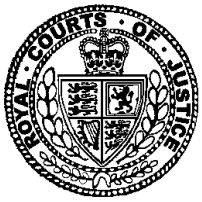

Neutral Citation Number: [2023] EWCA Civ 1352

Case No: CA-2023-001797

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT MILTON KEYNES
Recorder Newport
MK11/2023

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 November 2023

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE BAKER
and
LADY JUSTICE ANDREWS

- -

N (Children: Revocation of Placement Orders)

- -
- -

Leslie Samuels KC and **Christine Julien** (instructed by **Reena Ghai LLB Hons Solicitors**)
for the **Appellant Mother**
Nick Goodwin KC and **Alex Perry** (instructed by **Milton Keynes City Council**)
for the **Respondent Local Authority**
The Respondent Father represented himself
Rex Howling KC and **Clarissa Wigoder** (instructed by **Sills & Betteridge Solicitors**)
for the **Respondent Children by their Children's Guardian**

Hearing date: 8 November 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 17 November 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Overview

1. This is an appeal by the mother of two children, a girl aged 7 and a boy aged 5, from the dismissal of her application to discharge placement orders and her application for the instruction of an independent social worker to investigate the children's situation more fully. The appeal is supported by the children's father, from whom the mother has separated, but opposed by the local authority and by the Children's Guardian.

2. The underlying proceedings began as long ago as October 2019 because of domestic abuse by the father from which the mother was not protecting the children. In November 2019, interim care orders were made on a plan for the children to remain with the mother, with the father being excluded from the home. A fact-finding hearing before a District Judge concluded in June 2020, but an appeal by all parties was allowed in September 2020 and a fresh fact-finding hearing was ordered. That was a substantial hearing before a deputy judge, ending in February 2021 with the removal of the children, then aged 4 and 3, from the mother's care; they have been in foster care ever since. The deputy judge found that the father had repeatedly assaulted the mother but that she had lied about it or retracted complaints and had failed to separate from him or protect the children from being exposed to such incidents. Neither parent had engaged with the child protection plans and the work and support offered. In July 2020, the father had breached the exclusion requirement and the mother subsequently retracted her report to the police.

3. After an even more substantial welfare hearing, the deputy judge made placement orders in December 2021. Permission to appeal was refused by my Lord, Baker LJ. Farewell contact with the mother took place in March 2022, and the prospective adopters were identified in October 2022. Introductions began, but on 2 March 2023 the mother applied for leave to apply to revoke the placement orders, which was granted unopposed on 11 May. With the court's approval, fortnightly meetings between the prospective adopters and the children have continued. The children, who are unaware of the mother's application, are confused about why they have not yet moved to their adoptive home.

4. The proceedings are unusual. Placement orders are sometimes discharged because the adoption plan cannot for some reason be carried out. Applications for permission to apply to revoke a placement order are not uncommon, but very few cross the threshold requiring that there has been a sufficient change of circumstances since the making of the placement order and that it would be in the child's interests for the application to be heard. We are only aware of two reported appeal cases concerning opposed applications for revocation.

5. In this case, permission to apply to discharge the orders was granted without opposition because the mother had made significant changes since the making of the placement orders. She had consolidated her personal life and had distanced herself from the father, for whom she had previously covered up. At the same time, the children had travelled a long way down the path to adoption and, but for the mother's application, would have been in an adoptive placement months ago. The court therefore had a welfare decision to make: were the prospects of a return to the

mother's care good enough to justify abandoning a plan for adoption that had been over two years in the making?

6. The mother's application was heard for four days, with judgment being given on 1 September 2023. After a thorough assessment, Recorder (now HHJ) Newport found that he had sufficient information to make a final decision and he rejected the proposal for further assessment of the mother by an ISW. He concluded that it would not be in the children's interests to revoke the placement orders. He agreed with the social workers and the Guardian that, despite the mother's considerable efforts, she could not meet the needs of children who now need skilled parenting.

7. Having heard the appeal, I would uphold the recorder's careful decision. Like him, I acknowledge the progress that the mother has made since the children were removed from her care 2½ years ago. However, time has not stood still for them either and they now urgently require a permanent home. The mother accepted that she could not provide that as matters stood. The recorder's conclusion is one that was plainly open to him and there is no basis upon which we could interfere.

