Neutral Citation Number: [2010] EWCA Civ 871

Case No: B4/2010/1533 and 1488

COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Mr Recorder Pulman Q.C.
sitting at Chelmsford County Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2010

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE RICHARDS
and
LADY JUSTICE BLACK

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Between :

A Local Authority	**Appellant**
- and -	
K A B	**First Respondent**
and	
M B	**Second Respondent**
and	
GR , R, C and G (by their Children's Guardian)	**Third, fourth, fifth and sixth Respondents**

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Miss Sarah Dines (instructed by the Local Authority Legal Services) for the Appellant
Mr Robin Powell (instructed by Garrods Solicitors) for the First Respondent
Ms Diana Cade (instructed by Budd, Martin Burrett Solicitors) for the Second Respondent
Ms Jane Drew (instructed by Smith Law Partnership) for the Third, Fourth, Fifth and Sixth Respondents

Hearing dates : 15th July 2010

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JUDGMENT

Lady Justice Black :

1. On 7 June 2010, Mr Recorder Pulman QC, sitting in the Chelmsford County Court, gave judgment in relation to applications by the appellant local authority for interim care orders in respect of four children. The children are all children of Mrs B, whom I will call the mother. The older two are boys, GR and R. They were born on 26 May 1994 and 17 July 1995 and are therefore 16 and nearly 15 years old. The next in age is a girl, C, who was born on 25 July 1997 and is nearly 13. The youngest, G, was born on 14 February 2005 and is 5. The father of the younger two children is Mr B. He is not, in fact, the father of the older two boys, but as these proceedings focus upon his two children, I will refer to him as the father without further qualification.

2. The Recorder granted interim care orders in relation to the older two boys; there is no appeal in relation to those orders. However, the Recorder refused to grant interim care orders in relation to the younger two children and the local authority seeks to appeal against that refusal.

3. The local authority correctly sought permission to appeal from the Recorder, at the end of the hearing before him. He refused permission but he did grant interim care orders for seven days in order to allow the local authority time to approach the Court of Appeal. In due course, these temporary interim care orders were extended, on the local authority's application, until 18 June 2010 because the local authority had not yet commenced an appeal. By 18 June 2010, that was still the position, although grounds of appeal had been drafted. That morning, the local authority sought a further extension of the temporary interim orders. The Circuit Judge to whom that application was made extended

the orders only until 4 p.m. that day which allowed the local authority sufficient time to contact the Court of Appeal with a view to having the orders extended further pending an appeal.

4. On the afternoon of Friday, 18 June 2010, I was asked to order such an extension as a matter of urgency. Counsel all attended in person. That rather unusual course was taken because, by the time I was contacted, they were all on their way to the Royal Courts of Justice from the morning's hearing in the county court and it looked as if it would be the speediest way in which to determine whether the children should remain with foster carers for the time being or not. The only note of the Recorder's judgment, at that stage, was the note taken by counsel for the local authority. A transcript of the judgment had been requested but was not yet available and, indeed, never did become available because the tape turned out to be defective. Counsel's note of judgment was not entirely agreed by the other parties that afternoon, nor was her note of the evidence of the guardian which was possibly significant to the proposed appeal. In these circumstances, and in the light of the need to consider the matter rather more fully before deciding on the arrangements for the children's immediate future, I extended the interim orders until I could consider the local authority's application for permission to appeal on the papers with the benefit of an agreed note of the judgment and of the guardian's evidence. The following week, these issues having been attended to, I ordered an oral hearing to determine the local authority's application for permission to appeal, with the appeal to follow if permission was granted, and I ordered that the children were not to be removed from their foster home in the meanwhile.

5. There has been long standing social work involvement with the mother and her children, dating back to the mid 1990s when the family consisted of the mother, the father, the mother's eldest child, GM, GR and R. The papers before the Recorder included a 46 page chronology, covering the period from May 1996 to February 2010. It details neglect, emotional abuse, and incidents of alleged physical abuse. Repeatedly, social services responded to allegations of various types from various sources, including the children themselves, and each time closed the case in due course. On three occasions the children were taken into foster care for relatively short periods with the parents' agreement; the last of these periods in foster care ended in 2005.

6. Included in the chronology is an entry for 7 July 1999 recording that the father was given a police caution for assault occasioning actual bodily harm on GM, then aged 9. The formal record of the caution is not available so it is difficult to form a secure view of what happened, but the chronology suggests that the incident in question occurred in June 1999, when a neighbour called the police after seeing the father dragging GM along the pavement by her arms; GM had bruises on her legs and two very small scratch marks on her arm.

7. The present care proceedings, which were begun at the end of March 2010, are the first proceedings taken by the local authority. The catalyst was an incident on 18 February 2010. Prior to that, the case had most recently been closed by the local authority on Christmas Eve 2009.

