Neutral Citation Number: [2019] EWCA Civ 1998

Case No: B4/2019/2746

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LINCOLN
Recorder Wigoder
LN19C00525

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 November 2019

Before :

LADY JUSTICE KING
and
LORD JUSTICE PETER JACKSON

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C (A Child)(Interim Separation)

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Gina Allwood (instructed by **Sills & Betteridge Solicitors**) for the **Appellant Mother**
Stefano Nuvoloni QC & Christopher Bramwell (instructed by **Lincolnshire County Council**) for the **Respondent Local Authority**
Anita Garrod (**Garrod's Solicitors**) for the **Respondent Father** by written submissions only
Patrick Freer (instructed by **Langleys Solicitors**) for the **Respondent Child by his Children's Guardian**

Hearing date: 18 November 2019

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Approved Judgment

Lord Justice Peter Jackson:

1. The question that arises on this appeal is whether an interim order for the separation of a child aged four months from his young mother was justified.

2. The ability to make interim care orders under s.38 Children Act 1989 is one of the family court's most significant powers and it is not surprising that it has been considered by this court on many occasions. A consistent series of propositions can be found in these decisions:

   (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.

3. The proceedings concern a boy who I will call Andy (not his real name). He was born in June 2019 and is now five months old. His mother, the appellant, was aged 20 when he was born. She has had a four-year relationship with the father, during which he has served at least two sentences of imprisonment for assaulting her, the most recent of which ended in the month of Andy's birth. A significant issue in the case has been the mother's ability and willingness to separate from the father.

4. Andy has broadly remained in the care of his mother since birth although the way that has being achieved has been anything but straightforward. The order to which this appeal relates was the seventh occasion on which the court needed to give directions about his placement. As briefly as possible, the sequence of events is as follows:

   (1) The local authority applied for an interim care order and removal to foster care on the date of Andy's birth. The threshold was not in issue. After a contested hearing at which the maternal grandmother gave evidence, a District Judge made an interim care order on the basis that mother and baby should stay together at the home of the maternal grandmother under the terms of a written agreement. The

mother's case was that she was no longer in a relationship with the father and an injunction was made against the father coming to that address.

(2) Unfortunately, the relationship between the mother and grandmother became fractious and, after an incident about which the court made no findings, it was agreed that Andy and his mother would move to a mother and baby foster placement. This occurred on 17 July when they moved to a placement intended to last for 12 weeks.

(3) On 17 September, the local authority again applied to remove Andy to foster care on the basis that it had been informed that the mother had taken him to meet the father. The matter came before a circuit judge the following day when evidence was heard and warnings given. The local authority's application was adjourned and in the meantime the placement was maintained. During the course of her evidence, the mother confirmed that she understood the importance of sticking to the rules of the placement and important for her to stay calm "to show I could do it."

(4) While this placement continued, a substantial parenting assessment was carried out. It presented a varied picture. The mother's ability to give basic care was good, and there was seen to be a warm and strong emotional bond between mother and child. As against that, she had lied about having had a number of telephone conversations with the father and was minimising his abusive behaviour; she had continued to smoke cannabis; she was reluctant to accept advice about her parenting; and her actions were causing instability to Andy. The main concern was that the mother remained emotionally attached to the father and that they would collude and put Andy's need safety at risk. The report, dated 7 October, concluded that "the worries and risks greatly outweigh the positives" and recommended that Andy be removed from his mother and placed in foster care.

(5) The foster placement ended on 11 October and a court hearing took place that day and evidence was again heard. Even though it found that the mother had lied in her evidence about past events, the court again did not sanction the local authority's plan for removal but instead directed the local authority to identify another mother and baby foster placement in advance of a further hearing a week later. In the meantime Andy was placed in foster care.

(6) The local authority identified a mother and baby placement and, following another hearing on 16 and 17 October, the mother and Andy moved there on 18 October. As would be expected, there was a clear set of house rules that the mother was required to follow to ensure A's safety. A final hearing was fixed for February 2020.

5. The history of this four month period shows that the local authority consistently argued that the child should be removed but the court consistently refused to endorse this, despite lies and breaches of the rules by the mother. While this was going on, Andy came to no actual harm but concerns about the risk of harm endured.

6. Unfortunately, the second, brief, foster placement was a disaster and the local authority restored the matter to court, where it came before Recorder Wigoder on 30 October. The placement had broken down and Andy was again placed in foster care that night as

the local authority had no alternative placement. The hearing resumed on 31 October, when the recorder heard evidence from the foster carer and the mother and submissions from all parties.

