Neutral Citation Number: [2023] EWCA Civ 944

Case No: CA-2022-002354

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SWANSEA
DECISION OF HHJ HARRIS-JENKINS DATED 11-11.2022
CASE No SA22C50077

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/08/2023

Before :

SIR ANDREW MCFARLANE PRESIDENT OF THE FAMILY DIVISON
LADY JUSTICE MACUR
and
LORD JUSTICE COULSON

- -

JW (Child at Home under Care Order)

- -

Mr Patrick Llewelyn (instructed by **Gomer Williams & Co Solicitors**) for the **Appellant**
Ms Jessica Lee (instructed by **LA) for the 1st Respondent**
Ms Catrin John (instructed by **Avery Naylor) (written submissions only)**

Hearing dates : 14th March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 4th August 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Andrew McFarlane P:

1. For some years it has been recognised that a difference exists in the approach taken by courts in different regions when determining whether a final care order, supervision order or no order should be made when care proceedings conclude with a plan for the subject child to be placed, or remain living, at home with their parent(s). Broadly speaking, if a line is drawn from Hull down to Bristol and beyond, courts in England and Wales that are North and West of that line will often make a care order in such cases, in contrast to courts South and East of the line where normally a supervision order or no public law order will be made. My experience is that the judges who sit on one side of the line or the other are confident that the approach taken in their area is the correct one. The difference of approach is striking, and its existence has become something of a hot potato, and increasingly so as Family Courts across England and Wales strive, once again, to conclude public law care proceedings within the statutory 26 week time limit set by Children Act 1989, s 32(1) ['CA 1989'].

2. The choice between a care or supervision order when a child is placed at home has not been the subject of any recent determination by the Court of Appeal. In particular, the issue has not been considered on appeal since the important decision of Baker J (as he then was) in *Re DE (Child under Care Order: Injunction under Human Rights Act 1998)* [2014] EWFC 6; [2018] 1 FLR 1001, which established that, in the absence of a true emergency, if a local authority is intending to use its power under a care order to remove a child from home, notice should be given to the parent(s) to allow them to bring the issue to court, either via an injunction application or an application to discharge the care order.

3. The present appeal concerns three children: a girl, now aged nearly 14 years, and two boys, now aged 11 and 7 years. In 2020, the children's mother ("the mother") met 'Mr P' and the couple married the following year. It was only after her marriage that the mother was informed by social services that Mr P had been convicted in 2005 of offences of making and possessing a large number of indecent images of children. He had been made the subject of a Sexual Harm Prevention Order prohibiting him from having unsupervised contact with children. In October 2021, as soon as she had been made aware of this information, the mother agreed to and signed a safety plan under which Mr P moved out of the family home. However, in the following months the local social services authority became increasingly concerned that the mother was not adhering to the safety plan and that Mr P was having unauthorised contact with her and the family. As a result, in May 2022, the local authority issued care proceedings under CA 1989, s 31. Throughout the proceedings the children remained living at home with their mother under an interim supervision order. At the final hearing, in November 2022, HHJ Harris-Jenkins acceded to the submissions of the local authority and children's guardian by making a full care order with a care plan for the three children to remain living at home. The mother's appeal to this court asserts that making a care order with the children at home was wrong; in the alternative it is argued that, rather than making a final order, the judge should have extended the proceedings to allow the mother's ability to protect the children from Mr P to become more established. Before saying more about the appeal itself, it is necessary to describe the statutory context, the extant caselaw and recent guidance.

Care and supervision orders: the statutory context

4. A court may only make either a care order or a supervision order if the 'threshold criteria' in CA 1989, s 31(2) are satisfied, namely:

> "(a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to—
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
>
> (ii) the child's being beyond parental control."

5. The court may, on an application for a care order, make a supervision order and, vice versa, on an application for a supervision order make a care order [CA 1989, s 31(5)].

6. If the threshold criteria are met, the choice of whether to make any order, and if so which, in care proceedings is to be determined by affording paramount consideration to the child's welfare [CA 1989, s 1(1)]. The court must have regard to the matters set out in the welfare checklist in CA 1989, s 1(3) and the non-intervention principle in s 1(5):

> "(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all."

(a) Placement with parents under a care order

7. By CA 1989, s 31(1)(a), a care order places a child with respect to whom the order is made in the care of a designated local authority. The local authority shares parental responsibility for the child, but has the power to determine how any other holders may exercise parental responsibility [CA 1989, s 33]:

> '**33.— Effect of care order.**
>
> (1) Where a care order is made with respect to a child it shall be the duty of the local authority designated by the order to receive the child into their care and to keep him in their care while the order remains in force.
>
> (2) …
>
> (3) While a care order is in force with respect to a child, the local authority designated by the order shall—
>
> (a) have parental responsibility for the child; and
>
> (b) have the power (subject to the following provisions of this section) to determine the extent to which

(i) a parent, guardian or special guardian of the child; or

(ii) a person who by virtue of section 4A has parental responsibility for the child, may meet his parental responsibility for him.

(4) The authority may not exercise the power in subsection (3)(b) unless they are satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

…'

8. A child who is placed in the care of a designated local authority under CA 1989, s 31(1) is a child who is being 'looked after' by the authority for the duration of the care order [CA 1989, s 22(1)]. Part 3 of the CA 1989, in England, and the Social Services and Well-being (Wales) Act 2014 [SSWB(W)A 2014], in Wales, make extensive provision describing the duties placed upon local authorities with respect to 'looked after' children.

9. In England, CA 1989, s 22C establishes a default requirement for a looked after child to live with a parent or similar parental figure:

"22C Ways in which looked after children are to be accommodated and maintained

(1) This section applies where a local authority are looking after a child ("C").

(2) The local authority must make arrangements for C to live with a person who falls within subsection (3) (but subject to subsection (4)).

(3) A person ("P") falls within this subsection if—

(a) P is a parent of C;

(b) P is not a parent of C but has parental responsibility for C; or

(c) in a case where C is in the care of the local authority and there was a child arrangements order in force with respect to C immediately before the care order was made, P was a person named in the child arrangements order as a person with whom C was to live.

