difficulty identifying and understanding consequences of risky behaviour, poor attention, memory and retention difficulties and deficits in appreciating appropriate social behaviour. E is vulnerable and suggestable. He becomes aggressive either provoked or unprovoked. He engages in criminal behaviours and significant polysubstance misuse. His cognitive strengths include verbal comprehension and processing speed so that he may present to others as a capable young man, masking his significant difficulties.
- 15) Many interventions have been attempted, including medication. Therapies such as CBT and DBT have been considered but, because of his difficulties, E has struggled to engage meaningfully in any form of therapy.
- 16) Exasperated at what they saw as a lack of support, E's parents finally privately funded E living, first at a secure unit in Utah for 6 weeks in August 2019, and then at a ranch academy in Utah for 12 weeks from December 2019 until mid-March 2020. As both these units were secure there were firm and robust boundaries in place and E's risks and vulnerability were well managed. In their report the ranch academy (a locked door residential placement for behaviourally challenged youths) reported "*the way we were able to manage [E] was because we are a very structured environment, he was within eye sight of staff at all times and given constant redirection. We are a locked down facility and he could not leave or go anywhere without a staff member. He seemed to really respond well to that structure. It was when he was given a bit of freedom on and off campus visit with his dad that he struggled*".
- 17) E returned to the UK in mid-March for a planned visit. That coincided with the Covid-19 lockdown and he was unfortunately unable to return to resume his stay at the ranch academy. He absconded from home almost immediately, spending 5 days in a drugs den in West Dorset and threatening his father with a knife. He sent sexually inappropriate pictures to his sister. It is believed he has had (possibly) unprotected sex with a prostitute, exposing him to risk of Covid-19, amongst other things.
- 18) On 3 April 2020 E was accommodated voluntarily under section 20 of the 1989 Act and, following four days at an outdoor centre (a mobile home supported by agency staff), has since been in a placement in

Southampton providing 16+ supported accommodation falling outside the requirements for Ofsted regulation.

Despite 1:1 supervision with waking staff, increased to 2:1 following concerns about absconding, the manager of the placement told the guardian he did not consider they could keep E safe. He thought E was at significant risk of harm. They were unable to lock doors or windows and E was easily able to leave. The location of the placement made it easier for E to engage with inappropriate adults and put himself in risky situations. He was misusing solvents. The manager considered that E could only be kept safe in a secure placement or a placement in a rural area away from the temptation of risks. The local authority, E's parents and the guardian all agree this placement was not able to keep him safe.

- 19) The guardian was told that E had recently been threatened by drug user local to his placement. This seemed to have frightened him into staying in his placement for a short while, but he left the placement again on 30 April. E had also previously been communicating on Snapchat with a 14-year old girl who had been sending him indecent images of herself, so exposing E to risk of criminalisation and the girl concerned to the risk of abusive behaviour.
- 20) Following the hearing on 1 May, E went missing at 5.20pm that afternoon but returned later that evening. The next day he was taken to Southampton A&E having reported that between 11pm on 1 May and 2am on 2 May he had smoked heroin, crack cocaine and cannabis in his room at the placement and had thoughts to harm or kill himself. It was reported that he had tried to use the cord of an electric heater around his neck, was restrained by staff and assaulted a member of staff. The doctor who examined E did not think his presentation consistent with the drug use he reported. E could not be assessed by CAMHS because of Covid-19 restrictions. He was discharged at 5.30am with a plan for CAMHS to make contact that day. At 8.50pm that evening E went missing again, saying he was going to meet a friend. He returned at midnight in an agitated state and showing staff a "baggie" with white powder, reporting he had used cocaine.
- 21) Attempts over the weekend by E's solicitor to speak with him were unsuccessful.

