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Urgent Care Proceedings for New-born Babies in England and Wales – Time for a Fundamental Review

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ABSTRACT

Emergency action to safeguard babies at birth who are at risk of significant harm is sanctioned in a number of international jurisdictions, including the UK, the USA, Canada, Australia, New Zealand, and Europe. However, there is widespread international disquiet about this practice, regarding breaches of parents' Articles 6 and 8 rights (Human Rights Act 1998), as well as the reliability of hasty decisions for children. This article reports the findings from the first large-scale qualitative study of professional and parental experience ($n = 307$ participants) of compulsory State intervention at birth, with a specific focus on urgent care proceedings. Completed in eight local authority areas and corresponding health trusts in England and Wales (2019–2021), the study concludes that children's social care, hospitals, and the family courts are not yet sufficiently aligned around the needs of a small, but highly vulnerable population of mothers, their partners, and babies to ensure equitable, just or effective practice in cases of urgent care proceedings. Evidence is provided from both professionals and parents about the highly consequential nature of interim decisions, particularly where they result in physical separation of mother and baby at birth. The article advances knowledge about the distinctive challenges of issuing family court proceedings in the immediate post-partum period and calls for a fundamental review.

I. INTRODUCTION

When babies are deemed at risk at birth, social workers and the family courts must carefully balance the protection of the baby, with the imperative to act in ways that are proportionate and fair. This is an unenviable challenge, particularly in the case of new-born babies who are entirely dependent on their caregivers. This challenge is not particular to the UK, indeed, the practice of emergency action at birth has been subject to considerable debate and disquiet in the USA, Canada, Australia, New Zealand, and in Europe.[1] Critics have argued that both Articles 6 and 8 of the Human Rights Act (HRA) 1998 are

1 For example, L. Campbell and others, 'High Risk Infants in the Children's Court Process in Australia: Dilemmas and Directions' (2003) 25(2) *Journal of Social Welfare and Family Law* 121–135. See also, Office of the Ombudsman, New Zealand (2020) *A Matter of Urgency. Investigation Report into Policies, Practices and Procedures for the Removal of New-born Pepi by Oranga Tamariki, Ministry for Children.*

at stake, because urgent action compromises parents' access to robust legal representation and leaves the decision-maker with incomplete or partial information upon which to base a judgment about children's welfare.[2] Although decisions for children can change during the course of proceedings, critics have argued that interim decisions, particularly where parent(s) and child are separated, can influence final outcomes because of the detrimental impact on parents' mental health.[3] In the case of new-born babies, interim decisions are also particularly potent, because decision-makers will be reluctant to disrupt a young baby's stable caregiver arrangements.[4] Recent evidence from England and Wales is that only a small proportion of new-born babies are subject to a supervision order, or no order, at the close of care proceedings, whereas a high proportion of infants are subject to plans for adoption.[5] This observation is consistent with related research on children in care, which has consistently reported lower rates of restoration of infants to parents, compared to older children.[6]

In this article, we report the findings from a qualitative study of compulsory State intervention at birth (2019–2021) in England and Wales, focusing specifically on urgent

https://www.ombudsman.parliament.nz/sites/default/files/2021-11/He%20Take%20Kōhukihuki%20-%20A%20Matter%20of%20Urgency.pdf. (Last accessed 15 November 2021).

2 This point is made in a number of leading judgments in England: Munby LJ refers to issues of quality and completeness of evidence in: *X Council v B & Ors* [2004] EWHC 2015 (Fam). Jackson LJ summarises concerns regarding interim decisions in: *re C (A Child) (Interim Separation)* [2019] EWCA Civ 1998. At point 2 (1) Jackson LJ states: 'an interim order is inevitably made at a stage when the evidence is incomplete.' See also Masson and others, *Protecting Powers. Emergency Intervention for Children's Protection* (Wiley, 2007). The authors found courts were not effective in scrutinising EPO applications and identifying weak applications (p. 217).

3 See J. Hunt. *Parental Perspectives on Family Justice System in England and Wales: a Research Review* (Family Justice Council, 2010). See P. Chill, 'Burden of Proof Begone, The Pernicious Effect of Emergency Removal in Child Protective Proceedings' (2003) 41(4) *Family Court Review* 457–470. Chill argues that the emotional stress of child removal can ultimately become the basis upon which the court feels longer-term removal is in the best interest of the child (pp. 461–463).

4 In the UK and internationally, there is considerable emphasis on early permanence for infants in family justice proceedings. UK initiatives designed to promote early permanence include fostering to adopt and concurrent planning. The Children and Families Act 2014 imposes a duty on local authorities to consider placement with dually approved carers (ie, carers who are approved as foster carers but also as prospective adopters).

5 For statistics on new-borns in care proceedings, see K. Broadhurst and others, *Born into Care: Newborns in Care Proceedings in England* (Nuffield Family Justice Observatory, 2018) <https://www.nuffieldfjo.org.uk/resource/born-into-care-newborns-in-care-proceedings-in-england-final-report-october-2018> (Last accessed 3 November 2021). Based on $n = 13,214$ new-born cases (England), the largest proportion of new-born babies were subject to placement orders at the close of care proceedings (ie, the plan was for adoption). Finding consistent across all years at 47–52 per cent of all cases. 12–14 per cent of infants in care proceedings were subject to a supervision order, or no order. For the full breakdown of legal order data for babies compared to older children, see Table 6, p. 33. Limitations of the data and assumptions: pp. 16–17.

6 For statistics on new-borns in care, see eg, R. J. Pearson and others, 'Characterising New-Born and Older Infant Entries into Care in England Between 2006 and 2014' (2020) 109 *Child Abuse and Neglect* 104760. Based on all infants ($n = 42,000$) who entered care before 2010, 58.2 per cent of new-born babies were adopted over follow-up and only 19.7 per cent were restored to parents' care, over follow-up. Regarding placements at first care entry, very few babies were placed at home with parents per year (range:1.7– 2.9 per cent) and very few were placed in mother and baby placements each year (1. 9– 4.8 per cent), see Table 1, p. 8. See also, E. Neils, L. Gitsels, and J. Thoburn, 'Returning Children Home from Care: What can be Learned from Local Authority Data' (2019) 25(3) *Child and Family Social Work* 548–556. Children aged 0–2 years have very different pathways through care and were less likely to be restored to parents' care.

care proceedings issued under section 31 of the Children Act 1989 (hereafter, CA 1989). The project was completed as part of the *Born into Care* series, a programme of work designed and delivered for the Nuffield Family Justice Observatory.[7] The findings reported in this article speak directly to concerns captured in the most recent national report from wholesale review of family justice by the President of the Family Division's Public Law Working Group (PLWG, England and Wales, 2021) about the growing volume of care proceedings issued at short notice, the reasons for this increase, and the implications for families and professionals.[8] This article builds on recent research which has captured trends in the use of urgent care proceedings in England and Wales for new-born babies.[9] In an increasing proportion of infant care cases in England and Wales, parents are given only 1–2 days' notice of a court hearing and in some cases, parents are given less than 1 days' notice.[10] This statistical evidence prompted a formal response from the President of the Family Division (England and Wales) in June 2021, in which Sir Andrew McFarlane called for investigation of the overall context of practice and stakeholder experiences, noting the particular vulnerability of mothers in the immediate post-partum period.[11]

In England and Wales, a range of emergency or urgent actions are open to social workers and partner agencies when a baby is deemed to be at risk of immediate harm and the local authority wants to remove the baby from parents' care. These options include seeking a voluntary agreement with parents (section 20 of the CA 1989/section 76 of the Social Services and Well-being (Wales) Act 2014), the use of police powers (section 46, CA 1989), an application for an Emergency Protection Order (section 44, CA 1989), or an application for an Interim Care Order (ICO) (section 31, CA 1989) to be heard on an urgent basis. The exercise of police powers does not require authorisation of the court, but these powers only allow removal of a child for 72 hours. If the local authority requires a longer period of separation, a voluntary agreement with parents must be sought, or a court order. Evidence is that the use of both voluntary agreements and Emergency Protection Orders (EPO) in new-born baby cases is waning in England and Wales[12] following a number of high-profile Court of Appeal

7 Reports from this series are available at: https://www.nuffieldfjo.org.uk/our-work/newborn-babies. (Last accessed 12 November 2021).

8 Public Law Working Group, '*Recommendations to Achieve Best Practice in the Child Protection and Family Justice Systems*' (2021) para 45, p. 29. <https://www.judiciary.uk/publications/message-from-the-president-of-the-family-division-publication-of-the-presidents-public-law-working-group-report/> accessed 12 November, 2021.

9 R. Pattinson and others, '*Born into Care: New-born Babies in Urgent Care Proceedings in England and Wales*' (Nuffield Family Justice Observatory, 2021). In England, ~86.3 per cent of all new-born cases were issued at short notice in the fiscal year 2019–2020 and 74.8 per cent in Wales. See data tables in main report, pp. 19–20 <https://www.nuffieldfjo.org.uk/wp-content/uploads/2021/06/newborn-babies-in-urgent-care-proceedings-in-england-and-wales-report-0621.pdf> (Last accessed 12 November 2021).

10 Pattinson and others ibid. In an increasing proportion of cases, the application is made and heard on the same day (approx. 1 in every six cases). Overall, the notice period is reducing.

11 Sir Andrew McFarlane, quoted in the Law Gazette, 4 June 2021. <https://www.lawgazette.co.uk/news/newborn-care-report-sparks-judicial-response/5108743.article> (Last accessed 10 October 2021).

12 *Children looked after in England, including adoption* 2018–2019, London: Department for Education. This is the most recent DfE report and indicates overall downward trend in children entering care subject to s.

judgments,[13] with local authorities preferring to issue care proceedings on an urgent basis. In this context, it is critical to provide policy makers and practitioners with a more detailed understanding of the practice and experience of urgent care proceedings, to inform debates about effective and proportionate safeguarding action at birth.

