RE D (A MINOR)

House of Lords

Lord Keith of Kinkel, Lord Brandon of Oakbrook, Lord Griffiths, Lord Mackay of Clashfern and Lord Goff of Chieveley

4 December 1986

Care proceedings – Child born with drug dependency due to mother's drug abuse – Child taken from mother at birth – Juvenile court finding that child's health being impaired or proper development being prevented – Whether mother's conduct before birth relevant – Whether justices entitled to make care order – Children and Young Persons Act 1969, s. 1(2) (a)

The child was born in March 1985 suffering from symptoms caused by withdrawal from narcotic drugs. The mother had been a registered drug addict since 1982 and had been taking drugs for about 10 years. She had continued to take drugs throughout her pregnancy, though aware that by doing so she could be causing damage to the child. The child was kept in intensive care in hospital for some weeks following the birth. A place of safety order was obtained by the local authority on 23 April 1985 and successive interim care orders were in force from 13 May 1985 to the date of the full hearing in the juvenile court. The child was never in the care or control of either of her parents, both of whom were addicted to drugs and remained so at the time of the hearing. The medical condition in which the child was born was a direct result of the taking of drugs by the mother during pregnancy. On 1 August 1985 the juvenile court made a care order, the primary ground being under s. 1(2)(*a*) of the Children and Young Persons Act 1969. The child by her guardian ad litem then appealed by way of case stated against the order to a Divisional Court of the Family Division. The appeal turned upon whether the justices had jurisdiction to make the care order on the basis of the primary ground being under s. 1(2)(*a*) of the 1969 Act. It was never contended that the secondary ground in s. 1(2), namely that the child was in need of care and control, had not been satisfied. The Divisional Court allowed the appeal and discharged the care order on the basis that the words 'is being' in s. 1(2)(*a*) required the magistrates to look at the child's situation in the continuum from the time when it became a person, i.e. at birth, whereas in the present case the only evidence of the conduct of the mother *vis-à-vis* the child related to the period before birth and was no longer applicable at the date of the hearing.

On a further appeal to the Court of Appeal the order of the Divisional Court was set aside and the care order restored, the Court of Appeal holding that the magistrates had been correct in treating the child's development as a continuing process which encompassed the present and the past, not excluding events before birth, and accordingly that the primary condition in s. 1(2)(*a*) had been satisfied. The child by her guardian ad litem then appealed to the House of Lords.

Held – dismissing the appeal –

(1) The three situations set out in s. 1(2)(*a*) of the 1969 Act were to be regarded as alternatives, any one of which would satisfy the requirements of the section.

(2) The following construction should be put on the words 'is being', applied to each alternative in the section. First, they referred to a continuing rather than an instant situation. That could be concluded from the use of the present continuous tense and from the consideration that the concepts of development, health and treatment of a child were themselves continuing concepts. Secondly, in considering whether that continuous situation exists the court must look at the matter at the point of time immediately before the procedure for protecting the child was started.

Thirdly, in order to determine at that point of time whether the necessary continuing situation existed, the court must look at the situation not only as it was then but also as it had been in the past and as it might continue in the future, provided that the future was considered in conjunction with the past and the present. Fourthly, at the point of time when the court must consider whether any of the continuing situation described in s. 1(2)(*a*) existed, there was no reason why the court should not look at events which occurred while the child was still unborn or at the state of affairs at the child's birth. The provisions of s. 1(2)(*a*) must be given a broad and liberal construction to give full effect to their legislative purpose.

Per Lord Goff: The mere fact of a past avoidable prevention of proper development or impairment of health was not sufficient to fulfil the condition of s. 1(2)(*a*) even if there were symptoms or effects which persisted or manifested themselves later. The words 'is being' in the section required that there should be a continuum in existence when the magistrates were considering whether to make a place of safety order.

Statutory provisions considered

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

Cases referred to in the opinions of their Lordships

A v Liverpool City Council (1981) 2 FLR 222; [1982] AC 363; [1981] 2 All ER 385
Essex County Council v TLR and KBR(1979)9 Fam. Law 15; (1979) 143 JP 309
F v Suffolk County Council(1981) 2 FLR 208; (1981) 79 LGR 554
M v Westminster City Council [1985] FLR 325
W (A Minor) (Care Proceedings: Wardship), Re [1985] FLR 879; [1985] AC 791; [1985] 2 WLR 892; [1985]2 All ER 301

James Townend QC and *Christopher Critchlow*for the child*;*
Nichola Medawar QC and *Barbara Slomnicka for* the local authority;
T. Scott Baker QC and *Paul W. Reid* for the parents.

