Neutral Citation Number: [2022] EWHC 2900 (Fam)

Case No: PR21C50003

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2022

Before:

THE HONOURALE MR JUSTICE HAYDEN

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Between:

Lancashire County Council	**Applicant**
- and -	
M	**1st Respondent**
-and-	**2nd Respondent**
F	**3rd Respondent**
-and-	
W **(a Child, acting by his Children's Guardian)**	**Intervenor**
-and- **Lancashire and South Cumbria Integrated Care Board**	

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Ms Samantha Bowcock KC and Ms Danielle Wood (instructed by **Lancashire County Council**) for the **Local Authority**
Mr Rex Howling KC and Ms Natasha Johnson (instructed by **Paul Crowley Solicitors**) for the **First Respondent**
Ms Lorraine Cavanagh KC and Ms Kerri O'Neill (instructed by **Morecrofts Solicitors**) for the **Second Respondent**
Ms Tina Cook KC (instructed by **Vanguard Law**) for the **Third Respondent**
Mr Martin Downs (instructed by **Hill Dickinson**) for the **Intervenor**

Hearing dates: 24th October 2022

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Approved Judgment

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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.

MR JUSTICE HAYDEN:

1. These proceedings concern W, who is 13 years of age and suffers from multi-system problems, arising from a rare gene mutation. His needs are complex and there is an ever-present risk of an acute life-threatening event. Accordingly, he requires 24-hours per day care, 7 days a week. Such are his needs that care must be provided on a 2:1 ratio. It would be too easy to see W as the raft of his needs and complex problems but to characterise him in this way would be to fail to do justice to his extraordinary personality. Whilst his capacity is limited in so many aspects of his functioning, he has a seemingly fathomless reserve of love for those around him and an engaging receptivity to the love he receives from others, most particularly, his family.

2. W, within the parameters set by his condition, enjoys spending time with other people, both with children and adults. He thrives on this social interaction. Though it is necessary for his food to be puréed, he greatly enjoys it and, I sense from what I have heard, dines like a King. Latterly, it has been necessary to put him on a diet. W is adept at communicating his wishes and feelings non-verbally but when he is unable to do so, he gets very frustrated. Those who encounter him frequently describe him as adorable and a cheeky, engaging personality. He is a great and a loyal fan of the television broadcaster, Dermott O'Leary.

3. The plan for W is that he should live at home. His parents share parental responsibility for him with Lancashire County Council, under the aegis of an interim care order, first made by HHJ Burrows on 11th March 2021 and subsequently renewed. Since June this year, W has been at home every day, and since August, he has frequently been staying overnight, at very least, two nights per week. He receives, what his parents rightly perceive as, excellent care from the Alder Hey Children's Hospital.

4. Recruiting, training, and retaining care staff in the present challenging climate, is in this case, as in many others, proving to be difficult. Three candidates have been recruited and trained and three more have been identified, interviewed, and considered to be suitable for training. Ms E, the key social worker, told me that which I have heard in other cases, namely that care workers of this kind are now very rare and much sought-after personnel, frequently lured away by competingly attractive employment packages and prospects of promotion. Many applicants who evince an interest in advertised posts, simply, Ms E tells me, fail to follow through. Added to all this, are the ongoing challenges faced by the continuing Covid-19 pandemic which can take crucial workers out of the arrangements at short notice and create real problems for the efficacy and safety of the plan. The parents recognise and understand these pressures within the system, but it generates inevitable stress.

5. The basis for the Local Authority's intervention in W's life, is most conveniently summarised in the case summary prepared on its behalf, for the hearing before His Honour Judge Burrows on 5th July 2021. It was contended that:

> *"The parents have been mistrustful of and combative towards the staff appointed by [the care company], for example:*
>
> *(i) They have insisted on having oversight of the training of carers at all times;*

(ii) They have required the removal of two of the carers from their position on unreasonable grounds;

(iii) They alleged, without proper foundation, serious misconduct by the paediatric nurse with oversight of [W]'s care package and demanded her de-registration before their allegation had been investigated;

(iv) They have declined to co-operate with a review of [W] care package despite having complained that he is not being adequately supported by trained health care staff;

(v) On 03.03.21 [W] suffered a hypoxic episode in which his saturation levels dropped to below 85%. The threshold for calling emergency services during such an episode, according to his care package, is three minutes. The parents refused to permit the care staff on shift to call for an ambulance immediately after the threshold had been reached, causing him to remain dangerously desaturated for ten minutes.

