M v BERKSHIRE COUNTY COUNCIL

Court of Appeal

Cumming-Bruce and Slade LJJ

8, 9, 10 October; 9 November 1984

Care – Child in care of local authority – Powers of juvenile court to make orders as to access

Care proceedings – Application for care order – Local authority proposing to place child with long-term foster parents with a view to adoption – Guardian ad litem recommending short-term placement with a view to rehabilitation – Juvenile court making care order – Mother applying in wardship – Whether lacuna in powers of juvenile court to implement guardian ad litem's recommendation

Child – Care proceedings – Local authority proposing to place child with long – term foster parents with a view to adoption – Guardian ad litem recommending short-term placement with a view to rehabilitation – No power for juvenile court to give directions as to access and rehabilitation – Power of juvenile court to control proposed arrangements for child by access order – Need for local authority to apply for the child to be freed for adoption before placing child with a view to adoption

Wardship – Care proceedings – Local authority propose to place child with long-term foster parents with a view to adoption – Guardian ad litem proposing short-term placement with a view to rehabilitation – Whether lacuna in powers of juvenile court justifying exercise of wardship jurisdiction

In January 1983 the mother was convicted of an offence of infanticide and a probation order was made. On 28 May 1984 the mother gave birth to a son. The local authority obtained a place of safety order that day and the child was immediately removed from the mother's care. The local authority commenced care proceedings and applied for a care order on the ground set out in s. 1(2)(*bb*) of the Children and Young Persons Act 1959. (See Note below for the relevant statutory provisions.) The juvenile court made an order under s. 32A (1) of the 1969 Act that the mother should not be treated as representing the child and appointed a guardian ad litem under r. 14A (1) of the Magistrates' Court (Children and Young Persons) Rules 1970. The duties of a guardian ad litem are set out in r. 14A (6) and (7) of the 1970 Rules. (See Note below as to the implementation of these provisions.) The mother obtained legal representation and a solicitor was appointed to represent the child.

Pending the hearing, the local authority placed the child with foster parents. The mother was allowed, and exercised, regular and frequent access.

The matter came before the court in July 1984. At the hearing the local authority sought a care order and made it clear that as, in their opinion, there was no prospect of rehabilitating the child with the mother they proposed to terminate access and place the child with long-term foster parents with a view to adoption. The mother sought the return of the child to her forthwith. The guardian ad litem prepared a written report and gave oral evidence to the effect that although she agreed that a care order should be made, the child should not be placed with long-term foster parents but that a further assessment of the mother's condition and capacity be undertaken with a programme aimed at gradual rehabilitation with increasing access. When addressing the court, the solicitor for the child indicated that he opposed the mother's proposal that the child should be returned to her forthwith and that he accepted that a care order should be made. He made no reference to the recommendation of the guardian ad litem.

The juvenile court made a care order without giving any reasons. The magistrates gave no indication of their view about the recommendation of the guardian ad litem.

The mother commenced wardship proceedings and the matter came before Bush J in August 1984. It was submitted on behalf of the mother that the court should assume its wardship jurisdiction on two grounds. First, because there was a lacuna in the powers of the juvenile court as that court had no power to give effect to the recommendation of the guardian ad litem. Secondly, because this was an exceptional case in that the solicitor for the child had made no submission regarding the guardian ad litem's recommendation and that this was an irregularity since, by virtue of r. 14A(6)(*d*), it was the duty of the child's solicitor to accept the instructions of the guardian ad litem. These grounds, it was submitted, fell within the circumstances in which it had been held that the High Court would exercise its wardship jurisdiction as stated in *A v Liverpool City Council* (1981) 2 FLR 222 and by Sir George Baker P in *M v Humberside County Councile* (1980) 1 FLR 91 at p. 98. The judge held that there was no longer a lacuna in a juvenile court's powers when a local authority proposed to place a child with long-term foster parents with a view to adoption having regard to the provisions of ss. 12A to 12G of the Child Care Act 1980 (added, with effect from 30 January 1984, by s. 6 of and Sch. 1 to the Health and Social Services and Social Security Adjudication Act 1983). The judge found that by virtue of ss. 12B and 12C of the 1980 Act (which are set out, so far as is material, in the judgment of Slade LJ at pp. 269G and 270B *post*), a local authority might not terminate a parent's access to a child or refuse to allow such access unless they had first given notice in writing to the parent. The parent might then apply to a juvenile court for access to be granted. The court could order access subject to any conditions it might specify or it might refuse access. An appeal lay to the High Court against any decision of the juvenile court relating to access. In view of these provisions, and the *Code of Practice: Access to Children in Care* prepared pursuant to s. 12G of the 1980 Act, the judge held that the juvenile court had appropriate powers to deal with the situation in this case. The judge also held that the failure by the child's solicitor to refer to the guardian ad litem's recommendation did not make this an exceptional case and he would assume that the magistrates had taken that recommendation into account. In these circumstances the judge dismissed the mother's application and ordered that the child be dewarded.

The mother appealed.

Held – dismissing the appeal –

(1) The judge had correctly held that this was not a 'lacuna' case. Sections 12A to 12G of the Child Care Act 1980 were added to that Act specifically to fill a lacuna in the powers of juvenile courts and to introduce a significant exception to the general principle that the courts would not interfere with the way in which a local authority exercised their statutory powers. These new statutory provisions did not merely enable the juvenile court to control access consistent with the local authority's plans for the long-term care of the child. The terms of the provisions were wide enough to embrace refusal of access for any reason, including the local authority's view that rehabilitation was impracticable. Further, as an aid to the construction of these provisions, reference could be made to the *Code of Practice: Access to Children in Care* made under s. 12G(3) of the 1980 Act; and para. 4 of the Code clearly contemplated the intervention of the juvenile court where a local authority proposed to place a child with a permanent substitute family. Therefore, although when making a care order or dealing with an application to discharge a care order, a juvenile court had no power to give directions for rehabilitation or continued access, ss. 12B and 12C of the 1980 Act had the effect, on the application of a parent, to override the proposals of a local authority for long-term fostering with a view to adoption.

