



Neutral Citation Number:

Case No: ZE19C00172

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/12/2019

Before:

MRS JUSTICE THEIS

Between:

A London Borough	<u>Applicant</u>
- and -	
X	<u>1st Respondent</u>
(by her Litigation Friend the Official Solicitor	
- and -	
Y	<u>2nd Respondent</u>
- and -	
Z (By his children’s Guardian)	<u>3rd Respondent</u>

Ms Elpha Lecointe (instructed by **LA**) for the **Applicant**
Mr Nicholas O’Brien (instructed by Hudgell and Partners on behalf of the **Official Solicitor**) for the **1st Respondent**
Ms Martha Cover (instructed by **Hanne and Co**) for the **2nd Respondent**
Ms Maud Davis (instructed by **Freemans Solicitors**) for the **3rd Respondent**

Hearing date: 25th and 28th November 2019

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MRS JUSTICE THEIS

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published. 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.

Mrs Justice Theis DBE:

Introduction

1. This matter concerns a young person, Z, now aged 17 years. He is represented in the wardship proceedings by Ms Davis through his Children's Guardian, Jo Gaywood. The local authority is the applicant, the respondents are Z's parents, X and Y (hereafter referred to as the mother and father) and Z. As a result of the courts determination on 15 November 2019, that the mother lacks litigation capacity she is represented through the Official Solicitor as her litigation friend.
2. These wardship proceedings were issued on 7 August 2019. Prior to that, in March 2019, the local authority had issued care proceedings as they considered Z was suffering or likely to suffer significant harm due to the failure of the parents to follow medical advice regarding Z's care or take him to medical appointments. Z has a range of very complex health needs, as a consequence he is wholly dependent on his parents to meet his day to day needs. The local authority initially sought the removal of Z from his parents' care, although he had never lived away from home. At that early stage the parents were not engaging at all with the local authority or the court process. Through the creative use of court orders and the expertise of the professionals involved in this case there is now broad agreement that Z should remain in the care of his parents, with his father being able to exercise exclusive parental responsibility in relation to all matters concerning Z's care. The issues that remained for determination can be summarised as follows:
 - (1) Should the wardship continue?
 - (2) Within what legal framework should the limitation on the mother's parental responsibility be made?
 - (3) Does the care being provided for Z amount to a deprivation of liberty?
3. At the conclusion of the hearing on 28 November I announced the courts' decision, with reasons to follow. These are now set out below.
4. Before turning to the detail, I would like to pay tribute to the dedication and commitment of Z's parents, together with the patience of the legal and social professionals who have been involved. One aspect of this case not in issue is the parents' devotion and love for Z, which is reciprocated by Z. It was reflected early on in the evidence and has not changed during these proceedings. It is to the parents very great credit that despite the difficulties there have been prior to and during these proceedings that important relationship has been maintained.
5. At the time the proceedings were issued the relationship between the parents had become unstable due to the mother's mental ill health and the father's inability then to manage the situation he found himself in. At the start of the proceedings neither parent wished to participate in the court process. Only through the perseverance of the respective legal teams and the persistence of the local authority social workers, who were often being confronted with very difficult and challenging circumstances, has change been brought about and the situation slowly began to improve. This change has been achieved through the careful and considered approach by the social work

team on the ground for which they have the court's admiration. Both parents have attended the recent hearings and have engaged with their respective legal teams, and the social work and community mental health teams.

6. Although, as set out below, the care arrangements approved for Z remain relatively new the court has confidence that with the continued co-operation of all parties, the mother's engagement with the community mental health team and the father's ability to manage the mother's behaviour the position for Z is now much improved.

Relevant Background

7. The parents have two children, W and Z. W is now in her early twenties and although she lives independently, with her partner and their young child, she remains a source of support for the parents and Z.
8. Prior to early 2019 the family were not known to the local authority. Z has suffered with global health difficulties since birth. Up until the summer of 2018 the parents ensured Z attended all appointments and devoted themselves to his care. This was primarily undertaken by the mother, as the father worked full time. All the reports prior to and during these proceedings confirm the day to day care for Z was provided by the parents to a high standard and Z was totally dependent on them to meet his day to day needs.
9. In mid 2018 the mother became concerned about the medical advice for Z and, consequently, stopped engaging with the medical professionals or attending appointments. The father and W noticed her behaviour became increasingly unsettled and paranoid. Due to rising concerns about Z there was a referral to the local authority as the information then available suggested that Z's health needs required an urgent assessment as to whether he required an operation relating to the curvature of the spine and there was information that his nutritional needs were not being met. Prior to the issue of proceedings, he had missed at least 10 appointments covering such areas as the Speech and Language therapy, Occupational therapy, Community paediatrics, Audiology and General paediatrics.
10. In early 2019 the local authority's attempts to engage with the parents were unsuccessful with the result they issued care proceedings in March 2019. Initially the local authority sought an interim care order to enable Z to attend the medical appointments the local authority considered his health needs required.
11. Neither parent attended the first hearing on 1 April, only the local authority and the child, through the Children's Guardian attended. At that stage the local authority sought an interim care order, with a plan for placement of Z with a specialist foster carer. The local authority confirmed at that hearing they had last seen Z in passing at the end of February 2019, before that in December 2018 and Z had last been seen by his GP in December 2018. The order recites arrangements being put in place for the father to speak to a solicitor and I made directions for evidence to be filed, including detailing the continued efforts to engage with the parents, with the matter returning to court on 12 April 2019.
12. On 12 April 2019 the mother didn't attend the hearing. There was evidence she had been served and was aware of the proceedings and the hearing. The father was

