Neutral Citation Number: [2022] EWCOP 8

Case No: 12975950

COURT OF PROTECTION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/03/2022

Before:

THE HONOURABLE MR JUSTICE HAYDEN

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Between:

LF	**Applicant**
- and –	
(1) A NHS TRUST **(2) G (BY HER LITIGATION FRIEND, THE OFFICIAL SOLICITOR)** **(3) M CCG**	**Defendant**

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John McKendrick QC (instructed by **Irwin Mitchell LLP*)*** for the **Applicant**
Michael Mylonas QC (instructed by **Hill Dickinson LLP**) for the **First Respondent**
Sophia Roper (instructed by **the Official Solicitor**) for the **Second Respondent**
Debra Powell QC (instructed by **Hill Dickinson LLP**) for the **Third Respondent**
Claire Overman (instructed by the **BBC's legal department**) for **Intervener**

Hearing dates: 23rd February 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HAYDEN

The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment

the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Hayden:

1. On the 13th December 2021, I delivered an ex-tempore judgment, now reported as: *A NHS Trust v G, LF and M CCG [2021] EWCOP 69*. The case concerned important 'best interest' decisions relating to a 27-year-old woman (G), who has a degenerative disorder affecting her central nervous system. Her medical history and her present condition are fully set out in that judgment and do not require to be repeated here. G's father (LF) had instructed his Counsel, Mr McKendrick QC, to apply for permission to appeal if the judgment went against him. Mr McKendrick made the application at the conclusion of my judgment. I refused it. It was not renewed to the Court of Appeal. Its significance, at this stage, is that it is a marker of LF's resistance to the plan.

2. To give context to the application that is made on behalf of LF today, it is important to identify some significant features of the earlier judgment:

    i. All parties agreed (including G's parents) that G's present circumstances were irreconcilable with either her medical or physical needs;

    ii. I concluded, on a compelling body of evidence, that G should move to live at A Home, a specialist residential unit;

    iii. As the judgment makes clear, the decision was predicated on analysis of G's needs, in which the cost of alternative options did not become a relevant consideration (my emphasis)**;**

    iv. I was persuaded by the evidence that an immediate move by G to her parents' care was likely to *"overwhelm"* her. She needed a period of assessment and adjustment. In any event, a care package supporting a placement at her parents' home could not be constructed within G's own timescales nor with sufficient robustness;

    v. It was necessary to undertake a full and a comprehensive assessment of G's needs, outside the hospital setting, in order to evaluate what was likely to be required when and if she moved to her parents' care;

    vi. The judgment makes it clear that a move by G to her parents' care should be the objective of her care plan. In particular, I highlighted that though G had been living in this specialist children hospital for 13 years, the arrangements had been such that she had been cared for primarily by her parents throughout the period;

    vii. As G has spent very significant periods of most days away from the ward, with her parents, now over many years, the clinical staff has become unclear as to what her understanding of and interaction with, the world around her is. This is likely to be better understood following the assessment at A Home. This is an unprecedented clinical scenario. No practitioner, from any discipline, has encountered a case of a 27-year-old adult who has spent her entire adult life as an inpatient in a children's hospital;

    viii. The relationship between LF and the treating team had become dysfunctional. A previous plan to move G back into the community had

> been abandoned as LF considered that the quality of local support care was insufficient. I made no judgement on LF's perception of that. Neither do I make any criticism of the hospital with the exception that I considered that they were not sufficiently robust with LF when his view of G's medical needs conflicted with their own.

3. On the 18th February 2022, LF filed an application to discharge the reporting restrictions, which had been in place since the 14th August 2017. The objective of the restrictions was to protect G's privacy. It is important, therefore, to emphasise that, over a significant period, LF recognised that his daughter's privacy required protection. These reporting restriction orders have proceeded by agreement. This is not easily reconcilable with the submission, made on behalf of LF, that G's life is already so significantly in the public domain as to obviate the need for further reporting restriction. All the parties have recognised, at least historically, that G's treatment and care have required sensitivity and privacy. Accordingly, it is not, or should not be, in the public domain.