(2) Another relevant factor was the bringing into force on 27 May 1984 of s. 14 of the Children Act 1975 enabling an adoption society or local authority to apply to the court for an order declaring the child free for adoption. The law now clearly imposed two duties upon a local authority who proposed to place a child with foster parents with a view to adoption. First, access must be terminated as that was a condition precedent to the successful adoption of a very young child, and that would

involve compliance with s.12B of the 1980 Act and the consequential ability of the parent to refer the matter to the juvenile court. Secondly, before placing the child with long-term foster parents with a view to adoption, the local authority must comply with s. 14 of the 1975 Act and apply without delay for an order freeing the child for adoption. It was therefore now open to a local authority to invoke the jurisdiction of the magistrates' court (sitting as a domestic court) to free the child for adoption without invoking the wardship jurisdiction.

(3) It was important to avoid delay in decisions relating to children. This had been frequently stated by the courts and was now emphasized in the *Code of Practice.* There was no reason why the new powers of a juvenile court exercisable through its control of access and of the domestic court exercisable through hearings to free the child for adoption should not be invoked and exercised without delay.

(4) The judge had correctly held that this was not an exceptional case because the child's solicitor had not referred in his submission to the guardian ad litem's recommendation. Although r. 14A (6) (*d*) of the 1970 Rules stated that the guardian ad litem should instruct the solicitor for the child, it was the solicitor's responsibility to decide how to reconcile the recommendations of the guardian ad litem with the statutory powers of the court. In this case the court could either make or refuse a care order. An adjournment to assess the prospects of rehabilitation would have been quite wrong having regard to the new powers of magistrates' courts under ss.12B and 12C of the Child Care Act 1980 and s. 14 of the Children Act 1975. In the circumstances the child's solicitor had carried out the instructions of the guardian ad litem correctly.

Per curiam: If a local authority allowed access to continue, but only at such long intervals as to frustrate a parent seeking rehabilitation, then it might be appropriate to consider whether there was a lacuna in the powers of the juvenile court justifying the exercise of the wardship jurisdiction.

Notes

Applications in care proceedings. A local authority may apply for an order under s. 1 of the Children and Young Persons Act 1969 if certain conditions are satisfied. These conditions include those set out in paras. (*a*) and (*bb*) of s.1(2) as follows:

> '(*a*) [the child's] proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated; or . . .
>
> (*bb*) it is probable that the condition set out in para.(*a*) of this subsection will be satisfied in his case, having regard to the fact that a person who has been convicted of an offence mentioned in Sch. 1 to the [Children and Young Persons Act 1933] including a person convicted of such an offence on whose conviction for the offence an order was made under Part I of the Powers of Criminal Courts Act 1973 placing him on probation or discharging him absolutely or conditionally is, or may become, a member of the same household as the child. . . .'

The offence of infanticide is an offence mentioned in Sch. 1 to the 1933 Act.

Implementation of statutory provisions relating to the appointment of guardians ad litem. Section 32A and 32B of the 1969 Act were added by s. 64 of the Children Act 1975. These new provisions applied, *inter alia,* to (*a*) applications for a care order and (*b*) applications to discharge a care order. By s. 32A(1) the court was enabled to order that the parent should not represent the child. Where such an order was made, r.14A(1) of the Magistrates' Courts (Children and Young Persons) Rules 1970 required the court to appoint a guardian ad litem of the child for the purposes of the proceedings if it appeared to the court to be in the interests of the child to do so. Rule 14A was added to the 1970 Rules by Amendment Rules of 1976 (SI 1976, No. 1769) and contained provisions in paras. (2) to (7) as to the selection and duties of a guardian ad litem.

By s. 32A(2) of the 1969 Act, where an application to discharge a care order was unopposed, the court was required to order that the parent should not represent the child. Where the court made such an order under s. 32A (2), s. 32B(1) required the court to appoint a guardian ad litem of the child unless it was satisfied that it was unnecessary to do so.

By the Children Act 1975 (Commencement No. 1) Order 1976 (SI 1975, no. 1744) ss. 32A and 32B were partly brought into force on 26 November 1976. They were effective only in relation to *unopposed* application to discharge an order; and s. 32A(1) was not implemented. New r. 14A of the 1970 Rules came into operation on the same date; but as s. 32A(1) of the 1969 Act was not brought into force, r. 14A(1) was of no effect.

