

Mental health, eating disorders and placement of young people

20 December 2022

At Browne Jacobson's first Health & Care Connect conference, lawyers in our Health, Advisory and Litigation team spent time discussing topical issues with clients and key industry contacts. One such topic was a recent uptick in complex eating disorder cases and discussion around the lack of specialised placements of young people with mental health difficulties.

Treatment in hospital vs a return to the community

Cases over the last few years have highlighted that it is not always in a person's best interests to remain on an acute ward, receiving medical treatment.

The case of *Re W (Medical Treatment: Anorexia)* [2016] EWCOP 13, Mr Justice Jackson directed that remaining on an acute ward was not appropriate and that *W* should be discharged into the community with full community support. He mentioned the 'conventional assumption' that remaining in a hospital setting is beneficial to *P*, when in fact clinicians had done everything they could to help *W*. There was unanimous support for it being in *W*'s best interests to be discharged.

Similarly in *Cheshire & Wirral Partnership NHS Foundation Trust v Z Z* [2016] EWCOP 56, medical professionals considered 3 possible options for care. *Z* was 31 years old and had severe anorexia for around 16 years. *Z* had not engaged with treatment in a meaningful way. The Trust considered continuing medical treatment under section 3 of the Mental Health Act 1983 ('MHA'). Hayden J noted "the evidence was that she had a 20-30% chance of success if maintained for 12 months in a specialist unit where she would be forced fed by naso gastric tube, either by sedation or physical restraint."

Hayden J confirmed that it was in *Z*'s best interests to be discharged to the community and the MHA framework. In deciding this, he considered *Z*'s wishes and feelings and *Z*'s doctors experience that *Z* is more likely to comply with treatment when she is not 'subjected to an enforced medical regime.' Hayden J confirmed that by signalling to *Z* that clinicians will withdraw from her life to respect her wishes and autonomy, this may lead to a sense of emotional wellbeing and in some way to prolong her life.

Placement on acute wards in the absence of alternatives

Judges are increasingly drawing attention to the lack of appropriate placements in the community. In *Manchester City Council v (1) K, (2) An NHS Trust (3) J* [2022] EWFC 121, a 13-year-old child who had been admitted to hospital and was medically fit for discharge had remained on the ward for 3 months. *P* was considered to be at high risk of suicide and sanctioned an unregulated, unlawful placement because no lawful placement could be found. Whilst the High Court has the option of sanctioning unregulated placements, the Planning, Placement and Case Review (England) (Amendment) Regulations 2021, Regulation 27A, cast doubt on the legality of such authorisations. This results in a balancing act between *P*'s article 5 rights and the duty imposed on local authorities to safeguard a child's welfare.

The local authority had exhaustively searched for appropriate placements, and Mr Justice Poole noted that there is a lack of therapeutic homes for children who are emotionally and psychologically complex. This case follows many similar cases including *NHS Trust v ST* [2022] EWHC 719 where there was a refusal by the Court to authorise a Deprivation of Liberty on an acute ward.

Care packages for high risk and complex young people are difficult to find. The Court will want to see that the public body responsible for finding a placement has undertaken a sufficient search. We are seeing an increase in recommendations from the Court to directing public

bodies to commit to extensive searches at a national level for appropriate placements and to consider setting up bespoke placements (sourcing accommodation and care providers independently), to ensure P's safety and proximity to family. Even if certain packages aren't viable, it is recommended that the detail of each option is set out, as much as possible.

Applications concerning young people

An application might be made to the Court to authorise care and/or treatment to P, where P and/or other interested parties where P is under 18 and where restrictions are considered extensive or P is refusing care despite the opinions of professionals involved. When P lacks capacity to make a decision on their care arrangements, the proportionality of the actions required to protect P from harm require consideration. For example,

- Do any restrictions amount to a deprivation of liberty (which cannot be authorised by section 5 of the Mental Capacity Act) and is therefore a breach of Article 5 of the ECHR? Consider the extent and duration of restrictions to P.
- Is there any interference with the persons family life which may breach Article 8 of the ECHR?
- Are there objections to the proposed interventions? - Objections from P themselves, P's family or another person interested in P's care and welfare.

Where there is the potential for P to be moved to a less restrictive placement, there will also be the consideration of searches by public bodies to locate a suitable placement for a young person. The application can be a useful vehicle to improve collaboration between the bodies involved.

Practical preparation for Court applications

- Bring matters that may require Court approval to the attention your legal advisors as early as possible.
- Undertake a capacity assessment in respect of the relevant decision (e.g. treatment and associated restrictions (if on an acute ward), care and residence)
- If this isn't an available option, ensure there is a detailed care plan with details of relevant interventions (e.g. physical interventions, removal of personal items etc.)
- Ensure all those interested in P's care and welfare have been consulted about the restrictions.
- Where there are concerns about P's mental health, ensure that P is reviewed by Children and Adolescent Mental Health Services (CAMHS) or the relevant team and, where appropriate, an assessment under the Mental Health Act has been carried out or properly explored.
- Ensure the local authority's safeguarding team are notified of any concerns.

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