

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE (FAMILY DIVISION)
Her Honour Judge Pearlman
FD 03 C00824

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2005

Before :

LORD JUSTICE THORPE

and

LORD JUSTICE WALL

Between :

W (A CHILD)

Rex Howling (instructed by **Lewisham Legal Services**) for the **Appellant**
Melanie Nazareth (instructed by **Myria Pieri & Co Solicitors**) for the **Respondent**
Jane DeZonie (instructed by **Vahib & Co Solicitors**) for 4th **Respondent**

Hearing date : 11th May 2005

Judgment

Lord Justice Wall :

Introduction

1. This appeal concerns CJW (known as CJ) who was born on 13 September 2000. He is the eldest of four children born to Samantha W (Samantha) by four different fathers. Samantha was born on 9 July 1981 and is 23. CJ's father plays no part either in his life or in the proceedings.
2. On 21 February 2005, Her Honour Judge Pearlman, sitting as a Deputy High Court Judge of the Family Division, dismissed an application by the London Borough of Lewisham (Lewisham) for a care order under section 31 of the Children Act 1989 in relation to CJ. The care plan on which the application was based was that CJ should be placed for adoption outside the family. On the particular facts of the case, this meant: (1) that he had to be removed immediately from the home of Samantha's younger sister Sabrina W (Sabrina) where he had been left by Samantha in April 2004 (and where he had been living ever since); (2) that he should then be placed with short-term, specialist foster parents; and (3) that he would then be moved into a permanent, adoptive placement as soon as suitable prospective adopters could be identified. The reason two moves were required, it should be said, is that Sabrina was not prepared to contemplate or assist in a move by CJ to an adoptive placement.
3. The judge rejected the care plan, and refused to make a care order. Instead, she made an interim order that CJ reside with Sabrina. She also made an interim supervision order directed to the London Borough of Bromley (Bromley), the area in which Sabrina lives. The judge adjourned the proceedings to 4 April 2005, and directed Bromley to file and serve by 31 March 2005 details of the support package it could offer CJ and Sabrina. She made a number of other practical orders designed to get Bromley on board and up to speed.
4. Lewisham promptly sought permission to appeal the judge's refusal to make a care order in relation to CJ, and the application was referred to me on the papers. On 14 March 2005, I directed that the application for permission should be adjourned to the earliest available date after 4 April 2005, with appeal to follow if permission was granted. I chose that particular date because I took the view that this court would be in a better position to make an overall judgment if it knew the outcome of the hearing before the judge on 4 April 2005.
5. In the event, that expectation has been disappointed. As Mr. Rex Howling, for Lewisham, helpfully informed us, Bromley did not file details of the support package it could offer CJ and Sabrina by 31 March 2005: indeed, it did not allocate the case to a social worker until 5 April 2005. Since Bromley was not in a position to assist the judge on 4 April 2005, she put the matter over to 29 April 2005. She did, however, join Bromley as parties to the proceedings.
6. On 28 April 2005 a statement was filed by the allocated social worker, but Bromley asked for more time to consider their proposed support package, and indicated that they needed to undertake a core assessment. The judge has ordered this to be filed by

15 June 2005, and the matter has been listed before the judge for an hour on 21 June 2005. On 28 April 2005, the judge also renewed the interim supervision order in favour of Bromley and made a residence order relating to CJ in Sabrina's favour.

7. None of the counsel appearing before us at the hearing on 11 May 2005 proposed a further adjournment of the application for permission to appeal, and rightly so. The consequence, however, is that the case is no further advanced than it was on 21 February 2005. I regard this as highly unsatisfactory. Section 27 of the Children Act 1989 imposes on local authorities a duty to co-operate with each other. We have not heard Bromley, from whom a faxed letter was received during the course of the hearing stating that it was neutral so far as the merits of the appeal were concerned and that it did not intend to appear. We thus have had no explanation from them of their failure to obey the judge's order of 21 February 2005.
8. We have a copy of the statement filed by Bromley's social worker on 28 April 2005. Whilst this is positive in terms of the worker's observations of the interaction between Sabrina and CJ, it records that a referral had been made to Bromley Child and Adolescent Mental Health Services (CAHMS) on 20 April by CJ's general practitioner, although as at 28 April CAHMS had not, for some unexplained reason, even received the referral, let alone acted on it. No indication is given of the length of the Bromley CAHMS waiting list. The worker also reports Sabrina stating that she does not feel it necessary for her "to undergo therapy at this time".
9. These points are of acute relevance because, as my relation of the facts will make clear, CJ is a seriously damaged and needy child, and the expert evidence before the judge was that once permanently placed he would need psychotherapy for an extended period of time. Furthermore, the evidence disclosed that Sabrina herself came from a highly dysfunctional background, and the clear advice from two of the experts who reported to the judge was that she herself required psychotherapeutic intervention to help her come to terms with the abuse which she herself had suffered.
10. At the outset of the hearing on 11 May 2005, we granted permission to appeal. We heard argument from counsel instructed on behalf of Lewisham, Sabrina and the Guardian. Samantha did not appear either in person or by counsel. At the conclusion of the argument, we reserved judgment.

The issues in the appeal in outline

11. In summary, the appeal was advanced to us by Lewisham in stark terms. The judge, Mr. Howling argued, had been plainly wrong. She had failed to follow unanimous expert advice (reinforced by the evidence of the social workers and the guardian) to the effect that Sabrina, however well-meaning, simply did not have the capacity to care in the long term for a child as damaged as CJ. The judge had, moreover, failed to explain why she had not followed the expert advice given to her, and her judgment was, accordingly, fatally flawed. In these circumstances, the proper course was not to send the matter back for a rehearing, but to grasp the nettle and make the care order which the judge should have made. That submission was strongly supported by Miss Melanie Nazareth for the guardian.

12. For Sabrina, Miss Jane DeZonie argued that in a difficult and finely balanced case, the judge was entitled to take the view that the risks involved in removing CJ from his placement with his aunt, where he had made progress and which represented the only stable home he had known, outweighed the risks inherent in leaving him where he was. The judge had been right to take at face value and as genuine a belated acknowledgement by Sabrina that CJ required on-going therapy. As to the experts' evidence, the judge had done sufficient to explain why she had rejected it. One of the experts (Dr. Clare Lucey) had acknowledged in terms that it was a "finely balanced case". The order made by the judge was within the broad area of her discretion.
13. Having listened carefully to the arguments advanced to us, I have not found the formal outcome of this appeal difficult to determine. I am in no doubt at all that the appeal must be allowed, and the judge's order set aside. The truly difficult decision, in my judgment, lies in what we should put in its place. However, to explain how I reach that position, I must set out the facts, relate the evidence before the judge, and examine her judgment.

The facts

14. Even by the deprived and abusive standards of many of the cases which come within the scope of the public law jurisdiction of the family justice system, this case is extreme. Samantha and Sabrina are the children of Philomena W (Philomena). Philomena is 45. Sabrina was born on 10 April 1983 and is 22. The family is Irish by origin. Philomena is one of 18 children who, at the age of 8, was placed in the care of the catholic church in Ireland by her mother when her father was imprisoned. She and her siblings were dispersed. She herself was gravely abused in care. She did not return home when her father was released, and remains estranged from her siblings.
15. The father of Samantha and Sabrina was, in the guardian's words:

"A violent inebriate. Mother and children kept on the move to try to escape his abuse of them, but to no avail. Philomena was beaten and humiliated. I think that abuse, combined with the legacy of her childhood, has left her with fragile mental health, which was a feature of the girls' adolescence".
16. CJ's maternal grandfather was not just a violent inebriate. When Sabrina was interviewed for the purposes of the proceedings by Dr. Judith Freedman, one of the three experts who reported in the case, she told Dr. Freedman that her father had repeatedly physically abused her mother. On one occasion her father had petrol-bombed the home in Ireland in which Philomena and the children were living. They had been forced to jump out of the window. As a consequence, Philomena had been paralysed for some 8 months and left with a permanent legacy of rheumatoid arthritis.