Sections 32A and 32B were brought into force fully on 27 May 1984 by the Children Act 1975 and the Adoption Act 1976 (Commencement) Order 1983 (SI 1983, No. 1946). The 1970 Rules were further amended by Amendment Rules of 1984 (SI 1984, No. 567) and these provided, *inter alia*, for the amendment of r. 14A by substituting new paras. (2) to (4), (6) and (7) relating to the appointment and duties of the guardian ad litem. Paragraphs (6) and (7), which state the duties of the guardian ad litem, are set out in the judgment of Cumming-Bruce LJ at p.266C *post.*

Statutory provisions considered
Child Care Act 1980, ss. 12A to 12G
Children Act 1975, s.14

Cases referred to in judgments
A v Liverpool City Council (1981) 2 FLR 222; [1982] AC 363; [1981] 2 WLR 948; [1981] 2 All ER 385
E (A Minor) (Wardship: Court's Duty), Re [1984] FLR 457
F (Wardship: Adoption), Re [1984] FLR 60
J (A Minor) (Care Order: Wardship), Re [1984] FLR 43
M v Humberside County Council (1980) 1 FLR 91; [1974] Fam. 114; [1979] 3 WLR 234; [1979] 2 All ER 744

Cases also cited
E (Minors) (Care Proceedings: Wardship), Re (1983) 4 FLR 668
H (A Minor) (Wardship: Jurisdiction), Re [1978] Fam. 65
APPEAL from Bush J.

Lionel Swift QC and *Diane Barnett* for the mother;
Mhairi McNab for the local authority.

Cur. adv. vult.

CUMMING-BRUCE LJ:
This is an appeal by a mother of a minor born on 28 May 1984 against the order of Bush J, who decided in wardship proceedings instituted by the mother that the minor should be dewarded. The minor was in the care of the local authority, who gave an undertaking to the judge not to remove the minor to long-term foster parents pending appeal of the mother to this court.

The general law
In this court the appellant accepts that the judge accurately summarized the law governing the conditions in which the court will assume its juris-

diction so as to intervene in the way in which a local authority exercises the powers confided upon it by statute in relation to a minor whom it has in its care. Bush J, after referring to *A v Liverpool City Council* (1981) 2 FLR 222, correctly summarized the relevant passages in the judgment of Sir George Baker P in *M v Humberside County Council* (1980) 1 FLR 91 at p. 98 where the President said:

> 'Now . . . it seems to me that the High Court will assume jurisdiction only in limited circumstances. First, if the powers of the lower court required to be supplemented, that is to say where its powers are inadequate. Second, if there has been some irregularity or excess in the exercise of the powers of the local authority and, third, the composite head, if there is something exceptional, something really unusual, about the case which necessitates the intervention of the High Court.'

For the next 5 years the wardship jurisdiction was exercised in cases in which a parent was seeking rehabilitation of a child who clearly had to remain for the present in the care of a local authority. If there was an issue whether rehabilitation was practicable, the juvenile court had no power to impose conditions as to access. Wardship proceedings were necessary to supplement the powers of the magistrates. These cases became known a 'lacuna' cases.

The judge decided in the instant case that there was no lacuna in the powers of the juvenile court, and that there was no exceptional feature calling for his intervention in the wardship jurisdiction. The mother appeals on the grounds that both decisions were wrong.

Are the powers of the juvenile court still inadequate?

This issue arose because the social worker appointed as guardian ad litem of the minor recommended to the juvenile court that the present condition of the mother, considered in the light of her history, pointed to the solution that the child should remain in the care of the local authority, but that there should be a further assessment of the mother's condition and capacity, and a programme aimed at gradual rehabilitation with increasing access commensurate with the mother's prospects of recovery. This recommendation was, in the view of the guardian ad litem, supported by psychiatric evidence called on her behalf. The local authority, on the other hand, had declared at the beginning of the case in the juvenile court that their plan for the baby was to place him with long-term foster parents with a view to adoption and to terminate access to his mother. Their case before the magistrates was that there really was no prospect of rehabilitating the child with his mother. The mother's case was that the child should return to her forthwith. The magistrates simply announced their decision that the child should remain in the care of the local authority without giving any indication of their view about the recommendations of the guardian ad litem as to prospects of rehabilitation, access or postponement of placement of the baby with long-term foster parents.

Before Bush J it was argued on behalf of the mother that this was just the kind of situation in which there was a lacuna in the powers of the juvenile court of the kind illustrated in a number of decisions in the Family Division and this court, and by the decision and reasoning of the House of

Lords in *Re E (A Minor)* [1984] FLR 457. The judge decided that there was no longer any lacuna in the powers of the court because it had been filled by the legislation about parents' rights on termination of access, which gave new powers to the juvenile court and on appeal to the High Court and which was brought into force on 30 January 1984. The judge added that there is another protection for a parent in this position provided by the *Code of Practice: Access to Children in Care* which was laid before Parliament on 16 December 1983.

On behalf of the appellant, Mr Swift has submitted that the judge was wrong in his conclusion that the new powers added as ss. 12A to 12G to the Child Care Act 1980 by Sch. 1 to the Health and Social Services and Social Security Adjudications Act 1983 and, accompanied by the guidance given by the Department in the *Code of Practice*, have the practical effect of giving the Juvenile court the same effective powers as could be wielded by the High Court in the wardship jurisdiction. He rested this submission on three main grounds for regarding the new provisions as inadequate to enable the juvenile court, or the High Court on appeal, to protect and to promote the welfare of the child as effectively as the High Court in its wardship jurisdiction:

> '(1) As a matter of construction, ss. 12A to 12G of the Child Care Act 1980 are only intended to deal with access consistent with the local authority's plan for long-term care of the minor. The new provisions were not intended to be applied in such a way as to frustrate a local authority's plans for the child. Therefore a juvenile court would not contemplate ordering access in a situation in which the local authority regarded rehabilitation as impracticable.
> (2) Even if this is wrong, a parent's right to apply to the juvenile court only arises after the local authority has first given notice of termination of access – and there is no such right as long as some access continues, however inadequate – to prepare the child for rehabilitation. Further, by the statutory form of the notice of termination of access that the local authority now has to give, the parent has 6 months in which to apply. This interval of time may have a crucial and prejudicial effect upon the child for whom long-term plans may be postponed for a length of time inconsistent with his needs.
> (3) The arrangements for preparing a child for adoption by placing him with long-term foster parents with a view to adoption raise issues wider than those dealt with by ss. 12A to 12G of the Child Care Act 1980.

