Neutral Citation Number: [2023] EWFC 27

Case No: LN23C50022

IN THE FAMILY COURT

Date: 10/03/2023

Before :

MR JUSTICE MOSTYN

- -

Between :

Lincolnshire County Council	**Applicant**
- and -	
SC	**1st Respondent Mother**
- and -	
MW	**2nd Respondent Father**
- and -	
Ellie (by her Guardian)	**3rd Respondent Child**

- -

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Amelia Heathwaite (instructed by **Lincolnshire CC**) for the **Applicant**
Patrick Freer (instructed by **Robinsons Solicitors**) for the **1st Respondent**
Paula Bloomfield (instructed by **Sills & Betteridge Solicitors**) for the **2nd Respondent**
Lucy Winterburn (instructed by **Ringrose Law**) for the **3rd Respondent**

Hearing date: 2 March 2023

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Approved Judgment

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MR JUSTICE MOSTYN

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of

court. Any report of this judgment should refer to it as *Re Ellie (An Infant: Interim Care Order)*.

Mr Justice Mostyn:

1. Ellie (not her real name) was born on 25 February 2023. On 27 February 2023, before Ellie and her mother were discharged from hospital, Lincolnshire County Council ("the LA") commenced care proceedings and applied for an urgent interim care order ("ICO"). The stated purpose of the LA's application was to remove Ellie immediately from the care of her parents. The application came before District Judge Veits on the same day. He granted the application at a summary hearing. He was satisfied that Ellie's safety demanded her immediate separation from her parents. Ellie was taken by social workers and placed in the care of the mother's own sister (supported by their mother).

2. The order was, of course, of the utmost gravity which directly interfered with the right to a family life of the parents and Ellie.

3. The parents wished to challenge this order. Although the draft of the order made by District Judge Veits states that it will last until the conclusion of the proceedings it was arranged that the matter would be reconsidered by me at a reasonably full hearing in Lincoln on 2 March 2023. At that hearing the matter proceeded as if the LA were making its application *ab initio*. No reliance was placed on the reasoning of District Judge Veits (which had not been transcribed). The application was therefore heard de novo, the LA accepting that it had to prove its case from scratch.

4. Section 38(2) of the Children Act 1989 provides that:

> "A court shall not make an ICO or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2)."

5. Section 31(2) provides, for the purposes of this case:

> "A court may only make a care order or supervision order if it is satisfied that the child concerned is suffering, or is likely to suffer, significant harm; and that the harm, or likelihood of harm, is attributable to the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him …"

It is well-established that "likely" does not mean more likely than not, but rather that there is a "real possibility" of the happening of significant harm. In *Re H & Ors (minors)* [1995] UKHL 16 at [68] - [69] Lord Nicholls stated:

> "What is in issue is the prospect, or risk, of the child suffering <u>significant</u> harm. When exposed to this risk a child may need protection just as much when the risk is considered to be less than fifty-fifty as when the risk is of a higher order. Conversely, so far as the parents are concerned, there is no particular magic in a threshold test based on a probability of significant harm as distinct from a real possibility. It is otherwise if there is no real possibility. It is eminently

> understandable that Parliament should provide that where there is no real possibility of significant harm, parental responsibility should remain solely with the parents. That makes sense as a threshold in the interests of the parents and the child in a way that a higher threshold, based on probability, would not.
>
> In my view, therefore, the context shows that in section 31(2)(a) likely is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case." (original emphasis)

6. Where the threshold is based on the risk of future harm (as it usually is) the exercise is thus predictive. The court has to make an assessment of the likelihood of future significant harm. It does not have to be as much as 50%, but has to be of a degree that reflects the idea of a "real possibility". The probability or degree of likelihood is not fixed at, say, 40% but will vary in step with the seriousness of the significant harm. Thus in *Re S-B* (Children) [2009] UKSC 17 at [9] Baroness Hale stated:

> "Thus the law has drawn a clear distinction between probability as it applies to past facts and probability as it applies to future predictions. Past facts must be proved to have happened on the balance of probabilities, that is, that it is more likely than not that they did happen. Predictions about future facts need only be based upon a degree of likelihood that they will happen which is sufficient to justify preventive action. This will depend upon the nature and gravity of the harm: a lesser degree of likelihood that the child will be killed will justify immediate preventive action than the degree of likelihood that the child will not be sent to school."

