BERKSHIRE COUNTY COUNCIL v D-P

Family Division

Hollings and Waite JJ

3, 4 February 1985

Court of Appeal

Dillon, Stephen Brown and Woolf LJJ

19 March 1986

Care proceedings – Application in respect of child born suffering from drug abuse symptoms caused by mother's abuse of drugs during pregnancy – Whether relevant to consider events during pregnancy – Whether wardship proceedings appropriate.

Child – Care proceedings – Child born suffering from drug abuse symptoms caused by mother's abuse of drugs during pregnancy – Relevance of events during pregnancy.

The local authority instituted care proceedings which were heard in a magistrates' court over a number of days in July and August 1985. The facts as found by the magistrates were that the child, a girl, was born on 12 March 1985. The mother and father were both drug addicts. The mother was a registered drug addict and during the pregnancy took drugs in excess of those prescribed by her doctor knowing that thereby she could be causing damage to the child. At birth the child was suffering from symptoms caused by withdrawal from narcotics and she was placed in intensive care at hospital. A place of safety order was obtained and when the child was discharged from hospital she was placed with foster-parents. The child was never in the care or control of the parents.

The local authority brought the proceedings under s. 1 of the Children and Young Persons Act 1969. The relevant parts of subs. (2) of that provision read:

> 'If the court before which a child is brought under this section is of opinion that any of the following conditions is satisfied in respect of him, that is to say –
>
> (*a*) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated;
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> and also that he is in need of care and control which he is unlikely to receive unless the court makes an order under this section . . . the court may if it thinks fit make such an order.'

It was submitted by the guardian ad litem of the child and by the parents that care proceedings could be brought only in respect of a child who had been born and that although the court could look to past behaviour to consider whether the condition in para. (*a*) of s. 1(2) of the 1969 Act was made out, the use of the present tense in para. (*a*) precluded the court from considering the harm caused to a child while in the womb and as there had been no neglect or ill-treatment of the child by the parents after birth the condition in para. (*a*) was not made out. The guardian ad litem and the parents further submitted that care proceedings were not appropriate because the powers of the juvenile court were limited so far as the orders which could be made and that therefore wardship proceedings should have been taken. The local authority submitted that the condition in para. (*a*) was satisfied if the magistrates took into account the harm caused to the child before her birth; and further that wardship was not appropriate as the magistrates' court had adequate powers under the 1969 Act.

The magistrates were of opinion that as the local authority had commenced care proceedings it was their duty to hear and adjudicate upon the case as they, like the High Court in wardship, would act on the principle that the welfare of the child was paramount and, further, that the powers of the magistrates' court were sufficient to ensure the best interests of the child. The magistrates were also of opinion that they were entitled to have regard to the mother's abuse of drugs during pregnancy when deciding whether the condition in para. (*a*) was proved. Being satisfied that the condition in para. (*a*) was made out in respect of the child the magistrates made a care order.

The child, through the guardian ad litem, appealed by way of case stated to the Divisional Court and the court gave leave for the parents to appear and be represented by counsel in the appeal. The court, allowing the appeal, found that although the magistrates could properly have regard to what happened to the child before birth, care proceedings could be brought only in respect of a living, born child. In this case, the mother's conduct to the child after birth had never been tested and, by its very nature, her conduct to the child before birth could never be repeated. The only evidence before the magistrates was that the parents continued to be addicted to drugs. There was no evidence to suggest that the mother's abuse of drugs would affect the child. Therefore, the magistrates were wrong to find that the condition in para. (*a*) was satisfied. The magistrates had been right to hear and determine the application. The availability or otherwise of wardship proceedings was not a relevant consideration for them. However, as the appeal was allowed and the care order discharged and as it was conceded that the child was in need of care or control, it was now appropriate to consider wardship proceedings.

The local authority appealed.

Held – allowing the appeal –

(1) Care proceedings could only be brought in respect of a living child, and not in respect of an unborn child. However, if events which occurred before the birth of the child had the effect of causing the child's proper development to be avoidably prevented or neglected or his health to be avoidably impaired or neglected, then it was proper to take those events into account. The Divisional Court fell into error because, in effect, it restricted consideration of the development of the child to events which had taken place since its birth. That was too narrow an approach. Because of the mother's abuse of drugs, the child was born affected by drugs and suffering from drug abuse symptoms which needed intensive care for several weeks.

Per Woolf LJ: The proper approach to the interpretation of s. 1(2)(*a*) of the 1969 Act was to ask two questions. First, is the child's proper development being prevented or his health being impaired or neglected? Secondly, was that neglect avoidable. In this case there was no doubt that the child's health (after birth) was being impaired, so the answer to the first question was in the affirmative. The second question must also be answered in the affirmative in this case because, before birth, the mother should have taken steps to avoid the consequences to the child after its birth. In asking the first question it was not proper to look at what occurred before birth. In asking the second question it was perfectly permissible to consider what happened before birth.

(2) It was not appropriate for the wardship jurisdiction to be involved. That would be appropriate only if the statutory scheme provided by the Children and Young Persons Act 1969 and other statutes was not applicable.

CASE STATED by Reading magistrates' court.

