

IN CONFIDENCE

Case No: ZE15C00355

IN THE FAMILY COURT AT EAST LONDON

11, Westferry Circus,
London,
E14 4HD

Date: 06/01/2016

Before :

HER HONOUR JUDGE CAROL ATKINSON
(sitting as a Deputy Judge of the High Court)

Between :

LONDON BOROUGH OF NEWHAM

Applicant

- and -

Mrs S

Respondents

Mr S

Mr L

J (a child) (through his Guardian)

Mr Stott for the London Borough of Newham
Mr Sharpe (instructed by Official Solicitor) for Mrs S
Ms O'Malley for Mr S
Mr O'Sullivan for Mr L
Mr Cregan for J (through his Guardian Lena Coker-Thompson)

Hearing dates: 4th January 2016

JUDGMENT

HER HONOUR JUDGE CAROL ATKINSON :

1. J, is a 12 year old boy born, on 16th April 2003. J's mother is Ms S ("the mother"). She lacks litigation capacity and is represented by the Official Solicitor. J's father is Mr S (the father). He resides in Poland with his wife and young child. He has parental responsibility for J.
2. The mother's partner and carer is Mr L. He does not have parental responsibility for J. He entered the UK unlawfully in about 2001. His leave to remain allowed him to work but not claim benefits and expired on 14th August 2015. He applied for an extension which was refused on 24th February 2015. He is appealing that refusal and pending that appeal he has the right to remain and to work. If his appeal is unsuccessful then he would be at risk of deportation.
3. J currently resides with his mother, her partner and the maternal grandmother (MGM) in London pursuant to an ICO made to the London Borough of Newham.
4. I have a number of live applications before me. The first in time is an application by Mr L for a child arrangements order in respect of J. That application is still pursued. The second is an application for a care order made by the LB Newham (the LA). The LA now seeks to withdraw its application for a care order in light of the final application before me, made by the Guardian, to make J a Ward of court.
5. The issue for me today is in what form these proceedings should continue in relation to J. Let me briefly describe how we have reached this position.

Background

6. J, his mother and father are Polish nationals. J first came to the UK with his mother in July 2010. He returned to Poland for a period in 2011 before returning. There appear to have been Hague Convention proceedings about which I know very little. Nothing I have to decide today turns on the detail of this. Everyone agrees that J and his mother are lawfully in the UK and are

habitually resident here so that I have jurisdiction to deal with these applications.

7. The family became known to the LA in 2011 due to an allegation by J of sexual and physical abuse by a “partner” of his mother – not, it would seem, Mr L. In any event a section 47 assessment was undertaken and concluded that the allegations were unsubstantiated. A core assessment was completed on 27.5.2011 and the case was closed to the LA.
8. On 15.7.2013, the mother suffered a subdural haemorrhage and cerebral infarction. She also suffered complications following a stroke. The mother underwent a craniotomy and was admitted to the Neuro-Intensive Care Unit at Queen’s Hospital, Romford; she was thereafter moved to Homerton Hospital on 10.9.2013 and underwent a cranioplasty on 23.4.2014 and a further craniotomy on 9.7.2014. The mother was discharged from Homerton Hospital on 1.9.2014.
9. Since being discharged home the mother has required 24 hour care and support for all daily activities. She has severe physical and cognitive disabilities and Mr L has largely been responsible for her care supported by carers who attend the family home four times a day between 8-9.00am, 12.30-1.00pm, 4.00-4.30pm and 7.00-7.30pm. She does not have capacity in several specific areas and in particular the capacity to make decisions for J; nor is she capable of meeting J’s needs.
10. No clear prognosis has been given by the mother’s GP recently other than the fact that no further surgery is anticipated in the short term. The mother therefore has not been in a position to exercise parental responsibility for her son since July 2013. Whilst her condition is not properly described as terminal she presents with certain medical vulnerabilities which increase her risk of a shortened life expectancy.