Sabrina had also been told that whilst her mother was in hospital, paralysed, her father had made her sister Samantha hold a gun to her mother's head.

17. On another occasion, again when Philomena was in hospital, Sabrina told Dr. Freedman that her father had kidnapped Sabrina for some six weeks, during which he had mentally and physically abused her. She had only been returned to her mother when she was found by the police. She said she had never heard anything nice about her father, even from his own mother and sister.
18. Samantha also described in graphic detail to Dr Clare Lucey, the second of the three experts who reported, how her father had behaved towards her mother and towards her, including how he had taught her to threaten to kill her mother and how he had thrown Philomena out of the window.
19. The family appears to have fled to England when Sabrina was about two. When she was about 4 or 5 her mother began a relationship with another man (Nigel), which appears to have lasted some nine years and by whom she had two children. Sabrina appears to have got on reasonably well with Nigel. She appears to remain in touch with him and to regard him as a father figure. Samantha's and Sabrina's father is dead: when he died and in what circumstances are not clear to me.
20. Against that background, it is unsurprising that both Samantha and Sabrina demonstrated disturbed behaviour as teenagers. There was an episode of self-harm when Sabrina was 15 and a half, and shortly after Sabrina had formed her relationship with her partner Warren Oliver. She told Dr. Tom McClintock, a forensic psychiatrist, instructed in the proceedings to examine her that she had harmed herself in order to say to others: "I'm here". There had been some 9 or 10 self-inflicted incisional wounds on her arms requiring stitches. There has been no evidence of any repetition of such behaviour.
21. Sabrina also told Dr. McClintock that at the age of 13 or 14 she had been found guilty on a charge of street robbery, although she asserted she had been wrongly convicted. She had been fined £150 and placed on probation for a year. That was her only conviction.
22. By contrast with Sabrina's stable relationship with Mr. Oliver, Samantha has had a series of violent and volatile relationships with men, resulting in the four children referred to in paragraph 1 of this judgment. None of those children is living with, or being cared, for by Samantha.
23. There are other, obvious differences between the sisters. Samantha, who is the elder, has some direct memories of her appalling childhood experiences. Sabrina says she has no direct recollection: the events in question having taken place before she was three. As a consequence, Sabrina insists that there is nothing wrong with her and she is adamant that she is unaffected by her past because she cannot remember anything about it. And, as I have already indicated and by contrast with Samantha, Sabrina appears to have had a long-standing relationship with one man, Oliver Warren, whom she has known for six years, with whom she now lives and by whom she has a

daughter Skye, born on 2 January 2003, about whom nobody has any child care concerns.

24. The other three children born to Samantha are: Charlie born on 2 May 2002, Jorgi born on 21 November 2003 and Reilly, born on 12 November 2004. Charlie and Jorgi were the subject of the same proceedings as those relating to CJ, and much consideration was given earlier in the proceedings to the possibility that CJ and Charlie could be placed together. Jorgi had been removed from his mother shortly after his birth, and Samantha did not resist a care order in his case. He has since been freed for adoption. Charlie was made the subject of a care order which was conceded on 15 February 2005 after Samantha, in the instant proceedings, had unexpectedly given evidence that she had decided that it was in his best interests to be the subject of a care order, with a care plan for adoption. The order was made on 21st February 2005. There are ongoing proceedings relating to Reilly, with which this court is not concerned.
25. None of Samantha's children can be said to have had anything remotely resembling a normal family life. CJ's life, prior to moving to Sabrina in April 2004, had been chaotic. He had moved home some nine or ten times. He had undoubtedly witnessed serious domestic violence. When seen by a member of Dr. Freedman's team, CJ, whilst emptying the rooms of a doll's house described how his "daddy" (actually his step-father) "went mad" and hurt his mother.
26. The chronology of CJ's life makes dispiriting reading. Following his birth, he and Samantha lived with Philomena. Philomena soon became concerned that Samantha had not bonded with CJ, and was leaving him in her care for long periods of time. His name was placed on the child protection register (CPR) for the first time on 12 January 2001. Samantha then moved house, and on 22 March 2001, Lewisham issued an application for a care order in relation to CJ. An interim care order was made on 29 March 2001 on the basis of an agreement that CJ would reside at the property of Philomena.
27. On 12 April 2001, CJ was placed in foster care after Samantha refused to enter the agency Jamma Umoja with him for the purposes of an assessment. However, a community assessment by Jamma Umoja started in May 2001, and on 30 July, CJ, Samantha and CJ's step father, Justin Danes, commenced a residential assessment at Jamma Umoja. After it ended, Samantha, Justin and CJ returned home, but the family situation deteriorated. There were financial difficulties, and there appears to have been a fight between Samantha and Sabrina in front of CJ. Samantha had an epileptic fit and CJ was removed into foster care on 14 December 2001 for five days. Thereafter he was frequently looked after by Philomena. In April 2002 he was admitted twice to hospital, once with diarrhoea, and once with viral meningitis. Samantha was by this time pregnant with Charlie, who was born on 2 May 2002.

28. On 8 June 2002 the police were called following an argument between Samantha and Justin, whom Samantha said had become aggressive when he could not obtain cannabis. She also accused him of hitting CJ across the back of his head with a baby bottle, although this was later said to have been an accident.
29. On 2 July 2002, CJ's name was removed from the CPR. However, in August there was an anonymous report to social services that CJ was being neglected and that cannabis was being smoked in the home. On 6 September 2002 a supervision order was made in relation to him. However, his mother continued to fail to care for him, and he seems to have been looked after in Samantha's absences by Philomena.
30. In January 2003, Samantha told social services she could not cope with caring for the two boys, and wanted Philomena to do so. In February 2003, she discovered she was pregnant. However, after a domestic dispute she miscarried on 20 February 2003.
31. In April 2003, Samantha went to Ireland for a month, leaving the children in the care of her mother. On 29 August 2003, Lewisham applied to extend the supervision order for a further year, and this was ordered on 4 September 2003. On 26 October 2003, after Samantha had been admitted to hospital after taking an overdose of paracetamol, the local authority issued the current proceedings for a care order. Their concerns included Samantha's lack of cooperation with Lewisham, her leaving the boys with her mother in an unplanned way, her failure to keep appointments for the boys, and domestic violence between herself and Justin Danes, as well as with neighbours. Jorgi was born on 21 November 2003, and placed immediately in foster care.
32. On 16 April 2004, Philomena contacted social services to say that Samantha had left the two children in the care of Justin Danes, without food or electricity. Philomena advised that Samantha was 10 weeks pregnant. In the event, CJ went to stay with Sabrina on a permanent basis, and Charlie was left with Philomena. The latter, however, was unable to cope, and on 10 May 2004, Charlie was placed with foster parents. Interim care orders were made on the same day in relation to both boys, and Sabrina issued a residence application in relation to CJ. On 27 August 2004 Lewisham issued an application seeking the removal of CJ from Sabrina's care. That application came before Judge Pearlman on 1 October 2004 when she adjourned it to the final hearing of the care proceedings in February 2005.