The findings reported in this article are drawn from close qualitative engagement with eight local authority areas and corresponding health trusts in England and Wales, which involved a large sample of professionals and parents in interviews and focus groups, to probe the context and experience of infant removals at birth. A total of 307 research participants took part in this collaborative study. The article concludes with a set of observations which are of international relevance, but also calls for a more fundamental review of family justice in the immediate post-partum period.

II. THE REMOVAL OF BABIES AT BIRTH: AN INTERNATIONAL CONCERN

In Australia, New Zealand, Canada, the USA, the UK, and a number of European contexts, proceedings cannot be started until *after* an infant has been born. We might therefore expect greater urgency when safeguarding action is taken at birth, which includes family court proceedings. However, the human rights concerns raised by the emergency removal of infants at birth are considerable. A number of high-profile cases and international reviews have brought this issue sharply into focus, leading to some measurable changes in a number of jurisdictions for parents and babies. A full review of cases/inquiries is beyond the scope of this article; however, examples from different international jurisdictions illustrate the global salience of this justice issue.

Turning first to Canada, apprehensions of babies at birth have been subject to considerable scrutiny in a number of provinces.[14] For example, in Alberta, apprehensions are governed by the Child Youth and Family Enhancement Act (CYFEA) . Under section 19 of this legislation, if Alberta Children Services have sufficient grounds to believe removal is in a child's best interests, officials can apply to the court for apprehension ex parte (without hearing the parents' defence).[15] However, this practice has been questioned in a series of high-profile cases (*C.J.P v Alberta*, 2007 ABQB 659, *C.R. v Alberta* (Child, Youth, and Family Enhancement Act, Director), 2015 ABQB 198)[16] with critics arguing strongly that all apprehensions should require sufficient notice for parents and

20 CA 1989. England makes limited use of EPOs and Wales makes extremely limited use of EPOs. See Pattinson and others (n 9), p. 25.

13 Examples of case law: Emergency Protection Orders: *X Council v B (Emergency Protection Orders)* [2004] EWHC 2015 (Fam). Use of s. 20 agreements: CA (A baby) [2012] EWHC 2190 (Fam); H (A Child: Breach of Convention Rights: Damages) [2014] EWFC 38.

14 Media Coverage in Canada. <https://www.todaysparent.com/family/family-life/birth-alerts-canada-discriminatory-need-to-stop/>. Canadian Institute of Child Health, '*Pro-Action, Post-ponement, and Preparation/Support*' (CAPC/CPNP, 2020) . See also E. Ordolis, 'A Story of their Own: Adolescent Pregnancy and Child Welfare in Aboriginal Communities' (2020) 3(4) *First Peoples Child & Family Review* 30–41.

15 Child Youth and Family Enhancement Act, RSA 2000: notice of apprehension is set out at s 19 <https://www.qp.alberta.ca/documents/Acts/c12.pdf>. (Last accessed 12 November 2021).

16 The following provides commentary on key cases and subsequent changes to practice in Canada. <https://familylawyerab.com/blog/ex-parte-apprehensions-of-children/>. (Last accessed 10 October 2021).

that parents must have a right of reply. Any ex parte application and court process runs counter to a judicial commitment to impartiality. Without both sides present to balance the presentation of information, judges may have a misleading, inaccurate, or an incomplete version of the facts. In Alberta, the latter point has received considerable scrutiny (*P.E. v The Director of Child and Family Services*, 2010 NUCJ 24),[17] because of a failure on the part of children's services to seek court review of ex parte decisions within a reasonable timeframe. In Canada, this is seen as a violation of the principles of fundamental justice as enshrined in section 7 of the Canadian Charter of Rights and Freedoms.[18]As a result of a number of similar high-profile judgments in Canada, in some provinces ex parte orders are no longer possible, or children's services must return swiftly to court for a review of such decisions.

In New Zealand, the high-profile attempted uplift (removal) of a baby at birth in Hawkes Baye Hospital,[19] extensively covered by the media in 2019, drew the issue of removal of babies from indigenous communities into sharp focus. When children's services (Oranga Tamariki) attempted to uplift a baby from the hospital, family members and midwives filmed the event. The film was subsequently released to the press. In this case, neither the mother nor wider family members had been given notice of the uplift or plans for the baby. The case highlighted deep concerns about the mistreatment of Māori families within child protection practice in New Zealand, incompatible with the Treaty.[20]As a consequence, significant changes have been made to child protection practice.[21]

In Australia, high-profile cases covered in the media have raised questions about whether the removal of a baby at birth is 'precipitously premature'[22] because removal at birth presumes, rather than tests out, a parent's ability to care for a baby after birth.[23] As Campbell and colleagues have stated, in the case of a first child, parents have no track record against which parenting performance can be judged or predicted.[24] This can make the removal of a first baby at birth appear highly presumptive in terms of future risks. In New South Wales, judges have refused applications for infant removals, arguing that pre-planned interventions based on future risks are premature and based on incomplete assessment. They have argued that parenting

17 This case indicates the disquiet about apprehension ex parte and the evidentiary burden when emergency action is taken.

18 Canadian Charter of Rights and Freedoms. <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html#a3> (s 7 is legal rights).

19 Coverage of NZ uplift cases. <https://medium.com/@marli_k/uplifting-babies-how-to-design-for-a-service-no-one-really-wants-16a9620242fd>. Video is available at: https://www.youtube.com/watch?v=vi7N5jknS8c. (Last accessed 21 October 2021).

20 The case was formally reviewed by the Office of the Children's Commissioner New Zealand. <https://www.occ.org.nz/assets/Uploads/Te-Kuku-O-Te-Manawa-Report-2-OCC.pdf>. (Last accessed 20 October 2021).

21 In a statement from formal review of the case, conclusions were that practitioners had not tried hard enough to build good relationships with whānau members or to explore options to place the baby with wider family, and the systems in place to check decisions did not work as intended. Formal apology is available at: <https://www.youtube.com/watch?v=mqV6R-IbllI> accessed 14 November 2021.

22 Article cites the opinion of a NSW District Court Judge who was highly critical of a planned removal at birth. <https://www.abc.net.au/news/2021-06-23/childrens-court-slams-plan-to-remove-baby-from-mother-at-birth/100231236>; See also, Campbell and others (n 1).

23 https://indaily.com.au/news/2020/06/29/aboriginal-mothers-absolutely-helpless-after-babies-taken-at-sa-hospitals/ (Last accessed 15 November 2021).

24 Campbell and others (n 1).

assessment must continue after birth.[25] The issue of disproportionate rates of baby removals from indigenous families is also a major concern in Australia.[26]

In 2015, a report from the Council of Europe[27] which examined child protection practices in Member States concluded that there were marked differences in practice across Europe[28] in respect of adoption without parental consent and the complete severance of family ties. The report was also highly critical of the removal of babies at birth. It was argued strongly that all of these matters have a direct impact on the right to family life, in respect of children and parents (Article 8, HRA 1998), as well as the right to a fair trial (Article 6, HRA 1998). Member States were urged to review their practices to ensure that the removal of babies at birth is reserved for the most extreme circumstances.[29] In addition, any child removed from parents' care must be subject to an active plan for family re-integration, wherever possible.

In England and Wales, there has been substantial criticism of the use of voluntary agreements with parents and the EPO. Turning first to voluntary agreements (section 20, CA 1989 and section 76, Social Services and Wellbeing Act [Wales] 2014), although social workers and local authority lawyers value these arrangements, voluntary agreements have been subject to fierce judicial critique. In a series of high-profile Court of Appeal cases, judges have argued that the avoidance of proceedings means that the basis for intervention in family life has not been tested, and may result in action with which a court would not agree. In the case of new-born babies, local authorities have been criticised for failing to have full written consent in advance of removing a baby, and questions have been asked about whether mothers are in a position to give informed consent within hours or days of birth (*Re CA (A baby)* [2012] EWHC 2190 (Fam)).

At the opposite end of the spectrum, the use of EPOs has also been subject to fierce critique. In 2015, Sir James Munby described the use of EPOs as an 'extremely harsh measure' (*X Council v B (Emergency Protection Orders)* [2015]) and stressed the necessity of ensuring parents are given notice when an application for an EPO is made, save for 'wholly exceptional' cases.[30] In this case, Munby LJ stressed the heavy burden of responsibility on local authorities, the need to consider very carefully the European Convention on both the rights of the child and the parents, and the ethos of the CA 1989, which steers local authorities in the direction of least intervention. Munby LJ also emphasised that evidence in support of an EPO must be detailed, accurate, and compelling. The current position in England and Wales is that local authorities are more cautious about seeking voluntary agreements with parents, and there is scant use of the EPO. The conclusion of the PLWG's recent review

25 (n 22).

26 See M. O'Donnell and others, 'Infant Removals: The Need to Address the Over-representation of ABORIGINAL INFANTS and Community Concerns of Another 'Stolen Generation'' (2019) 90 *Child Abuse and Neglect* 88–98.

27 See O. Borzova, 'Social Services in Europe: Legislation and Practice of the Removal of Children from their Families in Council of Europe Member States' (2015)<https://pace.coe.int/en/files/21567/html> (Last accessed 12 September 2021).

28 ibid p. 3, para. 3.

29 ibid.

30 *X Council v B* (n 13).

was to strongly discourage the use of sections 20/76 for new-born babies, aside from very restricted circumstances.[31] Similarly, the proportion of public law cases for new-borns, in which an application for an EPO is recorded, has fallen from 12% in 2007–2008 to 5.5% in 2019–2020.[32] In contrast, new evidence is of increasing use of urgent care proceedings in England and Wales, with the greatest increase for new-born babies.[33]

Taken together, this body of evidence arising from national and international reviews and high-profile cases highlights the challenges of safeguarding new-born babies but also international consternation regarding due process. Although there is clear recognition of the need to protect new-born babies at risk of harm, common concerns across jurisdictions include serious disquiet about notice to parents, general transparency of practice, lack of inclusion of wider family networks, disproportionate impacts on marginalised communities, the quality of evidence put before the courts upon which decisions for children are made, the checks and balances within justice systems, and the impact of emergency action on mothers in the immediate post-partum period.

