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The Importance of Interim Removal Hearings

Simon Wilkinson - 2010

Two recent cases have drawn into focus the importance of interim removal hearings and, in particular, the importance of interim threshold when the court is making its determination. The cases are:

Re C (Permission to withdraw: Medical evidence: Interim threshold not crossed) [2018] EWFC B37

and

Re G (Children: Fair Hearing) [2019] EWCA Civ 126

Both of these cases demonstrate the on-going importance of ensuring that proper thought, consideration and rigour is given to interim removal hearings: both in respect of

approaching the evidential canvass with a critical eye and ensuring that these hearings are dealt with fairly and without bias in an ever burdened family justice system.

Re C (Permission to withdraw: Medical evidence: Interim threshold not crossed) **[2018] EWFC B37**

The facts

This case, heard by Her Honour Judge Vincent, concerned a very young baby who was the daughter of 19 year old parents. She was born with the use of forceps and had some marks on her head but these quickly disappeared. The mother had joined various groups such as the teenage parenting group and all professionals who observed her care were positive about the care she was providing. Throughout the case the parent's care was observed to be nothing other than above criticism.

A number of marks then appeared on the child's face – initially by a health visitor. The child was seen by the GP who initially considered it to be a superficial blood vessel. The mother subsequently reported further marks and took photographs of them. She showed them to the health visitor. A week later a different GP saw the child (who did not have any bruises). That GP saw the photographs taken by the mother and felt that they clearly showed five bruises. A referral to a paediatric radiologist was made. In the referral letter the GP notes that the child was developing well and had good interactions with the mother.

A paediatrician – Dr J – who later saw the child (with no bruising) but saw the photographs also felt that the marks shown were *consistent with bruises*. That paediatrician subsequently raised concerns that the marks were bruises and that bruising in a non-mobile baby was indicative of inflicted injury.

That was on 23 April 2018. On 24 April the Local Authority applied for an Emergency Protection Order (which was made unopposed) and mother and child were placed in a mother and baby placement. Care proceedings were issued on 30 April 2018 and the matter listed for a hearing on 2 May 2018. Interim threshold found met on the basis Dr J's report. An interim care order was made (neither consented to nor opposed by the parents) on the

basis that the plan was for mother and child to live with maternal great-grandmother with mother being supervised by her. The father joined them a couple of weeks later.

Thereafter on 3 May, 9 May and 29 May 2019 the child was taken by her mother and great-grandmother to hospital with marks on her face. On each of those occasions the clinicians concluded that the marks represented blood vessels visible through the skin with no cause for concern. The marks all disappeared in a short space of time. As a result of this, and in light of the evidence that *all observations of the parents' interactions with their daughter [were] universally positive* it became clear that an interim hearing on whether the interim threshold was met was needed. Due to the necessity for a meeting of the clinicians and the stresses on court lists, the case was not listed for consideration until 20 June 2018.

<u>The hearing, evidence and outcome</u>

The court heard evidence from the initial GP and from Dr J. After hearing the evidence the Local Authority applied to withdraw its application. The judgment sets out [para 19] that *the Local Authority rightly anticipated that on the basis of the evidence…I would not have made findings on a balance of probabilities…and therefore…I could not be satisfied that there were reasonable grounds for believing that [the child] had suffered significant harm in her parents' care*. The application was granted.

The court is clear within its judgment that it neither criticises nor seeks to give guidance to medical and social care professionals about how to manage cases in the future.

The following points in respect of the medical evidence and sharing of information can however be taken from the judgment:

1. The photographs relied upon by the medical professionals were taken by the mother – they were amateur photographs taken on her phone.

2. There were a multiplicity of professionals involved – some of whom saw marks, others who did not. They saw the child at numerous points over a two week period

and did not appear to have shared fully their notes / observations in respect of what they saw or what their impressions of the marks in the mother's photographs were.

3. The paediatrician had only seen marks on the mother's phone (taken nine days prior to his examination). He was not aware of when or in what circumstances the photographs he saw were taken; the quality of the images could have been affected by their transfer to hospital software; the description given of the size of the mark was *only an estimate from looking at the iPhone image and not reliable. He had not taken any measurements himself and there was no scale ruler on the photograph* [para 23, iv]; and as he had only seen the marks on the photograph he had not been able to perform physical tests.

4. The description from the health visitors who had seen the marks in person differed from that which the paediatrician saw in the photographs – with all the problems highlighted above.

5. The referral letters sent by the GP referred to 'bruises' but did not specify which of the marks were being so classified. However none of the clinicians who <u>saw</u> the marks identified them as bruises. That identification came only from those who saw the marks on the photographs.

6. It did not appear that *a single body of medical notes was available to clinicians at the meeting* meaning that *there was some confusion between them over who had seen what*.