LORD KEITH OF KINKEL:

My Lords, I have had the opportunity of considering in draft the speech to be delivered by my noble and learned friend Lord Brandon of Oakbrook. I agree with it, and for the reasons he gives would dismiss the appeal.

LORD BRANDON OF OAKBROOK:

My Lords, on 1 August 1985 the justices of the petty sessional division of Reading, sitting as a juvenile court at the Civic Centre, Reading, made an order ('the care order') committing a baby girl ('the child') to the care of the Berkshire County Council ('the authority'). The original parties to the proceedings consisted only of the authority and the child, for whom a guardian ad litem was appointed. The child's parents, however, were subsequently allowed to intervene and take part in the proceedings. The care order having been made, the child by her guardian ad litem appealed by way of case stated against it to a Divisional Court of the Family Division of the High Court (Hollings and Waite JJ). An order was made before the hearing of the appeal that the parents should be parties to it as second respondents, and at the hearing of the appeal they were separately represented by counsel, who supported the child's appeal. By an order made on 4 February 1986 the Divisional Court allowed the appeal and discharged the care order. The authority, with the leave of the Divisional Court, appealed to the Court of Appeal (Dillon, Stephen Brown and Woolf LJJ), and that court by an order made on 19

March 1986 allowed the appeal, setting aside the order of the Divisional Court and restoring the care order. The child by her guardian ad litem now brings a further appeal to your Lordships' House with the leave of that House. The parents appear again separately by counsel as second respondents supporting the child's appeal. The sole question to be decided by your Lordships, as it was in both the Divisional Court and the Court of Appeal, is whether, having regard, first, to the terms of the relevant statutory provisions, and, secondly, to the facts of the particular case, the juvenile court had jurisdiction to make the care order. It is not contended for the child or the parents that, if the juvenile court had jurisdiction to make the care order, they were wrong to exercise it. The relevant statutory provisions are to be found in the Children and Young Persons Act 1969 (as later amended) and are in these terms:

'PART I

CARE AND OTHER TREATMENT OF JUVENILES THROUGH

COURT PROCEEDINGS

Care of children and young persons through juvenile courts

1. — (1) Any local authority . . . who reasonably believes that there are grounds for making an order under this section in respect of a child . . . may . . . bring him before a juvenile court.

(2) If the court before which a child . . . 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

(*b*) it is probable that the condition set out in the preceding paragraph will be satisfied in his case, having regard to the fact that the court or another court has found that that condition is or was satisfied in the case of another child . . . who is or was a member of the household to which he belongs; or

(*bb*) it is probable that the condition set out in paragraph (*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 Schedule 1 to the [Children and Young Persons Act of 1933] . . . is, or may become, a member of the same household as the child . . .

and also that he is in need of care or control which he is unlikely to receive unless the court makes an order under this section in respect of him, then . . . the court may if it thinks fit make such an order.

(3) The order which a court may make under this section in respect of a child . . . is –

(*c*). a care order (other than an interim order);

. . .

Detention

28. – (1) If, upon an application to a justice by any person for

authority to detain a child . . . and take him to a place of safety, the justice is satisfied that the applicant has reasonable cause to believe that –

(*a*) any of the conditions set out in section 1(2)(*a*) to (*f*) of this Act is satisfied in respect of the child . . .;

. . .

the justice may grant the application; and the child . . . in respect of whom an authorisation is issued under this subsection may be detained in a place of safety by virtue of the authorisation for 28 days beginning with the date of authorisation, or for such shorter period beginning with that date as may be specified in the authorisation. . . .

(6) If while a person is detained in pursuance of this section an application for an interim order in respect of him is made to a magistrate' court or a justice, the court or justice shall either make or refuse to make the order. . . .

PART III

Supplemental

70. – (1) In this Act, unless the contrary intention appears, the following expressions have the following meanings: –

"child" . . . means a person under the age of 14. . . .'

The particular facts of the case, as found by the juvenile court and set out in the case stated, are as follows:

(a) The child was born to the mother, then aged 29, 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 had 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 in 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 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 question whether the juvenile court had jurisdiction to make the care order depends on whether the particular facts of the case brought it within para.(*a*) and the latter part of s. 1(2) of the 1969 Act. This in turn means that the only basis on which the juvenile court could have had such jurisdiction was that two conditions were satisfied. The primary condition, arising from para.(*a*) of subs. (2), is that (i) the proper development of the child was being avoidably prevented or neglected, or (ii) the health of the child was being avoidably impaired or neglected, or (iii) the child was being ill-treated. The secondary condition, arising from the latter part of subs. (2), is that the child was in need of care and control which she was unlikely to receive unless the court made a care order. It has never been in dispute that the secondary condition was satisfied; but there is and has been a dispute between the authority on the one hand, and the child and the parents on the other hand, as to whether the primary condition was satisfied.