III. URGENT CARE PROCEEDINGS AT BIRTH: THE SHIFTING USE OF LEGAL OPTIONS IN ENGLAND AND WALES

Shifts in application of the law warrant detailed examination, particularly where they concern matters as contentious as family court proceedings at birth.[34] Although issuing care proceedings at birth may (in part) satisfy critics uncomfortable with both voluntary agreements and the use of EPOs – it is clear that applying for an ICO at short notice also raises searching questions about parents' Articles 6 and 8 rights. In 2021, the final report from the President of the Family Division's PLWG (England and Wales, March, 2021) reported widespread concerns about the increasing volume of care proceedings issued on an urgent basis. A number of sections of the final report were devoted to practice with new-born babies – once again raising questions of rights and proportionality when safeguarding action is taken at birth.

Issuing care proceedings at birth raises a number of distinct challenges regarding procedural justice. Turning first to *notice*, in all cases of care proceedings under the CA 1989, parents must be given notice. However, when proceedings are issued on an urgent basis the local authority applies to the court for a hearing at short notice. Under the Public Law Outline,[35] a first hearing within care proceedings typically

31 See para. 20, p. 154 PLWG: 'separation of a new-born or a young baby from their parents is scarcely appropriate under the provisions of s 20. The circumstances in which this is appropriate are very rare. The (limited) appropriate use of s 20 in this context may include circumstances where the parents need a very short period in a residential unit to prepare for the child to join them, or if a carer needs to undergo a short programme of detoxification or medical treatment.'

32 Data tables (aggregate) available from Centre for Child and Family Justice Research, Lancaster University on request.

33 Pattinson and others (n 9). In 2019–2020, 86.3 per cent of cases involving new-born babies in England and 74.8 per cent of cases involving new-born babies in Wales were heard at short notice (under seven days) – the majority of which on an emergency basis, with 1–2 days' notice.

34 Pattinson ibid usage of emergency protection orders is set out on p. 25.

35 Public Law Outline, Practice Direction 12A sets out key stages of the court process. <https://www.justice.gov.uk/courts/procedure-rules/family/practice_directions/pd_part_12a#para> accessed 20 November 2021.

takes place after 12 days. However, abridged notice can mean cases are heard with as little at 1–2 days' notice, and indeed, new evidence is of an increasing number of cases issued and heard the *same* day.[36] Given moves towards a shorter notice period, it is questionable whether safeguards for parents are, in practice, materially better than those afforded by the EPO. Unlike the EPO, a hearing within care proceedings cannot take place ex parte, but where notice amounts to a few hours immediately after birth, parents' rights to a fair trial are undoubtedly compromised (Article 6 HRA 1998).[37]

A second concern centres on the outcome of an interim hearing, in particular where *immediate separation* of mother and baby is ordered. When the local authority applies for an ICO at an urgent first hearing, a range of outcomes are possible which typically include the immediate removal of a baby from parents' care, or the placement of mother and baby in a supervised setting (foster care, residential unit), or with kin. Physical separation of mother and baby at an interim stage in care proceedings is seen as a particularly severe interference with the right to family life under Article 8, because evidence before the court is inevitably incomplete. Thus, the court needs to be satisfied that removal is both necessary and proportionate and that resources which might prevent separation have been exhausted.[38] The test for separation at an interim stage is that the child is at risk of immediate harm and resources are not available to safeguard the child without separation.[39] It is important to differentiate the threshold for the making of an ICO and the separate test for removal.[40] In the recent Court of Appeal case: *Re C (A Child) (Interim Separation)* 2019, Peter Jackson LJ underscored the severity of removal in the case of a baby and his isolated young mother. Jackson LJ found in favour of the mother, arguing that a further mother and baby placement ought to have been agreed because separation would severely interrupt the *formation* of the bond between parent and baby.[41] Thus, Jackson LJ considered that a further supervised placement was more proportionate than separation. Moreover, he stressed the potential for interim removal to *influence the case in the longer-term:* 'the separation of mother and child at such a crucial developmental stage would, apart from its serious impact on the child and on the mother/child bond, risk skewing the final decision.[42] In new-born baby cases, assessment of parenting is often incomplete at the point of birth; however, the arrival of the new-born baby forces the hand of the local authority. Given this fact, it is critical that interim decisions do not (unintentionally) constitute premature determination of the case. Conclusions drawn by Jackson LJ resonate with those of a number of US

36 Pattinson and others (n 9) p. 20.

37 Right to a fair trial: https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/5 (Last accessed 21 September 2021).

38 For a useful discussion of the threshold for interim and final separation, see <https://www.transparencyproject.org.uk/what-is-the-legal-test-for-taking-a-baby-away-before-a-final-order-is-made/> (Last accessed 25 September 2021).

39 C (A Child) (n 2).

40 See M. Freel, 'Baby K's Unlawful Removal: Practice Issues in the Emergency Protection of Children' (2010) 19 *Child Abuse Review* 158–168. The distinction between the threshold for the making of an ICO and interim removal is explained on p. 160.

41 C (A Child) (n 2)

42 ibid.

critics[43] who have argued that the detrimental impact of parents' mental health in particular, when courts rule in favour of interim separation, can subsequently prejudice the final outcome of cases. Of course, had parents agreed separation on a voluntary basis, they would have retained the right to demand return of their baby, but where separation is authorised by an interim care order, the case must be returned to court.

Concerns about short notice and immediate separation at birth are compounded by a third concern, which is the absence of any requirement within the law, to swiftly review interim decisions in care proceedings. In the case of urgent care proceedings, the judge can request a swift return date (ie, as soon as is practical) to properly test the evidence for removal, but this is at the discretion of the individual judge. As Masson and colleagues[44] have described, when we act in an emergency we tolerate a lower standard of evidence, mistakes can be made and decisions for children may not be durable. It is therefore, critical that such extraordinary action is subject to review, as soon as is practical. This understanding was built into the design of the EPO, a short-term order, which lasts for only 8 days and requires the local authority to return to court if there are grounds for a longer period of removal. Strictly limiting the duration of the EPO, which could also be made ex parte, aimed to protect parents and children from the unfettered power of the State. In addition, parents or those with parental responsibility can apply to the court to discharge the EPO within the first 72 hours, if the EPO was made without notice or they have not attended the hearing. This stands in contrast to the making of an ICO, where a first ICO is no longer time limited, rather national guidance simply states the court should determine the duration of the order taking into account the particular circumstances of the case.[45]

In pursuit of an effective but proportionate approach to safeguarding babies at birth, local authorities face broader systemic challenges, which also help to explain the 'urgency' of care proceedings at birth. The practice of discharging mothers and babies from the maternity ward as soon as possible after birth, has been described by practitioners as a key causal factor in the rush to care proceedings in the immediate post-partum period.[46] Maternity units now routinely discharge mothers and babies within 48 hpurs of birth in England and Wales, resulting in considerable pressure on local authorities to issue care proceedings close to birth.[47] Such pressures are not new,[48] but have understandably

43 Chill (n 3).

44 Masson and others (n 2), see chap 1.

45 The Children and Families Act 2014 removed time limits on interim care orders, see s. 14 of the Children and Families Act 2014. See also paras 27–31, pp. 28–29 of national guidance: *Court Orders and Pre-proceedings for Local Authorities.* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306282/Statutory_guidance_on_court_orders_and_pre-proceedings.pdf> (Last accessed 21 December 2021).

46 C. Mason and K. Broadhurst, Discussion Paper: 'What Explains Marked Regional Variation in Infant Care Proceedings' (2020). <https://www.nuffieldfjo.org.uk/resource/regional-variations-infant-care-proceedings> accessed 28 November 2021. Practitioners described different approaches to hospital discharge, but overall, hospitals sought to discharge mothers and babies within 48 h of birth, unless there was a clear medical warrant for a longer stay.

47 ibid.

48 Maternity care in the UK is a high volume universal service. In the UK, there are around 800,000 births annually at considerable cost to the NHS. Practice has moved in the direction of very short stays following birth. In England, in 2013, almost 70 per cent of women remained in hospital for less than two days

increased during the COVID-19 pandemic.[49] Where this pressure combines with a national shortage of mother and baby placements, local authorities may have little option but to separate mothers and babies at birth , pending further assessment.

Prior to the research we report in this article, there has been no systematic analysis of the concerns raised by the PLWG or by individual Court of Appeal decisions about urgent care proceedings. This absence has left policy makers and practitioners with only a handful of published judgments or anecdotal evidence to guide practice development. In this context, it is of little surprise that the final report of the President's PLWG (England and Wales) illustrated the continued professional debate about the best way to safeguard children who require urgent protection.

IV. METHODOLOGY

1. Overview and Quality Standards

The findings reported in this article are drawn from the first large-scale qualitative study to examine compulsory intervention at birth from the perspective of a range of health, welfare, and legal practitioners, as well as parents. The aim was to understand the experience of separation of mothers and infants at birth, through the lenses of different stakeholders and to identify commonalities in perspectives and experience. Theoretically, the research was informed by the principles of applied policy research,[50] was driven by research questions grounded in real-world dilemmas, and sought close engagement with practitioners and family members throughout the project, including in the consultation on findings.[51]

The process of data collection and analysis adhered to recognised standards for robust qualitative research.[52] The research team attended to all key elements of research design and conduct. Specifically, we adhered to standards for ethical research, transparency in methods of recruitment and sample profiling, the use of appropriate and rigorous methods of collecting interview and focus group data, as well as transparency in study

after giving birth. For statistics on post-natal maternity hospital stays, see J. Bowers and H. Cheyne, 'Reducing the Length of Postnatal Hospital Stay: Implications for Cost and Quality of Care' (2016) 16 *BMC Health Services Research* 16.

