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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Neutral Citation Number: [2024] EWFC 336

Case No: LS24C50446

IN THE FAMILY COURT

Sitting at Leeds

Date: 21/11/2024

Before :

MR JUSTICE PEEL

- -

Between :

A Local Authority	**Applicant**
- and -	
The child C (by her Guardian)	**Respondent**

- -
- -

Charlotte Worsley KC and Oliver Latham (instructed by Local Authority Solicitor) for the **Applicant**
Martin Kingerley KC and Nathaniel Garner (instructed by Ramsdens Solicitors) for the **Respondent**

Hearing date: 11 November 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE PEEL

Mr Justice Peel :

1. This is an unspeakably tragic case.

2. Child C ("C") is 10 years old. In July 2024 a fire at home led to the deaths of her mother and sister. The evidence at this stage is that her mother deliberately caused the fire.

3. C is in hospital with very serious injuries. It is hoped that she will be discharged by March 2025, about four months away. She has had a number of surgical interventions and more may be required.

4. The psychological impact upon her is likely to be profound. It is not clear what her level of awareness is of what happened, but the dreadful reality is that she has lost everything that was normal in her life.

5. C's paternity is unknown. On her birth certificate, Mr D is named and therefore has parental responsibility under s4(1) of the Children Act 1989, but a DNA test has excluded him as biological father. The Guardian has applied for (i) a declaration of non-parentage under s55A of the Family Law Act 1986 and (ii) an order under s4(2A) and (3) of the Children Act 1989 terminating his parental responsibility On the morning of this hearing, Mr D sent a text message to the Guardian indicating that (I paraphrase) he intends to seek legal advice, that he played a role in C's life until the terrible events of 31 July 2024, and that he wishes to continue to play some role in the future. He has informed the social worker that he does not put himself forward as a potential carer. In the circumstances, I consider that the applications should be adjourned to give Mr D an opportunity to put his case.

6. C is visited by family members almost daily, whose support I am sure is a great source of solace. The obvious hope is that she can be cared for within the extended family in due course, although many challenges lie ahead. A positive preliminary viability assessment has been undertaken of one family member. Another has indicated a wish to be considered.

7. C is subject to s20 accommodation, on the basis that (per s20(1)(a)) there is no person who has parental responsibility for her.

8. On 7 August 2024, the Local Authority ("LA") issued care proceedings.

9. On 17 September 2024, the LA applied for leave to make a wardship application. The next day the LA applied to withdraw the care proceedings.

10. In addition, there have been applications made by the Hospital Trust in connection with medical treatment. Declarations of lawfulness to carry out certain surgical procedures were made on 5 September 2024, 19 September 2024 and 11 October 2024, in each case by agreement.

11. What then is the way forward, consistent with C's best interests in this unimaginably difficult situation for her?

12. The LA submits that the appropriate course of action is to withdraw the care proceedings and for C to be made a ward of court at least until she is ready to be

discharged from hospital by when it is hoped that plans will have been made for her to live in an extended family setting. By this step:

i) Her custody would be vested in the court, and no major step could be taken without the court's approval, including in respect of significant medical procedures.

ii) She would be accommodated at hospital until alternative arrangements are made.

iii) Day to day oversight of her care would be provided by the LA under an agreed list of delegated functions approved by the court. She would continue to be subject to a child in need plan. The LA would commit resources and continue their assessments.

13. The Guardian submits that the reverse should take place, namely that the care proceedings should continue and the wardship application be refused. He says that:

i) A fact-finding inquiry can take place swiftly and effectively within the care proceedings and is an important step in determining C's future.

ii) Care proceedings can achieve the same objectives as wardship.

iii) The LA would formally hold parental responsibility which it can then exercise with no need for direct court oversight.

14. Both parties say it is a finely balanced issue upon which I must rule.

15. Before I do so, I make it abundantly clear that from everything I have seen and heard, the LA, whether proceedings take place under Part IV of the Children Act 1989 as a care application, or under the wardship jurisdiction, is utterly committed to promoting the best interests of C. This is not a LA which needs judicious encouragement to do so, or which will tailor its approach depending upon which legal framework is adopted.