The threshold criteria under section 31 of the Children Act 1989

33. These were conceded at a hearing in July 2004. The judge summarised them in paragraph 11 of her judgment in the following terms: -

“First, I think it is appropriate that I refer to the threshold criteria. They are clearly set out in the bundle and it was that the children were suffering or were at risk of suffering significant harm attributable to the care being given by the mother not being what it would be reasonable to expect a parent to give; and it is submitted that both children were suffering from an impairment of their health and development

such that their emotional development, and in the case of the child, Charlie, his physical development also, were being avoidably impaired at the commencement of the proceedings. The details are that the mother failed to care for the children adequately in that she lacked insight into the children's physical and emotional needs; that she left both boys with her mother in an unplanned manner causing them anxiety, and moreover the maternal grandmother is unable to cope adequately on such a basis with the care of the children given her own fragile health; Charlie lost weight; that both children had been exposed to domestic violence; that the mother had failed to take up the offer of various services made available to her, and it details a nursery placement in respect of CJ, facilities at a family centre, counselling and advice; and that there had been insufficient improvements in the conditions of the mother's family home; and that she failed to keep a significant number of appointments with department staff. That was the threshold criteria."

The evidence before the judge

34. The judge had written evidence from a number of sources. She had two kinship care viability reports from a Lewisham social worker, Sue Zelenitz. She had statements from Lewisham's past and current allocated social workers, Nokuzola Mangcotywa and Christy Bell. She had statements from Samantha and Sabrina. She had a number of reports from the guardian, and, perhaps most importantly of all, she had reports from three experts: (1) a detailed psychiatric report on the family dated 12 November 2004 by Dr. Judith Freedman, a consultant psychiatrist in psychotherapy at the Portman Clinic in London, and her team (Mr. John Lawrence and Mrs. Debbie Bellman, both psychotherapists); (2) a report also dated 12 November 2004 from Dr. Clare Lucey, a consultant child and adolescent psychiatrist; and (3) a psychiatric report on Sabrina dated 26 January 2005 from Dr. Tom McClintock, an adult consultant forensic psychiatrist. There had also been a meeting of experts attended by Dr. Lucy, Dr. Freedman and Mr. Lawrence on 4 January 2005 of which the judge was provided with a note taken by the guardian's solicitor.
35. The catalyst for Lewisham's proposal for moving CJ from Sabrina's care had come from the second report of Ms Zelenitz. Her first report is dated 22 June 2004, and the second 17 September 2004. Ms. Zelenitz's task was to assess CJ's placement with Sabrina. In her first report, Ms Zelenitz concluded that the placement was viable for the present, although she listed a number of concerns. These included: -
 - “(Sabrina's) understanding of CJs emotional needs and her ability to meet these.
 - (Sabrina's) ability to parent CJ long term and into adulthood.

(Sabrina's) ability to protect and shelter CJ from the turbulent relationships between herself, Samantha, and her mother Philomena, and the effect that these volatile relationships have upon CJ.

Mr Oliver's unemployment. There is no income in the family other than benefits at the moment.

Safety hazard in the rear garden. There is debris piled in the garden which is overgrown and unfenced. Plans are to repair this summer."

36. In her second report, Ms Zelenitz recommended that CJ be removed from Sabrina's care as soon as possible. A more extensive assessment had removed none of Ms Zelenitz's original concerns, and had led her to the view that Sabrina and Warren Oliver were stretched in caring for two children. There were also concerns about Sabrina's commitment to CJ retaining contact with Charlie and a failure to attend properly to CJ's health needs. Ms Zelenitz recognised, however, that CJ might be very upset by the change, and would need a great deal of support.
37. In an extempore judgment given on 1 October 2004, the judge decided that it was in the best interests of CJ not to make a decision as to his removal. The judge took the view that she should await the reports of Dr. Freedman and Dr. Lucey.
38. At the final hearing, the judge heard oral evidence from Christie Bell, Jane Page, Lewisham's adoption team manager, Ms Sadler, a team manager employed by Lewisham, Dr. Freedman, Dr. Lucey, Samantha, Sabrina, Mr. Oliver and the guardian.

The written evidence of Dr. Freedman, Dr. Lucey and Dr. McClintock

39. On any view, the report prepared by Dr Freedman and her team is an impressive piece of work. It runs to some 74 pages. It is extremely thorough. At its outset, Dr. Freedman identified the issues she has been asked to address:

“To assess the attachment needs of (CJ) and Charlie in respect of their relationship to each other.

(CJ's) attachment to Ms Sabrina W.

Given Ms Sabrina W's own history, her ability to meet (CJ)'s needs both in terms of attachment and parenting, both now and into the future.

To identify any services or therapeutic input which would be available to Ms Sabrina W and the timescale required for that, if she is in needs of any such support in order to meet (CJ)'s need.

To make recommendations with respect to the placement of (CJ) and Charlie whether or not (CJ) remains with (Sabrina) and in respect of contact between them and Jordi.

To identify any services or therapeutic input required by (CJ) and Charlie either now or in the foreseeable future.”

40. As to the first point in their instructions, Dr. Freedman came to the conclusion that whilst the two boys had an attachment to each other, their individual needs for a secure placement and to have an adult carer attending to their needs was more pressing for both of them. As I have already indicated, by the conclusion of the hearing before the judge, the proposal to place CJ and Charlie together was no longer being advanced, and Charlie had been made the subject of a care order, with a separate plan for adoption.
41. As to CJ's attachment to Sabrina, Dr Freedman recognised that in the period since April 2004, CJ had become attached to his aunt, and felt that he had a place in her home and in her family. She added, however: -

“We think that it is important to consider (CJ's) attachment to Sabrina W both from the perspective of (CJ's) ability to form attachments and from the perspective of what Sabrina W is able to offer to him.

Our reading of the Court papers indicates that (CJ) has had a severely disrupted and traumatised early childhood. We do not think that it is necessary for us to detail these events here, as they are well known to the Court. Suffice it to say that (CJ) has suffered a number of sudden separations from his mother and has been exposed to strife and violence between his mother and his stepfather and between his mother and his grandmother. His mother said that she was unable to bond with him during his early infancy. (CJ) suffering this rejection in the earliest days of his life caused him trauma and rendered him less able to cope with the later traumas that we outlined above.

In addition, (CJ) has not known his father. His stepfather Justin was his father figure for several months, and he has now disappeared from (CJ)'s life as well.

We think that the early trauma that (CJ) suffered has left him without an experience of reliable and unconditional maternal love. This has left him with little internal sense of security; instead, he feels that he needs to cling to his carers for survival. We think that this results in (CJ) appearing strongly attached to Sabrina W, but we think that it is an insecure attachment.

At the same time, we think that Sabrina W really has provided a sense of security and love for (CJ). Dr Freedman observed that Sabrina W was attentive to (CJ) and aware of his need for closeness to her.”

42. On the third point, namely Sabrina’s ability to meet CJ’s needs both in terms of attachment and parenting, both now and into the future, it is, I think, necessary to set out Dr. Freedman’s conclusion in full: -

“We think that Sabrina W has offered attentiveness, security and love to (CJ), as we said above. His situation is improved; he has been able to start attending nursery, despite the difficulties he encountered in the beginning, and he is beginning to make progress, in terms of making friends and beginning to learn.

However, we are concerned about Sabrina W’s ability to meet (CJ’s) needs over the long term. Given the disruptive early experience that (CJ) has had, as we described above, we think that (CJ) has already suffered in his emotional development. As we said, due to his mother rejecting him in his early infancy, he does not have the inner foundation of security that a child normally has. Mrs Bellman noticed that (CJ) is showing passivity and a sense of resignation. In his play, he appeared to have difficulty in thinking how to clear a path for an engine with which he was playing and how to gain access to rooms in a dolls’ house. We think that this indicates that (CJ) has not only suffered deprivation but also that his development has become wayward. His passivity, his sense of anger, and his sense of insecurity may constitute an early form of depression, to which he is likely to be vulnerable given his family history of several generations of depression.