On the first point I can see no reason, as a matter of construction, to accept the restricted meaning advanced by counsel for the appellant. In their natural meaning the words are wide enough to contemplate refusal of access for any reason, including the reason that future rehabilitation has to be recognized as impracticable having regard to the needs of the child. The Health and Social Services and Social Security Adjudications Act 1983 was given the Royal Assent on 13 May 1983. By that date there had been a series of judicial decisions in which the existence of a lacuna in the powers of the juvenile court had been explained in the sense that the court had no power, when making an order committing the care of a child to a local

authority, to control in any way the decision of the local authority to terminate access, thus preventing a parent from getting any judicial control over a programme for future rehabilitation of a child with his parents, save by resort to the wardship jurisdiction. In my view there is a strong presumption that by 1983 Parliament was well aware of this line of judicial pronouncement, continuing unabated since the President's judgment in 1979 in the *M v Humberside* case (above), and decided to increase the powers of the juvenile court in order to close the well-recognized gap in existing powers. And these judicial pronouncements amounted to a call for new legislation designed to confer upon the juvenile courts powers enabling that court to take the decision when a parent took issue with a local authority upon rehabilitation as a reason for continued access. As an aid to construction, I would also think it right if it were necessary to have regard to para. 4 of the *Code of Practice*, which specifically envisages that a parent may apply to the juvenile court after notice to terminate access because there is no realistic hope of rehabilitation.

The *Code of Practice* was prepared by the Secretaries of State pursuant to a duty imposed upon them by s. 12G (1) of the 1980 Act. By s. 12G (3), provision is made for laying copies of the *Code* and of any alteration before Parliament, and either House of Parliament may require him to withdraw it. The current code was placed before Parliament on 16 December 1983 and the new ss. 12A to 12G were brought into force by statutory instrument on 30 January 1984, save for s. 12F (3) and (4) dealing with appointment of and rules for the guardian ad litem which came into force on 27 May 1984. In these circumstances it is unlikely that Parliament would have allowed the *Code of Practice* to be published in the form laid before it if the right of a parent to apply to the juvenile court upon receipt of notice of termination of access did not arise in the circumstances which most urgently called for judicial control, i.e. the case of the parent seeking access with a view to rehabilitation.

As to the second point taken by Mr Swift, the provisions of ss. 12B and 12C are evidently framed by the legislature so as to impose upon the local authority the duty to take formal steps giving notice to a parent, guardian or custodian of a decision to terminate or to refuse to make arrangements for access, and thereafter to give the parent the right to a judicial decision.

The serious content of the proceedings is underlined by the provision that an appeal from the juvenile court is not to the Crown Court but to the High Court. The period of 6 months running from the date of service of notice of termination is evidently contemplated as the period which reconciles, as far as practicable, the urgency of the needs of the child with the reasonable requirement of the parents for time to decide upon their course of action. On the facts of the instant appeal, this time period could not be a reason for intervention by the wardship judge. The local authority announced its intention to refuse access if the juvenile court confirmed their care of the child. The care order having been made, the local authority has served notice of termination dated 6 September 1984 upon the mother. The fact that she might decide to wait for 6 months before applying to the juvenile court against the refusal could not possibly be a ground for continuing the wardship. Whether it could ever be a good ground in another case it is unnecessary for us to speculate. I should think it very unlikely.

Mr Swift is right in his submission that the new legislation dealing with access does not itself clothe the juvenile court and the High Court on appeal with all the powers which effectively give them the powers of a wardship judge. The court also needs powers over a decision of a local authority to place a child with long-term foster parents with a view to adoption. In the case of a child who is a ward of court, the local authority must obtain the leave of the wardship judge before so placing the child. See the decision of this court *Re F (Wardship: Adoption)* [1984] FLR 60. But the answer is simply that since 27 May 1984 the court has had the relevant power. On that day, s. 14 of the Children Act 1975 at last was brought into force after laying dormant on the statute book for 9 years. It may be that Bush J referred only to ss. 12A to 12G of the Child Care Act 1980 merely by inadvertence. It is more likely that he was directing his mind specifically to the legislation dealing with access because that was the issue most prominently before him for consideration. The law now clearly imposes two duties upon a local authority who intend, as does this local authority, to place the child as soon as possible with foster parents with a view to adoption. They must bring access to an end if, as in this case, that is a condition precedent to successful adoption of a very young child. To that end they must comply with s. 12B of the Child Care Act 1980. They must also, before placing the child with long-term foster parents with a view to adoption, comply with s. 14 of the Children Act 1975.

That section was brought into force by the Children Act 1975 and Adoption Act 1975 (Commencement) Order 1983 (SI 1983, No. 1946). By para. 8 of Sch. 2 to the Order the words 'approved adoption society or local authority' shall be substituted for the words 'adoption agency' in s. 14, and for the word 'agency' there is substituted the words 'society or authority'. The local authority therefore has to make application to an authorized court. 'Authorized court' is construed by s. 100 (2) of the 1975 Act to be:

> '(*a*) the High Court;
> (*b*) the county court within whose district the child is, and, in the case of an application under s. 14, any county court within whose district a parent or guardian of the child is;
> (*c*) any other county court prescribed by rules made under s. 102 of the County Courts Act 1959;
> (*d*) a magistrates' court within whose area the child is and, in the case of an application under s. 14, a magistrates' court within whose area a parent or guardian of the child is.'

