Neutral Citation Number: [2019] EWCA Civ 2300

Case No: B4/2019/2656

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT NOTTINGHAM
Mr Recorder Wigoder
NG18C00206

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2019

Before :

LORD JUSTICE FLOYD
LORD JUSTICE NEWEY
and
LORD JUSTICE BAKER

- -

IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF J (CHILDREN)

Between :

KH	**Appellant**
- and -	
A COUNTY COUNCIL (1)	**Respondent**
A (2)	
EJ and KJ	
(by their children's guardian) (3 and 4)	

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Patrick Freer (instructed by **Harrop White, Vallance and Dawson**) for the **Appellant**
David Horne (who did not appear in the court below) (instructed by **Local authority Solicitor**) for the **First Respondent**
Hannah Simpson (who did not appear in the court below) (instructed by **Tallents Solicitors)** for the **Third and Fourth Respondents**
The Second Respondent was not present nor represented

Hearing date : **3 December 2019**

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Approved Judgment

This judgment was delivered in public but it is ordered that in any published version of the judgment no person other than the advocates or the solicitors instructing them and other persons named in this version of the judgment shall be identified by name or location and that in particular the anonymity of the child and members of her family must be strictly preserved.

LORD JUSTICE BAKER :

1. This is an appeal by a mother against an interim care order made on 3 October 2019 by Mr Recorder Wigoder sitting in the family court at Nottingham in respect of two of her three children, E, now aged twelve, and K, now aged seven. Although the mother's second child, A, was also the subject of the proceedings, she was by the time of the hearing living with her father, and the local authority did not seek public law orders in respect of her. By consent, a child arrangements order was made by the recorder authorising A to live with her father.

2. At the conclusion of the hearing before us, we indicated that the appeal would be allowed and the matter remitted for rehearing before HH Judge Rogers, the Designated Family Judge for Nottingham. This judgment sets out the reasons for our decision.

Background

3. The three children have been known to social services for over eight years. They have been provided with intensive support by the local authority and other agencies at various times in the intervening period. Concerns about the family included the children's appearance, conditions in the home, the mother's engagement with professionals, and, latterly, K's behavioural problems and developmental delay. In 2016, the children were made subject to a child protection plan under the category of neglect.

4. Conditions at the home continued to cause concern. There were many reports that the property smelled of urine. Dog faeces were observed in the children's bedroom. In May 2018, a contract of expectations was prepared and signed by the mother. It was her case that she believed things had significantly improved, but the local authority disagreed. Further child protection visits were undertaken and the condition of the home remained poor. A parenting assessment later that year concluded that there had been little evidence of change in the mother's parenting of the children. Although there was some improvement – for example, in school attendance – the overall conclusion was that there were significant concerns for the safety and welfare of the three children. The eldest child, E, had taken on responsibility for caring for her siblings. The middle child, A, was spending increasing time with her father. The youngest child, K, was the subject of blame, isolation and high levels of criticism. The assessor felt that the poor level of care shown to him was resulting in episodes of wetting and soiling.

5. On 24 September 2018, the local authority filed an application for a care order. A contested interim care hearing was listed before the magistrates a few days later but, after the guardian indicated that he did not support the removal of the children from their mother's care, the local authority withdrew its application for an interim care order at that stage. Shortly afterwards, A moved to live with her father, but the other children continued to live at home with their mother under an interim supervision order during the currency of the proceedings.

6. For various reasons, the proceedings did not reach a final hearing until September 2019, a year after the application was filed. Although the case was listed before the recorder for a final hearing, the local authority did not invite the recorder to make a

final order. Instead, it proposed that he should come to a decision whether or not the children should be removed permanently from the mother's care. If he accepted the local authority's case that the children should be removed permanently, he was invited to make an interim care order. The local authority care plan was that the children would then be placed with a maternal aunt, N, and her partner, who live some 15 miles away in a different local authority area. It was proposed that the interim order should continue until a further hearing in the early part of 2020 when the court would be invited to consider making a special guardianship order in favour of the aunt. The mother and guardian, on the other hand, opposed the local authority plan. It was the guardian's case, supported by the mother, that the court should make a final order under which E and K would remain at home with their mother under a supervision order. All parties were agreed that A should remain living with her father under a child arrangements order.