8. A home visit had been made by social services on 10 February 2010 in response to diverse concerns from the children's schools; those visiting concluded that the home environment was unacceptable in hygiene terms. The

next entry in the chronology related to 18 February 2010. That day, GR and R ran away from home to the nearby house of a teacher and alleged that the father had assaulted them. They were taken into police protection and placed with their maternal grandparents, where they were seen by a social worker. They said that there had been an argument between the mother and the father. They said the father was intoxicated and that he assaulted the mother. They said that G threw a candle at the father who lost his temper and hit both of the older boys on the arms and the side of the body. They also said that the father grabbed G by the hair and pushed his head into the sofa and that he kicked C.

9. When the social worker visited the parents to discuss these allegations the same day, the parents said that they were not true, that there had been no altercations and that the children had run off because they were unable to play out that evening with friends. C and G were seen. C was unwilling to engage with the social worker, becoming upset when asked about the incident the night before. Both she and G were taken into police protection and placed in separate foster placements.

10. Within a matter of days, the older boys were also moved to foster care, the parents not wanting them to remain with the grandparents.

11. Initially, the parents gave their agreement for all four children to be accommodated by the local authority under section 20 Children Act 1989 but they withdrew this towards the end of March which led the local authority to commence care proceedings because it was considered inappropriate for the children to return home.

12. The interim care hearing began on 19 April 2010. The children's guardian was only appointed on 16 April 2010 so she had very little time to investigate before it commenced. However, the hearing was extended over 7 days at intervals up until 7 June 2010 when the Recorder gave judgment, and the guardian continued her enquiries over this period. She provided a written report entitled "Initial Analysis and Recommendations" dated 30 April 2010. At this stage she had met the parents and all of the children, as well as other important people in the children's lives, such as teachers and foster parents. GR and R had confirmed their accounts of 18 February 2010 to her and said that they did not want to go home because they were concerned that there would be the same problems.

13. The guardian saw the older boys again after writing her report. As she told the Recorder in her oral evidence, R maintained his account of what happened on 18 February but GR's account changed. He denied that there had been violence on the day they left home and said that they left when their parents refused to let them go out to see a friend.

14. Over the seven days of the hearing, the Recorder heard a surprising amount of oral evidence for an interim hearing. As well as hearing from the local authority, the parents and the guardian, the evidence he heard included evidence from a witness for the parents, Mr Helps, who was present on the evening of 18 February and supported the parents' account of events, and from someone from the school attended by R and C, who we are told gave evidence for a whole day.

15. The Recorder began his judgment by announcing his conclusion that there should not be interim care orders in relation to C and G and briefly summarising the reasons for it, which are recorded in this way in counsel's note:

> "Their safety does not require the immediate separation – at a final hearing a different decision may be made as different considerations apply. This hearing took an unusual course with substantial evidence being heard over 7 days because there are differences in the case between firstly GR and R and secondly C and G which were not identified as clearly as they should have been and the legal test for an interim care order was not properly applied."

16. In the body of his judgment, the Recorder amplified the differences that he considered there were between the positions of the older two children and the younger two.

17. Of the older two, he said:

> "The local authority is justified in taking the 2 older boys into care. They were likely to suffer significant harm due to the care given to them by the parents. I rely on the observations in the chronology and their fear of going home."

18. Of the younger two, he said:

> "The position is different regarding the 2 younger children. I am not satisfied they are suffering harm. They had suffered some harm but on the date the harm cannot be described as significant. There is some evidence they were likely to suffer some harm, but not such as made an interim care order appropriate."

19. A little later in his judgment, he returned to the question of harm in more detail in relation to each of the children separately. Of GR, he said:

> "There are reasonable grounds to believe he could be at some risk of physical harm from [the father]. I expressly observe that I have made no finding of violence by [the father] against GR.

> Neither [the father] nor [the mother] are able to properly discipline him. He is also at risk of emotional harm and he does not want to return home. Forcing him to go home with his additional problems would be likely to cause him emotional harm. There are extensive references in the social work chronology of the inadequacies of the parents in looking after him. I rely on these. "

20. Of R, the Recorder said:

> "I find there are reasonable grounds to believe his educational and physical needs are not met at home. Running away is evidence of that. A change now in circumstances would be a backward step for R. Whether his fear of returning is justified I do not know. His age, sex etc. does not add to this. There are reasonable grounds to believe that he may be at risk of physical and emotional harm if placed with his parents. He has expressed a fear. His parents have failed to permit him to thrive. The emotional harm is his parents not being able to deal with him is evidenced in the chronology and in his improvements whilst he has been in care. His parents are not capable of meeting his needs. I make no observations on the allegation of violence by [the father] on R for the same reasons as for GR."