The legal framework

8. Section 24(1) Adoption and Children Act 2002 simply provides that the court may revoke a placement order on the application of any person. Subsection (2) provides that leave is required for an application by anyone other than the local authority holding the placement order, and subsection (3) states the criterion for granting leave.

9. Once leave has been granted, the decision under section 24(1) is a welfare decision to which section 1 of the Act applies: see section 1(7)(a). When determining an application under this section, the question for the court is whether it has been shown that it is in the child's interests for the placement order to be revoked. In reaching a conclusion, the court will apply the provisions of section 1 in the light of the important principles that underpin the exercise of the original power to make care and placement orders.

10. These principles were set out by Baker LJ in *In re C (Children) (Placement Order: Revocation)* [2020] EWCA Civ 1598, [2020] 4 WLR 167 at paragraphs 17-21. At paragraph 22 he concluded that they plainly have a bearing on applications to revoke a placement order. I agree, and would only add one very minor comment. Paragraph 23 contains a summary of the principles derived from the judgment then under appeal. We heard some submissions about minor aspects of that summary. In particular, subparagraph (g) suggests that a placement order might be revoked where parental/family care is merely 'realistic', when the correct test, stated above, is that revocation must be in the child's interests. With this slight amendment, I would also endorse paragraph 23.

11. As with any application, the legal burden of proof will rest with the applicant, here to show to the civil standard that it is not in the interests of the child to maintain the placement order. That is as it should be, since it is the applicant who seeks to change a plan for adoption that has been approved after serious deliberation. However, the outcome of the application will not in reality turn on the burden of proof, as the court will not be able to find that a placement order remains in the child's interests if it no longer meets the stringent conditions that justify such a fundamental order. As the

trial judge put it in *Re C* (see paragraph 26), the question is not 'why shouldn't the placement orders remain?' but 'what does the welfare of these children *now* require?'. Further, once permission to apply has been granted, the principles governing that preliminary stage are no longer relevant and the court's task is to carry out an impartial review of whether a placement order continues to be in the interests of the child.

12. On evidential matters, the usual position applies. The party seeking a factual finding will bear the burden of proving it, again to the civil standard. So, it will typically be for an applicant parent to show how much their situation has changed since the placement order was made, and for opposing respondents to make good their case about what a change of plan would mean for the children. Moreover, although the substantive principles surrounding adoption are constant as between applications for placement orders and applications for revocation, the evidential picture will not usually be the same. Overall, the evidence before the court at a revocation hearing will differ in quantity and focus (but not quality) from the evidence that was given in the care and placement proceedings. That is because the court has already made its findings about events preceding the placement order, so that subsequent evidence will be more closely focused on events since then and, crucially, on the future.

13. It happens that since the recorder's judgment in this case, this court has considered a Guardian's appeal from the revocation of placement orders in *Re H (Children: Placement Orders)* [2023] EWCA Civ 1245. At paragraph 45, I said this:

> "At the same time, the boys, who urgently need a permanent family that can give them skilled parenting, have been kept waiting for what now amounts to 2½ years. They had said goodbye to their birth family and been prepared for adoption. That plan could only sensibly be sacrificed in favour of a plan for rehabilitation if the evidence showed that success could be predicted with a high degree of confidence."

In the following paragraph I listed the sequence of events that would have to occur before a return to parental care could be achieved, and then said this at paragraph 47:

> "The amount of delay and uncertainty inherent in this programme is so obvious that the judge was bound to confront it squarely before preferring it to a plan for adoption that could be put into effect immediately. The boys' situation is a glaring example of the general principle, enshrined in section 1(3) of the Adoption and Children Act 2002, that any delay in determining a question with respect to the upbringing of a child is likely to prejudice the welfare of the child."

These observations were made in the context of a parent who faced even greater challenges than this mother, but whose case was that the children could be returned in six months' time. In the present case, the mother did not argue that the court could definitively approve the return of the children at a future date, but rather that this might be possible and that her proposal deserved further assessment.