represented by Ms Little, who had instructions from the father by telephone, as he was at work. After hearing submissions, I made a child assessment order under s 43 of the Children Act 1989 (CA 1989) requiring Z to be taken to an appointment with Mr Lucas, the consultant orthopaedic surgeon, on 15 April. I directed the matter returned to court for further consideration on 17 April.

13. The parents failed to take Z to this appointment. When the matter returned on 17 April the mother, again, failed to attend court. The father attended with his solicitor, together with his eldest child, W. At that hearing the father agreed to take Z to the next appointment with Mr Lucas, also to remain in contact with the allocated social worker. The local authority in turn agreed that even though it sought an interim care order it did not intend to remove Z from the parent's care and agreed to return to court if that position changed. Having heard submissions from the parties I acceded to the application by the local authority to make an interim care order in addition to giving leave under s 100 (4) CA 1989 to enable the local authority to make an application for an order requiring the mother to leave the home from 8am to 6pm on 30 April, the next occasion when Mr Lucas could see Z. This coupled with a recovery order I made on the same day, to be effective on 30 April, provided proportionate orders to enable Z to be seen by the medical professional to deal with the most urgent health issue (the need or not for an operation on his spine) in a way that could be enforced, if required, by the mother's arrest. I directed the matter should return to court on 3 May.
14. Despite being served with order requiring her to leave the family home on 30 April, the mother failed to do so. The police attended, she was arrested, produced before Lieven J on 30 April, who discharged her from custody with no further order. Whilst the mother was absent from the home the father took Z to the appointment with Mr Lucas. He confirmed in a subsequent letter due to Z's weight loss the risks of an operation outweighed the benefits. He recommended further appointments to deal with Z's nutrition and weight loss.
15. The mother attended the hearing on 3 May in person, together with Z and his sister, W. With the mother's agreement arrangements were put in place, with the assistance of Ms Little, for her to have an appointment with a solicitor. The order records the mother's agreement to see the solicitor, the allocated social worker and the Children's Guardian, as well as Z attending further health appointments. I made directions, including for the local authority to file an updating statement addressing Z's medical and health needs and discharged the interim care order. The next hearing was listed on 17 June.
16. At the hearing on 17 June the mother was represented by counsel, although the mother did not attend court. She had not taken Z to the health appointments since the previous hearing and had not permitted the social worker access to the family home or kept the appointment with the Children's Guardian. In addition, she had missed two appointments with her solicitor and had not filed a statement, as directed. At that hearing the father informed the court he intended to stop work, take Z to the forthcoming health appointments listed in the order and make the necessary applications for financial benefits for Z. The father signed an agreement at court to record these matters and the local authority agreed to provide the father with assistance to secure benefits for the family and to consider any request for payments under s 17 CA 1989. Given the mother's failure to engage with the local authority, I

made a supervision order and gave directions for the filing of updated evidence and listed the matter for further consideration on 22 July and 8 August.

