Orphans – are some of them prejudiced by the Children Act 1989? Can this be remedied?

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If you are unlucky enough to be an orphan, you might also be unlucky enough to have no other member of your family and friends network willing to take on parental responsibility for you. In a situation where the threshold is met under s 31 of the Children Act 1989 ('CA 1989'), the local authority can be given parental responsibility by virtue of a care order. Without threshold, no care order is available and there appears to be a loophole in our current interpretation of the law, which means this class of orphans have no one and nobody who can assume parental responsibility for them. From time immemorial legal systems have been rated according to their ability to protect the most vulnerable, orphans being a classic case in point. This has been a mantra of our culture from the Old Testament to Oliver Twist. One would hope it still is today. The authors contend, however, there is a failure in our law that amounts to a breach of the human rights of an orphan who needs someone to hold parental responsibility for them and for whom no 'individual' is willing or able to accept parental responsibility.

Local authority duties to orphans

Section 20 of the CA 1989requires a local authority to accommodate an orphan:

> '(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him . . . '

Section 22(1) of the CA 1989makes any child accommodated by the local authority under s 20 a 'Looked After Child'. The local authority then has general and specific duties for the safety, wellbeing, education, maintenance, health and accommodation of that child. However, the local authority does not have parental responsibility for them by virtue of these duties.

The difference between s 20 accommodation and a care order for children who do not have anyone to exercise parental responsibility for them was explored (in a different context) in detail in *Re J (Child Refugees)* [2017] EWFC 44, [2018] 1 FLR 582 from which the following principles emerge:

a. Whether or not it is appropriate to proceed under s 20 duties or for the local authority to apply for a care order will be fact and case specific,
b. The benefits that flow from a care order include all those that arise from s 20 accommodation but additionally include; support under a formal court approved care plan, a child being given priority for access to services, having someone to exercise parental responsibility for them, the local authority being under an obligation which cannot be resiled from to find an absconded child and, finally, that the local authority would be under a higher duty to establish a family life for the child,
c. In terms of disadvantages of each regime; s 20 accommodation does not confer the above advantages of a care order, but the making of a care order may stigmatise a child and is a more interventionist regime which requires greater justification before it is implemented.

Is threshold met as a result of a child being an orphan?

Threshold in respect of orphaned children under the CA 1989was considered by Thorpe J (as he then was) in *Birmingham City Council v D; Birmingham City Council v M* [1994] 2 FLR 502. In that case it was conceded that the children were not suffering harm and the local authority attempted to establish a likelihood of harm on the basis of the potential harm that could be caused if there was no legal person to exercise parental responsibility on behalf of the children. This argument was roundly rejected Thorpe J who said:

> 'Section 31 is plainly designed to protect families from invasive care orders unless there is a manifest need evidenced by a perceptible risk of significant harm. Of course in these cases the local authority does not seek to invade, but to protect and compensate children who have been bereft of parental support. I have every sympathy with the local authority's motives and their aims, but I must construe s 31 sensibly and realistically. If there is some shortcoming in the statutory framework it is not for me to remedy the deficiency by a strained construction of s 31, particularly in the light of the opposition of the guardians ad litem.'

In *Leicester City Council v AB and Others* [2018] EWHC 1960 (Fam), [2019] 1 FLR 344 Keehan J made the child of a terminally ill parent a ward of court. He declined to find the s 31(2), CA 1989 threshold on the basis of the mother's inability to continue to care for her child because of her terminal illness.

It would, therefore, appear that threshold will not be met directly as a result of a child being, or soon to become, an orphan.

Can the local authority acquire parental responsibility by becoming a guardian under s 5 of CA 1989?

As will be further explored below, the current state of the jurisprudence does not permit a local authority to be appointed as a guardian for children. However, this was not always the case. Prior to the CA 1989, the Child Care Act 1980 was in force. The 1980 Act placed a duty on the local authority to provide accommodation to orphans (s 2) and the local authority could assume parental rights of children that it was

accommodating under s 2 of that Act by passing a resolution (under s 3).