Alongside the healthy developments that (CJ) might be able to make in the context of a caring environment, his emotional difficulties may continue to exert a strong effect on his personality and functioning and may present his carers with difficult behaviour.

We think that (CJ) has special emotional needs. He needs ‘higher order parenting’.

We found that Sabrina W is an intelligent and well-intentioned young woman. However, she is also a person who has had a traumatic childhood in her own right. She has not yet begun to come to terms with her early experience; instead, she still prefers not to remember it. In her current life, her partner has a serious cognitive handicap, and we believe that Sabrina W and Warren Oliver lead a restricted social life. Sabrina W does not

feel that Social Services have been or are willing to help her. Instead, she believes that they are only interested in amassing evidence to prove her inadequate as a carer for (CJ).

We think that Sabrina W is correct in her belief that Social Services do not regard her as someone who has a good enough capacity to care for (CJ). Alongside this, she does not believe that she needs help; Warren Oliver told Mr Lawrence that they do not need “extra special help”, and Sabrina W did not disagree. At the same time, Sabrina W complained that Social Services do not offer her help. Given the history that she now has in her relationship with Social Services, we think it would be difficult for her to accept any help they might offer her.

We think that at present, Sabrina W satisfies (CJ)’s needs for attachment. We think that given her limited personal resources, her having a handicapped partner who depends on her, and her having a young child of her own, Sabrina W is not able to offer (CJ) the parenting that we think he needs in the longer term. We are concerned that if (CJ) were to remain with Sabrina W and her partner, his needs would outstrip their capacities, with serious consequences not only for him, but also for the stability of their young family.”

43. I draw attention in particular to the final paragraph of this citation, which encapsulates both Dr. Freedman’s conclusion and the views of both Dr. Lucey and the guardian.

44. On point 4 in their instructions, Dr. Freedman’s views were as follows: -

“As we said above, we do not think that Sabrina W is willing to seek or receive therapeutic work. This is in part due to her belief that the best way for her to manage the difficulties in her background is not to think about them. We think that this is an understandable position for Sabrina W, but our concern is whether her attempt to keep these matters out of her mind will stand her in sufficient stead in her later adult life.”

45. On point 5, Dr. Freedman repeated her previous conclusion that both boys required “higher order parenting” and recommended separate adoptive placements. As to therapeutic input for CJ, Dr Freedman advised: -

“We have mentioned above that we believe that (CJ) is already showing that he has emotional problems that may become further organised into a form of childhood depression. We

think that once (CJ) is settled into his permanent home, it would be helpful for him to begin individual psychotherapy with a qualified child psychotherapist. We think that he could benefit from the chance to put his feelings and worries into words and in that way begin to develop a means of thinking about himself, as opposed to feeling stuck, as Mrs Bellman felt he was at times during her interview. ”

46. Dr Lucey summarised the issues on which she had been instructed to advise the court under the following headings: -

“1&2 The children’s individual needs in terms of emotional and physical support and parenting. (Samantha’s) ability to meet those needs both now and in the future.

4,3,6&7 Whether or not (Samantha) does suffer from any inherent psychological or psychiatric difficulties and if so the nature of these.

Given her own reporting of her health difficulties, taking into consideration her medical history, (Samantha’s) ability to cope with her own health and psychological difficulties and the impact this has had upon her parenting of CJ and Charlie.

Whether or not (Samantha) will be able to address those difficulties through counselling and if so the type and duration of the counselling that is required. Given the timescale required for counselling, whether any necessary change could be effected in a timescale available to the boys.

5 The impact these have had on her parenting or are likely to have on her future ability to parent.

8&9 Given (Samantha’s) history of personal relationships, to examine the nature of (Samantha’s) relationship with Justin Danes and to assess her ability to make relationships which are safe for her children. The assessment demonstrates that to pursue the relationship with Justin Danes is not in the best interests of the children, to assess her ability to separate from him emotionally in order to safeguard her children.

10&12 To assess (Samantha’s) ability to conduct adult relationships in general, in a stable way, with particular reference to her ability to manage anger and

conflictual relationships. The ability for change to be effected in a timescale available to the children.

- 11 To identify any services or therapeutic input which would be available to her to effect change and the timescale required for that.
- 13 To assess (Samantha's) ability to work with professionals and supportive agencies and individuals in the short and long term and the impact upon the children of that. ”

47. I do not propose to set out all Dr Lucey's conclusions. It is, for present purposes sufficient to give her conclusions to questions 15&16 as she had identified them.

“15&16 In my view (Samantha) cannot care for CJ and Charlie and it would be in their interest to be cared for elsewhere. I support the concept of keeping the children together and seeking a joint placement. I appreciate this means removal from Aunt Sabrina. In this view I am mindful of the kinship assessment which was detailed and thorough. My experience of aunt Sabrina was that she is a woman who has more fully survived her childhood and adolescence and that her personal maturity is greater. However, I was left with anxiety about the actual quality of care provided to CJ (the pseudo maturity, the level of stimulation) and the priority given to his needs (health, nursery, sibling contact etc). In the end it is my view that caring for CJ and Skye would probably be too much for Aunt Sabrina given the needs of the child as outlined and the level of priority he requires and that she and Warren should be allowed to focus on their own child. I also agree with (the guardian) about the potential risks within the family dynamics.”

48. At the meeting of experts on 4 January 2005, the principal question under discussion was whether CJ and Charlie should be placed together or apart. The conclusion was that there existed a need for clear, swift planning, and that whilst placement together was the preferred option, it was clear that, in reality, the prospects of a suitable placement were remote. Adoption was, however, in the interests of both boys with indirect contact with family members.
49. It was as a result of the concerns expressed by both Dr. Freedman and Dr. Lucey, and by Lewisham's social workers, that Sabrina went to see Dr. McClintock. He had

copies of the relevant court documentation, and in a thorough report he expressed his conclusions in the following terms: -

“I consider that (Sabrina) does not have any mental health difficulties and she does not have a personality disorder. She seems to have escaped the difficulties in life which have been shown by her sister and I do not consider that she needs any form of medical or psychotherapeutic help.

I have been asked to assess her background history and how this has impacted on her. I could find no discernible psychological damage or mental health difficulties. She states that she does not recall her history and I have been asked about the significance of this in terms of her personality and functioning. I think it is probably correct that (Sabrina) does not recall any of these unpleasant events but it is not necessary for her to do so in order for these to have had an effect on her. A Child Psychiatrist would state that children are at their most emotionally vulnerable during this period and the overall atmosphere in which the family lived must have been upsetting for (Sabrina). However that impact has not been severe enough to cause significant behavioural difficulties which would warrant for example the diagnosis of a personality disorder. I was however concerned about the self-harm behaviour at the age of 15 years. The scars on her arms are noteworthy, they were significant wounds requiring stitches and although (Sabrina) does not articulate this clearly, I believe they were a product of growing up in an environment with a troubled sibling. (Sabrina) articulates that her sister Samantha was receiving more attention than her and that this was a cry for attention on her part. I am undecided about how this impacts, if at all, on the current nature of the relationship between (Sabrina) and her sibling.

I have been asked to consider if (Sabrina’s) mental health problems would impact on her ability to provide positive parenting for CJ. Even in the Letter of Instruction CJ is described as a “troubled child who will need optimum parenting”. Essentially even in the absence of personality difficulties or mental health problems, (Sabrina) may still not be able to provide this optimum care which CJ needs. I was struck by the different ways in which CJ is portrayed by (Sabrina) and in the professional reports. The latter describes CJ as being a troubled child who will need psychotherapy and even as an adult Psychiatrist I realise that this is a measure of the extent of his difficulties.”