14. My remarks in *Re H* were intended to underline the fact that a decision to discharge a placement order is as serious as a decision to make one in the first place.

The revocation proceedings

15. When granting leave to the mother to apply for revocation on 11 May, HHJ Hughes gave directions leading to a two-day hearing on 19 July. These included a direction for an assessment to be carried out by the children's previous social worker, Mr B, who the parties agreed was a suitable choice. Paragraph 6 of the order contained a list of the matters to be covered:

> " - An assessment of the Mother's current circumstances; details of the changes the Mother has made, if any, since the making of the Placement Order; whether the changes are sufficient to address the concerns/risks determined by the Court at conclusion of the previous Care and Placement Order proceedings; the current risks and nature of harm to the children now posed by their parents; the likelihood of risk/harm arising in the light of those changes; any support that could be put in place by the Local Authority to mitigate any identified risks.
>
> - The children's circumstances including any change since making of the Placement Orders.
>
> - The children's welfare in the context of the application.
>
> - An analysis of the impact on the children of each potential outcome of the substantive application.
>
> - An update as to any work that has been undertaken with the children; an update from the children's schools and any professional with whom they are working; an update as to the …[v]isits that have taken place and future visits; and an update as to the prospective adopters' position."

16. By 15 June, Mr B's assessment was available: it was negative. The mother considered that it was deficient and, on 26 June she applied under Part 25 for a fresh assessment to be undertaken by an identified ISW on the basis that Mr B's work was incomplete. That application, which was opposed by the local authority and by the Guardian, came before HHJ Perusko on 5 July at the pre-trial review. He rescheduled the proceedings for a longer hearing in August and refused the mother's Part 25 application. Although his order does not record it (and we have no transcript of the hearing), the parties are agreed that he indicated that the mother could renew her application to the trial judge if it became appropriate to do so.

17. The hearing of the revocation application began on 29 August and ended with a judgment and order on 1 September. Evidence was heard from the mother and the father (who was then represented and appeared by CVP), from the children's former social worker, from Mr B, and from the Guardian. During the hearing counsel made an oral application on behalf of the mother for the proceedings to be adjourned for an ISW assessment.

The judgment

18. In a structured judgment of 35 pages, the recorder detailed the background at paragraphs 1-18, identified the issue to be resolved at paragraph 19, and set out the relevant law at paragraphs 20-27. He reviewed the evidence in detail at paragraphs 28-148, outlined the parties' submissions at paragraphs 149-157 and gave his impressions of the witnesses at paragraphs 158-165. His analysis, leading to his ultimate conclusion, is found at paragraphs 166-227.

19. At paragraph 3, the recorder summarised the mother's case:

> "She seeks the revocation of the placement orders that are in place or an adjournment of the application itself for further assessment, the latter of which became her primary position, as such, as the hearing developed. The mother accepts, as she did in oral evidence, that in the event of a revocation the children would not return to her care now and that an application to discharge the care order which is also in place would be needed."

20. When he came to his decision, he considered the application for an ISW first:

> "166 As the mother's primary case is that the court does not have sufficient evidence before it to make a decision, I must first consider that issue. Miss Julien initially made the submission on the basis of *Re B* and the requirement upon the local authority and guardian to provide proper evidence which addresses all the options which are realistically possible, and which contains an analysis of the arguments for and against each option. I have already set out the updated position at the end of submissions.
>
> 167 In para.23 of *Re C* Baker LJ endorses the principles set out by HHJ Sharpe, who drew those principles from case law, and in particular the case of *Re B*. The principles contain the requirement upon the court to consider all the competing options. As Mr Perry reminds the court, these are not care proceedings. His submission is that any gap is in the May order, and not in the evidence itself.
>
> 168 Miss Julien makes a powerful submission in respect of Mr B's role and whether he should have been the report's author. Having listened carefully to his evidence, I am satisfied that he is passionate about his work and invested in the outcome, but I did not detect a closed mindset from him. He has undertaken his task diligently. He accepted, quite fairly, that the time constraints meant that his report was somewhat rushed, and he would have liked more time but that does not mean that there are gaps in his evidence or that his report is flawed.
>
> 169 Although the wider principles are relevant, the evidence required in this type of case and directed by the court is different to care proceedings. As Mr Perry acknowledges, the local authority would fall short if these were care proceedings. Mr B and Ms F both gave detailed oral evidence and were subject to