7. In order to make the prediction the court will invariably have to rely on past facts, as it is a truism the best prophet of the future is the past. The past facts will either be admitted or the court will have to make findings about them on the balance of probabilities.

8. However, on an application for an ICO the court does not have to make findings about past facts because the law requires only that it should have "reasonable grounds for believing" that the predictive exercise would take the court across the threshold. A belief is the subjective requirement for knowledge. It is, *ex hypothesi* a partial, personal judgment. However, s.38(2) requires the belief of the court to be well-supported by "reasonable grounds". What this means is that the court must be satisfied that the LA's case on the threshold is a strong one. And, save in exceptional circumstances, it will form that judgment on the written evidence alone – see FPR 22.7(1), which provides that:

> "the general rule is that evidence at hearings other than the final hearing is to be by witness statement unless the court, any other rule, a practice direction or any other enactment requires otherwise."

9. Therefore the threshold requirement for an ICO is that the court must be satisfied that the LA has a strong case for proving that, unless there is an intervention, there is a real possibility that the child will suffer significant harm at the hands of his or her parent(s). In determining whether the LA's case is strong the court will be careful not to make findings of fact on controversial issues. The object is to hold the ring, neutrally and impartially, pending a final hearing. It is important that nobody takes away from an ICO decision any kind of perceived sense of victory or of tactical advantage for the final hearing.

10. Although the terms of s. 38(2) do not require the LA to prove more than the strong case described above, case law has imposed additional requirements where the purpose of the ICO is to effect an immediate removal of a newly born baby from its mother's care. There is a line of authority culminating in *Re C (A Child : Interim Separation)* [2019] EWCA Civ 1998, where Peter Jackson LJ stated at [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." (emphasis added)

11. In that case the Court of Appeal held at [23] that:

> "..we must reach the conclusion that the Recorder's decision to authorise separation was wrong in that it was not a necessary and proportionate response to the situation that had arisen. I

> would allow the appeal on Ground 2 only. I would set aside the order and record that the LA does not now seek to separate mother and child. The matter will be restored for an early hearing before the Designated Family Judge at which the necessary orders to underpin the placement and identify its purpose can be made. Finally, the mother must understand that nothing that has been said on this appeal should encourage her to believe that she and Andy will not be separated in future if the circumstances should indeed justify it."

12. The ICO was therefore set aside. The case was remitted to the trial judge, who, Mr Freer (who appeared both in that case and before me) informs me, made a new ICO on the footing that mother and child would not be separated.

13. This authority illustrates the well-known and long-standing tension which has existed between local authorities and the court since the dawn of the Children Act 1989 as to future decision-making once a care order, whether interim or final, has been made.

14. The underpinning legislative scheme of Part II of the Children Act 1989 is that where a care order has been made, all decision making as to the best interests of the child devolves exclusively to the LA. While a care order is in force the terms of the statute stipulate that the court has no further role, other than to make orders for contact. However, under s 31A the LA is obliged to prepare a care plan, and the court will have that plan at the forefront of its mind when it considers what order it might make, if any, once the threshold has been proved. If the court makes a care order on the basis of proposals in the care plan, and it later transpires that those proposals have not been implemented, then it would be open to an aggrieved parent to invoke the ultimate nuclear power vested in the court of discharge under section 39; and it might be thought that such an application would have a reasonable prospect of success in such circumstances.

