



Neutral Citation Number: [2023] EWCA Civ 1245

Case No: CA-2023-001576 and 1577

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT PETERBOROUGH
His Honour Judge Tolson KC
PE002/23 & P22C50128

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 October 2023

Before :

LORD JUSTICE PETER JACKSON
LORD JUSTICE MALES
and
LADY JUSTICE ELISABETH LAING

H (Children: Placement Orders)

Henry Lamb (instructed by **Futter Chapman Family Law Solicitors**) for the **Appellant Children by their Children's Guardian**
Gary Crawley (instructed by **Pathfinder Legal Services**) for the **Respondent Local Authority**
Alison Hunt (instructed by **Oslers Solicitors**) for the **Respondent Mother**
The Respondent Fathers did not appear and were not represented

Hearing date : 5 October 2023

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 October 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:

Introduction

1. This is an appeal by the Children’s Guardian from orders concerning three young children. The older two are boys who are now aged four and three. The third child is G, a one-year-old girl. The children have the same mother; the boys’ father is F1, while G’s father is F2.
2. The boys have lived in foster care since the spring of 2021 and placement orders were made at the end of that year. In their case, the order under appeal revoked the placement orders on the mother’s application. G has lived with her mother since birth and in her case the Guardian challenges the decision that this should continue under a supervision order, rather than G being removed under a care order with a view to adoption. The local authority supports the appeal in respect of the boys, but opposes it in respect of G. The mother seeks to uphold both orders. The fathers play no part in the appeal.
3. For the reasons given below, I would dismiss the appeal in relation to G, but I would allow the appeal in respect of the boys and would restore the placement orders.

Background

4. These children are the youngest of the mother’s seven children. The eldest girl (aged 18) lives at home. The second boy (B, aged 17), who has learning difficulties, is in foster care but was likely to return home on reaching majority in October 2023. The father of these two children has not been involved in their lives. The next two children, whose father is F1, are girls aged 11 and 8. They are in long-term foster care, with supervised contact with their mother every six weeks.
5. The family has been known to the local authority since 2011 due to recurring concerns about the care given to the children, which increased when each child was born.
6. The involvement of the Family Court began in April 2021, when care proceedings began and all the children, except the eldest, were placed in foster care. In July 2021, the threshold was agreed on the basis of: the children’s exposure to domestic violence between the mother and F1, that had recently led to his imprisonment; the parents’ anti-social behaviour and repeated shoplifting; the mother’s involvement with F2, a drug user who was in a state of mutual enmity with F1 that would periodically break out into violent incidents; the mother’s own use of drugs; and neglect of the children’s health and educational needs. In the same month, an independent social work assessment of the mother was negative. It cited her lack of insight into the risks that her decisions and behaviour posed to the children’s emotional welfare and safety, a lack of accountability and a tendency to blame others for the harm experienced by the children, absence of remorse impacting on motivation to change, a fundamental lack of honesty, and an incapacity to work openly with professionals.
7. In November 2021, the Guardian, who represented the children then as now, supported the application for care orders in respect of all five subject children and advised that in the case of the youngest two, the boys, the balance tipped firmly

towards a plan of adoption. She noted strengths in the family in the form of loving relationships between the parents and children and between the children themselves, and the availability of some wider family support. She described B as having very significant learning difficulties and as requiring a high level of support and supervision to keep him safe and develop functional life skills while avoiding exploitation by others. The younger boys were noted to be very active with little sense of danger or awareness of how their actions may affect each other. Their experienced foster carer felt that their need for attention was significantly higher than any other children she had cared for. The Guardian regarded it as particularly worrying that the mother had continued to engage in criminal activity, associate with risky adults, and expose the children to drug use, even after learning that the independent social worker had recommended adoption for the boys.