A report made to ministers by an interdepartmental working party *Review of Child Care Law* (September 1985) when considering the position of orphans in the future stated this:

> '15.32 In our view, where there is no harm or risk of harm to the child the only circumstance in which there is a case for transferring parental rights to the local authority is when there is no longer any parent available to exercise them. Where there is a parent who is sharing care with the authority and may be able to resume full care in the future we do not think that it should be possible for parental rights to be transferred.
>
> 15.33 Guardianship is the present procedure for appointing a legal parent for a child who has none and we recommend that in these cases the authority should apply, as indeed they already can, to be appointed guardian. However guardianship proceedings are at present available only where one or both parents have died. We recommend that they be extended to cases where a child has been abandoned to the care of a local authority. The definition of abandonment should go beyond that in the present criminal law or the presumption arising when the parents' whereabouts have been unknown for twelve months, to cover cases where the parents have permanently abdicated their responsibilities to the local authority.'

The *Review of Child Law: Guardianship*, Law Commission Working Paper 91 (1985) recommended:

> '3.56 Further, where the court finds it impractical or undesirable to appoint a guardian or to make any other order for the care of the child in favour of any individual, it should be empowered to make an order committing the child to the care of the local authority. Such an order can already be made on the failure or revocation of a custodianship order, on the refusal of an adoption order, in wardship and in custody proceedings and the absence of such a provision in guardianship proceedings is anomalous. Given that the need to appoint a local authority as a sort of 'fall back' guardian is just as much, if not more, likely to arise in guardianship than custody proceedings, we think that such a provision should be included among the court's powers to protect the child. Alternatively, the court could simply be empowered to appoint the local authority guardian. Local authorities may already apply to be appointed guardian (although we are not aware of their doing so) but we consider that the court should be able to act without prior application. We would welcome views as to which is the better solution.'

Section 5(1) of the Guardianship of Minors Act 1971 provided:

> 'Where a minor has no parent, no guardian of the person, and no other person having parental rights with respect to him, the court, on the application of any person, may, if it thinks fit, appoint the applicant to be the guardian of the minor.'

Working Paper 91 suggested that local authorities were entitled to apply for guardianship under this Act.

Section 5 of the CA 1989in some ways expanded the circumstances in which a court could appoint a Guardian, it provides:

> '(1) Where an application with respect to a child is made to the court by any individual, the court may by order appoint that individual to be the child's guardian if—
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> (a) the child has no parent with parental responsibility for him; or
> (b) a parent, guardian or special guardian of the child's was named in a child arrangements order as a person with whom the child was to live and has died while the order was in force ; or
> (c) paragraph (b) does not apply, and

the child's only or last surviving special guardian dies.

(2) The power conferred by subs (1) may also be exercised in any family proceedings if the court considers that the order should be made even though no application has been made for it.'

However, s 5 uses 'individual' instead of 'person' even though the draft Children Bill 1988 in Law Com 172 used 'person' rather than 'individual'. Further, the *Children Act Guidance and Regulations, Volume 1, Court Orders, Department of Health*, HMSO, 1991, states at para 2.12 that a guardian must be an 'individual', ie a human person rather than a local authority, a voluntary organisation or a trust corporation. This, on the face of it, makes it very difficult to argue that Parliament intended anything other than to restrict guardianship to human persons only.

Thus the CA 1989does not seem to reflect the proposal to expand guardianship proceedings in respect of children who have been abandoned to the local authority and, further, it appears to prevent local authorities from applying for guardianship in any circumstances. Per Hollis J in *Re SH (care order: orphan)* [1995] 1 FLR 746:

> 'In my view that is aimed clearly at conferring guardianship on an individual and not upon what I describe as an artificial individual such as the director of social services as suggested in this case who, in effect, would be the local authority'.