(4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so—

(a) would not be consistent with C's welfare; or

(b) would not be reasonably practicable.

(5) If the local authority are unable to make arrangements under subsection (2), they must place C in the placement which is, in their opinion, the most appropriate placement available."

10. Similar provision is made in Wales by SSWB(W)A 2014, s 81:

> "**81 Ways in which looked after children are to be accommodated and maintained**
>
> (1) This section applies where a local authority is looking after a child ("C").
>
> (2) The local authority must make arrangements for C to live with a person who falls within subsection (3), but this is subject to subsections (4) and (11).
>
> (3) A person ("P") falls within this subsection if—
>
> (a) P is a parent of C,
>
> (b) P is not a parent of C but has parental responsibility for C, or
>
> (c) in a case where C is in the care of the local authority and there was a child arrangements order in force with respect to C immediately before the care order was made, P was a person in whose favour the child arrangements order was made.
>
> (4) Subsection (2) does not require the local authority to make arrangements of the kind mentioned in that subsection if doing so—
>
> (a) would not be consistent with C's well-being, or
>
> (b) would not be reasonably practicable.
>
> (5) If the local authority is unable to make arrangements under subsection (2), it must place C in the placement that is, in its opinion, the most appropriate placement available (but this is subject to subsection (11))."

11. However, an English local authority may only allow a child in care to live with a parent, person with parental responsibility, or the previous holder of a 'live with' child arrangements order (made under CA 1989, s 8), in accordance with the Care Planning, Placement and Case Review (England) Regulations 2010 ['CPPCR(E)R 2010'].

12. An English local authority which has placed a child with a parent under CPPCR(E)R 2010, Part 4 must satisfy itself that the welfare of the child continues to be appropriately provided for by his placement [CPPCR(E)R 2010, reg 35 and Sched 7]. In particular, the local authority must provide such support services to the parent as appear to them to be necessary to safeguard and promote the child's welfare [reg 20]. In addition, by reg 28, arrangements must be made for a person authorised by the local authority to visit the child from time to time as necessary, but in any event:

    (a) within one week of the start of the placement;

    (b) at least every six weeks during the first year of the placement;

(c) thereafter, where the placement is intended to last until the child is 18, at least every three months, and in any other case, at intervals of not more than six weeks.

13. In Wales, the Care Planning, Placement and Case Review (Wales) Regulations 2015 ['CPPCR(W)R 2015'], reg 31 to 35 make similar provision for children in care placed with parents in Wales.

14. In both England and Wales, a court deciding whether to make a care order is required to consider the 'permanence provisions' of the local authority's care plan for the child [CA 1989, s 31(3A)(a)]. By s 31(3B) the permanence provisions are defined as including:

> "such of the plan's provisions setting out the long-term plan for the upbringing of the child concerned as provide for … the child to live with any parent of the child's or with any other member of, or any friend of, the child's family; …"

The permanence provisions of the care plan for a child who is to be placed at home with his/her parent will include any provision for support services to the parent, together with provision for visiting and case review as provided for within the respective English or Welsh regulations.

(b) Supervision order

15. On an application by a local authority for a care or supervision order, the court may make a supervision order 'putting [the child] under the supervision of a designated local authority', provided that the s 31 threshold criteria are satisfied. CA 1989, s 35 provides that:

> "(1) While a supervision order is in force it shall be the duty of the supervisor:
>
> (a) to advise, assist and befriend the supervised child;
>
> (b) to take such steps as are reasonably necessary to give effect to the order; and
>
> (c) where:
>
> (i) the order is not wholly complied with; or
>
> (ii) the supervisor considers that the order may no longer be necessary, to consider whether or not to apply to the court for its variation or discharge.
>
> (2) Parts I and II of Schedule 3 make further provision with respect to supervision orders."

16. In contrast to a care order, a child under a supervision order is not being 'looked after' by the local authority and the authority neither has parental responsibility for the child, nor the power to direct how those who do have parental responsibility may exercise it. By CA 1989, Sch 3, para 2, a supervision order may require the child to comply with any directions given from time to time by the supervising officer. If the

person responsible for the child's care (for example a parent) consents, the supervision order may include a requirement for the responsible person to comply with directions and other requirements [Sch 3, para 3]. There is no express requirement for the supervising officer to visit the child during the life of the order or to keep the plans for the child under review.

Social Services and Well-being (Wales) Act 2014

17. Social care is a devolved issue in Wales and the Social Services and Well-being (Wales) Act 2014 ('the SSW(W)A 2014') substitutes bespoke Welsh provision for CA 1989, Part III relating to support for children and families. During the appeal hearing, counsel for the mother, Mr Llewelyn, clarified that it was common ground between the parties that the issues in this case, which was heard in Wales at first instance, did not turn on any differences between the statutory provision for Part III in Wales and England. The case was Welsh and thus the local authority operated under the Welsh framework. Given the likely wider application of this case, Mr Llewelyn was asked to provide a note on the differences between the SSW(W)A 2014 and the CA 1989. The court is grateful to Mr Llewelyn for doing so. His note helpfully addresses the matters directed by the court in a concise and clear manner.

Care or supervision order: case law

18. Since the early days following the implementation of CA 1989 in 1991 the practice of making a final care order on the basis that the child will be living at home was endorsed by the higher courts. In *Re S (Children: Interim Care Order)* [1993] 2 FCR 475, Johnson J held that there would be many cases where it was appropriate to make a care order with the child returning to live with his parents. In *Re T (Care or Supervision Order)* [1994] 1 FLR 103, the Court of Appeal [Hirst LJ and Bracewell J] held that the statutory provision in CA 1989, Part III and the regulations that were then in force (and which are in essence replicated in Part III as amended and the English and Welsh CPPCR Regulations)

> '… envisage that local authorities may place children with their parents even though the local authority has obtained a care order. The 1989 Act also envisages that children may have remained at home pending court proceedings and may remain there after the granting of a care order.
>
> The placement under the regulations is part of the overall planning for children. Such an arrangement is not inconsistent with partnership between parents and the local authority, because although the local authority achieve parental responsibility by reason of the care order the parents do not lose their parental responsibility which is merely limited in scope.
>
> The Children Act 1989 has not, in my judgment, altered the previous law as set out in *M v Westminster City Council* [1985] FLR 325. In that case the Court of Appeal did not consider it wrong in law to make a care order where a local authority intended to leave the child in the day-to-day care of the parents.'