7. At the hearing before the recorder, it was agreed that the threshold criteria under s.31(2) of the Children Act 1989 were satisfied in that, at the time the local authority started proceedings in September 2018, the three children had suffered, or were likely to suffer, significant harm in the form of physical and emotional harm and neglect attributable to the care provided by their mother, or likely to be given by her, not being what it will be reasonable to expect a parent to give. The specific findings on which the threshold was found to be crossed were agreed and subsequently recited in the judgment as follows:

    (1) There is a history of the home conditions at the mother's property being of such a level that they are unacceptable for children to live in which has put the children at risk of physical and emotional harm as the mother has been unable to maintain acceptable home conditions as follows:

        (a) Numerous visits to the home have revealed a strong smell of urine and faeces, with dog faeces present in the children's bedrooms and the rooms downstairs.

        (b) Faeces and stained clothing and a mattress stained with faeces have been found in K's bedroom.

        (c) Large amounts of rubbish have been observed under K's bed and overflowing in bin liners on the stairs and downstairs at the mother's property.

    (2) K has a poor history of physical presentation which puts him at risk of social, behavioural and emotional harm as follows:

        (a) K has been reported to be dirty and unkempt, wearing dirty, smelly clothing when in the care of his mother.

        (b) K has been sent to school by the mother in trousers that are too long for him and a girl's blouse.

    (3) K suffers from incontinence and his health needs have not been prioritised by the mother as follows:

(a) The mother has not attended all appointments at the continence clinic and has missed home appointments from health professionals in respect of K's incontinence.

(b) The mother did not contact the GP about K's continuing incontinence in a timely manner resulting in the family service worker having to make the appointment.

(c) K's GP requested that the mother take a urine sample from K to assist with his treatment, but this was not obtained by the mother until several weeks later.

(4) There is a lack of supervision, guidance and boundaries of the children at the mother's home which puts the children at risk of physical and emotional harm as follows:

(a) E and A have accessed inappropriate material on the internet and have spoken with strangers.

(b) K's behaviour can be difficult and the mother has not always immediately dealt with K's behaviour whilst the social worker has been present.

(5) The mother suffers from mental health problems which have impacted her ability to care for the children, putting them at risk of emotional and physical harm as follows:

(a) The mother has spent time as an inpatient in hospital in 2010 for depression.

(b) The mother has admitted to having suicidal tendencies and, in March 2017, took an overdose of paracetamol and flu tablets with the intention of taking her life when K was in bed with her.

(c) The mother has struggled to manage her mental health properly and has not always been compliant with her medication for depression.

(d) The mother's mental health problems have endured for many years and remain unsolved.

8. The hearing before the recorder took place over four days between 30 September and 3 October 2019. Having heard evidence over the first three days, the recorder adjourned with the intention of delivering judgment on the following afternoon. In the event, when the court reconvened, the recorder explained that he was not able to deliver judgment due to a computer error. He indicated that he proposed to outline his decision and hand down a written judgment a few days later. His decision was that he accepted the local authority's submissions and would make an interim care order on the basis of the plan for removal of the children from the mother's care and placement with the maternal aunt. After further argument from counsel, the recorder agreed that, given that the reasons for his decision were not available, the time for any application for permission to appeal would be extended to 28 October 2019 and that the interim care order would be stayed until 1 November. An order was subsequently sealed

including those provisions, together with the directions for the filing of documents and the adjournment of the final hearing to 16 January 2020. The order included a number of recitals, including that the court had "determined that the mother is unable to care for E and K and thus they should be placed into the care of the maternal aunt and her partner in order for a special guardianship order to be considered". A child arrangements order was made stating that A should live with her father.

9. The judgment was duly sent to the parties on 7 October 2019. It started with a summary of the history and a recital of the agreed basis upon which threshold criteria under s.31 were satisfied at the relevant date, namely the start of the proceedings. Having recited those agreed findings, the recorder observed that it was therefore unnecessary to consider matters prior to September 2018 in any further detail. Rather, it was necessary to consider the evidence about what had happened since the proceedings started, looking in particular at whether there had been any demonstrable improvement while E and K had been living with their mother and whether she had shown a capacity to change. The recorder proceeded to consider the evidence about this from five sources – the schools, those responsible for treating the mother's mental health, the social workers, the mother herself, and the guardian.