7. In their evidence, the mother and the foster carer disputed the reason for the breakdown of the placement. The mother described the 11 days of the foster placement as unbearable. At the start it had been difficult for her to settle Andy after he had been away from her for several days. She alleged that the local authority had set her up to fail and that the foster carer had deliberately tried to sabotage her and Andy staying together. The foster carer gave evidence that the mother had broken the agreed safety plan on an almost daily basis, for example by having the door to her room closed and the baby monitor turned off. This, the recorder considered, was probably because she wished to cover up phone calls with the father. She also left Andy unsupervised on the bed when she was elsewhere in the house or smoking in the garden. The foster carer described the mother's verbal abuse and her breaking or throwing items to the extent that the foster carer was concerned for the safety of her own young grandchild. She had felt intimidated and threatened. The mother was argumentative and unwilling to take advice, such as about the risks of using a kettle while holding the baby: "don't tell me how to look after my effin son."

8. The position of the parties was that the local authority again sought separation, while the mother pursued an application for a further joint placement. The Guardian, because the hearing had been convened at short notice, had been unable to attend court and her attendance had been excused. Her counsel had conducted the case on the basis that the events as known to her would not justify separation. However, during the course of submissions the Recorder invited him to take instructions about what the Guardian's position would be if the court's finding was that the mother had deliberately sabotaged the placement from the outset. The Guardian then gave instructions by telephone that she would in that case consider separation justified. The hearing ended late on the afternoon of 31 October and was adjourned for judgment to be given on the following morning.

9. I need only cite three extracts from the Recorder's judgment. The first concerns the first foster placement and the general approach that he took to the evidence:

> "5. … I haven't heard any evidence from that foster carer. I've seen an e-mail from her, which indicates that there may be a real issue over the reasons why that placement ended, and I am urged, and accept, as it wouldn't be appropriate at this preliminary stage, to take that (or indeed the breakdown of the placement with her mother) into account.
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> 6. I must, and do, restrict myself solely to the evidence which I have heard, namely about the current placement, which is necessary to decide this application"

In the e-mail referred to, which the first foster carer provided to mother's solicitor, she said that she had never found the mother violent or particularly argumentative but that she couldn't maintain the placement because of the need for intense supervision. Both she and the mother had struggled with the mother not having any free time with Andy

and the placement became less sustainable because the mother was spending more time out of it, which would have an impact on the assessment.

10. As to the conflict of evidence between the mother and the foster carer, the Recorder said this (substituting names for ease of reading):

> "8. … Before considering the placement in detail, it's important to bear in mind and make allowances for the fact that the mother is herself very young. … It cannot have been easy, moving to a strange house and having to comply with not just the safety plan but also house rules. Set against that, she can have been under no illusion which she indicated on oath on the 18th of September that she understood the importance of the safety plan, and of the need for her to comply with it, if Andy was to remain with her.
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> 9. … I have absolutely no doubt that the mother's account, both in her statement and in her oral evidence, that the foster mother told her that she'd seen some awful cases, and that over half the mother and baby placements she had had with her had failed, are lies.
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> 10. They're lies deliberately told to try and cover up for her behaviour, and for her responsibility towards the breakdown of this placement. Similarly, the mother's statement, that she believes the local authority was setting her up to fail by placing her with this foster carer, was totally mis-founded. The truth is that from the start, for whatever reason, the mother set out to sabotage this placement. …"

11. The Recorder gave his decision in these terms, which I quote in full:

> "23. The law. We are of course at an interim stage in the proceedings. It follows that I must not consider any issues that are likely to be prepared for the final hearing which carries with it the risk of a premature determination of the case. That is why I have solely focused on the 10 days the mother spent with the foster mother. The threshold for removal is very high – there must be an immediate risk of really serious harm. The authorities for that are well-known.
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> 24. Re L (Care Proceedings: Removal of Child) 2008 1 FLR 575 and Re L-A (Care: Chronic Neglect) 2010 1 FLR 80) amongst others. I must bear in mind the fact that removal is going to be deeply traumatic for the child, because the evidence in this case is quite clear that Andy does find contentment in his mother's arms, that the mother is attentive to his needs, and if she cannot soothe him when he is crying will try lots of other things until he has settled, and also that the way the mother loves and adores Andy is shown by the way she cuddles him, kisses him, talks to him softly, and the sense of pride when he reaches a milestone, and I take that from page 105 of parenting assessment. An earlier

position statement/ skeleton argument on behalf of the mother referred to the authority that removal will not be justified where harm is not immediate and not of the gravest sort.

25. There are, on the evidence before me, a number of ways in which that threshold is passed. The starting point is my finding… that the mother has deliberately sabotaged this placement. That has a number of consequences. The first is that should anybody be found to offer her a further placement she'll undoubtedly do the same again. She knew what she was doing. We'll all be back here in a matter of days. So that's not a realistic option. That means that the court is in fact back to precisely the situation that faced the judge on 11 October: either discharge the interim care order so she's free to return to the father, or to direct removal.