21. The Recorder also observed, in a passage dealing with the guardian's evidence but apparently expressing his own view:

> "The older children are different. There is a risk of violence in the family home."

22. Later, finding that the threshold was made out in relation to the older two boys, he said:

> "Given the fragile state of GR and his special needs, if returned home he would run away. He would be likely to flee. He was at this time unable to look after himself. He would have been at immediate risk. In relation to R, for the same reasons, and for him the danger is compounded. He would be worried about being sent home. He is younger and less able to look after himself. He would be likely to be separated from GR. He would have an even greater difficulty in surviving on his own."

23. In relation to C, the Recorder observed that she would be "emotionally upset if she does not return [home] but that could be dealt with by the foster carer". He then said:

> "If she does return I do not consider she will suffer emotional or physical harm. Her parents will meet her needs and get her to school if she says she does not want to go. I do not consider, in relation to the welfare check list, that her age, sex and background and any other characteristics, adds anything here. She will not suffer physical and emotional harm and is not at risk of violence. Now she has learned about physical care she will be clean and tidy. Her parents are likely to keep her clean and tidy and get her to school. I am not able to say the consistent failure of her parents to get her to school means that her safety requires separation. This is a matter for the final hearing."

24. He reiterated later (albeit recognising that the parents' care of C had been very poor, for example her school attendance being bad and her hair matted):

> "I do not consider that C's safety requires immediate separation. That may not be so at the final hearing. There is no risk to her immediate safety.....Being dirty and unkempt is not a safety issue. Educational harm is not immediate."

25. In relation to G, he recorded that G wanted to live at home but was content and thriving in foster care. He said:

> "His emotional and physical needs were only just being met by his parents. The matters complained of do not come within "immediate risk of safety". There is no immediate risk to his safety. It is said his head was pushed against a sofa. It is what GR said. I find this thin, weak and unconvincing.
>
> In relation to the welfare checklist, I find his age, sex, background and any characteristics of his which the court considers relevant, is not material. Without GR and R at home the situation will be different. I am not able to say the catalogue of findings is not relevant at the final hearing, but they are not so weighty as to justify immediate removal now. The risk of poor parenting is not such that his safety is immediately at risk.
>
> I have to be satisfied that there are reasonable grounds to believe he is suffering significant harm. There is a catalogue of

> failure which is relevant to the final hearing. There is not enough weight for removal now. This is the latest of a long saga of incidents properly relied upon by the local authority."

26. Later in relation to G, he recognised that he had not been well looked after by the parents but said:

> "He is perceived to be at risk of violence. There was an incident with his head on the sofa but I find the evidence unreliable. There are no injuries. I am not able to find an immediate risk to his safety of that there continues to be."

27. At the end of the judgment, counsel for the local authority asked him if he would expand his reasons for differing from the recommendations of the guardian, which had been that interim care orders were required in relation to all four children. I will revert to this aspect of the Recorder's decision later. During the lunch adjournment, however, there were discussions between counsel for all parties and it was agreed that the Recorder should, in fact, be asked to address three additional matters as well. A list of points was drawn up and submitted to the Recorder after lunch and he retired to consider them, then expanded on his original judgment. The three extra points, which all related to the s 38 threshold for an interim care order and the issue of harm to the younger two children, were:

> "1. Has the Court applied the interim threshold test set out at Section 38 of the Children Act 1989 in respect of each child?
>
> 2. The Court must decide whether or not the interim threshold is met in respect of each child.
>
> 3. Has the Court considered emotional safety in respect of C and G as well as physical safety?"

28. In response to these points, the Recorder indicated that he found the interim threshold met in relation to each child and that that was on the basis that there

were reasonable grounds for believing that the circumstances were made out. He added that

> "In respect of harm suffered by C, this was significant harm. So too with G."

29. As for emotional safety, in relation to C he appears to express the view that there is no immediate danger of harm. This view comes wrapped up in a reference to the guardian's evidence, in a passage in which the Recorder may also be expressing the view that the emotional issues are not sufficient to cross the threshold, though it is difficult to be clear from the note of judgment whether this is a comment about emotional harm generally or merely emotional harm from domestic violence. What he is noted as saying is:

> "She [the guardian] does not make reference to emotional safety such that there is a risk of immediate danger or harm. The consistent complaint is that it is a drip-feed, a continuing lack of care by each of the parents, partly physical and partly emotional. Physical failure impacts on emotional impact. When the guardian referred to domestic violence there is no mention of emotional abuse. Domestic violence can be an emotional disadvantage. It does not get to the state it is so poor here that it is above the threshold. "

30. The Recorder says that he applies "the same consideration" with regard to G. He remarks on G's particularly disgusting language and threats of violence which are beyond what might be expected of a child of his age but expresses the view that he is not in emotional danger to such an extent that he should not be returned to his parents' care. He refers to the evidence of neglectful abuse, which he does not equate with emotional abuse and he concludes, in relation to G:

> "Taken at its highest, I do not consider it high enough to meet the test I have to apply today."