17. By the time of the next hearing on 22 July all parties attended court, except the mother, although she was represented by counsel. Prior to the hearing the mother had not been at home for pre-arranged meetings with the social worker, although she had been there to see the Children's Guardian when she visited. The local authority informed the parties just prior to the hearing they wished to assess the father as a sole carer for Z. Directions were made, which included the local authority providing evidence and a care plan to support their position, together with evidence in response from the other parties in time for a hearing on 1 August when the local authority planned to seek an interim care order, together with an order excluding the mother from the home to secure the father's position as sole carer for Z. Further hearings were directed on 8 and 13 August, the latter prior to Z's 17th birthday.
18. On 1 August the mother failed to attend the hearing, although she was represented by counsel. She had been served with and had notice of the orders being sought. After hearing the parties' submissions, I made an interim care order until 13 August, with an exclusion order requiring the mother to leave the family home by 1 August, with a power of arrest attached. Further directions were given to enable the court to reconsider the matter on 8 August.
19. The mother refused to leave the family home later that day and there were delays in securing the assistance of the police. As a result, the matter returned to court on 2 August when the local authority sought to remove Z to place him in a residential placement and the mother sought to set aside the exclusion order. The local authority reconsidered their position if the order made on 1 August was put into effect. I refused the mother's application to discharge the exclusion order. The order recorded the mother's agreement to attend appointments with her solicitor and the social worker, as well her agreement to hand over the keys for the family home to her solicitors and confirmation that she will stay with her daughter pending the hearing on 8 August. The local authority agreed to conduct unannounced visits to monitor the father's care of Z and arrangements were put in place for the mother to see Z for contact at the family centre. The interim care order and the exclusion order made on 1 August remained in effect, with Z remaining at home in the care of his father.
20. After hearing submissions on 8 August, I refused the mother's further application to discharge the exclusion requirement and continued the orders made on 1 August.
21. At the hearing on 8 August the parties raised the issue of wardship proceedings to enable orders to be made securing Z's welfare needs beyond the age of 17 years. The local authority issued those proceedings and on 13 August Z was made a ward of court, with an order that he lives with his father. The father issued proceedings under the Family Law Act 1996, and orders were made continuing the mother's exclusion from the family home to enable the father to provide the consistency of care Z needed. Directions were made for a psychiatric assessment of the mother's capacity by Dr Lyall, adult psychiatrist, and a family assessment to be undertaken by an independent social worker, Jeffrey Baker. The matter was timetabled to a final hearing on 25 November. In October I extended the time for the filing of the capacity assessment and assessment from the independent social worker, and in early November extended the time for the filing of the local authority evidence.

22. The detailed report from Mr Baker was filed at the end of October. It followed two appointments with the father, an observed contact between Z and his mother and a meeting with W. The mother failed the pre-arranged appointment with Mr Baker and was very resistant during observed contact to the need for Mr Baker to undertake any assessment. In his report he noted that Z *'is a young person who has been constantly stimulated and affectionately interacted with by his parents and sister, such that he has developed some communication and social skills, and the obvious love and excitement he demonstrates for interacting with others'*. He observed that *'despite the recent stressors; it has been a joy for [the father] to spend more time with Z as his primary carer at home...the father spoke with some pride about how he has increased Z's food intake, and has a schedule for his meals and supplements and his medication.'* When he observed contact between Z and his mother he records he was *'immediately struck first by how caring, affectionate and natural [the mother] was with Z, and how Z responded to her with such ease and comfort, rarely wanting to be out of her lap, and listening to her read for extended periods of time, gently turning the pages at her prompt.'* His report goes on to detail his concerns about the mother's behaviour and his attempts to encourage her to attend the appointments with the psychiatrist. He said a striking feature of the observation of contact was how seamlessly both the parents managed Z despite the mother's agitation and the mother seemed to *'switch on a beat from lengthy paranoid diatribes to singing softly or reading expressively to Z'*. He records leaving the observed contact concerned about the mother's presentation, not in relation to the direct interactions he saw between her and Z but for her own safety moving around the community on her own in a state of agitation over what seem to clearly be paranoid and/or delusional ideas. Mr Baker describes in his report the father's increasing concern for the mother's wellbeing and Mr Baker's detailed communication to the local mental health team to assist and assess the mother.
23. In his report he concludes that if, and when, the mother is not mentally unwell the parents are probably *'both capable of looking after him to a better than adequate standard. In my opinion they are indeed devoted to Z and that he and their daughter and grandchild are at the centre of their lives and their thoughts'*, and he assessed the parents have a *'secure attachment'* to Z. He expressed his concern about the continued separation of Z from his mother, that Z misses her and the contact he observed was of *'high quality; the only exception to this being when she distracted by telling me about her fears and outrages'*.
24. At the pre-hearing review on 7 November the court was informed the mother had failed two appointments with Dr Lyall, was not co-operating with the community mental health team and that the local authority had concerns the mother was spending time at the family home, without the knowledge or agreement of the local authority. Detailed recitals in the order were made, including confirmation of the mother's willingness to attend the appointment with Dr Lyall the following day, to co-operate with the community mental health team and her agreement to the father exercising parental responsibility in relation to Z. Z remained a ward of court and the next hearing was fixed for 15 November.
25. The mother attended the appointment with Dr Lyall on 8 November. He filed a capacity assessment dated 10 November confirming his diagnosis. He concluded, for the reasons he set out, she lacked litigation capacity. On 12 November he filed a

detailed report setting out his conclusions following his meeting with the mother on 8 November. His report notes that the mother's mental condition is treatable with anti-psychotic medication and he considers there is a possibility that the mother's mental state may improve with such treatment, but he raises doubt as to whether the mother would voluntarily accept such treatment. The mother attended an appointment with the community mental health team on 14 November, attended a further appointment for blood tests and was next due to see her mental health worker on 28 November.