26. There can be absolutely no doubt that to put Andy at risk of contact with the father is placing him at an imminent risk of really serious harm. The past history of the relationship between the parents established that beyond any reasonable doubt. That means the Court, in its primary function of looking after Andy's welfare, has only one option which is removal.

27. Secondly, as the Guardian stated when asked for her attitude should the court conclude that what has gone on here was a deliberate sabotage then she would support removal and would accept that the test would be met, would demonstrate a lack of prioritisation between the welfare of her son and her own emotional needs, and, as I've already stated, would contribute to the likelihood of future placements breaking down.

28. Third, there is the impact on Andy's emotional well-being if the mother was to sabotage a further placement as it seems highly likely if not inevitable she will. She won't listen to other people. She said so herself, and there is a pattern where people give her advice about potential danger to Andy, for example over the boiling water while holding him, or leaving him on the bed unattended which she simply will not listen to. Her reaction to being given advice, namely shouting and screaming, carries a further clear risk of causing Andy really serious harm. It follows that I am satisfied that the very high bar in this case is in fact crossed.

29. I don't think I have mentioned so far that I do bear in mind, of course, that this is a case brought by the local authority, and I have to be satisfied to the balance of probabilities, and that is the test that I have applied.

30. The mother has demonstrated an ability to fail to prioritise Andy's needs, and that set against the history of her relationship with the father, means that the Court has no option but to order removal.

> 31. I have considered the mother and Andy's Article 8 rights, and I'm satisfied that such an order is proportionate, it reflects the position I have found, that Andy's safety demands immediate separation. That, accordingly, is my judgment."

12. The Recorder was then invited by counsel for the mother to grant permission to appeal and to stay his order on the basis that there was another mother and baby placement available, albeit at a distance. The Recorder refused both applications and an immediate application for a stay was made to this court, it being a Friday afternoon with the parties waiting at court for a decision. I granted a stay and in consequence, the mother and Andy have since 1 November been at the new mother and baby placement.

13. The grounds of appeal can be distilled in this way:

    (1) The Recorder was wrong on the evidence to find that the mother tried to sabotage the placement.

    (2) In any event, he was wrong in law to find that sabotaging the placement was sufficient to cross the very high threshold for interim removal.

    (3) Before hearing submissions, the judge informed the parties that on the evidence of the mother and foster carer he did not believe the test was met for removal.

    (4) The Guardian's counsel submitted after the evidence that the Guardian did not support removal from the mothers care. That position changed when instructions were taken about deliberate sabotage. There was no opportunity for the mother to challenge this because the Guardian was absent. This was a breach of the mother's Article 6 and 8 rights.

14. Having invited and received responses from the respondents, I granted permission to appeal on 11 November. I noted that the core ground of appeal was number 2 and that the other grounds, and in particular ground 1, probably had no real prospect of success, or added nothing.

15. On behalf of the mother, Ms Allwood, who did not appear below, has nonetheless pursued all the grounds of appeal. In relation to ground 1, she argued that there were many reasons why the Recorder should have preferred the mother's evidence and that he did not explain why he preferred that of the foster carer. A finding of this kind was unfair to the mother and could have damaging consequences when future decisions came to be taken. As there was an alternative placement available, there was no need for the Recorder to have investigated why the placement had broken down at all. As to ground 2, the Recorder was totally reliant on speculative risks to Andy, including the risk of a further placement breakdown; he did not consider the alternative placement option; he did not balance up all the factors relating to mother's care and the child's well being. Ms Allwood also developed arguments in relation to the Recorder having at one stage queried whether the test for separation was met, and in relation to the sequence of events concerning the Guardian.

16. The local authority had opposed the grant of permission to appeal. However, in submissions dated 15 November, Mr Nuvoloni QC, leading Mr Bramwell who appeared below, states that in the light of the fact that the current placement is

progressing well and that the mother is complying with all rules and agreements, the local authority is not now proposing that Andy should be removed from her care. On the basis of the positive indications in respect of her cooperation and basic care, the local authority proposes to maintain the placement as the basis for a period of further assessment. As to the appeal, the local authority supports the Recorder's conclusions about the reason for the placement breakdown. It rebuts the other grounds of appeal and argues that the appeal should be dismissed.

17. The Guardian considers that findings of fact are a matter for the court and she does not seek to go behind the Recorder's assessment in that respect. She points out that her welfare analysis was carried out in somewhat unusual circumstances due to her absence from the hearing. She was invited, without any notice, to provide a 'from the hip' answer to a very specific question in the absence of any further explanatory context. She does not seek to change her advice, but has reservations about the circumstances in which it was given. Had she been more closely involved she may have taken the view that a continuation of the assessment of the mother's parenting ability was necessary notwithstanding findings of sabotage. The Guardian confirms that the mother and child have settled in at the new placement and that the mother was adhering to the ground rules. In the circumstances, the Guardian does not oppose the appeal.