4. In a statement filed by LF, dated 18th February 2022, he set out his reasons for his application:

> *"I believe that it would be in G's best interests for the RRO to be lifted as it would allow G's story and progress to be shared. G's story is one of success due to her sustained medical stability she now enjoys and how much she has improved. G had a survival rate of only 5% after being diagnosed with osteosarcoma in 2008 and was told that survival rate was only for a further five years."*
>
> *"I want to emphasise that G has never received any negative comments or suffered any kind of harm from the media articles published about her, many of which provide extensive details of her medical needs that are freely accessible by the public and have been for at least twelve years. G has only received beautiful compliments and praise on her social media platforms"*
>
> *"If the RRO was lifted, this would allow the family to begin a GoFundMe or other crowd funded campaign to raise funds to purchase a specially adapted vehicle. Lifting the RRO would therefore be in G's best interests as she would have a better platform for these funds to be raised in order for her to see her family. G has gone out into the community with us almost every day of her life and it is clear how much she enjoys these experiences. We have been approached by individuals before to raise these funds but have found it difficult to do so due to the reporting restrictions that are currently in place.*
>
> *Various celebrities have also offered to be involved by donating to G's fund or promoting the crowdfunding appeal. This endorsement could be of huge value to G and make a significant difference to her life, but it would not be possible without lifting the RRO. This is because supporters with large followings and platforms may be deterred by the reporting restrictions and it*

> *wouldn't allow for the full detailed explanation required around the need for such a vehicle and the reasons why she doesn't already have one.*
>
> *G's grandmother, who looks after her extensively, has also been approached in the past by TV shows that are designed to support those with physical and mental conditions. The family has found it difficult to accept their offers of support due to the reporting restrictions in place, because we have been prohibited from explaining why we need certain help following decisions made by the court. Lifting the RRO can therefore only be in [G]'s best interests as it would potentially allow her to access experiences that can enhance her life whereas it is currently preventing it."*

5. On the 11th January 2022, the applicant Trust were contacted by the Sunday Mirror newspaper. The email requires to be set out in full:

> *"Good afternoon*
>
> *I'm getting in touch from the Sunday Mirror to see if you would be able to comment on a story we are looking at for this weekend. It is in relation to the ongoing care of G who has been a patient at [A NHS Trust] for almost 14 years.*
>
> *We understand there was a court hearing at the Royal Courts of Justice last month where Mr Justice Hayden ruled she should be moved to a nursing home. This is against the wishes of her parents who would like to take G home where, they say, they can care for her in a loving, family environment. They believe their views and wishes have been disregarded by medical staff who started making arrangements to move G to a home without consulting them. They have been totally devoted to their daughter and have been by her side every day since she was first admitted in April 2008. They are devastated by what has happened. We have been told there is a transparency order in relation to the case - would it be possible to see a copy of this? We understand this is a difficult case and G has complex medical needs. Would it be possible to speak to someone about this?*
>
> *Many thanks*
>
> *PC"*

6. 10 days later, 21st January 2022, the Trust were contacted by the Mail on Sunday newspaper, again, the email requires to be set out in full:

> *"Good morning,*
>
> *We are interested in running an anonymised piece about a legal case involving a long term [A NHS Trust] patient, ['G']. She has been at [A NHS Trust] since 2008, mainly in HDU. However, my*

> *understanding is that she is stable and has been medically fit for discharge for a long time. There has been a very longstanding disagreement between, on the one hand, her parents, and on the other, [A NHS Trust] and [M CCG], as to where she should be discharged to. Her parents have been arguing that their daughter should be discharged to an adapted family home, where they would care for her, supported by a very intensive package of domiciliary care. [A NHS Trust] / [M CCG] has been arguing for [G] to be discharged to a nursing home. I understand this ongoing dispute is the principal reason why [G] has remained in [A NHS Trust] for many years without being discharged. The case was heard in October and December at the Court of Protection where a judge ordered that she be discharged to a nursing home.*
>
> *Her parents do not agree with this decision at all, for various reasons. I am aware that the judge put in place what is called a 'Transparency Order', which prohibits publication of 'any material or information that identifies or is likely to identify' [G] or her family, 'directly or indirectly', in relation to the proceedings. However, we believe that, with care, the facts of this case can be reported while maintaining the patient's and her family's anonymity. I would not, for instance, be referring to her as [G], but as 'P' as mentioned in the Transparency Order.]*
>
> *I am writing because:*
>
> *- I want to check the basic facts of the situation – as outlined above - with the [A NHS Trust] / [M CCG], and;*
>
> *- I want to know the [A NHS Trust] / [M CCG's] joint position as to why they believe a nursing home is the best place for [G] / P. If someone could get in touch with me today, I would be most grateful.*
>
> *Yours sincerely*
>
> *S A*
>
> *Medical Editor"*

7. There can be no doubt that the accounts revealed by these emails reflect LF's true reaction to the plan. The tenor is markedly different from the carefully crafted passages in his statement (see above). Indeed, his reaction, set out in these emails, had been foreshadowed in my judgment:

