



Neutral Citation Number: [2018] EWCA Civ 3038

Case No: B4/2018/3016

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE WALSALL COUNTY AND FAMILY COURT
(HIS HONOUR JUDGE LOPEZ)

The Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 20 December 2018

Before:

LORD JUSTICE PETER JACKSON
and
LADY JUSTICE ASPLIN

IN THE MATTER OF M (Children : Interim Care Order)

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(Official Shorthand Writers to the Court)

Ms T Lakin (instructed by **Clarkes Solicitors**) appeared on behalf of the **Appellant** mother
Ms C Binnion (instructed by **Telford and Wrekin Council**) appeared on behalf of the
Respondent local authority

The remaining parties did not appear and were not represented

Approved Judgment

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LORD JUSTICE PETER JACKSON:

1. The removal of children into foster care under an interim care order in the course of proceedings is always a major step. It can only happen where it is necessary. The question on this application for permission to appeal is whether an interim care order with a plan for removal immediately into foster care was necessary.

2. The matter comes before this court as a matter of urgency following an order made by HHJ Lopez in the Family Court at Walsall on 12 December last. On that occasion, on the application of Telford and Wrekin Council, he made an interim care order which led to the removal of three children aged between ten and seven into foster care. The judge refused the application made by the children's mother for a stay of his order to allow her to approach this court, with the unfortunate result that the children had been placed in foster care before a stay was granted by a judge sitting out of hours. As a result the children returned home, where they currently remain.

3. Briefly, the history is that the children's parents separated in 2011, since when they have lived with their mother. They have had no contact with their father since about 2012. The situation of the mother and the children first became known to the local authority in March 2018. That was the result of very high level of concern about the welfare of two other children, children of the N family, who were removed from their parents that month. The mother of these children, the M children, is the sister of the father of the N children. In the proceedings relating to the N children allegations have been made, particularly by the children themselves, that they had over a long period of time been subjected to harsh treatment amounting to cruelty and that the mother of the M children had participated. In May 2018 she was arrested for child cruelty, and in

July she became an intervener in the N proceedings. Both proceedings are due for hearing by HHJ Lopez next February with a time estimate of 20 days.

4. These circumstances rightly caused concern to the local authority, and it carried out various investigations. In June the children became the subject of child protection plans under the heading of emotional abuse. Then in September the mother was convicted of cruelty to animals and was banned from keeping animals for 15 years. This arose from a distressing incident in which one of the family dogs had attacked the other, causing such serious injuries that the dog died, but not before it had lived for several days without the mother seeking veterinary treatment. The children had been exposed to that experience.

5. In October 2018 the local authority decided to start proceedings in relation to these children. That was prompted by the mother's conviction and by pressure from the children's guardian, who has also acted as guardian for the N children. On 22 November care proceedings were issued. The local authority framed its case in a threshold document under some nine headings. Three of these referred to the events relating to the pet dog. Others related to the children being made to do domestic chores, to the mother's approach to removing first teeth, to the fact that two of the children are classed as overweight and to their allegation that the mother did not show the children emotional warmth. But the core of the threshold allegations resided in the local authority's allegation that the children had suffered or were likely to suffer emotional harm as a result of their exposure to the mother's behaviour towards the N children and the suggestion that they had to some degree been involved or had knowledge of how those children were being treated. There can be no doubt and it was

not argued otherwise that all of these matters provided reasonable grounds for believing that the threshold for intervention under section 31 was amply made out.

6. The local authority filed evidence setting out the history and supplemented it with a short statement explaining why it now sought the children's immediate removal. It contended that in all these circumstances the children were being exposed to ongoing emotional distress. That analysis was supported by the children's guardian, who of course has close knowledge of the circumstances of both sets of children. She informed the parties to these proceedings of the concerns arising from the N proceedings. She was also at pains to point out the strengths in the family system. These include the fact that the children attend school regularly; that they are making good academic progress; that they have a strong, positive relationship with each other; that they appear as well-mannered children, suggesting that they have experienced consistent boundaries; that they have been taken to medical appointments where necessary; and that they have a close and loving relationship with their mother. The children were appropriately spoken to by the guardian, and they described to her in their own ways being happy and comfortable at home. They are described variously as children who are delightful, sweet and lovely. Nevertheless the guardian's professional opinion was to support the local authority's application. I quote from paragraphs 38 and 39 of her report:

"38. The local authority's care plan is one of removal to foster care, which should always be a last resort. I have considered the possibility of the children remaining in the care of the mother, either with or without the making of an interim care order. However, I am concerned that the cooperation demonstrated by the mother may be of a superficial level and contain a level of disguised compliance, and this will require further exploration through these proceedings.

39. Therefore I am of the view that there is sufficient evidence before the court to suggest that the children's welfare demands that they are removed from their mother's care. There is considerable evidence to suggest that she has willingly participated in the alleged cruel treatment of the N children and, as such, this raises significant concerns for the care that she provides for these children."