Mr. Warren Oliver

50. Before turning to the oral evidence, it is necessary to say a short word about Sabrina's partner, Mr. Warren Oliver, the father of her child Skye. Mr. Oliver filed a statement and gave evidence to the judge. He was not in employment, although training for employment as a fork lift truck driver. He plainly had learning difficulties. He was, however, supportive of Sabrina's position. To anticipate, the judge described him in the following terms: -

“Mr. Oliver is not as articulate as (Sabrina). It is clear that she does not have to look after him except in the way that (a) woman living with a man has to look after him, and that his handicap is reading. Mr. Oliver appears as honest and supportive of (Sabrina). He is training for work, has said that he intends to work full time and if that is so he would be a good role model for CJ.”

The oral evidence

51. We have been provided with transcripts of the hearing. The only passage which does not appear to have been transcribed is the point at which – as appears from her judgment - the judge caused Sabrina and Mr. Warren to be recalled to put to them what Dr. Freedman and Dr. Lucey had said about CJ's need for therapy.
52. Although the judge herself recorded her own summary of the oral evidence, it is, I think, nonetheless necessary to cite substantial extracts from the evidence of Dr. Freedman and Dr. Lucey. Dr. McClintock was not required to give oral evidence. Mr. Howling helpfully identified for us the many passages in the transcripts where the two doctors re-iterated their views. It is, moreover, clear beyond peradventure that those views were expressed in the knowledge that, since they had reported, Sabrina had accepted that CJ was a child who needed psychotherapeutic assistance. In her evidence in chief, Dr Freedman described the traumatic start which CJ had had in life, and re-iterated the likely effect on CJ of therapy: -

“One of the things that we would anticipate would happen in the course of therapy would be a kind of re-living of some of his experiences. He may become symptomatic; he may become more clingy and dependent. I am now talking about the things that his carers will notice. His behaviour may become more disturbed. We would not expect that these will be permanent changes in him, but they may be phases that he will go through”.

53. Dr Freedman made it clear that she was looking at therapy of the frequency of at least once a week for a period of a minimum of two years. CJ was “a very damaged child” and more damaged than most children seen by Dr. Freedman. Crucial to the success of the therapy was, of course, a carer for CJ who could support him throughout the therapy, and that was something which Dr. Freedman did not think Sabrina could do. In cross-examination by Samantha, Dr. Freedman repeated her basic thesis: -

“CJ needs to be looked after by carers who can understand the difficult experiences that he has been through, and part of the way that one does that is by being in touch with the difficulties in one’s own life. That is what concerns me about Sabrina’s ability to care for CJ in the way that he will need to be cared for over the long term.....

I think it is right to say that Sabrina has given CJ a great deal. We said that in our report, and I am happy to say it again, but I think that what lies ahead for CJ in the rest of his childhood would exceed the capacities of what Sabrina and Warren are able to give him....

I think that to leave CJ in a placement where I feel quite convinced that his carers will not be able to meet his long term needs would be damaging and wrong. I think there is quite a good chance that with enough support, CJ can make the transition first to a bridging placement and then to a permanent placement. I would not be recommending this action to the court if I did not think that CJ could be in great difficulty in his future life if he remains where he is as present”.

54. After Dr. Freedman had repeated that she thought it would be very difficult for CJ to have psychotherapy whilst living with Sabrina and Warren, the judge intervened: -

Q: JUDGE PEARLMAN:

“Just tell me why would it be difficult for him to have psychotherapy living with Sabrina W and Mr Oliver?

A. Your Honour, I think that Sabrina and Warren’s ability to recognise the difficulties that CJ has, and the experiences that he would be going through as he goes through his psychotherapy and to provide a robust support to him as he goes through those experiences, will be very limited. I think that particularly the fact that Sabrina W has blocked out her own childhood will make it extremely difficult for her to provide what a child needs in the way of support from a carer

whilst going through psychotherapy. In other words, if I put this in a more graphic way, whenever CJ bumps up against issues that potentially resonate with the difficulties that Sabrina has blocked out, it is going to be difficult for her if not impossible to allow him to do the work that he needs to do because it will make her so uncomfortable.”

55. Dr Freedman was then cross-examined by Miss DeZonie, for Sabrina. During the course of that cross-examination, the following exchange occurred: -

“(Q) The point I am getting at, Dr Freedman, is that as time moves on, the improvements seem to be getting better. Where do you say it is going to stop. Where do you say that the plateau comes that is going to be so damaging for this little boy? (A) I don’t think we are talking at this stage about him being more damaged, but rather him not being able to recover adequately from the damage that has already been done to him. I think there is a risk in adolescence that it will begin to tip more into damage being done because I think this boy is going to present challenging behaviours to his carers in adolescence, and I think it will require a great degree of emotional maturity and flexibility for carers not to simply kick him out when he enters his adolescence. So there are two stages I am talking about: one is the rest of his young childhood when I think that what CJ most needs is to have an opportunity to have psychotherapy, to be in a secure home environment and to make as great a degree of recovery as he is able to make will then, I hope, hold him in good enough stead, and hold his carers in good enough stead so that by the time he reaches the challenges of adolescence they may be able to see it through. I think it would be very damaging for this child to be in a setting where he finds himself kicked out in his adolescence, and I think that is a real risk.

(Q) Are you suggesting that Sabrina and her partner would kick this child out? (A) I am suggesting that any carer who does not have the necessary depth of emotional maturity would probably find it impossible to continue to care for the challenging behaviour that this child is prone to showing by adolescence.

(Q) But that presupposes that there is no support package in place. What I want to ask you is this. Why should not psychotherapy begin if, as we now know, both Sabrina W and Warren Oliver recognise – and Sabrina W was quite forceful yesterday in saying that she had been persuaded by Dr McClintock who had persuaded her that it was for CJ’s benefit. It was that and focusing on the benefit to CJ which has made her shift her position. Why should not

that support package which is integral to, begin with CJ remaining in his current placement. (A) What I have already said in my evidence is that I think that CJ will find it, and his therapist will find it, more difficult for him to engage properly in psychotherapy if what he finds at home is a kind of mixed message: a message that on the one hand says, yes, we now know what you need is psychotherapy but at the same time says these issues are no go areas. This family does not think about these issues because this family cannot tolerate these issues. That is the problem that the psychotherapy would find itself up against. It is one thing to say that Sabrina and Warren now agree that they should take this child physically from home to psychotherapy appointments. It is quite another thing to say can they see it through the long haul and offer him the support that he would need to get into these very difficult issues. My advice to the court is that I do not think it is going to work.”

56. That Dr Freedman’s advice remained the same is demonstrated by an exchange with Miss DeZonie towards the end of her cross-examination: -

“(Q) What we know about Sabrina W, however, is that she has formed a stable relationship with Mr Oliver which has endured six years. There is no suggestion in what they have been through in the last ten months that that is fragile or breaking up. There is no concerns at all about her care of Skye; not on the child protection register; no involvement with Social Services; no concerns from any outside agency. I am afraid I am not quite understanding why that should not be seen as something so positive that she should be entrusted to do what is best for CJ. (A) I think it is about the tenth time today I have said it, but I will say it again, your Honour. This child has quite sophisticated needs of a carer and a carer who has blocked out her childhood is not in a position to meet the needs of this child because he will present to her routinely aspects of her own experience that she does not feel able to face and that is a recipe for disaster.”

57. Finally, the following extensive exchange took place between Dr. Freedman and the judge: -

“JUDGE PEARLMAN: Yes. Tell me this. Have I got it correctly that broadly speaking I have the tenor of your recommendation which is that in your opinion Sabrina W and

Warren Oliver cannot in the long term offer CJ the parenting he will need. I have got that right. (A) Yes.