The test for an interim care order

31. The local authority's Notice of Appeal does not include, as a ground of appeal, that the Recorder erred in the test that he applied in determining whether to grant an interim care order. The grounds of appeal relate to the failure of the Recorder to have regard to the evidence of the guardian and to give proper reasons for not following her recommendation, his failure to take account of the whole of the social work chronology and to have regard to particular features of the home circumstances and the approach of the parents, and his failure to justify the view he took that C and G would not be at risk if returned home.

32. In their skeleton argument for the appeal, the local authority submit that the Recorder was unclear, when giving judgment, as to the legal tests. The guardian's skeleton argument takes a similar approach. It seemed from oral argument that the criticism of the Recorder was that he wrongly interpreted the authorities as requiring immediate risk to physical safety before an interim care order could be made, thus failing to take emotional risks into account. In reality, however, the law was not the focus of the appeal, as it was presented orally. The focus was very much more on the Recorder's approach to the particular circumstances of the family and his conclusions about the nature and extent of the risk to the younger children in the parents' care.

33. It may nevertheless be of assistance to look briefly at the proper approach to the granting of interim care orders. It is trite law that the question must be approached in two stages. The first stage is encapsulated in s 38(2) Children

Act 1989 and is sometimes referred to as the threshold for an interim care order. S 38(2) provides:

> "(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 circumstances with respect to the child are as mentioned in section 31(2)."

34. S 31(2) provides:

> "(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."

35. If the court is satisfied as required by s 38(2), it must then go on to consider, as a discrete issue, whether or not to grant an interim care order. This is a question with respect to the upbringing of the child, so, in accordance with s 1 Children Act 1989, the child's welfare is the court's paramount consideration. The delay principle (s 1(2)) applies, as does the no order principle in s 1(5). As the court is considering whether to make a Part IV order, it is also to have regard to the welfare checklist set out in s 1(3). There are existing authorities in relation to interim care orders which serve as a guide as to how to approach this second stage of the court's determination, the purpose of which is, of course, to establish a holding position pending a full hearing.

36. In Re H (a child)(interim care order) [2002] EWCA Civ 1932, Thorpe LJ said:

> "38. … Above all it seems to me important to recognise the purpose and the bounds of an interim hearing. There can be no doubt that a full and profound trial of the local authority's concerns is absolutely essential. But the interim hearing could not be allowed to usurp or substitute for that trial. It had to be properly confined to control the immediate interim before the court could find room for the essential trial.
>
> 39. …..In my judgment, the arts 6 and 8 rights of the parents required the judge to abstain from premature determination of their case for the future beyond the final fixture, unless the welfare of the child demanded it. In effect, since removal from these lifelong parents to foster parents would be deeply traumatic for the child, and of course open to further upset should the parents' case ultimately succeed, that separation was only to be contemplated if B's safety demanded immediate separation."

37. In Re M (ICO: Removal) [2005] EWCA Civ 1594, Thorpe LJ referred, in the final paragraph of his judgment, to "the very high standards that must be established to justify the continuing removal of a child from home" as well as to the need to weigh in the balance the potential risk to the child of extended separation from their parents.

38. In Re K and H [2006] EWCA Civ 1898, Thorpe LJ said:

> "16. Decisions in this court emphasised that at an interim stage the removal of children from their parents is not to be sanctioned unless the child's safety requires interim protection."

39. In Re L-A [2009] EWCA Civ 822, influenced by the decision of Ryder J in Re L (Care Proceedings: Removal of Child) [2008] 1 FLR 575 which he considered to have altered the law, the trial judge had not made an interim care order when it appears he might otherwise have been inclined to do so. The reference in Ryder J's judgment in Re L which had influenced him was to "an imminent risk of really serious harm i.e. whether the risk to ML's safety demands immediate separation". On appeal, it was common ground that Ryder

J had not intended to alter the approach set out in the three Court of Appeal cases to which I have referred already. Thorpe LJ took the opportunity to restate the principles established by those authorities. From paragraphs 38 and 39 of Re H, he extracted two propositions:

> "that the decision taken by the court on an interim care order application must necessarily be limited to issues that cannot await the fixture and must not extend to issues that are being prepared for determination at that fixture"
>
> and
>
> "that separation is only to be ordered if the child's safety demands immediate separation."

