Neutral Citation No: [2020] NIFam 22 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE11337** *ICOS No:* **20/045764** *Delivered:* **21/10/2020**

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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BETWEEN:

A FATHER

Appellant;

-and-

A HEALTH AND SOCIAL CARE TRUST

Respondent.

-and-

A MOTHER AND A GREAT AUNT

Respondents.

IN THE MATTER OF STEFAN (A MINOR)
(APPEAL: INTERIM CARE ORDER: IMMEDIATE REMOVAL)

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Ms Martina Connolly QC and Ms Victoria McNaughton BL (instructed by Rafferty Solicitors) for the Appellant
Ms Wendy Davidson BL (instructed by DLS) for the Trust
Ms Rice BL (instructed by McKeown & Co) for the Respondent mother
Ms Katharine McAleavey BL (instructed by Breda Cunningham Solicitor) for the Respondent Great Aunt
Ms Caroline Steele BL (instructed by Denis D Humphrey Solicitors) instructed by the Guardian ad Litem

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KEEGAN J

Nothing should be published which would identify the child or his family. The name that I have given to the child is not his real name.

Introduction

[1] This is an appeal from a decision of Her Honour Judge McCormick QC sitting in the Family Care Centre on 12 October 2020. It relates to a young child who was born in summer 2020. The appeal was heard as an urgent matter as the decision under appeal was one of interim removal of the child into care. The judge having heard this application decided to reject the Trust care plan of the child remaining in the care of his father along with the paternal grandparents under an interim care order. The father had agreed that an interim care order should be made and supported the Trust care plan. This plan was opposed by the mother and aunt. It was also opposed by the Guardian Ad Litem whose case developed during the course of the hearing. Initially, the Guardian Ad Litem supported a care plan of the child remaining with the paternal grandparents with the father removing himself from the home but during the hearing she changed her mind and supported a care plan of removal into stranger foster care.

[2] The court heard the interim care order application remotely over six days between 28 September to 7 October 2020 (in various different time slots) with evidence heard via Sightlink. The judge gave her decision on 12 October 2020 and provided a written ruling and also agreed to stay her decision for removal under the interim care order pending an appeal.

[3] The notice of appeal sets out two core grounds of challenge namely:

(a) That the learned judge erred in law in substituting for itself an alternative care plan of removal into foster care as opposed to the Trust care plan of paternal care pending assessment, particularly in circumstances where no risk of imminent harm had been identified or supported by the applicant Trust bringing the application. Additionally, the error was compounded by the fact that no identified placement or contact plan were even in existence at the time of the impugned decision to be considered, let alone approved by the court.

(b) That the learned judge erred in law by refusing to approve the considered Trust care plan of paternal care and that in all of the circumstances the plan approved by the court was disproportionate, unnecessary and failed to meet the threshold for interim removal of this infant.

[4] It is also important to note that interim threshold criteria were agreed pursuant to Article 50 of the Children (Northern Ireland) Order 1995 ("The Children Order") and so the case focused on the issue of the care plan.

[5] Counsel agreed that this case would be heard as an urgent appeal upon submissions in accordance with the authority of *G v G* [1985] FLR 894 and *McG v McC* [2002] NI 283. I should say that this appeal was conducted in an exemplary

way by way of submissions. I received an agreed appeal bundle filed by the solicitor for the Appellant. This was supplemented by excellent written submissions from all counsel. I also heard economical and focused submissions from all counsel. I gave my decision orally the day after the hearing and indicated that I would provide some written reasons given the issues. That is what follows.

Appeal of an interim care order

[6] At the outset I reiterate the fact that appeals from interim orders are generally discouraged. This is on the basis that they are not final orders and obviously capable of review. That principle applies in both public and private law. However, where the effect of a decision taken at an interim stage is stark and prejudicial as removal into foster care, appeals may be mounted. That is what occurred in this case and by agreement of all parties it was accepted that I should deal with this appeal in the usual way.

Background facts

[7] Stefan was born in summer 2020 and was five weeks premature. The mother has recently had two other children freed for adoption. It is fair to say that the mother presents with many problems and so in the initial stages the fact that the parents were together also militated against the father. The father does not present with the same level of concerns. He has two other children who live with their mother but with whom he has unsupervised contact.