### **The challenges facing the local authority**

- 22) It is clear the local authority recognises the scale of risk to E. In the first social work statement it was said that he:
  - is easily distracted and seems unable to settle - he has stopped engaging in sports and art and appears to have lost pleasure in friends, family events and any form of education;
  - really struggles to connect with his own emotional world and struggles to read the emotions of others;
  - misinterprets situations as negative or threatening, which can result in him being instantly on guard and ready to run or retaliate;
  - can become very upset and dysregulated, often by apparently minor triggers, and if pushed or challenged he will often run away;
  - struggles to 'read' sensory or physiological signals from his own body, for example if he is warm or cold;
  - struggles to take care of himself and manage daily living tasks, although he responded well to a checklist of daily tasks developed when he was in Utah;
  - struggles to work within boundaries and appears to have very limited capacity to understand risk;
  - struggles to acknowledge any negative behaviours, often feeling very negative and hopeless after situations have gone badly wrong - he does not understand cause/ effect and does not recognise consequences;
  - has very low self-esteem, believing other people think he is stupid, feels he is not loved, and no-one would care if he was not around;
  - wants positive relationships and friendships but struggles to maintain these;
  - is so desperate to connect with others, but his intense presentation can alienate peers.
- 23) The social worker said, "*Currently the risks posed to [E] are significant and he is placing himself in situations which impact on his physical, emotional safety. [E] is already known to the criminal justice system. [E] continues to place himself at significant and ever-increasing risk which will potentially have a significant impact on his safety and potentially his mortality*".
- 24) In her case summary for the hearing on 1 May, Ms Holland set out the local authority's position:
  - a) in the event that a placement became available, the Director of Children's Services or someone with delegated authority would authorise for E to be placed under the 72-hour provision with immediate

instructions to apply for a secure accommodation order;

- b) there is a lengthy waiting list on which E is number 46 with no placements becoming available over the preceding 6 weeks;
  - c) E is discussed daily at the “High Risk and Vulnerable Children Panel” chaired every morning by the Corporate Director, when daily updates following daily searches for placements are also discussed.
- 25) It is clear, and I accept, that the local authority is doing its utmost to find a placement for E that will meet his needs as they see it. It is not entirely clear that the focus has until very recently been on secure accommodation, which is plainly what is required.
- 26) The problem, put simply, is the lack of secure placements available in England. That is a resourcing issue quite beyond the powers of the local authority.

## **The applications**

### Interim care order

- 27) E is quite plainly, as everyone agrees, currently beyond parental control. The threshold for an interim care order under section 38 of the 1989 Act is therefore met because there are reasonable grounds for believing that E’s circumstances are as set out in section 31(2)(b)(ii) of the 1989 Act (that he is suffering, or is likely to suffer significant harm attributable to him being beyond parental control).
- 28) In making this order, E’s welfare is the court’s paramount concern in accordance with section 1(1) of the 1989 Act and I have regard to the welfare checklist at section 1(3), especially to E’s needs and to any harm he has suffered or is likely to suffer. E’s wishes and feelings are not currently ascertainable. I hope that position will change and, to the extent that he wishes to challenge the orders I am making, he will of course have the opportunity to do so - either through the guardian or by instructing his solicitor direct if he is deemed competent to do so. The interim care order is of course just that - an interim order. The DOLs order is subject to review.
- 29) Having regard to the risks to E, the potential consequences of those risks and the inability of the local authority to manage them otherwise than through exercise of parental responsibility and secure placement, it is plain that the making of an interim care order is a necessary and proportionate interference with E’s Article 8 right to respect for private and family life.
- 30) I therefore make the interim care order sought.

### DOLs authorisation

- 31) The interim care plan is for E to be placed in an unregistered and unregulated placement in a private house in East Dorset, staffed on a 2:1 basis with waking nights by agency staff from the same agency that staffed the outdoor centre E stayed at between 3 and 7 April. It is said that E responded well to these carers when initially staying at the outdoor centre as he felt he had a connection with them and liked the exercise and activity based care they provided. The proposed placement is in a cottage in a semi-rural location surrounded by forest and country park with lots of nature and outdoor exercise available on the doorstep. It is hoped these positive distractions will remove E from the immediate risks posed by drugs and criminal/sexual exploitation in Southampton.
- 32) In *Re S* (supra) Cobb J set out at paras 16-20 the wider context of and concerns about unregulated placements:

“16) *There are currently more than 78,000 children in care; the majority of those children are in foster care. A significant number (c.6,500<sup>[41]</sup>) are in children's homes; the Care Standards Act 2000 ('CSA 2000') defines a 'children's home' as an establishment which provides 'care and accommodation' 'wholly or mainly' for children (see section 1(2) CSA 2000). It is accepted in this case that the current accommodation provided for Samantha is captured by the statutory definition of 'children's home'<sup>[51]</sup>. However, many young people, like Samantha, are in placements ('children's homes') which are not registered; 'care and accommodation' is provided for these young people in a range of places, including short-term holiday lets (i.e. flats and cottages), as in Samantha's case, and in mobile homes, and static caravans. Where those units are not being used simply for leisure, cultural or educational activities for children, they are deemed to be unregistered children's homes. Given the shortage of suitable accommodation in England and Wales, particularly for the most challenging children, some have been known to be placed in children's homes in Scotland (see, for example, the judgment of MacDonald J in*

