



Neutral Citation Number: [2021] EWCA Civ 36

Case No: B4/2021/0045 and 0049

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT MIDDLESBOROUGH
HH Judge Cains
MB19C01905

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 January 2021

Before :

LORD JUSTICE BAKER
and
LADY JUSTICE CARR

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF DD (REMOVAL UNDER INTERIM CARE ORDER)

Between :

GD (1)	<u>Appellants</u>
AH (2)	
- and -	
A LOCAL AUTHORITY (1)	<u>Respondents</u>
CT (2)	
GT and SB (3) and (4)	
DD and AJ (5) and (6)	

Scott Smith (instructed by **Meikles Solicitors**) for the **First Appellant**
Helen Scourfield (instructed by **Hewitts Solicitors**) for the **Second Appellant**
Lesley McKenzie (instructed by **Local Authority Solicitor**) for the **First Respondent**
Becky Jane (instructed by **Tilley Bailey Irvine Law**) for the **Second Respondent**
Kevin Ross (instructed by **TMJ Solicitors**) for the **Third and Fourth Respondents**
Nafeesa Choudhury (instructed by **The Richmond Partnership**) for the **Fifth and Sixth Respondents**

Hearing date: 18 January 2021

Approved Judgment

LORD JUSTICE BAKER :

1. The two appellants appeal against an interim care order made in respect of D, the daughter of the first appellant, on the basis of a care plan under which D would be removed from the care of the second appellant.
2. There is a long and complex background history to these proceedings. For the purposes of this short judgment, the most important facts can be summarised as follows.
3. D's parents started a relationship in 2015 and D was born in July 2016. The parents' relationship was volatile and there were allegations that the father was violent and abusive towards the mother. The father was involved a number of criminal offences for which he received a series of custodial sentences. Shortly after D's birth, the relationship came to an end and each parent entered a relationship with another person. The father started a relationship with another woman, AH, who had an older child, L, by another man. In due course, that man, who was also involved in criminal offences including offences of violence, started a relationship with the mother. In the course of these relationships, both AH and the mother became pregnant again. In January 2018 the mother gave birth to a son, A, and in March 2018 AH gave birth to a son, G.
4. In February 2019, the father retained D after a contact visit and ever since that date, she has lived with the father and AH, L and G. In April 2019, the mother started private law proceedings regarding D, but subsequently it was agreed that she should continue to live with her father and AH and have contact with her mother.
5. In September 2019, the father sought medical advice about bruising on D's body which he claimed had been sustained while she was staying with her mother. As a result, the local authority started care proceedings in respect of D and A which are still ongoing. In November 2019, A was made subject to an interim care order and placed with maternal relatives, GT and SB. D was made subject to a child arrangements order in favour of AH and the father, coupled with an interim supervision order.
6. In April 2020, the police were called following an altercation between the father and AH, each of whom made allegations of violence against the other. No action was taken and D remained living with the couple. In May 2020, the mother, who had by now moved onto another relationship, gave birth to another son. In July 2020, the father and AH separated again briefly before resuming their relationship. It is the local authority's case that they have not been transparent and honest about difficulties in their relationship.
7. The fact-finding hearing in the care proceedings was listed to start in November 2020 but for reasons connected with the Covid-19 pandemic had to be adjourned until the following month. The hearing duly started in December 2020 but after hearing evidence from one witness had to be adjourned again. When the court reconvened on 4 January 2021, yet another adjournment was required because the social worker was unavailable. At that stage, however, the local authority and guardian became aware that AH and the father had separated over New Year, with D remaining in AH's care. This gave rise to increased concerns about the stability of D's placement as a result of

the volatility in the adults' relationship. The local authority concluded that, as a result of the behaviour of AH and the father, D was at risk of immediate significant emotional harm.

