SUMMARY OF LEGAL PRINCIPLES RE INTERIM HEARINGS & REMOVAL OF CHILDREN FROM PARENTS

1. An examination of the case law continues to demonstrate that interim removal should very rarely be ordered and that very great care indeed should be taken to ensure that there is proper pre-proceedings disclosure and scrupulously fair procedures adopted at hearings.
2. In Re O (Supervision Order) [2001] 1 FLR 923, Hale LJ (as she then was) emphasises that ‘the court should begin with a preference for the less interventionist rather than the more interventionist approach.  This should be considered to be in the better interests of the children … unless there are cogent reasons to the contrary …’
3. In Re C & B (Care Order: Future Harm) [2001] 1 FLR 611, the feared harm to the subject child derived from the mother’s personality traits which in stressful situations, including conflict with the father, led to her becoming irrational, aggressive, emotionally demanding and incapable of putting the children’s needs before her own .. (para 15)).  At the time of the interim hearing resulting in the child’s removal there was no evidence of physical harm; on the contrary, the evidence was that he was thriving.  Hale LJ (as she then was) said (para 17): ‘I am bound to comment about that.  On what basis could it possibly be appropriate to remove a 10 month-old baby from the only parents and home he had ever known, at a crucial stage in the development of his attachments, when there was no evidence that he was at immediate physical risk and, indeed, no evidence that he was at immediate emotional risk?  All the evidence was that he was doing well.  All the evidence was that there was no existing pointer to anything that might have been thought to indicate that he was not doing well at that time.  Any evidence of a risk of harm was to his intellectual and emotional development at a considerably later stage…. I do not, of course, wish to suggest that there are no cases in which one should intervene now to prevent future harm, or that none of those may warrant immediate pre-emptive action before the case comes on for full hearing.  But this was nowhere near a clear enough case of the former to warrant the latter.  It was a classic example of a situation where the case for intervention should have been proved by a full hearing in court before the intervention took place, and not after.’
4. Hale LJ went on to say (para 28) that the court had to look at the nature of the feared harm – clearly removal might be justified where there was a comparatively small risk but of really serious harm.  However, it was not so justified where the harm was not immediate and not of the gravest sort.  The nature and gravity of the feared harm must be highly relevant to the action taken in response to it.  ‘I also accept that there are cases in which the local authority is not bound to wait until the inevitable happens: it can intervene to protect long before that.  But there has to be a balance.  The cases where it is appropriate to do that are likely to involve long-standing problems which interfere with the capacity to provide even ‘good enough’ parenting in a serious way, such as serious mental illness, or a serious personality disorder, or intractable substance abuse or evidence of past chronic neglect or abuse, or evidence of serious ill-treatment and physical harm’ (para 30).  The response or intervention must be proportionate to the feared harm.
5. In Re G (Care: Challenge to Local Authority’s Decision) [2003] 2 FLR 42, Munby J held: ‘The fact that a local authority has parental responsibility for children pursuant to s 33(3)(a) of the Children Act 1989 does not entitle it to take decisions about children without reference to, or over the heads of the children’s parents.  A local authority, even if clothed with the authority of a care order, is not entitled to make significant changes in the care plan, or to change the arrangements under which the children are living, let alone to remove the children from home if they are living with their parents, without properly involving the parents in the decision-making process and without giving the parents a proper opportunity to make their case before a decision is made.  After all, the fact that the local authority also has parental responsibility does not deprive the parents of their parental responsibility.’
6. In Re B (Care: Interference with Family Life) [2003] 2 FLR 813, Thorpe LJ held: ‘the judge may not make such an order without considering the European Convention for the Protection of Human Rights and must not sanction such an interference with family life unless he is satisfied that that is both necessary and proportionate and that no other less radical form of order would achieve the essential end of promoting the welfare of the children.’
7. In Haase v Germany [2004] 2 FLR 39, the European court held (para 95 ff): ‘ 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 Art 8 to enjoy a family life with their child…before public authorities have recourse to emergency measures in such delicate issues 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 measure, there should be no room for an emergency action, in particular when, like in the present case, the danger had already existed for a long period.’
8. The approach to be adopted by the courts is well summarised in the Court of Appeal judgment in [Re GR (Children) & others [2010] EWCA Civ 871](http://www.familylawweek.co.uk/site.aspx?i=ed63478) and the lead judgment of Lady Justice Black:

