

## **W (A Child) [2014] EWCA Civ 772**

### **Interim care order made within private law proceedings pursuant to s37 direction – appeal by mother on grounds of procedural irregularity and incorrect application of the test for interim removal – appeal dismissed**

Within private law proceedings the Court had listed a fact-finding hearing to investigate a number of serious allegations made by the mother against the father. It found that, amongst other things, the mother had wrongly suggested that the child did not want to see the father, believed that the father had been involved in previous abuse of the child by the paternal grandfather, had encouraged the child to make false allegations about the father, was "out of control" in believing her own propaganda and convincing the child of it and had encouraged the child to have an unhealthy attitude towards the father. Having previously made a direction under section 37 CA 1989 the judge had the jurisdiction to make an interim care order. He considered that the interim threshold was met and made an interim care order approving the child's removal into foster care.

The mother appealed to the Court of Appeal. The mother's appeal was opposed by the father, the children's Guardian and the local authority (which, by the time of the hearing of the appeal, had made a public law application).

It was submitted on behalf of the mother that the decision to make an interim care order had been procedurally unfair as she had no effective notice of the judge's intention to remove the child into foster care and was not permitted an opportunity to pursue alternative carers or the assessment of alternative carers before the step of removal was taken. These grounds were rejected by Ryder LJ, who held that the judge had made clear at a number of previous hearings and indeed during the fact-finding hearing, that he would consider removing the child from the mother if her allegations were not made out. Further, the mother had had an opportunity both during the adjournment over which written submissions were required, and also during the day when the judge's decision was announced, to make proposals in respect of alternative carers. In any event, on the facts of this case, there would not have been a realistic prospect of the judge accepting the mother's proposals for alternative carers in the absence of further assessments.

The mother's other grounds of appeal centred on the decision itself, it being submitted on behalf of the mother that there had been no risk to the child's safety that required immediate separation, removal was disproportionate having regard to the level of risk and less draconian steps being available and that the child's welfare was safeguarded by the mother who had provided better than good enough care throughout her life.

All of these grounds were rejected by Ryder LJ. He recalled that the test is as set out in *Re LA (Care: Chronic Neglect)* [2010] 1 FLR 80 and *Re B (Care Proceedings: Interim Care Order)* [2010] 1 FLR 1211, noting that "safety" is given a broad construction and includes emotional and psychological welfare. He held that the interim threshold had been met and the only question which realistically arose was whether the judge had exercised his child protection duties and powers proportionately. He held that, contrary to the suggestion that removal had been disproportionate, it would have been "unconscionable" for the judge to have left the child in the care of the mother, and no level of sufficient support and necessary protection for the child which could have been implemented with the child remaining in the mother's care had been identified by anyone. The submission in respect of the mother providing better than good enough care in other respects had missed the point and that the child needed protection from the risk of emotional harm posed by the mother.

Ryder LJ confirmed that, given that a decision by a court to remove a child into public care engages article 8 of the ECHR, a welfare analysis and proportionality evaluation were necessary. In a case where there were more than one realistic option it would be necessary for the judge to summarise his conclusions in a "conventional balance sheet approach", adding at paragraph 25 that "[a]n adequately reasoned judgment must deal with the reasonably available options and give them proper and focussed attention". However, in this case, as there were no other realistic options, there was no more proportionate interference available than that contemplated by the judge, and no further analysis than that provided in the judgment was necessary.

Appeal dismissed.

Case summary by [Thomas Dudley](#), barrister, [1 Garden Court](#)

---

Case No: B4/2013/3527

Neutral Citation Number: [2014] EWCA Civ 772

**IN THE COURT OF APPEAL (CIVIL DIVISION)**

**ON APPEAL FROM the Birmingham District Registry of the Family Division of the High Court of Justice**

**His Honour Judge Cardinal sitting as a judge of the High Court**

**BM09P09235**

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 11/06/2014

**Before:**

**LORD JUSTICE LAWS**

**LORD JUSTICE RYDER**

**and**

**LORD JUSTICE UNDERHILL**

-----  
**In the Matter of W (A Child)**  
-----

**Ms Kristina Brown** (instructed by **Anthony Collins**) for the **Appellant mother**

**Mr Alistair MacDonald QC** with **Ms Rosalyn Carter** (instructed by **Blair Allison Solicitors**) for the **1st Respondent father**

