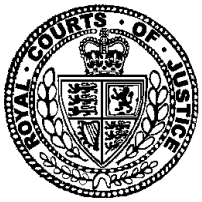

Neutral Citation Number: [2023] EWCA Civ 1266

Case No: CA-2023-001516

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL FAMILY COURT
HH Judge Oliver
ZC22C50485

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 November 2023

Before :

LORD JUSTICE BAKER
LADY JUSTICE SIMLER
and
LADY JUSTICE ELISABETH LAING

- -

J, K AND L (CHILDREN: INTERIM REMOVAL)

- -
- -

Alison Easton (instructed by **Burke Niazi**) for the **Appellant**
Simon Miller and Eleanor Howard (instructed by **Local Authority solicitor**) for the **First Respondent**
Deborah Bryan (instructed by **Wilsons Solicitors LLP**) for the **Second Respondent**
Edward Elliott (instructed by **National Legal Service**) for the **Third, Fourth and Fifth Respondents by their children's guardian**

Hearing dates : 10 October 2023

- -

Approved Judgment

This judgment was handed down by the judges remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 11.15am on 3 November 2023.

LORD JUSTICE BAKER :

1. This is an appeal against interim care orders made in respect of three children, twin girls aged 8 and their younger sister aged 6.

2. At the conclusion of the appeal hearing, we informed the parties that the appeal would be allowed. This judgment sets out my reasons for agreeing with that decision.

Background

3. The family has been known to social services for many years. The mother has had a very sad and troubled life. The social services records show that as a child she spent periods in care because of her own mother's drug abuse and mental health problems and was eventually placed with her grandparents. As a teenager and young adult, she was reported to have used crack cocaine and heroin and was convicted of a range of criminal offences. She has had a total of seven children (by three different fathers), of whom the subject children are the youngest three. All of her older children were removed from her care. Tragically one of those older children developed serious medical problems and later died. The mother has continued to have long-term difficulties with substance misuse and a range of mental health problems.

4. The father also has a number of other children in addition to the three subject children. He has known the mother for a number of years and had what he has described as an on and off relationship with her. In 2015, the mother became pregnant again and gave birth to the twins, J and K. In 2016, she gave birth to her youngest child, L. In the following years, the family was referred to social services on a number of occasions because of concerns about domestic abuse between the parents and the children's exposure to drugs. In 2019, the parents separated but remained in close contact. The children remained with the mother but had regular contact with the father.

5. In January 2022, the mother was arrested for drink-driving and it was discovered she had left the children alone overnight. As a result, she was charged with a number of offences, including child neglect. Those charges remain outstanding and are now listed for trial in December 2023. The children were placed with the father but returned to the mother after a few weeks. The local authority's attempts to engage with the mother through the Public Law Outline were unsuccessful and, in November 2022, care proceedings were started under s.31 of the Children Act 1989. Initially, the children remained at home with their mother under interim supervision orders. Various assessments were ordered. A parenting assessment of the mother was incomplete due to her limited engagement. A parenting assessment of the father concluded that, with support, he had the capacity to meet the long-term needs of all three children if they were placed in his care.

6. The children remained with their mother for several months after the start of proceedings. On 2 May 2023, however, following a referral from the ambulance service about concerns about the mother's health, the children were placed back with their father. On 25 May 2023, a hearing took place before District Judge Orchover. She refused the mother's application for the return of the children and instead made a child arrangements order providing that the children should live with the father until the next hearing or further order. She was, however, not satisfied with the local authority's

limited proposals for the children's contact with the mother. Her views were recorded in a recital to the court order in these terms:

> "the Court … being of the view that once there is further information about mother's health the aim should be for more extensive contact leading to overnight contact with mother and that agreement for shared care should be attainable before the next hearing. The court was of the view that the current proposals for contact (1 hour Tuesday, 1 ½ hours Saturday and 2 hours Sunday) were inadequate and that subject to suitable support being available it would be reasonable for the mother to spend a whole day with the children each weekend as well as there being contact during the week."

7. At a contact review meeting with the local authority attended by both parents on 26 May 2023, it was agreed that the mother should have unsupervised contact with the children from 10am till 3:45pm on Saturdays and Sundays and on Tuesdays after school, with the children to be collected and returned at a contact centre. According to the minutes of the meeting, the social worker told the mother:

> "we must follow the court order that's in place, if things go well this can be reviewed in the future, we need to look at the handovers progress going forwards, and coparenting with [the father]."

At a core group meeting on the same day, it was recorded that:

> "the children … are thriving in [the father's] care and there are no concerns about the level of care being afforded to them."