18. Happily, there is now broad consensus about the practical plans for the mother and Andy. It only remains to determine whether the appeal should or should not be allowed. This is not academic as a matter of principle is involved and the issue may arise again in this case.

19. I would start by clearing away all but one of the grounds of appeal. The challenge to the Recorder's fact-finding is in my view hopeless. He clearly needed to reach conclusions about what had happened in the foster placement in order to fairly determine the local authority's application for separation. This court will very rarely disturb primary findings of fact and in this case the Recorder had ample evidence to support his conclusion that the mother had set out to sabotage the placement and had given untruthful evidence. He heard from both witnesses, and he preferred the evidence of one over the other. He was entitled to do that and there is no possible basis on which his primary findings can be successfully challenged. However, I would stress that here, as in any case, a finding made at an interim stage does not bind the court in its final assessment. These events need to be kept in proportion by professional assessors and the court and set alongside all of the evidence that will be taken into account when Andy's future comes to be decided.

20. Likewise, there is nothing in the ground of appeal arising from the Recorder's query at the close of the evidence (it was not more than that) about whether the test for removal had been made out. It is not uncommon for judges to discuss issues with parties as a hearing progresses, or to express provisional views. Unless that leads to procedural unfairness, it takes an appellant nowhere. Here, the Recorder's passing observation was followed by extensive submissions and an overnight adjournment during which he had the opportunity to consider the matter fully.

21. Lastly, in my view the grounds relating to the role of the Guardian add nothing to the core ground of appeal. The advice of the Guardian in a situation of this kind is usually of real value to the court, but it is in the nature of urgent hearings (and this case had many) that the Guardian is not always able to carry out a full and up to date assessment

or attend the hearing. So it is no disrespect to the Guardian to say that the decision in this case was not likely to turn upon her instructions, given remotely, when she was not in a position to provide the court with a comprehensive opinion. In my view the issue about how the Guardian's position developed is best seen as an aspect of the core ground of appeal, to which I now turn.

22. Based on his findings of fact, the Recorder was faced with a difficult situation, but my conclusion is nevertheless that the appeal must succeed on Ground 2, for these reasons:

(1) The Recorder directed himself correctly on the law. He was certainly entitled to consider that it would be unsafe for Andy to be with his mother unsupervised in the community, indeed no one argued otherwise. He was aware that the case had a particular history, with the local authority repeatedly seeking to remove Andy from the mother, but being prevented from doing so. He fairly recorded that the mother herself had shown good aspects to her parenting, that she was in a pressured situation, and that there were serious disadvantages to Andy in being removed from a parent to whom he is attached.

(2) However, the Recorder did then not bring these matters into account when assessing the necessity and proportionality of separation. Instead he effectively based his decision on the events of the previous eleven days. He was entitled to find that the mother had repeatedly shown herself to be capable of being untruthful, immature and confrontational. On any view, her behaviour in the second foster home was completely self-defeating. But this had to be set alongside all the factors in the case.

(3) This case concerns an isolated young mother and a first child. A final hearing was due to take place in twelve weeks' time and it could not be foreseen whether the local authority's application (which might well extend to pursuing a plan for adoption) would succeed or not. In such circumstances, there must be a high premium on keeping all options open to the court making the final decision. Moreover, the separation of mother and child at such a crucial developmental stage would, apart from its serious impact on the child and on the mother/child bond, risk skewing the final decision. It therefore required a very high level of justification.

(4) The reasons that were said to justify separation could not in my view be seen as sufficient. They were that the mother had sabotaged the placement and would inevitably do so again; that this would place Andy at risk from his father; that the Guardian supported removal; that the mother ignored advice on safety issues such as kettles and leaving the child unsupervised on the bed; and that overall the mother failed to prioritise Andy's needs over her own.

(5) As to these matters, removal was not in fact the only realistic option when an alternative placement was available. The conclusion that the mother would inevitably sabotage it took no account of the history of the much longer first foster placement but, apparently with the support of the parties, the Recorder explicitly left that out of consideration. It was understandable that he did not base criticism of the mother on this longer placement, but that did not mean that the placement could be ignored when reaching a view on her capacity to sustain supervision of this kind.

(6) In the particular circumstances, the Guardian's instructions could not weigh heavily when the court had no fresh analysis from her.

(7) The mother's rejection of advice, even on safety issues, was a matter of justified concern, but it was not at a level of seriousness that would in itself warrant separation.

(8) Even if the mother had been maintaining contact with the father, this had not been proved and, while Andy was in a foster home, it did not represent an immediate risk to his safety.

(9) The overall charge that the mother was putting her needs above Andy's was one that was more suitable for consideration at the final hearing than an interim stage.

23. For these reasons, I consider 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 local authority 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.

Lady Justice King:

24. I agree.