10. The evidence from the schools presented a mixed picture. It showed that E was doing very well. She had an above-average attendance record and was described as "always well presented with a smile on her face, save for a couple of isolated occasions". She was said to get on well with staff and with peers and was described as having a "brilliant" attitude to learning. On the other hand, the evidence from K's school was more concerning. He had a poor attendance record. Although there had been some improvement in the early period of the proceedings, it had deteriorated again during the summer term 2018, although in the early days of the autumn term his attendance record had been 100%. It had been noted that there was a lack of support for his learning at home. On one occasion, he had told staff at school that nobody loved him and he wanted to jump out of a window and kill himself. Soiling had been a problem at school, and K's behaviour was a matter of concern. On occasions, K had been aggressive towards other children.

11. For some time, the mother has been receiving treatment for mental health problems, in the form of counselling and antidepressants. There have been concerns about whether she has taken her antidepressants regularly. At an early stage in the proceedings, her GP observed that, if she were to take regular medicine and engage in counselling, her prognosis would be much improved. During the proceedings, she had attended a course of CBT sessions, and the therapist had observed that she was motivated to develop herself with regard to her parenting. A forensic psychologist, Dr. Chekwas, had been instructed to prepare a psychological assessment of the mother for the purposes of the proceedings. He found that she presented with a range of psychological and mental health difficulties that had impaired, and may continue to impair, her ability to provide good enough parenting for her children. Her problems included depression, social anxiety, personal superstitious thinking, and a mixed personality disorder trait. The psychologist described her as presenting as emotionally fragile and traumatised, a condition that was caused to some degree by her own experiences of being abused in childhood.

12. Dr Chekwas concluded his assessment in these terms:

> "It is my firm view that [the mother] will continue to need ongoing psychological help for her mental health problems and social work support to be able to provide good enough and safe parenting for her children. It is difficult from this assessment alone to prescribe with certainty how long she will need support for, but provided she complies and continues to comply [with the treatment] she currently has available, I will estimate a minimum of 12 months from the filing date of this report. Her trauma is enduring and deep rooted and previous support (mental health and parenting) she has received has been appropriate but is yet to assist her towards sustainable change.
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> Parental mental health and psychological problems can undermine parenting ability and adversely affect the physical and emotional development and overall well-being of children, but it remains possible for parents presenting with mental health problems to parent adequately with help from professionals, family and friends. It is clear from the case papers that [the mother] has received a lot of help from professionals (mental health and social work). However, with her renewed zeal and acknowledgement of previous inadequate parenting, it is possible for her children to remain in her care whilst she continues to receive interventions for mental health and psychological problems."

13. The mother told the psychologist that she was taking regular medication, but the recorder noted that this was contradicted by the GP's evidence. In her evidence, the mother said that she had not been taking her prescribed pills because of side effects and instead was taking an over-the-counter herbal remedy. The recorder observed that it was no function of his to say whether or not such a remedy was efficacious. He was, however, extremely perturbed about her failure to discuss this with professionals, in particular with the psychologist.

14. Next, the recorder considered the social worker's evidence, noting that the mother had had no fewer than six key social workers in succession in recent years. The matters of recent concern raised in the social worker's evidence included failure to attend appointments with professionals, a hostile attitude towards the social worker, and poor conditions at home, including the chronic problem of a smell of urine. In her final report, the social worker concluded that, although there were positive features about the mother's care of the children – including a supportive family, improved attendance at school, and the love she has for her children – E and K would continue to suffer significant harm through neglect if they remained in her care. The principal concern related to K's emotional well-being and self-esteem, linked to his toilet habit problem which was becoming more entrenched as time goes by and leading to ostracism by his mother and bullying. In her oral evidence, the social worker noted that in recent weeks the mother had started to communicate better, answering phone calls and leaving messages in response. But it remained her view that the neglect would continue, that the problems of the children would escalate in gravity and severity, and that the intervention offered during the proceedings had not resulted in any significant improvement in the mother's parenting.