In the case stated the juvenile court, after reciting the submissions made to them on behalf of the authority, the child and the parents, expressed this opinion:

> 'We accepted that the particular circumstances on which the primary condition was based would not recur since the child had now been born. 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 that 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 the 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. In so deciding we accepted that we should not look at the future development of the child.'

The juvenile court went on to state four questions for the opinion of the High Court:

> '1. 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?
> 2. 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 mere*?
> 3. 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?
> 4. 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 and procedures available to the local authority?'

Before examining the way in which first the Divisional Court, and secondly the Court of Appeal, dealt with the case stated, it will be convenient to refer to three reported cases on the meaning of the expression 'is being' in s. 1(2)(*a*) of the Act of 1969, all of which were cited to the juvenile court and the Divisional Court, and the last two of which were cited to the Court of Appeal.

In *Essex County Council v TLR and KBR* (1979) 143 JP 309 (also reported more shortly in (1979) 9 Fam. Law 15) the custody of two children, the marriage of whose parents had broken down, was early in 1974 granted to their father, a soldier then serving in England. In March 1974, at the request of the father on his being posted to Hong Kong, the children were voluntarily received into the care of the Essex County Council, which placed them with foster-parents in Colchester. In 1976 the Essex County Council received information that the father, who was by that time serving in Northern Ireland, intended to go to Hong Kong to marry a Chinese woman, and then to come to Colchester to collect the children and take them to live with him in Northern Ireland. The Essex County Council, in order to prevent the removal of the children, sought a care order from a juvenile court at Colchester under s. 1(2)(*a*) of the 1969 Act, and, as a preliminary to those proceedings, applied for and was granted authority to detain the children temporarily in a place of safety. Up to and at the time of the hearing the fostering of the children was entirely satisfactory, in that their proper development was being promoted, their health was being safeguarded and they were being well treated. The juvenile court having refused to make a care order, the Essex County Council appealed by way of case stated to a divisional court of the Queen's Bench Division (Lord Widgery LCJ and Kilner Brown and Robert Goff JJ). That court held, upholding the decision of the juvenile court, that there was no material on which that court could have found that any of the conditions specified in s. 1(2)(*a*) was satisfied.

Robert Goff J, with whom Lord Widgery LCJ and Kilner Brown J both agreed, said, at pp. 311-312:

> 'In my judgment, the conclusion of the justices was right in law, and, not only that, it was right for the correct reasons. It is clear that they approached the statute in accordance with the correct legal principles. They first looked at the relevant part of the subsection (subpara.(*a*) in its context in the Act and ascertained its natural and ordinary meaning, and concluded, in my judgment correctly, that on its natural and ordinary meaning it refers only to events presently in existence. They then asked themselves the question: Does the context require any different construction? On examining the context, they saw from the statute that the immediately following part of the subsection (subpara. (*b*)) dealt with the probability that the condition set out in the preceding paragraph would be satisfied and limited by its words the circumstances in which such a probability could be considered. I can add that there

> appears to have been added to the statute another subparagraph (*bb*), wherein a further specific circumstance can be taken into account which may give rise to a probability that the condition set out in subpara. (*a*) of that subsection will be satisfied. These two subparagraphs – (*b*) and (*bb*) – show that the words of subpara. (*a*) should be given their natural and ordinary meaning, viz., that it is only concerned with presently existing events and not with future or probable events, the latter being specifically dealt with in the succeeding subparagraphs.
>
> Counsel for the appellants has urged upon us that to adopt what she has called "a literal interpretation" would have the effect that courts cannot take account of future events when it is highly desirable that they should be able to do so. As to that, I would say only this. The construction adopted by the magistrates is, in my judgment, the only possible construction one can place upon the clear wording of the statute, having regard to the words used and the context in which these words are found, and, however desirable it may be that the court should have wider powers than those conferred upon it by the statute, it is the duty of this court to give effect to the clear words of the statute.'

In *F v Suffolk County Council*(1981) 2 FLR 208, McNeill J, sitting as a single-judge Divisional Court of the Queen's Bench Division, had before him an appeal by way of case stated against a care order in respect of a child made by a juvenile court at Lowestoft on the ground that the proper development of the child was being avoidably prevented or neglected. In the course of a judgment upholding the care order he said at p. 213E, F:

> '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.'