26. Although the Official Solicitor did not seek a further capacity assessment, the mother did not accept the report from Dr Lyall. After hearing the oral evidence of the mother and the submissions on her behalf I concluded on 15 November she did not have litigation capacity and the Official Solicitor consented to act as the mother's litigation friend. There remained an issue as to how much time the mother could spend at the family home pending the final hearing the following week. There was evidence that the mother had nowhere to stay and the father was becoming increasingly concerned about her wellbeing. The local authority agreed to fund accommodation for the mother that weekend, and the mother returned to the family home the following Monday, 18 November with the exclusion order being discharged. The parties agreed there would be a professionals meeting at the end of that week to decide whether the mother could remain in the home pending the final hearing, listed the following week. That meeting took place where it was agreed the mother would remain in the family home pending the final hearing.
27. The matter was listed for final hearing on 25 November. Prior to that hearing the local authority filed its final care plan and the Children's Guardian her final report. There was agreement that the mother should remain in the family home, but there should be orders in place for Z to live with his father that ensured the father could exercise parental responsibility in relation to Z's medical, educational and care needs to the exclusion of the mother. The Official Solicitor raised the issue of deprivation of liberty due to the circumstances of the care being received by Z.
28. In their care plan dated 27 November 2019 the local authority set out the proposed care for Z. It recognises the improvements made since the father has had the sole care of Z and been able to make decisions without the need to consult the mother. It confirmed that Z will remain open to the Children with Disabilities Team under a child protection plan, and the local authority confirmed in court there are no plans for the allocated social worker to change. A Review Child Protection Conference is scheduled for 9 December where consideration will be given to stepping the case down to a Child in Need plan, with the allocated social worker remaining responsible for implementing the overall care plan, under the supervision of the team manager. Under the Child Protection Plan Z is visited every 10 days, including both announced and unannounced visits, core group meetings are held every six weeks with review child protection conferences every six months. Under a Child in Need plan social work visits will reduce to every 20 days and the plan reviewed at a meeting every three months. The plan notes that as there has been limited time to assess the position if the case was stepped down to a Child in Need plan but there would be increased social work visits and more regular monitoring by review meetings. The plan notes the arrangements in place for Z to attend a specialist school in January, which had been assessed with the full co-operation of the father and he can attend until he is 19 years. The school has assessed Z requiring 2:1 care when he is with them. Z has an

Education, Health and Care Plan (EHCP) which has been updated to reflect Z's current and future needs, which will be subject to regular review. The care plan confirms Z is known to the local authority Preparing for Adulthood Team (PFA) to ensure that planning for transition is in place. The PFA social worker, Ms Sullivan, has completed a Mental Capacity Assessment in respect of Z, which confirms he lacks capacity to make informed decision for himself. The plan records that the current allocated social worker will work closely with Ms Sullivan to ensure a smooth handover of responsibility from children to adult services and there will be a multi-agency meeting prior to Z turning 18.

29. The first Children's Guardian, Elizabeth Brun, prepared the initial analysis. Following her move to a different area the case was re-allocated and the current Children's Guardian has provided two reports during these proceedings. Her most recent report, dated 22 November, together with her report on 7 August provide a detailed and perceptive analysis of the issues the court needs to consider. She is satisfied that the father, with support from W, has the ability and capacity to meet Z's needs. She considers Z is '*thriving*' in the father's care and her own observations suggests Z views his father as his primary carer. She notes that over time he has been able to demonstrate his ability to manage the mother's behaviour and assert his position as the main carer for Z, as well as encourage the mother to seek help from the mental health services. Whilst she recognises the father's conflict, she concludes he has been clear that Z is his priority. She notes that '*Z is a delightful, cheerful young man who gives a big smile and cuddle to almost everyone he meets. He is completely dependent on adults to meet all of his needs...He has a positive, warm and affection relationship with each of his parents*'. During her most recent visit to the family home she describes the conversations she had with both parents, which confirm the father's role as the main carer and provided support that the mother is engaging with the community mental health team and noted the local authority reported no concerns during the period of the first week when the mother was back in the family home. In her final report she recommends Z remains in the care of his father and the current structure of orders remain in place.
30. I heard oral submissions on 25 November and reserved my decision until 28 November, when I announced the court's decision with reasons to follow.