- 17) *I recognise that many local authorities, including ERYC, simply do not have sufficient provision locally to meet the needs of all of the children who require accommodation. All those working in the Family Court are familiar with the situation of a child who at a point of crisis is placed, or is to be placed, in an unregistered children's home, as an often unavoidable, urgent and temporary measure. The urgency of a situation, however, does not truly make it any more acceptable. It is important to emphasise that it is a criminal offence to run a children's home without the appropriate registration (section 11 CSA 2000); concerns have been widely raised across the professional spectrum about the quality of the care, support and safeguarding offered by some of the providers. Research commissioned by the Department for Education ('DfE') earlier this year<sup>[6]</sup> provided evidence that:*

*"Several local authorities (LAs) use existing unregulated providers with bespoke packages designed to cater for young people with multiple issues (such as mental health issues, a history of assaulting staff, fire setting, and self-harming), often in the context of placement breakdowns. According to the LAs concerned, these children are very difficult to place in registered provision and they place them in unregulated settings as a short-term measure, while suitable registered provision is located and/or an assessment is undertaken to determine a young person's needs. The children involved range from 11 to 17 years old and include some for whom LAs are looking to obtain a secure placement."*

*Interestingly, the research also showed that the young people placed in unregistered provision were said to typically have complex needs with often a history of multiple placement breakdowns. Where this is the case, registered providers may be reluctant to accommodate young people. All of this research evidence entirely correlates to Samantha's experience.*

- 18) *It is of course a particular concern that placements of young people in unregistered provision are not uncommonly accompanied by applications in the High Court (as here) for authorisation to deprive the young person of their liberty. This was highlighted by the Court of Appeal in *Re T* [\[2018\] EWCA Civ 2136](#), in which the President of the Family Division, giving the lead judgment, said this:*

*"[5] It is plainly a matter for concern that so many applications are being made to place children in secure accommodation outside the statutory scheme laid down by Parliament. The concern is not so much because of the pressure that this places on the court system, or the fact that local authorities have to engage in a more costly court process; the concern is that young people are being placed in units which, by definition, have not been approved as secure placements by the Secretary of State when that approval has been stipulated as a pre-condition by Parliament".*

- 19) *The growing alarm about this wholly unsatisfactory situation prompted the issuing of the Practice Guidance: Placements in unregistered children's homes in England or unregistered care home services in Wales jointly by the President of the Family Division and Ofsted on 12<sup>th</sup> November 2019; this makes clear that judges must ensure when authorising a placement in an unregistered unit that:*

*"... steps are immediately taken by those operating the unit to apply for registration (if the unit requires registration) so that the placement will become regulated within the statutory scheme as soon as possible".*

- 20) *Shortly before the last hearing in this case, the DfE published a consultation paper on reforms to unregulated provision. In its introductory section, the paper reads:*

*"We are particularly concerned that increasing numbers of children under the age of 16 are being placed in situations where either the provider is only offering support and not care, or care is being provided but the provider is operating illegally (an unregistered setting). It is unacceptable for any child or young person to be placed in a setting that does not meet their needs and keep them safe, for any amount of time".*

*I respectfully share these concerns. Regulation of our children's homes offers an essential safeguard to the delivery of appropriate care for our young people, many of whom, like Samantha, are damaged through their own life experiences."*

- 33) The concerns expressed by Cobb J are indeed only too familiar to this court.

- 34) I was told by the local authority social work team leader at the hearing on 4 May that the proposed placement is not regulatable. As the Practice Guidance of 12 November 2019 makes clear at paragraph 6, any person

who provides or manages a children's home in England and Wales must be registered in respect of that children's home. Carrying on or managing such provision without registration is an offence: section 11 Care Standards Act 2000.

35) The definition of a children's home is in section 1(2) of the 2000 Act:

“An establishment in England is a children's home ... if it provides care and accommodation wholly or mainly for children.”

