IN THE FAMIY COURT SITTING AT WORTHING

Case No. SD22C50039

[2022] EWFC 170

Christchurch Road
Worthing BN11 1JD

Tuesday, 6th December 2022

Before:
HIS HONOUR JUDGE THORP
(sitting as a High Court Judge (pursuant to s9(1) SCA)

B E T W E E N:

WEST SUSSEX COUNTY COUNCIL

and

K

MS P TROY appeared on behalf of the Applicant Local Authority
MS M HANCOCK appeared on behalf of the Respondent Mother (A protected party, by the Official Solicitor)
MS L WALLS appeared on behalf of the Child through their Guardian

JUDGMENT
(Approved)

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.

HHJ THORP:

1. This is an ex tempore judgment.

2. I am dealing in this case with the welfare of K, who is 14 and a half years of age. Since 23 February 2022, she has been living in a foster placement subject to an interim care order made by the Court.

The issue before the Court

3. All of the parties agree that K should continue to live in foster care. All of the parties agree that in this case a section 20 placement would not be appropriate or support her adequately, and that the Local Authority needs to be involved and able to provide her with help, support, and advice. Moreover, all of the parties are agreed that if it were possible, the best order for K would be by way of a care order, and that that would meet her welfare interests (which, of course, is the paramount factor which the Court must take into account).

4. However, earlier in proceedings, the parties raised an issue as to whether the Court can find that threshold is met in this case. I am told that the matter was raised before HHJ Bedford, who identified the issue of whether the threshold might be met in relation to the risk of future harm, and who listed the matter for a hearing before himself. Unfortunately, he has not been able to sit today. The matter has been listed before myself for an issues resolution hearing/early final hearing, but also to deal with this crucial issue of threshold.

5. The position of the parties taken today was as it was at previous hearings; that is, that they do not consider that threshold is met on the facts before the Court. In accordance with that position, the Local Authority has advanced an alternative case; that is, that the Court should make K a Ward of Court, and there was a formal application from the Local Authority to that effect. Nevertheless, the position of all of the advocates was that if the Court does not agree with their interpretation of the law as applied to the facts in this case, then that would not be something with which they would take significant issue; indeed they (and particularly the children's guardian) would welcome the orders which the Court could then make.
The Official Solicitor has raised a wider concern about whether threshold should be met in any case in which a parent becomes particularly incapacitated, and that is a matter to which I will return in due course.

6. I know that all of the advocates have given considerable and long thought to the arguments put before the Court. I have three highly experienced counsel before me, who all agree on the approach which the Court should take. In those circumstances, it is with some caution that I have reached the conclusion that their interpretation of the legal position in this case is not correct, and I have concluded that threshold is indeed met in this case. That is despite the skilful submissions made by all of the advocates - in particular by Ms Troy, on behalf of the Local Authority, who took the lead.

7. I will deal very briefly with the circumstances of the case. They are tragic. K's father died when she was two. Throughout the whole of her life, she was cared for by her mother. There is nothing in the documentation to suggest that the mother's parenting was poor, or that K suffered from harm in the mother's care. Further, no party suggests that there was

anything in the history which would or could cross the threshold for making public law orders.

8. However, sadly, in November 2021, the mother suffered a sudden and catastrophic brain haemorrhage. She has been left with minimal abilities; she requires 24/7 care; she has very limited cognition and understanding; and she lacks capacity to litigate or make any decisions about her own welfare. It is agreed that she lacks capacity and is not able to make any decisions about her child's welfare, and cannot exercise any parental responsibility for her on a practical basis. In those circumstances, all decision-making is made by others and she has no input into it. Further, it is agreed that she does not have capacity to provide agreement under section 20 for K to stay in Local Authority accommodation.

9. In the early stages after the catastrophic events of November 2021, the wider family stepped into the breach and helped K. She was looked after by them for a number of months. However, they were not able to continue to care for her, and gave notice to the Local Authority of this. It was that which triggered the issue of proceedings in the case.

10. The threshold in the case is contained within the C110A application at B4 in the bundle. It is set out in the position statement filed by Ms Hancock on behalf of the mother. It is an interim threshold. I understand why it has remained an interim threshold, given the position of all the parties, but it is clearly not appropriate for final orders. Ms Troy, on behalf of the Local Authority, agreed with me today that it could be reduced to a single short paragraph - that is, that the mother suffered a sudden and catastrophic brain haemorrhage on 17 November 2021, that she is not able to provide any care at all for her daughter, that she is not able to make any decisions on her behalf or exercise her parental responsibility for her. Also, that there are no other persons available who would provide that care.
I have been referred to a number of cases and a number of different scenarios, and while there have been some discussions as to the relevant date for threshold, I agree with the parties that this is 18 February 2022.