**Mr Paul Lopez** (instructed by **Carvill Johnson**) for the **2nd Respondent child**

**Mr Craig Jeakings** (instructed by **Solihull MBC**) for the **Intervenors (Solihull MBC)**

Hearing date: 12 February 2014  
-----

## **Judgment**

### **Lord Justice Ryder:**

1. This is a mother's appeal against an interim care order made under section 38(1) of the Children Act 1989 [CA 1989] by His Honour Judge Cardinal sitting as a judge of the High Court in Birmingham which had the effect of approving the immediate removal of the mother's eight year old daughter from her care. The essence of the appeal is that the order was procedurally unfair and wrong. The mother had also complained that the judge was plainly wrong in his decision on the facts but after careful consideration at an oral hearing on 22 January 2014, permission to appeal the findings of fact was refused.

2. At the time the order was made the proceedings were private law children proceedings brought under the CA 1989. They were between the child's mother and the child's father. The issue between the parties was the father's contact with his daughter. The child had been joined as a party to the proceedings and was represented by a children's guardian in accordance with rule 16.4 of the Family Procedure Rules 2010 [FPR 2010]. The jurisdiction to make an interim care order in this case was available to the judge because of a direction made in the proceedings under section 37(1) CA 1989 for an investigation by the local authority of the child's circumstances. Since the judge's order the local authority have issued public law children (care) proceedings within which a further interim care order has been made on the basis that the findings of fact and value judgments made give rise to 'reasonable grounds for believing that (the) circumstances with respect to the child are as mentioned in section 31(2)' CA 1989. In other words the jurisdictional threshold for an interim care order was satisfied by Judge Cardinal's determination.

3. On 10 February 2014 the local authority into whose care the child was received was given permission to intervene in the appeal. The father, the children's guardian on behalf of the child and the local authority oppose the appeal.

4. The child was born on 3 October 2005 and until the order complained of had lived with her mother all her life. She has had contact with her father in accordance with orders made by the court. At a finding of fact hearing in December 2010 the court concluded that the child had been sexually abused by her paternal grandfather. There was then a further finding of fact hearing before Judge Cardinal that immediately preceded the child's removal on 11 November 2013 and which dealt with further serious allegations made by the mother against the father.

5. On that day the judge concluded at [246] to [260] of his judgment that all of the allegations that the mother had made against the father were false including, in particular, that he had ever behaved in a sexually inappropriate way towards his daughter. The judge set out his conclusions in considerable detail. The conclusions that were reasoned in the previous 245 paragraphs. He held that the mother:

- (i) had wrongly suggested that the child did not want to see her father, and was frightened by him;
- (ii) had knowingly sought to prevent the child from having a relationship with her father by putting pressure on her about seeing him, and by putting obstacles in the way of contact;

(iii) had deliberately and wrongly sought to exclude father from school events and being involved in the child's life;

(iv) believed that the father was involved in the child's abuse in London (i.e. the abuse perpetrated by the paternal grandfather), and had informed others of her belief;

(v) misled the court by saying that it was the child rather than herself who struggled with the grandfather's abuse;

(vi) deliberately put the worst interpretation on events to place obstacles in the way of the father's contact;

(vii) encouraged the child to make false allegations against her father because of her own fear of contact (which the child did at her mother's behest despite being a daughter who delights in seeing her father);

(viii) had told the child about alleged domestic violence on the parties' separation to influence the child against her father and to cause her to make similar allegations;

(ix) is out of control, believing her own propaganda and convincing the child of it: creating a situation that is deeply concerning - the child was and is subject to influences which she should not be;

(x) is worryingly obsessed by the abuse of the child by her paternal grandfather to the extent that she had unfairly taken an adverse view of the father and worked against his contact at every opportunity, save when she could police it herself. Her reluctance to let him develop a natural relationship with his daughter was plain for all to see; and

(xi) had encouraged the child to have an unhealthy attitude towards her father, to make untrue allegations, to know more about sexual matters and about the case than was good for her with the consequence that her emotional and psychological progress had been damaged.