8. In the course of discussions at court, the father agreed to submit to an exclusion order until the conclusion of the fact-finding hearing. AH, however, was ambivalent about the need for such an order, and her attitude increased the local authority's concern about the relationship and its impact on D. There were also concerns that, if the child arrangements order remained in place, D might move between AH's home and the home of the paternal grandparents with whom the father was by now living. At a further hearing on 7 January, the local authority therefore sought an interim care order and proposed that D should move to live with GT and SB, the carers of her half-brother.
9. In a clear and well-structured judgment, Judge Cains summarised the background, identified the relevant legal principles and set out the position of the parties. She concluded, first, that in light of the risk of D moving between properties, and the difficulties about the smooth running of contact, it was now necessary and proportionate for the local authority to share parental responsibility under an interim care order "to ensure stable arrangements in place regarding D's residence and contact".
10. The judge then turned to consider whether it was necessary and proportionate for D to be removed from AH's home. She took into account the fact that D has been living there for almost 2 years. During that time, AH has been his primary carer and D has developed a close relationship with the other children in the home, L and G. On the other hand, she noted that there was now further evidence of significant volatility in the relationship between AH and the father, exacerbated by the ongoing pressure of court proceedings coupled with periods of restrictions and lockdown resulting from the Covid-19 pandemic. She noted the particular pressures on AH, who in addition to caring for three children, has been working in a care home. The judge observed that she "has done her best to juggle these commitments". She noted that AH, as a key worker, was eligible for the children to attend school but that she wished to educate the children at home to avoid risk of infection. Family support had been less available through no fault of AH's. This was the context in which her relationship with the father had broken down. The judge observed:

"the circumstances prevailing now are very different to those at the time the order was made. There is a chronic pattern of separation and reconciliation."
11. The judge considered whether these issues could await the final hearing observing that, if so, it would be wrong to deal with them now. She concluded, however, that it

"seems to me that in [the] intervening period pressures within the house and the relationship between AH and the father are likely to continue or even increase as they are practical stresses. Between now and March the pressures within the household and relationship will continue and increase as the stressors alluded to will only carry on over time ... Using the past as a predictor of the future, there are reasonable grounds to believe

this is [a] which will expose D to the potential of significant emotional harm.”

12. The judge noted that neither the allocated social worker nor the children’s guardian had had an opportunity to discuss the proposed removal with the father or AH. She recorded that the father had proposed a written agreement or safety plan to protect D in the interim and had indicated that he would agree if necessary to submit himself to an exclusion order to ensure that he did not return to AH’s home during this time. The judge added, however, that when this proposal had been canvassed with AH, it had been her primary submission that such an order was unnecessary. It was submitted by the local authority and others that this confirmed the fact that the relationship remained. The judge concluded that, whether or not there was any reconciliation, the stresses within the relationship would continue.
13. The judge then considered the alternative options for placement and concluded that, of the options available, an interim placement with GT and SB, as proposed by the local authority, represented the best option in the circumstances. Such a placement would enable D to live with her half-brother, A.
14. The judge reached the view that the interim care order alone would not be sufficient to prevent the pattern of reconciliation and separation to which D had been exposed and which was likely to be emotionally significantly harmful to her. The interim care order alone would not ensure that AH would be open and transparent with the local authority about the relationship. She concluded:

“I consider interim removal necessary and proportionate. I accept D will likely be distressed if removed from AH’s care But on the evidence before the court I consider that the distress of removal is outweighed by the exposure to discord, stress and volatility in the relationship of the father and AH, each of whom is also in the pool of perpetrators and there would be a risk of physical harm which cannot be discounted The nature of risk in AH’s care is such that it cannot be reduced by practical care to a manageable level; it is an emotional and relationship-based risk.”
15. She therefore made the interim care order on the basis of a plan for placement with GT and SB, and directed that there should be interim supervised contact for the father and AH once a week, with two further “virtual” contact sessions. She refused applications for permission to appeal but agreed a short stay of the order to allow those applications to be renewed to this Court. Those representing the father and AH immediately filed notices of appeal to this Court. On reading those applications, I granted permission to appeal, listed the hearing urgently today and extended the stay of the order, with the result that at present D remains in the care of AH.
16. The legal principles to be applied when considering whether a child should be removed under an interim care order pending the conclusion of proceedings is helpfully summarised by Peter Jackson LJ in *Re C (A Child)(Interim Separation)* [2019] EWCA Civ 1998 at paragraph 2:

“(1) An interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.