11. J's father has parental responsibility but is in Poland and is estranged from J.
It is not yet clear why their relationship is as it is but J's father is keen to repair it.
12. Mr L and the maternal grandmother (MGM) reside in the family home with J.
The MGM is herself a vulnerable adult who suffers from depression and is, at present, also cared for by Mr L. Mr L has been caring for J since 2013 despite not having parental responsibility.
13. Mr L commenced private law proceedings in the spring of 2015 seeking a child arrangements order (CAO). This would give him parental responsibility. There was a hearing in this application on 20 May 2015 when DJ Cooper gave Mr L permission to apply for a CAO. A FHDRH was listed on 1 July 2015 when it was anticipated the mother would be represented by the Official Solicitor.
14. At the hearing on 1 July an interim care order was made when the LA attended indicating that it was pursuing an application before the Court of Protection (CoP) that Mr L was a safeguarding risk to the mother. Orders were sought in the CoP to revoke his appointment as Deputy for the mother's property and affairs and to exclude him from the family home which would have prevented Mr L from having any contact with the mother and from providing personal care and attention.
15. In light of the developments in these proceedings the CoP proceedings have now been withdrawn but it was the concerns the LA expressed in the CoP which prompted its issue of public law proceedings (ZE15C00355) on 9 July 2015; the interim care order was continued within those proceedings with a care plan for J to remain at home ostensibly in the care of Mr L. The private law proceedings were consolidated with the subsequent public law proceedings. The ICO had the effect of discharging the interim CAO.

Care plan

16. The local authority's final evidence in the care proceedings dated 4 November 2015 and its care plan dated 23 November 2015 proposed that J remain at home with his mother, grandmother, and Mr L on the basis a CAO is made in favour of Mr L supported by a supervision order. This recommendation followed a positive assessment dated 15 October 2015 of Mr L by an ISW. Subsequently, a positive assessment (dated 4 November 2015) was completed by ISW in respect of the father.
17. At an IRH before me in November 2015, whilst the mother through the OS supported the care plan, the father opposed it, arguing for a planned rehabilitation of J to his care. There was discussion at court as to the efficacy and overall benefit to J in implementing the local authority's final care plan given the extent to which J's life is in a state of flux and uncertainty. It was at this point that the possibility of wardship was first floated.

Wardship application

18. The children's guardian subsequently issued an application to make J a Ward of court. This application was transferred by the High Court, where it was issued, to ELFC to be heard by me sitting as a deputy High Court judge. All parties, save for Mr L, supported the discharge of the ICO, and making of the order for wardship. Mr L opposed the wardship on legal grounds and sought the making of a CAO in his favour concluding the proceedings.
19. The matter was listed today for a determination of whether I should permit these proceedings to proceed within the framework of wardship as opposed to care proceedings.
20. At the IRH, for the sake of completeness, I also:
- a. directed the LA to file and serve a final threshold document by 17 December. A final document has now been filed.
 - b. gave permission to the Guardian to instruct Dr Pettle, Consultant Child and Family Psychologist, to undertake an assessment of J's relationships with his father and Mr L in order to understand the cause

and effect of the disruption in J's relationship with his father and to try and identify what reparative steps could be taken to support and rebuild their relationship. The report is due to be filed and served by 29 January 2016.

THE LAW

21. The statutory framework within which the first two applications in time were issued is the Children Act 1989. So far as the primary proceedings are concerned, the care proceedings, they are brought pursuant to Part IV of the 1989 Act.
22. The orders sought by this LA on application, namely care orders, can only be considered once the statutory threshold is crossed and a determination made that J is suffering or likely to suffer significant harm and that harm is attributable to the care given to him if the order is not made "not being what it would be reasonable to expect a parent to give to him".
23. Once the threshold is crossed, J's welfare is my paramount consideration and I must have in mind at all times the welfare checklist, the elements of which have relevance to any decision-making with regard to a child's upbringing.
24. The LA seeks to withdraw its application provided that I replace it with the framework created by making J a Ward of court. Setting the pre-condition to one side for a moment, the LA needs my permission to withdraw. In circumstances in which it is unable to make out the statutory threshold then withdrawal follows; the only other possible outcome would be dismissal. Where the threshold is capable of being crossed, however, I can only give permission to withdraw if that is consistent with the interests of the child. When considering such application, I must have regard to the overriding objective FPR 2010 r 1.1 and the issue of proportionality. Welfare cannot be trumped by proportionality but it must be considered.
25. Turning now to the wardship jurisdiction, I am most grateful for the skeleton arguments of all parties but most particularly that of Mr Cregan whose

analysis of the current law I accept and adopt. Essentially, what it boils down to is this:

- a. The wardship jurisdiction is still available to me - see Family Procedure Rules 2010 Practice Direction 12 D Inherent jurisdiction including wardship for guidance. Paragraph 1.1 provides that the court in exercising its inherent jurisdiction may make any order or determine any issue in respect of a child unless limited by case law or statute. I note that such proceedings should not be commenced unless it is clear that the issues concerning the child cannot be resolved under the Children Act 1989.