8. Against this background, on 10 December 2021, Her Honour Judge Davies made care and placement orders, bringing the first set of proceedings to an end. It is unsatisfactory that no transcript or even a note of judgment was created, so no record exists of what was said by the court when it made such serious orders for these five children, even if the reasons for the decision can be broadly deduced from the professional reports. I repeat what I said in *Re M (A Child: Leave to Oppose Adoption)* [2023] EWCA Civ 404 at paras. 5-7 about the obligation on the court and the local authority to ensure that a transcript of judgment is obtained when care or placement orders are made unless the court hands down a written judgment or makes arrangements for an approved note.
9. To complete the background, between July 2021 and March 2022, the mother was said to have been caught shoplifting on 18 occasions, often in company with F2. In June 2022, she was sentenced to an 18-month community order for shoplifting and drug driving. She and F2 were each given a two-year criminal behaviour order barring them from certain named shops or from going into any shop together.
10. In July 2022, potential adopters were identified for the boys.

Events since the birth of G

11. In August 2022, G was born to the mother and F2. The local authority began care proceedings the next day. They were allocated to His Honour Judge Tolson KC. On 26 August 2022, he refused the local authority's application for an interim care order with a plan for G's placement in foster care and he made an interim supervision order. The mother and F2 gave a number of undertakings to the court, including that the mother should have no contact whatsoever with F1 or F2. On that basis, G remained in her mother's care.
12. On 9 September 2022, care and placement orders were made in proceedings concerning F2's 5-year-old child from another relationship, with that child being said to have been harmed by exposure to F2's chaotic and criminal lifestyle and by his dysfunctional relationship with G's mother. The next day, the mother and F2 were caught shoplifting together in a games store. On 5 October 2022, the windows of a social worker's car were smashed by a masked person during a visit to the mother's house. The local authority renewed its application for an interim care order, which was refused by the judge on 6 October 2022.

13. On 23rd October 2022, F2 smashed the windows at the mother's home. The local authority again applied for an interim care order, which the judge again refused on 14 November 2022.
14. Following the 2021 proceedings and her conviction in March 2022, the mother engaged with a number of services: substance abuse, victim awareness, mental health treatment, domestic abuse, parenting classes and employment training.
15. On 10 January 2023, the boys were matched with the potential adopters and contact ceased. On 25 January 2023, the mother applied for permission to apply to revoke the placement orders and on 13 March 2023, the judge granted her application without opposition from the local authority or the Guardian. The adoption plan was paused to await the outcome of the application.
16. On 1 December 2022, the mother pleaded guilty to the September 2022 shoplifting. On 29 March 2023, she was given a community penalty, which she duly served.
17. On 18 May 2023, F1 told the Guardian that he had been in a relationship with the mother throughout her pregnancy with G and that he had lived with her for eight weeks after the birth, but that he had separated from her because she continued to see F2. However, he had stayed there over Christmas/New Year and the mother had continued to message and call him after that. This account was broadly consistent with statements made by F2 to the police.
18. The final hearing took place on 24-25 May 2023. The judge heard evidence from the social worker, the team manager, the mother and the Guardian. F1 appeared briefly by video-link but thereafter absented himself. F2 attended the hearing, though his mental health was too poor for him to be able to give evidence, but the judge viewed a recording of a police interview with him.
19. The local authority considered that the progress made by the mother was just about sufficient to allow G to remain in her care. However, the social workers' assessment was that the boys' substantial needs could not be met by the mother on top of her responsibilities to G and in due course B. As a result of their experiences, the boys required better than good-enough parenting that the mother could not reliably provide.
20. The Guardian considered that the available information raised serious concerns about the changes the mother was believed to have made, and her capacity to work honestly, understand and manage risk, and prioritise and protect G. There appeared to have been a complete failure of the court-directed safety plan. When G was seen by the Guardian in April 2023, the home was clean and tidy and G was settled and content in her mother's care. However, although she did not appear to have been harmed by the mother's clandestine contact with the fathers, it was only a matter of time before she came to be physically or emotionally harmed by repeated exposure to criminal activity, conflict and risky decision-making. The local authority could not safeguard her effectively and the risks of conflict and aggression would multiply if the boys were returned because of the antagonism between the fathers.
21. In relation to the boys, the Guardian advised that they are loved by their family. They are very energetic and impulsive little boys who require a very high level of attentive and responsive care. They show attachment-related attention-seeking behaviour that

