Neutral Citation Number: [2020] EWCA Civ 1027

Case No: B4/2020/1118

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WATFORD FAMILY COURT
HHJ Clarke
WD19C01494

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3 August 2020

Before :

LORD JUSTICE MOYLAN
and
LORD JUSTICE PETER JACKSON

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H-B-S (Children: Discharge of Interim Care Order)

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Mai-Ling Savage and Monifa Walters-Thompson (instructed by **Hertfordshire County Council**) for the **Appellant Local Authority**
Rebekah Wilson (instructed by **Blaser Mills Law**) for the **Respondent Mother**
Lyndsey Sambrooks-Wright (instructed by **All Family Matters Solicitors**) for the **4th Respondent Father**
Grant Keyes (instructed by **Knowles Benning LLP**) for the **Respondent Children by their Children's Guardian**

Hearing date: 29 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Monday, 3 August 2020.

Lord Justice Peter Jackson:

1. This is a local authority's appeal from an order discharging interim care orders in relation to E a girl aged 9, and S, a girl aged 7.

2. The background is that the children's parents are separated. Their father is Mr S. In 2018, their mother started to live together with Mr B, who had the care of two children of his own and one stepchild. One of Mr B's children is T, a girl aged 8. On 4 November 2019, she went to school with significant bruising and other marks to her face and body. The explanation for the injuries is disputed. The local authority alleges that they were caused by the mother or by Mr B. They deny this and say that the injuries were inflicted by T herself.

3. The five children were removed by the police on 9 November. E and S were placed together in foster care. The local authority issued proceedings on 5 December. On 23 December, interim care orders (with the children remaining in foster care) were made by His Honour Judge Vavrecka without opposition.

4. The mother and Mr B, who separated in March 2020, were interviewed several times by the police. The five children gave a number of ABE interviews. An expert paediatric assessment was commissioned in the family proceedings.

5. The matter was listed for a fact-finding hearing in April 2020, but that had to be adjourned because of the pandemic. It was re-fixed for Wednesday 8 July 2020 before His Honour Judge Clarke, with a time estimate of 7 or 8 days. It was a hybrid hearing, with the mother and Mr B and their representatives being present in court and others attending online. I do not lose sight of how challenging a hearing of this kind is for the parties and for the court.

6. When the hearing started, transcripts of the children's interviews and the parents' interviews were outstanding, but the local authority informed the court that they would be available on Monday 13 July. The court started to hear live evidence that day, the previous week having been taken up with the question of whether T should give evidence. Between the Monday and Wednesday, evidence was given by T's foster carer, the paediatric expert, another doctor and a schoolteacher. Evidence in chief was given by Mr B. The evidence yet to be heard was the cross-examination of Mr B, evidence from a police officer and the evidence of the mother. Unfortunately, the transcripts were not provided as promised due to an error on the part of the local authority. They were considered to be essential and on the Wednesday the judge granted an application by the local authority for an adjournment. The court and the parties were understandably extremely concerned about the delay that this would cause.

7. On Thursday, 16 July, an application was made on behalf of the mother for the discharge of the interim care orders to allow the children to return home. It was said that there were no welfare concerns about these children and that the evidence was that they had been well cared for. It was argued that continued placement in foster care was not appropriate. The application was opposed by the local authority, Mr S, and the Children's Guardian. Mr B was neutral.

8. By the time the judge gave his decision, a date for a resumption of the hearing had not been identified. It seems that the possibilities ranged from mid-August to November

2020, although the judge referred to resumption being in November at best, with a welfare hearing to follow.

9. The judge gave an ex tempore judgement in which he granted the mother's application. He noted that the proceedings were supposed to be concluded within 26 weeks and that this would have been expected when the interim care orders were made. The hearing had already been put back from April and now it was being put back even further, with the earliest possible date for resumption being November. He said that even if the mother was found to be responsible for T's injuries, the consequence would not necessarily be that E and S could not return to her care. He noted that the evidence had not changed significantly since the original order was made. The question was whether the threshold under s. 38 Children Act 1989 was still met and whether continued separation was necessary and proportionate. He recorded that the local authority and the Guardian opposed the mother's application, the Guardian arguing that the test for removal had been met before and that the passage of time had not diminished the risk to the children. The judge remarked:

> "Hindsight is a wonderful thing. If at the initial ICO, it had been known that to obtain a decision in relation to the facts alone would take so long, I wonder whether the decision would have been the same but that decision is the background to this matter. At the time that decision was made, anticipation of the court was that the case would be concluded within 26 weeks. …
>
> I have to balance on a proportionality basis, an extended period of continued removal from M's care against the likelihood of harm."

He then referred to the teacher's evidence and the fact that the school summer holidays were starting. He continued:

> "But when I consider the proportionality exercise, I'm satisfied that the risk to these children presented by the Mother, even if identified as perpetrator to T, in circumstances where there were never any previous concerns regarding the Mother and currently no specific other identified concerns regarding the Mother, when weighed against potential ongoing harm to children of separation and applying the test for interim removal, would identify to me that continued separation from the Mother is not appropriate."