The procedure is prescribed by the Magistrates' Courts (Adoption) Rules 1984 (SI 1984, No. 611) dated 24 April 1984. The proceedings are domestic proceedings within the meaning of s. 65 of the Magistrates' Courts Act 1980, and the court must be composed in accordance with the provisions of that Act which relate to a court hearing domestic proceedings.

There is nothing to lead me to expect that a local authority will be dilatory in making an application to free a child in its care for adoption. The *Code of Practice* emphasizes the importance of speed in the administration of business relating to children. [See para. 10.] I see no reason why the new powers of the courts should not be invoked and exercised without undue periods of delay.

My conclusion on this ground of appeal is that the combined effect of Part 1 of Sch. 1 to the Health and Social Services and Social Security Adjudications Act 1983 and the statutory instrument bringing into operation the provisions of s. 14 of the Children Act 1975 confer upon the courts all the powers necessary to fill the lacuna which before 28 May 1984 gave rise to judicial concern. It is unlikely that it will again be necessary in the absence of some really exceptional factor to exercise the wardship jurisdiction in order to afford judicial control over decisions or action taken by local authorities in connection with termination of access or preparation for placing a child in care with long-term foster parents with a view to adoption. Counsel for the appellant submitted that a case might occur in which a local authority might continue access, but only at long intervals and so give rise to a situation in which the parent might be frustrated in seeking access of the frequency appropriate to a programme for rehabilitation which the local authority thought quite impracticable. That is not this case. If it arises, the facts might have to be considered in wardship proceedings.

Is this an exceptional case requiring intervention of the wardship court?
The other ground upon which the appellant relies rests upon submissions particular to the conduct of the proceedings before the juvenile court. Before the juvenile court the infant was legally represented by a solicitor. The guardian ad litem had submitted her report in writing to the juvenile court. Therein she restricted herself to a provisional recommendation because she had not, at the date of submitting her report, seen the most recent psychiatric reports upon the mother. She provisionally recommended that the child should be offered an opportunity for rehabilitation with his mother at that early stage of his development, whilst retaining certain safeguards, rather than undergo a further move to a long-term foster home with a view to adoption.

The proceedings were heard over 4 days. We have admitted a note, taken by counsel for the mother before the magistrates, of the oral representations made by the guardian ad litem personally after the evidence had ended. She then stated that she would prefer a care order in favour of the local authority with a view to future assessment of the prospects of rehabilitation. She did not favour long-term fostering at that stage. She said that the door should not be closed completely on the mother. I would interpret these recommendations as pointing to a continuation of some access. When the solicitor for the infant addressed the magistrates, we are told and accept that he said that he opposed the mother's application for return of the child to her forthwith and accepted on the evidence that the child should remain in local authority care. He made no submission about rehabilitation in spite of the recommendation of the guardian ad litem. Mr Swift submitted that therein his conduct was irregular as, under the rules, where the infant is legally represented the solicitor must accept the instructions of the guardian ad litem. Mr Swift submits that the solicitor should have represented to the magistrates that the guardian ad litem opposed a care order involving placement of the child with long-term foster parents, and that was the only plan that the local authority had announced to the magistrates as their intention if a care order was made. This irregularity by the solicitor is said to have created an exceptional situation in that it contri-

buted to the outcome, when the bench simply stated that the child was to remain in the care of the local authority without saying anything about the guardian ad litem's recommendation in favour of short-term but against ad litem's recommendation in favour of short-term but against long-term fostering.

The provisions which prescribe the rights and duties of a guardian ad litem appointed under r. 14A(1) of the Magistrates' Courts (Children and Young Persons) Rules 1970 or s. 32B (1) of the Children and Young Persons Act 1969 (added by the Children Act 1975 with effect from 26 November 1976) are paras. (6) and (7) of the 1970 Rules as substituted by the Magistrates' Courts (Children and Young Persons) (Amendment) Rules 1984 (SI 1984, No. 567) which came into operation on 27 May 1984. By paras. (6) and (7) of r. 14A of the 1970 Rules (as amended) it is enacted:

> '(6) the guardian ad litem appointed under this rule or s. 32B (1) of the Act of 1969, with a view to safeguarding the interests of the relevant infant before the court shall –
>
> (*a*) so far as is reasonably practicable, investigate all circumstances relevant to the proceedings and for that purpose shall interview such persons, inspect such records and obtain such professional assistance as the guardian ad litem thinks appropriate;
> (*b*) regard as the first and paramount consideration the need to safeguard and promote the infant's best interests until he achieves adulthood, and shall take into account the wishes and feelings of the infant, having regard to his age and understanding, and shall ensure that those wishes and feelings are made known to the court;
> (*c*) except where a solicitor has been instructed to represent the infant before the appointment of the guardian ad litem or a direction has been given in accordance with para. (4) of this rule that a solicitor be instructed, obtain the views of the court as to whether the infant should be legally represented and, unless the court otherwise directs, instruct a solicitor to represent the infant;
> (*d*) consider how the case should be presented on behalf of the infant, acting in conjunction with the solicitor in a case in which one has been instructed (Whether by the guardian ad litem or otherwise) to represent the infant; and shall, in such a case, instruct the solicitor (unless the solicitor considers, having taken into account the views of the guardian ad litem, that the infant wishes to give instructions which conflict with those of the guardian ad litem and that he is able, having regard to his age and understanding, to give such instructions on his own behalf);
> (*e*) seek the views of the court in any case where difficulties arise in relation to the performance of his duties;
> (*f*) as soon as practicable make a report in writing to the court for the purposes of r. 20 (1) (*a*);
> (*g*) perform such other duties as the court may direct.
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> (7) When the court has finally disposed of the case the guardian ad litem shall consider, acting in conjunction with the solicitor in a case in which the infant is legally represented, whether it would be in the

> infant's best interests to appeal to the Crown Court and, if it is considered that it would be, he shall ensure that notice of appeal is given on behalf of the infant (unless the solicitor, in a case in which the infant is legally represented, considers, having taken into account the views of the guardian ad litem, that the infant wishes to give instructions which conflict with those of the guardian ad litem and that he is able, having regard to his age and understanding, to give such instructions on his own behalf).'