Fortunately, for the child in *Re SH*, Hollis J was able to find threshold made out and the problem was avoided by making a care order. The same solution will not always be available for other orphans. Further a child, as the authors experienced in a recent case, may find a threshold enquiry into the defaults of the deceased parent, for whom he is grieving, rubs salt in already very raw wounds and may be quite destabilising either at the time of enquiry (which may include eliciting evidence from the bereaved child) or later in life when they consider the contents of their file.

What about wardship?

The effect of wardship, prior to the CA 1989coming into force, was set out in para 2.15 of Law Commission Working Paper 101 in respect of Wardship (1987):

> 'Wardship has two unique effects:
>
> (1) no important step in the child's life can be taken without leave of the court; [Re S. [1967] 1 W.L.R. 396, 407, per Cross J]
> (2) the court is empowered to make any order for the protection of the child or in relation to his upbringing. [Re N. [1974] Fam. 40, 47, per Ormrod L.J.]

These effects are often expressed by saying that the court becomes "guardian" or has "custody" of the child. The analogy cannot be pressed too far: it does not imply the continuous exercise of parental responsibility. Hence the court will normally grant "care and control" of its ward to whoever (among those available) is best able to look after him. The court does not grant custody as such, although in many cases the practical effect will be much the same. The person (or body, such as a local authority) with care and control, however, is always subject to the "important steps" rule.' [emphasis added]

It must be stressed that wardship does not confer parental responsibility on the court or anyone else. In any event, from the point of view of an orphan, the decision making process in Wardship is often delayed and cumbersome, may lack continuity of decision making and may feel remote.

Further, wardship has been significantly curtailed by Section 100 of the Children Act 1989. Section 100 (2) provides:

> '(2)No court shall exercise the High Court's inherent jurisdiction with respect to children-
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> (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.'

The result is that wardship cannot be used to delegate day to day parental responsibility of an orphan to a local authority.

Additionally, a warded child does not receive all the other advantages of a care order and faces all of the disadvantages of being under s 20 set out in *Re J* (above).

Why does a local authority having parental responsibility for an orphan matter?

The authors accept that having someone to hold parental responsibility for them may not be significant for every child, however, for some children it could have an impact on their welfare. In *Re SH*, Hollis J said:

> 'I heard the oral evidence of a social worker of some 14 years' experience, who told me that without a care order he might experience difficulties, for instance, if S were to run away from any placement and refuse to return, possibly for a seek and find order if that became necessary, possibly for medical treatment, or possibly if any member of S's extended family sought to obtain his care . . .
>
> It seems to me that such difficulties, if they arose, might involve delay which would adversely affect the boy. *There might be red tape involved in convincing whoever was concerned that the local authority had authority to decide what to do with the boy*.' [emphasis added]

Hollis J foresaw a a situation where something could happen at the weekend or over Christmas when an out of hours High Court judge would have to be contacted. The delay in a social worker contacting a lawyer, a judge being raised and an order being granted and drawn could be a number of hours. It would depend of every professional at every stage involved acting efficiently. If a care order is in force, then none of those steps would be required. The risks to a self-harming or absconding child by having such an extended chain of command are self-evident.

Apart from all this, from a psychological perspective, nobody having parental responsibility for a child could make it more difficult for the child to accept boundaries and have an adverse effect on their sense of identity.

Appendix 2 of the General Medical Council's 0–18 years: Guidance to all doctors states:

> 'People without parental responsibility, but who have care of a child, may do what is reasonable in all the circumstances of the case to safeguard or promote the child's welfare. This may include step-parents, grandparents and childminders. You can rely on their consent if they are authorised by the parents. But you should make sure that their decisions are in line with those of the parents, particularly in relation to contentious or important decisions.'

It is easy to see how the guidance to doctors could be applied when no person has parental responsibility for a child could result in confusion for a medical professional frightened of being sued for assault or professional negligence or of facing a professional investigation/tribunal.

Can the Human Rights Act 1998 provide a solution?

It is contended that the question of parental responsibility for an orphan engages their Art 8 rights and that, where they would be substantially disadvantaged, such as in the circumstances set out above, then nobody having parental responsibility for them would be a breach of their Art 8 rights. The question which, consequently, arises is; can s 5 of the CA 1989be interpreted so as to enable a local authority to become a

guardian and, thereby, obtain parental responsibility for them?