49 During the COVID-19 pandemic, hospitals have maintained strict restrictions on the number of visitors/birth partners and sought early discharge. <https://www.rcog.org.uk/en/guidelines-research-services/guidelines/coronavirus-pregnancy/covid-19-virus-infection-and-pregnancy/> (Last accessed 21 December 2021).

50 J. Ritchie and L. Spencer, 'Qualitative Data Analysis for Applied Policy Research' in A. Bryman and B. Burgess (eds), *Analysing Qualitative Data* (Routledge, 1994) pp.173–194.

51 In summer 2021, workshops were held by the project team which brought together practitioners from the research sites, as well as national policy and practice leads and advocacy groups for families, to consult on the findings.

52 J. Daly and others, 'A Hierarchy of Evidence for Assessing Qualitative Health Research' (2007) 60(1) *Journal of Clinical Epidemiology* 43–49. See also D. Davies and J. Dodd, 'Qualitative Research and the Question of Rigor' (2002) 12 *Qualitative Health Research* 279–289. K. Hannes, 'Critical Appraisal of Qualitative Research' in J. Noyes and others (eds), *Supplementary Guidance for Inclusion of Qualitative Research in Cochrane Systematic Reviews of Interventions* (Cochrane Collaboration Qualitative Methods Group, 2011), Version 1. <http://cqrmg.cochrane.org/supplemental-handbook-guidance>. L. Spencer and others, 'Quality in Qualitative Evaluation: A Framework for Assessing Research Evidence' (2003), Government Chief Social Researcher's Office, Occasional Series No. 2, 2003.

reporting.[53] Emerging standards for online qualitative data collection were also important, given that much of the data collection took place during the COVID-19 pandemic.[54] Two Advisory groups provided advice to the team, one group comprising birth mothers only, and the second group comprising policy, practice, and academic experts.

2. Research Approvals and Ethics

The project was subject to ethical clearance by the ethics committees at Lancaster University and Oxford University. In addition, the project was subject to full scrutiny by the governance groups within the participating local authorities and the national Health Research Authority. A protocol was developed with each participating local authority and Health Trust, with the latter structured by the Health Resesearch Authoritys Information Organisation Document.

Recruitment to the study was firmly informed by principles of voluntarism as outlined by the British Sociological Association.[55] Regarding all parents, capacity to consent to interview was critical, and hence we did not include women in this study who had previously required the services of the Official Solicitor within care proceedings or whom the local authority considered unable, at the time of the research, to participate in interview. A decision was taken to recruit participants who were not involved in active care proceedings at the time of interview. However, in a minority of cases, the local authority agreed the participation of mothers (and their partners) whose cases were not yet closed to care proceedings. The majority of parents interviewed for the study had a history of repeat involvement in care proceedings. This meant that the majority of parents were providing accounts of experience which pre-dated the pandemic. Regarding all participants, careful attention was paid to explanation of interview/focus group protocols as well as how the team planned to preserve anonymity and publications plans. All parents were invited to a pre-interview meeting (1:1 or as a couple), to ensure as far as possible that they understood, the nature of their participation, the consent process, and potential use of their data. Written consents were obtained following the sharing of a participant information document, prior to any data collection. Procedures were also in place to enable an effective response to parental distress/disclosure, given the sensitive nature of the project.

Upon completion of the focus groups and interviews, all audios or Teams videos were stored securely within MS Teams for analysis, protected by 365 authenticate and encryption, but then moved to Lancasters University's Secure Data Hub, pending deletion within 10 years of project completion.

3. Recruiting Participants to the Study

Eight local authority areas and health trusts in England and Wales were selected for participation in the study. Local authorities were selected on the basis of high rates of infants in care proceedings to ensure that we would have sufficient data collection

53 D. J. Cohen and B. F. Crabtree 'Evaluative Criteria for Qualitative Research in Health Care: Controversies and Recommendations (2008) 6 (4) *Annals of Family Medicine* 331–339.

54 C. Calia and others, 'Ethical Challenges in the COVID-19 Research Context: A Toolkit for Supporting Analysis and Resolution' (2021) 31 (1) *Ethics & Behavior* 60–75.

55 British Sociological Association (BSA) (2017) *Statement of Ethical Practice*. <http://www.britsoc.co.uk/media/24310/bsa_statement_of_ethical_practice.pdf> accessed 20 September 2021.

opportunities during the timeframe for the study. The sampling frame was shaped by earlier research on the distribution of care proceedings for infants in England and Wales.[56] The challenges that our sites report may therefore be more acute than in other areas, such as London, where rates of infants in care proceedings are much lower.[57] Midwives, social workers, Guardians ad Litem employed by the Children and Family Court Advisory and Support Service (Cafcass and Cafcass Cymru [Wales])[58] foster carers and heads of local authority legal services who had relevant experience of care proceedings at birth, were purposively sampled, and invited to participate in focus groups and interviews. In addition, parents were included in the study if they had experience of care proceedings at birth, or had previously entered into voluntary agreement with the local authority, allowing a baby to be placed with alternative caregivers. The majority of parents interviewed had experienced separation from their baby , with a minority of mothers placed together with their baby in a foster or residential placement. . The majority of parents had experienced care proceedings for a number of children. The majority of parent participants were mothers, with only a small number of fathers volunteering for the study ($n = 6/44$).

This study adhered to high standards in respect of collaborative research and was steered throughout by a wide range of stakeholder representatives. However, parents from Black, Asian and minority ethnic (BAME) communities were under represented in this study.

The final sample is described in Table 1 below:

Table 1 Research sample by stakeholder group

	Type of stakeholder group	Number of focus groups/ interviews	Total number of participants
Focus groups	Social workers	16	105
	Foster carers	9	46
	Cafcass	4 (3 areas)	22
	Midwives	19	81
Interviews	Local authority lawyers (head or principal)	8	9
Interviews	Parents	44	44
Total number of participants			307

56 Broadhurst and others (n 5). See also Alrouh and others, *Born into Care: Newborns and Infants in Care Proceedings in Wales* (Nuffield Family Justice Observatory, 2019) .

57 See Broadhurst ibid and Pattinson and others (n 9) for regional statistics.

58 The Guardian ad Litem is a specialist social worker who advises the court on the best interests of the child. The Guardians are employed in England by the Children and Family Court Advisory Service (Cafcass) and in Wales by Cafcass Cymru. Throughout this article, to reduce the risk of identification, we do not distinguish between Cafcass and Cafcass Cymru, rather we refer to Cafcass Areas A, B, and C.

4. Approach to Focus Groups and Interviewing (Offline and Online)

Most focus groups were conducted online because of the COVID pandemic, but because of the sensitivity of the material, efforts were made to interview parents face-to-face, adhering to social distancing rules, and with personal protective equipment. All focus groups and interviews were semi-structured aiming to ensure coverage of key questions but also creating space for more open discussion.[59] Where focus groups took place online, these were recorded in MS Teams. The focus groups were typically 60 minutes in length. The interviews varied in length (30 to 90 min duration). Data collection took place prior to and during the pandemic (June 2020), and the majority of cases to which practitioners referred, started prior to the pandemic. In addition, the interviewers were careful to steer participants towards a broader discussion of their experience of care proceedings . It was important that observations drawn from the study were broadly representative of practice, rather than specific to periods of changeable or locally specific rules of social distancing in England and Wales. Participants typically drew on a number of case examples, which spanned a number of years of practice. Interviewers encouradged reference to a number of case examples to ensure we were capturing generalised issues.

A. Data Analysis

The interviews and focus groups were initially coded and compared for consistency between three of the authors (C.M., K.B., and H.W.), using a structured data capture tool. Standard methods of qualitative thematic analysis were used, which sought to condense the volume of coded data around core themes.[60] Findings were further tested in a series of workshops with key stakeholders from the participating sites. For the purposes of this article, data have been further filtered to focus on the specific issue of urgent care proceedings at birth. As above, the data were collected and analysed with the explicit aim of capturing experience which was not specific to the pandemic. Overall, practitioners felt that the conditions of the pandemic had exacerbated challenges that were long-standing. Given the focus on the legal process, foster carer data have not been used for this article. All participating sites or research areas were assigned an individual code to preserve anonymity.

V. FINDINGS

The practice of urgent care proceedings at birth was very familiar to professionals across the participating local authority and health trusts. All parents participating in the study ($n = 44$) had experienced the removal of a baby at birth from their care, and many described feeling unprepared for care proceedings. Consistent among professionals was disquiet about the implications for parents but also about the reliability of interim urgent decisions for babies. In a number of cases, professionals felt that evidence which was put together in haste was incomplete or otherwise poorly prepared. Among parents, a sense of injustice was pervasive, lessened only by the efforts

59 J. Kitzinger, 'Introducing Focus Groups' in C. Pope and M. Nicholas (eds), *Qualitative Research in Health Care* (BMJ Publishing Group,1999) pp. 36–45.

60 A. J. Coffey and P. A. Atkinson, *Making Sense of Qualitative Data* (Sage, 1996). See also, D. Silverman (ed.), *Qualitative Research* (Sage, 2016).

of a number of outstanding professionals who explained legal processes, fought their corner, or otherwise provided emotional support. Parents and professionals alike were trapped in a system where design shortfalls remain unresolved – and were compounded by the pernicious impact of cuts to public services budgets over the past decade.

Findings are reported against the following five themes:

a. Urgent care proceedings: professionals and parents on the backfoot.
b. Legal representation: dispensing with parents' rights?
c. Right of reply: maternal capacity at birth.
d. Is the best evidence put before the courts?
e. Do interim decisions in urgent care proceedings shape final decisions for children?

1. Urgent Care Proceedings: Professionals and Parents on the Backfoot

Professionals distinguished between carefully planned but urgent action at birth – and urgent action that was characterised by a lack of planning and preparation. In all the research sites, examples were given of cases in which parents were aware that the local authority intended to issue care proceedings at birth and where consideration had been paid to parents' legal rights and support needs. However, professionals also said that *on too many occasions* practitioners and parents were on the back foot, babies had been born, and local authority planning had neither been finalised nor shared with parents. Resource constraints and delays in the pre-birth period meant that in many cases, it was only very close to, or following birth, that parents were informed of a first hearing:

Extracts 1 and 2 below illustrate both these points, taken from interviews with local authority lawyers and Guardians ad Litem.

