Articles

Transfer of proceedings for children aged 16 plus: when to transfer from the Family Court to the Court of Protection?

Hannah Rought-Brooks, *Garden Court Chambers*

Hannah specialises in family law, with particular reference to public law and children. She regularly acts in complex public law proceedings and has experience in all areas of care, supervision, special guardianship and adoption. She also has experience of cases that have transitioned from the Family Court to the Court of Protection. Hannah has also worked in the UK and overseas with organisations working on women's rights and children's rights.

This article will consider questions concerning the welfare of vulnerable children, over the age of 16 years who lack capacity and the cross cutting jurisdictions of the Children Act, the Inherent Jurisdiction of the High Court, and the Court of Protection. When is the right time to transfer a case from the Family Court to the Court of Protection when you have a child who lacks capacity and is aged over 16 years? What are the issues that the court will take into account when considering whether to do so? This article will look at the statutory framework and at the judicial consideration and guidance, as well as highlighting some of the thornier issues that emerge from case law and practice.

The starting point is the statutory framework which can be found in The Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 Art 3. This provides that where proceedings are pending in a court having jurisdiction under the Children Act 1989 that court may direct the transfer to the Court of Protection where it considers that in all the circumstances it is just and convenient to do so.

In deciding whether or not to transfer the proceedings, the court, having jurisdiction under the Children Act 1989, is directed to have regard to:

- whether the proceedings should be heard together with other proceedings that are pending in the Court of Protection;
- whether any order that may be made by the Court of Protection is likely to be a more appropriate way of dealing with the proceedings;
- the extent to which any order made as respects a person who lacks capacity is likely to continue to have effect when that person reaches 18; and
- any other matter that the court considers relevant.[1]

A mirror provision provides that where proceedings are pending in the Court of Protection in relation to a child, the court may direct the transfer of the whole or part of the proceedings to a court having jurisdiction under the Children Act 1989.[2]

The individual needs of a young person

Article 3 was considered by Hedley J in *B (A Local Authority) v RM, MM and AM* [2010] EWHC 3802 (Fam) [2011] 1 FLR 1635, where he stated at para [28]:

1 The Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 Art 3(2).
2 The Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007 Art 2.

> 'That raises the question particularly under Art 3(3)(d) as to what matters the court should take into account in deciding whether to exercise these powers and to adopt this approach. An ex tempore judgment in a case on its own facts is no basis for attempting an exhaustive analysis of these issues; nevertheless, a number of matters suggest themselves, matters which may often be relevant in the relatively small number of cases in which this issue is likely to arise. One, is the child over 16? Otherwise of course, there is no power. Two, does the child manifestly lack capacity in respect of the principal decisions which are to be made in the Children Act proceedings? Three, are the disabilities which give rise to lack of capacity lifelong or at least long-term? Four, can the decisions which arise in respect of the child's welfare all be taken and all issues resolved during the child's minority? Five, does the Court of Protection have powers or procedures more appropriate to the resolution of outstanding issues than are available under the Children Act? Six, can the child's welfare needs be fully met by the exercise of Court of Protection powers? These provisional thoughts are intended to put some flesh on to the provisions of Art 3(3); no doubt, other issues will arise in other cases. *The essential thrust, however, is whether looking at the individual needs of the specific young person, it can be said that their welfare will be better safeguarded within the Court of Protection than it would be under the Children Act*.' [emphasis added]

The background to this case was that the child had been removed from the jurisdiction and Wardship proceedings had been commenced to return the child to the jurisdiction, and on her return, care proceedings had been commenced. There were also differences between the family and the local authority ('LA')about the extent of the AM's difficulties, with the LA asserting that the mother had not accepted the difficulties presented by her profound disabilities and believing that she could be cared for at home. The mother saw it as her cultural, religious and family duty to personally care for AM for life, and while the LA recognised the central role that the family could play in her welfare, they were clear she could not be cared for at home. There was therefore a background of difficulties and tensions between the family and the LA about where AM should live and who is best placed to care for her. There was no agreement about the making of a care order in respect of AM.

Wishing to move on from this deadlock without causing further tension between the family and LA, Hedley J at para [5] stated:

> '. . . there is no profit or need in dwelling on the past as, if ever there were a case in which the Local Authority and family must work together in the future, this is it.'

This then provided for an important reason in this case why the decision was made to transfer this case to the Court of Protection.

> 'Declarations in the Court of Protection avoid all the negative consequences as I see them of making of a care order whilst at the same time, setting the necessary framework within which AM's needs can be addressed.'

Thus on the facts of this case, Hedley J, considered that the particular issues of the case justified an order for transfer under the Mental Capacity Act 2005 ('MCA 2005') and transferred the case to the Court of Protection on his own initiative. The judge also invited the guardian to consider accepting an appointment as litigation friend until the child's 18th birthday, something that is not possible for Cafcass children's guardians.