15. The judge then summarised the mother's evidence. She accepted the concerns that had existed in the past but said that she had tried her best to improve and succeeded in making significant changes. She described the steps she was taking to improve conditions in the home. She did not accept that she had any problems with supervision and boundaries nor that she was failing to prioritise her son's needs. It was her evidence that K's problem with soiling and wetting had improved. The judge observed that the mother dealt with the symptoms rather than the cause. He gave as an example her evidence that, once she became aware of the social worker's complaint that she was spending too much time in bed, she changed her sleeping arrangements and slept downstairs. The judge considered that this demonstrated the way in which she failed to care for, or interact with, the children.

16. Finally, the judge considered the evidence given by the guardian. He had a rather different view of the case from that put forward by the social worker. He had observed a close and loving relationship between E, K and their mother. He noted that the mother had a supportive family network, including the maternal grandmother and two maternal aunts, one of which is Aunt N. The guardian stressed the importance of preventing unnecessary change for children. He had spoken to the children about their future. Whereas E had said that she would be content to live with her aunt, as proposed by the local authority, K had insisted that he did not want to live anywhere else except "at home with my mum".

17. In his final report, filed in May 2019, the guardian acknowledged that, if the mother was unable to make and sustain the changes needed to bring her parenting up to a "good enough" standard, the children's needs were likely to be neglected to the extent that they would suffer significant harm. His recommendation, however, was that E and K should remain in her care under a supervision order. In his oral evidence, he summarised his reasons for that recommendation in these terms:

> "It's really asking myself the question … has anything got significantly worse for the children, i.e. was there anything that made the situation worse for the children to suggest that they should be taken out of that home environment, balanced with also the other question of how things got better for the children, and really coming down to the balance of harm about removing them from the situation that they're familiar with, in living with their mother, albeit to … a family placement with Aunt N - and my view very much was that balancing those risks, that it will be better for the children to remain in the care of their mother with a supervision order …."

When asked for his final recommendation at the conclusion of the hearing in September, he said:

> "Before I answer that, I'd like to qualify it by saying that the evidence I've heard during this hearing doesn't mean to say that my recommendation for a final supervision order means that I'm not concerned for the children's well-being within the care of their mother. I still remain concerned …. I think that it's become quite clear to me that she still continues to suffer from depression but that she needs some help and support for that,

> that the children will benefit from her getting that support and help, so that is a factor which has made me consider whether it would be wise and right for me to recommend to the court that they should be removed from that situation. But, bearing in mind what I know has happened since these proceedings were initiated, bearing in mind the evidence that I've heard from everybody, it's my view that the care [the mother] has given to her children is just about good enough and that needs to be consolidated and bolstered with the children remaining with her, because if they were removed from her, that could be detrimental to their emotional well-being."

18. After summarising the evidence, the judge set out the legal principles to be applied. What is striking about the summary of the law set out in the judgment is that it includes the principles to be applied when the court is considering making an interim care order. In doing so, it seemed that he was guided by the local authority's care plan which, as set out above, proposed that the children be removed from the mother and placed with their aunt under an interim care order until a further hearing to be listed a few months later. Thus, having referred to the burden and standard of proof, and the provisions of s.1 of the Children Act, the recorder continued:

> "In relation to E and K the order I am invited to make is an interim care order.
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> Under s.38(2), 'a court shall not make an interim care order … unless it is satisfied that there are reasonable grounds for believing that circumstances with respect to the child are as mentioned in s.31(2)'. That threshold is agreed and I have quoted it in full above. The courts have laid down a very strict test when considering interim care orders, following *Re L-A*.
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> Firstly, the decision taken by a court on an interim care order application must necessarily be limited to issues that are being prepared for determination at the final hearing. That does not arise here where we are at the final hearing.
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> The second proposition does however arise. Separation is only [to] be ordered if the child's safety demands immediate separation (*Re L-A (Care: Chronic Neglect)* [2010] 1 FLR 80). This is a very high standard. The child's safety is used in a broad sense to include their psychological welfare. It must be proportionate to the risk of harm to which he or she would be exposed if they were allowed to return to their parent's care. In *Re G (Interim Care Order)* [2011] 2 FLR 955, Sir James Munby summarised the authorities as requiring the court to ask itself firstly whether the children's safety, using that term to include both psychological and physical elements requires removal, and secondly whether removal is proportionate in the light of the risks posed in leaving the children where they are."

