Neutral Citation Number: [2019] EWHC 935 (Fam)

Case No: FD17P00301

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION
IN THE MATTER OF THE SENIOR COURTS ACT 1981
IN THE MATTER OF THE MENTAL CAPACITY ACT 2005
IN THE MATTER OF RM (A vulnerable adult)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/04/2019

Before:

MS JUSTICE RUSSELL DBE

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Between:

FT	**Applicant**
and	
MM	**1st Respondent**
and	
RM	**2nd Respondent**

(By his litigation friend, the Official Solicitor)

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Alistair Perkins (instructed by **Wilson Solicitors LLP**) for the **Applicant**
MM (the 1st Respondent) attended in person by telephone from the USA
Zimran Samuel (instructed by the **Official Solicitor)** for the **2nd Respondent RM**

Hearing dates: 23rd & 24th January 2019

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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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This judgment was delivered in private. 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.

The Honourable Ms Justice Russell DBE:

Introduction & Background

1. This case concerns RM, a vulnerable young adult man of nineteen who has profound learning disabilities, a citizen of the United States, who presently lives with his father in Texas. Sadly, RM has been the subject of acrimonious litigation between his parents throughout his childhood. Born on 8th September 1999, he is the second of two children; his elder sister NM, was also the subject of the prolonged litigation in the County and Family Courts. In 2006, following a hearing before Her Honour Judge Mayer, a most experienced Family Court Judge, findings were made that their mother (FT), the applicant in these proceedings had been abusive to her children as a result they were removed from her care and placed in the care of their father (MM), the 1st respondent in these proceedings.

2. The applicant (FT) initiated further litigation in 2011 regarding the arrangements for RM and seeking an order, under the Children Act (CA) 1989, for shared care: those proceedings concluded in 2015 when FT's application for shared care was refused and orders were made by Her Honour Judge Mayer (dated 4th March 2015) that RM was to continue to live with his father and FT have limited and supervised contact. In addition, an order was made pursuant to s91(14) CA 1989 that neither parent was to make any further applications in respect of RM during his minority without prior permission from the court. The order of 2006 was subject to an appeal by FT, but the appeal was dismissed; the order 2015 was not the subject of appeal.

3. These proceedings, which commenced not long before RM's 18th birthday, came about because RM was removed from this jurisdiction by his father on 2nd November 2016 to live in the US. The relocation had not been sanctioned by the court and was contrary to the provisions of the order of 4th March 2015. Prior to his removal FT had not, in fact, been taking up contact for some months because she was unwell and so it was not until the end of January 2017 that she discovered that RM was no longer attending his school in London. Police in the UK initiated a "safe and well" check by the police in Tampa, Florida, USA. No concerns were raised. RM was then moved to Texas where MM works and continues to live there with his father.

4. FT now seeks the implementation of the orders of this Court made since RM's removal from the jurisdiction including and specifically orders for RM to be returned to this jurisdiction. The 1st respondent father (MM) has only participated sporadically in the proceedings which FT has continued to pursue, but he has said that he will not bring RM back as he believes it is in his best interests for RM to remain living in the USA. The Official Solicitor (on behalf of RM who lacks capacity) had sympathy for FT as RM's mother and had originally supported FT, largely, it has to be said, because so little was known about RM's care and circumstances in the USA but now considers that RM should not be brought back to England if not solely then primarily, it would seem, for the purpose of further litigation. By the time of the hearing before me the Official Solicitor (OS) had the opportunity to made enquiries in the USA and has concluded that RM is safe and adequately looked after and that is not in his best interest to be returned.

5. Given RM's age the applicant FT filed Court of Protection proceedings which were issued at the time of the hearing in January 2019. The court office had written to the applicant's solicitors to inform them the application falls into a category where permission is required

to start proceedings. I am aware that application was issued on 15th August 2018, but permission to commence proceedings has not been granted by this court.