The guardian ad litem had in her concluding oral representation recommended that she would prefer a care order in favour of the local authority with a view to future assessment of the prospects of rehabilitation, and short-term as opposed to long-term fostering. Counsel for the appellant submits that on a proper construction of r. 14A (6) (*d*), it was the duty of the solicitor for the infant to submit to the magistrates that he opposed the application of the local authority for a care order because the only care order that the guardian ad litem recommended was one that included conditions designed to provide for future assessment of prospects of rehabilitation and for short-term fostering. I observe that this allegation that the solicitor for the infant failed to accept the instructions of the guardian ad litem is not made by the guardian ad litem.

The solicitor for the infant had inquired whether it would be necessary for him to appear in the wardship proceedings, but neither he nor the guardian ad litem took part in them. The guardian ad litem is not a party to this appeal. If this court considered that she ought to have been a party, it would have taken the appropriate action. In my view the submission to this court that the solicitor failed to act upon the instructions of the guardian ad litem is misconceived. The solicitor for the infant and not the social worker appointed as guardian ad litem had the responsibility of deciding on the infant's behalf how to reconcile the recommendations of the guardian ad litem with the statutory powers of the juvenile court. In the proceedings before them the juvenile court could only make or refuse a care order. An adjournment in order to assess prospects of rehabilitation would have been quite wrong, having regard to the new powers of the juvenile court in proceedings brought before it under s. 12B of the Child Care Act 1980 and s. 14 of the Children Act 1975. The solicitor for the infant carried out the instructions of the guardian ad litem correctly, and there is no material before us to suggest the contrary. There is nothing exceptional about this case.

For these reasons I would move that the appeal be dismissed.

SLADE LJ:

I respectfully agree with the judgment of Cumming-Bruce LJ, but will add something of my own since this case seems to me to raise issues of some general interest and importance in cases where disputes arise between a local authority and a parent concerning the care of a child.

In June and July 1984 the juvenile court heard an application by the respondent local authority seeking a care order in respect of the minor who was then just over 1 month old. At the hearing the local authority indicated to the magistrates that in their view there was no realistic prospect of rehabilitating the child with the mother and that, if the order was granted, they intended to terminate access and to place him with long-term foster

parents with a view to adoption. However, the guardian ad litem of the child in her oral evidence indicated her personal opinion that, while the child should for the time being remain with the local authority, there should be a phased programme aimed at eventual rehabilitation with the mother. The mother herself sought an order for the return of the child to her, coupled with a supervision order.

On 18 July 1984 the magistrates made the care order sought by the local authority. I think that on this appeal three points have been common ground. First, if the magistrates had expressly stated that they had considered the guardian ad litem's representations and rejected them on their merits, there could be no question of any party thereafter seeking to challenge the magistrates' decision by way of wardship proceedings, though the ordinary right of appeal to the Crown Court would have been available. Secondly, if, before the magistrates gave their decision, the local authority had not indicated to them their future intentions with regard to the child, the mother could not have successfully invoked wardship proceedings to challenge a subsequently announced intention by the local authority to place the child with long-term foster parents with a view to adoption. Any such challenge would have been met by the decision in *A v Liverpool City Council* (1981) 2 FLR 222 which ordinarily precludes the invocation of wardship proceedings as a means of interfering with the exercise by local authorities of discretions entrusted to them by statute, relating to the welfare of children within their care.

Thirdly, however, there are at least two well-recognized qualifications to the general principle stated in the *A v Liverpool City Council* case. The High Court may be prepared to assume jurisdiction in wardship if either (1) there is a 'lacuna' in the powers of the lower court, which renders it appropriate that those powers should be supplemented by the exercise of the wardship jurisdiction, or (2) there is something exceptional about the case which necessitates the intervention of the High Court. In this context Cumming-Bruce LJ has already referred to a well-known passage from the judgment of Sir George Baker P in *M v Humberside County Council* (1980) 1 FLR 91 at p. 98.

On 8 August 1984 the mother issued an originating summons seeking to make the child a ward of court. Bush J, by his order of 24 August 1984, dewarded the child and dismissed the mother's application. On this appeal the mother's submissions in essence are that he was wrong to do so because this is a lacuna case and/or an exceptional case in the senses described above. Cumming-Bruce LJ in his judgment has already explained the reasons why it is submitted on behalf of the appellant that this is an exceptional case requiring the intervention of the wardship court. I do not wish to add to his reasons for rejecting that submission, with which I agree. My own observations will be directed to the submission that this is a 'lacuna' case.

It is clear that when the magistrates came to give their decision on 18 July 1984 the choice of courses open to them was a limited one. On the facts as they then stood, there was no practical possibility of sending the child back to the mother without a supervision order. Even if they had entirely agreed with the guardian ad litem's views that the child should remain with the local authority but a phased rehabilitation should be attempted, they would have had not power to make directions designed to

achieve that end. For practical purposes there were only two courses open to them, namely either to send the child back to the mother under the protection of a supervision order or to make the care order sought by the local authority.