The continuity of the guardian

The importance of the continuing role of the guardian was also a factor in the decision making process in the case of *Re A-F (Children) (No 2)* [2018] EWHC 2129, where Sir James Munby (sitting as a High Court Judge) decided not to transfer the case to the Court of Protection. The court was determining issues arising from a

judgment concerning the lawful deprivation of children's liberty. The children had particular needs and were already subject to care orders depriving them of their liberty for their own safety. As the last hearing had been in August 2017, this hearing was required to review their situation and determine whether the orders should continue for another year. Two of the children were due to turn 16.

In relation to the main matter before the court, the LA and the children's guardian invited the court to authorise the continuing deprivation of liberty for all the children for a further period of 12 months. There had been no significant change in the specific needs of any of the children who remained under complete supervision and control and were not free to leave their placements. The judge agreed with the LA and the children's guardian that in the case of each child, orders should be made authorising their continued deprivation of liberty for 12 months. (paras [4]–[5] of judgement). These orders would need to be kept under review in accordance with the principles that had been set out in the previous judgement given in this case (*Re A-F (Children) (Restrictions on Liberty)* – see below).

It is perhaps worth noting in passing here that in an earlier judgment of *Re A-F (Children) (Restrictions on Liberty)* [2018] EWHC 138 Fam, [2018] 2 FLR 319, in relation to the same children, Sir James Munby had set out that continuing review is crucial to the continued lawfulness of any 'confinement'. There are required:

- Regular reviews by the LA as part of its normal processes.
- A review by a judge at least once every 12 months. The matter must be brought back before the judge without waiting for the next annual review if there has been any significant change (deterioration or improvement) in the child's condition or if it is proposed to move the child to a different placement.
- The child must be a party to the review and have a guardian.
- If there has been no significant change of circumstances, the review can take place on the papers, though the judge can direct an oral hearing. Directions can be given at the conclusion of the previous hearing as to the form of the next review.
- Generally it is preferable for the proceedings to be concluded at the end of the final hearing and thereafter at the end of each review, rather than being kept open, meaning the LA will have to issue a fresh application for each review.

In *Re A-F (Children)*, in deciding that the cases concerning the two 16 year old children should not be transferred to the Court of Protection, Sir James Munby agreed with the summary given by Hedley J (above) but found that in this case, the proceedings should not be transferred. The judge gave the following reasons:

1. There was no sensible basis for discharging the care orders already in place. The children required the continuing protection of reviews for looked-after children and the support of an independent reviewing officer.
2. Second, the care orders gave the Family Court a continuing, if much reduced, potential role in the lives of the children.
3. Until they approached their 18th birthdays, the children were the responsibility of the LA's children's social care teams, who were much more familiar with the practice and procedure in the Family Court and Family Division than that in the Court of Protection.
4. The children's guardians could continue exercising their role in the Family Court and Family Division, whereas it was doubtful they could act as litigation friends in the Court of Protection.
5. It might be easier to ensure judicial continuity if there was no transfer. (para [12])

In essence therefore, the court was anxious to maintain continuity for the children concerned, noting the importance of maintaining the role of the children's guardian and noting correctly, that they would be unable to continue their role in

the Court of Protection. This case differs from that of R v RM, in that the care orders were already in place and therefore there was no issue as to the 'negative consequences' set out by Hedley J. Instead, the judge noted the protection for the children of reviews for looked-after children and the support of the independent reviewing officer, and the continuing role of the children's social care team and their familiarity with the Family Court.

It is worth mentioning that in the case of *Liverpool City Council v SG (by her litigation friends and parents, J,S and G* [2014] EWCOP 10, Mr Justice Holman considered the question of whether the Court of Protection has the power to make an order authorising the deprivation of liberty of a person who is not a child (ie, who has reached the age of 18) in premises which are a children's home as defined in s 1(2) of the Care Standards Act 2000 and are subject to the Children's Homes Regulations 2001 (as amended). The court found, in a case where there was no disagreement between the parties, that the answer was yes, meaning that there is no bar to a court reconfigured as the Court of Protection continuing the placement of a young person in a Children's home if that is in their best interests. This does not say anything about 16 or 17 year olds, but it seems unlikely that the answer would be different.