FAMILY DIVISION
3, 4 February 1986

Statutory provision considered
Children and Young Persons Act 1969, s. 1 (2)(*a*)

Cases referred to in judgment

A v Liverpool City Council (1981) 2 FLR 222; [1982] AC 363; [1981] 2 WLR 948; [1981] 2 All ER 385
Caller v Caller [1968] P 39; [1966] 3 WLR 437; [1966] 2 All ER 754
Elliot v Joicey [1938] AC 209; [1935] All ER 578
Essex County Council v TLR and KBR (1979) 143 JP 309
F v Suffolk County Council (1981) 2 FLR 208
M v Westminster City Council [1985] FLR 325
Paton v Trustees of British Pregnancy Advisory Service [1978] 2 All ER 987
Salaman, Re [1908] 1 Ch 4
Villa v Gilbey [1907] AC 139

Cases also cited

M v Berkshire County Council [1985] FLR 257; sub nom. *Re M (A Minor) (Wardship: Jurisdiction)* [1985] Fam. 60; [1985] 2 WLR 811; [1985] 1 All ER 745
W (A Minor) (Care Proceedings: Wardship), Re [1985] FLR 879; *sub nom. Re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791; [1985] 2 WLR 892; [1985] 2 All ER 301

Christopher Chritchlow for the child;
Barbara Slomnicka for the local authority;
Paul Reid for the parents.

HOLLINGS J:

This is an appeal by way of case stated from the decision of the juvenile court sitting at the Civic Centre in Reading on 1 August 1985, whereby, pursuant to the provisions of s. 1(2) of the Children and Young Persons Act 1969 on the application of the Berkshire County Council for a care order under that section they decided that the child (whom I shall call Victoria without giving her surname) should be made the subject of a care order, because the condition laid down in para. (*a*) of that subsection had, on the evidence and on their findings, been satisfied. Victoria is the child of the first respondent and is represented by her guardian ad litem, the appellant.

Under that subsection it is provided:

> 'If the court before which a child is brought under this section is of the opinion that any of the following conditions are satisfied with respect to that child, that is to say –
>
> (*a*) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated. . . .'

There follow a number of other conditions in respect of which I need only refer to the fact that paras. (*b*) and (*bb*) refer to something which may happen in the future as compared with the phrase 'is being' in para. (*a*). The subsection continues, 'and also that the child is in need of care or control which the child is unlikely to receive unless the court makes an order under that section in respect of the child.' Then if those conditions, which have been referred to as the primary and secondary conditions, are satisfied, the court may, if it thinks fit, make such an order as is set out in subs. (3) of that section. Those orders include a supervision order and a care order as well as other orders.

In the proceedings before the juvenile court the guardian ad litem, acting on behalf of Victoria, in response to the application for a care order by the Berkshire County Council, asked the juvenile court to make a supervision order, with a view to the child being restored at some stage to the care of the mother or the mother and the father. In this appeal the guardian ad litem seeks the discharge of the care order, submitting that in the circumstances the only proper and available course is the institution of wardship proceedings.

The mother, who was not a party in the juvenile court proceedings but who was given leave to intervene and call evidence, has been given leave to appear in this appeal by this court, and she also appears by counsel. Her counsel supports the appeal of the guardian ad litem. Berkshire County Council appear by counsel to resist the appeal and to support the decision of the justices.

In stating the case the magistrates found certain facts, and it is I think useful if I recite the facts now which they found. They heard the case on 23 to 25 July and 1 August 1985. They found the following facts. Victoria was born to her mother, who was then aged 29, on 12 March 1985 at the Royal Berkshire Hospital in Reading. At the time of her birth Victoria was suffering from symptoms caused by withdrawal from narcotics. The mother had been a registered drug addict since 1982 and had been taking drugs for approximately 10 years. The mother continued to take drugs both by oral means and by injection from the time that she knew that she was pregnant to the time when the child was born. During pregnancy the mother took drugs in excess of those which were prescribed for her by her registered medical practitioner. The mother knew that by taking drugs while pregnant she could be causing damage to her child. The child was kept in intensive care at hospital for several weeks immediately following the birth, indeed until 19 May. A place of safety order was obtained by the social services on 23 April and successive interim care orders were in force on 13 May 1985 to the date of the hearing. This meant that Victoria was never in the care or control of the mother or of her father since her birth. They found that the medical condition in which the child was born was a direct result of deliberate and excessive taking of drugs by the mother during pregnancy. They also found that the mother, and the father too, continued to be addicted to drugs and remained so on the final day of the hearing of the case.

The case stated by the magistrates then sets out the respective contentions of the appellant and of the respondent. Having set out those contentions and having referred to the cases to which they were referred in the magistrates' court proceedings, they said as follows:

> 'The Berkshire County Council decided to initiate these proceedings in the juvenile court and we had jurisdiction to hear the matter.'

They refer then to the question of whether the wardship jurisdiction should have been allowed to take the place of the magistrates' jurisdiction. I will refer to that later in this judgment. They considered the case of *A v Liverpool City Council* (1981) 2 FLR 222, and on the basis of that decision they considered that their powers were sufficient to ensure that the best interests of the child were met. They accepted that the particular circumstances

on which what I have called the primary condition was based would not recur since the child had now been born, but, as they say in their case, they took the view that a child's development is a continuing process which encompasses the past and the present, 'and we considered that events in the past life of this child, even during the time when it was a foetus in the womb, were relevant'. For this reason they considered that they were entitled to have regard to the mother's abuse of her own bodily health during the pregnancy when deciding whether the condition in s. 1(2)(*a*) of the 1969 Act was proved in respect of the child born of that pregnancy. They expressed themselves satisfied that this child's proper development was being avoidably prevented or neglected, or her health was being avoidably impaired or neglected, or she was being ill-treated. I should interpose to say that it is accepted that they were entitled to make a finding in that compendious form, referring to the various alternatives which are set out in that primary condition. And they accepted that in so deciding they should not look at the future development of the child. They further concluded that the child was in need of care or control which she was unlikely to receive unless an order was made, and they made a care order in respect of the child.