e. As a result of the above, [the care group] gave notice on 4th March that they would no longer offer a service to [W] owing to the magnitude of the professional difficulties that existed between their staff and the parents by that date.

f. The parents have been unjustifiably critical of the standard of nursing care that would be afforded to [W] in a proposed admission to Alder Hey Hospital to investigate his hypoxic episodes. Their criticism and intransigence delayed the planned admission. This criticism continued when [W] was admitted to Alder Hey on a planned basis on 8th March 2021.

g. The parents have refused the services of [the hospice] for [W] on the unjustifiable ground that the nurses there would not be competent to care for him. By refusing to allow [W] to go to [the hospice] the parents deprived him of the social and recreational opportunities available to him and deprived themselves of much needed respite.

h. The burden of caring for [W] has had a deleterious effect on the mother's mental health and she has reported, at times, her inability to carry on looking after him. The parents reported that they had separated in 2020 due to the conflict that existed between them over aspects of [W]'s care. The father has not always supported the mother and has, on occasion, sought to undermine sensible decisions that she has taken.

i. [W] is alive to conflict and upset on the part of his parents. His self-harming behaviour, including breath holding episodes, has been observed to increase at such times.

> *j. On 08.03.21 [W] was admitted to Alder Hey Hospital for investigation into his hypoxic episodes. There were no carers available and willing to resume caring for him at home at the point of discharge. The parents will not be able to meet [W]'s needs by themselves without the required level of support from professional carers."*

6. Despite this unhappy start to the proceedings, events took a very positive turn with the instruction of Dr Kate Hellin, Consultant Chartered Psychologist and Psychotherapist. Dr Hellin's approach to this strained relationship struck me as insightful. Recognising that this dynamic occurs with some frequency and in order that her approach might be more widely understood, I delivered an interim judgment: *[2021] EWHC 2844 (Fam)*. That should be read alongside this judgment but, it is convenient to highlight the following:

> *"There are certain features of the system around [W] which make it more, rather than less, likely that problems will arise in it. First, it is a very complicated system.*
>
> *Second, the stakes are very high. Ultimately, this is about keeping a child alive and ensuring his best possible quality of life.*
>
> *Third, commissioners face what many would consider to be impossible decisions about resource allocation.*
>
> *Fourth, care work is intrinsically stressful, and the pressures on health professionals and care staff have been vastly increased by the Covid-19 pandemic.*
>
> *These factors all affect the emotional climate of the system around [W] and the relationships between those components of the system.*
>
> *The system around [W] has become sensitised and inflamed. Feelings have run high and perspectives have become polarised and entrenched.*
>
> *[M] and [F], individual professional staff and their organisations have become stuck in polarised beliefs about each other.*
>
> *It has become difficult for the parents and for professionals to respond moderately in ways that sooth rather than exacerbate the dynamic tensions between the different parts of the system.*

7. Dr Hellin drew the following conclusions:

> *"I hope it will be apparent that this analysis does not apportion blame.*

> *The family, commissioners and health and social care providers are all affected by the dynamic context in which they are trying to do their best.*
>
> ***Rather than looking to change the parents, I recommend a systemic intervention drawn from organisational psychology, psychodynamic psychotherapy, group analysis and systems theory.***
>
> ***The intervention would assist all agencies and the parents to understand the dynamic processes that have led to the current difficulties, to step back from mutual blame and recrimination, to establish working practices which will contain and diminish sensitivities and optimise collaboration between the different parts of the system.*** *(my emphasis)*
>
> *I recommend that an organisational or a systemic supervisor/consultant is employed to work with the system and facilitate systemic meetings within which the aims set out in the paragraph above would be addressed.*
>
> *The involvement of the Court has radically shifted the dynamics of this system.*
>
> *The involvement of their legal representatives and of the Court, a neutral authority, has diluted the emotional intensity of the polarised "them and us" dynamic which previously existed between the parents and the health/care providers."*

8. The 'systemic intervention' meetings have now commenced and are proving to be constructive. The dynamic of the social worker/parent relationship is always a challenging one. By Dr Hellin's approach, it is recast. The social worker and the parents meet together and on equal terms facilitated by a 'supervisor'. Intrinsic to this, is a recognition that the relationship in the past had failed, due to the stresses and pressures on both sides and, it requires to be said, failings on both sides. Thus, it is recognised that the basis for the Local Authority's intervention, as set out in paragraph 5 above, is misconceived.