19. In *Nottinghamshire County Council v P* [1993] 2 FLR 134, the Court of Appeal held that the court has no jurisdiction to compel a local authority to issue an application for a care or supervision order under s 31, but once the local authority has issued its

application and is satisfied the court that the threshold criteria under s 31(2) are met, it is for the court to decide which, if any, is the more appropriate order to make.

20. In *Oxfordshire County Council v L* [1998] 1 FLR 70, Hale J (as she then was) held that, whilst it was open to a court to make an order other than that for which a local authority has applied, there must be 'cogent and strong reasons' to force upon a local authority a more Draconian order than that requested. Hale J considered that there may be three possible reasons for making a care order on the basis that the child was to remain at home. In summary these were:

    a) The authority needed the power to remove the child instantly if circumstances required and also to plan for the child to be placed long-term outside the family;

    b) That it was necessary for the authority to share parental responsibility with the parents, but the fact that considerable help and advice may be needed over a prolonged period was not itself a reason for making a care order;

    c) That it was necessary to place duties upon the local authority, but it would be wrong to impose an order which was not in the interests of a child simply to encourage a local authority to perform its statutory duties towards a child in need.

21. The approach taken in the *Oxfordshire* case was reiterated by Hale LJ (which by then she had become) in *Re O (Supervision Order)* [2001] EWCA Civ 16; [2001] 1 FLR 923 with additional reference to the need for any intervention to be proportionate in order to meet the requirements of the European Convention on Human Rights and the Human Rights Act 1998. Hale LJ stressed:

> '[28] Proportionality … is the key. It will be the duty of everyone to ensure that in those cases where a supervision order is proportionate as a response to the risk presented, a supervision order can be made to work as indeed the framers of the Children Act 1989 always hoped that it would be made to work.'

22. An essential difference between a care order and a supervision order is that under the latter, the court's power to require a parent to discharge her/his parental responsibility in a particular manner is limited to the 'requirement' or 'direction' provisions in CA 1989, Sch 3. There is, as was confirmed in *Re V (Care or Supervision Order)* [1996] 1 FLR 776, no power to impose conditions upon a parent. Further, Waite LJ described an essential difficulty arising under a care order being

> '... the fact that a supervision order rests primarily upon the consent of the parent affected by it. Any provisions incorporated into a supervision order, either by direction of the supervisor or by requirements directly stated by the judge, are incapable of being enforced directly through any of the ordinary processes by which courts of law enforce obedience to their directions. The only sanction, when any infringement of the terms of a supervision order, or of directions given under it, occurs is a return by the supervisor to court. There the ultimate sanction will be the making of a care order under which the local authority will be given the necessary legal powers to enforce its will.'

As indicated above, this is in contrast to the position under a care order, where, under CA 1989, s 33(3), the local authority not only has parental responsibility but may determine how others may discharge their parental responsibility.

23. In care proceedings, the protection of the child is the decisive factor when the court is deciding whether to make a care order or a supervision order. The court should first make a careful assessment of the likelihood of future harm to the child, and must then weigh that harm against the harm that would follow from the child being removed from his parents under a care order. A care order rather than a supervision order should be made only if the stronger order is necessary for the protection of the child (*Re D (Care or Supervision Order)* [1993] 2 FLR 423; *Re S (Care or Supervision Order)* [1996] 1 FLR 753; and *Re B (Care Order or Supervision Order)* [1996] 2 FLR 693).

24. Where there is a care order in force with the subject child living at home, and a local authority is proposing to remove the child, a parent may apply to the court for an injunction preventing removal under the HRA 1998 and/or apply to discharge the care order under CA 1989, s 39. In *Re DE (Child under Care Order: Injunction under Human Rights Act 1998)* [2014] EWFC 6; [2018] 1 FLR 1001, Baker J, building upon previous High Court authority, held that, unless the need to remove arises as an emergency, a local authority considering removal should give notice to the parents, who may then make an application to the court to hold the situation via either an application to discharge the care order or a HRA 1998 injunction, or both. The decision to remove a child should only be made after a 'rigorous analysis of all of the realistic options', in a manner similar to that required by the Supreme Court in *Re B* [2013] UKSC 33 when adoption is being considered. Baker J continued:

> '35. While this process is being carried out, the child should remain at home under the care order, unless his safety and welfare requires that he be removed immediately. This is the appropriate test when deciding whether the child should be removed under an interim care order, pending determination of an application under s.31 of the Children Act: *Re L-A (Children)* [2009] EWCA Civ 822. The same test should also apply when a local authority's decision to remove a child placed at home under a care order has led to an application by the parents to discharge the order and the court has to decide whether the child should be removed pending determination of the discharge application. As set out above, under s.33(4) of the 1989 Act, the local authority may not exercise its powers under a care order to determine how a parent may exercise his or her parental responsibility for the child unless satisfied it is necessary to do so to safeguard or promote the child's welfare. For a local authority to remove a child in circumstances where its welfare did not require it would be manifestly unlawful and an unjustifiable interference with the family's Article 8 rights.'

25. Baker J set out the following guidance on the approach to be taken where a local authority is proposing to remove a child, who is the subject of a care order, from home. The guidance had been approved by Sir James Munby as President of the Family Division:

> '49. To avoid the problems that have arisen in this case, the following measures should be taken in future cases.

(1) In every case where a care order is made on the basis of a care plan providing that a child should live at home with his or her parents, it should be a term of the care plan, and a recital in the care order, that the local authority agrees to give not less than fourteen days notice of a removal of the child, save in an emergency. I consider that fourteen days is an appropriate period, on the one hand to avoid unnecessary delay but, on the other hand, to allow the parents an opportunity to obtain legal advice.

