



Neutral Citation Number: [2020] EWCA Civ 257

Case No: B4/2020/0277

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM LIVERPOOL CIVIL AND FAMILY COURT**  
**HH Judge Sharpe**  
**LV19C03159**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26 February 2020

Before :

**LORD JUSTICE LEWISON**  
**LORD JUSTICE DAVID RICHARDS**  
and  
**LORD JUSTICE PETER JACKSON**

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**C (A Child: Interim Separation)**

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**Leanne Targett-Parker** (instructed by **Liverpool City Council**) for the **Appellant Local Authority**

**Kathryn Dale** (instructed by **Morecrofts LLP Solicitors**) for the **Respondent Mother**  
**Jennifer Hunt** (instructed by **Cobleys Solicitors Limited**) for the **Respondent Father** (written submissions only)

**Carl Gorton** (instructed by **Susan Howarth & Co Solicitors Ltd**) for the **Respondent Child**  
**by her Children's Guardian**

Hearing date: 20 February 2020  
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**Approved Judgment**

**Lord Justice Peter Jackson:**

1. This appeal concerns a baby who I will call Rosie (not her real name). She is now 5 months old and was cared for by her mother under supervision in a residential unit until 16 January, when she was placed in foster care. On 31 January, HHJ Sharpe decided after a two day hearing that mother and child should be reunited in a different residential unit. From that decision the local authority appeals with permission of Baker LJ. The appeal is supported by Rosie's Children's Guardian.
2. Having heard the arguments, we informed the parties that the appeal would be dismissed. This judgment contains my reasons for that conclusion. The judge's decision was not wrong. He applied the law correctly and balanced up the risks and benefits of the available options. He reached a reasoned decision that was clearly open to him on the evidence. He was entitled to find that it was not necessary for separation to take place at what is a critical stage, both in the development of the child-parent bond and in the proceedings that will determine Rosie's future.
3. The background is that the mother, who is in her late 20s, had a very difficult childhood. She has two older children who she was unable to care for; one has been adopted and the other is being brought up by a paternal grandparent. The local authority's planning for Rosie rightly began before her birth because of the mother's longstanding drug addition, her chaotic lifestyle and a potentially abusive relationship with the child's father, who is not the father of the older children. One indicator of the situation into which Rosie was born was that she experienced drug withdrawal symptoms until she was 4 weeks old as a result of her mother's use of hard drugs until the seventh month of pregnancy. Another is that by 2017 the mother's drug use had led to the need for one leg to be amputated, so that she uses a wheelchair.
4. In these circumstances, care proceedings were inevitable and an interim care order was made, but despite the unpromising history the local authority creditably moved to support the mother in the hope that Rosie could remain with her. It found a residential unit offering high levels of supervision and support and they moved there in September when Rosie was one week old. A very thorough report produced by the unit on 13 December shows that the mother had maintained abstinence from drugs and had showed good capability in relation to most practical tasks. A very warm relationship between mother and child was observed. On the other hand, the mother was not infrequently resistant to advice and inconsistent in her approach to safety issues such as co-sleeping (in this case, falling asleep briefly in her wheelchair while holding the sleeping baby), and to moving around with her without using a sling or a pram. In early December, these issues were of sufficient concern to the unit's management for the mother to be given a formal warning. That said, the view of the placement was expressed in this way in its December report:

“[Mother] does have lots of positive qualities as a mother and on balance her parenting of [Rosie] has been observed to be good in most areas. It is my view that the concerns raised have not been at such a level that would warrant the separation of [Rosie] from her mother's care, but I am also not in a position to offer complete confidence in [Mother]'s ability to work with

the local authority and the relevant professionals which is what is necessary to ensure [Rosie]'s future safety and wellbeing.”

The judge aptly described this conclusion as neither a ‘yes’ or a ‘no’ but a ‘could be’. The unit’s recommendation, which was accepted by all, was that Rosie should remain in her mother’s full-time care in a mother and baby foster placement or a supported living arrangement, in each case with a high level of support. The unit agreed to keep them until such a placement could be found.

5. However, on 13 January an incident occurred that brought the placement to an end. The mother fell out of her wheelchair while holding Rosie. The incident was recorded on CCTV and is described by the judge in this way:

“The mother was holding the child and asked the Family Support Worker who was sitting next to her for a blanket which she was given and then a second item, which I think was a dummy, and immediately set off across the room. She got no more than two step pushes when her foot slipped on the floor. The mother fell forward as a result of the combination of an immediate loss of support from her leg and her centre of balance being forward to achieve traction for her foot with the floor. The end result was that she nearly fell on top of her baby who was being carried in her right arm.”