9. The application before me today is made by the Local Authority, who seek permission to withdraw care proceedings. The application is supported by W's Guardian and each of the parties in the case, save for the parents. NHS Lancashire and South Cumbria Integrated Care Board (ICB), who are Interveners, advance the following position:

> *"In this case, the ICB has sought to assist the Court and has been joined as an Intervener. It has participated with the parents and the rest of the multi-disciplinary team about the development of a reasonable bespoke plan for care for W at home with support. However, matters have now reached a point where these proceedings should be concluded."*

10. I do not consider the framework of the law in this area to be in any way controversial or ambiguous. The starting point is the Family Procedure Rules, Rule 29.4(2). This provides, *"where this rule applies, an application may only be withdrawn with the permission of the court."* Thus, a local authority may only withdraw an application for a care order with the permission of the Court.

11. Applications of this kind fall, essentially, into two identifiable categories. The first, arises when the local authority, on a considered evaluation of the evidence, recognises that it is unable to satisfy the threshold criteria, pursuant to Section 31(2) of the Children Act 1989 (the Act). Where the criteria are not met, it follows, axiomatically, that the application must succeed. The State cannot intervene, or justify continued intervention, into family life until and unless it meets the jurisdictional criteria for intervention. Above all, this is a fundamental safeguard to protect the rights of the subject child. This provision is also an intrinsic facet of the parents' Article 8 rights to family life, extensively buttressed by the protection afforded within Section 1(3) of the Act, the welfare checklist.

12. A Care Order imposes on a Local Authority a raft of statutory obligations, which it is unnecessary to rehearse here. The sharing of parental responsibility with parents involves a Local Authority assuming a significant and, in many cases, predominant share of parenting responsibilities. Inevitably, this generates both expense and time. Sometimes, it will be expedient for a Local Authority to seek to discontinue proceedings. For this reason, it is recognised that the decision must always be a determination of the Court. It follows that the Court is required to analyse the evidential basis of the application when determining to grant permission. Cobb J encapsulated the test to be applied in *J, A, M and X (children) [2013] EWHC 4648 (Fam),* concluding that the Local Authority's inability to satisfy the threshold criteria should be *"obvious".*

13. Where the Court considers that the threshold criteria is met, it may nonetheless evaluate whether withdrawal of the proceedings is in the best interests of the child. Furthermore, sight should never be lost of the "no order principle":

> *"(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."*

Whilst this provision does not create a presumption of no order, it mandates the Court to consider whether no order would be a better outcome for a child.

14. In his helpful submissions on the law, Mr Downs, on behalf of the ICB, submits that an application for permission to withdraw proceedings, falls outside the scope of Section 1(4) of the Act and, accordingly, releases the Court from the requirement to have regard to the welfare checklist in Section 1(3). The relevant provisions, though well-known, need to be set out:

> *(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—*

> *(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);*
>
> *(b) his physical, emotional and educational needs;*
>
> *(c) the likely effect on him of any change in his circumstances;*
>
> *(d) his age, sex, background and any characteristics of his which the court considers relevant;*
>
> *(e) any harm which he has suffered or is at risk of suffering;*
>
> *(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;*
>
> *(g) the range of powers available to the court under this Act in the proceedings in question.*
>
> *(4) The circumstances are that—*
>
> *(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or*
>
> *(b) the court is considering whether to make, vary or discharge a special guardianship order or an order under Part IV.*

15. Here, the Court is determining *"a question with respect to the upbringing of a child"* and thus *"the welfare of the child will be the Court's paramount concern"* (see *London Borough of Southwark v B [1993] 2 LFR 559 at 572)*. It strikes me as illogical therefore, if the Court were not required to have regard to the welfare checklist. However, if I yield to the application, the interim care order will be discharged. This, at least arguably, falls within the provisions of Section 4(b) above. Had there been no interim order, then Mr Downs would be entirely correct. In any event, as he submits, whether Section 1(3) applies or not, *"it may well provide a useful analytical framework when considering the merits of the application"*. I agree but would go further than that and suggest that it will always do so.