- b. There are statutory limitations upon the exercise of the jurisdiction. Most particularly, there are restrictions which prevent the use of wardship in respect of children already subject to care orders and there are restrictions designed to prevent LA's from using the jurisdiction to circumvent the legislative process set out in the Children Act. So for instance, s.100(2) provides as follows: "*no court shall exercise the High Court's jurisdiction with respect to children:-*
 - (a) *so as to require a child to be placed in the care, or put under the supervision of a local authority;*
 - (b) *so as to require a child to be accommodated by or on behalf of a local authority;*
 - (c) *so as to make a child who is the subject of a care order a ward of court or;*
 - (d) *for the purpose of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.*"

- c. Having said that, the jurisdiction is not defunct and there is a body of case law which suggests that wardship naturally lends itself to situations which are novel, unusual and problematic because of distinctive features which have arisen or indeed may arise. For example: Hedley J in *Re K (Children) [2011] EWHC B21 Fam*; Hayden J in the case of *Y (A Minor: Wardship) [2015] EWHC 2099*

Fam ; The President of the Family Division in M Children [2015] EWHC 1433 Fam; Re M and J (Wardship: Supervision and residence Orders) [200] EWHC 1585 Fam and Re W and X (Wardship: Relatives rejected as Foster carers) [2003] EWHC 1585 Fam.

The statutory threshold

26. There is some considerable dispute in this case as to whether the statutory threshold is crossed here.

27. It is argued with some force by Mr Sharpe on behalf of the mother that there is no evidence that J was suffering harm at the date of intervention simply due to the fact that nobody was exercising parental responsibility for him. The LA argues that he was at risk of harm whilst no-one exercised parental responsibility but given that he was being provided with de facto care by Mr L which has been assessed as good enough this argument may be difficult to sustain. There is a further problem raised on behalf of the Guardian regarding the extent to which the reasonable parent test can be satisfied in circumstances in which the mother's lack of capacity was not of her making and she had in place arrangements for his care by a competent other.

28. I have no intention of deciding whether the threshold is capable of being crossed. I do not intend to do anything more than remark that the crossing of the threshold and thereby the opening of the door to statutory orders is less than a certainty here and when I come to consider whether I should give permission to the LA to withdraw, I will do so on a welfare basis.

Welfare checklist

29. It will be convenient to gather together the essential information about this boy under the elements of the welfare checklist.

30. Age, sex, circumstances.... J is a 12 year old boy of Polish heritage. He has Polish parents and a significant extended family in Poland. Reading the evidence in the case it is evident that his most significant relationships are actually with his mother and grandmother. He has lived for over 2 years now

with a mother who is extremely ill and considerably incapacitated. His relationship with her is touchingly described by the ISW assessing Mr L and it is right to observe that both J and his mother recognise Mr L as enabling them to remain together. Indeed, without Mr L it is unlikely that J would be able to remain in the home with his mother.

31. For whatever reason he is currently estranged from his Polish father and his paternal family. However, he has a half sister in Poland and his father's partner, the mother of his half sister, and an extensive paternal family.
32. Wishes and feelings. J's wishes are to remain living in the family home where his mother is and where he is cared for by Mr L. He does not wish to move to Poland to be with his father. The ISW assessing Mr L considered that it is a key concern for this young boy that he is not taken away from his mother and so his desire not to go to Poland and to stay in England is very bound up with that.
33. Needs. J has the same needs as any 12 year old for safety, security and a loving, stimulating environment where he can attain his potential. However, J also needs to be with his mother and to be prepared for what lies ahead in terms of her life expectancy. He also needs to be free to develop a healthy and respectful relationship with his father, half sister and step mother and access his Polish identity.
34. Harm suffered/ effect on him of any change of circumstances J would be at risk of suffering emotional harm if separated from his mother at this time.
35. Capability of the potential carers. Neither, J's mother nor MGM is capable of caring for him. Both Mr L and J's father are capable of meeting his basic care needs. However, Mr L's immigration status is far from certain which causes concern regarding the longevity and stability of a placement with him. It is fair to say, however, that only Mr L can currently meet his primary need to remain in a secure and stable placement together with his mother.

