



Re J & Ors (Children: Interim Removal) [2023] EWCA Civ 1266

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Introduction

1. The recent Court of Appeal authority of ***Re J & Ors (Children: Interim Removal) [2023] EWCA Civ 1266 (3 November 2023)*** is a useful case for family practitioners to have in their toolkit, particularly those representing parents facing applications for interim removal of their children.

Facts

2. This case concerned three children, whose mother struggled with substance misuse and poor mental health. During the parents' relationship, the family was referred to social care due to concerns around domestic abuse and the children's exposure to drugs. The parents separated in 2019 but remained close, and the father had regular contact with the children.
3. Following the mother being arrested for drink-driving (the children having been left alone overnight), the children were placed with their father. They returned to their mother after a few weeks. Care proceedings were issued and the children initially remained with their mother under interim supervision orders whilst assessments were completed. A parenting assessment of the mother could not conclude due to the mother's limited engagement; the father's parenting assessment concluded that, with support, he could meet the children's needs.
4. Following a referral from the ambulance service raising concerns about the mother's health, the children were placed back with the father. At a hearing before District Judge Orchover, she refused the mother's application for the children's return, made a child arrangements order in favour of the father, however expressed dissatisfaction with the local authority's proposals for contact with the mother. She felt that the aim should be for a build-up to overnight contact and expressed the view that agreement for shared care should be

attainable before the next hearing. Following the hearing, agreement was reached for the mother to have unsupervised contact with the children in the community.

5. The mother then made (disputed) allegations that the father was ill-treating and physically abusing the children. The children did not corroborate the allegations and the social worker concluded there were no safeguarding concerns about the placement.
6. The local authority filed an application inviting the court to determine the mother's contact arrangements, with the social worker raising concerns that because of the impact on the children's wellbeing of the present contact, the contact requires supervision.
7. It then transpired that the father had allowed the children to stay with their mother overnight and he was advised by the social worker that the local authority did not agree to this and the parents needed to stick to the plan. A week later, the children told the social worker that they had slept over at their mother's house again, that she had taken them to school in the morning, would be collecting them at the end of the day, and she had told them not to tell the social worker. The local authority then amended their plan, seeking the children's placement in foster care under interim care orders.
8. At a hearing before HH Oliver, the parents opposed the children's removal into foster care, as did the Children's Guardian (subject to a working together agreement). The judge granted the local authority's application for interim care orders in relation to all the children, sanctioning their removal into foster care. He refused the father's application for permission to appeal, and he refused both parents' applications for a stay of his order pending an application to the Court of Appeal.
9. The father filed a notice of appeal with the Court of Appeal, permission to appeal was granted and a substantive hearing listed.

The Court of Appeal's analysis

10. Practitioners will know that the principles to be applied by the court when considering whether to authorise the interim removal of a child were summarised relatively recently in ***Re C (A Child) (Interim Separation) [2019] EWCA Civ 1998***:

“(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.”

11. The Court of Appeal noted that the authority of **Re C** was properly identified by the local authority during the hearing before HH Oliver, however it was not mentioned in the judgment. At one point, the judge referred to the “*immediate risk of serious harm*” which the Court of Appeal made clear was not the test to be applied. The Court of Appeal considered it unlikely that the judge was unaware of the test to be applied; the question was whether the judge had applied it.
12. The Court of Appeal identified three reasons for interfering with the decision of HH Oliver:
 - (1) The judge did not refer to the positive evidence about the care being afforded to the children by the father. This was an important factor in the court’s assessment of whether the children’s welfare and safety required their immediate removal and it did not feature in the welfare analysis.

- (2) The judgment did not analyse the risk of the children suffering emotional harm if removed from their father's care. The judge did not answer the question of whether the risk of harm of removal from the father's care was outweighed by the risk of harm in the father's care.
- (3) It was incumbent on the judge to scrutinise if there were resources that might obviate the need for separation. A few weeks prior to the hearing under appeal, the direction of travel had been towards a relatively high level of unsupervised contact between the children and their mother. The local authority subsequently concluded that contact should be supervised however at the time of the overnight stay permitted by the father, the Children's Guardian's impression was that the father was receiving mixed messages about the mother's contact which may have confused him. In those circumstances, the judge should have seriously considered the less interventionist option of the children remaining at home under an interim public law order, along with a clear order defining the mother's contact and a written agreement.
13. The Court of Appeal concluded that had the judge considered these three factors, he would have realised that the local authority's plan was unnecessary and disproportionate. For those reasons, the appeal was allowed, the interim care order was set aside and the children were returned to their father.
14. Perhaps the more interesting part of the judgment relates to what the Court of Appeal had to say about stays. Baker LJ noted that the judge erred further in refusing to allow a short stay to enable the father to apply to the Court of Appeal. He stated that this was "*contrary to authority and wrong in principle*", applying paragraphs 36 to 38 of **Re N (Children: Interim Order/Stay) [2020] EWCA Civ 1070** on 'short-term stays'. In this case, Baker LJ did not consider that the risks were so acute as to deny the father a short stay.
15. In **Re N**, Jackson LJ cites Wilson LJ in **Re A [2007] EWCA 899**, who said that:
- "[w]hen a judge considers that a significant change in the arrangements for the child needs to be made in effect forthwith and learns that there is an aspiration to appeal to this court, he should in my **view always give serious consideration to making an order which affords the aspiring appellant a narrow opportunity to approach this court for further, temporary, relief before his order takes effect.***

No doubt the welfare of the child remains paramount; but, subject thereto, the judge needs to consider whether a refusal to afford a narrow opportunity for such an approach unfairly erodes the facility for effective appeal. If he decides to afford it, he can do so either by directing that the change in the arrangements should occur only at the end (say) of the following working day or by directing that the change should occur forthwith but that execution of his order be stayed until the end (say) of the following working day. The difference seems to me to be immaterial. When, however, a judge declines to take either of these courses, there remains the facility for the aspiring appellant to approach this court by telephone and no doubt usually on notice to the other party.” [27, emphasis added]

16. The Court of Appeal in **Re J** observed that *unless a child’s safety and welfare demands immediate removal*, the court should always allow an unsuccessful party the opportunity to apply to the appellate court.
17. It could be argued that there is an inherent tension at the heart of **Re N** and **Re A**: if a court determines that a child’s safety warrants their immediate separation (to use the language of **Re C**) from their parent(s), how can it ever be appropriate to grant a short stay? However, the reality on the ground is that interim removal does not always mean immediate removal. It could mean removal at the end of the day, or removal the following morning when a foster placement becomes available. Of course, sometimes the risks are so acute that immediate removal is needed. In **Re M (Interim Care Order) [2018] EWCA Civ 3038**, Jackson LJ noted that *“there will be cases in which the removal of children must take place immediately and a stay will not be appropriate”*. This case, however, was not one of those.



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Law is correct as at 17th December 2023

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