(The reference to Sir James Munby is an error. The leading judgment in *Re G* was given by Sir James's predecessor as President of the Family Division, Sir Nicholas Wall.)

19. The recorder then considered the relevant factors in the welfare checklist in s.1(3). Regarding the children's ascertainable wishes and feelings, he accepted the evidence of the guardian that both children wanted to remain with their mother. Turning to their physical, emotional and educational needs, he concluded that there was nothing currently to suggest that E had any unusual needs at all. K, on the other hand, was "clearly in a different position" because of his problems with incontinence and behavioural issues. As for the likely effect on the children of any change of circumstances, the recorder noted that, as both children have always lived with their mother, a change in their circumstances would clearly have an effect. On the other hand, the local authority's proposal was that the children should move to live with their aunt to whom they are close and with whom they had stayed on a regular basis. With regard to the harm which the children had suffered or were at risk of suffering, the recorder noted that the type of harm involved in this case was neglect and its effects. The recorder then considered what he stated to be the key issue – the mother's capability of meeting the children's needs. He referred to the mother's mental health issues, her failure to comply with medication, and occasions when she had failed to attend appointments.

20. The recorder then expressed his conclusions in these terms:

> "I have to try and bring all the strands together. For at least the last four years [the mother] has been provided with a very high level of support to assist her in caring for her children. There have been some improvements, not least in terms of school attendance and in the outward presentation of her property. However, I am satisfied that notwithstanding the fact of these proceedings, which must have served to concentrate her mind, the children are still suffering serious neglect which puts them all at risk of physical and emotional harm. This applies most clearly to K whose behaviour demonstrates the impact of his mother's lack of care, and which, on the evidence of his school, is getting worse – beginning to bite himself and being aggressive towards other children. Instead of the care which he needs, the evidence demonstrates that [the mother] is, sadly, unable to prioritise his needs, as all the recent missed appointments, particularly those relating to K's health, demonstrate.
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> It is not just K, the evidence also demonstrates that A has been negatively affected, and that although E seems at least on the surface to be more resilient, considerable pressures are being placed on her which cannot be in the interests of her welfare. The problem with neglect is that its effect is necessarily less immediately apparent than an assault.
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> I simply cannot see any realistic prospect of [the mother] making the sort of changes which the children's welfare

> demands. There is no doubt that the root cause of the way [she] cares for her children, who she clearly loves, is her mental health problems. This is where, in my judgment, the manner in which she has not only not been taking [her medication] prescribed by her GP, taking instead a herbal remedy, but sought to deceive Dr Chekwas by saying that she was taking this medication, which he viewed as effectively essential, becomes so significant. On the evidence before me I simply do not accept that she is capable at present of taking the appropriate steps to deal with her mental health problems, and once that is stated, combined with the pattern of failing to cooperate with social services and the health services in relation to K, I am forced to conclude that if they were to remain with her, both E and K's safety would be at immediate risk.
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> I cannot see any power available to the court which would leave them at home immediately safe – the level of support which has been offered historically is really very high, but it has not served to protect the children, nor has [the mother] shown the necessary level of cooperation – missed appointments including in particular those with K and the doctor, all I am afraid drive me to the conclusion that K's welfare demands the making of an interim care order.
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> That then leaves E. E is clearly not as outwardly vulnerable as K, but even so I am satisfied that her safety also demands removal."

21. The recorder then set out his reasons for not following the guardian's recommendation, saying that he placed more emphasis than the guardian on the mother's mental health and her failure to seek treatment and the fact that she had not been taking her prescribed medication. He was also very concerned that it was only the imminent approach of the final hearing that led her to make any improvements at all, and that some of the improvements were merely superficial. He concluded his judgment with these words:

> "In all the circumstances I am satisfied that the welfare of E and K requires the making of interim care orders to reside with the aunt and her fiancé."

22. On 23 October 2019, the mother filed a notice of appeal against the recorder's order. On 1 November, permission to appeal was granted by Peter Jackson LJ, and the hearing listed before us on 3 December.

Submissions

23. The mother's case, as set out in her grounds of appeal and the skeleton argument prepared by her counsel, Mr Freer, can be summarised as follows.