Relevant Legal Framework

31. There are three particular aspects of the legal framework in this case that require the scrutiny of the court. First, whether the wardship should now be discharged or continue until Z's 18th birthday. Second, whether the previous orders authorising the father to exercise his parental responsibility to the exclusion of the mother should be the subject of either a specific issue or prohibited steps order under s 8 CA 1989, or an order made within the wardship proceedings. Thirdly, whether Z's current care arrangements amount to him being deprived of his liberty under the European Convention on Human Rights, article 5 and, if so, whether the court should authorise any such deprivation. Taking each of those matters in turn.

Wardship

32. Section 100 CA 1989 operates to restrict the use of wardship and provides that the High Court's inherent jurisdiction should not be used for any of the matters set out in s100(2). It also restricts any application for the exercise of the court's inherent jurisdiction with respect to a child by the Local Authority without first having obtained the leave of the court (s100 (3))
33. It is accepted that wardship enables the court to retain a flexible supervisory jurisdiction over all the arrangements for the child who is the subject of the proceedings until they attain the age of 18 years. There have been a number of cases that have considered the availability of wardship in relation to children who the Local Authority consider are at risk of harm.
34. In *Re F (Mental Health Act: Guardianship)* [2000] 1 FCR 11 a 17 year old with a mental age of 9 was considered to be at risk if she returned to her parent's home, which accorded with her wishes. The Court of Appeal concluded her wish could not be labelled as seriously irresponsible so fell outside the definition of mental impairment to come within the provisions of the Mental Health Act 1983, so the guardianship proceedings under that Act were not available for her protection. Care proceedings could not be issued due to her age and in those circumstances the Court of Appeal considered wardship was the most appropriate remedy to protect her during her minority.
35. In *Re K (Children with Disabilities: Wardship)* [2012] 2 FLR 745 Hedley J warded three profoundly disabled children (in substitution for care proceedings) where there had been protracted conflict between the local authority and the parents in trying to meet the needs of all three children. He perceptively set out the advantages of wardship in that case as follows [40]

"[The wardship] reminds all that they remain accountable to the court for the making of the necessary arrangements for the care, education and nurturing of these three young children and it confirms the court's powers over the control and delegation of parental responsibility. It provides a reference point for dispute although not one that will be easily engaged...the accountability process will be further worked out by the court requiring a short progress report...next year."

The power to limit the mother's parental responsibility

36. Both parents have parental responsibility as they were married at the time of Z's birth (s 2 (1) CA 1989) and exercise it in accordance with s 2 (7) which provides '*Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any enactment which requires the consent of more than one person in a matter affecting the child*'. Section 2 (8) provides that the fact that a person has parental responsibility for a child shall not entitle him to act in any way '*which would be incompatible with any order made with respect to the child under this Act*'. A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but '*may arrange for some or all of it to be met by one or more persons acting on his behalf*' (s 2 (9)).

37. Parental responsibility is defined in the CA 1989 at s 3 (1) as *'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to a child and his property'*.
38. The court has the power to restrict the exercise of that responsibility by way of court order, such as a prohibited steps order or a specific issue order under s 8 CA 1989 which provide
- "prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court"*
- "specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child"*
39. s 9 (2) CA 1989 restricts the local authority applying for or securing orders under s 8.
40. The extent of orders made under s8 restricting a parent's parental responsibility has been considered in several cases. In *Re S (A Minor) (Medical Treatment) [1993] 1 FLR 376* Thorpe J (as he then was) gave leave under s 100 (3) to invoke the inherent jurisdiction to permit a blood transfusion on a child suffering from leukaemia in circumstances where his parents, Jehovah's Witnesses, refused to consent. This approach was confirmed in *Re O (A Minor) (Medical Treatment) [1993] 1 FCR 925* although in *Re R (A Minor)(Medical Treatment) [1993] 2 FCR 544* it was considered such applications (relating to blood transfusions) could be dealt with by way of specific issue order.
41. In *Re W (children) (education: choice of school) [2002] EWCA Civ 1141* Hale LJ (as she then was) was dealing with the mother's application for a specific issue order that she should decide which schools the children attend and observed as follows *'I have to say that is not usually the object of a specific issue order. The family lawyers amongst us will know that the whole purpose of having specific issue orders is to decide the issue and not to give the right of exclusive decision to one parent or the other'*. That accords with the government website that describes specific issue orders as being used to *'look at a specific question about how the child is being brought up'* (for example the school they go to or if they should have a religious education) and prohibited steps orders to *'stop the other parent from making a decision about the child's upbringing'*.
42. As the order being sought in this case amounts to a wholesale restriction on the mother's parental responsibility, in effect to give the father complete autonomy to exercise parental responsibility for Z, it is the submission on behalf of the parties that such an order is more appropriate in wardship rather than under s 8. It is submitted orders under s 8 orders for prohibited steps or specific issue generally relate to deciding a discrete issue, at a point in time. The orders sought in this case have been compared to the situation when a care order is in place which gives the local authority enhanced parental responsibility which can override that of the parents, whilst the care order is in place (s 33 (3) CA 1989). A similar situation arises when a special guardianship order is made, giving the special guardians enhanced parental responsibility (s 14C CA 1989).