In respect of that latter decision, that is that the child was in need of care or control, which is the secondary condition, the appellant makes no complaint, and there is no appeal in respect of that condition, it being conceded that Victoria was at the time of the hearing before the magistrates, and indeed no doubt now, in need of care or control. The sole question for this court is whether the primary condition has been satisfied.

The magistrates then set out four questions upon which they asked for the opinion of this court. I will refer to those questions towards the end of this judgment.

The construction of para. (*a*) of subs. (2) of s. 1 of the 1969 Act has been the subject matter of consideration in two cases in particular to which this court has been referred. The first is the case of *F v Suffolk County Council* (1981) 2 FLR 208, a decision of McNeill J in the Queen's Bench Divisional Court, and the second is *M v Westminster City Council* [1985] FLR 325, a decision by Bush and Butler-Sloss JJ in this court, the Family Division Divisional Court. Both the cases of *F v Suffolk County Council* and *M v Westminster City Council* concerned children, or a child, who had during his or her lifetime been in the care of his or her mother. That is a distinction which has to be borne in mind when applying, so far as they are relevant, those decisions to the facts of this case.

In the case of *F v Suffolk County Council*, which was referred to by Butler-Sloss J in *M v Westminster City Council*, McNeill J, having referred to the case of *Essex County Council v TLR and KBR* (1979) 143 JP 309, which I do not need to refer to myself, said, at p. 213:

> 'What the court has to consider, as I see it, is this: is there present avoidable neglect or prevention? That is the present tense application to these words. Is that something which is happening now, or it may be has happened, with the result that the proper development of the child is affected in those ways? The proper development of the child is a continuing process, past, present and future, and what the court has to look at, in my view, is the present conduct and its effect on the development

> of the child in the past, at the present time and at any rate in the foreseeable future. Development being a continuing matter, I do not think this section is intended to rule out of consideration either mental development or development in its broadest and continuing sense.'

Having referred to that passage, with agreement and approval, but with some possible qualification as to how far it would apply in the foreseeable future, Butler-Sloss J considered the case before her and Bush J. In the case of *M v Westminster City Council* the mother had what were described as drink problems, which she had suffered from when having the care of the relevant children. However, by the time that the application for a care order came before the magistrates the particular drink problem was no longer present, and the magistrates decided that the court must look at the situation when the proceedings were started in the light of the subsequent relevant factors but that the fact that the mother had cared for the children well from 20 January until the hearing on 17 February did not prevent them from holding that the primary condition under para. (*a*) was made out, and they expressed the view that although the children were to be left with the mother a supervision order would not provide sufficient motivation for the mother and that a care order was appropriate. It was from that decision that the appeal was made to that Divisional Court. Butler-Sloss J said, at p. 335H:

> 'If Miss Hoyal' [counsel for the appellant mother] 'is right' [that is that one must look at the situation as at the moment of the application] 'then there will be virtually no cases under s. 1(2)(*a*) where the children have been removed from home in which it would be possible to find the primary condition in the subsection proved. One has only got to take the example of the very young child who has been battered and who is then put in a foster home who has recovered from the injuries by the time the case is heard, there having been perhaps a number of adjournments in order, as Miss Slomnicka [counsel for the local authority] in her submissions to us points out, to wait for the criminal proceedings that may arise; such a child by the time he is in foster care and has recovered from his injuries, as, fortunately, very young children often do, would not be, on the analogy of Miss Hoyal for the appellant, conceivably within the ambit of "is being avoidably prevented". Or, indeed, one could have a situation, again with a very young child who, even 2 or 3 months before, had been taken away after a long course of fairly minor injuries and was placed with foster parents and it would be impossible to say of such a child that the development is being avoidably prevented as at the date of the hearing, because there may be great difficulty in saying, with a very young child, how far that could possibly arise.'

She later continued at p. 336E:

> 'For my part, I find it impossible to find that for the primary condition to be established the child's proper development can only be considered as being avoidably prevented at the time of the hearing. A child's development is a continuing process. The present must be relevant in the context of what has happened in the past and it became a matter of

> degree as to how far in the past you go. It must be, as indeed counsel for the children has urged upon us, in the interests of the children themselves that one should look at the past and, since we are considering the development of the children, we must look to see what it is that we must look at. I take the view that this very restrictive approach, put forward with great enthusiasm by counsel for the appellant, is quite inappropriate to the way in which one should look at the proper development of a child. Therefore, the magistrates' approach to this case, whereby they said that you look at the position when the proceedings were started and are entitled to interpret it in the light of anything relevant which has happened since, was an entirely proper way for them to consider this matter, and it leaves out any problems there may be as to the future because it is clear from their case that they did not consider the future in respect of the primary condition.'