can escalate rapidly and requires skilful management. Their foster carer is cautious when taking them out due to their impulsivity and sometimes challenging behaviour, as also observed at contact. The persistent concerns about the mother's honesty and contact with the fathers would place the boys at risk from the problems that led to their removal. F1 would want to have contact with them, increasing the probability that he would spend time in the family home and that F2 would react angrily to him being in contact with G. The Guardian's report, which I anonymise, concluded:

“81. Most significantly, there is a very significant difference between the mother caring for one child and the complexities of caring for three very small children and for B, as a very vulnerable young person which would need to be very carefully, gradually and comprehensively tested before there could be real confidence in the likely success of rehabilitation and the sustainability of arrangements.

82. Any reintroduction of contact between the mother and the boys is likely to be extremely confusing and unsettling for them, undermine their trust in their carers and especially their social workers. It is highly likely to impact on their emotional regulation and behaviour at home with their carers and in school. They would need careful preparation to understand why they do not have new carers and are going to spend time with people they have already said goodbye to. They would need a high level of direct work with their social worker to understand each stage of the plan. They would need a high level of therapeutic care-giving to help them adapt to sharing their primary carer (their mother)'s attention.”

The judge's decision

22. In a reserved judgment given on 12 July 2023, the judge identified what he considered to be unusual aspects of the case: the difference in the risk assessments by the local authority and the Guardian, and the fact that the outcome might be that the younger child remained at home while the older two were “propelled towards a compulsory state-sponsored adoption.”
23. The judge directed himself appropriately with reference to the Adoption and Children Act 2002, the Human Rights Convention, and to relevant caselaw. He cited *Re F (A Child) (Placement Order: Proportionality)* [2018] EWCA Civ 2761, where I proposed that when analysing the risks likely to arise if a child is, on the one hand, placed with the birth family or, on the other hand, placed for adoption, the court should consider (1) the type of harm that might arise, (2) the likelihood of it arising, (3) the severity of the consequences if it did, and (4) what could be done to reduce or mitigate it. The court should then compare the overall welfare advantages and disadvantages of rehabilitation and ask itself whether adoption is ultimately necessary and proportionate.
24. The judge noted that the mother's case was not that the two boys should immediately return to her care, but that the care orders which would be reinstated on revocation of the placement orders should remain, but with a care plan for a return to her care. Her

case was that she would be ready to resume care of the boys in six months' time. He recognised that the question of harm that was likely to arise as a result of that plan was of particular importance. He further recognised that the position of the boys differed significantly from that of G and that each child's welfare had to be considered separately. He added that:

“9. ... I must also recognise that further delay for the boys in itself threatens their welfare interests and, in this case, may well make more difficult or even rule out the prospect of adoption in future. Not least in this respect is the fact that the local authority would, next year, if the mother did not succeed in her proposal, have to re-apply for placement orders. The mother's proposal is not an easy one and it has a considerable downside.”

He continued:

“10. In the case of G there must be an assessment of current risk. The assessment of risk to the boys involves looking to the future. That said, there is no denying that there is a considerable amount of overlap. My views on the boys must be heavily influenced by my views on G - and my view of the future by the present. This is because both assessments must be based on the facts as I find them to be and in particular the question whether the mother has ended her relationships with the fathers as well as changed her lifestyle, or whether she has (as the guardian contends may be the case) either pulled the wool over the eyes of professionals or remains too vulnerable to a return to old ways.”

