



Neutral Citation Number: [2025] EWCA Civ 132

Case No: CA-2024-001437

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM HHJ BEDFORD**  
**SD23C50244**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 17/02/2025

**Before:**

**SIR ANDREW McFARLANE**  
**[President of the Family Division]**  
**LADY JUSTICE KING**  
and  
**LORD JUSTICE ZACAROLI**

-----  
**Between :**

**West Sussex County Council**  
**- and -**  
**AB [1]**

**Appellant**

**CD [2]**

**Respondents**

-----  
**Mr George Butler** (instructed by **West Sussex County Council**) for the **Appellant**  
**Ms Maria Hancock, acting pro bono** (instructed by **Danielle Grinsted, Good Law Solicitors LLP**) for the **1<sup>st</sup> Respondent**  
**Mr Leo Cogin** (instructed by **Spearpoint Franks Solicitors Ltd**) for the **2<sup>nd</sup> Respondent**

Hearing date: 12 November 2024  
-----

**Approved Judgment**

This judgment was handed down remotely at 10.30am on 17<sup>th</sup> February 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....



**Sir Andrew McFarlane P:**

1. CD, who is now 17 years old, has complex needs and is a most troubled young person. Over the last two years her behaviour has been so concerning that she has been detained for periods under the Mental Health Act 1983. Despite the impressive care and commitment of her mother [‘AB’], it is accepted that she is, and has been for some time, beyond parental control. Since July 2023, the local authority has had authority under a series of deprivation of liberty orders [‘DOLs orders’] to protect her and others from harm by restricting CD’s liberty. In November 2023, the local authority applied for a care order under Children Act 1989, s 31 [‘CA 1989’] and, from that time, CD was the subject of an interim care order.
2. An unusual feature of the case is that, despite the substantial challenges presented to those seeking to care for and support CD, and partly because no alternative placement could be found, she has been accommodated in her mother’s home for the past 11 months. AB works full time and, in any event, additional carers are required for CD. As a result care is provided in AB’s home by a rota of professional carers, with at least two carers being on duty at any one time 24 hours per day.
3. In June 2024, HHJ Bedford, sitting as a deputy High Court Judge, continued the DOLs order on CD and, on 7 June, following a contested hearing, he placed her in the care of the local authority under a final care order. The focus of this appeal, which is brought by the local authority and supported by AB, is upon that latter decision. The appellants assert that, in circumstances where CD’s entire care package is authorised and regulated within the DOLs order, and where the authority and other agencies have statutory duties to provide the care that CD needs, a care order was neither necessary nor proportionate. The appeal is opposed by the children’s guardian, albeit that some of the local authority’s criticisms of the judgment are accepted.
4. Before embarking on a more detailed description of the case, it is right to make it clear that the appeal is mounted solely on grounds of proportionality, based on the specific facts of this unusual case and the approach of the judge in his judgment. No discrete matter of law arises for determination. It is not unusual for a DOLs order to be combined with a care order, and there is no legal impediment to doing so. I would also stress that, whilst CD is accommodated at home, the circumstances of this case are separate and distinct from those that are normally encountered when a child is placed at home under a care order and which were the subject of this court’s decision in *Re JW (Child at home under Care Order)* [2023] EWCA Civ 944. In the *Re JW* cohort of cases, a child in care is placed at home often with minimal monitoring or interaction with the social services. The contrast with the present case, where at least two carers are permanently present in the family home, is stark. Nothing that is said with respect to the approach to the specific circumstances of the present case can have any direct relevance to the more ordinary ‘care order at home’ cases being considered in *Re JW*.

**The factual context**

5. CD is an adopted child. Her birth mother is recorded as having alcohol problems and both birth parents had difficulties with their mental health. CD was adopted in 2012 (by age 5) by AB. CD was already, by then, identified as a vulnerable child. The scale of CD’s difficulties is demonstrated by the fact that she has been diagnosed as

suffering from dyslexia, dyscalculia, misophonia (sound sensitivity syndrome), non-epileptic seizure, Autistic Spectrum Disorder (ASD), ADHD and complex PTSD. She also suffers from disordered eating [SB/80], Foetal Alcohol Spectrum Disorder, depression, anxiety, a moderate learning disability and developmental trauma.