"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](http://www.bailii.org/ew/cases/EWCA/Civ/2002/1932.html), 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](http://www.bailii.org/ew/cases/EWCA/Civ/2005/1594.html), 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](http://www.bailii.org/ew/cases/EWCA/Civ/2006/1898.html), 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](http://www.bailii.org/ew/cases/EWCA/Civ/2009/822.html), 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."  
  
40. 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."   
  
41. 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.   
  
42. The most recent case to which I would refer is [Re B and KB [2009] EWCA 1254](http://www.familylawweek.co.uk/site.aspx?i=ed45073) 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."  
  
43. 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. "

1. Lady Justice Black further considered the issue of interim removal in [L (A Child) [2013] EWCA Civ 489](http://www.familylawweek.co.uk/site.aspx?i=ed113702). In this case the mother and her baby had already been separated for a period of 2-3 months as a result of a decision which was the subject of challenge. The mother was in prison and wished to care for the baby in the prison mother & baby unit. The local authority were clearly of the view that the mother would not be able to care for the baby in the long term although it did not argue that there would be a short-term risk to the child on the unit.

The court referred to the earlier summary of the relevant principles to be applied in Re G-R.

1. Black LJ held that the court was in principle entitled to take account of the fact that the mother & baby had already been separated and that the mother's wish would entail the child being removed from a foster placement in which he had settled, with the prospect of being separated from the mother in due course, if the local authority's pessimism was well-founded. However, here the District Judge had fallen into error in concluding that the child's emotional safety would be compromised because of the disruption in moving between placements and the likely effect on the proceedings being effectively stayed causing delay before long-term decisions could be made. Black LJ did not consider that these points about emotional harm were captured by the authorities on interim removal / separation:

“In saying that an interim care hearing was not the place for an evaluation of the longer term position, I am not saying that the district judge had to decline to look at the possible outcome of the final hearing at all. He was required to manage the case procedurally and for that purpose he was entitled, I think, to make a provisional evaluation of it on the evidence assembled so far and needed to do so in order to determine how the case should proceed thereafter. As he recognised, he needed to keep a firm control over the proceedings and had to ensure that in so far as possible the timetable for the proceedings did not get in the way of A's timetable. I agree with counsel for M that the way in which he could properly have minimised the impact of delay on A was to schedule an early final care hearing, rather than taking decisions at the interim care hearing which in my view came perilously close to prejudging the outcome of the case. Depending on the complexion of the evidence by that stage, that early final hearing would provide an appropriate forum for consideration of whether the prospects of M successfully caring for A herself were so poor as to leave no alternative to the making of a final care order or whether there was sufficient optimism to justify a further postponement of the decision or the making of some order which would permit continued exploration of the possibility that A might live with her.

In addition to the poor prognosis, as he saw it, for M's case and the delay to the plans for A that would result from the need to test out her good intentions when she came out of prison, what influenced the district judge here was the harm that would be caused to A by disrupting the attachment that had begun to grow between him and the foster parents in order to place him with M now and the chance that A would be subjected to further moves later on.

I would not dismiss such disruption to A's attachments and his settled living arrangements as irrelevant but it had to be put into the balance alongside the other factors that were relevant to the district judge's decision and accorded the weight that was appropriate given the Court of Appeal guidance on the use of interim care orders. It may be argued that it is not essential from A's point of view that he goes to live with M now because he would be able to transfer his attachment to her later on if a placement with her were later to be approved by the court. However, looking at the matter from a different angle, there can be little doubt that if M is to have the best chance of caring for him, she needs to have the opportunity to get to know A as soon as possible and to form a bond with him. She was with him for a matter of days only, in the hospital immediately after he was born. He will have been developing rapidly since then and the once monthly contact which the local authority arranged thereafter would not enable M to build up a relationship with him to serve as a foundation for care of him in the future and thereby to improve his chances of being able to live with her.

