SEEKING AN INTERIM CARE ORDER – AND INTERIM REMOVAL

BACKGROUND

This article refers to the following legislation:

Section 31 of the Children Act 1989 - Care and Supervision

s.31(1)

On the application of any local authority or authorised person, the court may make an order:-

(a) placing the child with respect to whom the application is made in the care of a designated local authority; or

(b) putting him under the supervision of a designated local authority.

s.31(2)

A court may only make a care order or supervision order if it is satisfied:-

(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.

Interim Orders - Section 38 Children Act 1989

s.38(1)

Where —

(a) in any proceedings on an application for a care order or supervision order, the proceedings are adjourned; or

(b) the court gives a direction under section 37(1), the court may make an interim care order or an interim supervision order with respect to the child concerned.

s.38(2)

A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in section 31(2).

In the context of an application by a local authority for an interim care order (ICO), where the local authority seeks to remove a child from their parents (usually into foster care) pending the outcome of s.31 proceedings, the court applies a 2 stage approach.

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THE FIRST STAGE: THE THRESHOLD STAGE

The court must first consider whether the interim threshold criteria are made out, as set out in s31(2) and s38(2) of the Children Act 1989 (CA). The key phrase is "reasonable grounds for believing" meaning that the Court must be satisfied that there is a real possibility that the child will suffer significant harm attributable to the care given by parents. Practitioners will be aware that the threshold criteria should be clearly and concisely set out in a threshold document; however, the purpose of this piece is not to consider the first stage, but to presume the court is satisfied that threshold is crossed and so to consider the second stage: the welfare and proportionality stage.

THE SECOND STAGE

The law was most recently restated and summarised by Lord Justice Peter Jackson in *Re C (A Child, Interim Separation)* [2019] EWCA Civ 1998 when he set out, (at para 2) the following propositions:

(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.

In *Re C* [2020] EWCA Civ 257, the Court at first instance had summarised the above as**:**

"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."

What does this mean to a local authority that is seeking to remove a child(ren) from parents at an initial stage in proceedings? In practical terms it means:

1. The local authority must, in submitting its evidence to Court (most likely to be the social workers initial statement) have undertaken a full analysis of all the options that have been considered, it being of utmost importance that the local authority recognises that the options to be considered may well not form part of the local authority's care plan, nonetheless, due deliberation must have been given.

2. In approaching the options, the local authority should be open minded and creative, as it is highly likely that the Court will be presented with a number of options from parents' representatives, including those that are simply not sustainable for the local authority, although will still fall within the scrutiny of the Court. For example:

    a. Residential placement for mother and baby – either in a mother and baby specialised unit or a suitably experienced mother and baby foster placement – particularly important when considering keeping a newborn baby with mother whilst undertaking further assessments.

    b. Residential placement, for the child(ren) and parents

c. Supported accommodation – professionally supported /supervised. This may not be available within the locality, and searches should be undertaken further afield if necessary.

d. Wider family support such as grandparents/aunts/uncles/etc who may be able to live with the parent(s) to support, or have the parent move in with them, indeed swapping homes may be a solution for a period of time in some cases. All the various permutations of a potential family arrangement should be considered. Viability assessments should be undertaken as a priority, not solely for the purpose of assessment as alternative carers, but as part of a support network. This being particularly important if the family has been in the PLO (pre proceedings process). It is worth noting that a family member who was not offering support pre proceedings may well change their mind if the only alternative is placing a child in foster care.

e. Whether additional orders would provide a layer of safety to the family home, such as an exclusion order preventing a parent from attending the family home whilst the parent who is the main care giver remains. It may be that undertakings or written agreements may also be sufficient for such purpose.

f. Implementing a robust matrix of daily professional visits to support and monitor the parent(s) and child(ren) or providing an in-house support worker 24/7 if necessary.

3. The local authority must, when determining that an option is not viable for the child(ren), set out clear and cogent reasons why not. Unfortunately, in the case of urgent applications the evidence in support of the local authority position may be limited. The court will be mindful of realities on the ground and the concerns and risks of the case, but this will not circumvent the fact that there must be "high justification that must be shown by a local authority seeking an order for separation" (*Re C (A Child, Interim Separation)* [2019] EWCA Civ 1998)

4. Only when all the options have been considered in this way will the local authority be able to demonstrate the application of the 5-stage test (Re C) and satisfy the Court that separation/removal is necessary and indeed the welfare of the child demands it.

Additional key features for consideration by the local authority in its' supporting evidence:

a. The Court will consider the child's welfare in full, including the potential harm of separation, which may be from wider family and siblings as well as parents. In particular, in the case of newborn babies, separation would impact the vital bonding process between a parent and a baby.

b. The Court must consider the least interventionist approach and therefore removal must be proportionate when considering the risks of the children remaining/staying with the parent(s).

c. The Court must pay particular attention to the balance of harm and consider the consequences that removal could cause the child(ren) significant harm which must be set against the harm the child(ren) will continue to suffer or be likely to suffer, if not removed. Thus the local authority should set out analysis to this consideration in its supporting evidence.

So in summary, the test is clearly set out in *Re C (A Child, Interim Separation)* [2019] EWCA Civ 1998, and ensures that the local authority carefully considers all options before seeking separation of a child from a parent, which is, without doubt, a draconian order . I would also suggest ensuring that the local authority reflects realistically whether there are any other measures which could be undertaken to provide for a child to remain with a parent at least on an interim basis pending conclusion of proceedings.

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