7. The guardian was concerned that the local authority should share parental responsibility for the children, but the local authority was unwilling to consider a placement at home under an interim care order. The options that face the judge were therefore to grant the application on the basis of the only care plan, to refuse it or to make some lesser order.
8. At the hearing on 12 December, the judge was concerned not only with these children but also with a significant directions hearing relating to the N children. Once that had been completed, he turned to this case. The parties sensibly agreed that the matter could be dealt with on oral submissions, there really being no argument about the evidence that might be relevant to the decision. The judge heard from the four parties. Only the mother opposed the removal of the children, and he then went on to give his decision. We have a note that is accepted by the parties to the appeal as being adequate, and from it one can see that the judge had a full grip of the relevant considerations. He noted the delay that he considered there had been on the part of the local authority in issuing proceedings concerning these children and agreed with the guardian that they should have done so earlier. He refers to the history concerning the N children and concerning the mother's conviction for animal cruelty. He noted the positives in the children's situation. In regard to all matters except the N children's case, the judge found that the threshold allegations were, as he put it, "makeweight allegations that had been put into the case to get removal". But he went on:

"Having said that, the allegations in the other case are of a serious and grave nature. If these are true, then these children are likely to have suffered significant harm."

9. The judge noted that the threshold was accepted to have been crossed for the making of interim order, and he directed himself entirely appropriately with reference to the authorities from this court in relation to the approach to be taken to the making of interim care orders with a plan for removal. He then set out accurately the submission he had received from the parties. He clarified that the guardian did not consider the suspicion of disguised compliance on behalf of the mother was a matter of relevance or the decision that he had to take.
10. I come then to the very conclusion of the judgment, which I shall quote verbatim from the note, although of course a transcript might show that the judge expressed himself somewhat more fully:

"Important to bear in mind the ... cumulative effect. The judge said that he does think the submissions regarding the teeth and so forth are makeweight. However, he said he does find that what is said in relation to the N allegations is serious, so that he finds an imminent and immediate risk of harm. The judge authorised removal as sought by the local authority."

11. Now, I make full allowance for the possibility that the noted is not absolutely complete, but it is clear and common ground between the parties that the judge's reason for making an interim care order was firmly and entirely rooted in the very understandable concerns arising from the alleged experiences of the N children.
12. We have had the benefit of crisp submissions from Ms Tracy Lakin on behalf of the mother and Ms Carol Binnion on behalf of the local authority. We have also received a

skeleton argument on behalf of the guardian in which her counsel, Ms Clifford, supports the local authority's position, and an indication from those representing the father that he does so too.

13. In the end the oral submissions we have received have enabled us to clarify confidently what has occurred at this quite recent hearing and frame the question for this court in the terms with which I opened this judgment. There is no dispute nor has there been for a long time about the legal requirements before an order of this kind can be made. The judge correctly directed himself to the effect that the court can only make such an order if satisfied that the children's safety (which includes their emotional safety) demands immediate separation.

14. I am conscious of the very justified level of concern surrounding these children. That level of concern was based upon facts that clearly established the threshold. I am also respectful of the considerable knowledge that HHJ Lopez has of not only the circumstances of the N children but now those of these children. Nonetheless I conclude that there are significant difficulties with the decision that he took. As can be seen from the quotation for the end of his judgment, there is no real explanation of the actual or feared harm that would be likely to come to these children if they were not immediately removed. When giving directions for this hearing, I noted that the basis upon which the judge had decided that the children were at immediate risk of harm was not clear from the documents. Ms Lakin submits that that remains the case. She says that the judge on this information could only speculate on whether the children might be undergoing ongoing emotional harm, because there was in fact no evidence that they were.

15. My second concern is that the judge, having very fairly acknowledged the positives in the children's presentation, did not when reaching his decision appear to bring them into the balance. Nor did he bring forward his recognition of the serious nature of the order into the reckoning for these particular children or weigh up the effects upon them of immediate removal for an indefinite period of time from a home within which they at least considered themselves to be happy. That state of affairs was to be replaced by supervised contact with their mother for 90 minutes twice a week. Before making such an order, the judge was bound to set those matters against the matters that he considered as justifying removal.

16. Third and last, there is no analysis of why immediate removal was necessary and why the children might not remain at home until all the evidence in relation to them had been gathered. That would of course include the court's findings in relation to their mother following the N children's hearing. Against this background it can of course be said that it might be better for the children to be placed elsewhere, particularly with the upcoming heavy hearing in February. But that is not the test.

17. For those reasons my conclusion is that the evidence was sufficient to cross the threshold but insufficient to warrant the making of an order which had the effect of the children's immediate removal. I would therefore grant permission to appeal and allow the appeal to the extent of setting aside the interim care order. Nevertheless the circumstances here amply warrant the making of an interim supervision order marking the level of concern that this court shares with the local authority and the guardian about the need for these children's welfare to be supervised and supported. That form of disposal is one to which the mother accedes and which the local authority accepts if

the appeal succeeded. In reaching this conclusion I note that matters do not stand still. The outcome of this application and appeal does not preclude a future interim application by the local authority if it considered that the evidence then available to justify it.

18. The last thing that I wish to say is that the court is grateful to all the parties and particularly those represented here today for enabling this hearing to take place at short notice. It would I think have been better if the judge himself had been willing to grant a conventional short stay in the face of the application for permission to appeal that he faced. The decision was taken at approaching five o'clock in the afternoon. The mother was, as we understand it, upset, and it was not until much later that night that her counsel was able to make an application for a stay to this court. That led to the children spending the night in foster care. I readily accept that there will be cases in which the removal of children must take place immediately and a stay will not be appropriate. Given the nature of the allegations in this case, it does not seem to me that this was a case of that kind.

LADY JUSTICE ASPLIN:

19. I agree with everything that my Lord Peter Jackson LJ has said in this regard, and I also emphasise that the decision that we have made is on the basis of the evidence which we have seen which was before the judge and no other evidence.

Order: Appeal allowed