10. The judge discharged the interim care orders. The local authority sought permission to appeal, which was refused, but a short stay was granted to allow an application to be made to this court. On 17 July I granted permission to appeal.

11. Matters have moved on in that the fact finding hearing can fortunately resume on 17 August with a time estimate of 3 days, and a welfare hearing has been listed on 14 December with a time estimate of 5 days. The missing transcripts were obtained on 20 July.

12. The grounds of appeal, in summary, are that the judge's decision to discharge the interim care orders was premature when the fact-finding process was incomplete and

there had been no parenting assessments. He did not consider the gravity of the allegations. He could not and did not balance the risks. The hypothetical question of whether removal would have been sanctioned if the length of separation had been known at the outset, was the wrong question. Ms Savage notes that the judge did not have any evidence that the children were suffering harm in foster care. She submits that delay had no impact on the assessment of risk and that there had been no new evidence or change of circumstances to alter the risk assessment. She submits that the judge fell into the error identified by Davis LJ in *Re O (A Child: Interim Care Order)* [2019] EWCA Civ 583 at [26]:

> "The judge gave no assessment of just what harm O might be at risk of if returning to his mother's home. Indeed, he probably was in no position to do so on the state of the evidence before him. The judge also does not explain precisely what the harm was that O was suffering whilst in foster care and being apart from his mother. Indeed, he was again not really in a position to do so on the state of the evidence before him; and in fact his view departed from the view, on the face of it perfectly reasonably held, by the guardian and the local authority."

Ms Savage also referred to *Re K (Children)* [2019] EWCA Civ 2264 at [25], where I stated that evidence that the children were unhappy to be separated from their parents did not establish that the separation was disproportionately harmful in the context of a placement in foster care that had been made for their own safety.

13. For Mr S, the children's father, Ms Sambrooks-Wright supports the local authority's submissions. It was premature for the court to make a decision of this kind in the middle of a fact finding hearing. The judge placed too much weight on delay.

14. For the Children's Guardian, Mr Keyes argues that the judge's decision was manifestly wrong. The judge was not in a position to balance the risks. Further, the judge was wrong to say that E and S have come to no harm in their mother's care, as the issue of emotional harm from witnessing T's alleged treatment remains undecided.

15. In her clear and comprehensive submissions on behalf of the mother, Ms Wilson argues that this court should not interfere with a permissible and properly reasoned interim decision by a judge who had the measure of the case. The children, who had not themselves come to harm, had already been away from their mother for 8 months. The judge considered and balanced these factors in the course of oral submissions and then in his judgment:

- The risk of harm to the children were they to return home and their mother found to have injured T.
- The different nature of any risk of harm to her children.
- The evidence of her good care of the children and meeting their needs until these proceedings, including the evidence of the teacher of there being no previous welfare concerns.
- The mother's separation from Mr B.

- The harm of delay to children.
- The harm suffered by being apart from a parent by being placed in foster care and missing family life.
- The impact of not seeing their mother directly for many weeks during the pandemic and now only seeing her once a week.
- The ability to manage any risk with a robust written agreement.

Ms Wilson emphasised that there had been changes since the original order was made, namely the unexpected delay, the loss of contact during lockdown, and the separation of the mother from Mr B.

16. At the end of the hearing we informed the parties that the appeal would be allowed. These are my reasons for agreeing with that decision:

(1) There is no doubt that the court has the power to review the continuation of interim measures that it has put in place and that it may decide to exercise that power where the balance of the evidence significantly changes during the proceedings. This may lead to the removal of children previously at home or the return of children previously in foster care. If the court considers it appropriate to revisit its previous decision, the essential question is likely to be whether the further information changes its original assessment of risk. Delay in making a decision is presumed to be detrimental to children but where children have been removed from home for their own protection it is not on its own likely to affect the risk assessment.

(2) In this case, the judge was wrong to have disturbed the arrangements in the middle of the fact finding process. The children had rightly been placed in foster care and there had been no significant change in the evidence. The judge was not in a position to assess the risk of returning the children to their mother and he did not in fact attempt to do so. He no doubt considered the factors set out in Ms Wilson's list, but he was not yet in a position to assess their weight or to balance them without an understanding of how T's injuries had come about.

(3) The only factor that might have been relevant to risk was the separation of the mother from Mr B, but that is not a factor on which the judge relied and it could not have tipped the balance at this stage of the proceedings.

(4) I accept that when the judge made this decision the options looked starker then they do now. I doubt whether he would have reversed the arrangements for the children if he had known that the hearing would be resuming in a month. Leaving aside my doubts about whether a decision of this kind can properly be based on delay, it was at least necessary for the court to establish what the delay was likely to be.

17. I would therefore allow the appeal and set aside paragraph 1 of the judge's order so that the interim care orders remain in effect. It is welcome that the hearing is to continue quite soon so that a solid decision can be made about the children's future as soon as possible.

Lord Justice Moylan

18. I agree.