Wardship

Another mechanism that has been invoked by the court in circumstances where there are disputes about the ongoing welfare of a child between the ages of 16 and 18, is Wardship under the inherent jurisdiction of the High Court. The Family Procedure Rules 2010 define the 'inherent jurisdiction' as meaning 'the High Court's power to make any order or determine any issue in respect of a child, including in wardship proceedings, where it would be just and equitable to do so unless restricted by legislation or case law'.[3] Wardship may only be exercised over children, whereas the inherent jurisdiction other than wardship may also be used in certain circumstances to protect adults. As soon as the child becomes a 'ward of court' no important step can be taken in the child's life without the court's consent.[4]

The case of *Re F (Adult: Court's Jurisdiction)* [2000] 2 FLR 512, predates the MCA 2005, and found that the mental health legislation did not cover the day-to-day affairs of mentally incapable adults. The court was concerned with a child of 17 years with a mental age of between 5 and 8 years, who was at risk of significant harm if she lived at home with her mother, but was too old to be made the subject of a care order. The Court of Appeal, with Dame Butler-Sloss giving the leading judgement, held that it had inherent declaratory jurisdiction to keep the child in LA accommodation and to restrict and supervise the child's contact with her family.

The legal vacuum that had been identified in *Re F* was filled by the inherent jurisdiction. However, the passing of the MCA 2005 brought about a comprehensive statutory framework setting out how decisions should be made by, and on behalf of, those who lack capacity to make their own decisions. The Court of Protection has jurisdiction to make personal welfare decisions for a person once they reach the age of 16, limited to decisions that P could take if he had the capacity to do so. In *N v ACCG* [2017] UKSC 22, the Supreme Court held that the jurisdiction of the Court of Protection was not to be equated with the jurisdiction of family courts under the Children Act 1989 to take children away from their families and place them in the care of a LA, which then acquired parental responsibility for, and numerous statutory duties towards, those children, and was also not to be equated with the wardship jurisdiction of the High Court.

Despite the extended jurisdiction and decision making powers of the Court of

3 See FPR 2010, 2.3(1). FPR 2010, PD 12D para 1.2, which supplements FPR 2010, Pt 12, Chp 5 'Special Provisions about Inherent Jurisdiction Proceedings', provides examples of inherent jurisdiction proceedings.

4 Butterworths Family Law Service, chp. 51, Wardship and the Inherent Jurisdiction, para 6302.1.

Protection, in a recent unreported case before Mr Justice Holman (November 2019), the inherent jurisdiction and wardship was the preferred way to safeguard the welfare and best interests of a 17 year old. In this case, welfare, placement and contact were in issue in respect of a 17-year-old (T) who lacked capacity. Care proceedings had been issued by the LA but a care order was not agreed by the mother of T. As was the case in *B v RM*, there was disagreement between the LA and T's mother as to the best placement and care arrangements. T's mother believed that she was able to care for T who had severe disabilities and had been placing himself in danger. The court had disagreed and earlier in the proceedings had made an interim care order and removed T from his mother's care to a residential placement. Subsequently, as T was approaching his 17th birthday, the LA had issued proceedings both under the Inherent Jurisdiction of the High Court and for orders in the Court of Protection, taking into account that the court would be unable to make a Care Order once T had reached the age of 17 years. The case came before Mr Justice Holman for a final hearing, and the question for the court was how to best address his welfare needs, and whether the Court of Protection was the appropriate jurisdiction.

Mr Justice Holman determined that orders under the inherent jurisdiction of the High Court and making the child a ward of the court were the best way to safeguard his welfare. Giving a judgement he gave the following reasons for making T a ward of the High Court:

(1) That this would retain the guardian from the Children Act proceedings, and the continuity of that important relationship and her visits to him, together with representation by his solicitor.

(2) The potential delay that could be caused by the need to involve the official solicitor.

(3) The benefit of the court continuing to oversee ongoing decisions over contact and placement through the Inherent Jurisdiction.

The judge approved of the care plan for T and the proposal for him to remain at the residential placement where he was living and had settled. The judge also made an order for the deprivation of T's liberty in strictly limited terms, and adjourned the applications that had been made under the Mental Capacity Act 2005 to just prior to the child's 18th birthday.

When should a transfer be made?

This then addressed the important question for practitioners of at what stage should cases, if requiring the continued involvement of the Court, be transferred to the Court of Protection and what measures should be put in place to ensure a smooth transition and prevent delay. The limited case law gives little guidance on this, and is also fact specific. What is possible to draw out, is the importance attached to retaining continuity for children and young people for as long as possible through the role of the children's guardian and the children's social work teams. Where cases are likely to be transferred, notice should be given to the Official Solicitor as soon as possible before any transfer to the Court of Protection, and assessments carried out in advance of transfer to adult services to ensure that services are in place. Family involvement and support is also crucial for the success of placements and for the welfare of the young people.

In conclusion, it is important for practitioners to be aware of and be familiar with the different jurisdictions, and to note that in cases involving 16–17 year olds who lack capacity, the courts will not assume that the Court of Protection is the appropriate jurisdiction. The courts will consider whether on the facts of a particular case, a child's welfare will be better safeguarded by orders in the Family Court or making orders under the inherent jurisdiction of the High Court.