25. The judge then reviewed aspects of the history. He considered the mother's evidence about the September 2022 shoplifting, which he described as 'nonsense', and found that it was a planned joint venture with F2. He described this, if it stood alone, as a significant pointer that the mother had not changed her lifestyle at all, and he said that it weighed heavily in his mind. He further found that the mother had been untruthful about the extent of her relationship with the fathers since G's birth, and he accepted their reported accounts over hers. He described the mother as a relatively powerful and manipulative character who believed that she could fool professionals as to her true nature. However, he considered that there had been some genuine change. The mother had engaged well with the drug counselling and had broadly tested negative since August 2021. She had done courses and shown some insight. Most significantly, she had cared well for G over her first 10 months of life. There was no recent evidence that she was in a relationship with either father. The last six months appeared to have been calm. Her home circumstances were about to change with the return of B, which would clearly present fresh challenges, which the Guardian regarded as adding to the unacceptable level of risk for G as well as the boys.

26. The judge then addressed the welfare checklists for G and the boys in turn. As to G:

“23. G is bonded to her mother and her inner feelings, although they cannot be expressed in words, would obviously be for this

bond to continue. G's physical care and emotional needs are being met and it seems will continue to be met. The only source of potential harm for her lies in her mother's lifestyle and in particular the risks from relationships with volatile men. I believe the mother remains attracted to her previous lifestyle and there is a real possibility that she will return to it. Shoplifting remains a particular risk. I believe that the risk from the fathers has receded, but it is highly likely that the mother will form a new relationship and the past gives no reassurance that the individual with whom she forms that relationship will be risk-free. I repeat, however, that there is no indication that either father (or any other man in the mother's life) would deliberately harm a child. I find this an important qualification to the level of harm to which any child in the mother's care would currently be exposed. The mother's character and abilities are obviously in play but are tied up with the risk of harm. The well-known and oft-cited dictum of Hedley J is relevant here: nothing in this judgment should be taken as endorsing either her obvious habit of shoplifting or her conduct of relationships, but the focus has to be on the harm to which she is likely to expose her children. That in my judgment is now limited.

24. In my judgment, any balance of these factors produces the conclusion that G must remain in her mother's care. A supervision order is, in my judgment, appropriate. I believe the local authority will experience difficulty in their conduct of that order. It will be difficult to advise, assist and befriend the mother. She does not believe she needs such advice and assistance. It is not, in my judgment, in her nature to believe this. She nevertheless does need it. One obvious piece of advice is that her shoplifting, if it continues, may land her in prison - perhaps not for so long that the care of G cannot be temporarily accommodated within the family or even beyond, but prison nevertheless. A second piece of advice would be to make an honest appraisal of her own character and stop pretending to be purely a victim. It will not be easy either for the mother or for the local authority. I do not believe the mother will be honest with the local authority. They will continue to have concerns. I can easily foresee an application to extend the life of the supervision order. Nevertheless, the circumstances are not such as require or justify a care order, still less an adoption care plan. I prefer the reasoning of the local authority to that of the guardian. In cross-examination and in submissions counsel put it simply: the mother has cared well for her daughter; she will not abuse her; she has addressed her substance abuse issues; the remaining concerns cannot justify removal. I agree."

27. In the balance of the judgment, the judge made his welfare analysis in the boys' case, which deserves extensive citation:

“25. For me, the same considerations cause me to conclude that the application to revoke the placement orders in respect of the boys must succeed. I recognise that the boys are in a different position. They have been in foster care for a long time. Plans to adopt them were put on hold by the local authority in July 2022 in the face of apparent improvements in the mother. The local authority initiated further assessment. It was only when that assessment was negative in December 2022 that the local authority proceeded down the adoption road.

26. ... The boys have as yet had no meeting with the proposed adoptive parents but have not seen their natural parents for 5 months. Their position, I recognise, is therefore very different from that of G.

27. I must also recognise that the mother’s case is not for a return to her care at the present time. Nor can she point to a fixed point in the future when they will move — whether by date, event, or extent of change in her. The most she can do is to suggest that by around Christmas 2023 she will have proved herself.