43. The mother's parental responsibility being restricted through an order made in wardship proceedings has the added benefit of flexibility as even though the mother's mental state could improve with medication there remain concerns about her ability to comply with any medication and engage consistently with the local authority.

Deprivation of Liberty

44. There is no issue regarding the threefold test as to whether arrangements for the care of an individual amount to a deprivation of liberty and that whether, or not, the circumstances of the case amount to a deprivation of liberty is a question of fact.
45. The threefold test was set out in *Storck v Germany* [2005] 43 EHRR 6 and adopted by the Supreme Court in *P v Cheshire West and Surrey CC* [2014] UKSC 19 when Lady Hale stated at [37] *'It is common ground that three components can be derived from Storck....(a) the objective component of confinement in a particular restricted place for a not negligible length of time; (b) the subjective component of lack of valid consent; and (c) the attribution of responsibility to the State.'*
46. In relation to the first component Lord Kerr in *Cheshire West* stated at [77] *'The question whether one is restricted (as a matter of actuality) is determined by comparing the extent of the restriction with someone of your age and station whose freedom is not restricted. Thus a teenager of the same age and familial background as MIG and MEG is the relevant comparator for them. If one compares their state with a person of similar age and full capacity it is clear that their liberty is in fact circumscribed. They may not be conscious, much less resentful, of this constraint but, objectively, limitations on their freedom are in place.'*
47. In *Re D (A Child)* [2019] UKSC 42 (a case that concerned the extent of parental responsibility and whether parents can consent to a deprivation of liberty) Lady Hale at [39] identified the *'crux of the matter'* as being summed up in the question *'Do the restrictions fall within normal parental control for a child of this age or do they not?'* At paragraph 41 she went on to state that for mentally disabled people, their living arrangements have to be compared with those of people who do not have those disabilities, because all human beings are entitled to the same human rights. Although arrangements for a mentally disabled person are in their best interests that does not mean those arrangements do not amount to a deprivation of liberty. The protection provided by Article 5 ensures an independent check on whether the arrangements are in the best person's interests.
48. In respect of the second component Lady Hale concluded in *Re D (ibid)* at paragraph 42 that parental consent cannot be a substitute for the consent of the individual concerned. There had to be evidence that the individual was willing to stay where he or she was and could express that view. Lady Black explored this issue further and concluded *'...as a matter of common law, parental responsibility for a child of 16 or 17 years of age does not extend to authorising the confinement of the child in circumstances which would otherwise amount to a deprivation of liberty.'* This was the majority view. Lord Carnwath and Lord Lloyd-Jones considered a parent of a young person aged 16 or 17 can validly consent to restrictions that would otherwise amount to deprivation of liberty, when the parent is acting responsibly, in the interests of the young person.

49. Turning to the third component, it was accepted in the Supreme Court in *Re D* that the State was actively involved in '*making and funding the arrangements*', including accommodating the young person in that case under s 20 Children Act 1989.
50. In this case there were submissions as to how and to what extent the State was involved in the arrangements for Z's care if he lived with his parents and attended school from January 2020, including the extent to which there is a positive obligation on the State to apply to the court to determine whether or not there is a deprivation of liberty, if the relevant local authority is responsible for the deprivation of liberty, or knows (or ought to know) about it. In the Court of Appeal judgment in *Re D [2017] EWCA Civ 1695* Sir James Munby, at paragraph 29 outlined the State's positive obligations to apply to the court when it becomes aware of a deprivation of liberty. Although this was not directly in issue in the Supreme Court, as it was accepted by then the accommodation was being provided by the State under s20 CA1989, Lady Hale observed at paragraph 43 in *Re D* '*Even without all this, it is clear that the first sentence of article 5 imposes a positive obligation on the State to protect a person from interferences with liberty carried out by private persons, at least if it knew or ought to have known of this*'.
51. It is accepted by all parties in this case that if the court continued the wardship the third component is satisfied as the decisions relating to the care of Z until he attained the age of 18 years remained vested in the court, an arm of the State.