In *M v Westminster City Council* [1985] FLR 325, a divisional court of the Family Divisional (Bush and Butler-Sloss JJ) had before it an appeal by way of case stated against a care order made in respect of a child by the Westminster North Juvenile Court. It had been contended by counsel for the appellant (Miss Hoyal) that, because of the use of the expression 'is being' in s. 1(2)(*a*) of the 1969 Act, the justices were only entitled to look at the situation of the child as at the date of the hearing before them and were not entitled to look at its previous situation. Butler-Sloss J, delivering the first judgment at the request of Bush J, rejected this contention. She referred at p. 335 to the passage in the judgment of McNeill J in *F v Suffolk County Council*, which I cited above, and, subject to some possible qualification as to how far in the future the court should look, expressed her complete agreement with it. She went on to say, at p. 336D-G:

> '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. . . . I take the view that this very restrictive approach, put forward . . . 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 right it seems to me, looking at the primary conditions, that they should not be looked at as alternatives but looked at as a whole.'

Bush J, delivering the second judgment, said at pp. 340E-341B:

> 'If the strict interpretation urged by Miss Hoyal were accepted, then there never could be a care order made, for example, in the case [of] a child who had recovered from the injury done to him and who was in the benign care of foster-parents or a children's home. I cannot think that that was the intention of Parliament. It is clear, of course, that in using the present tense Parliament was expressly ruling out a care order because of fear or future harm where there was nothing presently in the condition or treatment of the child whereby his proper development was being avoidably prevented or neglected or his health avoidably impaired or neglected. This must be the basis of the decision in the Divisional Court in *Essex County Council v TLR and KBR* (1979) 9 Fam. Law 15 though, of course, the report we have for our purposes is wholly inadequate.
>
> 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.'

I now turn to examine the way in which first the Divisional Court, and later the Court of Appeal, dealt with the problems which arise in the present case. Hollings J delivered the leading judgment in the Divisional Court. He referred to the last two of the three reported cases to which I have drawn attention and it seems clear that he accepted the general correctness of the views expressed by McNeill J in the one case and by Butler-Sloss J and Bush J in the other. Despite this, he said:

> 'The difficulty which, however, I have found is this: that unlike *M v Westminster City Council* and *F v Suffolk County Council* the whole of the conduct, if I may so describe it, of the mother *vis-à-vis* the child relates to the period before birth. The mother's present conduct *vis-à-vis* the child has never been tested, and of its very nature her previous conduct *vis-à-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 from *F v Suffolk County Council*. The only evidence before the justices as to the situation after the birth of the child was that this mother and father (one of course is concerned chiefly 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 do so, I hasten to add. As Miss Slomnicka submitted in *M v Westminster City Council*, in the case of a battered child who is now in the care of a 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 J and Bush J. 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 Act of 1969, 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 . . . to have come to the conclusion that this condition has been satisfied in any of its respects, for the reasons I have already stated.'

Hollings J went on to deal with the four questions of law posed by the juvenile court in the case stated. With regard to question 1, whether it was wrong in law for the juvenile court to find that the condition under

s. 1(2)(*a*) of the Act of 1969 was satisfied in circumstances where the child had never been in the care of either parent, or out of the care of responsible agencies, Hollings J said that there might be cases in the future in which 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. To question 2, whether the condition in s. 1(2)(*a*) of the Act of 1969 was satisfied in respect of the child when the evidence (which he emphasized was the only evidence) that the 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, related to when the child was *en ventre sa m‚re*, Hollings J gave a negative answer. To question 3, whether on the facts found the juvenile court could 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 was being ill-treated, and also to question 4, whether in considering s. 1(2)(*a*) of the Act of 1969 the juvenile court should have considered the availability of wardship proceedings and/or any other powers or procedures available to the authority, Hollings J again gave negative answers. Waite J agreed with the judgment of Hollings J.

The report of the Court of Appeal's decision is in [1986] 3 WLR 85. The first judgment was delivered by Stephen Brown LJ. He referred, at pp. 89-90, to the passage in the judgment of Butler-Sloss J in *M v Westminster City Council* [1985] FLR 325 at p. 336, which I cited earlier, and continued, at p. 90:

> '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 to 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. . . . Accordingly, I have come to the conclusion that the Divisional Court was wrong in the decision to which it came and that the justices 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." Those events, which had the effect of preventing the proper development of, and of impairing the health of this child, were avoidable and, 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.'

Woolf LJ, who delivered the second judgment, said at p. 91:

> '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 of the Act of 1969 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) of the Act of 1969 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 matter with which the court is concerned in relation to the second question is: was it avoidable or not?'