Representation & Evidence

6. RM is the 2nd respondent and is represented by the Official Solicitor (OS). The OS accepted the court's invitation to act as RM's litigation friend in December 2017. At the hearing before me, the applicant (FT) was represented by solicitors and counsel, the 1st respondent (MM) represented himself and attended only part of the first day of the hearing by telephone. At one point, to the concern of the court, it became apparent that MM was participating in the hearing on the phone while driving his car and the proceedings halted until he told the court he had stopped driving. Overnight MM provided the court, with the assistance of the office of the OS, with documents from the USA in respect of RM's care there and other issues; although some of these had been previously provided. MM did not attend the second day of the hearing. Oral representations were made by both counsel, who also provided written arguments and submissions. The court was provided with a bundle which included documentation from previous proceedings, including the previous judgments of Her Honour Judge Mayer and that of Mr Justice Mostyn.

These proceedings

7. The case was listed for a hearing with a time estimate of 3 days on 22nd January to consider the following (a) whether FT's application pursuant to the inherent jurisdiction (by virtue of the Senior Courts Act 1981) and her proposed application under the Mental Capacity Act 2005 should be stayed and whether the courts of England and Wales should cede jurisdiction to the Probate Court, Harris County, Texas, USA on the basis that it is the more convenient forum (although it is not clear that there were proceedings extant at the time of the hearing and seemed likely that there were not as the US court but the attorney acting for MM in Texas was aware of the court proceedings in England). This being MM's deemed application made by virtue of the order of Mr Justice Mostyn at the conclusion of the hearing before him on 7th August 2017. (b) that subsequent orders directing RM's return, should be varied or discharged; (c) if not, how this court could cause RM to be returned to England and Wales; and (d) the continuation of the freezing order made by Mrs Justice Roberts on 19 December 2017. Mr Justice Mostyn who had previously dealt with the case and had given the judgment previously referred to on 7th August 2017, listed the matter for a hearing on forum. Previously, Mrs Justice Roberts, who had case presided over the matter for over a year, had expressed her concerns about the costs of pursuing this case and observed that a time may come when the steps the court could take in this matter would be exhausted.

8. The OS, as previously observed, had at first, supported the applicant's attempts to implement the order made by Mr Justice Mostyn on 7th August 2017 for the return of RM. The OS as RM's representative has, throughout these proceedings, made concerted efforts to ascertain RM's location in the first instance, and thereafter obtain information about his well-being, and has, as a result, been able to provide the court with much more, albeit piecemeal, information about RM's current living arrangements than that which was before it when the OS first became involved in December 2017. In the interim, of course, RM has reached the age of majority and the orders made in wardship no longer subsist or can be considered capable of enforcement. When Mr Justice Mostyn gave judgment in August 2017 he observed as much, but also referred to the fact that RM would still be subject to

the inherent jurisdiction of the High Court as a vulnerable adult. It must be noted that at that time the judge was unaware of RM's whereabouts or of his welfare, there only having been the relatively cursory "safe and well" check by the police in Florida; nor had His Lordship had the advantage of reading Her Honour Judge Mayer's judgments from the protracted Family Court proceedings.

9. From the time MM first engaged with these proceedings, it was clear that he had no intention of bringing RM back to the UK. This was not unreasonable, for notwithstanding the circumstances and legality of RM's relocation to the USA in November 2016, as observed by Zimran Samuel, RM's counsel through the OS, if RM were to be brought back here, the provision of his care and the nature of that care, even where he would live immediately on his return, is far from clear and remained an separate question for the court. It must be made plain that the court would not and could not countenance placing RM in his mother's care, given the history of the case, as set out in Her Honour Judge Mayer's judgments.