Extract 1

> By the time you get to the end of a pregnancy it's usually very clear what the plan is, whether you are going to court or not – and I think it's at that stage, we want to have a good look at the evidence, even before baby comes. Let's look at the draft evidence and share with parents and their solicitors – so we are not ambushing new Mums and Dads on the day that it's going to court. But that isn't what happens, baby arrives and blind panic seems to ensue "Oh God we've got to get a SWET [social work evidence template] written", "we've got to get it into court today" – so yes, it feels chaotic from our point of view (Interview, local authority lawyer, S3).

Extract 2

> Often mothers are known to social services, mothers who have had several children removed previously. . .but I've had too many cases where it's a shock to the Mum, what the plan of the local authority is, it could be 2–3 days before she is about to give birth and she doesn't know what the plan is. And she might be told that they are going for removal, you know 2 days before she is going to give birth.

(Focus group, Cafcass Guardians ad Litem, Area B)

In Extract 1, the local authority lawyer describes practice which is '*chaotic*' because a baby has been born and 'blind panic' ensues. Although the lawyer is keenly aware that parents should not be ambushed on the day the case is going to court, the realities of practice are that this does happen. In Extract 2 above, the Guardian describes 'too many cases' in which mothers do not know the local authority plan, even very close to birth.

The problems arising from delayed intervention in pregnancy are compounded by babies being born early. Social workers stated that babies who were born before their expected date of delivery caught the local authority out; local authority assessments and care plans were not finalised. The research sites varied considerably in terms of resources, but where reserves were low, it was difficult to prioritise the unborn child in the face of more immediate crises on caseloads.

Social workers also referred to pressures on hospitals to discharge mothers and babies within 48 hours of birth, unless there were medical reasons which indicated otherwise (Extract 3 below). This meant that it was difficult to avoid care proceedings where there were serious child protection concerns. Alternative caregivers, such as family members, had not been identified and assessed prior to birth. As Extract 3 indicates, historically ('back in the day'), practitioners had more time to prepare parents for separation from their babies to include introducing foster carers, but next day discharge makes this impossible. Therefore, mothers found themselves handing their babies to foster carers whom they had only met at hospital discharge.

Extract 3

> Babies are not kept on the ward now for very long, back in the day, they used to be kept on the ward for about 4–5 days, you had time to bring the foster carer onto the ward for a couple of visits, but now, it's typically, discharge the day after birth (Focus group, social workers, S5).

In some cases, professionals stated that it was a phone call from the hospital informing the local authority they were due to discharge the mother, which prompted an urgent application to the court. In Extract 4 below, a midwife articulates this course of events:

Extract 4

> They (social workers) don't realise that these women can go into labour at 34, 35 weeks. Then it's all hell let loose when you ring the social worker and say, "We've got a baby." They'll go, "Oh, my God. It's not due for three more weeks." Then it's all holy panic (Focus group, midwives, HT 3).

Social workers were clear that sharing a plan for care proceedings after a baby had been born was acutely distressing, departing sharply from transparent partnership working with parents. Practitioners were very keen to place babies in out-of-home

care through voluntary agreement with parents, to avoid the trauma of care proceedings at birth. However, there was widespread mistrust of this process among parents, with many refusing or withdrawing consent at birth.

Extract 5

> . . .the mother gave birth 11 days early, it was all really rushed, we didn't have the birth plan ready, we didn't have the court work ready, it was the complete opposite of good practice, we had to go in, she [mother] wouldn't sign the consent form [to voluntary accommodation] it was all really distressing. . . A lot of our babies are born prematurely – so it is a lot of rushing around (Focus group, social workers, S7).

Interviews with parents enabled them to describe the experience of urgent care proceedings in their own words, confirming accounts from professionals, but providing a window into the confusion and distress parents experienced, when they were not prepared for care proceedings at birth. In Extract 6 below, the mother has to deal simultaneously with her labour being induced, and news from the social worker (by telephone) that the local authority planned to issue care proceedings.

Extract 6

> . . .she [the social worker] rang us while I was in the hospital. What had happened with it being COVID he [partner] wasn't allowed in. They'd called us in to get induced, they give you a tablet or something and they wait for the contractions to start. Then they invited him in. I was in for a whole day by myself before the contractions had started and Mary, the social worker rang me while I was in hospital.
>
> . . .She started being argumentative on the phone, basically saying there are too many problems for us to have the baby. She was like, 'we're going to take you to court'. I was like, 'I understand Mary, but I've done everything you've asked us to do.'
>
> . . .I said, 'Mary, don't ring me, you're stressing me out. Goodbye.' I put the phone down. The midwife had come in to check on me. I put complaints and everything in about her [the social worker] (Interview, mother 06 and father 02, S8).

In Extract 6, the mother was not expecting court proceedings. It is, of course, difficult for parents to comprehend a removal decision[61] and plans need to be sensitively articulated before and after birth. In the above extract, it is of no surprise that a mother in labour feels a complete sense of injustice when she receives a call from her social worker who informs her that care proceedings are imminent. In this case, her distress is heightened because her partner was not allowed onto the ward due to rules in place during the COVID-19 pandemic.

61 The difficulties parents experience in understanding court proceedings have been consistently documented. See eg, B. Lindley, M. Richards, and P. Freeman, 'Advice and Advocacy for Parent in Child Protection Cases, an Exploration of Conceptual and Policy Issues, Ethical Dilemmas and Future Directions' (2001) 13 *Child and Family Law Quarterly* 311–323. See also; Hunt (n 3).

In 2010, Felicity Kaganas[62] stated that in theory, the HRA (1998) should buttress parents' rights; however, in practice rights can be difficult to realise. Despite practitioners' best intentions, resource shortfalls[63] resulted in practice which practitioners felt acutely compromised the rights of families. When parents are on the back foot, the consequences are huge because parents may face immediate separation from their baby, with insufficient time to marshall a robust challenge. Early discharge of mothers and babies from maternity wards[64] has been typical for a number of years in England and Wales, but compounds resources constraints in local authorities, compromising efforts to work transparently and in partnership with parents.

2. Quality of Parents' Legal Representation: Dispensing with Rights?

All participants described the value of robust independent legal advice for parents. Legal representation was seen as essential in moderating the power imbalance between vulnerable parents and the State. It was essential in helping parents to understand the legal process and local authority plans. However, participants also argued, consistently, that if parents were given only hours or a day's notice of a first hearing, parents were unable to benefit from robust legal advice. Even if parents were aware of local authority plans pre-birth, professionals and family members remained concerned that abridged notice of a first hearing, compromised parents' entitlement to legal representation. References to 'fairness' were common among professionals. Extracts 7 and 8 illustrate the highly variable practice across the sites, contingent on resources and the timeliness of pre-birth social work.

Extract 7

> Insufficient time for assessment and planning pre-birth means that we are presenting our care plan after birth – we aren't getting into the PLO [Public Law Outline] process soon enough so the work isn't complete and we can't share the outcome and discharge plan in advance of Mum giving birth. Mum has given birth and parents won't agree to voluntary accommodation. . . parents can't access robust legal advice, it's 'off the hoof' and then you are looking at an urgent hearing which is not fair for them (Interview, local authority lawyer, S1).

Extract 8

> I can think of only one case in the past few years, where we didn't know what the care plan was at birth. . . it's really important to us (Interview, local authority lawyer, S4).

In England and Wales, a strength of the family justice system is that parents are entitled to legal aid when they attend a formal pre-proceeding meeting in the pre-

62 F. Kaganas, 'Child Protection, Gender and Rights' in J. Walbank and others (eds.), *Rights Gender and Family Law* (Taylor and Francis Group, 2010).

63 See M. Mclean and J. Eekelaar, '*Delivering Family Justice in Late Modern Society*' (Oxford, 2015). This edited collection documents the demise of family justice in respect of resourcing and political commitment, as an international trend.

64 Bowers and Cheyne (n 48).

birth period.[65] However, the low fee attached to this service has resulted in law firms allocating junior staff or a para-legal to cases at this point. This means that at birth, when parents are desperately in need of trusted legal advice, a new lawyer will typically take on their case. Discontinuity of legal advice does little to reduce the difficulties parents face in grasping complex legal process or the terrifying prospect of their new baby being removed. Parents were described as often having learning needs, which meant they required sufficient time to digest and make sense of the legal process, closely supported by a good lawyer. Hasty legal advice taking the form of a 'telephone call or a quick chat' (Extract 9 below) was seen as seriously departing from recognised standards of best practice.

Extract 9

> . . .the majority of our parents have learning needs themselves, they need time and they need information in a different format than a telephone call or a quick chat with their legal advisor about their options
>
> (Interview, local authority lawyer, S1).

Even when solicitors did meet parents on the maternity ward, it was still difficult for parents to engage meaningfully with their solicitors, because of a lack of privacy. Conversations between mothers and their lawyers were within earshot of other mothers on the ward. In Extract 10 below, the mother describes the difficulty of trying to talk to her solicitor, with only a curtain between herself and the other mothers on the ward.

Extract 10

> We didn't have any privacy at all. They wouldn't even let us go into a different room. She [the midwife] didn't see if we wanted to go to a different room, nothing. I couldn't really open up because of it. . . Yes. I didn't want them knowing or overhearing me, but I had to do what I had to do. . .. But I was okay talking about it. But it's just, I couldn't really open up more because I didn't have that privacy. . .. I know we could have closed the curtain, but it is still only a curtain (Interview, mother 01 S4).