[8] The Trust made an application for an emergency protection order shortly after Stefan's birth on 16 July 2020. This application was refused by the court. Upon hearing the evidence the judge was satisfied with a plan of the child living with the maternal aunt and the mother on the basis that the maternal aunt would be supervising the mother. The father was unhappy about the child living in this situation and this caused a fracture in the relationship. In addition, there were issues in relation to the father's contact and some concern raised by the Trust about the father's reaction to the location of his contact being restricted to the maternal aunt's home, due to Stefan being born prematurely and the risks of COVID-19.

[9] In the early days there was also uncertainty about the nature of the relationship between the mother and father illustrated by the following. In particular, I note on 21 July 2020 the mother got a bus in the late afternoon leaving the aunt's home until the next day. Neither the aunt nor Social Services were notified about this. It appears that the mother may have been with the father. There was a pattern of this type of behaviour between the mother and father throughout late July and early August. During the same period there were warning signs emerging about the viability of the placement with the aunt and the mother's commitment to this.

[10] On 6 August 2020 the Trust convened a Review Case Conference. It is noted in the Trust reports that initial observations of the care of the child had been positive with the health visitor observing the mother handling her son affectionately and feeding and dressing him well and also communicating appropriately and providing loving eye contact and smiles towards her son. It was also noted that the home environment was quite calm and stable. After this there appeared to be some further issues with the mother leaving the home and this clearly put a strain on the aunt's position. It is noted that on 10 August 2020 the aunt advised the social workers of the mother's absences from the home and indicated that the mother "continually lies to her and she feels taken advantage of." The records highlight that the aunt felt that the mother was not taking responsibility for Stefan as she was prioritising her social life. This led to the aunt withdrawing from the arrangement. The social worker agreed the Trust would also not support this arrangement any longer as the mother had repeatedly abdicated her responsibilities towards Stefan. The social worker was also concerned about the lack of communication. So, after discussion with both parents and their legal representatives it was agreed that Stefan would be voluntarily accommodated with his great aunt and that the mother would leave the home and the Trust would make an application for a care order to have the matter adjudicated in the court. I note that the aunt was advising that she could only care for Stefan as an interim arrangement. I also note that at this time there were ongoing disputes between the parents which were of concern. The plan was therefore for Stefan to remain in the aunt's care with provision for assessments of both the mother and the father.

[11] Following on from this there were continued problems. The mother was aggressive when having contact which meant that the Trust had to look again at contact occurring in the aunt's home and supervision of contact. A hiatus occurs on 26 August 2020 when the father arrived to the carer's home for contact accompanied by his mother and advised the carers that his intention was to remove the child from the kinship placement to his care in the home of his mother. The carer contacted the police and there was a confrontation. The child was not caught up in this to any great extent but he moved to the care of the father living with his parents. This was not entirely unexpected as the father's solicitor had been sending correspondence, which I have seen, on a number of occasions indicating that he did not agree with voluntary care in the aunt's placement and was intending to have the child in his care.

[12] Following this intervention by the father, a home visit was undertaken later that afternoon and an immediate safety plan was agreed with the father and his mother. Specifically, this involved the paternal grandmother ensuring that the father refrained from any use of cannabis given that he now had primary responsibility towards his son. The mother had made allegations about the father's cannabis use. The paternal aunt and grandmother also gave assurances that they would be available to support the father in the care of Stefan. Thereafter the situation in this home appears to have been relatively stable save an incident on 30 August 2020 when police were called to deal with an incident between the father

and his father reported to be a verbal altercation in relation to the grandfather turning off a steriliser in the house. The police did not take the matter any further and the grandfather agreed to stay with his daughter for the evening. The note advises that the grandfather was finding it difficult to adapt to his son and grandson living in the house. Other than this concerns were raised that the grandmother's car and the father's car windows were smashed and that the father believed this was down to the mother. There was also an allegation that the mother was near the home of the father's ex-partner and generally the father made allegations about the mother's aggressive behaviour.

[13] On 7 September 2020 the Trust convened a Review Case Conference in light of the change to Stefan's living arrangements and agreed to support the current living arrangements and undertake separate assessments of both parents. It was recommended that contact for the mother should be supervised twice weekly for 1½ hours on each occasion. There was a note made that Stefan was feeding and sleeping well, there were no health or developmental concerns and his weight was recorded as rising.