10. The London Borough of Enfield, the local authority which had been involved in the previous proceedings, although no longer a party, had indicated that they would give assistance to the court in providing information as to the kind of care package that would be available to RM if he were to be returned to the UK; but the assistance the local authority could render the court would only be limited as it could not be expected, nor would it be able, to provide specific information about the appropriate care and placement for RM in the absence of a care assessment which would require assessment of RM himself. Thus, far less is known about what would happen to RM if he were forced to return to this jurisdiction than is known about his current living conditions and social work support in Texas. Moreover, there is nothing before the court to suggest that the courts in the USA would force the return of a vulnerable young man, who is a citizen of their country in these circumstances; such information as the court does have from the attorney in Texas representing MM there suggests it is unlikely. It is unsurprising that the position of the OS from the outset of this hearing was that the USA is now the more convenient forum.

11. Moreover, as was abundantly clear, if the court acceded to FT's application and RM was returned to the UK it would be to a temporary placement, and one which is unlikely to best meet his needs in the short to medium term. It was probable that he would be on his own even if accompanied by his father to England and placed with strangers, as the local authority would have no obligation to house MM. Yet this is what his mother asks the court to do to RM. Indeed, when pressed by the court, her counsel accepted that FT would not be satisfied even if it was confirmed by care professionals in the UK that RM was well and properly looked after in the USA, and that she would continue to pursue her application in the Court of Protection. Thus, it would seem that RM, whose own representatives are satisfied that he is being properly and adequately looked after in the USA, is to be returned to the UK largely for the purposes of further litigation at the behest of his mother. The findings of Her Honour Judge Mayer in her three judgments on 24th July 2006, 2nd May 2008 and in March 2015 that FT is obsessed by, and thrives on, court hearings is borne out by this stance, which is driven by her quixotic desire to have RM removed from MM to live with her.

Wrongful removal & habitual residence

12. While in this case there can be no doubt that RM's initial removal from the jurisdiction of England and Wales was wrongful, the development in international law of measures to

prevent the wrongful removal or retention of vulnerable/incapacitated adults and/or securing their return is nascent. There is limited case law on the removal of vulnerable adults to assist this court. The court's attention was drawn to *Re HM (Vulnerable Adult: Abduction)* [2010] EWHC 870 (Fam), [2010] 2 FLR 1057, a case in which Sir James Munby P had no hesitation in finding the wrongful removal of a young woman with impaired capacity by her father to Israel in breach of an order made under the inherent jurisdiction of the High Court.

13. Notwithstanding that decision, the fact is that RM has been living in the USA, where is a citizen, since late 2016 a period of over two years during which time he has reached his majority. It was submitted by the OS on RM's behalf that that the determination of an incapacitated adult's habitual residence is to be assessed by reference to all the circumstances as they are at the time of assessment; that is to say when the matter is before the court. The Court was taken to the case *JO v GO & Ors* [2013] EWCOP 3932. On FT's behalf it was argued that the case did not extend to cases brought under the inherent jurisdiction of the High Court and was limited to Court of Protection (COP) cases; the propriety of this stance is somewhat undermined by FT's application to proceed with Court of Protection Proceedings should RM be returned. As submitted by Mr Samuel, a straight reading of the words of Sir James Munby at [21] does not suggest that his decision is limited to COP cases; there is no ambiguity in his words: but even if there were ultimately it is COP proceedings that the court would be considering. The words are quoted below.

"There is one final point. Counsel are agreed in submitting, and in my judgment the submission is correct, that determination of an incapacitated adult's habitual residence is to be assessed by reference to all the circumstances as they are at the time of assessment. In other words, the principle of perpetuatio fori has no application in this context. Accordingly, the relevant date for determining PO's habitual residence is the date of the hearing, July 2013, and not the date when JO made her application, November 2012."