The authors argue that the 1994 decision of Hollis J in *Re SH*, (that a local authority cannot be made a guardian), needs to be reconsidered following the passing of the Human Rights Act 1998 ('HRA 1998'). In particular, the interpretation of the word 'individual in s 5 of CA 1989 needs to be looked at again.

Section 3 of the HRA1998 says that 'where possible' domestic legislation should be interpreted in a way that makes it EHCR compliant. Under s 4, where it is not possible to so interpret domestic legislation, the court should make a declaration of incompatibility. This effectively creates a rebuttable presumption to interpret legislation in a manner which is compatible with the European Convention of Human Rights. Lady Hale said in *Gilham v Ministry of Justice* [2019] UKSC 44 at para [39]:

> 'In *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, the House of Lords held that the interpretive duty in section 3 of the Human Rights Act 1998 was the primary remedy [as opposed to section 4]. In *Ghaidan v Godin-Mendoza* it was also established that what is "possible" goes well beyond the normal canons of literal and purposive statutory construction.'

According to various authorities the obligation may require the courts to:

(a) give legislation a Convention compliant meaning even where there is no ambiguity in the statute
(b) on occasions adopt a linguistically strained interpretation of legislation
(c) modify the meaning and effect of primary legislation (which may require the court to depart from the parliamentary intention behind the legislation)
(d) read additional words into the legislation to achieve convention compliance
(e) read down the legislation so as to narrow the interpretation of a provision
(f) or clarify the effect of a provision without altering the words used,

(see *Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care Order: Adequacy of Care Plan)* [2002] UKHL 10, [2002] 1 FLR 815; *Ghaidan v Godin-Mendoza* [2004] UKHL 30; *R v A* [2001] UKHL 25 and *R v Lambert* [2001] UKHL 37.

For an example of the Court of Appeal interpreting the CA 1989in a manner which is compliant with the ECHR ('the Convention'); see *Re K (Secure Accommodation Order: Right to Liberty)* [2001] 1 FLR 526 where the court read the statute to import provision of education (in its widest sense) as a condition precedent for secure accommodation, even though the statute contained no such provision, in order to interpret the statute in a manner compliant with Art 5 of the ECHR.

If the court can, in light of the advent of the HRA 1998, interpret the word 'individual' as including an artificial person, such as a local authority, then the possibility of a breach of an orphan's human rights, on the basis explored in this article, is removed.

However, there are five points, in particular, that require careful consideration and which may point away from such interpretation:

(a) Having no person to hold parental responsibility for an orphan may not necessarily be a breach of an orphan child's human rights
(b) Section 5(4) of the CA 1989gives a guardian the power to appoint another guardian in the event of the first guardian's death. 'Artificial' individuals cannot die and so is the language of the statute probative of Parliament's intent to restrict the appointment of guardians to 'real' individuals?,
(c) Would re-interpretation of the word 'individual' as including a local authority mean that other 'artificial' individuals (such companies, charities etc) could also be appointed as

guardians? If so, does this contraindicate the re-interpretation of the word 'individual'?

(d) The consequences of re-interpreting 'individual' opens up a new route for local authorities to share parental responsibility with a parent (but not to hold determinative parental responsibility) without the need for threshold to be crossed. Is this right and proper?,

(e) The use of the word 'individual' is also used in the wording of the Special Guardianship provisions under s 14A, CA 1989. Does re-interpreting s 5 open up the path to make SGOs in favour of 'artificial' individuals? If so, is that right and proper?

Addressing point (a); in *Wagner and JMWL v Luxembourg (Application 76240/01)* [2007] ECHR 1213 the European Court of Human Rights considered the refusal by Luxembourg to recognise the Peruvian adoption order of an abandoned child. The court found there to be a breach of Art 8 by the refusal. The court said:

> '132. The court considers that the decision refusing enforcement fails to take account of the social reality of the situation. Accordingly, since the Luxembourg courts did not formally acknowledge the legal existence of the family ties created by the Peruvian full adoption, those ties do not produce their effects in full in Luxembourg. The applicants encounter obstacles in their daily life and the child is not afforded legal protection making it possible for her to be fully integrated into the adoptive family.'