Care planning

[14] The various care options were put before the court once the interim care order hearing was convened before the Family Care Centre. The choice was between the paternal care continuing or removal into foster care. At the interim stage it was quite clear that care to the mother or care to the aunt was not feasible. In addition to the background of each parent and the circumstances of the child coming to the paternal house in an unplanned way and the family dispute on 30 August a number of other issues were raised in terms of risk. Firstly, it was asserted that the father had a difficulty with cannabis use. Secondly, it was asserted that as a result of a guardian visit which took place on 24 September 2020 that there may be difficulties within the home. The guardian had been appointed in the case at the start of September and this was her first home visit during which she considered that the baby was quite jumpy and also that there may have been tensions within the home.

The judge's ruling

[15] This is encapsulated at paragraph [33] of the judgment where the judge says:

> "Given everything I have heard and read, the separation of Stefan from his father's assumption of his everyday care would be necessary and proportionate. I have arrived at that conclusion because I consider that the combination of Stefan physical safety, psychological and emotional welfare require this intervention and where I believe that the length of separation – long enough to undertake assessments – and the likely consequences of

> separation would be proportionate responses to the risks of harm to Stefan if the removal did not occur. It would not set either mother or father at a disadvantage but would enable the court to receive full information and assessment in respect of the father who seeks to have full time care of his son. In arriving at that conclusion, I take comfort from the GAL's assessment that a move for Stefan now would be less impactful than a move at a future date."

The argument on appeal

[16] All parties accepted the judge's ruling save the father. In making the argument on his behalf, Ms Connolly QC reminded me that the test for immediate removal is a high bar. I have referred to this in the case of *X v Y* [2020] NI Fam 5. Ms Connolly pointed out that there was no real evidence of potential physical harm. She pointed out that the father had a previous case in relation to two other children which resulted in him having unsupervised contact after an Article 56 investigation. She pointed out that due to the mother's volatility the father had obtained a non-molestation order against her. She pointed out that issues of cannabis were addressed in a health report and were not significant. Fundamentally, Ms Connolly argued that there were protections in this case in that notwithstanding issues raised about the father there were two other adults in the home who were willing to assist and offer protection. Finally, Ms Connolly relied on a very positive health visiting report which was of 22 September 2020 during which it was noted:

> "Stefan was observed to be very bright, alert and was looking around and tracing with his eyes and appeared very settled and content. Stefan was being held by his father who was displaying warm interactions towards his son. This was evident as Stefan was appropriately held, winded and also held close in his father's arms as his father spoke to him and made eye contact. Stefan's father and grandmother both reported that Stefan has settled well into his new home and is now sleeping throughout the night. Stefan is reported to consume 5 to 6 ounces of formula four hourly and is much more settled and no evidence of any further colic or constipation episodes. Stefan's father and grandmother spoke of how alert he has become and that he loves being held and watching what is going around his surroundings … Weight was recorded and noted to be 5.62 kgs and Stefan continues on the 75th centile range. A follow up review was agreed in

> two weeks to carry out Stefan's 14 to 16 week health and development review."

[17] The first ground of appeal is a procedural ground of appeal which Ms Connolly QC realistically did not argue with any real vigour. The fact of the matter is that the interim care plan presented by the Trust was not agreed by the court. It should be noted that the court is quite entitled to take a different view of a care plan. This is best explained in *Hershman and McFarlane: Children Law and Practice* Volume 1 Section C1140A. This text points out that the court has a shared objective with that of the Trust in reaching an outcome which is in the best interests of a child. The court can in this circumstance ask a local authority to consider its plan as in *Re T (A Child (Care Proceedings: Court's Function))* [2018] EWCA 650. In that case Jackson LJ made the point that the case could have been managed under the interim care order by way of a safe plan with a grandmother, but the court did not appreciate its own powers. There is a mirror image here in that the court rejected the Trust's plan for the child to remain with the father and the grandparents in their home. The procedural point is that upon doing so there should have been an amended plan to include contact arrangements. That is right but in my view this deficit was eminently recoverable by referral to the trial judge. The procedural issue was not of such a nature as to necessitate an appeal.

[18] It is the substantive issue with which I am concerned namely the proportionality of an interim care plan of removal. The legal principles are not in dispute between counsel. Article 8 and Article 6 of the European Convention on Human Rights ("ECHR") is engaged. I explained in the case of *TG v A Health and Social Care Trust and Others* [2016] NI Fam 5 that:

> "A Trust is also subject to the obligations contained within the European Convention on Human Rights (ECHR). A Trust as a public authority must act in a way which is compatible with the ECHR. In particular it is clear that a removal of children from the care of their parents is a violation of their right to family life. The right to family life under Article 8 is a right contained in Article 8(1). However, Article 8(2) is the provision whereby a breach of Article 8 can be justified if necessary and proportionate. The Trust has to act in a manner which is compatible with the Convention under Article 8."