6. The chronology of CD's significant behavioral difficulties goes back to 2017. In March 2023 the local authority formally identified her as 'a child in need'. For nearly a year in 2022/3 she was detained under the MHA 1983, s 3 and the first DOLs order was made following her discharge from hospital in July 2023.
7. When proceedings commenced, the local authority care plan was to place CD in a specialist residential placement. However, it was not possible to find a placement to meet her needs. The authority therefore commissioned carers to reside at home with the mother's consent. This was for 24 hours and, initially, with 4:1 supervision. At a review hearing on 19 January 2024, the local authority recommended that, with AB's agreement, the care plan should continue to be delivered at the family home.
8. Care proceedings were issued in November 2023. The local authority's application was based upon the s 31 statutory threshold being satisfied on the ground that CD was 'beyond parental control'. The threshold was accepted in full by AB on that basis. CD was assessed as having suffered significant harm because of her intrusive thoughts and the complexities of her neurodivergent thinking which made it likely that would suffer further significant harm.
9. Since her placement at home, CD has had a number of short further hospital admissions. Her behaviour continues to be challenging and it is clear that she is, sadly, going to require intensive support once she reaches adulthood during the coming year. The local authority is already planning to issue parallel proceedings under the Mental Capacity Act 2005 which can dovetail with the DOLs proceedings under the inherent jurisdiction which will fall away when she reaches her 18<sup>th</sup> birthday.
10. AB, who, it seems to me, has acted in a wholly admirable manner towards her daughter throughout these troubling years, is fully on-board and supports the local authority's care plan. In terms of the elements of the plan, it is accepted that nothing will change whether a care order is, or is not, made.

### **The judge's decision**

11. Before the judge, the local authority submitted that there was no need for either a care order or a supervision order. As a young person who had been detained under the MHA 1983, CD was entitled to support under s 117 of that Act. The authority's case was that the s 117 duty, coupled with CD's status as a child in need, would, with the mother's continued cooperation, mean that the full care package would continue to be provided without the need for a care order. In addition, CD, having been a child in care under the existing interim care order, would qualify for Personal Adviser support under the Care Leavers Regulations 2010 once she reached the age of 17½ or 18 years. The DOLs order was a free-standing provision made under the inherent jurisdiction and was in no manner dependent upon there being a care order.

12. At the hearing, although AB accepted that the s 31 threshold criteria were met on the ground of being beyond parental control, she supported the local authority's opposition to the making of a care order. The children's guardian, who had initially recommended a 12 month supervision order, revised her position shortly before the hearing to one of inviting the court to make a full care order.
13. It is of note that, partly it is said because of her very adverse reaction arising from her experience as a child in care up to the age of 5 years, CD had not been informed that she was currently subject to an interim care order and, if a care order were made, it was not thought to be in her interests to tell her that that was the case.
14. In a conspicuously careful and thorough judgment, the judge rehearsed the background and, in particular, he stressed the following aspects of the agreed facts:
  - a) CD was beyond parental control;
  - b) She cannot be safely managed at home, or in a hospital, without significant support and the current care package being in place;
  - c) The judge listed in full the examples set out by the local authority of complex and risk-taking behaviours for which CD had been admitted to hospital in order to demonstrate 'the great difficulties which [CD] and, indeed, her mother have faced in recent months';
  - d) The judge gave full details of the degree of supervision required under the DOLs order in order to demonstrate the extent to which the court had felt it necessary to use the inherent jurisdiction to protect CD. For example, she must be watched whenever she is showering or using a toothbrush, soap, mouthwash or a razor. All cutlery is removed immediately after use at mealtimes. If she leaves the home without supervision, the staff are to call the police immediately.
15. The judge was clear in setting out the reasons why he took a contrary view to that of the local authority and AB in holding that a care order was necessary. In summary those reasons were:
  - i) A care order would place the local authority under an 'obligation to provide services under the different statutory regimes' [paragraph 22];
  - ii) In the event that AB's position were to change, so that she no longer accepted the provision of the care plan, the local authority indicated that, in those circumstances, they would instigate fresh care proceedings. This was a state of affairs which caused the judge 'significant concern' [paragraph 29];
  - iii) The children's guardian recommended that a care order was required. The judge set out the guardian's analysis in detail and stated that he agreed with it.
16. In relation to (i), the judge recorded that CD needed to continue to receive services from:
  - a) The local authority as a child in need;