(2) Where a care order has been granted on the basis of a care plan providing that the child should remain at home, a local authority considering changing the plan and removing the child permanently from the family must have regard to the fact that permanent placement outside the family is to be preferred only as a last resort where nothing else will do and must rigorously analyse all the realistic options, considering the arguments for and against each option. Furthermore, it must involve the parents properly in the decision-making process.

(3) In every case where a parent decides to apply to discharge a care order in circumstances where the local authority has given notice of intention to remove a child placed at home under a care order, the parent should consider whether to apply in addition for an injunction under s.8 of the HRA to prevent the local authority from removing the child pending the determination of the discharge application. If the parent decides to apply for an injunction, that application should be issued at the same time as the discharge application.

(4) When a local authority, having given notice of its intention to remove a child placed at home under a care order, is given notice of an application for discharge of the care, the local authority must consider whether the child's welfare requires his immediate removal. Furthermore, the authority must keep a written record demonstrating that it has considered this question and recording the reasons for its decision. In reaching its decision on this point, the local authority must again *inter alia* consult with the parents. Any removal of a child in circumstances where the child's welfare does not require immediate removal, or without proper consideration and consultation, is likely to be an unlawful interference with the Article 8 rights of the parent and child.

(5) On receipt of an application to discharge a care order, where the child has been living at home, the allocation gatekeeper at the designated family centre should check whether it is accompanied by an application under s.8 of HRA and, if not, whether the circumstances might give rise to such an application. This check is needed because, as discussed below, automatic legal aid is not at present available for such applications to discharge a care order, and it is therefore likely that such applications may be made by parents acting in person. In cases where the discharge application is accompanied by an application for an order under s.8 HRA, or the allocation gatekeeper considers that the circumstances might give rise to such an application, he or she should allocate the case as soon as possible to a circuit judge for case management. Any application for an injunction in these circumstances must be listed for an early hearing.

> (6) On hearing an application for an injunction under s.8 HRA to restrain a local authority removing a child living at home under a care order pending determination of an application to discharge the care order, the court should normally grant the injunction unless the child's welfare requires his immediate removal from the family home.
>
> 50. The guidance set out in the preceding paragraph has been seen and approved by the President of the Family Division.'

26. Since 2014, the guidance and approach in *Re DE* has been widely followed by local authorities and courts where removal from home under a care order is being contemplated. Insofar as it is necessary to do so, I would endorse Baker J's judgment in *Re DE* and hold that the guidance in paragraph 49 should continue to be followed. In consequence, the earlier decisions about the making of a care order where the child is placed at home, where particular emphasis was placed upon the importance of the local authority having the power to remove the child, must be read with the understanding that, the existence of a care order does not place the local authority in a significantly different position with regard to removal than would otherwise be the case.

27. If there is a care order, then, in the absence of any pressing emergency, *Re DE* requires a process of notice and consultation leading, in the event of dispute, to the probability that parents will make an application to the court for an injunction or for discharge of the care order. In the meantime, the child should remain placed at home and the ultimate decision on removal will be taken by the court. If there is a supervision order, or no public law order, in an emergency the local authority may apply for an emergency protection order under CA 1989, s 44 to remove a child from home. If there is no emergency, a local authority considering removal may apply for a care order, and, within that application, for an interim care order. As with removal under a care order, the ultimate decision on removal is to be taken by the court.

28. In summary, looking at the statutory scheme and the case law as a whole, the following is clear:

    i) making a care order with a subject child placed at home in the care of their parent(s) is plainly permissible within the statutory scheme and express provision is made for such circumstances in CA 1989, s 22C and in the placement regulations;

    ii) the early post-CA 1989 authorities established that a care plan for placement at home was an appropriate outcome where the facts justified it, without the need for exceptional circumstances;

    iii) the analysis of Hale J/LJ in *Oxfordshire* and in *Re O* laid particular weight upon the need for the authority to have power to remove the child instantly if circumstances required it, or to plan for the child to be placed outside the family;

    iv) since *Oxfordshire* and *Re O*, the High Court decision in *Re DE*, containing guidance endorsed by the President, has been widely accepted so that, in all

but a true emergency, the local authority power to remove a child from their home under a care order should not be exercised without giving parents an opportunity to bring the issue before a court;

v) the difference concerning removal of a child from home either under a care order or where there is no care order is now largely procedural. In all but the most urgent cases, the decision on removal will ultimately be taken within the umbrella of court proceedings, rather than administratively within a local authority;

vi) sharing of parental responsibility by the local authority with parents is an important element, but, as Hale J/LJ stressed, the fact that considerable help and advice may be needed over a prolonged period is not a reason, in itself, for making a care order;

vii) it is wrong to make a care order in order to impose duties on a local authority or use it to encourage them to perform the duties that they have to a child in need;

viii) the protection of the child is the decisive factor, but proportionality is key when making the choice between a care and supervision order for a child who is placed at home;

ix) supervision orders should be made to work, where that is the proportionate form of order to make.

President's Public Law Working Group Guidance

29. In 2018, as President, I established a 'Public Law Working Group' ['PLWG'], with Keehan J as chair. The aim of the group was to review the current operation of public law children cases in the Family justice system and to recommend any necessary changes in practice, process and, if necessary, the law. The group grew into a substantial body representing the whole range of professionals involved in public children law. The PLWG's main report was published in March 2021. At that time I fully endorsed its recommendations in these terms:

> "It has been a striking feature of this work that the development of the group's ideas and recommendations has been organic and has proceeded at each turn on the basis of agreement across the board, rather than controversy. That this is so, strongly suggests that the recommendations made are both sound and necessary. It gives ground for real optimism that the messages in this report will be welcomed by social workers, lawyers, judges, magistrates and court staff across England and Wales and that, after a short implementation period, they can be put into effect and begin to make a real difference on the ground. That is my earnest hope and confident expectation."