11. The essential question which the Court has to answer can be put relatively shortly. That is, whether in circumstances where the mother has suddenly lost her capacity to care and is not able to provide any care for her child or make any decisions for her, is that sufficient to satisfy either of the limbs of section 31(2) of the Children Act 1989.

12. Section 31 of the Children Act provides as follows:

> *"(1) On the application of any local authority or authorised person, the Court may make an order-*
>
> *a) placing the child with respect to whom the application is made in the care of a designated local authority; or*
>
> *b) putting him under the supervision of a designated local authority.*
>
> *(2) A court may only make a care order or supervision order if it is satisfied-*
>
> *a) that the child concerned is suffering, or is likely to suffer, significant harm; and*
>
> *b) that 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; or

(ii) the child's being beyond parental control"…..

Al parties agree that the requirement in subsection (2)(a) applies to both limbs under subsection (2)(b). All parties agree that there are different considerations which apply to each of the limbs (that is (2)(b)(i) and (ii)), and I have heard submissions separately on those issues. Most of the discussion before the Court has been in relation to the first limb, and I will turn to that matter now.

First limb – Section 31(2)(i)

13. I stress yet again that it is not alleged that, at the time or immediately before the mother's unfortunate injury, K was or had suffered harm. As such, I treat the mother as a parent who is completely blameless in this case.

14. The parties make a number of points in their submissions that threshold should not be found to be crossed:

    a. Firstly (and this is perhaps the most substantial point made on behalf of the Local Authority), they rely on the case of *Re J (Children)* [2013] UKSC 9, in which the Supreme Court dealt with the issue of proof in relation to the risk of future harm. Ms Troy submitted that the effect of the judgment of Baroness Hale in that case when applied to the present case is as follows:

        > "In order to make a finding of significant harm for the future, it is submitted that the Court has to be able to establish that the likelihood of significant harm is attributable to a deficit in the parenting of the mother, as evidence by a past parenting failure. There does not appear to be any evidential basis upon which such a finding could be made".

        Thus, she says, the Court cannot make a finding of the future risk of significant harm if there has been no such harm in the past, or there has been no past parenting behaviour identified. She adds to that that any such proposition is "factually hypothetical and in reality not even possible let alone likely";

    b. The second submission made by the parties (and again I cite Ms Troy's submissions) is that there was a "very similar set of facts before the court in the case of *LCC v AB & Ors* [2018] EWHC 1960 (Fam)", and that the Court should apply that case accordingly;

    c. Thirdly, they submit that if the Court were to make a finding that threshold was crossed, that would in some way infer blame being placed upon the mother for putting her child at the risk of future harm. Further, that that would not be appropriate in particular in circumstances where the mother is a protected party;

    d. Fourthly (and linked to the third point), that the purpose of section 31 is to safeguard against unfair state intervention imposed upon the private family life of the mother and child. Further, that if the Court makes an order on the basis of threshold then it would be (and again I quote) "impugning the mother's parenting by an adverse finding against her in circumstances arising out of her unforeseen illness...", and that that is "an infringement upon the article 8 rights of this family, and is both disproportionate and unnecessary".

        I will return to that in due course.

15. Ms Hancock (acting on behalf of the Official Solicitor for the mother) supported the submissions made by the Local Authority on all points. However, she emphasised the last two of those and cautioned against a decision of the Court which might involve the crossing of threshold and intervention of the state whenever a party has a significant illness which rendered them incapable of caring for a child. She submitted on behalf of the Official Solicitor that that would be a dangerous route for the Court to go down, and that that is not what the threshold criteria are for.

16. As I have already noted, the Court should be very cautious in disagreeing with a position agreed by all parties. However, I also recognise that I have a duty to K and to her welfare, and if the Court considers that the arguments raised are not correct, it should not flinch from saying so. In my judgment, they are not correct and I turn to them now.

The argument in relation to Re J.

17. I do not accept that the effect of *Re J* is that a Court cannot find that there is a future risk of harm if there is no history of past risk or parenting failure. As has been agreed by the parties in submissions, *Re J* was a case on particular facts and was sent to the Supreme Court to resolve a particular issue. That was a case in which the Local Authority did in fact seek to rely upon past risk to establish future risk, and the concern of the Supreme Court was to identify how and to what standard past events must be proven in order to establish a prediction of harm for the future.