Care orders, wardship and s100 of the Children Act 1989: general principles

16. I attempted to explain in **Z v V and Anor [2024] EWHC 365 (Fam**) at paras 19 and 20 the basic principles underpinning the wardship jurisdiction:

"19. In respect of wardship and inherent jurisdiction deployed for the protection of minors, I have been referred to a number of authorities, including **Re A [2020] EWHC 451**, **A City Council v LS [2019] 1384 (Fam**), **Re M [2015] EWHC 1433 (Fam)**, **Re M and N [1990] 1 AER 205**, **Re J [1991] (Fam) 33**, **Re B [2016] UKSC 4** and **Re M [2020] EWCA Civ 922**.

20. From these authorities I distil the following propositions:

i) The inherent jurisdiction derives from the Royal Prerogative, as parens patriae, to take care of those who cannot take care of themselves, and, when exercised in respect of children, is

governed by reference to the child's best interests; **A City Council v LS [2019] (supra)** at 35.

ii) Wardship is a manifestation of the inherent jurisdiction or, to put it another way, an example of its use; **A City Council v LS (supra)** at 36.

iii) The distinguishing characteristic of wardship is that custody of the child is vested in the court, such that no important step can be taken in the child's life without the court's consent; **A City Council v LS (supra)** at 36. The ultimate welfare decision rests with the court.

iv) The inherent jurisdiction is strikingly versatile, and in theory boundless (**Re M and N (supra)** and **Re M (supra)),** but should be approached with caution and circumspection.

v) The inherent jurisdiction should not be deployed to cut across statutory powers designed to protect children: **Re B (supra)** at 85."

17. The LA requires leave to apply for wardship under s100(3) of the Children Act 1989.

18. Under s100(4)(a) and (b) the court may only grant leave if it is satisfied that:

> "(a) the result which the authority wish to achieve could not be achieved through the making of any order or a kind to which subsection (5) applies; and
>
> (b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm."

19. Subsection (5) refers to any order:

> "(a) Made otherwise than in the exercise of the court's inherent jurisdiction; and
>
> (b) Which the local authority is entitled to apply for…."

20. By s100(2) the inherent jurisdiction cannot be invoked to make what is tantamount to a care order, nor where a child is the subject of a care order. To do so would be to undermine the wholesale reform brought about by Part IV of the Children Act 1989 whereby care proceedings, previously brought in wardship pursuant to s7 of the Family Law Reform Act 1969, must instead be brought under the statutory scheme of the Children Act. The strict prohibition against the use of wardship proceedings to make what amounts to a care order was reviewed by MacDonald J in **A City Council v LS [2019] 2 FLR 1197**.

21. Where a child is accommodated under s20, the court is not prevented from making a wardship order: **Re E [2013] 2 FLR 63**.

22. Even if a child is the subject of a care order, for many years it has been well understood that some decisions are of such magnitude that the LA should not use its parental responsibility in respect thereof without seeking court approval. In other

words, the extent of its parental responsibility under the Act is not limitless. The obvious example is authorisation of serious medical treatment, which commonly is invoked via the inherent jurisdiction.

S31 threshold

23. In contrast with the making of a wardship order, for a final care order to be made, the statutory threshold under s31(2) would need to be established, and for an interim care order to be made, the court by s38(2) must be satisfied that there are reasonable grounds for believing that circumstances with respect the child are as mentioned in s31(2).

24. On the date of the application here, the only relevant parent was deceased. A query arises as to whether it would be open to the court to make a threshold finding in these unusual circumstances. Both the LA and the Guardian agree that the LA is entitled to bring, and the court can consider, care proceedings even though the parent was deceased at the time of the application. They tell me that absence of authority on the point can cause difficulties in similar cases.

25. There are two pre-requisite conditions for the threshold to be crossed.

26. First, by s31(2)(a) the court must be satisfied that "the child concerned is suffering, or is likely to suffer, significant harm".

27. Second, by s31(2)(b) that (so far as relevant to this case) "the harm, or likelihood of harm, is attributable to- (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him".

28. It is well established that the relevant date for the first condition (harm) is the date of the application or, if earlier, the date upon which protective measures were implemented and continuously in place until the application. This applies both to harm which has already taken place (**Re M [1994] 2 FLR 577**) and to the likelihood of harm in the future (**Southwark LBC v B [1998] 2 FLR 1095).** This is entirely logical; if it cannot be shown at the date of the application that a child is suffering, or likely to suffer, significant harm, then there is no basis for the application and no justification for state interference.