Later, at pp. 92-93, Woolf LJ indicated how he would answer the four questions of law posed in the case stated. With regard to question 1 he said that it was possible, as a matter of law, for the juvenile court to find that the conditions under s. 1(2)(*a*) of the Act of 1969 were satisfied in the circumstances set out. With regard to question 2 he said that what the court was concerned with was the condition of the child after its birth, but matters occurring before the child was born could give rise to its being in a condition which satisfied the requirements of the section. With regard to question 3, he said that he would answer it affirmatively, but stressed that the main matter with which the justices should have been concerned was the child's health. He did not consider it necessary to answer question 4.

Dillon LJ, who delivered the third judgment, said at pp. 93-94:

> '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 in s. 1(2)(*a*) 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 in *M v Westminster City Council* [1985] FLR 325,336 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 in s. 1(2)(*a*) was satisfied. The proper development of the child was avoidably prevented and her health was avoidably impaired.'

The appeal raises a number of questions with regard to the meaning and effect of s. 1(2)(*a*) of the Act of 1969. The first question is whether the three situations (I prefer to call them 'situations' rather than 'conditions') described in s. 1(2)(*a*) are to be regarded as alternatives or are to be looked at as a whole. Butler-Sloss J in *M v Westminster City Council* (above) expressed the view that the three situations should be looked at as a whole, on the ground, as I understand it, that there was no necessary antithesis between them. Dillon LJ in the Court of Appeal in the present case expressed sympathy with that view. With respect to both Butler-Sloss J and Dillon LJ, I cannot agree with them on this point. It seems to me that, on the ordinary and natural meaning of the words used, the three situations are to be regarded as alternatives. So to regard them is in no way inconsistent with the likelihood that, in many cases, any two of the three situations, or indeed all three of them, may coexist.

There follows a series of questions relating to the meaning and effect of the expression 'is being,' as used in the description of each of the three situations. First, does the expression refer to an instant, or to a continuing, situation? Secondly, if it refers to a continuing situation, as at what point of time should the court consider whether that continuing situation exists? Thirdly, how far back and how far forward, if at all, from that point of time should the court look? Fourthly, can the court look back to the time before the child concerned was born?

With regard to the first of these questions relating to the expression 'is being', there are, in my view, two compelling reasons for concluding that what is being referred to is a continuing, rather than an instant, situation. The first reason is that the use of the present continuous of itself indicates a reference to a continuing situation or state of affairs. The second reason is that the concepts of development, health and treatment of a child, which are the three alternative concepts dealt with in s. 1(2)(*a*), are themselves continuing concepts. It follows that I agree broadly with the views expressed on the matter by McNeill J in *F v Suffolk County Council* (above) and by Bush J and Butler-Sloss J in *M v Westminster City Council* (above), as did both the Divisional Court and the Court of Appeal in the present case.

With regard to the second question relating to the expression 'is being', it is, in my opinion, necessary to have in mind the purpose sought to be achieved not only by s. 1 but also by s. 28 of the Act of 1969. The effect of s. 28, when combined with that of s. 1, is to create a process for the protection of children which may often include three separate but connected stages. The first stage is the grant by a justice to an applicant under s. 28(1) of authority to detain a child and take it to a place of safety for up

to 28 days. Where the ground of the application is concern about the present development, health or treatment of a child, the justice can only accede to it if he or she is satisfied that the applicant has reasonable cause to believe that one or more of the three situations described in s. 1(2)(*a*) exists in respect of the child. The second stage is the making by a magistrates' court or a justice of one or more interim care orders under s. 28 (6). The purpose of such an order or orders is to preserve, for the protection of the child, the temporarily safe situation created by the original authority to detain the child and keep it in a safe place granted under s. 28(1) until the third stage is reached. That third stage is the hearing and determination of proceedings for a full care order (by which I mean a care order which is not an interim one) to be made under s. 1 of the 1969 Act.

All these three stages were gone through in the present case. Authority to detain the child and take it to a place of safety was granted on 23 April 1985. Then, proceedings for a full care order having been begun on 25 April 1985, successive interim care orders were made on 13 May, 10 June and 8 July 1985. Finally, the hearing of the proceedings for the making of a full care order took place on 23 and 25 July and 1 August 1985, the order being made on the last of these dates. In the result, a period of just over 14 weeks elapsed between the original authority to detain and take to a place of safety being granted and a full care order being made, and throughout that period the child was in the safe care of foster-parents chosen by the authority.