16. Ms Cavanagh KC and Ms O'Neill, who act on behalf of F, invite the Court to refuse any application by the Local Authority to withdraw the care proceedings. The parents have submitted a claim pursuant to Section 7(1)(b) of the Human Rights Act 1998:

> Section 7(1)(b) Human Rights Act 1998 states-
>
> ***"7 Proceedings.***

> *(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—*
>
> *(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or*
>
> *(b) rely on the Convention right or rights concerned in any legal proceedings, but only if he is (or would be) a victim of the unlawful act."*

17. The essence of the claim is that both the Local Authority and the ICB propose to act in a way which is incompatible with Article 8, by implementing a care package in which the burden placed on the parents generates a situation in which W's safety is compromised. The remedy sought by the parents does not seek damages but is entirely limited to declaration. The claim is brought within the Children Act proceedings to reinforce the fundamental importance of a sufficiently resourced care plan, in which the family is appropriately supported. Ms Cavanagh asserts that the Local Authority collated evidence, now 7 months ago, seeking a final care order. That evidence, she suggests, has not evaporated. She suggests that it has now become inconvenient for the Local Authority. If these proceedings fall away, so too, inevitably, does the HRA claim. That, says Ms Cavanagh, is the reason the Local Authority now seek permission to withdraw. It is, she suggests, pure *"expediency".*

18. The above charge is reflected back at Ms Cavanagh by Ms Bowcock KC, on behalf of the Local Authority. She contends that the parents' team seek to preserve the proceedings, exclusively to keep pressure on the Local Authority and the ICB, to construct a care plan, which finds favour with the parents but goes beyond that which is reasonable, having regard to the available resources, by no means confined to financial. Mr Downs goes further and submits that the parents' strategy has become a device to encourage the Family Court to drift away from its statutory moorings and become lured into *'dictating'* how independent agencies exercise their powers. It crosses the line, Mr Downs suggests, between the recognised responsibility of the Court to *'persuade'* Local Authorities to allocate resources to the care plan of a particular child where it considers that to be in the child's best interests and enters territory where the Court is being harnessed to apply *'pressure'* which is entirely beyond its remit: *Holmes-Moorhouse v Richmond-upon-Thames London Borough Council* [2009] UKHL 7, [2009] 1 WLR 413, [2009] 1 FLR 904, at paras [38]–[39] (Baroness Hale of Richmond).

19. It is not difficult to see how all this risks resurrecting, within the Court process, the *"sensitised and inflamed"* relationship that Dr Hellin identified in August 2021. Dr Hellin was clear that the distorted perspectives on each side had elicited increasingly demanding and defensive behaviour, again, on both sides. The 'system' had become so "sensitised" that both the parents and the organisations had become *"touchy"* and *"overly-reactive"* to each other. Dr Hellin thought it was difficult, both for the parents and professionals, *"to respond moderately in ways that soothe rather than exacerbate the dynamic tensions between the different parts of the system".*

20. In the course of this hearing, I heard from M, and from the social worker Ms E. As I foreshadowed above, both considered that the systemic intervention had been

constructive. M showed insight into her past dysfunctional response to stress and recognised the inevitable fallibility of human beings working within a stressful and overburdened system. She particularly acknowledged that her email campaign would not only have been distressing for the recipients, but entirely counterproductive. M was also clear that she had further work to do.

21. Ms E also spoke enthusiastically about the intervention. She impressed me as having entered into it in an entirely constructive and open-minded manner. She readily and fulsomely acknowledged the love and dedication of both parents and the intense and prolonged stress under which they have been living for some considerable time. However, Ms E, if she will forgive me for saying so, also has further to travel in this therapeutic process. I did not find it difficult to see how the parents might feel *"judged"* by her and sense that they were *"found wanting"* in some way.

22. The structures around W are framed in the language of medicine and social care. Shifts are allocated and divided, in response to W's needs. When M talks about taking on 'shifts', she is, in my judgement, applying the lexicon which surrounds her son into which she has inevitably migrated. Ms E has, at least to some degree, overstated the significance of this, in my judgement. She interprets it as the mother commodifying her care as if it were to be equated with and evaluated on a par with the professional carers. I do not believe, having listened carefully to both, that this is correct. That is not to say that I accept, without reservation, M's criticism of the extent to which she is personally required to support the care plan. The plan is, at present, incomplete and untested. It has not had the chance properly to be evaluated. Half of the available carers are not yet trained. M's anxieties strike me as entirely understandable but that does not mean that they will be realised.