Likewise Bush J on this aspect said this at p. 340H:

> 'The development of a child is a continuing matter and encompasses the past, present and, to a certain extent, the future. The magistrates, in determining the primary condition, must have regard to the past treatment of the child as well as to the present. They must ask themselves on the day of the hearing: "Are we satisfied that his proper development is being avoidably prevented or neglected, or his health is being avoidably impaired or neglected?" They are not bound to answer the question in the negative if, for example, there has been a temporary respite in the condition or treatment of the child. In my view "is being" is not temporal in the sense that it means "now", "this minute"; it is descriptive of the child, that is the child must fall into the category mentioned in the section. If the words used had been different then different considerations would apply. "Has been" would indicate some time in the past; "will be" would indicate some time in the future: "is being" would indicate a situation over a period, not now at this precise moment but over a period of time sufficiently proximate to the date of the inquiry to indicate that it is the present, not history and not the days to come. It is the description of a continuing set of circumstances which may not obtain on the particular day on which the matter is being considered but represents a category which the description of the child fits.
>
> Whether the evidence available satisfies this criterion is a question of fact and degree.'

Miss Slomnicka relies upon the decision and the effect of the judgments in *M v Westminster City Council*, and for that purpose she makes a further submission, and that is that the magistrates are not only entitled to look at how the mother behaved towards her unborn child, but are also entitled to treat that unborn child as a child for the purposes of the Act so that the damage which was caused to that unborn child was damage which did or might come within the purview of para. (*a*) of s. 1(2) of the 1969 Act as that paragraph had been interpreted and construed in *M v Westminster City Council*. For that purpose Miss Slomnicka has referred this court to not only the definition section in the 1969 Act and in the 1980 Act, the Child Care Act, but also to a number of authorities and to a number of statutes in order to seek to establish what she contends for.

By s. 70(1) of the 1969 Act, which is the definition section, it is provided that a child means a person under the age of 14. By s. 87(1) of the Child Care Act 1980 'child' means a person under the age of 18. For the purposes of her submission Miss Slomnicka has referred us to cases which have to do with wills and intestacy, with the maintenance of children, and with the rights of unborn children. She has referred us to *Caller v Caller* [1968] P 39, which was a case where whether a father had accepted an unborn child as a child of the family was under consideration. It was there held by the Divisional Court that the child even before birth could be accepted by the father for the purpose of his acceptance within the meaning of the Act then in force, so that he could be liable for the maintenance of that child when born, even though he had left the mother before birth. In the course of their judgments Karminski and Latey JJ made certain observations which were *obiter* and upon which Miss Slomnicka relies. I am satisfied that those observations were *obiter* and I do not find the facts of that case, or the decision in that case, of relevance or assistance to solve the present problem.

We were also referred to the case of *Paton v Trustees of British Pregnancy Advisory Service* [1978] 2 All ER 987, a decision of Sir George Baker P, which, however, only decided that an unborn child or foetus cannot have any right of its own, at least until that foetus is born and becomes a child. Again I find that of little assistance in solving the present problem.

She then referred us to a number of cases concerning wills and intestacy, in particular *Elliott v Joicey* [1935] AC 209, which reviewed the earlier cases of *Villar v Gilbey* [1907] AC 139 and *Re Salaman* [1908] 1 Ch 4, and from that it is plain that in the case of wills a particularly favourable construction to a child *en ventre sa mère* would be given if that would secure for the child a benefit which that child would have got if the child had been born at the relevant date, and it was in my judgment a construction of its own particular kind to meet a particular case. Again I do not find it of assistance in deciding the present case.

She has referred us to a number of statutes where it has been provided that the statute in question applies to a child *en ventre sa mère*: the Infant Life Preservation Act 1929, the Cogenital Disabilities Act 1976, the Inheritance Act 1975 and the Law of Property Act 1922. Those are all, I find, statutes passed to govern the particular matters with which those statutes were concerned, and once more I do not find the fact that those statutes have referred specifically to them applying to a child *en ventre sa mère* of assistance in this case, and indeed one might say they point more the other way, in as much as it was deemed necessary to refer specifically to the statute applying a child *en ventre sa mère*.

Added to that is the fact that care proceedings both under this Act and any other Act, it is common ground, can only be taken in respect of a living, born child. In those circumstances, having regard to that particular reason and the definition of a child as a 'person', and to the natural meaning of the word 'child', I am satisfied that this Act and this section applies only to a child from the moment of that child's birth. That does not mean, however, that what happened to that child while unborn was not to be looked at or considered by the magistrates, and how the mother had regard for or cared for her child during the pregnancy, it might be said, and the effect that her behaviour had upon the health of that child when born,

together with the fact that the mother continues to abuse drugs, may be considered perhaps relevant evidence for the purpose of considering whether the child's proper development is being avoidably prevented or neglected or her health is being avoidably impaired. The difficulty which, however, I have found is this; that unlike the cases of *M v Westminster City Council* [1985] FLR 325 and *F v Suffolk County Council* (1981) 2 FLR 208, the whole of the conduct, if I may so describe it, of the mother *vis- –vis* the child relates to the period before birth. The mother's present conduct *vis- –vis* the child has never been tested, and of its very nature her previous conduct *vis- –vis* this child can never be repeated. It is that circumstance which to my mind distinguishes this case from that of *M v Westminster City Council*, and indeed *F v Suffolk County Council*.