(Q) But then I think you went on and said that you seem to divide his needs into two periods: what you have described as the rest of his young childhood and his period of adolescence. Have I got that right or wrong? (A) Yes, that is right.

(Q) Looking at stage 1, the rest of his young childhood, in your view, do you think that Sabrina W and Warren Oliver can afford CJ good enough parenting in that first period. (A) No, your honour, I don't.

(Q) In what way in particular other than you have said. (A) Your Honour, it is what I have already said about their ability to support him through the treatment that he needs.

(Q) Of course, since you wrote your report and today, Sabrina W and Warren Oliver have read your report. They have grown a little older and they have told me – and, of course, it is a matter for me to decide whether they are sincere or whether it is tactical – that having considered your report and all the reports, they are now willing to seek and assist CJ to receive therapeutic help. Sabrina W has said that she is willing to consider it for herself. It is implicit from the tenor of your evidence that you do not think that that is enough: the fact that they have read your report and considered it, is enough to give you the reassurance you need. I want to ask you why because they are young people and without being any form of a psychiatrist, one thing I have found is that young people grow older and mature and learn. So my question really is why are either of these two young people so different from the average that you think that they will be and are unable to learn and adapt as they get older to CJ's growing needs as they become available? (A) Your Honour, my difficulty is about Sabrina's quite total warding off of her own childhood experience. I think that is a very worrying feature, and I think that for her to begin to approach it, as I hope she will, regardless of what your decision is. I think she is going to find it extremely difficult. I think she is going to have times when she is very distressed, and I think that it really comes too late for CJ. CJ needs to be getting on with his treatment straightaway rather than being in the position of waiting a few years to see if his aunt is going to make enough progress to be able to help him.

(Q) I understand that, but looking at the reality of what happens when a child goes into care – and we know with CJ he will go to foster parents (I suppose he will be there for a minimum of 6-9 months). I think Miss Page gave evidence about the length of time, but I am sure somebody will tell me –

MR. HOWLING: Six months.

JUDGE PEARLMAN: Six months. Then, if the Local Authority are lucky and CJ is lucky, they will find what they hope will be his final placement, and if that takes place in the next 12 months, I suppose that any treatment or therapy, call it what you will, will not really start until he is settled in his final placement, so that in any event, is it right to say that what CJ needs to help him cannot happen, cannot begin to happen, for a period probably of at least 12 months. Forget NHS waiting lists and all the rest. I am just assessing the position from the point of view of what is always told to me in these courts. Just help me about that. Am I right or wrong? (A) I think you are both right and wrong, if you will permit me to say that. I think that you are right that time is in certain ways against us. I think you are right that resources are limited, but where I would differ with you is that I do not think that putting CJ into families both on a bridging basis and on a permanent basis where there is more maturity, more willingness to face up to difficulties, is not going to help him in itself. I think it will help him. I think it will help him enormously, and I think that whilst that is not psychotherapy, I think it will be helpful to him. When I put that next to the possibility that Sabrina may engage in her own personal work which is going to take a very long time in which she is going to be up against the difficulties of her mother and her sister in a sense intruding into her life and into her efforts to change, I think that looks like a less secure possibility for CJ's continued growth than an alternative placement does."

58. When Dr. Lucey was called to give evidence, she described CJ in the following terms:

"I think the (CJ) that I saw was quite an aloof, unengaged child. It improved later on and when he was tired he did sit beside Aunt Sabrina, and I commented on that in my account of that visit, but I was struck by how unengaged he was for the rest of the time. In terms of attachment, I would say insecure and avoidant."

59. Dr Lucey was asked whether she had a different perspective from Dr. Freedman. She replied: -

"I can see where Dr Freedman is coming from and she will say a parent needs a certain psychological maturity, a parent needs a certain capacity to deal with their own histories, their experiences, what has happened to them without blocking out, and so she has a conversation about therapy. I am worried about the parenting capacity of Sabrina to actually connect emotionally with this boy and to be able to work out what is on

his mind when he behaves in (a), (b) or (c) ways. So for me the issue is the quality of the parenting, and the subsidiary issue of whether any therapeutic input can help with that, but I didn't hear a lot about that this afternoon."

60. On the views expressed by Sabrina and Warren in relation to therapy, Dr. Lucey was asked: -

"(Q) One further question arising out of the issue of therapy. The suggestion is that Sabrina W and Warren Oliver have had a conversion on the road to Damascus and now understand the need for psychotherapy. If they are genuine in that movement, does that in any way impact on the conclusions you have reached? (A) I am always cautious about court room conversions, if that is what it is, and the way that you are saying. Your Honour, that is for you to decide about the sincerity of it. If it is recent, and even if it is sincere, how long will it last? Is the decision that is appropriate really based on new understanding about what that really means: About really facing her history? The damage she has endured? Really facing that? As she starts to look after and parent (CJ) for the rest of his childhood. Does she know what she is saying yes to?"

61. Cross-examined by Samantha, Dr Lucey accepted that Sabrina and Warren had been committed carers, but did not agree that they were providing good quality, stable parenting. Cross-examined by Miss DeZonie, Dr Lucey said: -

"The issue here is the quality of Sabrina's to make an emotional link with this boy so that she, when he needs her to decode his emotional state, can do it. So when he needs her to be the mature adult sensible person who explains and helps him understand why he feels confused, angry, aroused, hostile, rejecting, furious, she is the one who will actually be able to help him make sense of those feelings and do something about them. Can she do that?"

62. When it was again put to Dr. Lucey that Sabrina had made significant progress because it was demonstrated in the progress CJ himself had made, Dr. Lucey replied:

"(A) I accept the youth argument. She is very young and she has done her best, and I think there is potential in the rest of her life to mature and grow. I appreciate that argument. I accept that one. I think she has done a good job with him and is committed to him and takes it seriously and responsibly. There are gaps and blips, but overall she has tried very hard. I accept that she has survived a lot herself. But what I cannot accept is that we can say that (CJ) is going to be the one that is the test to

see if in fact she can make those changes because the woman I met had little psychological mind. He needs a parent with a psychological mind. This argument about she has done a lot, give her the chance is a test to see whether she can actually make the rest of it, and I do not have the confidence that she can, and I have not heard from others, and I have not heard from Dr Freedman that she thinks that she can.

There has been no updating ---(A) Dr McClintock had conversations with Sabrina. Those same conversations were about trying to understand what people are worried about. It is not about providing a dinner or making a bed, or buying him new pyjamas; it is actually about understanding his emotional state and helping him too, and she has to understand her own first, and she has to have skills for herself which she will need for him.”

63. Slightly later, Sabrina’s change of stance is discussed in the following exchange: -

“Can I suggest to you in fact it was not a court room conversion; it was on the seat of Mr McClintock’s advice before he wrote his report where he was very clear about the benefits and the need for psychotherapy that the couple, certainly Ms W, discussed it with Mr Oliver’s mother who is a foster carer. It was admittedly a slow process of understanding, but people learn, don’t they? (A) The court will have to decide if it is tactical. I think that is a fair way of putting it. It does not seem from Dr McClintock's report that he left that meeting with a sense that there had been some meeting of minds about the need. His report is quite bleak about it. He did not leave that meeting thinking progress had been made, that understanding had been reached between them about the need for it. It may have happened afterwards. I am trying to shift the focus of the debate, because I think the issue is parenting quality and not about who needs the therapy for what. It is actually about the emotional connectiveness that a parent needs to make to a child in order to help them deal with their feelings. A parent has to be able to do that if they are going to reach maturity. It is a hard part of the task, but it is the bit beyond the food and the clothing that is very difficult to achieve, and that is why a lot of parents struggle.”