6. The judge concluded that the child could not remain living with her mother before the case was finalised because of the mother's behaviour, in particular her involvement of the child, and her unjustified convictions, in particular that the father was dangerous and presented a risk of sexual abuse. The judge concluded that the child had suffered significant emotional harm in her mother's care within the meaning of section 38 CA 1989 and that her psychological safety required her immediate removal from that care.

7. The ground of appeal is clearly stated namely, that the judge was wrong to have approved an immediate removal and that the process by which that determination was made was procedurally unfair. That can be broken down into the following submissions:

i) There was no reason sufficient to justify removal i.e. having regard to the test to be applied, there was no risk to the child's safety that required immediate separation;

ii) Removal was disproportionate having regard to:

- a) the nature and extent of the harm described by the judge
- b) the harm that would likely be caused to the child by the removal
- c) less draconian steps including the enforcement of contact and/or interim care, supervision or family assistance orders which could have been used as an alternative and which would have permitted the child to remain in the care of her mother;
- iii) The child's welfare was being safeguarded by the mother who had met her needs and provided better than good enough care throughout her life and the judge failed to analyse that by reference to the welfare checklist in section 1(3) CA 1989;
- iv) The mother was not permitted to pursue alternative carers or the assessment of carers before the step of removal was taken;
- v) The mother had no effective notice of the judge's intention to remove her child into foster care.

8. It is convenient to take the last two propositions first because the whole context of the decision making process needs to be analysed if one is to understand what happened on the day the order was made. At the time the fact finding hearing was being case managed by Judge Cardinal on 21 June 2013 the judge indicated to the parties in the presence of the mother that if it were subsequently to be established that the mother was leading the child to make false allegations against her father, the court would consider making a residence order in favour of the father. At that stage, the judge had identified as a key issue the nature and extent of the harm that was being or would be caused to the child if the mother's allegations were false and had rightly, in my judgment, identified one of the potentially serious consequences, namely removal of the child and a change of residence away from the child's primary carer.

9. On 16 July 2013 at a hearing when mother was again present and assisted by an experienced McKenzie friend, Ms Haines, Judge Cardinal repeated his concerns to both parents: the consequences for each parent of the allegations being determined to be true or false were patent. On 18 October 2013 in the presence of Ms Haines, the judge explained to the mother that if he rejected her allegations he would have to very carefully consider the child's future.

10. On the morning of 28 October 2013 before the fact finding hearing in question began, Judge Cardinal addressed all the advocates and Ms Haines. Entirely properly and to enable the parties to think about their positions, the judge indicated that if the mother's allegations against the father were subsequently proved, he would have to consider exercising his powers to make a section 37 direction and an interim supervision order because the threshold for intervention would be met and the child would need protective assistance. He also dealt with the converse position. He explained that if the allegations were found to be false (a necessary and logical position on the facts of this case if they were not proved) he would have to consider exercising his powers to make an interim care order on the basis he would approve the removal of the child from the mother's care. These observations were repeated by the judge more than once during the fact finding hearing.

11. The fact finding hearing was adjourned on 31 October 2013 at the conclusion of the oral evidence. The judge directed the parties to file written closing submissions by 10.00 am on 6 November 2013 in preparation for the resumed hearing on 11 November 2013. The judge directed the local authority as the recipient of his section 37 direction to attend court on 11 November

2013. In order to assist the mother, who did not have a legal representative, the judge identified specific questions for the mother to answer in her written submissions. The questions related to what orders he should make specifically including the options of interim care or supervision orders and residence and contact orders. The mother understood the judge's intentions at least to the extent that she faithfully replicated his questions in her written submissions.

12. The mother did not answer the questions posed by the judge in her written submissions but as respects the notice she had of the judge's powers and his realistic options, it is quite clear that she had days not hours or minutes to consider her position. Indeed, as to the key question about the removal of her daughter, she had more than 4 months notice and repeated reminders of the stark position that faced everyone if her allegations were found to be false.