The only evidence before the magistrates as to the situation after the birth of the child was that this mother and father (one of course is chiefly concerned with the mother) continue, or continued at least until the hearing before the magistrates, to take class A drugs. There was no evidence before the magistrates as to the effect that had or might have on her caring for the child. There was no evidence to suggest that her abuse or use of drugs would affect the child or that they would administer drugs to the child. Indeed no one has suggested that the mother would seek to do so, I hasten to add. As Miss Slomnicka submitted in the case of *M v Westminster City Council*, in the case of a battered child who is now in the care of the local authority one cannot say this condition does not apply because the child is now in care. That is because the child was battered when in the care of the mother and alive, and it is only because of the intervention of the social services and the care application that the child is no longer with the mother. What the magistrates have realistically to be concerned with is not the situation technically as it is before them at the time but the situation in the continuum, as it has been described by Butler-Sloss and Bush JJ. They had to look at the ability of the mother and the risk to the child in the light of the past, with some thought to the future, though not so far into the future. In the present case there is a notable absence of any such state of affairs.

That this child is in need of care and control is, as I said at the outset, conceded. However, in my judgment the magistrates, confined as they were to the provisions of that section of the 1969 Act, as interpreted by the two cases to which I have referred, even though they were entitled to look at what happened during the pregnancy, ought not, in my judgment, to have come to the conclusion that this condition has been satisfied in any of its respects, for the reasons I have already stated.

It remains therefore for me now to consider the four questions which have been posed to this court in the case stated. By the first question the magistrates ask:

> 'Is it wrong in law for the juvenile court to find that the condition under s. 1(2)(*a*) of the Children and Young Persons Act 1969 is satisfied in circumstances where the child has never been in the care of either parent or out of the care of responsible agencies?'

My answer to that is that there may be cases in the future where it might

be right to find that condition proved, even though the child was never in the care of either parent, but it was wrong in this case. I do not propose to answer that question in the generality in which it is posed.

The second question is as follows:

> 'Is the condition in s. 1(2)(*a*) of the Children and Young Persons Act 1969 satisfied in respect of the child when the evidence' [and here I would add this: 'when the *only* evidence'] 'of the child's proper development being avoidably prevented or neglected or his health being avoidably impaired or neglected or he is being ill-treated relates to when the child was *en ventre sa mère*?'

I would answer that question, as amended, 'No'.

The third question:

> 'On the facts found could the juvenile court properly find that the proper development of the child was being avoidably prevented or neglected or her health was being avoidably impaired or neglected or she is being ill-treated?'

I have already answered that question by 'No'.

The fourth question:

> 'In considering s. 1(2)(*a*) of the Children and Young Persons Act 1969 should the juvenile court have considered the availability of wardship proceedings and/or proceedings under the Child Care Act 1980 and or any other powers or procedures available to the local authority?'

Again I would answer that question 'No'.

The magistrates had only to consider the provisions of that section, bearing in mind the enjoinder in s. 44 of the Children and Young Persons Act 1933, that they must have regard to the welfare of the child. The availability or otherwise of wardship proceedings in my judgment is not a relevant consideration for the magistrates. It was for them to consider whether the conditions laid down in that section had been satisfied or not. By the decision in, especially, *M v Westminster City Council* [1985] FLR 325, the meaning of the words 'is being' has been expanded somewhat, but not enough to cover the facts and circumstances of this case. As I say the answer is 'No', but of course wardship proceedings are a relevant consideration here and now for the purposes of the welfare of Victoria, and I have no doubt that an application will be made in respect of that at the conclusion of this appeal.

For those reasons I would allow the appeal and discharge the care order.

WAITE J:

I agree that the appeal should be allowed for the reasons given by Hollings J, and I concur in the answers which he has given to the questions raised in the case stated.

COURT OF APPEAL

Statutory provisions considered
Children and Young Persons Act 1969, s. 1(2)(*a*)

Cases referred to in judgment
A v Liverpool City Council (1981) 2 FLR 222; [1982] AC 363; [1981] 2 WLR 948; [1981] 2 All ER 385
M v Westminster City Council [1985] FLR 325
W (A Minor) (Care Proceedings: Wardship), Re [1985] FLR 879; *sub nom. Re W (A Minor) (Wardship: Jurisdiction)* [1985] AC 791; [1985] 2 WLR 892; [1985] 2 All ER 301

Nicholas Medawar QC and *Barbara Slomnicka* for the local authority*;*
James Townend QC and *Christopher Critchlow* for the child*;*
Paul Reid for the parents.

DILLON LJ:
I shall ask Stephen Brown LJ to deliver the first judgment in this matter.

STEPHEN BROWN LJ:
This is an appeal from a decision of the Divisional Court of the Family Division of 4 February of this year. On that occasion the Divisional Court allowed an appeal by way of case stated from a decision of the justices at Reading on 1 August 1985 whereby they made a care order in respect of a little girl, Victoria, in favour of the Berkshire County Council.

The facts giving rise to these proceedings are sad but may be shortly stated. They concern a little girl called Victoria, who was born prematurely on 12 March 1985. She was born to a mother who was addicted to heroin or a substitute and, as a result, she was born in a condition where she herself was addicted to that drug and was suffering serious withdrawal symptoms. She was taken to a special care baby unit at the Royal Berkshire Hospital, her health having deteriorated after her birth. She spent some 6 weeks in hospital and, in the interim, the local authority, the Berkshire County Council, placed the child on the abuse register. They called a case conference to consider the circumstances of this little baby and they decided to seek a care order from the juvenile court under the provisions of the Children and Young Persons Act 1969.

Those proceedings were commenced on 25 April and subsequently successive interim care orders were made. It was arranged that the child should be separately represented by a guardian ad litem, who was appointed from a panel kept by the juvenile court. On 19 May 1985 the little girl was discharged from intensive care at the hospital to foster-parents.