> *".. [LF] could not identify the balance that requires to be struck between the two alternative plans. The door was simply closed in his mind to any advantages that the Home might have to offer or, more importantly, how a full assessment of [G's] needs, outside the hospital setting might ultimately strengthen the*

> *prospects of a reunification with her family. That does not bode well for the future, but I hope will not be a blockade to the objective that [LF] truly desires."*

8. The first and third respondents have visited the family's social media site. Extracts have been downloaded and hard copies provided. They have not been formally introduced into evidence, but appended to the skeleton argument of Mr Mylonas QC, on behalf of the first respondent. Mr McKendrick emphasises this fact but does not dispute the authenticity of the social media posts. He does however, rightly, insist that only edited extracts have been presented and these require evaluation in the context of wider exchanges.

9. Without attributing these posts to individual family members, I record that they reveal a clear opposition to A Care Home, an unambiguous resolve to get G directly home to the bungalow and a narrative designed to solicit financial support for a care package that it is believed would facilitate G's direct return home. Strikingly, there is no reference to the reasoning of the judgment and in particular no reflection of the fact that the plan is intended to be a stepping-stone to G's move to her parent's care. In short, the posts are a repetition of the case LF advanced to me and which I concluded could not be reconciled with G's best interests. The wording of the posts I have been shown, resonates with the same unyielding language that led me to express my concerns for the future (see para. 7 above).

10. Many of the posts are written in what purports to be G's own voice. She has an extremely limited capacity to communicate. Certainly, she has no power of speech. I find these social media messages rather disturbing. Though G's age is revealed, it is impossible not to notice that the tone and language attributed to her has an infantile complexion to it. I do not know, nor will it be possible to establish, what G's views are, but it is entirely clear that those views attributed to her, are those of LF.

11. It is necessary to state that the Official Solicitor (OS), appointed independently to protect the best interests of G, also supported the move to A Home. However, the OS does not share this aspect of my concern about these posts, or at least not to the same degree. Whilst she strongly objects to the content of the messages, she regards the artificial use of G's voice, to convey them, as essentially benign. I have listened very carefully to Ms Roper's submissions on behalf of the OS, but I am bound to say that I remain troubled by the hijacking of G's voice. After all, we are concerned here with LF's freedom of speech, but it seems to me that these messages raise G's rights under Article 10 as well. I would signal that it is important not to lose sight of the fact that we are dealing here with an adult. Her disabilities do not take her adulthood from her. She is not a child. I am concerned, along with others, that G's life in a children's hospital has skewed people's perception of her as an adult woman.

12. On the 9th February 2022, on a personal blog named '[G's] story' appears the following. It is again written with G's voice:

> *"I think I might be famous soon… please follow my story and invite your friends too"*

13. In his own statement, see para. 3 above, LF refers to *"various celebrities"* who have indicated to him that they would support his crowdfunding page. All this is consistent

with a contemplated high-profile crowdfunding campaign. Mr McKendrick asserts that to phrase it in that way would be an overstatement. With respect, I disagree. At the earlier hearing, I was presented with the costs of the alternative packages of care. Each involves hundreds of thousands of pounds per year. A crowdfunding campaign would, of necessity, have to be high profile if it were to raise the necessary funds. The "fame" contemplated, in G's post, is entirely consistent with the attention likely to be generated by a high profile, celebrity endorsed, crowdfunding initiative.

14. Mr Mylonas makes several submissions. They can be conveniently summarised: LF has not accepted the judgment; he remains determined that G should go to the bungalow; the application to lift the RRO is not made with the objective of obtaining a vehicle for G to be transported in (as asserted in LF's statement), but in order to raise funds to thwart the plan the Court has endorsed. LF, it is insinuated rather than stated expressly, is behaving disingenuously.

15. Ms Powell and Mr Mylonas anticipate an adverse impact on the placement at A Home, should the RRO be lifted. Ms Powell has asked to file statements setting out the position of the Home. Ms Powell highlights the social media slogans (which I anonymise but set out in order to communicate their impact and to protect G's privacy). They read as follows: *"#no to[A Home]"* and *"#get[G]HOME".* It is submitted, succinctly and with force, that these hashtags permit of no ambiguity and that a wider trawl of the social media posts is manifestly unlikely to change that. It is entirely clear that LF simply will not accept the judgment. If the assessment at A Home is to be afforded the optimum chance of success, it requires the parents and the staff to have a respectful and constructive working relationship, focusing on G's needs.