8. Over the next few weeks, the mother sent a series of emails following contact visits complaining that the father was ill-treating and physically abusing the children. These allegations were denied by the father. According to a statement filed in the proceedings dated 6 June, the social worker spoke to the children who said nothing to corroborate these allegations, although they said they were missing their mother and did not like having boundaries imposed by the father. They also told the social worker that "Daddy only cooks healthy food" and said they preferred their mother's cooking. The social worker concluded that there were no safeguarding concerns about the children's placement and observed that they were "very happy and comfortable around their father".

9. Ten days later, however, the local authority filed a C2 application "inviting the court to intervene and determine the mother's contact arrangements". The application was listed for hearing on 20 July before HH Judge Oliver. A further statement was filed by the social worker saying that, as a result of growing concerns about the children's emotional wellbeing following contact, the local authority had concluded that the contact "requires supervision at the moment in order to reduce the risk to the children and destabilising their care arrangements".

10. According to the social worker, the father had been supportive of this proposal. On 4 July, however, when the social worker spoke to the father after the contact centre had

informed her that neither parent had attended over the previous weekend, he informed her that he had allowed the children to stay with the mother overnight. She advised him that the local authority did not agree to overnight contact and that he and the mother needed to stick to the plan. On the following Monday, 10 July, the children told the social worker that they had slept at their mother's house over the weekend, that she had taken them to school that morning and would be collecting them at the end of the day, and that she had told them not to tell the social worker about it. According to the social worker, when she spoke to the father about this, he was "very defensive", saying he did not see the concern about the mother having overnight contact. He agreed, however, not to allow any further overnight contact before the next hearing.

11. On 17 July, the local authority filed a further statement from the social worker stating that the local authority now proposed that the children should be placed in foster care under interim care orders. Insufficient time was available at the hearing on 20 July to consider that proposal and the case was re-listed for a contested hearing on 26 July, again before Judge Oliver.

12. The hearing on 26 July proceeded on the basis of written evidence and oral submissions, after which the judge delivered an ex tempore judgment. He noted the submissions on behalf of the mother, supported by counsel for the father, that removal of the children was not a proportionate intervention and that there had been a misunderstanding by the parents as to the effect of the district judge's decision. He also noted the position of the guardian that, although it was a finely balanced case, the removal of the children from their father's care would be disproportionate and that the best outcome would be an interim care order with the children remaining at home under a working together agreement. If, however, that course was not acceptable or capable of working, the guardian would support the local authority's case. Counsel for the local authority informed the court that the local authority would not support the children remaining at home at that stage under an interim care order.

13. At paragraph 15 of this judgment, the judge continued:

> "The suggestion by Ms May [for the mother] was that the immediate risk of serious harm had not been met and therefore it was not a case here where the children should be removed because they are not, at this stage, suffering from any risk of harm, either emotional or physical. It is a question of whether they are suffering from emotional harm if they stay where they are. The social worker was concerned about the fact that the parents had effectively breached what was going on by allowing the children to spend nights with their mother; witnessed the physical violence the parents had exhibited and the fact that the children were being told to lie was, it was said by Mrs Fenn, another example of how the children were suffering from emotional harm."

14. The judge recited evidence that the children had told the social worker and staff at the contact centre that they had been told by their mother not to say that they had slept at her house. He continued:

> "17. The important point there is that the children clearly have spent time with their mother and clearly were saying to the social worker that they were being asked not to tell people, the social worker and the contact centre. What effectively was happening, it seems to me, was that the parents were using what was said by District Judge Orchover to be an objective, as effectively the carte blanche and just blowing a hole through the whole basis for which these proceedings were taken. They were doing their own thing and trying to avoid anyone knowing what was going on. That is not transparent, that is not working together, that is not in the best interests of the children.
>
> 18. I am satisfied that this is very risky behaviour, given the reason the proceedings were brought in the first place and it is simply putting things back to where they were before the local authority issued and the local authority has no control over that environment and that situation.
>
> 19. Would they have any more control if they were to have an interim supervision order with a plan and a working together agreement? The answer is probably not, no, and the reason for that is this, that if the parents were not working collaboratively and transparently with the local authority when there was an interim supervision order already in place, I do not see how they are going to work any better if there was a working together agreement or anything else. The children need to be protected and not caused or taught to lie."