Professional and parental interview accounts did, however, provide exceptions. In some cases, parents who had previously had a child removed from their care were fortunate to have the same solicitor across different sets of proceedings. This continuity served to lessen some of the problems of short-notice care proceedings at birth. In the example below (Extract 11), a young care leaver had been represented by her solicitor in previous proceedings. Her established relationship with the solicitor who was able to successfully 'fight' for a mother and baby placement was experienced very positively. However, the extent to which the mother relied on her lawyer,

65 Scope of legal aid is set out in this document, which also refers to pre-proceedings. <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948249/Scope_of_Family_Proceedings_Under_LASPO__January_2021_.pdf>. (Last accessed 12 October 2021). PLWG (n 8). The PLWG's recommendations regarding changes to legal aid are set out at point 80(4) p. 38.

and her limited grasp of the process and submissions that the lawyer washandling is clear from her descriptions of 'this, this and this'.:

Extract 11

> . . .I had an emergency meeting, a court meeting with my solicitor X, and that was to get me into a placement straight away so I didn't have to be separated where she'd go into foster care until a placement came along. They were like, I don't know, I could get a message or a phone call, and my solicitor rang me about 6:00 or 7:00 in the evening, 'We've got to go to court tomorrow. We've got this in. We've got that in. We're going to go for this, this and this' (Interview, mother 02 S5).

All too often in the focus groups, professionals described standards which fell short of best practice, largely due to discontinuities in lawyers assigned to their care, short-notice, but also the particular challenges of giving and receiving legal advice in the immediate post-partum period. Thus, although parents' legal rights are enshrined in the letter of the law and materialised through legal aid, they were not sufficiently or consistently realised in practice. A foundational principle of the family justice system is that parties should be on an even footing, which is only possible if: (i) the local authority's case is shared with parties at a timely point and (ii) parents have sufficient time to instruct a solicitor. Such principles have been set out in previous case law in England and Wales (eg, *Re L (Care: Assessment: Fair Trial*),[66] but as yet such judgments are not sufficiently shaping best practice.

3. Right of Reply? Maternal Capacity at Birth

Building on the observations above, practitioners and parents also raised general concerns about women's ability to both attend and participate meaningfully in the first court hearing. Irrespective of the quality or timeliness of practice, practitioners generally felt that asking women to participate in care proceedings within a day or days of birth was unjust. There are multiple reasons why care proceedings in the immediate post-partum period raise very serious concerns about the balance of power between the State and the family.[67] These reasons include: the physical and emotional vulnerability of mothers after birth, the fact that mothers may feel very reluctant to leave their babies on the ward to attend court, coupled with lack of support to travel to court at short-notice. Extracts 12 and 13 illustrate professional concerns:

Extract 12

> I simply cannot imagine standing up in court – and fighting for my child with milk spitting from my breasts. . . it's always baffled me (Interview, local authority lawyer, S4).

Extract 13

66 The following case raised serious questions about parents' rights under arts 6 and 8, but also the competence of the local authority in question, in regard to robust, transparent and consistent care planning. Re L (Care: Assessment: Fair Trial) [2002] EWHC 1379 (Fam).

67 Broadhurst and others (n 5).

> I've only seen it once where a man in a suit, literally – looked very official – came in. He just came and knocked on the door. We didn't know he was coming. Obviously, the ward let him on. He just served her, and I stood there and watched, and I just couldn't believe what was happening. This woman had only given birth the day before (Focus group, midwives, HT3).

In Extract 12, the local authority describes being completely baffled by the continued expectation that a woman will stand up in court with 'milk spitting' from her breasts to fight for her child. In Extract 13, the midwife describes her disbelief when an official 'man in a suit', serves notice of care proceedings to a mother who has 'given birth the day before'.

These views were highly consistent across professional groups, whether participants were Guardians, local authority social workers or midwives (Extracts 14–16 below).

Extract 14

> We are expecting parents to come to court, to give instructions, to put their evidence in, be their best selves, when they have just left their baby – with immense fear that someone will take the baby away while they are gone... (Focus group, Cafcass Guardians ad Litem, Area A).

Extract 15

> ...And then there are situations where, you know, you've got a mum leaving the hospital who's given birth maybe last night, a few hours ago at worst, and, you know, she went through labour and she's at court for her child, but she's maybe only had, it's a few hours old. You know, that's an incredibly distressing situation and it's upsetting for social workers as well (Focus group, social workers, S7).

Extract 16

> She's probably, poor woman. She has probably got nobody to look after this baby. The social workers are so obstructive and say, 'Well, if she has nobody, then she can't come.' I said, 'Can you not arrange for somebody to come and look after that baby?' But they don't, so she has not had her say, then, has she? She hasn't been able to attend. That's traumatic as well. But it has been better while it has been COVID, because they've been on the phone, haven't they? (Focus group, midwives, HT1)

Court proceedings so close to birth, were seen to place women in an impossible situation of having to attend court, whilst at the same time, not knowing whether their baby would be removed from the maternity ward in their absence. As the social worker states in Extract 16 above, it is simply not possible to expect women to 'be their best selves' in these circumstances.

Mothers were very clear that they were unable to instruct a solicitor in the immediate aftermath of birth – they were mentally and emotionally unfit for court, because they were recovering from the birth and their minds were focused on their new babies. Having very little notice of a court hearing simply compounded their vulnerability.

Extract 17

> . . .How fast you have to literally leave to go from wherever you are at the hospital, to go to court to then go back - to make a decision and build a case in the process. It's impossible because you can't fight back. You don't have it in you to answer back, know your own mind. All you're thinking is that you've got a baby, you've had to come away from this baby and you don't want to (Interview, mother 02 S5).

In Extract 17 above, the mother says that she cannot 'fight back' – the speed of events and having to build a case, she describes as impossible. She says she does not know her 'own mind' because her thinking is elsewhere – on her baby.

In Extract 18 below, the mother also describes being given very little notice of a first court hearing. She describes the challenge of getting to court, which clashes with caring for her new-born baby.

Extract 18

> The solicitor rang me and said we are going to court you need to get ready. I said when and he said now you need to leave "now" . . .I needed to get someone to the hospital to look after my child, I need to get showered, dressed. I had no clothes, so I had to get clothes prepared, I had to get a lift prepared to get up there. I had literally not long to do that
>
> (Interview, mother, 03, S1).

In the above extract, the mother felt that because she arrived late for the ICO hearing, this was held against her. The judge made the ICO sanctioning the immediate removal of the baby from her care. Whether in fact this was the case is not known; however, her account clearly conveys the impossibility of the situation she faced.

If the mothers chose not to attend court to stay with their babies, this offered little comfort, as the case would unfold without them:

Extract 19

> I refused to go to court because I didn't want to leave him in hospital. So, his dad went to court and my solicitor went, representing me. But it was quite upsetting, because I didn't know what was going on in court or anything, because I'd stayed in hospital with the baby. . .. But then, at the same time, I didn't want to leave him at the hospital on his own. What if they hadn't heard him crying or something? (Interview mother, 03 S1).

Mothers also described having to organise their own transport very shortly after birth and seemingly, with little consideration of their recovery needs. In the following two extracts, a mother (Extract 20) and a Cafcass social worker (Extract 21) are highly critical of the distress caused where court hearings are scheduled immediately in the aftermath of birth and where this distress is compounded by mothers having to make their own way to court.

Extract 20

I had to go from Town A to Town B in a taxi. I'd just had a caesarean section, no pain relief, they didn't give me any pain relief to take to the hearing – This was two days after my c-section. I walked up all the stairs to a court room. Cried for my baby, begged for one chance with my baby, and I just wasn't allowed (Interview, mother 05 S5).

Extract 21

The mother has had a traumatic c-section – but the local authority is not even providing parents with transport to get there – these forms of support are overlooked – but they shouldn't be because they are part of a wider picture (Focus group, Cafcass Guardians ad Litem, Area A).

Irrespective of the timeliness or quality of legal representation, the findings in this section raise a more fundamental question about whether women should *per se*, be expected to participate in care proceedings in the immediate post-partum period. Clearly, breaches of Article 6 rights are plain to see, given mothers were expected to participate in care proceedings so close to birth, and irrespective of birth complications or who would care for their babies while they attended court. Given the level of disquiet among both professionals and parents, review of this issue, as a national and international concern is long overdue.

4. Is the Best Evidence Put Before the Courts?

A key question concerning proceedings issued and heard on an urgent basis for newborn babies, is whether the evidence put before the courts is sufficiently robust, to ensure the best decisions are taken. Local authority lawyers and Guardians participating in this study raised questions about the quality and completeness of the evidence put before the court in haste. Local authority lawyers play a critical role in ensuring that the evidence put before the family courts is robust and delivers the best possible outcomes for children and parents. However, cases issued on an urgent basis undermine both these obligations. The following extracts from an interview with a local authority lawyer illustrates these points:

Extract 22.

That does happen in my team rather a lot unfortunately, we have to prepare papers in a hurry, we don't have time to consider the evidence we are putting before the court, we get a lot of external pressure for that, from solicitors representing parents and we take all the flack for that (Interview, local authority lawyer, S1).

Our job isn't just to get the evidence and send it to the court – we are not 'a middle man'; our job is to present the best possible case for the court and to make sure we are getting the right outcomes for the children, legally, and sometimes we aren't given the time to do that (Interview, local authority lawyer, S1).

From the above extracts, it is clear that the local authority lawyer felt very compromised regarding the quality of the evidence put before the courts when papers are prepared 'in a hurry.' But in addition, local authority lawyers are less confident that they are 'getting the right outcomes for the children'.

The Guardian ad Litem plays a critical role in ensuring family court decisions are firmly in the best interests of the child. The 'in tandem' model in which the Guardian is also represented and advised by his or her own solicitor is considered, internationally, as a gold standard for children.[68] The Guardian scrutinises the local authority case and care plan and also visits the child and family. However, in pre-birth cases, the compression of time undermines this role. Complaints shared by Guardians were two-fold. First, Guardians complained that when the local authority issued cases on an urgent basis, the quality of the evidence was often poor or incomplete. Secondly, in cases of removal at birth, Guardians had very limited time to appraise this evidence or make their own enquiries, because they were not notified until after the baby was born that proceedings were to be issued.