The important point from Re M was the very high standard which a local authority must meet in seeking to justify the continuing removal of a child from home. As to Re K and H, he identified the key paragraph as paragraph 16 providing that interim removal is "not to be sanctioned unless the child's safety requires interim protection."

40. There could be no doubt, therefore, following Re L-A, that it was to the traditional formulation in the Court of Appeal authorities that courts and practitioners should turn, not to Ryder J's phraseology.

41. The most recent case to which I would refer is Re B and KB [2009] EWCA 1254 in which the appeal was against the dismissal of the local authority's application for an interim care order. The trial judge had given himself what was described as an "immaculate self-direction" in these terms:

> "whether the continued removal of KB from the care of her parents is proportionate to the risk of harm to which she will be exposed if she is allowed to return to her parents' care".

However, Wall LJ, with whom Thorpe LJ agreed, was persuaded that the judge had failed to go on properly to conduct the required balancing exercise. He said:

> "56. Speaking for myself, I find L-A helpful. I agree with the judge that the section 38 criteria were plainly met in relation to both children, but it is equally clear to me that KB's welfare did demand her immediate removal from her parents' care and that there was abundant material (not least the views of the police) which warranted that course of action. In my judgment, KB's safety, using that word in a broad sense to include her psychological welfare, did require interim protection."

42. It may do no harm to invite particular attention to Wall LJ's definition of "safety" in this passage in Re B and KB. The concept of a child's safety, as referred to in the authorities which I have cited, is not confined to his or her physical safety and includes also his or her emotional safety or, as Wall LJ put it, psychological welfare. Indeed, it may be helpful to remember that the paramount consideration in the court's decision as to whether to grant an interim care order is the child's welfare, as section 1 Children Act 1989 requires, and as Wall LJ shows when he says that in his view "KB's welfare did demand her immediate removal from her parents' care".

43. The Recorder correctly took the view, as he said at the outset of his judgment, that the test he had to apply was that set out by Wall LJ in Re B and KB and he referred to paragraph 55 of that decision in which Wall LJ had quoted Thorpe LJ's restatement of the principles in Re L-A. In my view, a complete reading of his judgment shows that he took into account not only physical risk to C and G but also emotional risk and was conscious that an interim care order could, in a proper case, be required to protect a child's psychological safety/welfare, not just his or her physical safety. There are references

throughout the judgment to aspects of harm and risk which are not associated with physical safety, whether neglect and emotional harm/risk or (in the case of C) educational harm flowing from a failure to attend school. Examples of this are contained in the passages from the judgment that I have set out above. His view was that these emotional and educational issues were not sufficient to require the separation of the two younger children from the parents by way of interim protection. This was a view that was open to him, not least in the light of the fact that the local authority had not intervened over issues such as this over many years and, it would seem, were only ultimately provoked to take care proceedings by the physical risk which they considered to have been revealed by the events of 18 February 2010.

Physical harm

44. The Recorder was, of course, obliged to consider the case as a whole, rather than examining physical and emotional risk separately, and it is clear that he did this and that his view of whether the emotional and educational issues were sufficient to require an interim care order was conditioned by his view of the question of physical risk. He had concluded that there was no immediate risk to the physical safety of either G or C. He rightly recognised that physical risk was dependent, to a significant degree, upon the events of 18 February 2010 and what the older boys had said had happened on that day. All the advocates had agreed that it would be inappropriate for him to make findings of fact at the interim stage; it would have been quite exceptional if they had advocated any other approach. An interim hearing presents a judge with a challenge which is, in some ways, more difficult than the challenge of a final

hearing. The trial judge will have the benefit of all the material about the family that can be gathered together and will have the advantage of seeing the evidence tested in full cross-examination whereas, at the interim stage, the judge can only bring a critical eye to bear on the case so far, on the alert for glaring contradictions, frank impossibility in what is described or anything else which ought to give rise to real doubts in relation to the cogency of the material.

45. The Recorder was doubtful about whether reliance could be placed on what the older boys had said on 18 February 2010 and thereafter. He expressly did not make findings of violence by the father against them. He described the evidence that G's head was pushed against the sofa as "thin, weak and unconvincing". He did not deal expressly with the allegation that C had been kicked but, in the light of his general approach to the accounts given by R and GR and his conclusion that she would not suffer physical harm if returned home, he must have reached a similar view about that.

46. The local authority and the guardian submit that the Recorder's approach to the question of physical harm was flawed and that he failed to give sufficient weight to the accounts of the older two boys on and after 18 February 2010.