15. The judge then concluded with an analysis of the application of the welfare checklist in s.1(3) of the Children Act 1989:

> "20. ….. [T]he children's wishes and feelings are clearly that they would wish to stay with their parents and I have no doubt that that would be what they would say in any event.
>
> 21. Their emotional, physical and educational needs. The issue here is the emotional needs, them living a lie, them being put in the middle is going to cause them emotional difficulties, no question about that. Is it urgent in that respect? Well, the answer is yes, because each time the children are exposed to going to the mother's house, doing something which is against what was indicated, that is putting them at emotional harm and emotional risk.
>
> 22. The effect of a change in their circumstances would, of course, be that they would no longer be living with their parents for the interim period. How long that would be I am not sure at the moment. That would give the parents a chance to sort themselves out. Although it would be a negative effect upon them, I do agree with Mrs Fenn that the mitigation of that would be they would no longer be experiencing emotional harm.

> …
>
> 24. The harm they suffer or are at risk of suffering is the emotional harm that I have already talked about and the fact that that matter cannot be managed at present because what was in place simply did not manage it. The problems continued, i.e., having time with the mother, being asked to lie even with an interim supervision order in place, so the harm that will be suffered will continue if there is no other decision made. The capability of each parent, well, that is being assessed at the moment, it is not something that is finalised, but at the moment, given that they have been lying to the local authority, given that they claim that they did not understand, which I do not actually accept, then the parents are not at the moment capable of acting in the children's best interests.
>
> 25. So I am satisfied actually that the right course of action is not to follow what the guardian says in her position statement, because I cannot see how that wraparound arrangement that Mr Bulman has identified in his position statement could make much difference. Yes, I suppose a visit to the father's house could take place more frequently. The rest of them are things that are almost impossible to police and monitor and the local authority's position is that it cannot be done under an interim care order other than they have parental responsibility and removed the children and that they would not agree with the children staying at the father's under the interim care order.
>
> 26. I am entirely satisfied the children, if they remain where they are and it nothing changes, and I cannot see any basis upon it will change, will continue to be at risk of immediate harm and that harm being emotional.
>
> 27. Therefore, I grant the local authority application for interim care orders in relation to all three children."

16. The judge refused an application by the father for permission to appeal and refused an application by both parents for a stay of the order pending an application to this Court. He made a series of case management orders, including orders for the filing of assessments, including an addendum parenting assessment of the father.

The appeal

17. On 3 August, the father's solicitors filed a notice of appeal to this Court. Permission to appeal was granted by Moylan LJ on 22 September and the appeal listed for hearing on 10 October.

18. The grounds of appeal were, in summary, that the judge

    (1) misled himself about certain factual matters;

(2) failed to conduct a proper welfare checklist analysis;

(3) elevated what he wrongly called a "risk of emotional harm" beyond what is intended by the interim removal harm test with the result that any balance of harm test he conducted was flawed;

(4) failed to conduct a proportionality evaluation;

(5) failed to give any or any sufficient reasons why the children could not safely remain at home under an interim supervision order of interim care order, with appropriate additional safeguards;

(6) wrongly took the local authority's refusal to agree to the children remaining at home under an interim care order as determinative of that option.

19. Plainly there was considerable overlap between these grounds. In her succinct and cogent submissions at the appeal hearing, Ms Alison Easton argued, first, that the judge had failed to identify how the high hurdle for removing children at an interim stage in care proceedings had been crossed. Although he had been referred to the applicable legal principles in written submissions, they were not cited in the judgment and there was nothing in the judgment to show that he had applied them when reaching his decision. Secondly, she pointed to a number of factual errors in the judgment which, she submitted, had led the judge astray in reaching his decision. In particular, she cited the reference in paragraph 15 to the children witnessing physical violence, pointing out that there had been no suggestion of violence since the start of the proceedings. She also pointed out that the judge's reference in paragraph 21 to the risk to the children visiting the mother's house overlooked the fact that, after District Judge Orchover's order and the meetings on the following day, the children had been visiting the mother for extended periods each week with the local authority's approval. At that stage, the direction of travel endorsed by the court and the local authority had been towards an extension of contact. Thirdly, she submitted that the judge's evaluation of risk and assessment of the proportionality of removing the children from home was superficial and flawed. He did not refer at all to the clear evidence that the children were generally thriving in the father's care nor to the likelihood of harm they would suffer if removed from their family for the first time and placed in foster care for up to eight months until the final hearing listed in March 2024. He plainly accepted the local authority's case that the children would be at risk if they were allowed to stay overnight with their mother, but did not analyse the extent of that risk, or balance it against the risk if they were removed, or consider whether there were any other ways in which they could be protected from unauthorised contact short of removing them from their father. Ms Easton submitted that the option of requiring the parents to sign a written agreement as a condition of the children remaining at home under an interim supervision order or interim care order had not been properly considered, as it should have if the judge was to comply with the well-established principles that the court should adopt the least interventionist course consistent with safeguarding the children's safety and welfare.