Against the background of these three possible stages in the process of protecting a child under ss. 1 and 28 it is, in my view, clear that the court, in considering whether a continuing situation of one or other of the kinds described in s. 1(2)(*a*) exists, must do so as at the point of time immediately before the process of protecting the child concerned is first put into motion. To consider that matter at a point of time when the child has been placed under protection for several weeks, first by a place of safety order and then by one or more interim care orders, would, as pointed out by Bush J in *M v Westminster City Council* (above), defeat the purpose of Parliament. I would answer the second question relating to the expression 'is being' accordingly.

With regard to the third question relating to the expression 'is being', it seems to me that the court, in considering, as at the point of time immediately before the process of protecting the child concerned is first put into motion, whether a continuing situation of any of the three kinds described in s. 1(2)(*a*) exists, must look both at the situation as it is at that point of time and also at the situation as it has been in the past: how far back in the past must depend on the facts of any particular case. Should the court look at the future as well? In my view it should, but only in a hypothetical way by looking to see whether the situation which began earlier and was still continuing at the point of time immediately before the process of protecting the child was put into motion would, if that process had not been put into motion, have been likely to continue further. I would not think it right for the court to look at the future alone: only at the hypothetical future in conjunction with the actual present (in the sense in which I have defined that concept) and the actual past. It follows that I agree with the decision in *Essex County Council v TLR and KBR* (above) on its facts, for in that case the court was being asked to look at the future alone with-

out any connection with the present or the past. The case must not, however, be regarded as good authority for the wider proposition that it is never permissible for the court to look at the hypothetical future, so long as it does so in conjunction with the present and the past.

It is with regard to the fourth question relating to the expression 'is being', namely, whether the court, in viewing the past, can look back to the time before the child concerned was born, that the division of opinion between the Divisional Court and the Court of Appeal has arisen. The view of the Divisional Court can be summarized in this way. First, the expression 'child' in s. 1(2)(*a*) must be interpreted, in accordance with the definition of it contained in s. 70(1), as meaning a person under the age of 14. Secondly, a child does not become a person until it is born. Thirdly, that being so, it was not permissible for the juvenile court, in considering whether any of the three continuing situations in respect of the child described in s. 1(2)(*a*) existed, to look back to the time before it was born and before, therefore, it had become a person. Fourthly, without looking back at that earlier time, there was no material on which the juvenile court could find that any of the three continuing situations referred to existed.

The three members of the Court of Appeal, while arriving at the same result, did not, as I understand their judgments, proceed upon precisely the same grounds. Stephen Brown LJ and Dillon LJ, on the one hand, appear to have founded their decision on the broad ground that to exclude consideration of the time before the child was born involved adopting too narrow an approach to the question whether any of the three continuing situations in respect of the child described in s. 1(2)(*a*) existed. It was permissible for the juvenile court to look at that earlier time, and, having done so, it had ample material on which it could find that both of the first two continuing situations referred to existed. Woolf LJ, on the other hand, took the view that the juvenile court, in considering whether either of the first two continuing situations existed, had to ask itself two separate questions. The first question was, in the case of the first situation, whether the proper development of the child was being prevented or neglected, and, in the case of the second situation, whether the health of the child was being impaired or neglected. The second question, in either case, assuming an affirmative answer to the first, was whether that situation was avoidable, that is to say, whether it could have been avoided. In the view of Woolf LJ it was not permissible for the juvenile court to look back at the time before the child was born in order to answer the first question; but it was permissible for it to do so in answering the second question. Proceeding in this way the juvenile court had material before it on which it could give affirmative answers to both questions.

In my opinion, the provisions contained in s. 1(2)(*a*) of the Act of 1969 must be given a broad and liberal construction which gives full effect to their legislative purpose. That purpose is to protect, among other ways through the medium of a care order, any child of whom it can be said, in the ordinary and natural meaning of the words used, either (i) that its proper development is being avoidably prevented or neglected, or (ii) that its health is being avoidably impaired or neglected, or (iii) that it is being ill-treated. Children for whom such protection is provided include children who are only a few weeks, or even a few days, old.

The child in the present case, having been born on 12 March 1985, was

in hospital (for part of the time at least in intensive care) from that date until 19 May 1985, because she was suffering from symptoms caused by withdrawal from narcotic drugs. The point of time at which the process of protecting her was first put in motion was 23 April 1985, when the authority's social services department was granted authority to detain the child and take her to a place of safety, and that was accordingly the point of time as at which the juvenile court had to consider whether any of the continuing situations described in s. 1(2)(*a*) existed. It found, and had ample material on which to find, that at that point of time, when the child was still in hospital, both the first and the second of those situations existed, that is to say (i) her proper development was being avoidably prevented, and (ii) her health was being avoidably impaired. Each situation could have been avoided if the mother had not persisted in taking excessive narcotic drugs throughout her pregnancy. I see no reason why the juvenile court, in considering whether those situations existed, should not have looked back at the time before the child was born. At the relevant point of time for such consideration the child was 6 weeks old, and accordingly a person under the age of 14 years within the meaning of the expression 'child' in s. 70(1). The circumstance that the cause of the two situations in which the child was at that point of time, and the possibility of their having been avoided, dated back to the time before she was born appears to me to be immaterial. I can find nothing in s. 1(2)(*a*) which would exclude taking into account those matters. Further, it seems to me that the legislative purpose of s. 1(2)(*a*) is best furthered by allowing such matters, in a case of this kind, to be taken into account.