15. By the same token, where an ICO is made, the decision-making as to where the child is placed, and by whom the child is cared for, devolves exclusively to the LA, at any rate in theory. However, amendments made to the 1989 Act by the Family Law Act 1986 introduced ss. 38A and B, which allow the court to exclude a person who poses a danger to a child from a dwelling in which the child lives. These provisions plainly presuppose that the interim order will have been made on the specific basis that the child will live in a certain place and be cared for by a certain person.

16. S. 38(6) provides that:

> "(6)Where the court makes an interim care order, or interim supervision order, it may give such directions (if any) as it considers appropriate with regard to the medical or psychiatric examination or other assessment of the child; but if the child is of sufficient understanding to make an informed decision he may refuse to submit to the examination or other assessment. "

Case-law has held that this provision allows the court to direct that a child should reside with its mother at a mother and baby unit, notwithstanding the objections of the LA, as such a placement would be important for assessment purposes: see *Re B*

(Interim Care Order: Directions) [2002] 1 FLR 545, CA. I have to say that this does strike me as a highly creative judicial interpretation of this provision. It binds me nonetheless.

17. Drawing the threads together for the purposes of this case:

    i) I will decide the application for an ICO on the written evidence alone.

    ii) I cannot make an ICO unless I am satisfied that the LA has a strong case to prove that there is a real possibility (which does not have to be as high as 50%) that if the ICO is not made Ellie will suffer significant harm attributable to the care given to her by her parents. This is conceded by both parents.

    iii) Further, given that the LA plans to effect an immediate separation of Ellie from her parents I must be satisfied that (a) her physical safety or psychological or emotional welfare demands it and (b) that the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur. This is strongly contested by both parents.

    iv) If I am satisfied that the criteria for making an ICO are met, but I am not satisfied that immediate separation is proportionate, I can make the ICO nonetheless accompanied by a direction under s.38(6) that Ellie lives with her parents in a designated place, subject to conditions of unannounced inspections, and with the LA having the ultimate power to remove Ellie from her placement if they judge it necessary to do so to prevent her being exposed to danger.

This case

18. As stated above, Ellie was born on 25 February 2023 and once discharged from hospital at 2 days old was placed in the care of her maternal aunt to be supported by the maternal grandmother, following a positive viability assessment, where she has remained since. Ellie's three elder half-siblings are also in the care of the maternal aunt. The mother lives 12 miles (a 35-minute drive) from her sister and has been visiting Ellie on a daily basis. The LA's care plan is for the parents to visit Ellie three times a week for an hour and a half.

19. The mother has had her four older children removed from her care and there is an order in place preventing the father from having contact with his two youngest children. The LA seeks disclosure from Kent Children's Services to provide the full history of the removal of the mother's four older children.

20. The backstory of both parents is bleak, miserable and profoundly disturbing. The history is one of domestic abuse, violent behaviour, crimes, substance misuse, mental health difficulties and the use of physical chastisement. A theme throughout the history of the parents' involvement with children's services has been of non-compliance and dishonesty.

21. I address first the concerns relating to the mother.

22. Immediately prior to the hearing on 2 March 2023, the LA provided police disclosure in regard to an allegation of assault on 8 August 2022, when the mother would have

been 2½ months pregnant with Ellie. The PNC record states that the mother disclosed to police on that day that she was in a domestically abusive relationship with the father; that he was controlling her; that he had pulled her by her hair to the ground and had spat at her. The mother initially had denied this together but when faced with the evidence changed her story to say that all she called the police following an argument with the father to report him as missing because he had left the house. This avoidant and untruthful conduct by the mother does not augur well.

23. The mother's criminal record is extensive and very depressing to read. She is currently on probation for offences of criminal damage and a public order offence. Her criminal history includes possessing an offensive weapon in a public place; assault occasioning actual bodily harm; battery; destroying or damaging property; and using threatening abusive words or behaviour to cause harassment or alarm. In the past two years, the mother has been an involved party, or a suspect, in crime reports from Kent Police including harassment, theft, stalking, assault occasioning ABH, assault without injury, causing intentional harassment, criminal damage to a vehicle, alarm or distress and possession of cannabis.