(2) The removal of a child from a parent is an interference with their right to respect for family life under Art. 8. Removal at an interim stage is a particularly sharp interference, which is compounded in the case of a baby when removal will affect the formation and development of the parent-child bond.

(3) Accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower ('reasonable grounds') threshold for an interim care order is not an invitation to make an order that does not satisfy these exacting criteria.

(4) A plan for immediate separation is therefore only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.

(5) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation.”

17. In simple terms it is the primary contention of the appellants, the father and AH ,that the threshold for removing D from AH’s care has not been crossed. She has been settled there for nearly 2 years and removing her would cause her emotional harm and distress. It is submitted that the child’s safety and welfare do not require her removal, particularly at this late stage in the proceedings when the fact-finding hearing is set to resume later this week and a final hearing is listed for March 2021. In response, the other parties – the local authority, the mother, GT and SB and the children’s guardian – all contended in skeleton arguments that the judge’s decision was correct, that it was one which she was entitled to come to on the evidence, in particular about the volatility of the relationship between AH and the father, that she explained her reasons clearly in her judgment, and that accordingly this court should not interfere with her decision.
18. On reading the papers in preparation for this hearing, I reached the preliminary view, shared by my Lady, that, notwithstanding the clear and careful way in which the judge approached the issue, her conclusion was not in accordance with the legal principles set out above, having regard in particular to (1) the fact that D is extremely settled in the care of AH (2) the fact that the interim arrangements have continued for over 14 months since the proceedings started (3) the fact that it is now only a matter of weeks until the proceedings are finally concluded and (4) the volatility in the relationship has been known about throughout the proceedings. It seemed to me that, with further

discussions, it ought to have been possible to arrive at a solution that allowed D to remain with AH until the conclusion of the proceedings whilst protecting her from the adverse impact of the ongoing volatility in the adults' relationship. In short, this did not look like a case where the risk to her safety and welfare required D's immediate removal.

19. At the outset of the hearing, we indicated our preliminary views to the parties. The legal representatives agreed to take further instructions, a process which, like much else in this protracted litigation, was made much more difficult by the restrictions imposed as a result of the pandemic. After further time was allowed, the local authority agreed to amend its interim care plan so as to permit D to remain living with AH under the interim care order on the basis that the father give an undertaking to the court not to enter D's home and AH give an undertaking to the court not to allow the father to enter the home and not to facilitate contact save for that arranged or approved by the local authority. It was proposed that those undertakings should continue until the conclusion of the proceedings or further order. The local authority indicated that for the time being contact should be supervised professionally while an assessment is carried out of certain family members to establish whether they can be entrusted with supervising D's contact with her father. The children's guardian indicated that she would agree to the amendment, as did those representing the mother and GT and SB. AH also agreed to this proposal. The father agreed to the proposed amendment to the plan and to the undertakings outlined, but opposed the proposal that his contact be supervised. On his behalf, Mr Smith contended that the proposed undertakings provided sufficient protection to D and that there was no justification arising from recent developments to warrant the imposition of supervision on the father's contact.
20. The role of this Court is limited to the appeal before us. Where an appeal is decided in ongoing proceedings, there will often be issues which are left outstanding at the conclusion of the appeal and which have to be resolved by the court at first instance when the case returns there and which are more appropriately dealt with by the court of first instance. In my judgment the issue of whether contact needs to be supervised is just such an issue. We are in no position to determine whether the father's contact needs to be supervised. It is a finely balanced issue which should be determined on evidence. In my view, it should be determined at the next hearing due to start later this week. If the father wishes to pursue this issue at that hearing, he should file an application by close of business tomorrow for an order under s.34 that he be permitted unsupervised contact.
21. So far as this appeal is concerned, I have concluded that the proposed amendment to the interim care plan, coupled with the proposed undertakings, meet the concerns which this court has raised about the removal of D from AH's care. Accordingly, if my Lady agrees, I would allow the appeal and substitute an interim care order on the basis of (a) the local authority agreeing that D will not be removed from AH's care until the conclusion of the proceedings or further order (b) the local authority agreeing to file an amended care plan by 10 am on 20 January 2021 and (c) undertakings by the father and AH in the terms set out above.

LADY JUSTICE CARR

22. I agree.