16. 'A Home', Ms Powell informs me, is relatively small, with limited staff. The focus, at this juncture, must be on facilitating the move and settling G in. Ms Powell submits that it would be devastating if the placement were jeopardised or sabotaged. I agree. What is contemplated is a highly conflictual situation with a confrontational father, ventilating his perceived grievances in the public domain. It is not difficult to see how generating this kind of environment might alienate and undermine the staff at A Care Home to a degree which might cause them either to withdraw from it, or potentially to terminate it. Amongst their considerations will no doubt be the impact on other residents, families, and care staff. Should this happen, G will not be able to remain in the children's hospital. Her present situation remains entirely unsuitable for her, particularly at this stage in her life and treatment. It must be noted that all the medical team at this hospital have paediatric expertise. G requires adult expertise. It is important, once again, to stress that the move to A Care Home is pivotal to G's future.

17. The legal framework is relatively easy to state, though its application can sometimes be challenging. It is articulated by Lord Steyn in *Re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593* at [17] in the following terms:

> *"First, neither article has as such precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each."*

Thus, the first stage is to identify what the competing rights and interests are which fall to be balanced. In the balancing exercise, there must be a fundamental recognition that what is required is a parallel analysis of the competing rights in issue, in which neither right has precedence. The exercise is therefore one of evaluating evidential weight. The outcome will depend on which right establishes qualitatively greater evidence. Critical to this exercise is a recognition of the fact that the transparency order is there to protect the subject matter of the proceedings, it does not exist to confer general or diverse rights of anonymity. For the avoidance of doubt, and because it has recently been argued in another case, there is no preliminary threshold requiring an applicant to show "good reason" for relaxing the anonymity conferred by an RRO. Explicitly, paragraph 2.4 of Practice Direction 4C, creates no such requirement. Such would, in any event, be irreconcilable with the approach in *Re S (supra).*

18. Mr McKendrick has sought to argue that G has been identified in the media, for many years, as a *"young person with significant disabilities and in respect of whom her family want her to come home after many years in hospital*". He further submits that *"there is no suggestion in the evidence that the publication of this evidence has been at all adverse to [G's] interests or that of the public bodies".* I have been reminded of Peter Jackson J's (as he then was) observation in *Hillingdon LBC v Neary [2011] EWHC 413 (Fam)* at [16] (3): *"it is no one's interests for proceedings to be stultified by the withholding of information that is already in the public domain".* Certainly, there are examples of media coverage of G, centred upon her brave struggle against her disease and also chronicling largely happy milestones in her life.

19. In *PH v Brighton and Hove City Council [2021] EWCOP 63,* Her Honour Judge Hilder relaxed the reporting restrictions in place because she considered that P was already in the public eye and that he was so, precisely because of the matters that formed the subject of those proceedings. In a succinct phrase, she noted *"it is not that the proceedings are the story; it's the story that has moved into the proceedings".* Ms Overman, on behalf of the BBC, also highlights the very recent case of *Manchester University NHS Foundation Trust v Verden and ors [2022] EWCOP 4*. There, Arbuthnot J was emphasising the fact that extensive material in the public domain had not been made known to the Judge when he made the RRO on the 31st December 2021, the date may have some connection with the omission. Arbuthnot J considered it was proportionate to accede to the application to vary the reporting restriction order to allow P's name to be placed in the public domain. William Verden (as he was revealed to be) is a 17-year-old man in end-stage renal failure with the diagnosis of moderate to severe learning difficulties, autism, and ADHD. The evidence was that he had only 12 months left to live on haemodialysis. The application made by the mother, was to launch a public appeal for a living kidney donor, as it was agreed that this was more likely to be successful than a transplant from a deceased donor.

20. The Official Solicitor elicited from William that he would want media coverage or publicity, *"if it means that he will get a new kidney"*. I note that he did not want to see photographs in the press with lines and tubes attached to him during his haemodialysis, nor did he want photographs taken at home. This strikes me as a paradigm example of a balancing exercise that is heavily weighted to the Article 10 conclusion i.e., identification of P.

21. Miss Overman broadly supports LF's application. Her balanced and thoughtful submissions had the considerable disadvantage however, of being advanced both orally

and in writing before she had properly had the chance to consider my earlier judgment. Having been given the opportunity to do so (and taken it), she continued to support the application. She was highly sensitive to the fact that some of the information in the judgment is undoubtedly of a private nature and she told me, and I accept, that the BBC would not report on it. It was tentatively suggested that any reporting of the current proceedings, even in anonymised format, might lead to jigsaw identification of G, given what is already in the public domain. To some degree, this risk is always present, but it strikes me as unlikely, particularly if the argument is evaluated in the context of the earlier passages of this judgment i.e., a planned social media campaign.