> rigorous cross-examination from counsel for the parents. They have been able to speak to reports that they have not seen prior to their statements and able to incorporate that into their oral evidence. Any gaps in their written evidence, such as they may be, have been adequately accounted for in the witness box.
>
> 170 Being guided by *Re C*, I am satisfied that I have sufficient evidence to allow me to carry out the exercise approved by the Court of Appeal. I accept Mr Perry's submission that the court has ordered what is necessary and proportionate. No parenting assessment was ordered, and a previous court has refused the instruction of an independent social worker. That cannot have been deemed necessary as of 5 July 2023 and the decision was not appealed.
>
> 171 I remind myself that I must consider all the evidence and not compartmentalise it. In addition to the local authority and guardian's evidence, I have considerable evidence from the mother herself, and the relevant papers and judgments from 2021. I have heard extensive oral evidence; the local authority witnesses and the guardian have all given evidence after hearing several hours of evidence from the mother.
>
> 172 When considering the mother's application to adjourn, I must also consider the issue of delay and the scope of the evidence that the court might get. There is no new Part 25 application before the court, but I can consider the application as filed and updated in submissions. Updated timescales have been provided and they are essentially eight weeks at the earliest. A key issue will remain the mother's learning and its application to the children. She has already filed a full statement and given extensive oral evidence. It is difficult to see what else an ISW, who would be somebody entirely new to this case, would bring to the table at this late stage.
>
> 173 I accept the submissions about the likely impact of delay on the children. They need a decision now, whatever that decision might be. Given the nature of the assessments I have, and detailed evidence I have heard, I am not satisfied that further assessment is necessary. I therefore refuse the application to adjourn."

21. As to the substantive application for revocation, the recorder addressed the welfare checklist under the 2002 Act at paragraphs 174-206. He then considered the competing options for the children's care at paragraphs 207-223. The core of his decision appears in this passage:

> "220 Placement with mother can only be described as a possibility at this stage. I have already set out the advantages and disadvantages of that. The mother would have to complete each and every stage before she gets there. That would build in

> significant delay, confusion for the children and uncertainty. In circumstances where I am satisfied that after all the very impressive work undertaken mother is not able to meet the children's emotional needs, I accept Mr Littlewood's submission that we cannot predict a positive outcome if placement is revoked.
>
> 221 There is also considerable risk, as expanded upon by the local authority and guardian, of what the impact would be on the children if adoption is taken off the table only for the mother then to fail further assessment. They would lose out on adopters they are invested in and then have the knowledge that they might return to mother and all the emotions that that would bring, which could be positive as well as negative, only then to be told that that is no longer an option. In my judgment, the risk of emotional harm compounding the trauma already suffered is simply too great with the option of return to the mother, the prospective option of return to the mother or long-term foster care.
>
> 222 I am satisfied that these are exceptional circumstances that justify the permanent severing of ties between the children and the parents. Such action is motivated by the overriding requirements pertaining to the children's welfare and I am not satisfied that placement within family is realistic for the reasons I have set out."

22. Finally, the recorder conducted a proportionality evaluation at paragraphs 224-225. He ended by expressing the hope that the mother would be able to continue with what he described as the remarkable progress she had made to date.

The appeal

23. Permission to appeal was granted by Baker LJ on 16 October. We heard from leading and junior counsel for all parties, except the father, who was unrepresented and spoke briefly by CVP in support of the appeal.

24. The mother invites this court to direct an assessment by an ISW and to remit the matter to the Family Court for directions.

25. The grounds of appeal are as follows:

> 1. The Judge was wrong in law to determine that there is a difference between the quality of the local authority evidence required to support an application for care and placement orders and the quality of the evidence required to resist an application to revoke a placement order once leave has been granted. The Judge should have applied the same 'proper evidence' test.

2. The Judge was wrong to conclude that the deficits in the local authority evidence could be corrected by the social worker's oral evidence and that there were no gaps in the assessment evidence.