14. Mr Samuel went on to submit that habitual residence for purposes of Schedule 3 to the Mental Capacity Act 2005 has the same meaning as under the 2000 Hague Convention, where the doctrine of perpetuatio fori also does not apply. The court was referred to the observations made in the Explanatory Report to the Convention; https://assets.hcch.net/docs/1509ab33-c2fe-4532-981c-7aa4dad9ba45.pdf. Paragraph 51 sets out that where the change of habitual residence of an adult from one State to another occurs at a time when the authorities of the first habitual residence are seized of a request for a measure of protection, the perpetuatio fori ought to be rejected, in the sense that the change of habitual residence ipso facto deprives the authorities of the former habitual residence of their jurisdiction and obliges them to decline its exercise. This court can see no reason in law to depart from this approach in the exercise of its inherent jurisdiction pursuant to the Senior Courts Act 1981 and the principles of European Law which govern the court's jurisdiction.

15. The hearing before me focused in part on whether there was a deficit in the evidence, about RM's care and life in Texas, which prevented the court from making a final determination on the applications. MM has provided some information both before and during the hearing (much of the material provided during the hearing was in fact duplication of information that had been provided previously) including information from Texas, some generic (as to the provision of facilities and resources for adults with disabilities) and some specific to RM himself. In addition, there was information that had been gathered and filed over the preceding year.

16. It must be accepted that the court does not have a detailed analysis and report, such as might have been produced by a local authority when preparing a care plan, equally it must be accepted that a comprehensive overview is unlikely to be obtained. There is, nonetheless, sufficient evidence for this court to conclude that RM is habitually resident in the USA having lived there for over 2 years, has a settled life in Texas where he lives with his father, is attending school and is seen by his doctor and other professionals who are providing medical and social care. I have already noted in the course of this judgment that any further evidence which the court was able to obtain, would not satisfy the applicant as her goal is forcing the return of RM to this jurisdiction, regardless of his best interests, to pursue a case in the Court of Protection.

Appropriate forum

17. If I am wrong about habitual residence, then I find that most appropriate forum to litigate RM's future (if any litigation is necessary) is the court in Texas. The OS, on RM's behalf, supports the sharing of information about RM and the proceedings in the UK with the Attorney Ad Litem in Texas and the court in that state to provide a smooth "handover" over the case in RM's best interests. It is suggested that FT is able to engage with the Texan proceedings to a greater extent than she will admit; I am unable to properly evaluate that submission on the evidence before me, as I did not hear evidence from FT but observe that she has been able to continue pursuing her case, with the benefit of public funding, in this jurisdiction and has shown no disinclination to stop; hence the s91 (14) Children Act 1989 order made in the Family Court. I can only conclude that that same determination will continue to assist her in participating in any proceedings in Texas.

18. The 1st respondent's attorney in Texas has been helpful as the court saw from the note of the advocates meeting which took place on 17th January 2019. He has explained in detail the nature and procedure of the Texan court at a previous telephone conference on 28 September 2018, to the solicitors acting for RM and FT. The welfare officer appointed in the Texan court will able to collect information to assist that court and the applicant can participate in that process. While it is accepted that the Texan court has limited information and does not appear to have the relevant judgment of Mr Justice Mostyn, the proceedings there are at an early stage, and as, it must be observed that judgment was given at a time when the court did not have the evidence in respect of RM's circumstances and care in Texas that it has now. The lack of disclosure of documents from the proceedings in the courts in this jurisdiction can be easily remedied.

19. The matter has now been before this court for an over two years at considerable cost to the public purse with no end in sight. Even if this court concluded that it was in RM's best interests to have him brought back to this jurisdiction there is no readily available legal mechanism with which implement such a decision. Other ancillary orders and measures could, in theory be made but those that have including a freezing orders and the threat of committal have not been successful in securing the respondent's compliance with orders made for RM's return. In addition, as long ago as 22nd September 2017, an email was received from the Foreign and Commonwealth Office to the effect that they had spoken to Karin Wallace, Chief of Special Consular Services of the US Embassy; Ms Wallace had explained that it had been established that RM is a US Citizen by birth, and that there are no treaties between the USA and the UK with regards to returning him to the UK. There is therefore no action the USA authorities can or will take to return RM to this country.