In the judgment in question, the court of Appeal emphasised, inter alia, the need to give the child the most favourable status.

This judgment acknowledges that for a child to be left with no legal person having parental responsibility for them can be a breach of Art 8. An orphaned child who needs someone to exercise parental responsibility for them but has no one to do so will be in a broadly analogous situation with the child in *Wagner*. Examples of such orphans might include, young children, children with specialist health needs, behavioural difficulties or other complex needs.

If that analysis is correct, there would not only be a breach of Article 8 for that specific class of children but also of Article 14 which provides:

> 'The enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

In *Wagner* (above) the court said, finding a breach of Article 14:

> '152. For the purposes of Article 14 of the Convention, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, in particular, *Karlheinz Schmidt v Germany* (Application No 13580/88) [1994] ECHR 22).'

There is no 'objective or reasonable' justification for the specific class of orphans, identified above, looked after by local authorities, not having anyone to exercise parental responsibility for them.

Turning to the point b; namely does the ability of a guardian to appoint another guardian in the event of the first guardian's death point to a parliamentary clear intention that the provisions of s 5 should relate to 'real' as opposed to 'artificial' individuals? 'Artificial' individuals, of course, cannot die and there is no provision in the statute for 'artificial' individuals, which are going to cease to exist (for example by unitary authorities being reorganised and renamed) to nominate their successor as guardian for the child. This

might suggest that Parliament did not intend that 'artificial' individuals would be appointed as guardians for children. However, this could simply be (another) lacuna in the drafting, rather than evidence of Parliament's active intent to exclude 'artificial' individuals from the class of individuals who can become guardians. In any event, there are arguably good reasons why an 'artificial' individual should not have the power to nominate a guardian in the way that a 'real' individual can. Finally, on this point, in the absence of express contradiction in the statute (which does not exist) the statute has to be interpreted in a Human Rights compliant manner; s 3, HRA 1998 and *Re S and W*. No such express contraindication appears to exist only, at best, an inferential one.

The third consideration is that, if 'individual' is re-interpreted to include 'artificial' individuals, then this would, in theory, create jurisdiction for 'artificial' individuals other than local authorities to apply to be a child's guardian or to be nominated as such by a parent with parental responsibility; s 5(3), CA 1989. This, no doubt, would be a consequence entirely unintended by Parliament and one which is unregulated by primary or secondary legislation. Obviously, such a sea change gives serious pause for thought before re-interpretation of the definition of 'individual' as advocated. This consequence could be avoided whilst still interpreting the word 'individual' as per Hollis J in *Re SH*, under s 5(1). This is because s 5(2) of the CA 1989t gives the court the power to confer guardianship of its own motion. The term 'individual' is not mentioned at all in s 5 (2), which simply gives the court the power to exercise its powers under s 5(1) of its own motion. Of course, it could be argued that s 5(2) is sub-ordinate to s 5(1) and so cannot grant any wider discretion than is already conferred by s 5(1). However, interpreting s 5(2) without importing the word 'individual' would avoid incompatibility with the HRA 1998 and leave a situation where artificial individuals can only become guardians in situations where the court is in control and, in reality, the court is not likely to grant guardianship to any artificial individual other than a local authority.

It is of note that, unlike other provisions of the Act, there is no explicit statutory bar on making a guardianship order of its own motion in favour of a local authority. This contrasts with s 9(2) which prohibits an application by a local authority for a s 8 order and goes on to say no Court shall grant such an order in favour of a local authority. Thus the statute where parliament wished it to be is very specific about a local authority not being able to seek, or be granted, a specific type of order. The wording of s 9(2) also clearly acknowledges the potential distinction between a certain category of person being able to apply and the category of person to whom the court can of its own motion grant an order to – why else explicitly forbid both? In the absence of such specific prohibition in relation to guardianship under s 5(2), it is argued that the interpretive powers of s 3 of the HRA 1998 can and should be deployed.