64. Finally, at the very end of her evidence, the following exchange occurs: -

“(A) Are you saying what Dr Freedman said – and it is my words – you know what is in her report and what she has said

because you were here, they have done and are doing a very good job now but they do not have (when I say “they” I mean Sabrina W and Warren Oliver) the capacity to parent him in the future. Do you agree with that last remark of hers: (A) I do not think they have it now. I think they are doing elements of it now as best as they possibly can and as they understand the job, they are doing it.

(Q) You think they do? (A) As they understand it, which is about a safe world with no domestic violence, which is about food, which is about getting him to school, which is about keeping him clean. They are doing that, but that is not what we are talking about; we are talking about an emotional capacity which I do not think they have got now. In a sense, I started out by saying I found this is a difficult case. I think it is very finely balanced, I think it is a very difficult decision, but actually I do not think it is good enough now; I do not think it is just about the future of that domain of emotional care; it is not good enough now. On the other domains, yes, they are good enough.”

The judgment

65. The evidence and speeches concluded on Friday 18 February 2005, and the judge gave judgment at 2.00pm on Monday 21 February. The judge summarised the respective cases of the local authority and Sabrina in the following way: -

“It states that the foster carers, were experienced foster carers, and that they would help CJ’s needs for therapy to be explored during his placement so as to prepare him for his new family. The plan for the moving of CJ is for him to have two meetings with his foster parents, one in the home of his aunt and one in the home of the foster parents without the aunt, and that he be moved no later than 24th February when his care worker leaves the employ of the local authority. That care plan was subjected to detailed cross-examination and criticism in court, and I will refer to it hereafter.

On the other hand, the aunt seeks a residence order, coupled with or without a supervision order or a straight supervision order to the local authority providing that CJ remains with her. That is supported by the mother. The aunt proposed that there should be no contact with the mother or the grandmother until CJ’s therapy was concluded. During the hearing it became apparent that the aunt now supported therapeutic work for CJ and would seek it if CJ remained living with her. It is right to say, therefore, that the reports of the three experts, Dr Freedman, Dr Lucey and Dr McClintock, were on the basis that

the aunt saw no reason for concern about CJ, or any need for therapeutic work for CJ. It is understandable in those circumstances that none of them have or had interviewed the aunt after she had read and considered their reports. Dr Freedman did her work in October 2004, and Dr Lucey visited and did her work in September 2004.”

66. After setting out the threshold criteria (see paragraph 33 above) the judge summarised the oral evidence. Nothing much turns on her précis of the evidence given by Christie Bell, Jane Page and Ms Sadler, all of whom, of course, supported the local authority’s case.
67. The judge summarised the evidence of Dr. Freedman and Dr Lucey in paragraphs 19 to 21 of her judgment. These paragraphs must, I think, be set out in full: -

“Next I heard from Dr Judith Freedman of the Portman Clinic in addition to her report. She stated that the issues for the child were likely to be distressing at times, and CJ’s behaviour might become disturbed. The therapy she envisaged was at least once a week for about two years. CJ, she said, was a very damaged child, more damaged than most. She stated there was a lot of evidence to suggest the aunt too had sustained an emotional and traumatic childhood. Dr Freedman found it telling that the aunt remembered none of it, but she said the aunt was as damaged as CJ and the mother are. She, Dr Freedman, did not know what the effect would be on CJ if he was moved. He would find it difficult to be parted from his aunt. The aunt had given CJ a great deal. What he needed from the aunt would exceed what the aunt could give CJ. Moving CJ, she said, would not destroy him. To leave him in this placement where his long term needs cannot be met was not in his interests. Dr Freedman stated that the aunt had done a very good job and CJ had made improvements whilst in the aunt’s care. She said that if she had felt that they – meaning the aunt and her partner, Mr Oliver and CJ – could work together then she would leave CJ there. She described the aunt and Mr Oliver as both being emotionally limited. She said the aunt could not be faulted in what she had offered so far. She had done a remarkable job. She said that because there would be difficulties, it is not right to leave CJ with his aunt. She was concerned to help CJ recover from damage done to him in the past, and she said any carer who did not have the maturity would find it difficult to cope with CJ. She said what the aunt could offer just was not good enough to meet CJ’s needs in the years to come, but the aunt and Mr Oliver had given CJ something to build on. Dr Freedman expressed her concern at the aunt not remembering her own

youth and said if the aunt could not remember then she could not protect CJ. As I said, her visits and interviews were all in October 2004.

The next witness was Dr Claire Lucey, a child and family psychiatrist from the West London Mental Health Trust. In addition to her report she said she did not disagree with Dr Freedman. She said CJ was not depressed. She would describe him as an “aloof and insecurely attached child” when she met him in September 2004. She said she was struck by how unengaged he was. She said any carers had to be able to hypothesise and ask CJ “What’s the matter?” and talk to him about his cares and worries. She questioned whether the change of mind of the aunt and Mr Oliver was permanent. CJ, she said, had had a very damaged start and would bring it into future relationships in life ahead of him. Dr Lucey said that if the aunt can do it – i.e. therapy and support of CJ for years in therapy – it would be good and okay for him to stay with the aunt, but if not then CJ should be moved now. She said if the aunt’s place is the right place on offer then leave him there, but if not accept the plan. Her recommendation to me was unequivocal and it was to move CJ now. She agreed that CJ appeared to have moved on and to have improved at school since she had met him.

She said about the aunt that when she met her, the woman she met had ‘little psychological mind’. She did not think the aunt could assist CJ in the future. She said the whole issue is about the emotional quality of parenting in the future. The aunt and Mr Oliver, she thought, just did not have the emotional capacity. She described that what was best for CJ was, in fact, a very finely balanced decision and not an easy one”.

68. The judge then spent four paragraphs summarising Dr. McClintock’s report. I cite the last two: -

“24. Then he dealt with the question of whether her mental health problems would impact on her ability to provide positive parenting for CJ, because CJ was described as a troubled child who will need optimum parenting. He stated that the aunt may still not be able to provide this optimum care which CJ needs. He was struck by the different way in which CJ was portrayed by the aunt contrasted to the professional reports. He said that it did not bode well for the future of a child who needs, according to the professionals, better than average parenting.

25. He was asked about the aunt’s ability to co-operate with professionals and to take advice. He said that, essentially, she had to take on board the totality of the concerns of professionals, and even at that late stage – it was 18th January

of this year – she disagreed with the view that CJ was a particularly troubled child. He went on:

“If she does not completely accept that he has particular needs, I think she will not be able to commit herself to delivering these needs either in terms of attendance at appointments or realising that he will need more than her own child, Skye”.

He was asked whether the aunt would require additional support in order to parent CJ, and he said, although he thought that should properly be addressed to a child and adolescent psychiatrist, he did consider it would be required. He goes on:

“I think the starting point for that extra input would need to address the aunt’s reluctance to accept the views of professionals that CJ is different from other children and needs extra help. If the extra professional input does not allow her to get past this stage then any further input would be ineffective.”

That was Dr McClintock.”

69. The judge then summarised the evidence of Samantha and Sabrina. She recorded that Sabrina had said that she now realised CJ:-

“... needed a lot of work and support in the form of psychotherapy and counselling and she said that nobody had really explained to her about damaged children and how they were and the long term effects.”

