Neutral Citation Number: [2024] EWFC 350

Case No: LS24C50600

IN THE FAMILY COURT
SITTING AT LEEDS

Date: 28 November 2024

Before :

MR JUSTICE PEEL

- -

Between :

A Local Authority

Applicant

- and -

W (A Minor)
(By their Children's Guardian)

Respondents

- -

RE W (A MINOR) (DEATH OF MOTHER BEFORE BIRTH OF CHILD: THRESHOLD CRITERIA)

- -

Will Tyler KC (instructed by **the local authority legal department**) for the **Applicant**
Charlotte Wilce (instructed by **Sugare and Co Solicitors**) for an interested party
The putative father of **W** appeared in person
Martin Kingerley KC and Rebecca Musgrove (instructed by **Ridley and Hall Solicitors**) for the **Child**

Hearing date: 12 November 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 28 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 judgment concerns W, a three-week-old baby.

2. The circumstances of this case are almost impossibly sad.

3. W, then unborn, was placed on a Child Protection Plan on 18 September 2024.

4. On the morning of 22 October 2024, the mother of W was visiting her father in his flat on the 7th floor of a tower block. The evidence suggests that after a short while with her father, she jumped from the window and died at the scene. At the time, she was 7 months pregnant with W. Her body was taken to hospital where W was born by a caesarean section. W was for a while very unwell, but W's condition has improved markedly, and yesterday, on 11 November 2024, W was discharged from hospital.

5. W's father is, and was at the time of these events, in prison. He does not have parental responsibility for W.

6. W is now in foster care.

7. The Local Authority ("LA") applied for a care orders in respect of W on 28 October 2024. On 29 October 2024, HHJ Hillier adjourned the proceedings to today's hearing before me to consider, aside from general case management, (i) whether threshold can be met in circumstances where W's mother died before W's birth and (ii) whether W should be the subject of a wardship order or a care order.

Threshold for W

8. The reason why an ICO was not made on the last occasion was because of the unusual set of circumstances where W was born after W's mother had died. An issue for me to consider is whether it is open to the court to find that the relevant threshold (final under s31 or interim under s38) can be met and/or whether the court has jurisdiction to make orders in respect of W under Part IV of the Children Act 1989.

9. In **Re D (Unborn Baby) [2009) 2 FLR 313** it was held by Munby J (as he then was) at para 12 that the court could not exercise jurisdiction either under the Children Act 1989 or under wardship to order. in advance of the mother giving birth, that the child, upon birth, should immediately be removed into care: "The fact that the child is as yet unborn means that I cannot exercise jurisdiction under the Children Act 1989; it means that I cannot exercise jurisdiction under wardship".

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

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

12. 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".

13. It is well established that the relevant date for the first condition (significant harm) is the date of the application or, if earlier, the date on which arrangements for the protection of the child were put in place by the LA. 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 relevant date 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.

14. In principle it seems to me that in this case the relevant date for W is the date of birth, as arrangements for W's protection were then in place; it does not seem to me that the relevant date can be 18 September 2024, when the arrangements were first in place, as W was then in utero. If I am wrong about the relevant date being the date of birth, then it would be the date of the application.

15. Does the second condition (attributability) depend on the parent giver being alive at the relevant date? In my judgment there is no such temporal condition. The reference in **Re D (supra)** to the court not having jurisdiction in respect of an unborn baby was not a statement that the court cannot take account of acts or omissions of the care giver parent before the birth of the child. The court may not have jurisdiction until the child is born, but in my judgment the court is entitled, when considering threshold, to take into account the parental care given to the child before birth, even if the parent is dead at the relevant date point of either protective measures starting or at the point of application. If the question posed is: "can the care given by the parent encompass care given to a child in utero" I suggest that the answer, in principle, is yes.

16. This seems to me to be common sense, and in accordance with conventional practice. To do otherwise is unrealistic and contrary to the scheme of Part IV of the Act which is intended to ensure the protection of children who have been, or are likely to be, subject to significant harm. The acts of a parent while the child is in utero may amount to satisfaction of the threshold criteria: see, for example, the discussion in **Re M (supra)** at para 34. The court, when considering threshold, frequently takes into account drug or alcohol misuse by a mother during pregnancy. I see no difference in concept between that and (as here) a mother causing harm to the baby by the act of jumping from a high level which led to her (the mother's) death just before the birth.

17. 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.

18. For the avoidance of doubt, I am not suggesting that the court has jurisdiction to make Part IV orders in respect of an unborn baby. My conclusion is that after birth, threshold findings in respect of attributability of harm can, at least in principle, encompass care given pre-birth and, in principle, can include care given by a parent who at the relevant date is deceased or missing.

19. I am satisfied therefore, that it is open to the court as a matter of principle to find that the s31 threshold criteria, or, as the case may be, the s38 criteria, are met by reference to the actions of W's mother which were directly causative of significant harm.

20. If I am wrong about that, the fact that W's remaining care giver, the father, was in custody at all material times, and was not capable of giving W care at a time when W was in serious need, is in my judgment more than sufficient for the threshold to be met.

21. Indeed, the fact that on this alternative approach I would need to rely upon W's father's failings demonstrates why it is logical and appropriate that the court can take into account W's mother's failings even though she died just before W's birth. If, hypothetically, W's father had been dead or untraceable, would it truly be the case that the LA would have no ability to bring care proceedings because both parents were dead or missing, even if one or both of them was the cause of significant harm? I accept that wardship might then be a possible fallback, but for Part IV to be unavailable in such circumstances would, in my judgment, be the antithesis of the purpose of that part of the Act. I am satisfied that the Act should be read purposively to ensure that in unusual circumstance such as this the LA may apply for care proceedings, and the court may make care orders.

Care proceedings or wardship

22. 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**.
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> 20. From these authorities I distil the following propositions:
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> 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] EWHC 1384 (Fam (supra)** at 35.
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> 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.
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> 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.
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> 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."

23. In respect of the last point (cutting across statutory powers), I have in mind the strict prohibition against the use of wardship proceedings to make what amounts to a care order, as MacDonald J demonstrated in his review of the jurisprudence in **A City Council v LS (supra)**.

24. I have reached the conclusion that the LA is entitled to pursue care proceedings, for which the essential foundation stone is threshold under s31 (final) or s38 (interim). That being so, the need for wardship falls away. Part IV becomes the appropriate route to protect W. A wardship order would cut across the statutory scheme and fall foul of s100(4). Had I concluded that Part IV proceedings could not be brought, then wardship might have been the only recourse available to protect W, but that is not my conclusion. I therefore need to say no more about it.

Conclusions

25. I conclude:

i) The threshold criteria under s38 are met and an ICO is appropriate in respect of W.

ii) Wardship is not the appropriate way forward.