<u>Lessons to be learned</u>

At the conclusion of the case the legal representatives drafted a list of points which they felt would be helpful to share with the clinicians. HHJ Vincent was happy to endorse these and include them in her judgment, whilst being clear that each case turns upon its own particular facts and that she was not therefore intending to give guidance. The points bear repeating in full [from para 38]:

i. In this case and no doubt in others an enhanced coordination and sharing of available medical notes would assist all attempting to make a diagnosis;

ii. There is clearly a risk which needs to be guarded against that there are occasions when comprehensive sharing of medical data relating to a patient is not achieved;

iii. The hospital treating physicians when provided with photographs of marks taken on a date on or close to a date when the patient was examined by other medical professionals, in this case a health visitor and a GP, ought to have had made available to them the contemporaneous notes of those medical professionals;

iv. Those relying on the views of treating physicians, in this case social work professionals supported by their legal advisers, need to ensure that the core evidence (in this case notes of GP and HV) have been fully shared and considered by the treating hospital staff;

v. It is important to be aware that photographic imagery taken at amateur level may misrepresent what is present in fact;

vi. Other factors which affect the reliability of photographic imagery include the light exposure, and device used;

vii. When examining photographic images of suspicious marks, knowledge of the date and time & circumstances in which the photographs were taken would assist and ought as far as possible be compared to any contemporaneous account of matters (marks) seen, whether by a medical professional or carer;

viii. At any meeting of professionals only those whose attendance has been agreed by the parties (if the matter is before the court) may attend;

ix. At any meeting of professionals only questions which have been agreed in writing in advance (if the matter if before the court) should be put to those attending and all attending need to be provided with the same documentary material.

Lessons for lawyers

What is clear from this case is the obvious challenge that was available to the medical evidence at an early stage in the hearing. The temptation when dealing with cases of inflicted injury is for practitioners to simply advise their clients to concede that making of an interim care order and await the conclusions of the independently instructed expert. However as legal professionals one is under a duty to consider the evidence critically and to consider fully whether the disruption to the family's lives that comes with the interim involvement of the Local Authority really is justified and made out on the evidence.

In order to do this the following should be borne in mind:

- The importance of ascertaining from the outset the full chronology – particularly where there are a number of medical visits and treating clinicians involved.

- Ensuring that where decisions are based upon the opinion of one doctor that that medical professional has had access to all the relevant notes / information from other individuals and clinicians involved. This is especially important if, as in this case there has been a referral from health visitor to GP to hospital.

- A critical evaluation at an early stage of the state of the evidence: in this case the issue of the quality of the photographs was crucial. Those representing parents (and indeed all parties) ought to be considering whether even at its highest the evidence before the court can meet the evidential test for making the findings sought by the Local Authority.

- All those representing parents must be proactive: where there appears to be a real case to challenge interim threshold pressure should be brought to bear to ensure the

evidence is available as soon as possible in order to get the earliest possible listing. Where clinicians' meetings are needed (as in this case) then proper thought must be put into ensuring: the correct people are present, each of them has the same information/set of notes; there is an agreed list of questions and issues; and that there is a legal representative present to chair.

I would encourage all practitioners to consider the observations of leading counsel for the father (and others) in the ***Re C*** case as set out on Family Law Week

***Re G (Children: fair hearing)* [2019] EWCA Civ 126**

The facts

An application for interim care orders in respect of two children was listed before Her Honour Judge Carr Q.C. The children had been the subject of police protective measures following a domestic incident between the parents as a result of which the mother was arrested. The hearing was listed on the day that the police's powers were due to expire. There was limited evidence before the court including no evidence from the parents and no analysis from the Guardian. The mother met her very junior counsel for the first time at court.

The judgment from the Court of Appeal sets out in detail the transcript of the hearing and should be read in full. Essentially:

1. The matter was called on late in the morning but stood down until 14:00. At that stage the mother's counsel set out that his instructions were to contest the interim removal application.

2. There then followed a terse exchange between mother's counsel and the judge in which the judge made the following comments:

    a. If the mother proceeded with her opposition then the court would be *forced to make findings* which the mother *will be stuck with*. The court indicated

repeatedly throughout the exchanges that she *inevitably* would make findings.

b. In respect of the findings that the judge indicated she would make the court indicated that *it could impact on how the police look at it and everything*.

c. Without having heard from the Guardian the court stated that *this application is bound to be supported by the Guardian*.

d. When counsel for the mother attempted to set out the mother's response to the factual assertions made by the Local Authority the judge interjected as follows: *Oh nonsense…if that is the preposterous proposition you're putting to me, it'll fall on deaf ears.*

3. In light of the above counsel for the mother requested a short adjournment which was granted, following which the mother did not (perhaps unsurprisingly in light of the above) continue her opposition to the interim removal application.

Shortly after the hearing (which took place on 24 January 2019) the mother lodged her appeal, the case having been briefed to more senior counsel.

<u>Appeal</u>

Peter Jackson LJ (giving the lead judgment and sitting with Moor J) granted the appeal. The following grounds of appeal were described as the 'nub' of the matter:

2. The learned Judge had subjected the mother to extreme pressure amounting to duress and undue influence through her comments in court and impacted on the advice given to her. As a victim of duress she did not freely consent to the ICO. This resulted in serious procedural irregularity.