Mr Lionel Swift, in his very persuasive argument, has submitted that there was a relevant lacuna in the powers of the juvenile court. For it might be that they agreed with the opinion of the guardian ad litem as to the desirability of a rehabilitation but found themselves fettered by the lack of any power to give practical effect to her recommendations. In this context he drew our attention to the decision of this court in *Re J* [1984] FLR 43 on the facts of which it was accepted that, in respect of an application to a juvenile court for the discharge of a care order, there was a lacuna in the statutory scheme, because if the magistrates thought it right in principle to discharge the order they had no statutory power to impose conditions relating to the return of the child to its parents. Sir George Baker, in his judgment in the latter case, stressed (at p. 49) that:

> 'It would be quite different . . . if the magistrates decided, and appeared to decide, to dismiss the application on the true merits of the mother's case.'

In the present case Mr Swift pointed out that the magistrates gave no indication that they rejected the guardian ad litem's views as to an attempted rehabilitation. For the purposes of this appeal I am content to assume that the magistrates did *not* reject these views on their merits.

On this assumption there would, in my opinion, have been considerable force in the submission that there was a relevant lacuna in the power of the magistrates in the present case if it had not been for the new provisions relating to access to children in care inserted after s. 12 of the Child Care Act 1980 by the Health and Social Services and Social Security Adjudications Act 1983. The new provisions came into force on 30 January 1984 and, as I understand them, were specifically intended to introduce a significant exception to the general principle of the *A v Liverpool City Council* case as I have described it above.

It is perhaps worth setting out a few of these new provisions. Section 12A makes the provisions applicable to any child in the care of a local authority in consequence of a care order, otherwise than in consequence of a High Court order.

Section 12B (so far as material) provides:

> '(1) A local authority may not terminate arrangements for access to a child to whom this Part of this Act applies by its parent, guardian or custodian, or refuse to make such arrangements unless they have first given the parent, guardian or custodian notice of termination or refusal in a form prescribed by order made by the Secretary of State.
> (2) A notice under this section shall contain a statement that the parent, guardian or custodian has a right to apply to a court for an order under s. 12C below.
> (3) A notice terminating access shall state that access will be terminated as from the date of service of the notice.
> (4) A local authority are not to be taken to terminate access for the purpose of this section in a case where they propose to substitute new

> arrangements for access for existing arrangements.
> (5) A local authority are not to be taken to refuse to make arrangements for access for the purposes of this section in a case where they postpone access for such reasonable period as appears to them to be necessary to enable them to consider what arrangements for access (if any) are to be made.'

Section 12C provides:

> '(1) A parent, guardian or custodian on whom a notice under s. 12B above is served may apply for an order under this section (in this Part of this Act referred to as an "access order").
> (2) An application under subs. (1) above shall be made by way of complaint to an appropriate juvenile court.
> (3) An access order shall be an order requiring the authority to allow the child's parent, guardian or custodian access to the child subject to such conditions as the order may specify with regard to commencement, frequency, duration or place of access or to any other matter for which it appears to the court that provision ought to be made in connection with the requirement to allow access.
> (4) A juvenile court is an appropriate juvenile court for the purposes of this Part of the Act if it has jurisdiction in the area of the authority serving the notice under s. 12B above.
> (5) An appeal shall lie to the High Court against any decision of a juvenile court under this Part of this Act.'

Section 12G provides that the Secretary of State shall prepare and lay before Parliament a 'code of practice with regard to access to children in care'. Pursuant to this section, a code of practice was duly prepared, laid before Parliament and came into force on 30 January 1984.

It must be assumed that in making their order of 18 July 1984 the magistrates would have been well aware of the provisions of the Child Care Act 1980 to which I have referred and of the events which could reasonably be expected to follow the making of a care order. Thus, in my opinion, they could reasonably have anticipated that the following consequences would be likely to ensue:

(1) Pursuant to s. 12B, the local authority would be likely to serve a notice terminating the subsisting arrangements for access to the child by the mother.
(2) The mother would then be likely to apply to the juvenile court for an 'access order' under s. 12C.
(3) The juvenile court, on hearing that application, would have full power in the proper exercise of its discretion, if it thought fit, to override the wishes of the local authority by making an order requiring it to allow the mother access 'subject to such conditions as the order may specify with regard to commencement, frequency, duration or place of access or to any other matter for which it appears to the court that provision ought to be made in connection with the requirement to allow access'.
(4) The magistrates would thus be in a position on an application for an access order, if they thought fit, effectively to scotch any plans of the

> local authority for long-term fostering with a view to adoption (subject to any appeal to the High Court under s. 12C (5)).

Prima facie, therefore, I can see no reason why for practical purposes the magistrates should have regarded themselves as being hampered by any lacuna in their powers when making the care order, even if they had been in sympathy with the guardian ad litem's views regarding the desirability of an attempt at rehabilitation (as, for present purposes, I am content to assume they may possibly have been). Prima facie, they could have anticipated that these views could be given practical effect, so far as appropriate, on a subsequent application by the mother for an access order.