Extract 23

Cases come to Cafcass very quickly [just prior] before the hearing, we have very little time to reflect, we should have had the papers the day before. . . so that impacts on us (Focus group, Cafcass Guardians ad Litem, Area A).

Extract 24

I've had too many cases, where the local authority has had the case – it bumbles along, ends up in court because risks haven't reduced, but not much planning done. . .outcomes are changed depending on how much planning has been done pre-proceedings (Focus group, Cafcass Guardians ad Litem, Area, B).

Extract 25

Local authorities – we know some are better than us – in local authority X my experience has been really, really poor, in terms of absence of pre-birth work. Mother has engaged very well with antenatal care, fully engaged with midwifery services, she'd had children removed many years earlier - referrals have been made to children's social care; but the local authority had done absolutely nothing. . . baby was born. I was on duty as a Guardian and I couldn't believe that the local authority just issued an application for an interim care order that day and a plan for removal. I couldn't agree that. They had done nothing, just referred concerns from years ago – this was a particularly appalling case. The local authority social worker was an agency social worker and she arrived to a stack of cases. . . (Focus group, Cafcass Guardians ad Litem, Area C).

The Guardians described having to make an assessment of the grounds for removal 'on the papers' rather than their own engagement with the parents and baby, because they received little more than a day's notice. However, in some cases, the

68 The 'tandem' model of children's representation in care proceedings refers to the practice of children subject to public law cases being represented by both a publicly funded legal representative (lawyer) and a Cafcass Guardian.

Guardian was notified with even less than a day's notice which meant they could not seek their own legal representation or robustly appraise the local authority evidence.

Referring to a very young mother who was a victim of domestic abuse (Extract 26), the Guardian describes how she had 'to go digging' because the local authority had provided such scant information about the grounds for removal at birth. Fortunately, the judge stood the case down until the next day, directing the local authority and the Guardian to return to court with the facts of the case. The Guardian offers the following:

Extract 26

> That evening I rang the maternity ward, to get an idea how the mother was coping on the ward, she [the mother] had been doing a brilliant job. She ended up going into a mother and baby placement. . .So, sometimes, the local authority might not present all of the information and we might not have the time to go digging, so although we are confident to say," we need to hang fire here, we haven't got all the information", that was happenchance really, but usually we don't have time to ring the ward and we have to rely on the local authority evidence (Focus Group, Cafcass Guardians ad Litem, Area A).

Although, in the above example the judge refused to sanction immediate removal at birth and stood the case down, social workers argued that in very busy family courts, there was not always the time to challenge the local authority's plan. Hence the above case was the exception (happenchance') rather than the rule. In some cases, Guardians were notified before birth,[69] but this practice was contested and not consistent across participating sites.

Critics have argued that the enormous symbolic value of child protection means that few applications for care orders are refused. Kaganas writes that 'it appears that orders are not difficult to obtain'.[70] Masson et al. (2006), drew the same conclusion regarding applications for EPOs. Findings from this study, suggest that at present, current checks and balances can be seriously compromised in urgent care proceedings. Again, individual practitioners may strive to challenge shortfalls in practice, but in very busy courts, pressures on listing and performance targets for care disposal, may deter such actions.

5. Do Interim Decisions in Urgent Care Proceedings Shape Final Decisions for Children?

An interim decision in care proceedings is particularly significant when the decision concerns a new-born baby. As stated above, in the recent Court of Appeal case (*Re*

69 The introduction of the Children's Guardian into pre-proceedings was explored in an evaluation of the Cafcass Plus pilot. However, the evaluation concluded that Cafcass could not service all cases of care proceedings, and in addition, where the Guardian joined pre-proceedings, this raised questions about the Guardian's independence. However, the evaluation report (2013) recommended application of this model in pre-birth cases, given the very specific challenges of providing effective oversight when care proceedings are issued at birth. Evaluation report <https://www.basw.co.uk/system/files/resources/basw_15959-1_0.pdf> (Last accessed 5 November 2021).

70 F. Kaganas (n 62) p. 49.

C (A child) (Interim Separation) 2019) Peter Jackson LJ supported a young mother's appeal in favour of a further mother and baby placement, because separation would interrupt the formation of the parent–child bond, thereby prejudicing the final outcome of the case. In keeping with Jackson LJ's assertion, in this study, professionals and parents shared considerable disquiet about immediate physical separation of parent and baby at birth. Both professionals and parents lamented the shortage of mother and baby placements – agreeing that in the majority of cases immediate separation could have devastating consequences on the longer-term outcome of cases. Acute emotional crisis following baby removal is consistently documented in the international literature.[71]

Turning first to professionals, they offered accounts that compared and contrasted the likely outcome of cases, contingent on whether mothers were separated or remained together during care proceedings. The following extended extract from a focus group with Guardians illustrates these points:

Extract 27

Guardian ad Litem 1: The impact of separation when it's a new-born baby is huge. . .

Guardian ad Litem 2: I have a case where the local authority sought removal of a new-born, I think it was Mum's fourth child, long-standing drug issues, but the midwife wrote a statement to the court that was so strong against removal and she really balanced the impact of separation against the progress Mum had made and. . . because this was a contested hearing, I was able to make enquiries. The midwife actually came to court and gave such valuable information that . . .she did a drug test with Mum at court, it changed the outcome and Mum was placed in a residential unit and it changed the outcome of proceedings and it was such as positive outcome. Without the input from the midwife, baby would have been removed, mum would have relapsed and baby would have gone for adoption. . . from my experience the actual physical removal of a baby from a parent is so impactful. . . parents don't want to engage with someone who has removed their child. . . so there's a big impact of removal that impacts the outcome in the longer term

(Focus group, Cafcass Guardians ad Litem, Area B).

In the above extract, Guardians 1 and 2 refer to the huge impact of separation at birth. Guardian 2 argues that if Mum had not been placed in a residential unit, 'she would have relapsed and the baby would have gone for adoption'. The social

71 K. Broadhurst and C. Mason, 'Child Removal as the Gateway to Further Adversity' (2020) 19 (1) *Qualitative Social Work* 15–37. See also E. Wall-Wieler and others,'Maternal Health and Social Outcomes After Having a Child Taken into Care: Population-based Longitudinal Cohort Study Using Linkable Administrative Data' (2017) 7 (12) *Journal of Epidemiology and Community Health* 1145–1151; E. Wall-Wieler and others, 'Suicide Attempts and Completions among Mothers Whose Children Were Taken into Care by Child Protection Services: A Cohort Study Using Linkable Administrative Data' (2017) 63 (3) *The Canadian Journal of Psychiatry* 170–177.

worker writes: 'in my experience the actual physical removal of a baby from a parent is so impactful'. She adds: 'that impacts the outcome in the longer-term.'

Similarly, in the next extract below, the local authority lawyer also indicates that physical removal breaches trust, ultimately prejudicing the outcome of proceedings in the longer term. She refers to resource constraints which mean that at the interim hearing stage it is not always possible to find a mother and baby placement, but adds that by separating mother and baby: 'it is almost as if you have contributed to the outcome'. Knowledge of the detrimental impact of physical removal means that judges prefer to see mother and baby placements:

Extract 28

> We do unfortunately have constraints in terms of resources. . . we can't always find a mother and baby placement and we have to separate at birth. . .Judges would much rather see that [mother and baby placement]. . . because once you have breached that trust [by separating baby from parents], then you start to lose them and they will pay lip service to you or they just won't engage, so it's almost as if you have contributed to part of the outcome – and that should not be the case – when you should be there to encourage and support change (Interview, local authority lawyer, S7).

Turning to a further example in Extract 29 below, the local authority lawyer expresses deep concern about the likely outcome of proceedings, if resource constraints mean that mothers and babies are separated at birth:

Extract 29

> If a mother has done everything that we have asked of her and she is still separated from her baby at birth. Can you imagine that mother. . . she is just going to plummet (Interview, local authority lawyer, S4).

Evidence of the severe and negative impact of separation at birth on parents' mental health was also evident from parents' own self-reports. Even though infants were subject to interim orders, all too often women felt that all was lost when their new babies were removed from their care. Women described emotional breakdown, self-harming behaviours, and in some cases suicide attempts[72] – all this seriously undermined women's ability to maintain contact with their babies or contest final decisions. The following three extracts illustrate these points:

Extract 30

> I had a breakdown, I was wearing the same clothes for days, months, just not bothering – I wasn't even claiming benefits – I had no money to my name (Interview, mother, S5).

72 ibid.

Extract 31

I started drinking then. . .I was a mum without a baby, it was very traumatic (Interview 02, mother, S2).

The mother in Extract 34 below, captures the cumulative impact on her mental health of being separated from her child and enduring the stress of care proceedings, which means she is unable to attend the final hearing:

Extract 32

All set to go in for a final hearing where I would get cross-examined and I got my solicitor, I said, "I can't do it. I can't do a final hearing. My mental health won't take it," and to this day, I regret that because I wish I had (Interview, mother 18, S8).

Separation of a baby at birth profoundly disrupts parents' relationships with their new-born. For some women, abrupt removal of a baby at birth left them completely numb – and disconnected from their baby:

Extract 33

So, for any family or mother, whether they are going to remove the child or not, those first couple of days, just to have with that baby. It meant more to me with Ellie having that than not having it when I had Saskia, because I've got attachment still for Ellie. Saskia, I've got nothing. That's what it's caused me, it's left me with nothing (Interview, parent 02, S5).

In the case below, the mother describes giving up after her baby is unexpectedly removed at birth and feeling she had no choice but to agree to a plan for the baby to be placed with an older sibling in foster care:

Extract 34

At the time, I thought I was going in a mother and baby unit, until the day before I was released from hospital. I had a phone call saying I had court the day after, which I didn't know. . .I went to court then the day after and they said that I couldn't go in a mother and baby unit because it takes time and I wouldn't be able to do the courses that they wanted me to do if I went into one.