36. Range of orders available. Within the Children Act proceedings, when turning to consider which order(s), if any, will best meet J's needs I find myself troubled by a significant number of inter-related uncertainties regarding his future; all of which need careful monitoring and management.

The fundamental uncertainties

37. Currently J's welfare demands that he should remain where he can be with his mother. It is fundamental that this placement must be stable and secure so that he is free to maintain their close and loving bond. At the moment this is only possible whilst he lives in the de facto care of Mr L. However, there remains uncertainty over the stability of that arrangement given the problems that Mr L has with his immigration status. There remains a risk that this arrangement will be brought to a precipitous end. This would cause untold distress to J in the event that it happens during his mother's lifetime. This is the first uncertainty.

38. It may not always be the case that living with his mother in their family home will be either possible or in J's best interests. The mother's prognosis is very uncertain. Her condition may change so that she can no longer be cared for in the home. A number of months ago her death was communicated to me as possibly imminent. Now the position appears to be that her illness, whilst not terminal, is nevertheless likely to lead to a shortened life expectancy. The professional opinion is that J needs to be prepared for the possibility, if not inevitability, that she might die during his minority. It is not clear how he will react to this. When it happens the link between him and Mr L may well weaken; it may strengthen; it is likely to change.

39. The likely loss of his mother makes the need to rebuild a positive relationship with his father ever more pressing. It does not follow that upon such a loss he will move to live with his father. That is yet another uncertainty but all efforts must be made to ensure that he is free and able to access his paternal family when he chooses. Further he needs to be encouraged to see that this does not conflict with his relationship with either his mother or Mr L and it is in his interests that this door is opened.

40. These uncertainties – described as imponderables by Mr Cregan – will have a fundamental impact upon J as he moves into adulthood. The management of these issues and the sensitive negotiation of the relationships around this boy is something that is in my view beyond the scope of public law proceedings or orders and this combines to make this an unusual and unique case on the facts such that making a truly final order within any Children Act proceedings will be difficult if not impossible.

Limitations of Orders within the Part IV proceedings

41. As the Guardian observes and without wishing to attribute any bad motives to Mr L, whilst Mr L, I am sure, intends to do the right thing by J, there remains a concern that J is so closely aligned with Mr L's perspective and so bound up in his personal circumstances, that his own independent needs may be side-lined or overlooked. As Mr Cregan points out in his submissions, this is brought into sharp relief in the context of his fractured relationship with his father and the circumstances which may transpire following the death of his mother.
42. The Guardian is concerned that Mr L is perhaps looking at the matter from the perspective of his own precarious circumstances. Who can blame him for that? It does not mean that he does not have J's interests at heart. However, she is also concerned that he is minimising the difficulties that currently exist for J and that may exist in the near future. It is understandable that he seeks to adopt an optimistic outlook but it is unclear how he proposes to manage J's expectations, future living and contact arrangements, and emotional needs.
43. Mr Cregan poses the following questions in order to illustrate the uncertainties here. What will happen if Mr L is suddenly deported? What will happen when the mother passes away – in terms of practical arrangements for care of J, financial implications, accommodation, the position of the maternal grandmother? What will happen should J when in a bereft state suddenly decide to re-instate his relationship with his father and paternal family; what if J wishes to visit Poland or live with his father?

