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 child 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.

Neutral Citation Number: [2020] EWHC 3476 (Fam)

Case No: FD20P00804

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

IN THE MATTER OF THE INHERENT JURISDICTION
AND IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF THE CHILD, CK

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 December 2020

Before :

Mr Justice Peel

- -

Between :

Great Ormond Street Hospital for Children NHS Foundation Trust — **Applicant**

- and -

MK (by her litigation friend, the Official Solicitor) — **Respondent**

- -
- -

Miss Emma Sutton (instructed by Hill Dickinson LLP) for the Applicant
Mr Rhys Hadden (instructed by Bindmans LLP) for the Respondent, by her litigation friend the Official Solicitor

Hearing date: 16 December 2020

- -

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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Mr Justice Peel :

1. This application for authorisation of medical treatment comes before me in the Urgent Applications list. It is unopposed. A point of perhaps wider interest to practitioners has emerged about the use of a child arrangements order to confer parental responsibility on the close relative with whom the minor lives, so as to avoid the need for further such applications where there is agreement as to the way forward.

2. CK is 7 years old. The undisputed medical evidence is that she suffers from:
   i) Supravalvar aortic stenosis. This occurs when narrowing occurs just above the heart's aortic valve which reduces or blocks the blood flow into the heart. It can be life threatening if severe.
   ii) William's Syndrome with global developmental delay;
   iii) Recurrent respiratory infections; and
   iv) Cow's milk protein intolerance.

3. It is apparent that she faces a number of challenges in daily life. She has a learning disability and attends a special school. Her grandmother during the course of this hearing described her as "not a normal 7 year old", although this does not in any way diminish either the love felt for CK, or CK's ability to enjoy a meaningful life with likes and interests including music, going to the beach and watching children's television programmes.

4. Great Ormond Street Hospital for Children NHS Foundation Trust ("GOSH"), by application dated 8 December 2020, seeks from the court a declaration that it is lawful and in CK's bests interests to undergo open heart surgery on 23 December 2020. he would need to be admitted to hospital the day before, on 22 December 2020. As the issue is a question that has arisen in connection with an aspect of parental responsibility for a child, the relief sought by GOSH is a combination of a specific issue order under section 8 of the Children Act 1989 ("the Act") and declaratory relief under the inherent jurisdiction (*Re JM (A Child)* [2015] EWHC 2832 (Fam) applied). As a preliminary issue, I granted permission to the GOSH to bring its application due to the serious nature of the proposed application (life sustaining medical treatment for a child) and its connection to CK as the treating hospital.

5. CK's mother, MK, has a learning disability and does not have capacity to consent to the proposed treatment. She is unable to retain the information relayed to her about the benefits and complications of the proposed surgery and does not appear to follow the "concept" of the operation. She has consistently said that she agrees with it, although this appears to be based on her understanding that her parents consider that it should take place. The Official Solicitor agreed to act as her litigation friend on 14 December 2020. She spends some time living with her parents, but irregularly and sporadically, frequently leaving for weeks or months on end to stay with friends.

6. CK's maternal grandmother, GK, is, together with her husband, in all practical terms, CK's main carer and has been since the birth of CK. They are both 58 years old. GK does not have parental responsibility, a situation which will change if she obtains the Special Guardianship Order for which she has recently applied in the Family Court.

The application is due to be determined in March 2021. Given that it is unopposed and clearly in CK's best interests, I assume that the order will be made.

7. CK's father is unknown.

8. Accordingly, there is nobody with parental responsibility currently able to give lawful consent to the proposed surgery.

9. CAFCASS have been notified of the application and have confirmed that their involvement is unlikely to be necessary as there is no best interests dispute. I agree with their approach.

10. At this hearing MK, through the Official Solicitor, supported the application. GK, although unrepresented, has likewise consented. I am satisfied that she understands the nature of the proposed medical treatment, the reasons for it and the risks associated with it.

11. At the conclusion of the hearing I told the parties that the application would be granted and that, given the importance of the issue to CK, I would provide a short written judgment. This is the promised judgment.

12. I have read the contents of the bundle and in particular the witness statements of NY, consultant surgeon and head of clinical service for cardiothoracic at GOSH, and LS, consultant cardiologist at GOSH.

13. CK has been known to GOSH since May 2019. Various investigations have been carried out to arrive at the current diagnosis, including in particular a sedated echocardiogram on 7 October 2020.

14. On 22 October 2020 the multidisciplinary team at GOSH decided that CK should receive cardiac surgery. Since then, meetings have taken place with the family on 30 November 2020 and 4 December 2020. Without surgery, the narrowing will progress, which can lead to thickening of the heart muscle and ventricular hypertrophy. There is an increasing likelihood of damage to the heart outlet valve, coronary arteries, and heart muscle. There is, accordingly, an enhanced risk of collapse and sudden death, which statistically stands at 25 to 100 times higher compared to the matched population.

15. There is only one treatment option. The point of treatment would be at a localised hourglass deformity of the main body artery. The means of treatment would be open heart surgery with a heart lung bypass machine to enlarge the narrow area with patches. The 30-day survival rate is 97.3%. Long term survival is reported at 70-97% with good quality of life and freedom from re-operation at 65% after 20 years. There is a small risk of damage to other organs in the body, although this is often only temporary in nature without long lasting consequences.

16. The first available date for the proposed operative procedure is 23 December 2020. If it is not carried out then, there is an increased risk of collapse and death. The medical evidence is that it is imperative for the surgery to take place then, and not be delayed. The situation is, accordingly, one of considerable urgency.