It follows that I agree with the broad grounds of decision relied on by Stephen Brown LJ and Dillon LJ in the Court of Appeal and would dismiss the appeal.

There is one further matter with which I should deal before parting with this case. It may seem curious at first sight that, since both the child's guardian ad litem and the parents agree that a care order is necessary, they should have fought such a prolonged battle against its being made by the juvenile court. The explanation, however, is that all three believe that it would be better for the order to be made by the Family Division of the High Court in wardship proceedings under s. 7 of the Family Law Reform Act 1969 than by the juvenile court under s. 1 of the Children and Young Persons Act 1969. The reason why they believe that it would be better for the order to be made in wardship proceedings is that the High Court would then be able to exercise control over the authority in respect of the manner in which it implemented the order, whereas, if the order is made by the juvenile court, the High Court would not have that power: see *A v Liverpool City Council* (1981) 2 FLR 222 and *Re W (A Minor) (Care Proceedings: Wardship)* [1985] FLR 879. In particular they fear that the authority, if left to itself, may decide to programme the child for early adoption without their having an adequate opportunity to resist such a course being taken. I do not consider that it would be appropriate for your Lordships to express any view as to whether these beliefs and fears are justified or not. The only question for decision on this appeal is whether the juvenile court had jurisdiction to make the care order which it did make, and I think that your Lordships should confine yourselves to the decision of that question.

LORD GRIFFITHS:
My Lords, I have had the advantage of reading in draft the speeches proposed by my noble and learned friends Lord Brandon of Oakbrook and Lord Goff of Chieveley. I agree with both of them that this appeal should be dismissed and with the reasons they have given for reaching this conclusion.

LORD MACKAY OF CLASHFERN:
My Lords, I have had the advantage of reading in draft the speeches proposed by my noble and learned friends Lord Brandon of Oakbrook and Lord Goff of Chieveley. I agree with both of them that this appeal should be dismissed and with the reasons they have given for reaching this conclusion.

LORD GOFF OF CHIEVELEY:
My Lords, in cases under s. 1(2)(*a*) of the Children and Young Persons Act 1969 (as amended), the magistrates have to ask themselves the questions: Is the proper development of the child being avoidably prevented or neglected? Or is its health being avoidably impaired or neglected? Or is it being ill-treated? If any one of these questions can properly be answered by them in the affirmative, at the time when they are asked to make their order, the primary condition for the making of the order is fulfilled.

The problem in the present cases arises from the fact that the child suffered from withdrawal symptoms which necessitated her immediate admission to intensive care when she was born, because her mother took drugs before her child was born, during the period of her pregnancy. The question has therefore arisen whether, in such circumstances, it could be said that, at the time when the magistrates made their order, the child's proper development was being avoidably impaired. The submission that these questions must be answered in the negative was founded on the allegation that the time when the child's proper development was being avoidably prevented or her health was being impaired was when her mother was taking drugs during her pregnancy, and that this had ceased when the child was born; with the consequences that (1) the condition no longer existed when the order was made, and (2) during the time when the child's proper development was being avoidably neglected, or her health was being avoidably impaired, she was unborn and not therefore a child within the meaning of that word as used in s. 70(1) of the Act of 1969.

There is, I think, considerable force in this argument, as is demonstrated by the differing views taken by the courts below. In particular, we must avoid a construction of the Act which produces the result that any child, born suffering from the symptoms or effects of some avoidable ante-natal affliction, could be described, after its birth, as being a child whose proper development *is being* avoidably prevented or whose health *is being* avoidably impaired. The mere fact of a past avoidable prevention of proper development or impairment of health is not, in my opinion, sufficient to fulfil the condition, even if there are symptoms or effects which persist or manifest themselves later.