13. As the judge records at [56] of his judgment, the mother's closing submissions were received and considered after the deadline he set. There were in fact four sets of closing submissions from her, the last of which was received on 11 November 2013 which was the resumed final hearing day. By that time the mother would have been aware of the written submissions of the other parties specifically dealing with removal and inviting the court to take that step. The father asked the court to remove his daughter from the mother's care and the children's guardian recommended and reasoned the precise order made by the judge. The guardian also dealt with the difficult position that would arise if the judge decided that the mother's allegations were false and that she had involved the child in her allegations to the extent that on removal the child would not immediately be able to go to live with her father.

14. At [30] and [31] of his judgment the judge records the following:

"[30] At the outset of proceedings I warned both parents of the serious consequences of pursuing this fact finding exercise. Were the allegations now make [sic] of sexual abuse true, then the court would be finding [the child] had been abused twice over, both by the grandfather and, later, by father. It would almost certainly mean, given [the child's] distress, the need for a section 37 report, and probably an interim supervision order, and very careful evaluation of the need to protect, of a risk assessment, and the need to manage, with care, a deeply damaged little girl.

[31] Were the allegations untrue, then mother would be guilty of feeding her with untruthful stories, of an obsessive nature, about sexual abuse. Again, I would almost certainly be directing a section 37 report and making an interim care order, as [the child] would then need speedy removal from an abusive home."

15. Once the judgment had been handed down the judge gave the parties the opportunity to reflect on his conclusions and have discussions including with the local authority who were present in accordance with his earlier direction. Counsel recollect that there was a period from about 12.30 pm to 2.15 pm during which the mother asked the local authority to consider placement of her daughter with the mother's sister. The local authority would not accept that proposal without an assessment for reasons that are understandable having regard to the content of the judgment. That decision was not at that stage a matter for them but rather for the court and it is of note that from about 2.15 pm to about 3.00 pm the mother was given and used an opportunity to make further oral submissions to the judge about her proposals and the orders that the court could make.

16. Given the judge's record and that of all counsel in the case and for the reasons set out above, I cannot accept that the mother would have been in any doubt about what the judge was able to do

and indeed what he proposed to do if the facts were found against the mother and absent any submissions as to other alternatives. The mother had every opportunity which she used to make proposals about placement including her sister and other members of the family. During oral submissions to this court and for the first time both without written warning or earlier complaint, the mother instructed her counsel to the effect that she had not had notice of the other parties written submissions because she had had computer difficulties and had not been able to open their documents. The process that I have described and the manner in which this complaint is disclosed to this court make it inherently unlikely but even if it is correct, there is ample other material to remain of the firm view that there was no procedural irregularity. This element of the ground of appeal is without merit and is not the case that was put to the single judge when he granted permission. There was no procedural irregularity or unfairness.

17. Turning then to the implications of the findings of fact that the judge made. It should be noted that it is no part of this appeal that the judge applied an inappropriate test to the question of removal. That test was set out in *Re LA (Care: Chronic Neglect)* [2010] 1 FLR 80 at [7] by Thorpe LJ:

"separation is only to be ordered if the child's safety demands immediate separation [...] at an interim stage the removal of children from their parents is not to be sanctioned unless the child's safety requires interim protection"

18. Safety is given a broad construction and includes the child's emotional and psychological welfare (see, for example, *Re B (Care Proceedings: Interim Care Order)* [2010] 1 FLR 1211 at [56]).

19. The question is whether the test was wrongly applied to the facts. The judge rejected the mother's allegations that the father had been involved in or was aware of the sexual abuse of the grandfather or had himself acted in a sexually inappropriate manner. The judge made extensive findings about the inappropriate conduct of the mother which I have summarised by using the analysis that the judge himself constructed at the end of his judgment. The mother's conduct, even if explicable as a consequence of a psychological or behavioural condition, was inexcusable and highly damaging to the child. The judge's finding that the mother was "bent on manipulation and encouraging false allegations" was a finding of huge adverse significance in relation to her capability to care for her child. The child had been encouraged by the mother to make allegations against her father despite the child's own delight in seeing her father in the process of which she had obtained an unhealthy knowledge of sexual issues. On any basis, the risk of further significant harm to the child had to be addressed by the court. Given the prevalence of false allegations made by parents against each other in private law proceedings, conduct at this level by a parent should be understood to be serious child abuse that will usually necessitate intervention by a court.