Submissions

52. I am extremely grateful to all the legal representatives for their eloquent and focussed written and oral submissions, which have been of great assistance to the court.
53. The continuation of the wardship is supported by all parties, save for the local authority who submit those proceedings are not necessary, as all orders that are required can be met by orders under the CA 1989. The other parties submit the continuation is necessary due to the flexible nature of the jurisdiction, the arrangements for Z's care are at an early stage, in the event of disagreement the matter could swiftly return to court and Z would retain the benefit of the Children's Guardian until the age of 18 years.
54. No party advocates the restriction on the mother's parental responsibility can or should be done by way of an order under s 8 CA 1989, save for possibly the local authority. This is due to the nature of the restriction sought, effectively giving the father the entitlement to exercise all day to day parental responsibility to meet the care, education and health needs for Z in circumstances where the parties remain living in the same home both taking part in providing for Z's day to day needs. It is submitted the extent of the restriction, the length of time for which it is sought and likely to remain in place and, if the court retains the wardship, the continuing oversight of the court mean this order is more appropriately dealt with within those wardship proceedings.
55. Turning to the issue of the deprivation of liberty, apart from the local authority, all parties accept in this case the arrangements for Z's day to day care restrict his liberty when compared to the arrangements to be expected for another child of his age. He is under constant supervision, both day and night, he cannot go out on his own and these

arrangements are likely to be lifelong. There is, it is submitted, actual confinement and not for a negligible period. The local authority submit that in this case it is proposed Z will remain in the family home being cared for by his parents, he not confined within the home beyond the ordinary requirements in any home (for example, locked front door) and some assistance is required to help settle him at night but he is not locked in his room. Whilst it is accepted by the local authority that you can have deprivation of liberty within the family home, they note both *Cheshire West* and *Re D* concerned children in the care of the local authority.

56. In the light of the decision of the Supreme Court in *Re D*, in relation to the second component, it is accepted that parental consent cannot substitute for the subjective element of the second component and the evidence demonstrates Z lacks capacity.
57. As regards the third component all parties accept the following matters:
 - (1) The local authority is under a general and positive obligation to protect a person from interferences with liberty carried out by private person, at least if it knows or ought to have known of this. This accords with what Sir James Munby stated in the Court of Appeal in *Re D* at paragraph 29.
 - (2) If the wardship continues in this case the third component of the deprivation of liberty test is met as the court will be overseeing the continued arrangements for the care of Z.

Discussion and Decision

58. There is no dispute between the parties as to the appropriate welfare outcome in the case. The evidence clearly demonstrates Z is thriving in his father's care. With the support of the local authority, his extremely experienced and able legal team and the structure of orders made to date the father has been able to demonstrate his ability to prioritise Z's care needs over his understandable concern for his wife's welfare. His ability to do that has grown during the latter part of these proceedings and he has more recently been able to encourage and support the mother securing the help she needs from the mental health services. Z now looks to the father as his main carer. Whilst there is a consensus that these arrangements meet Z's needs, it is right to record the arrangements and the mother's co-operation with the mental health team are relatively recent, only occurring in the last few weeks, so it is early days. Whilst these developments are important and encouraging this family will require support for a considerable period to enable them to continue to meet Z's very considerable needs.
59. Having considered the recent evidence, in particular from the allocated social worker supported by the care plan, the reports from Mr Baker and Dr Lyall, together with the reports from the Children's Guardian, I am satisfied the father can best meet Z's welfare needs, albeit with some assistance from the mother, but with the father retaining the ultimate decision making for any matter relating to Z's needs.
60. The remaining issue is the structure of orders to be in place to ensure those arrangements are properly supported.
61. As I have observed at the start of the judgment, this local authority and the other legal and social work professionals in this case are to be commended for the creative child

centred approach they have all taken in this case. Without that approach the arrangements now in place may not have been attainable.