18. However, what the Supreme Court did not say was that where past events are not relied upon (as is the case here), then there cannot be a risk for the future. Certainly, the Supreme Court did not rule out threshold being crossed where the risk for the future to a child is obvious, but based on recent events - as, in my judgment, it is in the present case.

19. In my judgment, that much is also clear from the decision of Baroness Hale in *Re B (Childcare proceedings: threshold criteria)* [2013] UKSC 33. While I note that she was dissenting in that case, she was not dissenting on this point. At paragraph 193, she stated as follows:

> "*I agree entirely that it is the statute and the statute alone that the courts have to apply, and that judicial explanation or expansion is at best an imperfect guide. I agree also that parents, children and families are so infinitely various that the law must be flexible enough to cater for frailties as yet unimagined even by the most experienced family judge. Nevertheless, where the threshold is in dispute, courts might find it helpful to bear the following in mind:*
>
> 1) *The court's task is not to improve on nature or even to secure that every child has a happy and fulfilled life, but to be satisfied that the statutory threshold has been crossed.*
> 2) *When deciding whether the threshold is crossed the court should identify, as precisely as possible, the nature of the harm which the child is suffering or is likely to suffer. This is particularly important where the child has not yet suffered any, or any significant, harm and where the harm which is feared is the impairment of intellectual, emotional, social or behavioural development.*

3) *Significant harm is harm which is 'considerable, noteworthy or important'. The court should identify why and in what respects the harm is significant. Again, this may be particularly important where the harm in question is the impairment of intellectual, emotional, social or behavioural development which has not yet happened.*
4) *The harm has to be attributable to a lack, or likely lack, of reasonable parental care, not simply to the characters and personalities of both the child and her parents. So once again, the court should identify the respects in which parental care is falling, or is likely to fall, short of what it would be reasonable to expect.*
5) *Finally, where harm has not yet been suffered, the court must consider the degree of likelihood that it will be suffered in the future. This will entail considering the degree of likelihood that the parents' future behaviour will amount to a lack of reasonable parental care. It will also entail considering the relationship between the significance of the harmed feared and the likelihood that it will occur. Simply to state that there is a 'risk' is not enough. The court has to be satisfied, by relevant and sufficient evidence, that the harm is likely: see In re J."*

In my judgment, while *Re J* itself was concentrating on the level of past harm to establish future harm, Baroness Hale was not intending to rule out a court finding future harm when there was not past harm.

20. I did raise with counsel during the course of the submissions whether the position would be different if the mother's haemorrhage had not rendered her as incapable as it has, but instead had led to significant behavioural difficulties which might have made her (or would have made her) a risk to a child. That of course is a different position, but it illustrates, in my judgment, that there may be a number of ways in which parents may not be able to exercise care which it is "reasonable for a parent to give" in the future (or ways which would present a risk of significant harm to a child), even if they had not failed to do so in the past.

21. In my judgment, in the present context, the only relevance of *Re J* is that the Court must have sufficient evidence on which to base a finding of future risk. In the present case, in which it is quite clear from the evidence that the mother is not able to provide any care, never mind adequate care, it is in my judgment self-evident. I will return to this issue when dealing with the "blame" point and the Article 8 point.

LCC v AB

22. The parties have placed reliance upon the case of *LCC v AB*. That case is binding upon this court. It is also quite clearly correct. However, in my judgment that case was very different from the present case.

23. In that case, the mother was told that she had a terminal illness. When she learned of that (and of the fact that she was not going to be able to care properly for her children), she made a number of appropriate and correct decisions. It is quite clear, as Mr Justice Keehan set out, that she exercised her parental responsibility in the best possible way. In those

circumstances, it is not at all surprising that he reached the view that the fact the mother was terminally ill did not deprive her of the right as a parent to make decisions about the children's welfare, where they should live, and to make decisions about with whom they live in the future. Nor is it surprising that he reached the conclusion that the state, in the person of the Local Authority, should not be entitled to interfere with the mother's or the children's right to respect for family life. In short, while the mother was not able to provide physical care, she was able to make proper decisions and appropriate decisions, and exercise her parental responsibility for the children, as do many parents with disabilities up and down the land.