3. The Judge was wrong to accept the Guardian's conclusions when her analysis was flawed and/or based on the flawed assessment of the local authority.

4. The Judge was wrong not to adjourn the proceedings for a fair and proper assessment to be obtained. Such evidence was necessary for the just and fair determination of the proceedings.

26. Before addressing the individual grounds, it is worth noting that there are no factual issues in play on this appeal. The mother now accepts all the findings made in the earlier proceedings and there were no disputed primary facts for the recorder to resolve. The challenges are all to his evaluative conclusions.

27. On Ground 1, Mr Samuels argues that it was an error of law for the recorder to say at paragraph 169 (see above), with reference back to a submission by counsel for the local authority, that "the evidence required in this type of case and directed by the court is different to care proceedings." He suggests that the recorder was allowing that the evidence on a revocation application might need less stringent assessment than the evidence during the original proceedings. He submits that there was a lack of rigour in the conclusion that the mother could not meet the children's needs, seen in this passage which followed an extensive account of the positives of the mother's case and a conclusion that she is "a changed woman":

> "204 However, I am not satisfied that the mother is able to relate her extensive learning to her children. She gave many textbook answers to questions from Mr Perry and Mr Littlewood. She needed redirection at times to link those questions or her answers to the children. Several of her answers began or were qualified with a link to her work, as several references in the guardian's report also show.
>
> 205 Miss Julien is right to say and right to have challenged Mr B about the examples that the mother provided to him but in my judgment, and despite her admirable journey, I am not satisfied that the mother would be able to relate that learning to the children and meet their emotional needs. That is the core issue in this case.
>
> 206 I also keep in mind that these are not just traumatised children but by the time that they would come to the mother, if that was to happen, there would not only be considerable further delay, but the emotional harm suffered by the children is likely to be greater. The children would have to be told that they are not going to live with the prospective adopters. That will take work and likely lead to trust issues with the social worker and foster carers. They will then have to face the possibility that they might live with the mother. These would all be additional

> emotional issues that the mother would have to face. She would also have to contend, as a single parent, with not being the family life that [the older child] might expect."

28. Mr Samuels also argued that the recorder's risk assessment did not adequately focus on the type of harm that might arise, the likelihood of it arising, the consequences if it did, and the options for reduction or mitigation of risk, all being matters identified as relevant in *Re F (A Child) (Placement Order: Proportionality)* [2018] EWCA Civ 2761, [2019] 1 FLR 779 at paragraph 2.

29. Having read the judgment and heard submissions about the context in which the recorder's observation at paragraph 169 arose, I am satisfied that there was no error of law in his approach and that he was making the same point as I make above at paragraph 12, namely that the evidence before the court at a revocation hearing will differ in quantity and focus (but not quality) from the evidence that is given in the placement proceedings. For example, a full parenting assessment in the form that would be conventional in care proceedings was understandably not directed in a case with this history. It is in any case clear that the recorder directed himself correctly with reference to *Re C* and that he made a full welfare assessment and an evaluation and comparison of each realistic option for the children. He did not cut corners.

30. Nor was there any lack of rigour in the recorder's assessment of the mother's capacity to meet the children's needs. The professionals all lacked confidence in her ability to put her considerable learning into effect and, after intensive examination of the issue in oral evidence, the recorder was plainly entitled to reach the same conclusion. As to risk, it is apparent the recorder found that this came about in two ways, as seen in these passages:

> "192 … The children have undergone several significant changes in their young lives and are undoubtedly damaged and traumatised. They have witnessed events in the home, been removed from home, placed with foster carers (that, of course, has brought some stability) and then they have begun the process of working towards being adopted. The guardian sees a clear risk due to the emotional complexity of these changes and huge demands they will place on the children's emotional and behavioural functioning. They have suffered instability of primary care and are likely to be sensitive to change…
>
> 195 The guardian and local authority say that there is no amelioration or support that could be put in place to allow the mother to safely care for the children. The mother and the local authority agree that the father still poses a significant risk to the children. I agree. It is correct to say that the mother has positively acted to protect herself from the father and I have no reason to doubt that such measures would benefit the children if they were to live with her. She has moved to an unknown location. Her phone number and car have changed. Her actions in October speak for themselves. The question of risk is wider than that.