It is part of the chronology of events that the mother, who was unmarried at the time of the birth, married the father on 21 June 1985. The Reading juvenile court commenced the hearing of the application by the Berkshire County Council for a care order on 23 July and that hearing continued until it was completed on 1 August when the juvenile court made a care order in favour of the Berkshire County Council.

The guardian ad litem appealed by way of case stated from the decision of the justices to the Divisional Court of the Family Division. The Family Division, as I have indicated, allowed that appeal and the County Council,

the first respondent in the proceedings before the Divisional Court, is the appellant before this court.

The facts found by the justices and stated in their case were as follows:

'(*a*) the child . . . was born to [the mother] . . . on 12 March 1985 at the Royal Berkshire Hospital, Reading;

(*b*) at the time of her birth the child was suffering from symptoms caused by withdrawal from narcotics;

(*c*) the mother had been a registered drug addict since 1982 and had been taking drugs for approximately 10 years;

(*d*) the mother continued to take drugs, both by oral means and by injection, from the time when she knew that she was pregnant to the time when the child was born;

(*e*) during the pregnancy the mother took drugs in excess of those which were prescribed for her by a registered medical practitioner;

(*f*) the mother knew that by taking drugs whilst pregnant she could be causing damage to her child;

(*g*) the child was kept in intensive care at hospital for several weeks immediately following the birth. A place of safety order was obtained by Berkshire Social Services on 23 April 1985 and successive interim care orders were in force from 13 May 1985 to the date of the hearing;

(*h*) the child had not been in the care or control of the mother or the father . . . since her birth;

(*i*) the medical condition in which the child was born was a direct result of deliberate and excessive taking of drugs by the mother during pregnancy;

(*j*) the mother, and the father too, continued to be addicted to drugs and remained so on the final day of the hearing of this case.'

The justices accepted that the particular circumstances which gave rise to the physical condition of the baby could not recur after the child had been born, but in para. 7(*b*) of the case they stated:

> 'However, we took the view that a child's development is a continuing process which encompasses the past and the present and we considered that events in the past life of this child, even during the time when it was a foetus in the womb, were relevant. For this reason we considered we were entitled to have regard to the mother's abuse of her own bodily health during pregnancy when deciding whether the condition in s. 1(2)(*a*) of the Children and Young Persons Act 1969 was proved in respect of the child born of that pregnancy.
>
> We were satisfied that this child's proper development was being avoidably prevented or neglected or she was being ill-treated. In so deciding we accepted that we should not look at the future development of the child.
>
> We further concluded that this child was in need of care or control which she was unlikely to receive unless an order was made and we made a care order to the respondent in respect of the child.'

The appeal to the Divisional Court raised the construction and appli-

cation of s. 1(2) of the Children and Young Persons Act of 1969. Section 1 provides:

> '(1) Any local authority, constable or authorized person who reasonably believes that there are grounds for making an order under this section in respect of a child or young person may, subject to section 2(3) and (8) of this Act, bring him before a juvenile court.
> (2) If the court before which a child or young person is brought under this section is of opinion that any of the following conditions is satisfied with respect to him, that is to say –
>
> (*a*) his proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated, or
>
> . . .
> and also that he is in need of care and control which he is unlikely to receive unless the court makes an order under this section in respect of him, then, subject to the following provisions of this section and sections 2 and 3 of this Act, the court may if it thinks fit make such an order.'

The submissions made to the Divisional Court of the Family Division, which they accepted and upheld, concerned the application and construction of s. 1(2)(*a*). The submission which received approval was that, in this particular case, the only evidence before the justices as to the cause of the condition of the child related to events which had taken place before its birth; that there had been no opportunity for the mother to care for the child since the birth and accordingly no conduct on her part which could be said to have avoidably impaired the health or prevented the proper development of the child. Accordingly, applying the strict wording of s. 1(2)(*a*) in its present tense, the condition was not satisfied, which is the primary condition for the application of the section which enables a court to proceed to make a care order.

It is not in dispute, nor was it in dispute before the Divisional Court, that the child is in need of care or control. Submissions were made to the effect that this was a case in which the court should consider wardship proceedings as being the appropriate procedure. The Divisional Court came to the conclusion that the submissions made on behalf of the guardian ad litem and the mother, who was given leave to intervene before the Divisional Court, were made out and, accordingly, allowed the appeal.

Before this court Mr Medawar for the local authority submits that the Divisional Court fell into error. In his submission, it looked too narrowly at the application of s. 1(2)(*a*) and in effect overlooked the complete findings of the justices, including the continuing addiction of the parents. Mr Medawar submitted that, in this case, the facts found by the justices supported their conclusion that the proper development of the child was being prevented and her health was being impaired and that this was avoidable. He submitted that this was attributable to conduct which was the deliberate conduct of the mother and, looking at the situation as a continuing state of affairs, it was appropriate to take into consideration the matters which had in fact taken place while the child was still in her mother's womb. He submits that the decision of the Divisional Court has in effect divided the process of the child's development artificially: that is to say that

it is artificial to disregard the period before birth and to have regard only, and effectively only, to events which can be said to have occurred since the actual birth of the child.