24. In my judgment, that is a very different situation to the present case, where there is no question of the mother exercising her parental responsibility. She is not able to make decisions, and no one suggests that she is able to do so. That is not her fault, but in my judgment the position is wholly different to that in the case of *LCC v AB*.

25. Of course, the issue of the mother's lack of fault leads on to the other two points: firstly, as to the "blameworthiness" issue; and, secondly, as to the right to family life and the caution which the Court should exercise in allowing Local Authorities to intervene in this type of case. I now turn to those issues.

"Blame"

26. At paragraph 23 of her submissions, Ms Troy stated as follows:

> "The mother is a protected party and is incapable of any conscious thought.that could result in her being blamed for placing K at risk of future harm".

That is something which was repeated in the submissions by all of the parties. They are quite rightly, and understandably, very concerned that some sort of blame might be attributed to the mother in this case, or that the difficulties in her care may be placed at her door. As I have indicated earlier, the Official Solicitor is particularly concerned that there should not be state intervention just because a person has a disability, and that they should not be deprived of their Article 8 rights.

27. In my judgment, in the present case, it is neither necessary nor appropriate to deal with the case with any reference to blame. That such a finding is not necessary in any assessment under section 31 of the Children Act is clear from a number of cases, and in particular was highlighted in *Re B* (referred to above) by Lord Wilson, who stated at paragraph 30 and 31 that the submission that blame should be read into the Act was misconceived. At paragraph 31, he said as follows:

> "*The first of these alternative submissions represents a false dichotomy: for the character of the parents is relevant to each stage of the inquiry whether to make a care order only to the extent that it affects the quality of their parenting. The second of them is misconceived: for there is no requisite mental element to accompany the actions or inactions which have caused, or are likely to cause, significant harm to the child. Section 31(2)(b)(i) requires only that the harm or likelihood of harm should be 'attributable' to the care given or likely to be given to the child not being what it would be reasonable to expect a parent to give to him. Such is a requirement only of causation as between the care and the harm. The provision*

was prefigured in the White Paper, Cm 62, cited above, also at para 60".

> *"The court will also have to make a decision as to whether the harm was caused or will in future be caused by the child not receiving a reasonable standard of care or by the absence of adequate parental control. This is not intended to imply a judgment on the parent who may be doing his best but is still unable to provide a reasonable standard of care".*

28. In my judgment, "blame" is not required. Family practitioners are well used to the fact that in the family courts, we often see parents who are not blameworthy. The fact that they are not able to provide safe and adequate care may be for a variety of reasons but should not of itself reflect blame on their part. Rather, s31 recognises that in some cases where the children's needs are not going to be met by a parent, then the state may need to intervene to ensure that those needs are met.

Intervention by the state

29. In my judgment, neither does the making of a finding that threshold is crossed imply that it will be "too easy" for the state to intervene, or that this would somehow risk "opening the floodgates", and render vulnerable to state intervention any parent who becomes incapacious.

30. As the parties know from my discussions in Court, this was an issue which had caused me some concern. I recognise that the courts in a number of cases, albeit in different contexts, have emphasised that there should be a high bar for state intervention. That caution goes right back to cases such as *Birmingham City Council v D and M* [1994] 2 FLR 502, a decision of Mr Justice Thorpe, as he then was.

31. Nevertheless, I also have to take into account that the fact that threshold might be crossed for the purposes of orders being made does not provide a justification in every case that the Local Authority should or will intervene, or that the Court should or will intervene. I have already noted that there may well be situations where a parent is disabled and unable to provide day to day care for a child, but is able to exercise parental responsibility and make decisions, and that in those cases, threshold will often not be crossed, such as in *LCC v AB*. There will also be cases where the other family members are able to step in, and where it would be clearly inappropriate for the Local Authority to take public law steps. There are also likely to be cases where other provision can be made which will look after the child's safety (for instance, pursuant to the duties of a local authority under section 20) which would obviate the need for an application to the court.

32. However, in a situation where the parent cannot provide any safe care for a child, where the parent cannot exercise any parental responsibility on a practical level, where no alternative family carers are available, and where parties are agreed that a child requires accommodating because of the parent's inability to provide care, then in my judgment it is wholly proper for section 31 of the Children Act to be brought into play. Indeed, in my judgment that is precisely what it is there for: to protect children who are at risk of significant harm due to the inability of a parent – whether (in some cases) due to their fault, or (in other cases) due to no fault of their own.

33. It is right that the Article 8 rights to family life are affected in every case of this type (even where a mother is not capable of looking after a child), and that is a matter which must be given appropriate weight and factored into the decision making of a Local Authority and of the Court. However, in my judgment, that does not lead to the conclusion that threshold is not crossed.