23. This mother may talk about "work" and "shifts", but her dedication to W is manifest and abundant. The child I have described in some detail above is one who has had the chance to blossom and grow in his own particular soil. He simply could not have achieved everything that he has done, nor glean such obvious pleasure from life without the security of the stable, loving environment his parents have provided for him. The toll it has taken upon them will have been great. They have scarcely referred to it. They clearly perceive W as a great gift in their lives and it is not difficult to see why.

24. Applying this evidential matrix to the applicable legal framework requires me to ask the initial question as to whether the threshold criteria is met on the available evidence. The starting point, see para 11 above, requires me to consider whether it is "obvious", per Cobb J, that they are not met. Ms Cavanagh is charged on this point with being hoisted by her own petard. In a joint written submission for an earlier hearing, in April of this year, the parents' team stated the following:

> *"We submit that this case falls into the first category and that it is safe for this court to conclude that it is obvious that the local authority cannot establish the threshold criteria. The key to that conclusion is in the attributability condition, as your lordship foreshadowed in your judgement of October 2021."*

25. That is not merely inconvenient for the parent's argument, if maintained, it must lead it to wilt and wither away. Ms Cavanagh has, with considerable forensic dexterity, tried to retreat from the apparent absolutism of the concession in order to negotiate herself

into the Court's discretionary territory. Even so, it remains her case that the threshold criteria are not met but should nonetheless be regarded as requiring to be put to forensic assay. She is essentially seeking a hook upon which to hang the HRA application in the hope that will achieve a stronger and better supported care plan.

26. When Ms Cavanagh refers to my having *'foreshadowed'* my own view as to whether the threshold criteria are likely to be met in my October 2021 judgment, she must, I think, be referring to the following passage:

> *"[19] It is important to emphasise that the provision "not being what it would be reasonable to expect a parent to give" is not to be regarded as an abstract or hypothetical test but must be evaluated by reference to the circumstances the parent is confronting i.e. what would it be reasonable to expect of a parent in these particular circumstances, recognising that in a challenging situation many of us may behave in a way which might not objectively be viewed as reasonable. The test is not to be construed in a vacuum nor applied judgementally by reference to some gold standard of parenting which few (if any) could achieve. On the contrary, it contemplates a range of behaviour, incorporating inevitable human frailty. The reasonableness of the care given requires to be evaluated strictly by reference to the particular circumstances and the individual child."*

27. Dr Hellin did not attribute 'blame' to the parents. She analysed harm, or the likelihood of it, as generated by the *"high stakes, high pressure, dynamic context"* in which the parents and the professionals were *"trying to do their best".* As is clear from the earlier judgment, I found that analysis to be compelling, tightly reasoned, and insightful. Every person involved in this case agrees with it. In those circumstances, it strikes me as axiomatic or to put it another way, "obvious", that the threshold criteria are not met. Thus, the proceedings and the HRA claim fall away.

28. It is important to note, that I have arrived at this conclusion not on the basis of the expert opinion but on my wider analysis of the evidential canvas. In particular, as I have stressed above, the evidence of the mother and the key social worker is integral to the wider evidence. A care order, be it an interim or final order, represents a significant intrusion into the life of the child and the parents. 'Parental responsibility' manifestly confers rights and responsibilities to the parents. What must never be overlooked however, is that those rights also confer rights on the child. It is fundamentally in W's interests that his parents should be entitled to take decisions for him unfettered by the intervention of the State. Corporate parenting will never be a complete substitute for a real parent. Where a real parent is available and able to meet a child's needs, the child's own rights are engaged. Care orders impose checks, reviews, visits, and assessments which are an intrusion into the child's life as well and must be justified by the evidence. Here, they are not. W has the great fortune, not vouched safe to all children, of a secure, loving home. He does not require to be subject to public law intervention nor should he be.

29. In the past, as Dr Hellin pointed out, the legal process has been a positive advantage to both parents and professionals. Now that the systemic intervention has commenced, the

pendulum has swung, and litigation is more likely to prove an obstacle to progress. As the family courts often hear, constructive therapeutic intervention is far harder to achieve in the context of ongoing litigation. Much has been accomplished here and the obligation on all involved is to ensure that is built upon for the future. The extent of the care required must be focused on the needs of these particular parents and evaluated against the background of the case if it is to meet the needs of W.