Mr Medawar has invited the court's attention to the case of *M v Westminster City Council* [1985] FLR 325 and, in particular, to a passage in the judgment of Butler-Sloss J at p. 336D:

> 'For my part, I find it impossible to find that for the primary condition to be established the child's proper development can only be considered as being avoidably prevented at the time of the hearing. A child's development is a continuing process. The present must be relevant in the context of what has happened in the past and it becomes a matter of degree as to how far in the past you go. It must be, as indeed counsel for the children has urged upon us, in the interests of the children themselves that one should look at the past and, since we are considering the development of the children, we must look to see what it is that we must look at. I take the view that this very restrictive approach, put forward with great enthusiasm by counsel for the appellant, is quite inappropriate to the way in which one should look at the proper development of a child. Therefore, the magistrates' approach to this case, whereby they said that you look at the position when the proceedings were started and are entitled to interpret it in the light of anything relevant which has happened since, was an entirely proper way for them to consider this matter, and it leaves out any problems there may be as to the future because it is clear from their case that they did not consider the future in respect of the primary condition.'

It is, of course, the case that the facts of that case were different from the particular facts of the present case, but it is significant that, in this case, the Divisional Court did consider that it was appropriate and relevant to look at what had happened before the child was born. However, it seems to me that the Divisional Court fell into error in not applying the result of that view of the case because, in effect, it appears to me that it did restrict consideration of the development of the child to events which had taken place since its birth. In my view, that is too narrow an approach.

Mr Townend on behalf of the guardian ad litem, the first respondent to this appeal, has argued that one should not have regard to what has taken place before the birth of the child. That seems to me to be the result of his submissions. He further argues that, in point of fact, an appropriate procedure in a case of this nature is for the wardship jurisdiction of the court to be invoked. However, having regard to the recent decisions of the House of Lords in *A v Liverpool City Council* (1981) 2 FLR 222 and *Re W (A Minor) (Care Proceedings: Wardship)* [1985] FLR 879, that is only appropriate if the statutory scheme provided by the Children and Young Persons Act is not applicable. In my judgment, bearing in mind that what one has to have regard to is the continuing process of the development of the child, s. 1(2)(*a*) is apt to cover the facts of the present case.

Accordingly, I have come to the conclusion that the Divisional Court was wrong in the decision to which it came and that the magistrates were in fact correct when they stated in para. 7(*b*) of the case:

> 'However, we took the view that a child's development is a continuing process which encompasses the past and the present and we considered that events in the past life of this child, even during the time when it was a foetus in the womb, were relevant.'

It seems to me that those events, which had the effect of preventing the proper development of and impairing the health of this child, were avoidable and that, as a part of a continuing process, could and should have been in the contemplation of the court. Accordingly, they were entitled to find the primary condition of the section fulfilled and to proceed to make a care order, it not being disputed that the child was in need of care or control.

In my judgment, the appeal should be allowed and the decision of the magistrates restored.

WOOLF LJ:

I agree that this appeal should be allowed and I gratefully adopt the facts as set out by Stephen Brown LJ.

In my view, it is most important, when answering the questions posed by the justices in the case stated, to look at the statutory provisions with which the justices were concerned and determine their proper interpretation. Section 1 of the 1969 Act contains a most important and valuable power giving a local authority the ability to go before a juvenile court and to obtain from that court orders for the care and protection of children. It is, however, to be noted that, as Mr Reid submitted on behalf of the mother, the procedure which flows from that section does in some degree interfere with the mother's rights which would exist in wardship proceedings, and it is, therefore, important from her point of view that, in cases which do not fall properly within s. 1, that procedure should not be invoked.

In my view, this case raises a question that has not previously come before the court as to whether or not matters which flow from what was done to a child prior to its birth justify an order being made under s. 1 subsequent to its birth. If there was any doubt as to whether a child includes an unborn child for the purposes of s. 1, in my view, that doubt is removed by s. 70(1) which defines a 'child' as meaning a person under the age of 14. A 'person' denotes someone who is living, not someone who has yet to be born.

It follows, in my view, from that approach to the interpretation of s. 1 that what has to be considered in deciding whether the requirements of subs. (2)(*a*) have been met in any particular case is whether a living child's proper development is being prevented or neglected or a living child's health is being impaired or neglected or a living child is being ill-treated. However, the fact that the question has to be posed in that way does not mean that what happened before the birth of the child has to be ignored for all purposes. In my view, the proper approach to the interpretation of s. 1(2)(*a*) involves asking two questions, the first being, 'Is the living child's proper development, etc., being prevented or neglected?' and the second question being whether that was avoidable.

In considering those questions in relation to this case there was no doubt that the child's health was being impaired and, because of that, the answer to the first question must be in the affirmative. The next question is: Was that avoidable? Again, in my view, the answer must be in the affirmative because the mother, prior to the birth of the child, should have taken steps

to avoid the consequences to that child after its birth. Whereas in asking the first question I do not regard it as proper to look at what occurred before birth, in asking the second question it is, in my view, perfectly permissible to consider what happened before birth. The only matters with which the court is concerned in relation to the second question is: Was it avoidable or not?

So far as the use in s. 1(2) of the word 'being' is concerned, I would respectfully adopt the approach of the Family Division in the case of *M v Westminster City Council* [1985] FLR 325 in the passage from the judgment of Butler-Sloss J, to which Stephen Brown LJ referred, subject to one qualification. In that passage the judge said:

> 'Therefore, the magistrates' approach to this case, whereby they said that you look at the position when the proceedings were started and are entitled to interpret it in the light of anything relevant which has happened since, was an entirely proper way for them to consider this matter. . . .'