30. The PLWG report dealt expressly with the making of care orders where children are placed at home at paragraphs 158 to 162:

'Care order with child at home

158. There is an increased/significant regional variation in the number of children returning home under a full care order, which is of very real concern. There is as yet a lack of clarity as to why, in some areas, this practice is so common and elsewhere so rare. There is a risk that the making of a care order at home provides false assurances to partner agencies because the local authority is neither involved in, nor has a thorough oversight of, the child's day-to-day care.

159. The making of a care order should not be used as a vehicle to achieve the provision of support and services after the conclusion of proceedings. Unless a final care order is necessary for the protection of the child, an alternative means/route should be made available to provide this support and these services without the need to make a care order. This will include clarity as to the legal status of the child following the proceedings, in terms of whether they will be the subject of a child protection plan, or treated as a child in need, with accompanying reviews and services. In Wales, the current statutory guidance is set out in para 116 of the Code to Part 6 of the SSW-b(W)A 2014.

160. The making instead of a supervision order to support reunification of the family may be appropriate. However, there are many concerning issues regarding their use. They have the highest (20%) risk of breakdown and return to court for further care proceedings within five years and there are widespread professional concerns that supervision orders "lack teeth" as well as significant regional variation in their use and variability in the provision of support services.

161. A final care order should also not be used as a method prematurely to end proceedings within 26 weeks artificially to alleviate concerns that the children will be at continuing risk of harm. Any such order should only be made where the local authority can demonstrate that the assessment of any carer of a looked after child meets the criteria of the Care Planning Placement and Care Reviews (Wales) Regulations 2015 or the Care Planning, Placement and Case Review (England) Regulations 2010. This provides that any such placement has to be approved by a senior nominated officer, and can only be approved if, in all the circumstances, and taking into account the services to be provided by the responsible authority, the placement will safeguard and promote the child's welfare and meet their needs.

162. The making of a final care order must be a necessary and proportionate interference in the life of the family. A care order has a very intrusive effect of state intervention, with ongoing mandatory statutory interference not only in the lives of the parents, but in the life of the child, who will have the status in law as a looked-after child and all that goes with this. It can only be justified if it is necessary and proportionate to the risk of harm to the child. Where such an order is made there will be a real prospect of further litigation in the future, because the responsible local authority should regularly review whether the care of the child is such that the order is no longer necessary, and if so an application to discharge the order should be made. In an appropriate case, consideration should be given to the making of a supervision order.'

31. Later, in Appendix F of its report, the PLWG sets out 'best practice guidance' which includes cases where a care order is sought but the child is to be placed at home:

> '34. The making of a care order on the basis of a plan for the child to remain in the care of her parents/carers is a different matter. There should be exceptional reasons for a court to make a care order on the basis of such a plan.
>
> 35. If the making of a care order is intended to be used [as] a vehicle for the provision of support and services, that is wrong. A means/route should be devised to provide these necessary support and services without the need to make a care order. Consideration should be given to the making of a supervision order, which may be an appropriate order to support the reunification of the family.
>
> 36. The risks of significant harm to the child are either adjudged to be such that the child should be removed from the care of her parents/carers or some lesser legal order and regime is required. Any placement with parents under an interim or final order should be evidenced to comply with the statutory regulations for placement at home.
>
> 37. It should be considered to be rare in the extreme that the risks of significant harm to the child are judged to be sufficient to merit the making of a care order but, nevertheless, the risks can be managed with a care order being made in favour of the local authority with the child remaining in the care of the parents/carers. A care order represents a serious intervention by the state in the life of the child and in the lives of the parents in terms of their respective ECHR, article 8 rights. This can only be justified if it is necessary and proportionate to the risks of harm of the child.'

32. In contrast to the caselaw dating from the first decade following the implementation of CA 1989, it can be seen that the PLWG recommendations and best practice guidance places greater emphasis upon the need for proportionality in the face of significantly greater power afforded to a local authority under a care order. The PLWG therefore identifies the need for 'exceptional reasons' to justify the making of a care order with a plan for the child to be living at home, and states that it will:

> 'be rare in the extreme that the risks of significant harm to the child are judged to be sufficient to merit the making of a care order but, nevertheless, the risks can be managed with a care order being made in favour of the local authority with the child remaining in the care of the parents/carers.'

33. In April 2023 the PLWG published a further report '*Recommendations to achieve best practice in the child protection and family justice systems: Supervision orders*'. On its publication I welcomed the report, endorsed its recommendations and expressed the 'earnest hope and confident expectation' that they would be taken up in public law children cases.

34. The key provisions within the PLWG supervision report are set out at '*Appendix C: Best Practice Guidance: Child remaining with, or returning home to, their parent(s) at the conclusion of care proceedings*'. Central to the recommended changes is the expectation that, in every case where a supervision order may be made, the local authority will prepare a clear and detailed Supervision Support Plan which is tailored to the needs of the child. The guidance also requires that the plan should be clear as to the provision of resources to underpin each element of the plan, and that the plan

should be seen as a living instrument and be kept under formal 'robust' review during the life of the supervision order.

The 26-week time limit

35. By CA 1989, s 32(1)(a), the 1989 Act has always required applications for a care or supervision order to be concluded without delay. In 2014, s 32(1)(a) was amended to require the court to:

> 'draw up a timetable with a view to disposing of the application:
>
> (i) without delay, and
>
> (ii) in any event within twenty-six weeks beginning with the day on which the application was issued'

36. In circumstances where the 26 week limit will not enable the court to resolve the proceedings justly, CA 1989, s 32(5) provides for proceedings to be extended if the court considers it necessary to do so. Extensions are not to be granted routinely and require specific justification (CA 1989, s 32(7)) and each extension period can last no more than eight weeks (CA 1989, s 32(8)).