47. They both criticise his approach to the material in the social work chronology, in my view with justification. The Recorder was asked, very late in the day, to exclude the chronology from evidence. He quite rightly refused to do that. It was a very important document and there was no basis on which it should have been excluded. However the Recorder did decide that events before 2000 were not relevant because they took place too long ago. This was mistaken. It

is important for the court to have the full picture of the history. The judge needs to be aware of how long problems have endured for, when things first went wrong, whether there is a pattern to the difficulties and so on. This information is only available from a full chronology. Any cut off date is artificial and, in this case, the cut off date chosen by the Recorder excluded an important feature of the case which, albeit a long time ago, was relevant to the issue of the father's conduct towards the children and the credibility of the two older boys, namely the caution which the father accepted in June 1999 for the assault on GM. The importance of that was, it seems to me, that the caution could not have been given had the father not admitted the assault whereas the parents' approach at the time of the interim care hearing was a denial of any problems. This established assault by the father could, arguably, have been relevant in assessing the credibility of later allegations about his conduct, subject, of course, to proper consideration of the weight that could be attached to it.

48. However, the Recorder's approach to the pre-2000 material in the chronology, and his omission therefore of the 1999 caution, has to be seen in the context of the whole case. Objection to the chronology was not taken until a point during the guardian's evidence at the end of the case. By then, the local authority had, in fact, been allowed to cross-examine the witnesses on all the matters from it that they considered to be relevant. Furthermore, the period of the history which the Recorder did take into account was a very long one with many ups and downs, and the incident that led to the caution was over a decade earlier and in relation to a different child, albeit that the guardian had drawn parallels in her evidence between GM and C. The Recorder had the benefit of closing

submissions from counsel for the local authority, Miss Dines, which collected the chronology entries together under a large number of themed headings, one of the categories being entitled "Allegations of violence on the children perpetrated by [the father/the mother]". The Recorder indicated that Miss Dines' submission was to be read into the judgment from 2000. Merely reciting the history does not, of course, mean that it has been taken into account, but in this case, it is clear from the rest of the judgment that it has. At page 11 in the note of judgment, for instance, the Recorder identifies that there is a long catalogue of failure and remarks that "this is the latest of a long saga of incidents properly relied upon by the local authority", and he says that he adopts the headings from Miss Dines' submissions. Other passages deal with specifics arising from the chronology, for example the incidents when the father was said to have been violent and alcohol was mentioned.

49. The local authority and the guardian criticise the Recorder for his approach to the allegations of violence made in February 2010 by the older boys. It is material to note that the local authority's Grounds of Appeal do not contain any ground directed to this point. It emerges in the local authority's skeleton argument as an argument that the Recorder failed to keep an open mind with regard to the history of allegations of violence and effectively made a finding that the boys were telling untruths, which then influenced his approach to the whole case so that he shut his eyes to the underlying feature of violence in the history of the family. The local authority and the guardian complain that he dealt fully with the factors that suggested that the boys' accounts were unreliable but did not deal with the factors that suggested that they should be believed, thus failing to carry out a balanced evaluation of the evidence.

50. Part of the material which it is submitted the Recorder failed to take into account was the history of allegations of violence towards the children which it is suggested he minimised. I have already set out why I do not think it can be said that the Recorder ignored the history, nor do I think it can be concluded that he minimised it. Incorporated in the chronology, and also isolated under the headings in Miss Dines' closing submissions to the Recorder, which he adopted, were not only allegations of violence towards the children but also domestic violence incidents. That aspect of the history was not ignored by the Recorder either.

51. The local authority argue that the only possible conclusion for the Recorder, had he evaluated the evidence correctly, was that there was a risk of physical harm to the younger two children and that that risk, taken together with the overall picture of the situation in the family, dictated that the only outcome of the case was an interim care order in relation to each of the younger two children. They invite us, in the circumstances, to set aside the Recorder's decision and substitute interim care orders ourselves.

52. The guardian supports this argument of the local authority's. She appeared also to be advancing the rather less radical alternative submission that the Recorder had failed to carry out the necessary balancing exercise and therefore to exercise his discretion reliably because he had failed to evaluate the risk of physical harm to the children properly or to give it any or any proper weight. However, I think it is fair to say that this was not the real thrust of her argument, as she too invited us to allow the appeal and to make interim care orders and did not contemplate that the matter might need to be remitted for

rehearing, which, in a case where so much oral evidence was heard by the judge, is a course that would have to be given very serious consideration if more than one conclusion was open to the first instance court.

53. There is some force in the submission that the judgment does not spell out as clearly as it might have done the factors that could lend support to the view that the older boy's allegations were true. However, it is not fair to say that it includes nothing which might tend to indicate veracity. The Recorder records the account given by GR, later withdrawn, and he further records that R had maintained the same story he first gave in February and had complained that quite often the father had been violent to him. He records the guardian's evidence about what R said to her in relation to his fears about himself or C going home and the great strength of feeling with which he reacted. It is also noteworthy that the Recorder did, in fact, accept that there were reasonable grounds to believe that GR and R could be at risk of physical harm from Mr B and/or if living with their parents which suggests that he had not simply dismissed their allegations as without foundation.