28. These then, together with the whole picture described above in respect of G, are the considerations to which the welfare checklist within the 2002 Act must be applied.

29. The boys’ welfare throughout life. This would be served equally by a successful return to their mother’s care as well as by a successful adoption. Each would provide them with a family environment as children and family connections as adults. For them to remain in foster care would limit their lifetime opportunities. They would have to move to long-term foster carers in any event. Further moves are possible. Family connections (insofar as they were ever truly ‘family’) might well cease at 18.

30. Wishes and Feelings. An important point is that, now, the boys have been left in limbo for the last 5 months. Nevertheless, they probably retain an important and good relationship with their mother. They have no relationship with adopters. The guardian puts it thus (paragraph 76): “on balance, we would like to be able to live with our birth family if there was real confidence that we would be safe, well-cared for and protected from harm.” They can remain with their foster carers in the medium term - to whom they are close and with whom they are settled. It is common ground that they have thrived in this placement. They must leave these carers in the longer term.

31. The considerations of need apply in my judgment to the boys in exactly the same manner as G. It is important to note that although the local authority suggests that the number of

children in the mother's care will make a difference, this does not seem to me to be a consideration at the heart of the case. Of course, the more children there are the harder parenting becomes. But this is not a case in which the mother's caring abilities are said to be compromised by the 'overload' of caring for larger numbers of children. The main concern in the case - the threat level from her relationships - is the same no matter how many children in her care.

32. The effects of ceasing to be a member of their birth family raises no particular issues: all depends on the prospects of success of any adoptive placement and the prospects of a successful return to their mother's care. These have in my judgment improved for the reasons given in respect of G.

33. Considerations of harm apply in the same manner as they apply to G. All depends on their mother's lifestyle and relationships. I cannot see that they are at increased risk of harm compared with G.

34. The boys have existing relationships with their mother and other members of their family, but they have no relationship with prospective adopters as they have not been placed. This case would look very different if the boys had been placed for adoption. That said, they have been told that their future lies with a forever family. It is unclear what they make of this.

35. It is, I believe, also relevant to consider that it appears that only these 2 children amongst 7 would lose contact with their birth family. One child never left, one (B) is now returning, and one child recently born (G) will, subject to any appeal, also remain. This case will no doubt have important implications for the two girls remaining in foster care. On any view the position of the boys in adoption would be very different from that of their half-siblings. If they retain any form of contact with their mother or siblings, or perhaps in any event, they will become aware of these differences. In my judgment, it would not be an easy matter to explain why or how this situation had come about. It could be a source of confusion and even anxiety for them - in my judgment to a point where the "confusion" is at least the equal at the confusion which, the guardian maintains, they would suffer on being re-introduced to their mother.

36. In my judgment the core consideration is the prospect of the mother becoming able to care for the boys in the future within a reasonable time frame, which I believe has to be measured in months rather than years. I have reached the conclusion that the prospects are good. I can see no reason why the boys should not return to her care assuming only (i) that G continues to thrive; (ii) that the mother proves she can function as a carer after B's return; and, (iii) there are no violent incidents which

threaten the children. The long-term concerns set out above in respect of G will remain, but I cannot see that they can permit G to be in her mother's care but somehow rule out her care of the boys. I acknowledge that different considerations can apply to much older children (in this case the boys) which may justify care by a parent when younger children are removed. Nevertheless, I feel it will be a rare case in which one young child returns but two other young children must face compulsory adoption.

37. Ultimately, I return to the principles. I must be able to say that "nothing else will do" before the placement orders can remain. I cannot do that on this evidence.

38. Thus, in my view, the boys' welfare is best served by their remaining for the time being in their current placement where they are thriving and where they can remain for months (but not years) to come. The care plan should be for them to be returned to their mother's care. I think it is desirable to fix at least something of a time frame for their return. I believe the ambition should be for them to return in approximately 6 months.