I approach the matter as follows. The words 'is being' are in the continuous present. So there has to be a continuum in existence at the relevant time, which is when the magistrates consider whether to make a place of safety order. In cases under the subsection, this may not be established by proof of events actually happening at the relevant time. In the nature of

things, it may well have to be established, as continuing at that time, by evidence that (1) the relevant state of affairs had existed in the past, and (2) there is a likelihood that it will continue into the future. So it can be said that a child is being ill-treated if it has been cruelly beaten in the past, and there is a likelihood that it will continue to be cruelly beaten in the future. It is not enough that something has avoidably been done or omitted to be done in relation to the child in the past which has, for example, impaired its health, and that the symptoms or effects still persist at the relevant time; for it cannot be said in such circumstances that, at the relevant time, the child's health *is being* avoidably impaired – all that can be said is that its health has been avoidably impaired in the past.

I turn to the present case. Could it properly be said, at the time when the magistrates had to consider whether to make an order, that the proper development of the child was being avoidably prevented or that her health was being avoidably impaired? The magistrates could, first of all, look to the past and see that, by reason of the mother taking drugs during her pregnancy, the proper development of the child had been avoidably prevented or that her health had been avoidably impaired. In drawing this conclusion, I can see no reason why the magistrates should not be entitled to have regard to events which occurred before the child was born. They have, of course, to consider the question whether the relevant continuum exists, at the date when they are asked to make their order, with reference to a living child. But in looking for evidence whether such continuum then exists, there is no reason why they should not look at events which occurred while the child was still unborn or at the state of affairs at the child's birth, and it is contrary to common sense that they should be inhibited from doing so. Second, they could also say that, at the time when they considered whether to make an order, there was a likelihood that, by reason of the mother's drug addiction, the child's proper development would continue to be prevented or her health would continue to be impaired in the future, because the mother (and indeed the child's father, whom the mother has now married) were both still drug addicts, and parents suffering from that most unfortunate affliction, particularly a mother so addicted that she continued to take drugs throughout her pregnancy in the knowledge of the effect which this might have on her unborn child, could be said to be unlikely to be able to care for their child, so that there was a likelihood that, by reason of her mother's addiction to drugs, the child's proper development would continue to be avoidably prevented or her health would continue to be avoidably impaired in future.

But let us take a different case. Suppose that a mother conceives a child when she is an alcoholic and is unable at first to give up drinking, despite the fact that she knows that this may have an adverse effect upon her unborn child. Shortly before the child is born, the full effect of her conduct is brought home to her, and she becomes a confirmed teetotaller. The child is born. Its proper development has indeed been prevented, or its health has indeed been impaired, by its mother's drinking. But if the case then came before the magistrates, I do not think that they could then properly conclude that, at the time when they were asked to make the order, the child's proper development was then *being* avoidably prevented, or that its health was then *being* avoidably impaired. By then, the damage had been done: and there was no likelihood of any further avoidable prevention of

the child's development or impairment of its health. The same would have been true in the present case if the mother had, before the child was born, irrevocably given up the taking of drugs.

In the present case the magistrates looked only to the past history of the child, and studiously avoided considering the likelihood of prevention of the child's proper development or impairment of her health continuing into the future. I have little doubt that, in so doing, they misunderstood a judgment of my own in *Essex County Council v TLR and KBR* (above). In that case, magistrates were asked to make a care order under s. 1(2)(*a*) of the Act of 1969 solely on the basis of an event which was said to be going to happen in the future, i.e. that the father was going to take the children away from foster-parents to live with him in Northern Ireland after he had married a Chinese woman in Hong Kong. The magistrates refused to make an order, and a Divisional Court held that they were right to do so, because there was no relevant state of affairs then in existence which justified the making of an order, and the case fell within neither of the subsections of s. 1 which specifically refer only to future events. However, when magistrates are considering whether there is a presently existing state of affairs, and there is evidence before them of events which indicate the existence of such a state of affairs in the past, the magistrates are entitled and, indeed, bound to consider whether at the time when they are considering making an order, there is an existing likelihood that the state of affairs revealed by those past events will continue into the future, in order to decide whether the necessary continuum exists at the relevant time.

Even so, since the magistrates held – and, indeed, there was no dispute – that the child in the present case was in need of care and control which she was unlikely to receive unless the court made a care order, it is, I consider, an inevitable inference that the magistrates considered that prevention of the child's proper development or impairment of her health was likely to continue into the future. Accordingly, I am of the opinion that the magistrates were entitled to make the order which they made. I, too, would therefore dismiss the appeal.

Solicitors: *Kingsford Dormand*, agents for *Rowberry Morris & Co* for the child;
Sharpe, Pritchard & Co., agents for *D.C.H. Wilham* for the local authority;
Grefoy Rowcliffe & Co., agents for *Blandy & Blandy* for the parents.

P.H.