20. Given that context, the judge was required to consider his child protection duties and powers. The only question that realistically arises on this appeal is whether he exercised them proportionately. There can be no question that the court's jurisdiction to make orders under sections 37 and 38 CA 1989 was engaged on the facts of this case. The interim threshold for the making of an interim care order was clearly satisfied and there was jurisdiction to make that order. The test for removal was clearly satisfied on the facts as found and that only leaves the question of whether there was a less draconian, i.e. more proportionate order that the judge could and should have considered.

21. I ask the question rhetorically: given the court's findings, how could the judge leave the child with the mother? No level of sufficient support and necessary protection was described by anyone.

To leave the child without protection would have been unconscionable. One has only to consider physical abuse to a child that gives rise to a similar index of harm to understand that such a position was untenable. The submission made on behalf of the mother that her care of the child had in all (other) respects been good or even better than good simply misses the point. More than that level of care was needed to protect this child from her own mother. Each of the alternative orders described to this court would have left the child in that care without any better ability to protect the child than there had been hitherto. The situation might have been different if there could have been effective policing of that care in the interim and before other assessments were conducted but that was not an option addressed to the judge or to this court. I bear in mind that the family court sometimes hears cogent evidence of particular harm that may be caused on the removal of a child from the care of a parent which the court must consider and balance in the welfare analysis and proportionality evaluation, but that was not this case.

22. The distress that had been engendered in the child, as advised by the children's guardian, sadly made an immediate move to the father impossible. No other relative was immediately available without assessment of the position that relative would take in the highly antagonistic and dysfunctional family relationships that existed (for example, to consider the effect on the maternal family of the mother's discussions with them that the father was a paedophile). That included the mother's sister who is now being assessed by the local authority. The only realistic option that remained in this case was the neutral position of short term foster care.

23. The judge described his decision as proportionate at [264] and in accordance with the child's welfare having regard to the 'welfare checklist' in section 1(3) CA 1989. He specifically envisaged a short period of respite care while the local authority explored the possibility of placing the child with her father and/or the obtaining of therapeutic assistance for the mother. Given the need for an assessment of the child's aunt (who has not challenged the interim conclusion of the judge), there was no immediately available realistic option for the court other than removal.

24. Leading counsel for the father has taken the court through the judgment, identifying the specific points at which the judge came to value judgments about the welfare factors in section 1(3) CA 1989 based on the facts that he found. None of those conclusions is seriously challenged in this appeal and it is not necessary for this court to set them out seriatim. The judge analysed his conclusions by reference to more than 40 written submissions made by the mother. The judge did not specifically address the child's wishes and feelings in his analysis but he had set out in detail what it was that the child had been influenced to say. It is hardly surprising that there was little more that he could add given the context in which he had to make his decision. It may well have been harmful to ask the child anything else at that stage. Likewise, the judge made ample reference to the situation the child was in and focussed on the unacceptability of its continuation. To that extent the effect of the proposed change of circumstance for the child was regarded as positive and no party other than the mother disputed that.

25. Given that a decision by a court to remove a child into public care, whether in public or private law children proceedings engages article 8 of the ECHR, a welfare analysis and proportionality evaluation are necessary. In any case where there is more than one realistic option it will be necessary for the judge to summarise his conclusions in what is now a conventional balance sheet approach i.e. where there is a choice to be made between two or more realistic options, an analysis of each option by reference to the welfare checklist is required so as to afford paramount consideration to the child's welfare. The court is then required to evaluate the proportionality of its

proposed intervention (and / or that of the local authority) by conducting a balancing exercise in which each of the available options is evaluated by considering the positives and negatives, or the benefits and detriments, of each option side by side. An adequately reasoned judgment must deal with the reasonably available options and give them proper and focussed attention.

26. That was not this case. There were no other realistic options i.e. options that were reasonably available to the court and no more proportionate interference than that contemplated by the judge. Given the stark facts, no further analysis was necessary.

27. For the reasons set out above, I would dismiss this appeal. The care proceedings will continue and within those proceedings the court will be able to consider assessments of the reasonably available welfare options for the child.

**Lord Justice Underhill**

28. I agree.

**Lord Justice Laws**

29. I also agree.