39. I regret that I am disagreeing with the outcomes proposed by the guardian and so I am duty bound to state my reasons. I hope they will be apparent from what I have already said. My risk assessment in respect of G is in line with that of the local authority. I believe in those circumstances that adoption is not necessary for the boys."

28. The judge therefore invited the local authority to draw up care and safety plans for the boys' eventual return to their mother's care.

The appeal

29. Permission to appeal was granted by Macur LJ on 11 August 2023. The grounds of appeal state that the judge:
1. Erred in the analysis of the risk of future harm.
 2. Placed excessive weight on the lack of intent to harm and failed to properly consider the likely impact of significant emotional harm as a consequence of exposure to incidents of domestic abuse and adult conflict.
 3. Insufficiently distinguished between the differing needs of the children and the mother's ability to meet them.
 4. In consequence, failed to conduct a balanced assessment of the welfare options.
30. After permission was granted, the local authority lodged a Respondent's Notice and issued an application for the court to admit fresh evidence on the appeal.

31. The Respondent's Notice dated 14 September 2023 was filed outside the permitted period of 14 days from notification of the grant of permission to appeal: CPR 52.13(4) (b). It states that the local authority appeals from the revocation of the placement orders. However, the supporting argument essentially indicates support for the Guardian's appeal concerning the boys and in that respect the Respondent's Notice adds nothing. I would dismiss it.
32. Further time was spent at the appeal hearing considering the application for permission to file evidence in the form of a statement made by the social work team manager on 7 September 2023. The application was supported by Mr Lamb, representing the Guardian, who wished to deploy the evidence in support of the appeal. However, when Mr Crawley spoke on behalf of the local authority, he did not advance the application with any conviction. Instead he submitted that the evidence was not significant in relation to the boys, and that in G's case it represented 'more of the same'. The statement had, he said, been filed because it would have been 'remiss' of the local authority not to have done so. On behalf of the mother, Ms Hunt opposed admission of the statement.
33. The parties recognised that the test in *Ladd v Marshall* [1954] 1 WLR 1489, as explained in subsequent decisions of this court, determines whether further evidence will be admitted on appeal. However, the explanation given for seeking to rely on this statement falls far short of satisfying that test. Even in cases involving children, appeals are heard on the basis of the evidence that was before the trial court unless there is a principled reason for adding to it. 'Keeping the court informed' is not a principled reason for admitting evidence and evidence that is unlikely to be admissible should not be filed. Although it can easily be disregarded, there may be a perception of unfairness where a party seeks to introduce potentially prejudicial material without a sound basis.
34. As to the merits of the application, the origin of the team manager's statement is first found in two pieces of information provided by the police at a child protection review conference on 2 August 2023. An officer informed the conference that the mother and F2 are believed to have taken part in shoplifting offences between 5 and 15 May 2023 (so just before the hearing before the judge). F2 had been charged and the mother was due to be questioned. It was not stated whether G was with her parents on these occasions. At the conference the mother denied being with F2 or stealing items on one of these occasions. The second piece of information reported by the police related to a reported incident on 21 June 2023 (so after the trial but before judgement was delivered) in which an anonymous member of the public reported that a man had punched a woman in the face while she was pushing a baby in a pushchair and said that she recognised the couple as regular shoplifters, giving the parents' forenames. The police had immediately attended the mother's property where the mother, the eldest daughter and G were present. They denied that the mother had been out and no visible injuries were seen.
35. The other source for the team manager's statement was information given by F2's 14-year-old niece, who had absconded from local authority care on 15 July 2023 (so after judgment was given). She is said to have told her social worker that while missing she had spent time together with the mother, F2 and G and that the adults were in a relationship. The mother's account was that she had gone to a pub so that F2 could have time with G, supervised by his mother.