- b) The local authority under MHA 1983, s 117;
- c) The local authority as a qualifying person under the Care Leavers Regulations;
- d) The local Child and Adolescent Mental Health Service [‘CAMHS’];
- e) The Sussex Family Eating Disorder Service;
- f) The West Sussex Adoption Support Team (for AB);
- g) In due course, the local authority Transition Panel as she moves to Adult Social Care.

In relation to (g), the judge accepted the guardian’s view that the transition to adult services can be difficult and ‘if the local authority continue to share parental responsibility, there is potentially more support available to CD to ease this process.’

More generally, at paragraph 53, the judge stressed the need for ‘complete compliance’, both by the local authority and AB, with the complex care plan to ensure that services are in place and being accepted.

17. In regard to (ii), the need for the local authority to issue fresh care proceedings in the event of AB no longer agreeing to the care plan, the judge endorsed the guardian’s analysis [at paragraph 39]:

‘There is a risk that AB’s cooperation with the multidisciplinary network and current care plan might not continue particularly if her previous feelings about this intrusion into family life starts to take its toll again, or if AB and/or CD become dissatisfied with the input. In that event, if the local authority had to make a further application, this would feel more adversarial than continuing the current status quo. CD’s 17th birthday is [in October 2024]. Without a care order in place then, if AB disagrees with the care plan, the local authority will not be able to exert any influence. It will not be possible to apply for a care order. I pause to say that, in my view, that is a crucial and critical factor.’

18. At paragraph 55 the judge noted that there was evidence of non-compliance by AB in the past and at paragraphs 56 to 58 he set out his analysis of point (ii) as part of his overall conclusion:

‘56. A lack of the planned support arising out of any cause of its being reduced could be catastrophic for CD and even fatal. I am absolutely satisfied that AB is a completely capable mother and I make no criticism of her. However, I am also satisfied that she needs the maximum support and that I should do nothing to jeopardise that. I am also cognisant of the likelihood that, as in the past, there will be times when her decision-making is different from that which CD’s welfare requires in that it differs from that identified by the objective and expert professionals. The court considers its range of powers and does so carefully and comprehensively. Should there be a care order, the care order will bring all that is set out in the amended care plan which I have required and will do so with the statutory responsibility as defined by CD being a child in the care of the local authority. The current situation is said to be that the local authority will continue

to commit its resources is as per its stated plan and will do so throughout CD's status as a child in need. However, that latter regime will not guarantee the access to the totality of the services which the local authority is currently offering.

57. I ask myself whether a care order would be a greater interference in terms of the mother and CD's right to respect for family life. The package is already in place. The interference comes from that package, not the form of order behind it, but a care order will galvanise the local authority's stated commitment to it and reduce the vulnerability of the package to any understandable but wrong departure from it by the mother. Crucially, the local authority accepts that in the event of a deterioration in the situation, it would be necessary to apply for a care order via a fresh application.

58. In my judgement, given the way in which history shows that CD's difficulties come and go, there is every possibility that such a deterioration would be after CD's 17th birthday, in which case, it would not be possible for the local authority to apply for the order which it says would be its reaction to any deterioration in CD's situation. The decision is finely balanced but I am clear that to give CD and her mother, although it is unpalatable, the best chance going forward, I should do nothing to place them at risk of a lessening in the local authorities responsibilities to CD.'