In any event, ultimately, even if the potential for this re-interpretation to 'open the flood gates' exists, that is not a reason to leave the statutory interpretation on the current non-Human Rights compliant basis that subsists.

Turning to the fourth point outlined above; there is no threshold criteria for making a s 5 order. The court simply applies the s 1(3) welfare checklist and either makes an order or does not. Therefore, there is no 'first stage' protection for a child or other family member from state intervention. If an application to become a guardian were granted, the local authority would acquire parental responsibility for the child (albeit not determinative parental responsibility as would exist under a care order). The potential ramifications for this in all cases where there are other holders of parental responsibility are huge. It would open up the pathway for local authorities (or other concerned 'artificial' individuals) to seek to share parental responsibility (on a non-determinative basis) with parents but without having to satisfy the court that the threshold criteria were met.

This may be more of a theoretical concern than an actual one in that a local authority is unlikely, we would suggest, to apply for non-determinative parental responsibility for a child in respect of whom others hold parental responsibility.

Further, since the court only needs to interpret the law so far as it makes it human rights compliant it might be interpreted that guardianship to a local authority would be confined to that class of child where parental responsibility was for one reason or another not available by some other route. In other words it could be confined to exceptional circumstances, which did not involve cutting across anyone else who had parental responsibility (in other words avoiding the more controversial aspects of state intervention).

Additionally , if the exercise of such jurisdiction were confined to orders of the courts own motion, the court would not be faced with a flood or indeed by any applications. This problem might also be ameliorated in that, no doubt, any court considering whether or not to grant parental responsibility to a local authority (even non-determinative parental responsibility) when there are other 'real' individuals with parental responsibility would not do so without first being satisfied that there was a high justification (effectively the same as the s 31(2) threshold criteria) for doing so.

In any event, as set out above, even if the potential for this re-interpretation to 'open the flood gates' exists, that is not a reason to leave the statutory interpretation on the current non-Human Rights compliant basis that subsists.

As to the fifth concern, there is no suggestion that 'individual' under s 14A CA 1989has to be interpreted as including 'artificial' individuals in order for s 14A of the CA 1989 to be Convention compliant. Accordingly the most serious potential consequence, in this regard, of re-interpreting the meaning of individual in s 5 of CA 1989 is that 'individual' will have a different meaning in s 5 to that in s 14A. Whilst undesirable, the creation of such an inconsistency does not outweigh the need to interpret s 5 in a manner which is HRA 1998 compliant.

Further, s 14A(2) refers to the appointee needing to be 18 or more years old, which clearly is not fit for a corporate body. Thus s 14A is explicit about matters where s 5 is not. It may also be relevant that s 5 is in Part I of the Children Act, which looks at wider more general concepts, and s 14A is in Part II, dealing with private law orders.

An alternative to reinterpreting s 5 CA 1989would be to revisit the decision in *Birmingham City Council v D* (above), as it predates the Human Rights Act, and for the court to find threshold on the basis that a child has no person to exercise parental responsibility for them and that places them at a risk of significant harm.

Conclusion

There has been a lacuna in the statutory scheme for orphans looked after by local authorities from the coming into force of the CA 1989 to date. That lacuna should be considered urgently by the Government and legislation introduced to remedy it.

Until the gap in the statutory scheme is plugged by legislation, s 5 CA 1989 should be interpreted to permit local authorities to apply for and obtain guardianship for children where it is necessary for a local authority to hold parental responsibility to safeguard and promote the welfare of a child.

As there appears to be no judgment on this point, any case where such a course was attempted would have to be transferred to a full judge of the High Court sitting in the Family Court. The authors hope that the reasoning set out above will find favour with any judge who hears an application for Guardianship on behalf of a local authority for an orphan, where threshold cannot be satisfied, and the orphan requires a person to exercise parental responsibility for them.