36. When seeking to rely on the statement before this court, the local authority's written case was it could not have obtained the police disclosure for use at the trial with due diligence, that all the information is apparently credible, and that it would have had an important influence on the result of the case. The Guardian still seeks to rely upon it on these grounds. The mother argues that the local authority could have obtained the police disclosure concerning alleged shoplifting in May before the trial, that the allegation concerning an assault in July is not apparently credible, and that the information from the niece is disputed and would not be likely to have an important influence on the outcome.
37. I would not admit this statement. Although F2 has been charged with shoplifting, it appears that the mother has not (or not yet) been charged and she has denied the allegation. In the absence of any observed injury, the alleged incident in July cannot be presumed to have taken place without further inquiry, and it is questionable how much further the information from the niece takes matters. Further, this court could not act on these pieces of evidence as they stand. The mother would have to be given the opportunity to respond, and the case would have to be remitted to the judge. In G's case, the reality is that if the local authority considers that she is at unacceptable risk, it can issue proceedings seeking her removal and can present evidence accordingly. In the boys' case, the outcome of the appeal makes admission of the evidence unnecessary, regardless of the merits. I would therefore refuse to admit the statement.
38. As to the appeal itself, in relation to G, Mr Lamb argues that the judge's findings made his assessment of risk unsustainable. He found that both fathers are violent, aggressive and unpredictable and that F2 poses a significant risk to any partner and to others with whom he comes into any kind of conflict. The mother is likely to remain dishonest and any risk will be unmanageable. The fact that harm is not caused intentionally does not protect children from its effects. The Guardian does not argue for G to be placed at home under a care order but argues that she should be removed with a plan for adoption. As to the boys, the judgment is silent about their extra needs and the judge was wrong to reject the professional assessment that the mother would struggle to cope with three young children and a needy young adult.
39. Mr Crawley submitted that the order in relation to G should be upheld. As to the boys, he submitted that in order to revoke the placement orders there must at the very least be a reasonable evidence-based expectation that rehabilitation to the mother will succeed within an acceptable time frame. The judge's conclusion that the prospects were good was unduly speculative and contrary to the weight of the evidence.
40. In a spirited response, Ms Hunt argued the mother had demonstrated good enough care for G in an improving context. For the boys, the question was not 'why shouldn't the placement orders remain?' but 'what does the welfare of the children now require?': *Re C (Children: Revocation of Placement Orders)* [2020] EWCA Civ 1598 at [26]. The baseline of risk was the same for all of the children. The judge made a careful assessment and, having balanced the advantages and disadvantages, found that the evidence was insufficient for adoption.

Conclusions

41. The decision under appeal is expressed in an analytical judgment in which a judge with significant knowledge of the family situation directed himself correctly on the law and made clear primary findings of fact, having referred to all of the relevant factors. In these circumstances, the path to success on appeal is steep and narrow. Nothing less than a significant error of reasoning could justify intervention by this court.
42. That has not been shown in G's case. Whether she could safely remain at home was a matter of fine judgement. The judge was clear-sighted about the mother's frailties and the consequent risks, but he saw sufficient signs of improvement which, taken together with the reports of the quality of care that has so far been given, led him to a conclusion that was clearly open to him on this evidence. Time may bear out the Guardian's bleaker predictions, but I do not accept that the judge was bound to reject the care plan and require the local authority to remove G. The effect on her of such a significant change was bound to carry weight. The nature of the risks, which largely focus on emotional harm, meant that the welfare consequences of a failure of the current care plan and later removal need not be catastrophic.
43. However, the position of the boys is fundamentally different in two main respects.
44. The first difference relates to the significance of the history for the welfare assessment in their cases. In overview, they were necessarily removed from their mother at a very young age. In December 2021, the case for adoption was compelling. In the next 18 months, the mother instantly had another child by another unsafe man and after the birth she repeatedly flouted the safety plan under which she had been allowed to retain care of that baby. Meanwhile, the return of B, a very needy young person, was looming. The continued placement of G at home was, and remained, in the balance. Even allowing for some limited recent improvement, the context in which the application for revocation of the placement orders arose was not encouraging.
45. 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.
46. This required a careful analysis of what might happen next if the mother's application succeeded. The Guardian advised (see paragraph 21 above) that any rehabilitation of the boys would need to be very carefully, gradually and comprehensively tested before there could be real confidence in the likely success of rehabilitation and the sustainability of arrangements. The advice seems self-evident and the judge does not appear to have demurred. In practice, a revocation of the placement orders would set in train a sequence of events along these lines:
 1. The local authority would have to accept that it should defer to the court and take steps to reverse its care plan. It would have to draw up a complex rehabilitation plan based on the circumstances of the boys, of G, of B, of the fathers, and pivotally of the mother, someone the judge had found will not be easy to work with under a supervision order, or even be honest.