19. With respect to (iii), after setting out the guardian's analysis in detail, the judge concluded at paragraph 45:

'The guardian goes on that in the event of parental responsibility vesting solely with AB, the guardian questions how AB can be expected to manage taking responsibility for the restrictions considered necessary to safeguard CD which are likely to be contrary to CD's wishes. Having considered at length the factors for and against an order, the guardian is of the view that in the difficult circumstances of this case, CD's safety requires the continuation of the local authority sharing parental responsibility for CD by way of a care order. I have considered the guardian's identification of the points which she considers relevant and I agree that she has identified correctly the advantages and disadvantages of the alternative courses before the court.'

20. Finally, at paragraph 60, the judge refers to the fact that a deliberate decision had been taken not to inform CD that she was currently subject to an interim care order or may be subject to a final care order because of concern that this may have an adverse impact upon her. He described the potential for upset if told of the order as 'conjecture' and concluded:

'Even if upset, I am satisfied that it should be possible to mitigate that upset and that even if it is not possible to do so, then on balance it is still right that a care order should be made, such are the advantages which flow therefrom.'

## **The case on appeal**

21. Mr George Butler, counsel for the local authority, relied upon 5 grounds of appeal. In reality, grounds 1 to 4 were a statement, in different forms, of the local authority's overall assertion that making a care order was disproportionate, not the least interventionist order and was not necessary in this case. The final ground was that the judge had been wrong to make a care order to ensure that the care plan was fully delivered.
22. More particularly, the local authority submitted that the judge's reference to the mother's past behaviour did not justify holding that she may act in a way to jeopardise the care plan in the future was said not to be justified. The evidence of AB's previous non-compliance consisted of her taking objects to the hospital (a duvet and papers with staples in them), the fact that she has not always agreed with the professionals, and the fact that AB had not permitted the guardian to see CD in the week before the final hearing. Mr Butler submitted that these actions were given too much weight by the judge, when set against the clear commitment by AB to the overall package of the course of a significant period.
23. Further, Mr Butler submitted that it was wrong, as a matter of law, for the judge to make a care order so as to 'oblige' or 'galvanise' the local authority to deliver the care plan. He relied upon this court's judgment in *Re JW* where, at paragraph 37, I said:

'it would be wrong to impose an order which was not in the interests of a child simply to encourage a local authority to perform its statutory duties towards a child in need.'

Mr Butler drew attention to the legal framework under CA 1989, Part III, ss 17, 20 and 22C which required local authorities to deliver necessary support to a child in need.
24. Mr Butler submitted that making a care order interfered with AB's right to be responsible for the care of her child in circumstances where the local authority did not need to be in charge and where, taking a long view, AB has shown that she can be trusted.
25. The appeal was supported by Ms Maria Hancock on behalf of AB, who submitted that a care order was not necessary, there was no need for the local authority to share parental responsibility, AB can be trusted and a care order adds nothing to enhance AB's commitment to the regime. Ms Hancock also drew attention to the fact that, through the DOLs process, the court would continue to be involved in monitoring the delivery of the care plan, yet this was not a factor to which the judge referred.
26. Ms Hancock submitted that CD's likely reaction, were she to learn that she was the subject of a care order, was a significant factor which had been given insufficient analysis by the judge at paragraph 60.
27. For the children's guardian, Mr Leo Cugin submitted that the judge had been justified in making a care order. He particularly endorsed the judge's view as to the occasions when AB had in the past drawn back from, or failed to comply with, the care plan; this was, he submitted an important factor.



28. Mr Cugin did, however, accept that the judge had been in error in holding that a care order was required in order to ensure that the local authority delivered the care package in full. In making that acceptance, Mr Cugin acknowledged the statutory duties under CA 1989, Part III and this court's restatement of the law on this point in *Re JW*. He also accepted that the judge failed to address the necessity for a care order in circumstances where the court was to remain involved through the reviews in relation to the DOLs order.