(1) The recorder had attached too much weight to the difficulties suffered by K and insufficient weight to the presentation and achievements of E who has flourished notwithstanding living in the same environment as K.

(2) He failed to give sufficient consideration to the strong family support network surrounding the mother and the children.

(3) There was insufficient up-to-date evidence about the mother's capacity to care for the children. No parenting assessment had been carried out since the start of the proceedings.

(4) The recorder failed properly to apply the test for the interim removal of the children as set out in *Re L-A*. Had he done so, he would have concluded that the children's safety did not require that immediate removal. Alternatively, even if the test was met in respect of K, no reasonable tribunal could find that it was met in respect of E.

(5) The recorder wrongly ruled out the mother as a carer for children without applying the appropriate legal tests, and without sufficient evidence or analysis to justify their permanent removal from her care.

24. In reply, it was submitted by Mr Horne on behalf of the local authority that on the evidence the recorder was justified in concluding that the children's welfare required removal from their mother's care. Despite the significant and substantial support offered to the mother, there had been no material change in her parenting. The recorder was well aware of the positive features in E's presentation but had concluded that her welfare also demanded removal from her mother. Mr Horne accepted that there was some force in the submission on behalf of the mother that the recorder had failed to apply the test for interim removal in *Re L-A*. He submitted, however, that, as the final threshold had been agreed, the recorder was in fact ruling out the mother as a long-term carer for the children and approving the local authority's plan for the permanent placement of the children with the aunt and her partner, subject to a further period when the children would be in their care before the making of special guardianship orders. It was submitted that there was nothing wrong with the court dismissing a particular placement at an early stage of the proceedings. In support of that proposition, Mr Horne cited the decision of Black J (as she then was) in *North Yorkshire County Council v B* [2008] 1 FLR 1645 and the decision of this court in *Re R (A Child)* [2014] EWCA Civ 1625. It was not accepted by the local authority that the recorder had failed to conduct sufficient analysis of the available options. Alternatively, even if he had not undertaken what Mr Horne described as the "neat balancing of welfare factors described in *Re B-S* [2013] EWCA Civ 1146", it was submitted that the decision would not be amenable to appeal where the court has clearly engaged with the long-term welfare decisions and addressed them in a holistic way. In support of that proposition, Mr Horne cited the decision of this court in *M v GP and others* [2014] EWCA Civ 942. In this case, it was clear from the judgment that the recorder had fully considered the core aspects of the case.

25. In a skeleton argument filed on behalf of the guardian, Ms Simpson informed the court that, having reviewed the grounds of appeal and skeleton argument filed on behalf of the mother, the guardian neither supported nor opposed the outcome sought by the mother but did not believe that the recorder's decision was wrong.

Discussion and conclusion

26. It is evident from the judgment, and from the transcripts of evidence given at the hearing, that the recorder conducted the proceedings in a diligent and conscientious fashion. It is therefore particularly regrettable that his approach to the final hearing was flawed.

27. At a final hearing in care proceedings, once the court has found that the threshold criteria are satisfied, it proceeds to consider what order should be made in the light of its findings, having regard to the principles in s.1, including the paramountcy of the child's welfare and the relevant factors in the checklist in s.1(3). The relevant factors will always include, under s.1(3)(g), the range of powers available to the court. As successive decisions of this court have established, this requires the judge to identify the realistic options and analyse and compare the advantages and disadvantages of each, before setting out his decision in a fully-reasoned judgment. There is nothing in any of the cases cited by Mr Horne to contradict or undermine this requirement. Although this approach was originally prescribed in cases where the court is considering a plan for adoption, of which ***Re B-S*** is the most frequently-cited, it plainly applies to all proceedings under s.31 of the Children Act. Indeed, in my judgment, the discipline of identifying and articulating the realistic options and the advantages and disadvantages of each before making a final order is one which should be followed whenever the court is making a decision about the future of a child.

28. The approach is concisely explained in the following passage from the judgment of McFarlane LJ, as he then was, in ***Re G (A Child)*** [2013] EWCA Civ 965:

> "49. In most child care cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option.
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> 50. The linear approach, in my view, is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare."