29. Does the second condition (attributability) depend on the parent giver being alive at the date of the application? In theory, the argument may be that if the parent who caused harm prior to the date of the application is deceased, then it is not possible to attribute harm at the date of the application and accordingly it is not possible to make a threshold finding. I confess to find it somewhat difficult to follow this logic. There is, so far as I am aware, no temporal requirement for the second condition, namely the attributability of harm; in other words, it is not a condition that the attributability must be referable to parental care at the date of the application (which might exclude a deceased parent who is in no position to give care). There does not appear to be a case directly on the point. However, it seems to me that s31 should be interpreted purposively, and support for that approach can be found in **Re J [2017] EWFC 44** where the parents of unaccompanied asylum-seeking children were either missing or deceased, and certainly were not in the position of carers at the time of the

application. Peter Jackson J (as he then was) had no hesitation in concluding that the threshold criteria had been met.

30. In my view, the attributability requirement is not to be confined to, or aligned with, the date of the application. C was at the date of the application suffering significant harm. That harm was, on the evidence currently available, attributable to the actions of her mother a mere 7 days previously. It would be extraordinary if, in such a situation, the Local Authority could not take steps to protect the child. It would lead to the anomalous situation that the court would not be able even to inquire into threshold, however, desirable that might be, or seek protective orders. The purpose of Part IV of the Act is to enable children who are suffering, or likely to suffer, significant harm caused by parents to be protected from that harm by Local Authority intervention. To neuter s31 because the parental perpetrator of harm is no longer alive would be an unexpected, and unfortunate consequence. But in my judgment that is not the intention of the Act, nor is it what the Act says. A plain reading of the words in s31(2)(b) that the harm must be attributable to "the care given to the child" must include past care, i.e before the date of the application, which led to the application itself. The wording does not expressly add "at the time of the application" or some such rider. Nor does it say that a parent must be alive at the time of the application. If my analysis is correct, then it matters not whether the parent is alive, or dead, or missing. What matters is whether the LA can establish (i) harm at the date of the application (or, if earlier, when protective measures implemented and carried through to the date of the application) and (ii) attributability of that harm i.e that it is a consequence of parental acts or omissions.

31. I therefore conclude that it would be open to the court to make threshold findings even though C's mother was deceased at the time of the application for a care order.

32. Whether, however, care proceedings are the appropriate course is another matter entirely.

Withdrawal of care proceedings

33. Withdrawal by the LA of an application for a care order may only take place with the permission of the court: FPR 2010 r29.4(2).

34. The leading authority on the point is **Re GC [2020] EWCA Civ 848**. Per Baker LJ:

"19. As identified by Hedley J in the Redbridge case, applications to withdraw care proceedings will fall into two categories. In the first, the local authority will be unable to satisfy the threshold criteria for making a care or supervision order under s.31(2) of the Act. In such cases, the application must succeed. But for cases to fall into this first category, the inability to satisfy the criteria must, in the words of Cobb J in Re J, A, M and X (Children), be "obvious".

20. In the second category, there will be cases where on the evidence it is possible for the local authority to satisfy the threshold criteria. In those circumstances, an application to withdraw the proceedings must be determined by considering (1) whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned, and (2) the overriding objective under the Family Procedure Rules. The relevant factors will include those identified by McFarlane J in A County

Council v DP which, having regard to the paramountcy of the child's welfare and the overriding objective in the FPR, can be restated in these terms: (a) the necessity of the investigation and the relevance of the potential result to the future care plans for the child; (b) the obligation to deal with cases justly; (c) whether the hearing would be proportionate to the nature, importance and complexity of the issues; (d) the prospects of a fair trial of the issues and the impact of any fact-finding process on other parties; (e) the time the investigation would take and the likely cost to public funds.

Decision as to care proceedings or wardship

35. On balance, I take the view that the preferred course is for proceedings to take place within the statutory framework provided by the Children Act 1989 rather than under the inherent jurisdiction through wardship, for the following reasons.

i) The first category identified in **Re GC** clearly does not apply. It is not "obvious" that the LA will be unable to satisfy the threshold criteria. On the contrary, based on the evidence currently before me, it seems probable that the criteria will be met without a need for elaborate or extensive inquiry. The coroner's inquiry, which is due to be completed in January 2025, should add to the understanding of the circumstances in the foreseeable future. Other evidence may come to light and of course the court can take into account information which becomes available after proceedings commence: **Re G [2001] 2 FLR 1111**.