20. This court has in mind the case of *Re MM (A Patient)* [2017] EWCA Civ 34 when Sir James Munby P accepted that there may be little that the court could do; there, in an appeal from the Court of Protection the appellant had been ordered to facilitate MM's return to this jurisdiction, the court having found (on a number of occasions) it to be in MM's best welfare interests to be cared for in the south west of England. The parties compromised the appeal and the court was asked to approve a consent order, allowing the appeal, on the basis that (i) the order made had become otiose and (ii) it would be futile to subject the appellant to further coercive orders. Sir James Munby said at paragraph 14, *"…there are limits to how far the court can go in seeking to coerce the obdurate. In the first place, as I went on to observe in* Re Jones*: 'I have to recognise that the court – and this is a very old and very well-established principle – is not in the business of making futile orders.'"* Further court orders would appear to have little or no prospect of success, and in any case, there are good grounds for finding that a return to this jurisdiction are not in RM's best interests unlike MM in the above case.

21. I do not consider that there is any likelihood that further orders to try to bring RM back to this jurisdiction would be any more successful than they have been heretofore. The court is not in the business of making futile orders particularly where the subject of the proceedings is likely to suffer detriment and harm were he returned with nowhere to live and to an uncertain future. Moreover, having decided as I do that RM is now habitually resident in Texas there is a further limit to this court's jurisdiction for unlike the case of *Al-Jeffery v Al-Jeffery (Vulnerable Adult: British Citizen)* [2016] EWHC 2151 in which Mr Justice Holman confirmed for the that the High Court can exercise its inherent protective jurisdiction over a vulnerable (but capacitated) British adult on the basis of their nationality, even if they are not habitually resident in England and Wales, RM is a US national which means if habitual residence has changed to the USA, it is not obvious what jurisdiction the High Court can be said to retain.

22. I have referred to the doctrine of perpetuatio fori (paragraphs 13 & 14) above because I accept that it is could be seen as unacceptable for the 1st respondent to succeed because RM is now settled into life in Texas. As argued in in child abduction cases the doctrine is applied to stop that the abductor relying their breaches of court orders to found a case that the child has subsequently settled in another jurisdiction; but RM is an adult and the doctrine does not apply. The court cannot ignore the reality that as a matter of law decisions about RM's welfare now should be made in Texas. Following *JO v GO & Ors* [*ibid*] it is possible for a vulnerable adult's habitual residence to change during the currency of proceedings, and this court although the court of original habitual residence no longer has jurisdiction. The submission that there is no mechanism to freeze habitual residence for a period of time by issuing proceedings made on behalf of OS has force, the court can lose jurisdiction over such a vulnerable adult who is a foreign national has been abducted even if proceedings are brought in England and Wales if their abductor keeps them away from this jurisdiction for a sufficient length of time.

23. The authorities in Texas are aware of RM's presence and are engaged with him, although his full care regime has not been set out in full the information received, I find that when pieced together the evidence is that RM is receiving the medical, educational and social care he needs. There is no evidence as to what the extent of the emotional impact on RM would if he were to be removed (quite probably from his father's care given that the 1st respondent has no suitable accommodation in London) and placed in the UK. It is more

than possible to infer that he is very likely to be distressed and suffer emotional harm in the process.

24. Guardianship proceedings are already initiated and are to proceed in the appropriate court in Texas as has been made known during these proceedings. There is no evidence before the court to gainsay the information and material which supports the OS's submissions, and that of his father, that RM's needs are being met other than the negative assertions of the applicant; these assertions do not of themselves amount to evidence other than evidence of her continued determination to pursue litigation regardless of the cost to RM. The court has sympathy with her desire to have contact with her son, but the practical reality is that his future is in the USA and further information about RM's welfare needs to be pursued in Texas and not in the High Court in London. RM's future as an adult lies in the USA and these proceedings are to come to an end in recognition of that fact and of the reality of this case.

25. It follows that there will be no proceedings in the Court of Protection and no directions will be given.

26. This is my judgment.