24. The mother continued to use cannabis during her pregnancy with Ellie which placed the child at risk of physical harm. The father has continued to use cannabis at medium levels between May 2022 and January 2023 as confirmed by hair strand testing.

25. Lastly, a report dated 26 January 2023 from the mother's current GP confirms that she has no mental health diagnosis and is not currently taking any treatment. Records indicate that she has a history of anxiety and depression dating back to 2008. Information from previous assessments show that the mother has a diagnosis of ADHD, however the mother denies this and the current GP has no records of her having ADHD.

26. I turn to the father.

27. The father is assessed as a high-risk perpetrator of domestic violence (according to the pre-birth risk assessment dated 21 January 2023) and is known to have been abusive to his ex-partner. He received a prison sentence of 18 months for a violent assault on her. His ex-partner obtained in 2019 a protection order in her favour, with no expiry date. The pre-birth risk assessment dated 17 January 2023 concluded that the father has failed to take any responsibility for his actions and that there is no evidence to show that he has completed any meaningful work to address the obvious concerns.

28. The father is currently on probation for a public order offence; using a motor vehicle without insurance; and driving a vehicle other than in accordance with a licence. The father's criminal history includes shoplifting; battery; failing to comply with the requirements of a community order; assault occasioning actual bodily harm; driving without a licence and using a vehicle whilst uninsured; and using threatening abusive insulting words or behaviour or disorderly behaviour to cause harassment, alarm or distress. In the last two years, the father has been an involved party, or a suspect, in crime reports from Kent Police including breach of a restraining order; fear or provocation of violence; stalking; criminal damage; threats to destroy or damage property; harassment without violence; criminal damage to a vehicle; causing

intentional harassment, alarm or distress, criminal damage to a residence; and harassment.

29. There is no recent medical report on the father's mental health and he does not wish to receive any support for his mental health. This is despite there being police evidence of the father having a history of poor mental health and a GP report in the pre-birth assessment dated 29 September 2021 finding that the father had thoughts of self-harm and suicidal ideation.

Parenting assessments

30. A parenting assessment of the mother took place in 2021. This made recommendations identified over a span of 12-24 months with additional time to ensure that changes are embedded. The recommended changes included that the mother remained separated from her ex-partner (not the father) and refrained from any other relationships given her history of abusive relationships. She was also recommended to undertake a full programme of support from domestic abuse charities; to undertake individual support regarding her emotional wellbeing; to undergo a further review of her ADHD and to comply with any treatment deemed necessary; and to liaise with her GP regarding her mental health. The LA submits that none of these recommendations has been completed.

31. The pre-birth risk assessment dated 17 January 2023 recommended that the parents continue to engage with Early Help; attend social care meetings and visit; engage in hair strand testing; complete work with substance misuse services; and liaise with their GP regarding mental health. The social worker recommended that the mother specifically completes a full programme of support from domestic abuse charities; undertakes individual support regarding her emotional wellbeing and a further review of her ADHD and complies with treatment should this be deemed necessary. For the father it was specifically recommended that he should complete any identified domestic abuse perpetrator programmes.

32. In response to the recommendations, the mother had completely ceased cannabis use as at the date of the report (31 January 2023); had attended all antenatal appointments; and had completed work with EDAN Lincs and SAFE which are local domestic abuse support services. The parents have engaged with Double Impact which is a substance misuse relapse prevention service.

33. The parents have obtained all necessary equipment and other essential items for Ellie. They have a warm, clean and well-furnished home and there are no issues with regard to financial stability.

Parties' positions

34. Ms Heathwaite on behalf of the LA contends that the ICO should remain in place and that the child should remain in the care of her maternal aunt (supported by the maternal grandmother) in the same household of three of her half-siblings. The LA remain concerned that the parents have not been cooperative and on 27 February 2023 they refused to allow the social worker to enter the room which they deny. A further house visit was attempted since but that was refused.