44. Against that background one can see that there are severe limitations in the care plan for a CAO coupled with a supervision order (were that even possible given the potential problems with the threshold). A CAO would give Mr L parental responsibility but given the mother's lack of capacity it would leave Mr L able to take unilateral decisions. The mother is incapable of exercising control. The father is outside the jurisdiction and currently has no communication with his son; practically there would be little he could do.
45. There are severe limitations as to how the local authority might manage the dynamic of this situation under its child in need procedures and powers of supervision. It would not share parental responsibility. Its role would be to advise, assist and befriend the child with an element of monitoring. I agree with the Guardian that this would leave J in a very vulnerable and uncertain situation.
46. What is more, I cannot see a point in the coming months when it may be said with any degree of confidence or certainty that such orders as are open to the court under the Children Act could be made in order to settle J's future.

The Inherent Jurisdiction

47. The application under the inherent jurisdiction is made by J's guardian out of the acute anxiety she holds for J's future emotional state. She invites the court to "exercise its powers creatively to ensure that there is a bespoke approach to ensure J's future is secure and settled in a manner which serve his best interests". All things considered, it seems to me that Wardship is the appropriate way of managing J's circumstances now and in the future.
48. I remind myself of the comments made by Hedley J in the case of *Re K* (*supra*). At paragraph 26 he said that; '*what was needed here was not necessarily orders under Part IV of the Children Act 1989 but a legal framework which kept all parties on equal terms and did not undermine the morale of the parents, as I am sure a care order would have done, but*

nevertheless made both parents and the local authority accountable to the court for the maintenance of a proper working relationship. Again, a unique solution for a unique case’.

Further at paragraph 40 Hedley J goes on to say this: *‘In my view with the parents as plaintiffs, that preserves equality between the parties. It reminds all that they remain accountable to the court for making the necessary arrangements for the care, education and nurturing of these children and it confirms the courts powers over the control and delegation of parental responsibility. It provides a reference point for dispute, although not one that will be easily engaged’.*

49. Like benefits would accrue in this case:

- a. The situation at home may continue with little or no material change;
- b. The role of the Local Authority is confirmed as actively supporting this family unit rather than interfering – however, the LA will not be able to sit back and do nothing to deal with the issues raised as it will be under the scrutiny and control of the court in how it delivers its services to this family unit;
- c. There will be no need for a party to re-open proceedings as matters develop and yet there will exist a mechanism by which the mother could bring matters back before the court, the father likewise will have access to the courts of England and Wales, all parties will retain the benefit of the legal advisers;
- d. J will retain his voice through his Guardian;
- e. There is no time restraint and the court can respond to the challenges as they arise;
- f. Emergency situations can be dealt with immediately and effectively.

50. I accept that J would prefer that there were no ongoing court proceedings regarding his welfare but that is unavoidable given the uncertainties that face him in the future. However, it seems to me that making him a Ward could actually prove to be a “lighter” touch than the ongoing involvement of the local authority on a defined statutory basis or the making of orders which may become redundant as circumstances change.

51. I too have no desire to keep him subject to court supervision for any longer than is necessary. To that end I stress that it is not necessarily the case that the wardship need endure until J reaches majority. I would hope and indeed I expect that the wardship will be discharged when there is a reasonable degree of certainty and I consider that J's future is safe, secure and settled.

Orders

52. I am satisfied then that the issues concerning J cannot be resolved under the Children Act 1989. I agree that there are many issues and potential disputes in this J's life which will need careful management and negotiation by the adults in his life and with the assistance and support of the LA. I cannot predict when those issues or disputes will arise and so I am satisfied that the only way in which I can safeguard J's future is by making him a Ward of court.

53. I cannot make him a Ward whilst he is subject to an Interim Care Order and so I discharge that order. For the same reasons I consider it contrary to his welfare to allow the care proceedings to continue and accordingly I give the LA permission to withdraw its application.

54. At the same time I make J a ward of court. I fix both Mr L and the mother with care and control. I appreciate that the mother lacks capacity and may not therefore be in a position to exercise that care and control. However, it is clear to me from the evidence of the ISW that she is able to communicate her wishes in respect of J and I am certain that they are capable of being understood by those who care for her – especially Mr L. What is more it is an important signal to all concerned that the mother is of equal importance in this family unit vis a vis J.

55. The LA will become parties to the wardship and I will list the case for a further hearing when we can consider the evidence of Dr Pettle (which will become evidence in the wardship) and whether there is any sufficient clarity regarding the issues raised to end the wardship at that point.