### **Discussion and conclusion**

29. Prior to the commencement of the appeal hearing, I was of the view that the order of this most experienced Family judge, whose profound concern for the future well-being of a most vulnerable young person was fully justified, and should be upheld. In the event, I was persuaded that the appeal should be allowed for the following reasons.
30. Firstly, as is accepted by all parties to the appeal, the judge was in error as a matter of law in justifying the imposition of a care order as a means of obliging or galvanizing the local authority into delivering the agreed care plan. As paragraph 37 of *Re JW* repeats, it has long been held that a care order should not be used solely to encourage a local authority to do that which it is already statutorily obliged to do.
31. The judge was obviously justified in seeking to maximise the prospects for the multi-faceted and multi-agency care plan to be delivered in full to meet the needs of this most vulnerable young person in the coming year. But, as a matter of law, where the authority has, and accepts that it has, a statutory duty to deliver the care plan, the making of a care order does not impose any additional requirement upon it. It is a fundamental principle that, once a full care order is made, the court does not have jurisdiction to review the operation of a care plan (*A v Liverpool City Council* [House of Lords] [1982] AC 363) or require a local authority to adhere to key elements in any care plan (*Re S and Re W (Care Order: Implementation of Care Plan)* [2002] UKHL 10 – the ‘starred care plan’ case). Thus, should it wish to, a local authority may, on the day following the making of a care order, amend or fundamentally alter the care plan that has been approved by the court, subject only to the risk of an application to discharge the care order or judicial review proceedings.
32. Additionally, as Hale J (as she then was) held in *Oxfordshire County Council v L* [1998] 1 FLR 70, whilst it was open to a court to make an order other than that for which a local authority has applied, there must be ‘cogent and strong reasons’ for doing so. In the present case the reasons given for justifying the making of a care order, against the wishes of the local authority, cannot be couched in such terms.
33. Finally, on this point, and in contrast to most care cases, the court does have a continuing role in monitoring the delivery of the care plan for CD through the ongoing DOLs process. This was an important element in the balance to be struck on the issue of whether or not to make a care order, yet it was not referred to in the judgment.
34. In relation to the second area of the case identified by the judge as supporting the making of a care order, namely the potential for AB to change her position and move away from cooperating fully with the care plan, there was some evidence justifying

the judge's concern. But, as the evidence underlying the submissions made to this court on behalf of the local authority demonstrates, such falling off as there had been in the past was comparatively minor and, in any event, had to be set against the very substantial body of evidence of established and sustained support from AB over a significant period. Although there must always be a risk of AB, or any parent, withdrawing cooperation, when set against the evidence as a whole, this was not a likely outcome and not one which, on its own, justified the imposition of a care order.

35. The judge rightly pointed to CD's imminent 17<sup>th</sup> birthday, with the consequence that, if there were no continuing care order in place, no care order may thereafter be made with respect to her [CA 1989, s 31(3)]. The judge had 'significant concern' that the local authority would, in the event of AB withdrawing from cooperation with the care plan, look to protect CD by issuing fresh care proceedings yet be unable to do so post-17. That level of concern did not, however, justify the making of a care order in case there should be a falling away in AB's support. Firstly, because, as I have already held, this was not a likely eventuality. Secondly, the local authority's proposal to issue fresh care proceedings was, with respect, misplaced. It would not be necessary to apply for a fresh care order where, as here, there were ongoing High Court proceedings supporting the DOLs order. In the event of a change in AB's support, any dispute, or variation of the care plan, could and should be dealt with within the DOLs process or any subsequent Court of Protection proceedings. Where a local authority is authorised by the High Court under a DOLs order to deliver care to a young person in a particular manner, there will be few circumstances where their position would be enhanced by any additional power that would come from having parental responsibility and the ability to control AB's exercise of parental responsibility under a care order.
36. A further factor bearing on the choice between making a care order or not arises from the concern that both AB and the professionals had as to the impact on CD's behaviour were she to discover, or be told, that she was, once again, a child in care. This was not an insignificant factor in the welfare balance, given CD's vulnerability and the very volatile nature of her behaviour. It was, to my eyes, striking that for some 8 months during which CD had been the subject of an interim care order, the professionals and her mother had agreed that she should not be told that that was the case. It is no small thing for a 16 year old not to be told information of that nature, and the degree of professional and maternal concern about CD's likely reaction can be gauged from their decision not to do so. Against that background, it is hard to understand the judge's characterisation of that degree of professional concern as 'conjecture'. This was a factor which, as Ms Hancock submitted, was of significance and to which insufficient consideration was given.
37. Drawing matters together, and whilst fully understanding the judge's focus on doing all that he could to ensure the delivery of all aspects of this complex care package to support CD, I have concluded that the making of a care order was not justified. If My Lady and My Lord agree, the consequence is that the appeal must be allowed and the care order set aside.