In the short term, there was no danger to A's safety, physical or emotional, in the prison unit and it was inappropriate, as I have said, to class the longer term issues as a danger to A's emotional safety of the type contemplated in the authorities. Accordingly, in my view, the relationship of A and M should have been preserved pending a final adjudication of the issues in the care proceedings. Concern as to delay should have been addressed by making arrangements for this final adjudication to take place promptly rather than by foreshadowing its determination by the making of an interim care order which kept M and A apart. It is for these reasons that I was in favour of allowing the appeal and substituting an interim supervision order for the district judge's order.

1. Pauffley J made some important points in [Re NL (A Child) (Appeal: Interim Care Order: Facts and Reasons) [2014] EWHC 270 (Fam)](http://www.familylawweek.co.uk/site.aspx?i=ed127643) about the manner in which interim hearings should be dealt with and evidence which will suffice to justify interim removal.
2. She reminds us of the three well known propositions derived from the Court of Appeal's decision in *Re LA (Care; Chronic Neglect) [2010]* 1 FLR 80 applicable to interim care orders. Firstly, "…that the decision taken by the court must necessarily be limited to issues that cannot await the substantive hearing and must not extend to issues that are being prepared for determination at that fixture". Secondly, "… that separation is only to be ordered if the child's safety demands immediate separation" (my emphasis). And thirdly, that a local authority in seeking to justify the removal of a child from home necessarily must meet a very high standard – reiterating what had been said in *Re K and H [2007]* 1 FLR 2043 namely 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."
3. Applying the principles from the cases cited above, a local authority and a court should take consider:
4. Does the child’s safety demand their immediate separation? Interim removal is only to be sanctioned if this is the case. Safety is to be considered in a broad sense, to include the child’s emotional and psychological welfare.
5. Are the necessarily very high standards for the removal of the child met?
6. Is the decision to make an ICO limited to issues that cannot await the fixture? The decision must not extend to issues that are being prepared for determination at that fixture.
7. Is there any justification for an order interfering with this child’s right to family life?
8. If there are any concerns established which might justify some sort of order, the court should prefer a less interventionist legal regime than an ICO with a removal plan.  Is there a way in which the concerns of the local authority can be met without the need for removal?
9. Have the parents been properly involved in the decision-making of the local authority or afforded the proper opportunity to make their case before a decision is made?
10. Is the order being considered really aimed at ensuring assessment of the child (not in itself sufficient justification for removal)?
11. What evidence can be filed in support of the application? Is it full, detailed, precise and compelling?
12. What proposals are there for contact between the child and either of her parents?  These need to be clear and substantial.
13. Has a case conference been held and the minutes made available? Has the parent been given a copy of the CPC minutes?  Are there other relevant documents which the court will expect the parents to have seen?
14. Has the local authority carried out a meaningful assessment of the family and can it produce evidence of its conclusions?
15. Is the local authority concerned because it cannot get evidence or an agreement to an assessment?  This will not by itself justify the making of an ICO if other remedies can be implemented.
16. Can removal be justified before a Guardian has been appointed, reported or had sufficient opportunity to consider the case independently?
17. Can the decision on removal be postponed for a short time to allow for any procedural fairness issues to be dealt with, without undue risk to the child or with short-term high level intervention or monitoring?
18. Is the alternative proposed adequate and in the interests of the child? If a foster placement is proposed does the proposed carer have the necessary skills, appropriate family set up and meet any particular ethnic or cultural needs? Is there anything about the child which militates against an unplanned move (such as autism affecting the child’s ability to manage change)?

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