34. In my judgment the appropriate way to approach the issue is to remind oneself again of the comments of Baroness Hale in the case of *Re B*. The Court must identify as precisely as possible the nature of harm which the child is likely to suffer, and the Court must identify the likelihood that the parents' future behaviour will amount to a lack of reasonable parental care. Of course, that mirrors the judgment of Lord Wilson, which I set out a moment ago, which advises the Court to concentrate on the wording of the Act. That is precisely what the Court must do.

Is threshold crossed?

35. In those circumstances, in my judgment, threshold is crossed in this case, whether the threshold date is shortly after the mother had her haemorrhage or whether it is in February 2022. The fact of the matter is that if there was no intervention and an order was not made, this is a child who would not have the care from a parent which it would be reasonable to expect a parent to give. The reason for that is that the mother just cannot provide it, through no fault of her own. Equally, in my judgment it is highly likely that as a result of her mother's incapacity (and, hence, her inability to provide the care which it would be reasonable to expect a parent to give), K would be likely to suffer significant harm in the future if an order were not made. Indeed, no party submitted that she would not be at risk of significant harm in these circumstances.

36. I return to the point that I raised earlier with regards to the wording of threshold, and I asked the Local Authority to amend threshold accordingly. However, on that straightforward wording, threshold is met in this case.

Beyond parental control

37. In the circumstances, it is not necessary for me to deal with the issue of "beyond parental control" other than to recognise the arguments raised. I recognise that I have not heard submissions to counter the arguments advanced by counsel in court. On the limited submission I have heard, I do respectfully agree with the decisions of HHJ Burrows in the *Lancashire County Council v PX and Ors* [2022] EWHC 2379 case; HHJ Bellamy in *Re K* [2013] 1 FLR 1; and Recorder Darren Howe QC in the case of *Re T (A Child)* [2018] EWFC B1 (which is cited by all of the parties) in which he stated as follows:

> *"In my judgment it is immaterial whether a child is beyond parental control due to illness, impairment or for any other reason. The court simply has to consider if, on the facts, the child is beyond the control of the parent or carer. If that condition is satisfied, the court then has to determine if the child is suffering or is likely to suffer significant harm as a result of being beyond the control of the parent. If the answer to that second question is 'yes', then section 31(2)(b)(ii) threshold is, in my judgment satisfied".*

Of course, beyond that, the Court needs to find that by reason of being "beyond the control of a parent", that the child is likely to suffer significant harm.

38. I am aware that there are various authorities dealing with specific sets of circumstances (including one in which "beyond parental control" was satisfied where one parent had died and the other was not willing or able to care for the specific child), and I have already noted that I have not been addressed on any contrary arguments. Nevertheless, I do accept the submissions of the parties that most of the cases which have been before the Court involve children who are beyond parental control in that their behaviour is of concern in some way (whatever the cause of this), and not purely because of the inability of a parent to care for them. If it were otherwise, there would be a risk of conflating the two limbs of section 31. Those are separate tests, and I accept the submissions made to the court that while the cause of the child being beyond parental control may not need to be established, it should be established that the child is presenting in some way which is "beyond control". What would qualify for this would be for another court on another day. However, in this case, there is no suggestion that the child is presenting in that way. If I had had to decide the matter (and recognising the limitations of the court not having heard arguments to the contrary), I would have accepted the submissions of the parties in relation to the second limb.

Conclusions

39. In those circumstances, I find that threshold is crossed, and that the threshold should be amended accordingly.

40. Against that background, all of the parties agree that it is in K's welfare interests for a care order to be made; I have no doubt at all that in the circumstances, that is something which is in her welfare interests.

41. I remind myself that her welfare interests are paramount. I do not propose in the circumstances to go through the Welfare Checklist, but it is apparent that virtually all the pointers are towards the making of a care order. This is a young person who has been through a torrid, difficult, and traumatic time. She has her own significant difficulties. Unfortunately, for various reasons, her family are not able to provide the support that she needs, and she needs the intervention of the Local Authority. The best place for her, as agreed by everyone, is in a foster placement. In my judgment, it is vital that the Local Authority share parental responsibility so that there is in fact someone who is able to exercise parental responsibility, and so that K can be looked after appropriately.

42. I make a care order in this case.

End of Judgment.

Transcript of a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

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This transcript has been approved by the judge.