54. He was entitled to express doubts about the allegations, however, because there were indeed significant factors which undermined their credibility. He would equally have been criticised had he ignored the recent examples of the boys telling untruths (he lists five examples of this). He also had to bear in mind the intellectual limitations of the boys and their possible reasons for making false allegations about the father, as well as GR's retraction. He had to give consideration to the evidence of Mr Helps, who he had seen in the witness box, which supported the parents' account rather than the boys'. He

was right to take into account that the allegations of violence had tended to be linked with allegations that Mr B had been drinking whereas other evidence did not support this. He records that on one occasion the police returned the boys and the father showed no sign of having consumed alcohol. When we enquired during the oral hearing, we were also told that despite unannounced visits to the family home, no evidence of alcohol had ever been found.

55. The care and anxiety with which the Recorder approached his task is clear from his judgment and it may be that it is underlined by the exceptional length of the interim hearing. In relation to the allegations, he said expressly " Each allegation has to be considered very carefully. I have found myself in considerable doubt." Having gone through the detail of the judgment very carefully, and with a degree of anxiety, myself, and then having surveyed it as a whole, I am not satisfied that it has been established that the Recorder erred as the local authority and the guardian submit, in his treatment of the question of physical abuse and risk. The lack of a formal transcript of judgment may not have done him any service. Although we are told that counsel's agreed note was approved by him, a note of this kind has always got its limitations when it comes to conveying some of the nuances in what a tribunal said. I have read the judgment with that very much in mind. Furthermore, this was not, as I understand it, a reserved judgment. It certainly could not have been in relation to the passage that followed the questions posed for the Recorder by counsel before lunch. That needs to be borne in mind as well. Our attention was invited to the well-known case of Piglowska v Piglowski 1999] 2 FLR 763, in which Lord Hoffman quotes what he said in Biogen Inc v Medeva plc [1997] RPC 1 and adds some additional comments. He reminds us that the

exigencies of courtroom life are such that reasons for judgment will always be capable of being better expressed and that an appellate court should resist engaging in a narrow textual analysis of the judgment with a view to establishing that the judge misdirected himself and then substituting its own exercise of discretion.

56. Turning to the question of the Recorder's approach to the guardian's evidence, this is not a case in which the Recorder failed to give any reasons for disagreeing with the guardian, but rather a case in which it is said that his reasons do not stand up to scrutiny. By the start of the hearing, the guardian had had a very limited opportunity to make enquiries, in a case in which, self-evidently, there must be a mass of material. She continued to investigate following her initial report. It is argued by the local authority and the guardian that this process explained any evolution in her view and should have been taken into account by the Recorder, whereas, in fact, he wrongly concluded that she had significantly changed her opinion without proper reason to do so and then failed to follow either her oral evidence or her written report. They submit that he should have viewed her evidence as a whole and recognised that, as she told him in evidence, what had happened was that she came to feel far more strongly about her recommendations as she learned more about the family and heard the father give evidence, to the point that she did not feel that social services would be able to safeguard the two younger children if they were returned home.

57. The guardian recommended, both in her report and in oral evidence, that all four children remain accommodated in local authority care. The Recorder was

anxious to consider each of the children separately, or at least to consider them in two groups. He cannot be faulted for this. The factors that he lists as differentiating the younger children from the older two children were cogent ones. He was also entitled to take the view that if the two older boys remained in foster care, that would remove a source of difficulty and change the home situation. He says, correctly, that the guardian did not address each child separately in making her recommendations in her report. There are individual sections in the report dealing separately with the *current* situation of each child but, in the section on "Risk issues and safety planning", all four children are largely dealt with as a group, there is no separate analysis of their situations in the "Analysis of key issues", and nor is there in the concluding passage of the report, commencing at paragraph 55 and entitled "Recommendations for next steps". It was therefore only in oral evidence that the guardian turned her attention to the possibility of treating the younger children differently from the older two. It can be inferred from what the Recorder said in the first part of his judgment, when giving reasons for differing from the guardian, that he considered that the failure to consider earlier the possibility of the younger children returning home undermined the guardian's recommendations. That view was open to him on the material before him.