Mr Swift, however, has suggested that the juvenile court, on considering an application for an access order relating to a child in care, will be bound to proceed on the basis that an unappealed care order is in force and, accordingly, on the assumption that it cannot properly introduce access arrangements if these will frustrate the long-term care planned for a child by a local authority. This suggestion raises what seems to me an important question of principle. If well founded, it would impose an important limit on the powers of juvenile courts when dealing with applications for access orders under s. 12C. In my opinion, however, it is not well founded. First, the discretion conferred on the court by s. 12C (3) is in terms very wide and, by its very nature, exercisable, contrary to the wishes of the local authority. Secondly, the *Code of Practice* itself expressly contemplates that an application for an access order by a parent may be made – and may succeed – in a case where the intention of the local authority is to place a child with 'a permanent substitute family'. Thus, para. 4 of the *Code* reads as follows:

> 'There will, however, be some circumstances in which local authorities conclude after careful consideration that access is not in the child's best interests. This may happen because there are clear indications that access is damaging to the child or because it must be recognized that there is no realistic hope of rehabilitation and the child's future lies with a permanent substitute family. The local authority may conclude that termination of access is an essential part of such a plan for a child. Where a decision is made to terminate access – or, exceptionally, to refuse access from the outset – the local authority is required by s. 12B of the Child Care Act 1980 to serve notice on the parents before access is terminated. The parents have a right to apply to the juvenile court for an order requiring the local authority to grant access.'

Since the publication of this code is envisaged by s. 12G of the 1980 Act and it has been laid before Parliament in accordance with that section, it is, in my opinion, permissable to refer to it as an aid in the construction of s. 12C. Thus, it reinforces my opinion that, in exercising the wide discretion given to it under s. 12C on an application for an access order, the juvenile court should not regard itself as inhibited by the fact that a care order has already been made. The views and wishes of the local authority as regards the child's future are, of course, entitled to great respect, but all other relevant factors brought to the court's attention must be given due weight. In short, the juvenile court, in exercising the discretion conferred

on it by the 1980 Act, is not inhibited by the principle of the *A v Liverpool City Council* case. A legislative purpose of the section, I infer, was to provide a specific exception to that principle. I therefore cannot accept the suggestion that a juvenile court could not properly make an access order in a case where the local authority regards rehabilitation as impracticable.

Mr Swift made a number of penetrating observations on the wording of the new provisions of ss. 12A to 12G of the Child Care Act 1980. He questioned whether the wording of s. 12C (3) would be wide enough to give the magistrates the power to make all the particular directions which they might wish to make in any given case (for example, in regard to psychiatric assistance for a parent). He pointed out that, under the prescribed form of 'notice of termination', a parent has 6 months within which to apply for an access order, so that delays and uncertainties prejudicial to the child might be occasioned during the period before it was known whether or not the parent intended to apply. He observed that the rights conferred by s. 12C are conferred only on a 'parent, guardian or custodian' and are not available, for example, to grandparents. He observed that the parent's right to apply under s. 12C only arises after he or she has received a notice terminating access and that in view of s. 12B (4) a local authority might conceivably be able to avoid the need to serve any such notice by proposing new arrangements for quite minimal access.

I appreciate that all or any of these points might in other cases conceivably give rise to problems which might justify the intervention of the High Court by way of wardship, on the grounds that a relevant lacuna existed. With all respect to Mr Swift's argument, however, I am not persuaded that any relevant lacuna has yet been shown on the facts of the present case. The local authority, as anticipated, has served its notice terminating access on the mother. She accordingly has her right to apply for an access order under s. 12C. If, contrary to my present expectation, the parties' respective legal advisers or, indeed, the magistrates themselves in the light of the circumstances which exist when that application falls to be determined, were to take the view that a new lacuna situation had arisen which made it necessary to invoke the wardship jurisdiction of the High Court, the application could be made at that stage. Meantime, I see no sufficient grounds for invoking the wardship jurisdiction in a situation such as the present which Parliament, in the new provisions of s. 12A to 12G of the Child Care Act 1980, has envisaged will normally be dealt with by the juvenile court.

Though adoption is contemplated in the present case, I do not think that this factor will make it necessary to invoke the jurisdiction of the High Court in Wardship, since subss. (1) to (4) and (6) to (8) of s. 14 of the Children Act 1975 have at long last been brought into force as from 27 May 1984 by Statutory Instrument No. 1946 of 1983. Until s. 1 of the 1975 Act comes into force, which I understand has not yet occurred, s. 14 has effect with the substitution of the words 'approved adoption society or local authority' for the words 'adoption agency' and of the words 'society or authority' for the word 'agency' where that word occurs alone: see Sch. 2, para. 8 of Statutory Instrument No. 1946 of 1983.

Under s. 100(2) of the 1975 Act, the 'magistrates' court' is an 'authorized court' for the purpose of s. 14. Thus, under s. 14 it will, in my opinion, be open to the local authority to invoke the jurisdiction of the magistrates' court without necessarily invoking the wardship jurisdiction for this pur-

pose, to free the child for adoption. The judge did not expressly advert to these statutory provisions but, in my opinion, they prevent the adoption envisaged by the local authority from, by itself, giving rise to a lacuna situation which renders necessary the intervention of the court by way of wardship.

Mr Swift made somewhat gloomy prognostications of the delays that would be likely to ensue in practice if matters proceeded before the magistrates instead of a judge in wardship. I do not wish to add anything to what Cumming-Bruce LJ has said in this context. For the reasons given by him, and for the further reasons which I have attempted to state, I think that the judge was right in concluding that this is not a case where any relevant lacuna has been shown.

I would accordingly dismiss this appeal.

Appeal dismissed. No order as to costs save legal aid taxation.

Solicitors: *Meaden & Griffiths* for the mother;
Sharpe Pritchard & Co. agents for *D.C.H. Williams* for the local authority.

B.C.