20. The father accepted that he had allowed the children to stay overnight with the mother on the first weekend in July without the local authority's approval. But he had not concealed what had happened when speaking to the social worker and there was no evidence that he had encouraged to children to conceal information from her. Ms Easton

submitted that in all the circumstances his error in allowing overnight contact to take place was not sufficient to justify the immediate removal of the children from his care.

21. The appeal was supported by the mother and also, at the hearing, by the children's guardian. On the guardian's behalf, Mr Edward Elliott endorsed the submissions on behalf of the father that the judge had failed to carry out a proper evaluation of risk which had prevented him conducting the necessary proportionality exercise. Given what Mr Elliott described as the mixed messages from professionals about contact after the court hearing on 25 May, the guardian was concerned that he may have been left confused about what was expected of him. The key question at the hearing on 26 July was the father's capacity to cope with the mother's dysregulation. The judge had not identified this as the issue nor considered what measures could be taken to ameliorate the risk while allowing the children to remain at home.

22. On behalf of the local authority, Mr Simon Miller leading Ms Eleanor Howard accepted that the father's care of the children had been good, but submitted that for the local authority and the judge the issue had been the parents' toxic relationship, which was clearly established on the historic evidence, and its adverse impact on the children. The failure to comply with the agreed plan for contact had been the tipping point because it demonstrated that the father was not at that stage able to act in the children's best interests. Mr Miller submitted that the judge had carried out a sufficient welfare analysis by reference to the statutory checklist in which he had noted the children's wishes and feelings and the impact of separation from the father, but identified as the core issue the need to protect the children from emotional harm through exposure to their parents' abusive relationship. Given the chronic history of that relationship, before and during the proceedings, the judge was entitled to conclude that he could not see any basis for change. In those circumstances, this Court should not interfere with his decision.

Discussion

23. At any point when care proceedings are adjourned, the court has power under s.38(1) of the Children Act 1989 to make an interim care order or interim supervision order. Under s.38(2) it may not do so unless satisfied that there are reasonable grounds for thinking that the circumstances are as mentioned in s.31(2) which specifies the threshold criteria for making a care or supervision order. But even if the test for making an interim order is satisfied, it does not follow that the child must always be removed from the care of their parents.

24. The principles to be applied by a court considering whether to authorise the removal of a child under an interim care order, derived from a series of reported cases, were 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."

25. The authority of *Re C* was very properly identified in the case summary prepared on behalf of the local authority for the hearing on 26 July and the key passage from paragraph 2(4) of the judgment expressly cited. It was not mentioned in the judgment – indeed, at one point, the judge referred to "the immediate risk of serious harm" which, as this Court made clear in *Re L-A (Children)* [2009] EWCA Civ 822, is not the test. Nevertheless, it is unlikely that this very experienced judge was unaware of the test to be applied, especially as he had been expressly reminded of it in the local authority case summary. The question is whether he applied it.

26. It is well recognised that every judgment is capable of being better expressed and that particular latitude must be afforded when considering judgments delivered ex tempore. This Court is fully aware that judges sitting at first instance in the family court are under great pressures of time and resources. But making all appropriate allowances, I concluded that the judge failed to apply the test for immediate removal and that, had he done so, he would have reached the opposite conclusion. It is true, as Mr Miller said, that the judge carried out a welfare analysis of the sort with which this Court should only interfere when there is a clear justification for doing so. In this case, however, there are clear reasons for interfering, of which the following three are the most prominent.

27. First, nowhere in the judgment does the judge refer to the very positive evidence about the care being provided to the children by their father. The evidence showed that they were thriving in his care. The parenting assessment had concluded that, with support, he had the capacity to meet their needs. The social worker had recently confirmed that there were no safeguarding concerns about the children's placement and observed that they were "very happy and comfortable around their father". None of this was mentioned in the judgment. The positive evidence about the father's care of the children was plainly an important factor in the assessment of whether the children's welfare and

safety required their immediate removal but it did not feature in the judge's welfare analysis.

28. Secondly, the judgment contains no analysis of the risk of the children suffering emotional harm if removed from their father's care. It is true that, when considering the effect of a change of circumstances, the judge acknowledged that removing the children from their parents would "have a negative effect" on them. He added that "the mitigation of that would be they would no longer be experiencing emotional harm". But the implication of that observation is that they would not suffer emotional harm through being removed. As they had spent their entire lives to date in the care of one or both of their parents, the suggestion that they would not suffer emotional harm if removed was plainly implausible. The question for the court was whether the risk of harm if removed was outweighed by the risk of harm if they remained with their father. That question was never addressed.