58. The Recorder also says that the guardian made a recommendation for assessment, in paragraph 55, but did not say that the children's safety required immediate separation. He took the view that if her concerns had been as serious as she said at the hearing, she would have said so in her report and she did not. It is fair to say that the guardian refers to emotional and physical

abuse in the report, including a reference in paragraph 55 to a failure to address physical abuse to the children, but this is not a report which focuses particularly on physical dangers to the children or emotional harm but rather on the general catalogue of diverse and apparently intractable problems of long standing, listed by the guardian in paragraph 55 as "poor school attendance, domestic violence, neglect and physical abuse". The focus is on the need for the parents to be assessed, for work to be done with the parents, and, the guardian says:

> "[w]hilst the children remain in foster care it will give them an opportunity to establish their projected potential and then for the parents to focus on showing whether they have the ability to whether they have the ability to care for their children and support them through their minority years to reach their individual potential."

59. The Recorder should, I think, have acknowledged rather more than he did that at the early stages of care proceedings, and indeed sometimes throughout the proceedings, a guardian is collecting information and impressions and that his or her opinion is likely to evolve; in those circumstances, it may be unfair to describe an evolution in the guardian's evidence as "expedient". However, he was entitled, in his effort to analyse what the real risks were in the case and what was demanded by way of interim protection, to subject her evidence to scrutiny by examining how she put things in her written report as opposed to in her oral evidence. The guardian had been influenced by the fact that the parents had consistently denied the truth of the allegations made against them and it was not wrong of the Recorder to bear in mind, in this regard, that the allegations had not yet been established and may be unreliable. He was entitled also, from his evaluation of the guardian's evidence as a whole, to

conclude that (precise legal tests apart) she had set the requirements for interim removal of the children from their parents too low. That this was his view of her position can be gathered from, amongst other places, his comment when announcing his conclusions as the outset of the judgment that the legal test for an interim care order was not properly applied.

60. Given all these circumstances, and accepting that, as counsel for the mother submits, the Recorder had to consider the guardian's evidence in the context of all the material that he had considered over the seven days of the hearing, I have concluded that the Recorder spelled out sufficiently the reasons why he differed from guardian.

61. The discretionary exercise that had to be carried out in this case was a delicate and difficult one. That is often so where an application is made for an interim care order, and not least when the application comes when care proceedings are finally launched after a very long history of difficulties. Into the balance must come not only the harm that may befall children in their home but also the harm that may be occasioned to them by removal from home. The Recorder was acutely conscious that his decision was an interim decision and may not reflect the final outcome; he stressed this during the judgment. He had the benefit of studying the evidence in detail and heard a considerable amount of oral evidence. He is criticised for appearing to blame the older boys for the problems of the family and commenting that they are an obvious source of tension and violence in the home whereas the local authority submit that it was the father who was responsible for the risk. He is criticised for concluding, without proper foundation, that C would go to school if returned home and

would keep up her personal hygiene. The reality was, however, that he had to do the best he could, looking not just at the detail but also at the matter as a whole, in a complex and as yet uncertain situation. This is not, in my view, a case in which it can validly be said, as the local authority and guardian do, that there was only one possible outcome. The catalogue of problems set out in the chronology ebb and flow over the years, with allegations of physical abuse being made periodically and incidents of domestic violence reported without this always, or even often, leading to the children being taken into foster care. It is notoriously difficult for a local authority to determine when, in a long history of neglect and alleged physical and emotional abuse, to take the step of seeking to remove children from home. A very fine balance has to be struck and this can be particularly sensitive and difficult when considering what is appropriate for the interim period pending the conclusion of care proceedings. The Recorder's decision was one which was within the ambit of decisions that were open to him and I am not persuaded that his decision is flawed in such a way as to lead to it being overturned.

62. Therefore, whilst I have no doubt that it is appropriate to give the local authority permission to appeal, I would dismiss their substantive appeal.

63. There is one further matter with which I must deal. The mother seeks permission to appeal in relation to the short term interim care orders made by the Recorder on 7 June 2010 in respect of C and G. The basis of the proposed appeal is that the Recorder had no jurisdiction to make the orders. Counsel for the parties who would have been respondents to the mother's appeal did not address the issues to which it gave rise in writing at all and were not in a

position to provide us with as full argument as we would have wished at the oral hearing, although they agreed to attempt to provide further submissions thereafter. It would have been wholly undesirable to have held up the determination of the local authority's appeal until we were in a position to take a considered view on the mother's proposed appeal. Accordingly, this judgment deals only with the local authority's appeal. Given that the order made by the Recorder (even in its extended form) has expired and given that the children will return home as a result of our dismissal of the local authority's appeal, the mother's proposed appeal has become entirely academic. In the light of that, this is not an appropriate case in which to give permission for the points raised by the mother to be considered. I would therefore refuse the mother permission to appeal**.**

Lord Justice Richards

64. I agree

Lord Justice Moore-Bick

65. I also agree.