6. Fortunately, though the mother was shaken and upset, neither she nor Rosie was injured. However this incident was, the judge said, the last straw for the unit and the local authority. The unit gave notice that the assessment could not continue and the local authority applied for the court’s authorisation for separation. That was given on an interim basis at an urgent hearing and since 16 January, Rosie has been in foster care, with contact five times a week. The mother sought Rosie’s return, having found an alternative residential placement. It was this issue that faced the judge at the hearing on 29-30 January, at which he heard focused evidence from the manager of the first placement, the support worker who was present when the incident occurred, the social worker, the mother and the Guardian.
7. Having summarised the background, the judge directed himself as to the test for interim separation, most recently sent out by this court in *Re C (A Child)* [2019] EWCA Civ 1998 at [2]:

“(1) An interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.

(2) The removal of a child from a parent is an interference with their right to respect for family life under Art. 8. Removal at an interim stage is a particularly sharp interference, which is compounded in the case of a baby when removal will affect the formation and development of the parent-child bond.

(3) Accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower ('reasonable grounds') threshold for an interim care order is not an invitation to make an order that does not satisfy these exacting criteria.

(4) A plan for immediate separation is therefore only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.

(5) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation."

For the purposes of his decision in this case, the judge summarised it this way:

"The test is whether the child's safety is at risk and, if so, any removal should be proportionate to the actual risks faced and in the knowledge of alternative arrangements which would not require separation."

8. The judge then turned to the only factual matters that were not agreed: whether the mother had been told that she was not to move even for short distances with the child in her arms, and whether the mother could have fallen even if Rosie had been in a sling. As to the latter, he accepted the mother's evidence that she could have fallen as a result of a slip even if she had been using the sling. As to the former, he concluded that there was a clear rule that the sling or pram were to be used for longer distances around the unit or outdoors but it was not clear that the instruction had been given for any movement at all and that if that was a rule it had not been consistently followed or enforced. He noted that the FSW had not attempted to intervene when the mother had set off, when it was obvious that she was heading across the room to retrieve the pram.
9. The judge then asked himself whether these facts amounted to an imminent risk of serious harm and whether removal was proportionate to the risks of the child staying in the mother's care. He said that he had reached the clear conclusion that this test was not made out. He gave his reasons in detail, but they can be summarised in this way. The incident was a pure accident. Accidents happen and children are not removed for that reason. The use of a sling would not have removed all risk. Had the mother not fallen, her conduct on 13 January would have passed without comment or concern. She had failed to follow guidance about matters such as co-sleeping, but this was not such a case. In any event removal would not be a proportionate response to the risk. Although serious injury might be caused, these were not likely or imminent risks. There is clear evidence of positive attachment and it is important to enable that to develop, particular during an assessment. The position would be different if the risk were higher or the child was not benefitting from her mother's care. There is an alternative placement: it may have less good supervision, such as full CCTV, but

CCTV did not stop this accident happening. What matters is the mother's willingness to engage. As to that, the mother has made promises before but the experience of separation has been the 'kick up the backside' that she needs to implement rules fully in future. For those reasons the judge found reunification to be the right course.

10. At a subsequent hearing, when refusing permission to appeal, the judge is noted as stating that he accepted that the judgment did not refer to the Guardian's views but said that, while he understood them, the decision was a matter for him.
11. I would summarise arguments presented in support of the appeal by Ms Targett-Parker and Mr Gorton in this way:
  1. The judge identified all the relevant features of the evidence but his conclusion that there was not a likely or imminent risk of serious harm was perverse. He wrongly treated the fall as an isolated incident rather than an accident waiting to happen. Previous concerns had focused on co-sleeping but earlier in the week of the incident there had been two other occasions on which the mother had been noted to move short distances without using the sling. The judge should have accepted the Guardian's opinion that the mother's evidence showed that she had not learned from her mistakes and could not commit to the level of engagement needed to safeguard Rosie. He should not have accepted the mother's evidence and was wrong to place reliance upon her having learned her lesson. The good attachment between mother and child (which is being preserved by frequent contact) had not prevented the fall.
  2. The safeguards that are available in the alternative placement are inadequate, in particular because they do not have complete CCTV coverage. If Rosie could not be kept safe in her mother's care in the original unit, with its intensive level of supervision, she cannot be kept safe in another placement.