29. Thirdly, in order to satisfy itself that the "the length and likely consequences of the separation [were] a proportionate response to the risks that would arise if it did not occur", it was incumbent on the court to scrutinise the available resources that might remove the need for separation. As the Supreme Court acknowledged in *Re H-W (Children)* [2022] UKSC 17 (per Dame Siobhan Keegan at paragraph 45) it is a "longstanding proposition of English childcare law that the aim must be to make the least interventionist possible order". The intervention required here was to prevent the children having unauthorised contact with their mother. The question was whether removing them from their father was a necessary and proportionate course to meet that requirement.

30. In answering that question, it was plainly important to consider what Ms Easton described as the direction of travel towards an extension of contact endorsed by the court and charted by the local authority only a few weeks earlier. After the hearing before District Judge Orchover, the local authority had agreed a schedule for contact that included what could fairly be described as a high level of unsupervised contact between the children and their mother to take place at the mother's home. It is true that the local authority had subsequently changed its mind and concluded that contact should be supervised. It had informed the father of its decision and he had supported that proposal. But at the time of the subsequent overnight stay, the local authority had no parental responsibility for the children, and it was the guardian's impression that the father had received mixed messages which may have left him confused about what was expected of him. In those circumstances, the judge ought to have given very serious consideration to the less interventionist option of allowing the children to remain at home under either an interim care order or an extension of the interim supervision order, buttressed by a clear order defining the mother's contact and a written agreement signed by both parents. The point raised in the sixth ground – whether he erred in regarding the local authority's refusal to agree to the children remaining at home under an interim care order as determinative of that option – is not an issue which needs to be resolved in order to dispose of this appeal.

31. Had the judge taken into consideration the very positive evidence about the quality of care being provided by the father, the risk of emotional harm if they were removed, and the fact that the perceived risk of harm from unsupervised contact could be ameliorated by a court order defining contact supported by a written agreement signed by both parents, he would inevitably have realised that the local authority's proposal was

unnecessary and disproportionate. Instead, he should have adopted the less interventionist course, either, if the local authority agreed, under an interim care order or, if they did not, by continuing the interim supervision order.

32. It was for those principal reasons that I concluded that the appeal should be allowed, the interim care order set aside, and the children returned to the care of the father.

33. There was a further point where the judge fell into error. His refusal to allow even a short stay of the order to enable the father to apply to this Court was contrary to authority and wrong in principle: see *Re N (Children: Interim Order/Stay)* [2020] EWCA Civ 1070 per Peter Jackson LJ at paragraphs 36 to 38. Even if the judge's view as to the risks to the children remaining at home was correct (which in my judgment it was not), they could never be described as so acute as to justify denying the father a short stay to apply to this Court. By the time the application for permission to appeal was considered by Moylan LJ, the children had been in foster care for several weeks and it would clearly have been wrong at that stage to return them to their father pending determination of the appeal. The consequence is that, by the date of the appeal hearing, the children had been away from their father for over ten weeks.

34. Courts and practitioners must follow the course identified by Peter Jackson LJ in *Re N*. Unless the child's safety and welfare require their immediate removal, the court should always allow an unsuccessful party the opportunity to apply to the appellate court. As summarised in *Re N*, arrangements are in place for an urgent application to this Court to be considered very promptly.

35. In the event, by the time of the appeal hearing, the addendum parenting assessment of the father ordered on 26 July had been virtually completed and the assessor had informed the parties that its conclusions and recommendations were positive. Accordingly, after this Court had informed the parties of our decision, they were able to reach an agreement as to the way forward which was embodied in the following order approved by the Court:

> "UPON the appellant father agreeing for the children to remain in the care of the local authority until 6.00pm on 11 October 2023 pursuant to s.20 Children Act 1989,
>
> AND UPON the father agreeing to sign a written agreement with the local authority prior to 6.00pm on 11 October 2023, (a draft written agreement having been circulated to the parties on his behalf today),
>
> (1) The appellant's appeal is allowed and the interim care order made on 26 July 2023 is set aside.
>
> (2) The children shall be the subject of an interim supervision order to [the local authority] until the conclusion of the proceedings or further order.
>
> (3) The local authority shall file and serve an updated interim care plan in respect of each child and a detailed written

agreement for the mother and father to sign by 4.00pm on 17 October 2023.

(4) The application shall be listed at the Central Family Court for an urgent FCMH, not before HHJ Oliver, on the first open date after 23 October 2023, time estimate 2 hours.

(5) No order for costs save a detailed assessment of the legal aid costs of the parties."

LADY JUSTICE SIMLER

36. I agree.

LADY JUSTICE ELISABETH LAING

37. I also agree.