37. When deciding whether to grant an extension the court must have regard to the factors contained in CA 1989, s 32(6):

> '(6) When deciding whether to grant an extension under subsection (5), a court must in particular have regard to—
> (a) the impact which any ensuing timetable revision would have on the welfare of the child to whom the application relates, and
> (b) the impact which any ensuing timetable revision would have on the duration and conduct of the proceedings;
> and here "ensuing timetable revision" means any revision, of the timetable under subsection (1)(a) for the proceedings, which the court considers may ensue from the extension.'

38. A procedural template, known as 'the Public Law Outline' ['PLO'], was introduced in 2014 to assist courts in resolving public law children applications within 26 weeks. The PLO forms PD12A to the Family Procedure Rules 2010. On 16 January 2023, the PLO was 'relaunched' in England and Wales in order to re-engage courts with the need to determine cases within the statutory 26 week limit.

The factual background: further detail

39. Further to the factual background summarised at paragraph 2, following the mother being informed of Mr P's sexual offences, she agreed and signed a safety plan in October 2021. This involved Mr P moving out of the family home. Unfortunately, her engagement with Children's Services in the months that followed this intervention was less than fully cooperative. The children were placed on the Child Protection Register in November 2021. Between December 2021 and April 2022, the mother only sporadically engaged with Children's Services. At times she prevented social

work visits or did not allow the children to speak to an independent advocate. By April 2022 the mother was threatening to move Mr P back into the family home.

40. The mother's failure to allow for reasonable contact between the social worker and the children led the local authority to issue CA 1989, s 31 proceedings in May 2022 seeking an interim supervision order ['ISO'] and supervised contact between the children and Mr P. An ISO was made on 31st May 2022. From that time, the children had weekly supervised contact with Mr P until September 2022.

41. In September 2022 contact with Mr P was ended following a recommendation by Professor Gray, an independent expert psychologist who had been instructed to assess the mother and Mr P.

42. Throughout September 2022 the mother oscillated between ending the marriage and remaining with Mr P. On 6 October 2022 Professor Gray's report was received, which set out the significant risks posed by Mr P and recommended that the mother should cut all ties with him. Thereafter, the mother finally decided to end the marriage. In the following days she took administrative steps to sever her connections with Mr P, such as notifying Universal Credit and changing her mobile phone number. However, the mother continued to remain in contact with Mr P, for example by contacting him to discuss finances and living arrangements.

43. In his position statement to the court, on 11 October 2022, Mr P accepted the mother's decision to end the relationship and stated he would not contact her. However, behind the scenes he continued to contact the family surreptitiously via the mother's eldest son.

44. On 20 October 2022 a parenting assessment was completed and, as a result of its conclusions, the local authority recommended a care order should be made in respect of the children, with a plan that they remain at home with the mother. The final hearing took place between the 9th and 11th November 2022, the last date being the date on which the 26-week timetable expired.

The orders made

45. The Local Authority's original application, on 13 May 2022, sought an ISO. Although the children's guardian had been of the view that the children should have been subject to ICO, given the risks posed by Mr P and the mother's perceived susceptibility in relation to him, the ISO made in May 2022 remained in place until the final hearing.

46. At the final hearing the parties agreed the basis upon which the s 31 threshold criteria were satisfied. In addition, an occupation order (backed up by undertakings) was made with respect to the matrimonial home under the Family Law Act 1996. The only issue for determination was the nature of the order under which the children would remain in the care of their mother. By that stage the local authority had changed its position and sought final care orders due to their consideration of the legal framework, the risk assessment and that any recent positive changes in the mother's presentation were untested. The guardian supported the local authority and submitted that a care order was the more appropriate order to make.

47. The judge made final care orders in respect of all three children. In reaching that conclusion he took into account the need for the order made to be necessary and proportionate and the need to apply the s 1(5), CA 1989, least interventionist approach. In assessing risk, he took into account the mother's 'inordinate' delay in committing to cut ties with Mr P.

48. The Judge considered that the mother had been groomed by Mr P and he attached weight to the local authority's and guardian's views that it was premature to 'reduce' the protection afforded to this family by any order less than a care order. The word 'reduce' is of note as the family had hitherto been under interim supervision orders. Whilst the judge acknowledged that that was the case, he emphasised that the mother had yet to embark upon a planned course of work with a sexual abuse charity, aimed at strengthening her ability to identify risk and protect the children. He described this work as 'imperative' and said that it was a 'significant' factor that it had not yet started.

49. The judge credited the mother for not 'slipping', in terms of protecting the children, and he accepted that there was no suggestion that she had placed the children at risk of harm. He was satisfied that the services to support the family could operate under either order and the local authority was clear that it intended to support the mother irrespective of the form of order made. However, for the judge, the need for the local authority to share parental responsibility with the mother was decisive.

50. Drawing matters together the judge concluded:

> '33. The realities are in this case, that all of these factors which I have mentioned mean that there is a safeguarding risk in this case over the next period of probably the short to medium term of the next 12 months or so, when the risk is going to be at its highest (at the start) and still significant until [the protective work] is completed.
>
> 34. In my judgment, I am persuaded by the evidence and the submission that I have read and heard, that a Supervision Order does not have the safeguarding features that a Care Order has and which are needed in this case. In particular, a Supervision Order, as the Guardian has pointed out, does not place the Local Authority under a statutory duty in terms of visitation to the property but also the sharing of parental responsibility, so that the Local Authority can effectively take the whip hand, if need be, if there is a falling down of the safeguarding position at any point. Further, the Care Order places onto the Local Authority a positive duty to ensure the welfare of the child and to protect the child from any inadequate or risky parenting. They share parental responsibility and in this case, where Mother has been challenging of the Local Authority stance, this requires reinforcement, which only a Care Order can do.
>
> 35. In balancing the competing arguments in this case, it has been a fine balancing exercise. The Local Authority has satisfied me that this is one of those cases in which a Care Order is necessary and a proportionate response. It is exceptionally a case where such an Order is made when the child lives at home with Mother, firstly, because of how recent the breakup of the relationship is (By that, I do not mean just the physical relationship. It is the emotional relationship) and also secondly, the fact that Mr P is still clearly intent, as recently as the 20th

> October 2022, to press on with getting his message across to [mother] that [he] is not a risk. Added to that, is the fact that she is going to be vulnerable. I do not consider that the Occupation Order and the undertakings given are by themselves a sufficient protection. Mr P after all is assessed by Professor Grey as highly manipulative. I agree with her opinion.'