One of the original grounds of appeal was that the judge had departed from the Guardian's recommendation without giving reasons, but this fell away during the hearing as it was accepted that the judgment deals in substance with the issues that she had raised.

12. I do not consider these arguments persuasive. A decision of this kind calls for the evaluation and balancing up of factors relevant to the child's welfare. That task is entrusted to the judge and unless his or her conclusion is shown to be wrong, because evidence has been ignored or misunderstood, or evaluated and weighed up so inadequately that the conclusion is perverse, this court will not interfere. Why this is so was explained by Lord Wilson in *Re B (A Child)(Care Proceedings: Threshold Criteria)* [2013] UKSC 33, [2013] 1 WLR 1911, [2013] 2 FLR 1075. In discussing appeals from decisions made in care proceedings, he said this at [42]:

“The function of the family judge in a child case transcends the need to decide issues of fact; and so his (or her) advantage over the appellate court transcends the conventional advantage of the fact-finder who has seen and heard the witnesses of fact. In a child case the judge develops a face-to-face, bench-to-witness-box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask

himself not just “is this true?” or “is this sincere?” but “what does this evidence tell me about any future parenting of the child by this witness?” and, in a public law case, when always hoping to be able to answer his question negatively, to ask “are the local authority’s concerns about the future parenting of the child by this witness justified?” The function demands a high degree of wisdom on the part of the family judge; focussed training; and the allowance to him by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision. But the corollary is the difficulty of mounting a successful appeal against a judge’s decision about the future arrangements for a child.”

13. This was said in the context of a long-running care case, where the eventual outcome was adoption. But it also applies to interim orders such as the present one. Decisions about the removal of a baby from parents are among the most anxious decisions taken by the family court, indeed by any court. The separation may prove irreversible and set the course for the child’s life. The fact that the decision often has to be taken urgently and at a relatively brief hearing does not diminish the prerogative of a judge who has assessed the evidence coherently and applied the law to reach a rational decision.
14. In this case, the core ground of appeal is indeed that the judge’s assessment of risk was perverse. Of course with a baby, physical safety is a particularly salient concern, but other than in an extreme case it is not the only consideration, and the essential task for the judge was to decide whether the risk to Rosie’s physical safety was so great as to justify separation in circumstances where every other consideration pointed towards keeping mother and child together.
15. As to the risk itself, the judge was called upon to evaluate the type of harm that might arise, its likelihood, its consequences and any resources that might reduce or mitigate the risk: *Re F (A Child)(Placement Order: Proportionality)* [2018] EWCA Civ 2761; [2019] 1 FLR 779 at [2]. He reached conclusions about each of these matters that can readily be squared with the facts of the case, even if they do not accord with professional opinion about the same facts. This was not a risk assessment in which the witnesses enjoyed any particular advantage over the judge, particularly as he heard oral evidence, including from the mother herself.
16. The judge’s starting point was bound to be that in December any risks were considered to be manageable in the light of the positive features. The question then comes down to whether a single accident, albeit of a type that had been feared, justified separation with all its consequences. The unit and the local authority considered this to be the last straw, but the judge was not bound to agree. A number of the arguments presented in support of the appeal amounted to a submission that Rosie could never have been kept safe in her mother’s care, but this is to beg the question that the court must decide at the final hearing, and it is inconsistent with the conclusion reached in the December report and accepted by the parties that mother and child should move to a supported placement with less supervision than before. The local authority and the Guardian were also forced to accept in submissions that if the January incident justified separation, so did previous occasions on which the mother had moved short distances with Rosie without falling.

17. The judge addressed the question of whether there was a clear prohibition on moving short distances without using a sling, and his finding about that is one that cannot be challenged. But even if this was in truth ‘an accident waiting to happen’ and the mother was more culpable than the judge considered her to be, he still considered whether separation would be a proportionate response. He found that it would not and, speaking for myself, I think he was right.
18. The judge was also entitled to consider that the alternative placement was sufficiently protective. In the end the debate boiled down to the lesser degree of CCTV coverage, but he explained why he did not regard that as a disqualification and (particularly bearing in mind that the local authority and the mother had been actively looking for an alternative placement that would have had no CCTV at all) that was also conclusion that was open to him.
19. In making his decision, the judge made clear to the mother that she is now being given a last chance to show that, with support, she can parent her daughter to a good enough standard. I can find no fault in his approach and I therefore join in dismissing the appeal.

**Lord Justice David Richards**

20. I agree.

**Lord Justice Lewison**

21. I also agree.
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