The judge, when the whole passage which Stephen Brown LJ cited from her judgment is looked at, may not have been intending to limit her approach to a consideration of the situation at the time when the proceedings were started. If she was intending to limit consideration to that time or a consideration from that time, then I would respectfully disagree with her approach because, in my view, it is at the time of the hearing with which the justices are primarily concerned although, in accordance with what Butler-Sloss J said, in approaching the matter you look at the continuing situation. I would respectfully, on this aspect, prefer the approach of Bush J in the same case at p. 340H, where he said this:

> 'The development of a child is a continuing matter and encompasses the past, present and, to a certain extent, the future. The magistrates, in determining the primary condition, must have regard to the past treatment of the child as well as to the present. They must ask themselves on the day of the hearing: "Are we satisfied that his proper development is being avoidably prevented or neglected, or his health is being avoidably impaired or neglected?" They are not bound to answer the question in the negative if, for example, there has been a temporary respite in the condition or treatment of the child. In my view "is being" is not temporal in the sense that it means "now", "this minute"; it is descriptive of the child, that is the child must fall into the category mentioned in the section. If the words used had been different then different considerations would apply. "Has been" would indicate some time in the past; "will be" would indicate some time in the future; "is being" would indicate a situation over a period, not now at this precise moment but over a period of time sufficiently proximate to the date of the inquiry to indicate that it is the present, not history and not the days to come. It is the description of a continuing set of circumstances which may not obtain on the particular day on which the matter is being considered but represents a category which the description of the child fits.
>
> Whether the evidence available satisfies this criterion is a question of fact and degree.'

Applying that approach, I would say, on the findings of fact of the justices in this case, that, so far as the questions posed in the Divisional Court are concerned, the answers would be as follows.

In relation to question 1 – which is, 'Is it wrong in law for the juvenile court to find that the condition under s. 1(2)(*a*) of the Children and Young Persons Act 1969 is satisfied in circumstances where the child has never been in the care of either parent or out of the care of responsible agencies?' – I would answer that it is possible, as a matter of law, for the juvenile court to find that the conditions under that section are satisfied in those circumstances.

In relation to question 2 – which is, 'Is the condition in s. 1(2)(*a*) of the Children and Young Persons Act 1969 satisfied in respect of a child when the evidence of the child's proper development being avoidably prevented or neglected or its health being avoidably impaired or neglected or its being ill-treated relates to when the child was *en ventre sa mère?* – I would answer that question by saying that what the court is concerned with is the condition of the child after its birth, but matters occurring before the child were born can give rise to its being in a condition which satisfies the requirements of the section.

In relation to question 3 – which is, 'On the facts found could the juvenile court properly find that the proper development of the child is being avoidably prevented or neglected or her health is being avoidably impaired or neglected or she is being ill-treated?' – I would answer that question in the affirmative, but I would say, on the facts of the particular case which was before the juvenile court, the primary provision of the subsection which the justices should have been concerned about was relating to the question of the health of the child. It was that which was being impaired as a result of what had occurred before its birth.

I do not consider that it is necessary for me to deal specifically with the fourth question because, clearly, this was, in my view, a matter falling within the juvenile court's jurisdiction under the Children and Young Persons Act 1969.

It is for those reasons that I agree that this appeal should be allowed.

DILLON LJ:

I agree that this appeal should be allowed. I would stress that there is no question whatever in this case of giving this child back to a mother who is a drug addict. There is no doubt that the child is in need of care and it is essentially a question of which is the appropriate procedure to ensure that that care is provided. Is it the procedure of a care order made by the juvenile court in favour of the local authority under s. 1 of the 1969 Act or is it the procedure of wardship in the Family Division?

It has been pointed out by Lord Scarman in *Re W* [1985] FLR 879, to which reference has been made, at p. 880, that Parliament has, by a series of statutes, including in particular the 1969 Act, entrusted the responsibility for the care of children received into care by a local authority to the local authorities, subject to the safeguards specified in the legislation. It has been said by Lord Scarman and the other members of their Lordship's House that the purpose of the statutory scheme is clear, whatever difficulties may arise in the interpretation of some of the detailed provisions. It follows that, where the statutory scheme applies, there is no scope for wardship.

In the circumstances of this case, I have no doubt that, on the findings of the juvenile court, they were fully entitled to be satisfied that the primary condition (*a*) in s. 1(2) of the Act was satisfied. The development of the child is, as has been pointed out, a continuing process. I have, for my part, sympathy with the view expressed by Butler-Sloss J at p. 336 in *M v Westminster City Council* [1985] FLR 325 that the primary conditions should not be looked at as alternatives but be looked at as a whole. I do not see any antithesis between proper development and health. Here there is the continuing process that the mother was a taker of Methadone, both throughout the pregnancy and thereafter up to the conclusion of the hearing in the juvenile court. The child was therefore born affected by the drug and suffering from drug abuse symptoms which needed intensive special care for several weeks; and equally, because the drug abuse would have continued, the mother was unable to breast-feed the child or look after the child. The whole process has to be looked at as a whole and, in my view, the primary condition (*a*) was satisfied. The proper development of the child was avoidably prevented and her health was avoidably impaired.

That being so, this appeal should be allowed and the care order of the magistrates should be restored.

Appeal allowed. Legal aid taxation of the guardian ad litem's costs and the parents' costs. Leave to appeal to the House of Lords refused.

Solicitors: *D.C.H. Williams* for the local authority;
Rowberry Morris & Co. for the child;
Blandy & Blandy for the parents.

B.C.