51. The judge, who had previously reminded himself of the PLWG guidance that a care order at home should only be made in exceptional circumstances, held that a care order was the "least interventionist approach…in the exceptional circumstances of this case", being one which places an onus on the local authority to maintain an active intervention in the life of the children.

The Appellant's case

52. On behalf of the mother, Mr Llewelyn advanced her appeal on two grounds:

    i) The court was wrong to make final care orders instead of final supervision orders in circumstances where the care plans were for the children to remain at home with their mother.

    ii) Alternatively, in the event that the court had considered that more time was required for the mother to evidence the ending of the relationship with Mr P and/or her commitment to the proposed work, the court was wrong not to adjourn the final hearing and extend the proceedings.

53. Mr Llewelyn sought to correct a submission made by the local authority and guardian that very cogent reasons were required before the court imposes on an LA an order that the authority does not seek. The 'very cogent reasons' test set out in *Oxfordshire* and *Re T* related to forcing 'upon the local authority a more Draconian order than that for which they have asked', rather than the other way around.

54. Mr Llewelyn, understandably, relied firmly on the approach recommended by the PLWG with a care order at home only being 'rarely' made in 'exceptional circumstances'.

55. With respect to ground one, it was submitted that the judge had not identified with any specificity what extra safeguard would be provided under a care order, as opposed to a supervision order. The judgment, which at no stage refers to the individual children (not even stating how many there were, their ages or gender), does not in any manner specify the risk from which they are to be protected.

56. Mr Llewelyn submitted that the judge had ignored the fact that the children's biological father and the mother's adult son were a potential source of protection. He also pointed to the expert opinion as to the mother's ability to place the needs of the children at the centre of decision making and to prioritise their needs, and, secondly, the expert's observation that she had not seen anything to make her overly concerned about the mother's capacity to work openly and honestly with professionals. The ancillary evidence demonstrated that there had never been any subterfuge. Mr Llewelyn described the mother as having some resistance but otherwise being an 'open book'. She was, he submitted, 'openly defensive' and this enabled the local authority to know what they were dealing with. Mr Llewelyn reiterated the words of

the trial judge to the effect that the mother had not 'slipped'. He argued that this case required detailed analysis of the care order and analysis as to why sharing parental responsibility was necessary to mitigate risk of the children remaining at home, yet the judgment only refers to the non-specific features of a care order.

57. Mr Llewelyn also submitted that the judge's assessment of exceptionality looked at risks but failed to state how the LA sharing PR with the mother would protect against those risks. Under a care order a local authority is under a statutory duty to visit children every six weeks. However, Mr Llewelyn asserted, it is open to the local authority to visit children more frequently than this, whatever the order is made. Visits were, therefore, not a unique feature of a care order, or of sharing parental responsibility, and weight should not be attached to this factor.

58. With respect to the power that a care order gives to a local authority to remove the children from home without first obtaining a court order, Mr Llewelyn pointed to the particular characteristics of these children, including one child's additional needs, their ages and the strong family network, which would complicate any plan for their immediate removal and placement outside of the home. To remove them without recourse to the children's guardian, through court proceedings, would be troublesome and in reality, unlikely to be a course that the local authority would follow. The judge had not considered whether removal under a care order would be preferrable, or not, to removal under an interim care order were a supervision order to be made.

59. Mr Llewelyn argued the mother's case principally under ground one. His main submission on ground two pointed to the fact that the expert report had only been received on 6 October 2022, with the final hearing starting on 11 November 2022, only 35 days later. That was not long, he submitted, to expect a strongly religious woman to react, end her marriage and provide proof that she had cut all ties with her husband. She had done her best in the time. It was submitted that a short, purposeful, adjournment was necessary. The children would remain under a further interim supervision order during the adjournment. In addition, an adjournment would have allowed time for the mother to commence the necessary protection course.

The Local Authority and children's guardian

60. Ms Jessica Lee, for the local authority, submitted that the judge was entitled to decide that a care order was justified and it is not possible to hold that he was wrong in doing so. Mr P was an identified source of serious risk, who would not engage in therapy. She pointed to the fact that the couple's separation was recent and the children's mother had yet to embark on the course aimed at enhancing her ability to protect them.

61. Ms Lee submitted that, although the PLWG guidance establishes a high bar for making a care order with the child at home and these orders must be rare, that does not rule out cases where it will be the appropriate order, and this case was such an example.

62. In response to a question from the court, Ms Lee accepted that the judgment did not include consideration of the difference between the children being removed from their home by an administrative decision under a care order, or, if there were no care order, after a fresh application to court. She stressed, however, that the judge had considered

the requirement for regular visiting and there being a heightened level of responsibility required from the local authority under a care order.

63. With regard to ground two, Ms Lee submitted that there were no grounds to justify departing from the 26 week timetable in this case. The choice of order fell to be made on the evidence at the time of the hearing. If not then, Ms Lee questioned just how long it might be before sufficient time had passed for the judge, given his analysis of risk, to be satisfied that it was no longer necessary for a care order to be made.

64. The local authority's case in opposing the appeal was supported by written submissions by Ms Catrin John on behalf of the children's guardian.

Care order with child placed at home:

65. The present situation, in which the law is applied in a markedly different manner in two halves of England and Wales, cannot continue. There needs to be a common approach throughout England and throughout Wales. What that common approach should be has been determined through consultation and discussion by the multidisciplinary membership of the PLWG. The recommendations at paragraphs 158 to 162, and the Best Practice Guidance at paragraphs 34 to 37, of the PLWG March 2021 report, and Appendix C of the April 2023 report on supervision orders, which have already had extra-curial endorsement, I now formally endorse in a judgment of this court. They must be applied in all cases. The approach taken by the PLWG is no more than the logical development of the earlier caselaw, once account is taken of the need for proportionality and once it is understood that, following *Re DE*, there are only procedural differences between the power of removal where there is a care order or where there is none. As Hale J/LJ made plain, it has never been the case that a care order should be used as a means to ensure that a local authority meets the duties that it has with respect to children in need in its area, nor should it be used to influence the deployment of resources.