36) That requirement is subject to the exceptions set out in regulation 3 of the Children's Home (England) Regulations 2015:

Excepted establishments

3.—(1) For the purposes of the Care Standards Act 2000, establishments of the following descriptions are excepted from being a children's home—

- (a) an institution within the further education sector, as defined by section 91(3) of the Further and Higher Education Act 1992(1);
- (b) a 16 to 19 Academy, as defined by section 1B of the Academies Act 2010(2);
- (c) an establishment—
  - (i) that would (apart from this sub-paragraph) be a home merely because it provides accommodation for children for the purposes of a holiday, or for cultural, educational, recreational or sporting activities; and
  - (ii) at which accommodation for any one child is not provided for those purposes for more than 27 days in any twelve month period;
- (d) premises—
  - (i) that would (apart from this sub-paragraph) be a home merely because they are used to provide childcare; and
  - (ii) at which such childcare is not provided in relation to any one child for more than 27 days in any twelve month period;
- (e) an establishment that would (apart from this sub-paragraph) be a home merely because it provides accommodation for children aged 16 and over—
  - (i) to enable the children to undergo an apprenticeship or training;
  - (ii) for the purposes of a holiday; or
  - (iii) for cultural, educational, recreational or sporting purposes;
- (f) an establishment that would (apart from this sub-paragraph) be a home merely because it provides care and accommodation for children as a holiday scheme for disabled children, as defined in regulation 2 of the Residential Holiday Schemes for Disabled Children (England) Regulations 2013(3);
- (g) an approved bail hostel or an approved probation hostel;

(h) an institution provided for the detention of young offenders under section 43(1) of the Prison Act 1952(4).

(2) The exception in paragraph (1)(d) does not apply to any establishment or premises in which the children who are accommodated are wholly or mainly of a description falling within section 3(2) of the Care Standards Act 2000.

(3) In determining for the purposes of paragraph (1)(d) whether accommodation has been provided for more than 27 days, no account is to be taken of any day which includes a period of 9 hours or more during which—

(a) the child is in the care of a parent or relative; and

(b) childcare is not provided for that child.

37) I have not heard detailed argument on this point and do not have enough information about the use of the proposed placement to be able to come to a conclusion whether the proposed placement is used to provide care and accommodation wholly or mainly for children so as to require engagement of the exceptions under regulation 3. I will require further submissions on this point.

38) The proposed restrictions on E's liberty are:

- to have no unsupervised access to money;
- to have his current phone removed and be provided with an alternative basic phone and phone number with no access to the internet - this is to reduce risk of him making or being contacted by connections in Southampton or Bournemouth and to prevent him from seeking indecent images of teenage girls when communicating online with them;
- to have no access to the internet unless fully supervised by staff and to communicate with his family;
- to be supervised at all times on a 2:1 basis with waking nights to reduce risk of absconding and self-harming behaviours;
- all doors and windows to be locked to prevent him leaving the property unsupervised;
- to be supervised when taking any prescribed medication and this to be kept in a secure place to prevent him attempting to sell his medication;
- to be reported missing immediately if he leaves the supervision of staff;
- staff to remove any objects from E's bedroom which may pose a risk of harm to him i.e. belts, sharp objects, anything which could be used as a noose.

39) The parties agree, and I find, that these restrictions meet the test in *Storck v Germany* (2006) 43 EHRR 6, namely (a) an objective element of confinement to a certain limited place for a not negligible period of time, (b) a subjective element of absence of consent to that confinement and (c) the confinement imputable to the State, and there is therefore a restriction of E's liberty for the purpose of Article 5 ECHR. I am also satisfied that such restrictions are a necessary and proportionate interference with E's Article 5 rights and are the least restrictive necessary to safeguard his welfare and the safety of others. I am satisfied that E's welfare requires that such restrictions, which are of course permissive in nature, be put in place.

40) I have directed that this order will be reviewed at a hearing on 16 June 2020, although I hope by then a secure placement for E has been found and this order will become redundant.

#### Secure accommodation

41) As it appears to me both -

- a) that E has a history of absconding and is likely to abscond from non-secure accommodation and, if he absconds, is likely to suffer significant harm;
- b) that if he is kept in non-secure accommodation he is likely to injure himself or other persons;

the test under section 25 of the 1989 Act is met and the court must therefore make a secure accommodation order. That order will last for three months initially. The order is also of course permissive only. As things



stand it is clear secure accommodation is what E requires, but situations can change with time of course.

- 42) I direct that this judgment be sent to the Secretary of State for Education and to the Children's Commissioner. The important message is that E is at risk of harm to himself or others, possibly fatally so, unless a secure placement can be found for him. At the moment, no such placements are available because there simply are not enough of them.
- 43) That concludes this judgment.