22. Unlike the facts in *PH and RH*, this is not a case in which the story has become the proceedings. The proceedings here revolve around a discrete, but very important issue, namely where, with whom, and in what circumstances G should live and at a time, all agree, is now the later stage of her life. It is manifest that G's Article 8 rights are engaged. In the most direct sense, the central issue is her right to family life. Though LF simply will not engage with the key point, I repeat it, G requires a period of decompression, having lived for 14 years in a hospital situation, where the full gamut of her needs outside the hospital, cannot properly be assessed. When they have been, it is hoped by everyone concerned that those needs can be met by a carefully crafted care plan supporting a move to her parents when and if that is assessed as being in her best interests.

23. It is clear from the evidence, analysed in my substantive judgment, that if G were returned home directly from the hospital she would be *"overwhelmed"*. Put in a different way, it is likely that she would have been set up to fail. I emphasise again, a crucial opportunity for G would have been lost which would be unlikely to arise again. Moreover, the type of plan LF is advancing would, I have been told, take some months to put together to facilitate the necessary recruitment (which is a challenge) and training. It is LF's failure to confront this that has led to him finding himself in a position where he has unwittingly become the most significant obstacle to the outcome that he would most dearly wish to achieve i.e., his daughter's return home.

24. LF's case is also, in many ways, the polar opposite to the facts of *Manchester University NHS Foundation Trust v Verden (supra).* In that case, publicity was sought to identify a donor which all agreed was the only opportunity to save William's life. Here, the consensus of the evidence is that G's best interests are met by a contemplated placement in A Home. LF's wish is to subvert that outcome.

25. It follows that in this case, the Article 10 right asserted by the father is to pursue, in the public domain, an outcome which has been assessed as contrary to his daughter's interests. Conducting the balancing exercise, requires an intense focus on the comparative importance of the specific rights being claimed. Here, G's right is to be cared for safely in order to maximise the quality of her life at this stage. It is proposed that she would be looked after and her needs evaluated by an experienced team, who can take on the responsibility and the pleasure of caring for her within a matter of days. Furthermore, all this is driven by a central objective which is to afford her the opportunity of family life in the fullest possible way i.e., by returning her to her parents' home if that is possible, as all hope it will be.

26. LF's right to his freedom of speech is an important one. It is not to be curtailed merely because what he wishes to say to the media is, on all the available evidence, misguided,

and inaccurate, rather it is because it is in direct conflict with his daughter's rights as I have analysed them. LF's freedom of speech, in relation to his daughter's treatment, seriously jeopardises the transition to and the security of this placement. The consequences of this must be confronted directly. It is unlikely that a similar provision would be found locally, and distance would inevitably reduce both the extent and quality of G's contact with her parents. It would significantly diminish the prospect of G being able to return home. That would be a tragedy for her and for her family.

27. In these circumstances therefore, it seems clear that the justification remains for restricting LF's Article 10 rights. It also continues to be a proportionate and necessary intervention. However, I do not regard the balance of rights that I have analysed or indeed the proportionality of the present intervention as being set in stone. It may be, at some stage in the future, both the balance in favour and the proportionality of the RRO may shift. It is not difficult to foresee that a crowd funding initiative, based on wider awareness of the facts, might become an entirely justifiable objective in circumstances where there was a genuine funding issue. There can be no funding issue here because a direct return home is contrary to G's interests. Funding does not arise as an issue. In the event that it does, I have no doubt LF will renew this application.

28. This application falls to be determined in the context of the legal framework set out at para. 17 (et seq). Although it is made, in the course of proceedings initiated in the Court of Protection, pursuant to the Mental Capacity Act 2005, the provisions of that Act do not apply to this exercise. This is not a *'best interests'* decision. It is, as I have said, a parallel consideration of the competing rights and interests involved, in which neither has precedence.

29. Nothing in the above, in any way, causes me to revisit my clear finding that LF and his partner love their daughter greatly and have an enormous amount to offer her. LF's sometimes combative manner is driven, in my assessment, by his understandable perception that he must fight on his daughter's behalf. I have no doubt that there have been times in the past where he has had to. I have found it necessary to express myself in very clear terms to him in order that he understands precisely where his responsibilities lie. I can certainly foresee circumstances where LF's voice in the press and on social media may well be very effective on her behalf. Here, however, his undoubted strengths are mis deployed. They are, in fact, undermining the common objective of all involved, namely, to get G home. This remains a realistic possibility. The time may come when LF will need to broadcast or transmit, for now however, he must listen and receive.