35. Mr Freer on behalf of the mother submitted that at its highest the LA's evidence is based on one incident over 6 months ago, the detail of which is disputed by the parents. He contends that the LA's concerns are historic and that the mother has done all that she can to address their concerns. The disputed incident of August 2022 aside, there have been no incidents of concern since 2021. While acknowledging the appalling back story he submits that the mother is in effect being asked to approve an impossible negative and that the local authority's stance gives her no opportunity to demonstrate that she has followed a path to redemption.

36. Ms Bloomfield on behalf of the father adopted Mr Freer's submissions and added that this would be an apt case for a direction to be made under s.38(6) providing that Ellie should live with her parents while a concurrent residential assessment takes place to assess whether the parents can meet her needs, continue to work with the LA and demonstrate that they can care for her at the conclusion of these proceedings.

37. Ms Winterburn, on behalf of Ellie supports the LA and submits that the ICO and continued separation is necessary and proportionate.

38. I note that no referrals have been made to residential placements and no information is known regarding the availability of such a placement and any waiting list for such.

Decision

39. This case illustrates the acute dilemma that a court is often presented with when asked to make an interim care order in a case with a horrific backstory but where in the immediate past the parent, or parents, have seemingly repented of their past conduct and have set out on the path to redemption.

40. In this case the horrific back story unquestionably provides reasonable grounds for believing that there is a real possibility that Ellie would suffer significant harm if an order were not made. Indeed, such a finding is not opposed by either parent. The question is whether that risk is mitigated proportionately, justly and consistently with the right to family life of the parents and Ellie, by an immediate separation of Ellie from her parents.

41. At the end of the day I have to decide, if I were to leave Ellie with her parents under an ICO (with a direction that they live in their home, are subject to unannounced visits and to parental assessment, and with the power of peremptory removal of Ellie should the LA judge this to be necessary), whether this would be sufficient to mitigate that risk.

42. It is true that my mind has wavered during the course of the proceedings. At times I was inclined to think that the parents' road to redemption was being blocked with impossible obstacles. However, on balance, I have reached the conclusion that the steps taken by the parents to demonstrate that their past misconduct is now firmly in the past are insufficient both in terms of time and depth for me to conclude that the risk in question has been sufficiently mitigated.

43. Having reached that decision I now ask whether the Draconian step of removal of Ellie from her parents at such a very young age is a proportionate response to the identified risk. I have to say that if the proposal was to place Ellie with a stranger with

limited contact in favour of the parents then I would have concluded that the measure was disproportionate and that the interference with the parents' and Ellie's right to a family life would not have been justified. However, Ellie is placed with her aunt and grandmother and is living under the same roof as her siblings. Her parents see her daily. In such circumstances I am just satisfied that the measure is proportionate.

44. Accordingly, I make an ICO to continue until the proceedings are concluded. In the meantime I am of the view that contact should continue at least four times a week, preferably daily, although in the first instance the decision about the scale of the contact should lie in the discretion of the LA to determine.

45. I am of the view, in circumstances where such a serious order has been made, that it is the duty of the system to seek to resolve this particular case as expeditiously as possible.

46. I invited Mr Freer to submit a note indicating what directions he would be seeking in order that this matter can be resolved expeditiously. His proposals, which I am satisfied are reasonable, and which I adopt, are as follows:

    i) The LA's application is listed for a Case Management Hearing (CMH) between day 12 and day 18).

    ii) The parents shall file their Responses to Threshold and Initial Statement within 14 days and in any event no later than two working days before the CMH.

    iii) Permission is given to the parents to disclose the case papers to potential residential units who could assess them.

    iv) Any Part 25 applications shall be made 3 working days before CMH

    v) The LA is given permission to seek from the LA(s) in the previous proceedings concerning the other children of the parents, disclosure of the case papers in such proceedings and to disclose the same into these proceedings.

    vi) The parties shall agree a core bundle of relevant documents for the CMH.

    vii) The advocates shall hold a meeting no later than 2 working days before the CMH.