29. In the present case, the recorder regrettably adopted an entirely linear approach. He looked in detail at the option of the children remaining with the mother. He identified the advantages and disadvantages for each child. But he said nothing at all about the advantages and disadvantages of the other option under consideration for the future care of the children, namely placement with the aunt and her partner. Instead, having concluded that they should be removed from the mother, he made an order authorising placement of the children with the aunt and her partner and adjourned the final hearing so that the option of a special guardianship order in their favour could be considered at a later date. It is difficult to conceive of a more "linear" approach.

30. This is not a dry technical objection. The decision whether E and K should live with their mother under a supervision order or with Aunt N and her partner under a special guardianship order, or possibly a child arrangements order, is complex and sensitive. The two children have very different needs. It is conceivable that they should live separately. Aunt N is part of the family network that has provided extensive support to the mother and the children. Wherever the children are living, contact with other family members will be extremely important. There may conceivably be an intermediate option, under which the children lived principally with their mother but have a form of respite care with their aunt, or, alternatively, live mainly with their aunt and spend longer periods in school holidays with their mother. In mentioning these possible options, I am not expressing any definitive view as to the right outcome. Rather, I am seeking to demonstrate that in this case the holistic approach is crucial so that the court has the best opportunity of identifying the right outcome for the children.

31. How did the recorder come to fall into error in this way? I am sure he is well aware of the *Re B-S* line of authorities. The local authority plan at the hearing was for an interim placement of the children with the aunt under an interim care order. In submissions to the recorder it was contended that he should therefore apply the legal principles to be adopted when considering an application for an interim care order at the start of proceedings, hence the references in the judgment to s.38(2) of the Children Act (the threshold criteria for making an interim care order) and the decision of this court in *Re L-A*.

32. As the recorder rightly noted, the approach prescribed in *Re L-A* is that, at an interim stage in care proceedings, the removal of a child from his or her primary carer is not to be authorised by the court unless the child's safety requires interim protection. The court is required to ask whether the children's safety (using that term to include both psychological and physical elements) requires removal and whether removal is a proportionate step in the light of the risks posed by leaving the children where they are: *Re G (Interim Care Order)* [2011] EWCA Civ 3745 per Wall LJ at paragraph 22. The imposition of this relatively higher hurdle is justified by the fact that the court at the initial stage of the proceedings will not have all the evidence necessary to make findings or decide whether the threshold criteria under s.31 are satisfied, and in those circumstances the serious step of removing a child from his or her parents is only to be contemplated when the court is satisfied that the child's safety requires interim protection.

33. The *Re L-A* test applies when the court is considering an application for an interim care order at an early stage in the proceedings. By the end of the proceedings, however, the court is in a very different position. All the evidence will be available to enable it to make findings of fact and decide whether the threshold criteria under s.31 are satisfied, and, if they are, to determine what order should be made for the future care of the children. It will normally be neither necessary nor appropriate in those circumstances for the court to consider the *Re L-A* test. It may occasionally be necessary to adjourn the final hearing for a short while before a final decision can be taken but in those circumstances the decision about interim placement can be made by a straightforward assessment of welfare.

34. The hearing in this case in September 2019 was a final hearing over 12 months after the start of the proceedings. The parties agreed the basis on which the threshold

criteria under s.31(2) were satisfied and the court adopted that analysis. It was neither necessary nor appropriate for the court at that stage to apply the *Re L-A* test. In the course of her submissions, after we had raised these matters with counsel, Ms Simpson on behalf of the guardian very fairly accepted that the citation of *Re L-A* in this case was, in her words, a "red herring" and that the reports provided to the recorder lacked the necessary analysis of the realistic options.

35. As the recorder adopted entirely the wrong approach to this final hearing, his decision plainly cannot stand. For that reason, we decided that this appeal should be allowed. There will have to be a full rehearing of the final hearing at which a judge must apply the proper approach as set out above. I stress that nothing that I have said should be read as indicating any view as to the ultimate outcome of the proceedings.

36. We have therefore set aside the order of 3 October 2019, save for the child arrangements order in respect of the middle child, A. We vacated the further hearing listed before the recorder and remitted the matter to Judge Rogers for further directions and case management. For the time being, E and K will live at home with their mother. We imposed an interim supervision order to continue until the conclusion of the proceedings or further order.

LORD JUSTICE NEWEY

37. I agree.

LORD JUSTICE FLOYD

38. I also agree.