ii) At the very least, the interim criteria under s38 are comfortably met. Thus, an ICO can be made to govern proceedings until such time as a final determination on threshold is made.

iii) The second category in Re GC requires the court to consider (1) whether withdrawal of the care proceedings will promote or conflict with the welfare of the child concerned and (2) the overriding objective under the Family Procedure Rules.

iv) As indicated above, in my judgment the fact finding part of the Part IV proceedings is likely to be straightforward, capable of being dealt with at a short hearing.

v) Further, it will give a solid factual foundation for the welfare disposal, which will impact on all aspects of C's wellbeing. I regard it as important for the truth to be known not just for the welfare determination, but for the rest of C's life.

vi) The fact finding inquiry would take place within the care proceedings where C is represented. The court can make findings against deceased or missing persons as Peter Jackson J did in **Re J (supra)**.

vii) There is no reason to think that C would be affected more negatively by care rather than wardship proceedings or vice versa.

viii) Similarly I do not have any reason to think that C's family, who are of considerable importance to her future, would be impacted any more or less by care or wardship proceedings.

ix) The LA would acquire parental responsibility under a care order in circumstances where no other person has parental responsibility. There would be no doubt as to the LA's role and responsibilities. Thus, the proposed list of delegated functions drawn up by the parties would necessarily fall upon the LA to discharge. There would be no need to return to court in the event of any doubt, as might be the case under wardship.

x) It seems to me that it is preferable, more readily understandable and far more in tune with modern thinking, for C to have the comfort of a statutory body exercising parental responsibility rather than to be subject to the ancient concept of wardship.

xi) Of course, serious medical treatment would need to be determined under the inherent jurisdiction. To date, that has taken place consensually. It can take place separately from the care proceedings.

xii) A care order (whether interim or final) would give a clear delineation of responsibility which, for example, may assist both the LA and the Hospital Trust in working through hospital care for C.

xiii) The outcome which the LA seeks to achieve, namely placement with family members, can be properly secured both under care proceedings and wardship. But there is no obvious reason for the assessments, and exploration of all options, not to take place under the statutory framework and in accordance with settled case law.

xiv) Although I am confident that the LA is entirely committed to promoting C's welfare, should that, for whatever reason, change, the ability of the court under wardship to order the LA to approach the case in a particular way, or devote resources for a particular purpose, would be constrained whereas under care proceedings the LA would always be subject to its statutory duties.

xv) Wardship remains an option for the future. If, for example, the threshold criteria are not crossed, or become much less clear cut for whatever reason, it may then be the appropriate route; see, for example, **Re K [2012] 2 FLR 1** where Hedley J elected to make a wardship order in respect of severely disabled children rather than explore threshold where there was some doubt as to whether the threshold criteria would be met and it was held to be inimical to their interests to pursue threshold findings. Another example might be if the lines of communication between the Hospital Trust and the LA become frayed or unworkable.

xvi) By reason of care proceedings, the court will retain general oversight and can list hearings as appropriate. There is no question of the court simply abdicating responsibility unless and until C's future is settled. This is plainly a complex case, and the court will need to scrutinise carefully the care plan and various options.

xvii) Whilst wardship is a very flexible jurisdiction, it should generally be deployed only in order to fill gaps which are not provided for by the statutory frameworks for children. Here, I am not persuaded that there are any such gaps. Accordingly, in my judgment, to make a wardship order risks cutting across the statutory regime under Part IV of the Children Act 1989 and, in particular, s100(4) and (5) thereof.

xviii) Finally, and importantly, continuation within care proceedings will require a tight timetable in accordance with the Public Law Outline. The 26 week limit expires on 5 February 2025, and I will require the IRH/final hearing to be listed before then. Wardship, by contrast, is not subject to the same strictures.

Conclusion

36. Accordingly, I am satisfied that:

i) The application for permission to withdraw the care proceedings should be refused.

ii) The application for leave to apply for a wardship order should be refused.

iii) An interim care order should be made.

iv) Directions should be given in the care proceedings. In particular, this case must be listed for IRH/final hearing before the end of the 26 week limit. At that hearing, if it is not possible to conclude proceedings, the court will give consideration to future directions and whether the case should continue under wardship.

v) The declaration of non-parentage, and termination of parental responsibility, in respect of Mr D shall be adjourned to be considered at the IRH/final hearing. Mr D shall file within 21 days his case on this matter.