> 196 In my judgment the father remains a significant risk. Despite completing a 32-week DAPP course, he took it upon himself to track the mother down. He did so using covert methods and when he found her in October he was abusive and sat on her car for the 17-minute drive to the police station. That shows his determination, emotional state and his willingness to lie was apparent from the body-worn footage that we have seen. Credit must be given to the father for his progress since. He has pleaded guilty, and he has complied with the restraining order.
>
> 197 The court remains troubled by the fact that even in May 2023 he was trying to contact people known to the mother. Whether that is restricted to a single Facebook message or not, the risk is apparent. Father candidly told the court of his future intentions. One day he would like contact with the children. The position is entirely understandable. He also said he would like to sit down with the mother to discuss co-parenting. That tells me that despite everything that has happened, the father is likely to seek the mother and the children out."

Once again, it seems to me that the recorder squarely identified the nature of the risk from the father and the probability that it would arise if the children were with her. I can see no basis on which this court could depart from that assessment. Ground 1 therefore fails.

31. Grounds 2, 3 and 4 spring from the overall submission that a fuller assessment of the mother's circumstances would have allowed the court to reach an even more positive view of the mother's transformation and to investigate supports that could be put in place around her, both from family and friends (mentioned by the recorder at paragraph 202) and from the local authority. Ground 2 points towards Mr B, Ground 3 towards the Guardian, and Ground 4 towards the recorder.

32. The recorder gave his impressions of the evidence of Mr B and the Guardian:

> "164 Miss Julien described Mr B as an honest witness and Mr Littlewood said that we would not find a more focused or dedicated social worker. I agree. Mr B's oral evidence was entirely consistent with how counsel describe him. He is plainly an experienced social worker who has gone above and beyond when the children require it. His oral evidence was given to the court after the mother had given evidence, so he had the benefit of hearing her answers after having read the documents that he had accepted not having seen at the time of their discussions. I accept his evidence.
>
> 165 I found the guardian to be a clear and compelling witness. I accept her reasoning for not seeing the children at such a delicate stage of proceedings. I was assisted by her evidence about the risks of trauma that may come with each option and how even now the guardian has given clear thought to what else the mother could or would need to do if there is delay. Her hope to hear the

> mother give child-focused answers, even until Wednesday, suggests that her mind has been kept open. I accept her evidence."

The recorder also found the current social worker to be careful, measured and child-focused. These are all plainly assessments that could not be, and are not, challenged.

33. The recorder continued with his assessment of Mr B and the Guardian at paragraphs 168-169, already cited above. For the mother, it is said that gaps in the evidence could not be cured in the courtroom, but needed proper prior assessment as required by the May directions order.

34. That leads to Ground 4. The first point made by Mr Samuels is that the recorder misunderstood the position reached by HHJ Perusko in July, when he treated the application as if it had been dismissed:

> "170 … No parenting assessment was ordered, and a previous court has refused the instruction of an independent social worker. That cannot have been deemed necessary as of 5 July 2023 and the decision was not appealed."

Again, this is a point without substance. The recorder was correct in what he said, but in fact he looked squarely at the possibility of adjourning for further evidence and rejected it for the full reasons cited at paragraph 20 above. He made a decision on the merits.

35. As to those merits, again I cannot find reason to fault the recorder's conclusion that further evidence was not necessary. The mother's argument has not identified any potentially significant matters that were missing from the evidence that was eventually before the court, or that had to be completed before the hearing itself. Inquiries can usually be fuller, but this was in my view a thorough one. I would therefore reject Grounds 2, 3 and 4.

36. I have great sympathy for this mother, who has courageously tried to repair the daunting problems in her life. The recorder rightly placed considerable weight on the changes she had made. However, he found that they had not brought her to the point where she can meet the children's needs. There would have to be months more delay at least and the outcome would be uncertain. These young children have been in limbo for 2½ years and their childhoods are slipping away. The recorder understandably decided that they cannot wait any longer.

37. I would dismiss the appeal.

Lord Justice Baker:

38. I agree.

Lady Justice Andrews:

39. I also agree.