62. I have reached the conclusion that the wardship proceedings should continue, that any restriction on the mother's parental responsibility should be made in those proceedings and that the care provided for Z does amount to a deprivation of liberty. I have reached those conclusions for the following reasons.
63. First, the wardship should continue as, in my judgment, by doing so Z's welfare needs will be met for the following reasons:
- (i) The care arrangements now agreed for Z are relatively recent, only being finalised in the days leading up to the hearing on 25 November. Everyone remains optimistic they will provide the right framework for Z's future care, but they need to be seen in the context of the complex difficulties that surrounded Z's care in the recent past. Whilst recognising the enormous changes that have been made, with the father being more actively involved in Z's day to day care and the mother recognising the father's role, these remain very recent changes.
 - (ii) The uncertainty surrounding the mother's mental health continues, she is only at the very early stages of coming to terms with the diagnosis and any possible treatment. Whilst her recent engagement is encouraging, these are very early steps.
 - (iii) The risks to Z's health of any changes in his care arrangements need to be recognised and the need for an effective structure being in place to swiftly resolve any dispute is required to meet his welfare needs.
 - (iv) In the unusual circumstances of this case where it is proposed an order is made providing for Z to live with his father, in circumstances where the mother will remain part of that household, that is better met within wardship proceedings as an order made under the CA 1989 for Z to live with his father will cease to have effect after six months if the parties continue to live together (s 11 (6) CA 1989).
 - (v) Z's welfare needs will be best served by the framework that continuation of the wardship proceedings will provide. The court would retain responsibility for the oversight of the arrangements during this critical time. This is in the context that despite both parents being devoted to Z, he suffered harm in his mother's care after her mental health deteriorated and there may be a real limit to what the local authority could do to achieve positive change without the assistance of the court. As Hedley J observed in *Re K (Children with Disabilities: Wardship)* [2012] 2 FLR 745 at paragraph 40 the advantages of wardship are that it '*...confirms the court's powers over the control and delegation of parental responsibility. It provides a reference point for dispute although not one that will be easily engaged...*'.
 - (vi) Z is now too old for there to be public law orders (s 31 (3) CA 1989).
 - (vii) By continuing the wardship it provides a framework for the court to review the position prior to Z's 18th birthday, as part of an application by the local authority to the Court of Protection.

64. Second, the restriction on the mother's ability to exercise her parental responsibility is best provided for by orders made through the court exercising its inherent jurisdiction for the following reasons:
- (i) The order relating to this, which provides for Z to live with the father, will be made within the continuation of the wardship proceedings and other orders being made.
 - (ii) The order sought relating to parental responsibility does not concern a discrete issue of parental responsibility (such as choice of school), which applications under s 8 CA 1989 more generally relate to. The starting point in s 2 (8) and (9) Children Act 1989 makes it clear that parental responsibility cannot be surrendered or transferred by a person and cannot be exercised in a way that is incompatible with any order made under the Act.
 - (iii) Such an order made under the inherent jurisdiction is consistent with the observations made by Hedley J in *Re K 9 (ibid)* that the wardship jurisdiction gives the court the power to control and delegate the exercise of parental responsibility.
 - (iv) Orders restricting the exercise of parental responsibility under s 8 CA 1989 were not aimed at giving one parent the right of exclusive decision to one parent or the other (per Hale LJ in *Re W*).
 - (v) It is likely, due to the complexity of the position caused by the mother's mental health and the history of her relationship with the local authority that restrictions on the exercise of the mother's parental responsibility will be required for the rest of Z's minority.
65. Third, the arrangements for Z's care do amount to a deprivation of liberty and that each of the three components for that are met for the following reasons:
- (i) It is clear the arrangements for his care, when compared with, for example that provided for his older sister when she was the same age, are very different. He is under the complete supervision and control of his parents, in particular his father, due to the nature of the orders made regarding parental responsibility. The level and extent of supervision he requires is illustrated by the fact that the school he will attend from January 2020 consider full time 2:1 support will be required during the time he is with them. That level of supervision is reflected when he is at home, he can't go out unsupervised, all his care needs are met by his parents both during the day and at night. The fact that these restrictions are for the benefit of the person affected, does not prevent them being a deprivation of liberty but is a factor in the lawfulness of the deprivation. As Lady Hale observed in *Cheshire West* at paragraph 46 '*A gilded cage is still a cage*'. Whilst it is unusual to have a young person living at home being deprived of their liberty, this case is unusual due to the degree of supervision and control required to be exercised in this case. The situation here falls outside the usual circumstances described by the majority in the Supreme Court in *Cheshire West*.
 - (ii) In accordance with *Re D* the parents cannot consent to the deprivation of his liberty, it is accepted he does not have the capacity to make that decision.

- (iii) By continuing the wardship proceedings and with the orders made within those proceedings that makes it clear the court retains control over the arrangements that I have concluded deprive him of his liberty. Consequently, it is attributable to the State.
- (iv) I am satisfied that the arrangement in place do meet Z's needs and that the extent to which they are a deprivation of his liberty those arrangements are proportionate and necessary to protect him from future harm. The authorisation will continue until Z attains the age of 18 and it is agreed the matter should return for review before then, when the court can consider any application for orders under s4A and 16(2) Mental Capacity Act 2005 which can continue authorise the deprivation of liberty after Z attains 18 pending a review by the Court of Protection.