17. The law is not controversial. I gratefully adopt Mr Justice Macdonald's distillation of the applicable principles in **University Hospitals Plymouth NHS Trust v B (A Minor) (Urgent Medical Treatment) [2019] EWHC 1670 Fam**:

> "13. In *Re W (A minor: Consent to medical Treatment)* [1993] 1 FLR 1 Balcombe LJ observed as follows:
>
> > "One must start from the general premise that the protection of the child's welfare implies at least the protection of the child's life. I state this as a general and not as an invariable premise because of the possibility of cases in which a court would not authorise treatment of a distressing nature which offered only a small hope of preserving life. In general terms however, the present state of law is that an individual who has reached the age of 18 is free to do with his life what he wishes, but it is the duty of the court to ensure so far as it can that children survive to attain that age?To take it a stage further, if the child's welfare is threatened by a serious and imminent risk that the child will suffer grave and irreversible mental or physical harm, then once again the court when called upon has a duty to intervene."
>
> 14. Within this context, law that the court must apply when determining whether to grant the relief sought by the NHS Trust is well settled and can be summarised as follows (drawn from in particular *In Re J (A Minor)(Wardship: Medical Treatment)* [1991] Fam 33, *An NHS Trust v MB* [2006] EWHC 507 (Fam), *Wyatt v Portsmouth NHS Trust* [2006] 1 FLR 554 and *Kirklees Council v RE and others* [2015] 1 FLR 1316:
>
> > i) The paramount consideration of the court is the best interests of the child. The role of the court when exercising its jurisdiction is to give or withhold consent to medical treatment in the best interests of the child. It is the role and duty of the court to do so and to exercise its own independent and objective judgment;
> >
> > ii) The starting point is to consider the matter from the assumed point of view of the patient. The court must ask itself what the patient's attitude to treatment is or would be likely to be;
> >
> > iii) The question for the court is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken;
> >
> > iv) The term 'best interests' is used in its widest sense, to include every kind of consideration capable of bearing on the decision, this will include, but is not limited to, medical, emotional, sensory and instinctive considerations. The test is not a mathematical one; the court must do the best it can to balance all of the conflicting considerations in a particular case with a view to determining where the final balance lies. In reaching its decision the court is not bound to follow the clinical assessment of the doctors but must form its own view as to the child's best interests;
> >
> > v) There is a strong presumption in favour of taking all steps to preserve life because the individual human instinct to survive is strong and must be presumed to be strong in the patient. The presumption however is not irrebuttable. It may be outweighed if

the pleasures and the quality of life are sufficiently small and the pain and suffering and other burdens are sufficiently great;

vi) Within this context, the court must consider the nature of the medical treatment in question, what it involves and its prospects of success, including the likely outcome for the patient of that treatment;

vii) There will be cases where it is not in the best interests of the child to subject him or her to treatment that will cause increased suffering and produce no commensurate benefit, giving the fullest possible weight to the child's and mankind's desire to survive;

viii) Each case is fact specific and will turn entirely on the facts of the particular case;

ix) The views and opinions of both the doctors and the parents must be considered. The views of the parents may have particular value in circumstances where they know well their own child. However, the court must also be mindful that the views of the parents may, understandably, be coloured by their own emotion or sentiment;

x) The views of the child must be considered and be given appropriate weight in light of the child's age and understanding."

18. Having considered the evidence and the legal principles, I have reached the clear conclusion that the proposed treatment is consistent with CK's best interests. There is a strong likelihood that it will reduce, by a significant degree, an otherwise life-threatening condition. Although the proposed surgery is not entirely free of risk, such potential for risk is far outweighed by the potential for benefits. To refuse the application would, by contrast, seriously compromise her health to the point where there is a substantial enhanced risk of death. The view of GOSH and the treating clinicians is unanimously supportive of the application. It is consented to by all interested parties. I therefore grant the application.

19. There is a possibility that further surgery or other treatment will be required. As things stand, and prior to the anticipated grant of Special Guardianship status to GK in March 2021, an application to the court will be required on each such occasion for authorisation of such treatment. This is costly, and onerous, on the parties, particularly in circumstances where the history suggests GK's views will likely be aligned with those of GOSH.

20. In order to avoid this, the parties invite me to make a child arrangements order under s8 of the Act that CK shall live with GK, which in turn would confer on GK parental responsibility by s12(2) of the Act. GK is entitled to apply by s10(5B) of the Act in that she is a relative with whom CK has lived for 1 year prior to the deemed application made before me today. A child arrangements order would plainly reflect the reality of the situation, which is likely in any event to be confirmed in March 2021 by the Special Guardianship Order. Further, it is apparent that the lack of a person with parental responsibility who is able to provide lawful consent has hampered provision of medical care for CK, in particular, generating delay at GOSH which the clinicians there are anxious to avoid. That is wholly unsatisfactory, and inimical to CK's welfare. Taking into account the paramountcy principle and the welfare checklist, I am entirely satisfied that it is appropriate to make an order that CK lives with GK.

21. I am therefore clear that, on the facts of this case, the use of a "live with" child arrangements order in favour of GK so as to confer parental responsibility on her and obviate the need for further court applications (absent a dispute between her and GOSH) is appropriate. This may be a useful course of action in other cases where the minor lives with a close relative who does not have parental responsibility. Of course, the court must always be satisfied before making a child arrangements order that it is in accordance with the statutory principles; although plainly satisfied in this case, it may not always be so.

22. Finally, I would like to pay tribute to (i) the sensitivity and care shown to CK and her family by GOSH, and in particular, the treating clinicians; and (ii) the immense love and dedication for CK shown by GK. I wish everyone, and especially CK, the very best outcome from the surgery on 23 December.