3. The learned Judge's comments gave a strong indication she had pre-judged the application and prejudiced a fair hearing, breaching the Mother's Article 6 and 8 rights

Within a typically forthright judgment Peter Jackson LJ makes the following observations:

- He dismissed the submission made by the Local Authority that the correct approach would have been an application discharge in circumstances where it is alleged that a judge brought improper pressure to bear: this issue had already been determined – *Re R (Contact: Consent Order)* [1995] 1 FLR 123

- Counsel for the Local Authority (who appeared in the court below) accepted that one interpretation of the transcript supported the complaints made by the mother and she was *not able to suggest any other possible interpretation*.

- It is entirely proper for judges to indicate provision views in accordance with the overriding objective of the Family Procedure Rules 2010. What is not permissible is for judges to *place unreasonable pressure on a party to change positon or appear to have prejudged the matter*. What happened in this case *fell well outside the proper exercise of the court's powers*.

- Given the matter was urgent and there was little court time it was well open to the judge to deal with the matter on submissions with a full listing in short order; however that is not what happened – paragraph 26 of Peter Jackson LJ's judgment sets out starkly all that went wrong within the hearing.

- Criticism is also made of the positions taken by the Local Authority, the Guardian and the father on appeal which *show a failure to understand the nature of the overriding objection or the requirements of a fair hearing*.

In a short supplemental judgment (supported by Peter Jackson LJ), Moor J also raises criticism that the Court of Appeal was informed by counsel for the Local Authority that *it*

was commonplace in certain courts to warn parent that, if the application for an interim care order was opposed, the court may have to make findings as to facts in dispute…that…would then stand for all time. Moor J stresses the difference between the legal basis for the making of interim care orders (section 38(2)) and final care orders (section 31(2)) and much lower bar of 'reasonable grounds' in the former. He urges caution on courts making reference to the significance of conclusions drawn at the interim stage *as such comments may appear to the parents to be a form of pressure* [para 34].

Observation

This case is concerning for a number of reasons and should serve as a stark reminder for all parties of the need to ensure fairness and procedural propriety at interim care order hearings. I make the following observations:

1. The way in which the court approached this hearing is cause for concern. It ought to have been incumbent on the other parties to ensure that this situation was rectified.

2. The level of inexperience of mother's counsel adds to the above. Whilst accepting that one was not present at the hearing itself, the transcript would suggest that his inexperience was at least partly the reason why the court was able to bring such undue pressure. It would be concerning if the inexperience had been exploited and that none of the other advocates – in their roles as officers of the court – stepped in to address this.

3. The positions advanced by the other respondents to the appeal are astounding in light of the transcript. It is noteworthy that at least two of the respondents were represented at appeal by advocates present at first instance. It is suggested that it is incumbent upon all parties (and indeed lawyers advising all parties) to be alive to issues of procedural fairness and to respond accordingly: neither the children at the heart of the system nor the financial pressures which are already bringing the system to stretching point are done any favours by attempting to defend the indefensible.

4. The incorrect approach to the test for interim threshold is extremely concerning – in particular the suggestion dismissed by Moor J that findings of fact could be made with which the mother would be *stuck*. This fails to take into account a raft of jurisprudence from the senior courts (see: *Re L (Care Proceedings: Removal of a Child)* [2008] 1 FLR 575; *Re LA (Care: Chronic Neglect)* [2010] 1 FLR 8; *Re H* [2002] EWCA Civ 1932; *Re M* [2005] EWCA 1932; and *Re K and H* [2007] 1 FLR 2043.

   Whilst in my experience this is not as common as problem as may have been suggested by counsel for the Local Authority, there is an obligation on all parties to ensure that the court is not allowed to err in law. Notwithstanding the inexperience of mother's counsel, which may have led him to either be uncertain or reluctant to correct the circuit judge, the other advocates in the case perhaps ought to have set out the correct legal position so as to avoid the mother feeling as though she were having undue pressure placed upon her.

5. It is important, I would suggest, for the initial orders to be as accurate as possible. Each standardised case management order has a section relating to threshold. Where possible, those representing parents should be clear the basis upon which the interim threshold has been adopted by the court whilst also ensuring that the order is plain that no findings of fact have been made and any threshold determinations at the interim stage are made to the lower evidential standard set out in section 38(2).

Conclusions

The above two cases highlight in stark terms the importance of interim removal hearings, both in respect of considering the evidence before the court and interim threshold and also the importance of procedural fairness and the responsibilities upon all advocates to stand firm in the face of over-robust judicial case management.

Whilst the test for interim separation is well rehearsed, perhaps little focus is and has been placed upon the test for interim threshold. Practitioners must not underestimate or downplay the significance of interim removal hearings – the importance to the children and families who are affected and also to the pressures on the family justice system as a whole

from fully fledged care proceedings which can be dealt with sooner should not be underestimated.

Similarly, with the ever-increasing number of care proceedings being issued (as recent figures have suggested), there is a rise in the number of interim removal hearings coupled with ever-increasing pressures on court time. Nevertheless, all involved within the system have a duty to uphold the fundamental principles of fairness and lack of bias in order to ensure that the families and children for whom the system is designed are best served by it.

Simon Wilkinson
Parklane Plowden Chambers

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