66. The PLWG recommendations and guidance can be reduced to the following short points:

a) a care order should not be used solely as a vehicle to achieve the provision of support and services after the conclusion of proceedings;

b) a care order on the basis that the child will be living at home should only be made when there are exceptional reasons for doing so. It should be rare in the extreme that the risks of significant harm to a child are judged to be sufficient to merit the making of a care order but, nevertheless, as risks that can be managed with the child remaining in the care of parents;

c) unless, in an exceptional case, a care order is necessary for the protection of the child, some other means of providing support and services must be used;

d) where a child is to be placed at home, the making of a supervision order to support reunification may be proportionate;

e) where a supervision order is being considered, the best practice guidance in the PLWG April 2023 report must be applied. In particular the court should require the local authority to have a Supervision Support Plan in place.

67. The impact of the requirement for a 26-week timetable and adherence to the PLO mean that the decision as to what final order to make may occur at a comparatively early stage where a child has been removed from home, but a rehabilitation plan is being implemented. In such cases, there may be grounds for extending the 26-week deadline to some extent, but where, as in the present case, the children are settled at home and what is taking place is the reinforcement and further development of protective measures over an extended period, the court should make a final order rather than contemplating extending the proceedings over an extended or indeterminate period.

The Appeal: discussion and conclusion

68. In the present case, the judge was fully aware of the PLWG guidance and recommendations with regard to the making of a care order for a child placed at home. He expressly referred to it and invited submissions specifically on the point. The hearing took place before publication of the April 2023 PLWG report on supervision orders and, naturally, its conclusions were not, therefore, before the court.

69. The situation before the judge was that the three children had always lived with their mother. The sole source of risk to them came from her association with Mr P and the potential for him to cause significant harm to a child as a result of his past history. The harm from which the children required protection was sexual abuse which might follow from Mr P once again becoming involved with the family and 'grooming' them in order to generate a situation in which he could then abuse one or more of the children. In the judgment the judge identifies the risk as arising if the mother, once again, 'allows him back into her life'. The risk that would then follow is described as 'devious' 'manipulation' and 'grooming' by Mr P were he to come back into the family. That risk, which was plainly and correctly identified by the judge, was not one of a sudden assault on one or other of the children. Rather, it would arise gradually, over time, from Mr P further insinuating himself into the family.

70. There was no suggestion that the children should be removed from their mother's care. The situation had been maintained under interim supervision orders throughout the proceedings and the mother had not been seen to 'slip' in her ability to protect the children, despite her continued contact with Mr P from time to time in breach of the agreement made with the local authority. The breaches of the agreement were a cause for concern and grounds for holding that the local authority and the court could not fully rely upon the mother's future cooperation. The judge was entitled to hold that the mother had inordinately delayed cutting her ties with Mr P. In the coming months the mother was to engage in a course of professional intervention aimed at enhancing her ability to protect the children. Her separation from Mr P, leading to divorce, was to be further tested. An injunction order and undertakings were in place to control Mr P having any contact with the family. The local authority was clear that the measures that it would deploy to monitor and support the family would be the same whether a care order or a supervision order was made.

71. Against that background, it is difficult to understand the basis for holding that the situation in the family was exceptional or rare when compared to other families where the children are placed at home with parents at the end of care proceedings.

72. The judge's principal reason for making a care order was that a supervision order did not have 'the safeguarding features' of a care order and that it was necessary for the local authority to share parental responsibility, and if necessary take the whip hand, if there was a falling down in the safeguarding position at any point. The judge did not, however, identify what 'the safeguarding features' of a care order in this case were. In circumstances where the local authority plan was the same under either order, it must be presumed that the judge was referring to the fact, as he expressly did, that under a care order the authority would share and control the exercise of parental responsibility. In short terms that means that, as a matter of law, the local authority could insist that the mother should act in a particular manner in her care of the children. But, the judge did not give any consideration of the consequences, on the ground, were the mother to refuse to comply. In particular, he did not consider whether, in 'taking the whip hand', the authority would be justified in immediately removing the children from their mother's care. Unless it was likely that immediate removal would be justified, then, on the basis of *Re DE*, whether the final order was a care order or a supervision order, the issue of removal would have to come back to court. In those circumstances, it is difficult to understand just what additional power the judge was contemplating that a care order would give to the local authority in order to maintain adherence to the safeguarding plan or add to the authority's ability to protect the children.

73. In in all the circumstances, the judge was in error in holding that this case was exceptional and that a care order was the proportionate and necessary order to be made. For the reasons that I have given, the reality is that, in a case such as this, where the risk is slow burning and the plan for monitoring and support is the same under either order, and where any attempt to remove the children from home would be likely to lead to further court proceedings, there was nothing that making a care order would add to the local authority's ability to provide protection.

74. I would therefore allow the appeal on ground one.

75. I would, however, dismiss ground two. Further adjournment in the present case would have been for an open-ended period that would probably include the mother starting and completing the protection enhancement course and demonstrating a substantial period of total separation from Mr P. Extension of the 26-week timetable on such a basis would not be justified.

76. If My Lady and My Lord agree, the appeal will be allowed and supervision orders will be made in place of the care orders for all three children. The supervision orders will run from 11 November 2022 for an initial period of one year in accordance with CA 1989, Sch 3 paragraph 6(1). Pursuant to the PLWG guidance, it is necessary for a Supervision Support Plan to be filed by the local authority for each child and, in order to do so within the terms of the relevant Welsh legislation, the parties have agreed that the local authority will prepare 'care and support plans' pursuant to SSW(W)A 2014, Part 4.

Lady Justice Macur:

77. I agree.

Lord Justice Coulson:

78. I agree