The day after that, she got taken. Broke my heart. . .

I thought I was going into a mother and baby unit and then they refused it in court. I had to go back to the hospital then and then the day after I had to say goodbye. One minute I thought I was going in a mother and baby unit and then the second thing, I've got to say goodbye. My head was just gone at the time, my head was gone. . . my solicitor said to me that it takes time for them to look for a mother and baby unit. She said, "We won't have time by tomorrow,"

I just had to agree with everything (Interview, parent 01, S5).

When parents are separated from their babies, their relationship with their baby is then circumscribed by formal time-limited contact arrangements, assessment, and scrutiny. This is far removed from the majority of parents' everyday experiences of caring for and bonding with a new baby. Physical separation whilst assessment is ongoing can be acutely painful, impacting severely on parents' mental health. Although some parents will retain their fight to have their baby returned to their care, for others they may simply concede the local authority plan. Of course, once babies are settled with alternative carers as in extract 34, social workers and the courts will be reluctant to disrupt these arrangements. Findings from this study support concerns expressed in the national and international literature regarding the potential of interim decisions to shape the longer-term outcome of cases.[73]

VI. DISCUSSION

Systematic qualitative examination of urgent care proceedings at birth has uncovered the multiple challenges faced by practitioners, when taking protective action to safeguard a new-born baby. In addition, the distress described by parents (particularly mothers) is deeply concerning. A number of the findings resonate with concerns raised in the broader international literature concerning adequacy of notice and legal representation, the quality of evidence upon which urgent decisions are based, and consequences of those decisions.[74] Although local authorities in England and Wales may be favouring urgent care proceedings at birth in the face of heavy criticism of alternative routes, it is very clear that questions of Articles 6 and 8 rights persist.[75] In addition, the findings from this research deepen our understanding of the distinctive challenges faced, when care proceedings are issued in the immediate post-partum period.

Turning first to notice and questions of legal representation, in too many cases, parents felt ambushed by care proceedings at birth, with very little notice. Although the welfare of the child must take precedence in care proceedings, parents' rights are not dispensable. A delayed response to the unborn child on the part of the local authority resulted in 'blind panic' – requiring hasty planning and decision-making. Problems of short notice were exacerbated by changes in legal advocates for parents, who in the immediate aftermath of birth, were often faced with a completely new legal advocate. Inevitably parents will find legal processes difficult to follow – however, in the immediate post-partum period mothers struggled to grasp information about a forthcoming court hearing, when trying to focus on a new-born baby. An essential element of a fair trial is that parties have all the relevant information and are on an even footing in terms of representation (Article 6, HRA 1998).[76] Snatched conversations with advocates over the telephone in maternity settings fall far short of the requirement for adequate legal representation. From parents' accounts, inadequacy of legal advice pre-dated the COVID-19 pandemic and resulted not just from

73 Chill (n 3).

74 (n 21–27).

75 Pattinson and others (n 9).

76 Art. 6 is set out in the Human Rights Act 1998: https://www.legislation.gov.uk/ukpga/1998/42/schedule/1/part/I/chapter/5

short notice but also a lack of sensitivity and attention to women's privacy needs on the ward. Receiving papers from a 'process server' or consulting with a solicitor in a communal ward, severely compromised women's ability to benefit from legal representation. In addition, professionals expressed grave concern about the lack of support provided to women to physically travel to a court hearing – irrespective of how close to birth or any birth complications. Although it is important to stress the varied experience of legal representation, frank accounts from both professionals and parents, indicate far more needs to be done to ensure legal entitlements are realised. Given these findings the PLWG's call for renewed emphasis on pre-proceedings is welcome,[77] as are national calls to improve the funding of legal aid in pre-proceedings. Working with parents intensively prior to issuing care proceedings holds out the promise of reducing the number of children subject to family court proceedings and/or ensuring that applications are made with greater planning and transparency in partnership with parents.[78] Given rapid developments in the use of remote courts as an international trend,[79] new opportunities to conduct care proceedings more humanely via remote link to maternity settings, also warrant further examination.

The findings from this article also advance knowledge about the potential consequences of interim removal decisions. Although a number of outcomes of an interim hearing are possible, many instances of physical separation of mothers from their babies were recounted by professionals and parents in this study, who lamented the shortage of mother and baby placements. In this context, professional disquiet about the quality of evidence and hasty decision-making is particularly salient. Both professionals and parents agreed that immediate physical separation of mothers (and fathers) from their new-born baby, could prejudice the outcome of the case in the longer term. Findings resonate with concerns set out by Jackson LJ (2019),[80] that separation at such a developmentally critical juncture (birth) can inadvertently determine the final outcome of care proceedings. Findings also speak directly to the general arguments set out in the following high-profile case: *L (A Child)* [2007] [81] in which Ryder, J cautioned against litigating at an interim stage for fear of pre-judging a full trial of the local authority's case and parents' response.

Concerns that interim removal decisions can set cases on a track that is hard to reverse have been expressed by a number of US critics. Paul Chill argues that emergency removal can become self-reinforcing, because the negative emotional impact of separation on parental functioning then becomes the ground 'for continued separation and ultimately, termination of parental rights'.[82] In addition, Davis and Barua

77 PLWG (n 8) Recommendation 80 (4) p. 38.

78 For a fuller discussion of use of pre-proceedings in respect of unborn babies, see J. Masson and J. Dickens, 'Protecting Unborn and Newborn Babies' (2015) 24 *Child Abuse Review* 107–119.

79 OECD. *Access to Justice and the COVID-19 Pandemic. Compendium of Country Practices* (2020). <https://www.oecd.org/governance/global-roundtables-access-to-justice/access-to-justice-compendium-of-country-practices.pdf> (Last accessed 17th November 2021).

80 Jackson, LJ (n 2).

81 In this case, Ryder J supported a mother and baby placement, refusing interim removal which was deemed premature and based on faulty analysis. Ryder J asserted that the local authority was attempting to resolve questions on the basis of incomplete evidence, that ought to be dealt with more fully at the close of the case. For full details of this case see: L (A Child) [2007] EWHC 3404 (fam).

have argued that because family court proceedings are (understandably) underpinned by child development principles, it becomes more difficult with time to reverse a decision to place children with alternative caregivers.[83] In new-born baby cases, the stakes at interim removal are particularly high, because the likelihood of permanent severance of parental ties at the close of care proceedings is far greater for this group than all other age groups of children.[84]

It was clear that professional disquiet prompted some highly committed professionals to oppose an urgent application which would lead to immediate separation. For example, Children's Guardians used the opportunity of an adjournment to 'go digging' for further information, which ultimately led to a better outcome for mother and baby. However, in a system with few reserves and stringent timeframes for case disposal, there is little to incentivise routine adjournments or to call parties back to court for additional hearings or indeed to agree to 'stay' the case pending urgent appeal from parents.[85] In this context, and given the particular implications of immediate separation at birth, there is merit in revisiting earlier involvement (pre-proceedings) of the Guardian ad Litem.[86] Concerns from Guardians that they were unable to make a robust appraisal when relying 'on the papers' clearly indicate shortfalls in checks and balances. A new requirement within legislation to review a first hearing called at short notice would also provide additional safeguards for parent and child. This latter suggestion would follow the international direction of travel in terms of bolstering oversight of parents' procedural rights and children's best interests in short-notice cases.

The broader context of local authority decision-making also requires further attention. Pressure on hospitals to discharge mothers and babies within 48 hours of birth compounds the difficulties that professionals face in trying to work transparently and fairly with parents. In this context, international interest in the role that hospitals might play in providing a voluntary safe space for parents warrants closer attention. For example, in New Zealand, some hospitals are able to keep mothers and babies on the maternity ward for several days to enable proper and inclusive planning with wider family. Given huge disquiet about the disproportionate removals of babies from Maori families, greater emphasis has been placed on creating a safe space in hospital settings after birth, to enable the identification of kin carers and to avoid unnecessary placement moves for new-born babies.[87] Although maternity settings in England and Wales are very stretched, the number of women who will be subject to removal of their babies at birth is small, which would suggest that their vulnerability can be accommodated better by hospitals. Allowing mothers and babies to have more time in a protected setting, would also allow evidence from midwives

82 Chill (n 3) pp. 161–162.

83 P. Cooper Davis and G. Barua, 'Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law' (1995) 2 (1) *The University of Chicago Law School Roundtable: Article 8.*<http://chicagounbound.uchicago.edu/roundtable/vol2/iss1/8> accessed 10 October, 2021.

84 (n 6).

85 For a recent example of the refusal of interim order/stay see: Re N (Children: Interim Order/Stay) [2020] EWCA Civ 1070.

86 (n 69).

87 Office of the Ombudsman (n 1) p. 179.

caring for mother and baby on the ward needs to be routinely requested, which is vital to robust decision-making. International case law (*K and T v Finland*, 2003; *P, C, and S v United Kingdom*, 2002)[88] has already determined that urgent removal of babies from hospitals is a disproportionate response in the absence of life-threatening conduct from the mother – thus paving the way for multi-agency debate about alternatives to current practice.

In sum, children's social care, the family justice system and hospitals are not yet sufficiently aligned around the needs of a small, but highly vulnerable population of mothers, their partners and babies to ensure equitable, just or effective practice in all cases. Overarching, from parents and professionals demonstratedgrave concern that asking women to participate in care proceedings shortly after birth was unjust. Irrespective of the outcome of a first hearing, professionals stated that it was simply inhumane to expect a mother to appear in court with 'milk spitting from her breasts' and 'fight for her child within hours or days of birth'. Given the strength of feeling expressed by all participants, this would suggest a more fundamental review is needed of women's legal and procedural rights in the immediate post-partum period, and what more might be done to strengthen urgent decision-making for babies.

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88 *K and T v Finland*, 25702/94. 2003. 36 EHRR 255; *P, C, and S v United Kingdom* 56547/00. 2002. 2 FLR 631.