2. The adopters who had been matched with the boys would probably be lost.
 3. The boys would have to be supported to understand the changed plan, and the fact it could not happen straight away, and adapt to the reintroduction of contact.
 4. The mother's care of G would have to be carefully monitored for a perceptible period.
 5. The effect of B's return would have to be similarly monitored.
 6. The position of the fathers would have to be monitored.
 7. The local authority would at some point have to decide whether the boys could safely be returned, and if so how.
 8. If the decision was negative, more litigation would be likely. The mother might seek to discharge the care orders. The local authority might apply for placement orders. The two sets of proceedings about the children have already lasted for over two years, and a third set is unlikely to be short.
 9. If the decision was positive, reunification would hopefully succeed, but it might break down at some indeterminate point, in which case the boys would return to foster care and adoption may or may not be an option.
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 subsection 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. At paragraph 36, the judge pinned his decision on an assessment of the prospect of the mother as being able to care for the boys within a reasonable time frame. He found the prospect to be good, and he concluded that there was no reason why the boys should not return on three assumptions: that G continues to thrive, that the mother continues to function after B returns, and that there is no violence around the children. However, the judge was bound to question whether a care plan that was without professional support and was so dependent on delay and uncertainty for its success was a realistic final care plan at all. Had he done so, he would in my view have been driven to conclude that the prospect of a successful reunification of the boys was no more than speculative in the light of the evidence as a whole. As it was, a care plan along those lines would effectively delegate a final decision about rehabilitation to the local authority and contain the obvious possibility of further litigation and delay.
48. The second difference between G and the boys relates to the nature of the respective risk assessments. The judge made the point that, as the children would all be living in the same home, the risks would be similar. He reiterated that, although different considerations applied to the boys and G, he could not see that the long-term concerns in respect of G could permit her to remain at home but somehow rule out the mother as a carer for the boys. Even ignoring issues of overload and each child's special needs, I cannot uphold this line of reasoning. The risks within the home may have

been similar, but the consequences for the children were not. In contrast to G, these boys have a fast-narrowing window for adoption. Delay would derail that long-standing plan for an indefinite period with uncertain consequences, while a failed attempt at rehabilitation might quite possibly deprive them of a family of their own altogether. The judge alluded to this at paragraph 9, but this critical element of the risk assessment did not find its place in his ultimate assessment. Instead, the decision appears to have been unduly influenced by a perception that it would be unusual for older children to be adopted while a younger child remains at home. Whether or not that is so, the risk assessment had to relate to the actual situations of these children and to address the consequences, here amounting to harm, that might come to them as a result of the abandonment of the plan for adoption. Again, had the judge approached matters in this way, he would in my view have been bound to conclude that the foreseeable consequences were so contrary to the boys' welfare that the plan could not to be embarked upon and that the mother's application must be dismissed.

49. I would therefore uphold the decision in relation to G as being one that the judge was entitled to make, but discharge the order in relation to the boys on the basis that the predominant welfare features of delay and uncertainty were bound to lead to the conclusion that adoption remained the only safe option for them. I would dismiss the appeal in relation to G and allow the appeal in relation to the boys.

Lord Justice Males:

50. I agree.

Lady Justice Elisabeth Laing:

51. I also agree.