### **Postscript**

38. At a stage when our draft judgments were shortly to be circulated to counsel, the court became aware for the first time of a relevant decision by Lieven J: *Re JR (Deprivation*

*of Liberty: Care Order: Principles of Care*) [2024] EWHC 564 (Fam); [2024] 2 FLR 856.

39. In *Re JR* Lieven J was invited to continue a longstanding DOLs authorisation with respect to a 16 year old boy who was placed in a therapeutic placement. For the previous 3 years, JR had been accommodated by the local authority with the agreement of his adopted parents under CA 1989, s 20. The first DOLs authorisation had been made in May 2023. Whilst the local authority had issued an application for a care order under CA 1989, s 31 in October 2023, no interim care order had been made. By the time of the final hearing before Lieven J, the local authority (with the support of JR's parents) sought leave to withdraw the care order application. Having heard full argument, Lieven J refused the application to withdraw and made a final care order on the basis that it was necessary and proportionate to do so.
40. Some months prior to the final hearing in *Re JR*, there had been a dispute between the parents and the local authority in which JR's father sought to take him on holiday. The local authority were concerned that if they were alone, the father may not be able to control JR's behaviour. The authority were granted a court order preventing the parents from removing JR from his accommodation.
41. Lieven J relied upon two central reasons in support of her decision:
  - i) There was a need for certainty over the way that decisions concerning JR's care would be taken. There had been times when the parents and the authority had not agreed (with the recent holiday plan being a clear example). As long as JR remained in s 20 accommodation, as opposed to a care order, the prospect of further disagreement continued to exist. Once JR was 17, in the absence of a care order or the ability to apply for one, the local authority would have no ability to resolve disputes in circumstances where it was critical for JR to receive consistent care.
  - ii) Although the local authority had committed to JR's current care plan, the judge had little doubt that there would be a greater level of oversight if JR were subject to a care order. A care order, irrespective of the legal consequences, would give greater confidence in the authority taking responsibility for JR's care. There had been a long period when the local authority had failed to focus on JR's needs and there was concern that JR had been, and might again be, left in unsuitable placements.
42. It is a matter of concern that Lieven J's decision in *Re JR* was, on counsels' admission, not known about until this court recently drew it to the parties' attention, with the result that it was not shown to HHJ Bedford at first instance or to us during the appeal hearing. Whilst the decision had not been formally reported, it will have been available on the usual online resources prior to the June 2024 hearing. By the time of the appeal hearing, the case had been formally reported in the Family Law Reports. In all cases, but particularly in a case such as this where detailed submissions of law are to be made, it is the responsibility of specialist counsel to use due diligence in their research for any relevant decisions. Courts are entitled to rely upon counsel in this regard, and it is disappointing that in the present case there seems to have been failure across the board to notice the *Re JR* decision.

43. We are grateful to counsel who have responded to our request for further submissions. Having now considered the position, my view is that the analysis that I have undertaken in this judgment remains the appropriate one on the facts of this case. I also consider that Lieven J's analysis and decision in *Re JR* were justified and correct on the facts of that case. The level of parental divergence, from time to time, from the local authority's plans in *Re JR* was of a wholly different order to the altogether more modest disagreement in the present case. In addition, as Lieven J's judgment makes plain, the degree to which the local authority could be relied upon to afford priority to implementing the care plan was questionable, whereas in the present case that was not a significant issue. *Re JR* is an example of a case where a care order was justified alongside a DOLs authorisation, whereas, for the reasons that I have given, it was not justified in the case of CD.

**Lady Justice King:**

44. I agree

**Lord Justice Zacaroli:**

45. I also agree