[19] In *X v Y* I stressed that flowing from the decision of the Supreme Court in *Re B* [2013] UKSC 33:

> "An order compulsorily severing the ties between a child and her parents can only be made if justified by an overriding requirement pertaining to the child's

best interests. In other words, the test is one of necessity. Nothing else will do."

[20] In *Re C (A Child) Interim Separation* [2019] EWCA Civ 1998 the Court of Appeal in England and Wales recently reaffirmed that the court must consider whether it was necessary or proportionate to remove a child, in that case a four month old child from his young mother. A useful set of propositions can be found in this decision as follows:

(i) An interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.

(ii) The removal of a child from a parent is an interference with their right to respect for family life under Article 8. Removal at an interim stage is a particularly sharp interference which is compounded in the case of a baby when removal will affect the formation and development of the parent/child bond.

(iii) Accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower reasonable grounds threshold for an interim care order is not an invitation to make an order that does not satisfy these exacting criteria.

(iv) A plan for immediate separation is therefore only to be sanctioned by a court where the child's physical safety or psychologic or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.

(v) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation.

[21] In *Hershman and McFarlane* Volume 1 Section C1140 reference is also made to the principle that the preferred course at an interim stage is to leave a child where it is with an early hearing date. Interim hearings should not make findings and not pre-determine issues which are of final import in a case. The point is made that such a step should not be taken pending assessments unless absolutely necessary. Ultimately the child's safety must demand immediate separation.

[22] Reference is also made to the case of *Haase v Germany* [2004] 2 FLR 39 where the European Court of Human Rights ("ECtHR") held at paragraph [95]:

> "The fact that a child could be placed in a more beneficial environment for his or her upbringing will not on its own justify a compulsory measure of removal from the care of the biological parents; there must exist other circumstances pointing to the necessity for such an interference with the parents' right under Article 8 to enjoy a family life with their child … before public authorities have recourse to emergency measures in connection with such delicate matters as care orders, the imminent danger should be actually established. It is true that in obvious cases of danger no involvement of the parents is called for. However, if it is still possible to hear the parents of the children and to discuss with them the necessity of the measures there should be no room for an emergency action, in particular when, as in the present case, the danger had already existed for a long period."

Conclusion

[23] As I indicated at the hearing I have allowed the appeal on the basis that I do not consider the rejection of the Trust care plan was a proportionate response in all of the circumstances of this case. I summarise my reasons as follows:

(i) Whilst there are obvious concerns about the background of both parents, the child was settled in a family placement with a highly positive report from the health visitor.

(ii) In relation to the father, concerns were raised about his actions on 26 August. I agree with those concerns. However, there is a context to them given that he did not agree with voluntary care and his solicitor had given notice of that fact. This engages the provisions in Article 21 and 22 of The Children Order explained by the Supreme Court case of *Williams* [2018] UKSC 37. It is not an excuse for the father's actions but it is an important backdrop. The father's actions raise concerns about his ability to comply with Trust directions. That requires to be tested.

(iii) The main problem is that the Trust were left with a situation where the child was moved to an unassessed home. Such a situation is highly problematic however the Trust acted quickly with a home visit that afternoon and it assessed the situation as safe and agreed a safe care plan.

(iv) There were obvious concerns about the father's relationship with the mother. It remains to be seen if the separation is genuine or

maintainable. However for now the situation is stable and the father obtained a non-molestation order and there were no up-to-date incidents.

(v) Also, in relation to the issue of cannabis there was a substance misuse initial assessment of 2 October 2020 from Mr Hughes which pointed out *inter alia* "no concerns have been raised in respect of the father's presentation with any professionals, he has appeared lucid and has not displayed any obvious signs of intoxication from cannabis. The father has no physical/mental health problems which would support a view that he has significant addiction issues and is dependent daily on cannabis as alleged by the mother, these factors are not very strongly associated with substance misuse issues. The father reports that his social network is pro-social and support drug free living and lifestyles, the father was not also exposed to any substance use in the childhood family home. The father does report a low level of recreational use of cannabis, this is likely minimised to some degree, however even accounting for this, it is clear that the father would not meet the threshold for intervention from tier 3 addiction services. It is recommended that the father completes some educative work in relation to cannabis use, in particular its impact on parenting capacity. Some motivational work and work in relation to relapse prevention would also be beneficial to achieve or maintain abstinence from cannabis."

(vi) The benefit in this case is that in addition to the father there were two adults in this household who were assisting in looking after the child. Some mention was made of health problems on the part of the grandmother. There was also the row between the father and son however there is context to that given that this arrangement was largely foisted on the grandparents. There were no critical issues raised about these people at this stage.

(vii) Even though this child was premature the health visiting report indicates a very positive prognosis in that the child was putting on weight.

(viii) The guardian's visit was of concern to her but it does not in my view provide clear evidence which would meet the test for immediate removal. The test is not whether there would be a more beneficial environment elsewhere. The guardian herself in paragraph [14] of her final position paper indicated that the case law establishes that there is a high standard to be met to justify removal. Her counsel Ms Steele said that "She is candid that there has not been one incident that she can pinpoint to require immediate removal but describes a cumulative effect of various incidents, issues and concerns that in turn paint a very

> concerning and troubling picture of Stefan's current placement which she has assessed as not being in the best interests at this juncture." The guardian also raised that this was a busy home and that the grandparents have dogs. These issues merit attention however in my view they cannot merit removal *per se*.

[24] I recognise that the judge had the benefit of hearing evidence and that she had carriage of the case. However, applying the applicable legal tests and Convention principles I consider that her assessment was wrong. Overall, I have not been satisfied that there is sufficient evidence to meet the interim removal test required for immediate removal due to the immediate safety of the child being compromised. That is not to say that there are not issues in this case because clearly there are but this is a manageable situation at present. It is clear that further assessments are needed to take place in this case. I commend the judge for taking considerable care and effort to determine this case in the way that she did notwithstanding Covid regulations which have made court hearings difficult. She also very fairly allowed a short stay of this case to facilitate an appeal. My decision to maintain the status quo is driven by the fact that I consider that removal is premature without further consideration of evidence, in particular statements from the grandparents and further consideration of safe care planning. As such this decision is not an outright dismissal of the very real concerns raised by the trial judge. It is simply that at the stage that the matter was before the court with the evidence before the court I do not consider that interim removal was merited.

Conclusion

[25] The child will be subject to an interim care order. This is in place to allow the Trust to share parental responsibility and to manage the risks in this case. The key to this case at an interim stage is a robust safety plan and timely assessment of all of the adults. As I have been asked to retain the case I require statements from the two grandparents who are living with the father as to their support for him and any issues they have within seven days. I also require the Trust to file an updated safety plan. At the hearing, I made it clear that the contingency is removal into foster care if any terms of the safety plan are breached. The main ingredients of the plan are that the father and his family must co-operate fully with the Trust. The father must not consume any cannabis. He must not have any unauthorised contact with the mother. I also indicated that the Trust could consider applying for an Article 57A to exclude the mother from the paternal home.

[26] It remains to be seen if this plan is attainable on a long term basis but certainly it seems to me that it is something that can hold whilst assessments are undertaken. I read that those assessments are likely to take 6 to 9 months. I have asked for more detail on that as it would seem to me that within a shorter period of time the Trust should be able to gather reports together to see where the long term future for this child lies. In the meantime it is obvious that there are tensions between the adults. Much of the mother's case is taken up with allegations against

the father. It remains to be seen if they are accurate, but they should not at this stage prejudice an interim placement with him which has the support of two grandparents.

[27] I am very grateful to the guardian for the care which she has taken in this case. I fully understand her concerns which may ultimately come to pass. I encourage the guardian to continue her good work in this case which will continue by way of visiting and I would ask that for the next review in front of me she files an initial analysis report. I must also say that I consider the Trust have acted in a Convention compliant way in this case under difficult enough circumstances. When the emergency protection order was refused the Trust did look for family placements. It is very unfortunate that the current placement was orchestrated without proper assessment, but nonetheless the Trust has tried to support it and continues to support it. The Trust are also committed even with Covid 19 to regular visiting and monitoring of this placement. That is crucial and should occur on a very regular basis along with health visiting appointments. The Trust is in possession of an interim care order and so it will know that if an emergency situation arises it has the authority to remove the child from the placement immediately or in other circumstances they should utilise the *Re DE* (guidelines) and give notice of any intention to remove the child. Overall, I commend the Trust for the very professional actions that it has taken in managing a difficult adult dynamic.

[28] Accordingly, the appeal is allowed. I have made some directions in the case going forward and I require this matter to come back before me within the next number of weeks at which stage I will timetable for hearing.