70. Slightly later on, the judge says of Sabrina: -

“She said she now accepted that CJ needed therapeutic work and said she really accepted it some time after the interview with Dr McClintock in January 2005. She said she did not know she had the right to go back to him. She said CJ should have psychotherapy as soon as possible. He needs to be settled. She discovered the delay in her area for referral to the local CAMHS team. She told me that she was learning as she went along and commented, correctly I think, “as did all parents”. She said that the nursery had said that CJ had improved dramatically since he had been with her. She said that she believed that she and Warren Oliver had helped CJ. She did not want more children. She did not accept that five hours of interviews between CJ and Dr Lucey and Dr Freedman was

sufficient for them both to come to their conclusion. She said she used to see a lot of her mum but now she found it easier to stay away. The less she saw of Mrs Philomena W, the less she, the aunt, got emotional and so she could put more effort into the two children, Skye and CJ. She said that since September her family had left her and Warren to make their own decisions about Skye and CJ.”

71. The judge then records the evidence of Mr. Oliver and recalls that after all the witnesses had given evidence, but before the guardian did so, she recalled Sabrina and Mr. Oliver:

“to find out whether, having heard the evidence of Dr Freedman and Dr Lucey, they had changed their minds and whether they thought that what CJ needed was more than they could give. Both said they still wanted him to remain with them and thought they could provide him with what was needed by way of therapeutic support.”

72. The judge then records the evidence of the guardian, who in turn had recorded his admiration for Sabrina, who loved CJ to bits. However, he had re-iterated the theme which ran through the entirety of the professional evidence: Sabrina and Mr. Oliver did not have the ability to deal with a child of CJ’s complexity because CJ needed very special parenting. In paragraph 35, the judge summarised the guardian’s views in the following way: -

“(The guardian) continued that CJ was stable with Sabrina, that CJ had come on emotionally whilst living with his aunt, but would have come on even more if he had been moved, as he recommended to me in October 2004. He did not think that the aunt and Mr Oliver had the ability to cope on an emotional level with CJ. He thought that CJ would cope with two more moves. He said all he could do was to go by the experts. It was the aunt and Mr Oliver’s deep level of insight that he queried and how deep it was. He said that in his view there were risks down both routes, but in his opinion the risks of CJ remaining where he was with the aunt were greater than CJ having two more moves, which would happen if I accepted the local authority care plan.”

73. The judge then gave her assessment of the witnesses. They were all, she said, with the exception of Samantha, truthful and reliable. Sabrina and Mr. Oliver, in particular,

were truthful, reliable and trusting. She pointed out that they were both very young. She criticised Mr. Howling's description of their conversion to the need for therapy for CJ as damascene. She said: -

“I think that was wrong, I think these are two young people who I accept have found it perhaps difficult to understand what is required of them. They have learned in so far as the physical and day to day needs of CJ are concerned. They are, I find, genuine in saying that they are committed to helping CJ if they are given the chance in any way possible.”

74. The judge then made a very significant observation in paragraph 37 of her judgment. She said: -

“I have to say that after the evidence and because of the order in which the witnesses were called, I was tempted to adjourn the hearing and request further assessments and reports from Dr Freedman, Lucey and McClintock on the aunt and her capacity to deal with and parent CJ in the future and in the long term because of her late acceptance of the need for CJ to have therapy. Also, had I done that, I would have requested the local authority to find more experienced foster carers. In looking at that possibility, I looked at s. 1(2) of the Children Act, which sets out that the court should have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child, and in my judgment, if I had put the case back for reports, all that would have achieved would be a delay in the decision making process which would not have been in CJ's interest.”

75. I have to say that in my judgment it is a matter of considerable regret that the judge did not follow her judicial instinct and adjourn the hearing for the purpose she describes. In the time-scale of what has in fact occurred it would not have caused undue delay. Moreover, the delay would have been purposive. In addition, of course, there is abundant authority for the proposition that a judge should not make a final decision in care proceedings until all the facts are known, and the court has before it all the information it requires upon which to make a fully informed decision. However, the judge's reasons for carrying on are entirely understandable, and any criticism of them would be academic.

76. The judge began her analysis by addressing what she described as the two pertinent issues identified by counsel for the guardian. These were: -

“the aunt's willingness to accept CJ's needs and his need of therapeutic work, and she put the question, “Will it be lasting

and can it be converted into action, and willingness to co-operate last?” I have to say that, in my judgment, the answer to that is “yes”. I am impressed by Miss DeZonie telling me that the aunt, of her own volition, had ascertained the waiting time for referral to CAMHS.

The next question is, can the aunt keep CJ’s needs paramount? Of course, that is an important point with regard to the aunt’s closeness to her own family, because she and her sister were subject to a difficult upbringing and the functions of that family are such that CJ needs to be protected from them. That is agreed.

I find, first of all, that the aunt’s willingness to accept CJ’s needs and therapeutic help are genuine and lasting and she will be able to convert her words into action. She is 21, has had one relationship and there are no concerns about Skye. It is obvious that in the summer of 2004 she let CJ down, but it is quite apparent that, since (the guardian) intervened and since the October hearing, she has kept to her word, put her words into action and CJ has improved immensely. The position I find has changed drastically. I find that she did not have enough explanation of CJ’s emotional and therapeutic needs until comparatively shortly before the hearing, and it is to her credit that at this late stage she accepts the need for therapeutic help for CJ probably for many years to come. I have already said that I find that her acceptance is genuine. I accept that she and Mr Oliver are learning fast, learning as they go, and are on a steep learning curve. Mr Vobe stated they are truthful and reliable and I agree.”

77. The fact that Sabrina was genuine and had accepted the need for therapeutic help for CJ for many years to come left unaddressed the combined opinions of Dr Freedman, Dr Lucey and the guardian that Sabrina lacked the parenting capacity to care for a child as damaged as CJ in the long term. It was, accordingly, essential for the judge to address the expert evidence. She did so in four paragraphs of her judgment, namely 43, 46, 47 and 48. This is what she said:

“43. In so far as her recollection of her past is concerned, I prefer what Dr McClintock says about that on pp.8 and 9 of his report to what Dr Freedman has said in that respect. She has provided security and love for CJ.....

46. I make it plain, and I think everyone in this court is aware, that I agree with Dr Lucey that this is a difficult and finely balanced decision. I find also that Dr Lucey and Dr Freedman, for all their experience and qualifications, were

hampered by the aunt failing to commit herself to the need for CJ to have therapy until as late as she did. Dr Lucey and Dr Freedman met the aunt and CJ in September and October 2004. Four months have passed, a long time in the life of CJ and a long time in the life of even a 21 year old.

47. In determining what is in the best interests of CJ, I balance, first of all, the care plan which will involve two further moves. It will involve distress to CJ who will, in effect, be removed from his aunt and the only social worker he knows and go into a totally strange family. He will be going to foster carers who are described by Mr Vobe, a very experienced guardian, as “probably good enough”, plus a local authority support package and the absence of the trauma from the maternal family. Against that, I balance leaving CJ with his aunt. It is agreed that there has been no harm at present being done to CJ, who has settled down considerably at school and who loves his aunt and her family. I accept, as Miss de Zonie submitted, that I have to balance the unknown risk of moving CJ against the known risk of leaving CJ where he is. It is rare not to accept the recommendation of two experts such as Dr Freedman and Dr Lucey. I find that their opinions were formed before the aunt had accepted the need for CJ to have therapy, and as I said, she is young and learning fast. Mr Vobe’s evidence was that there were risks in both cases, but it was his opinion that the risks of CJ remaining with the aunt were greater than removing CJ.

48. When I consider all the evidence and balance all the matters, I conclude that I disagree with Mr Vobe’s final recommendations that the greater risk to CJ would be remaining with his aunt rather than approving the care plan.”

78. In between paragraphs 43 and 46, the judge expresses her anxiety about Sabrina’s capacity to separate CJ from Samantha and Philomena, but decides that, so far, she had done so, and that with advice from “the therapy team” would be able to continue to do so. She also gives her assessment of Mr. Oliver: see paragraph 50 above. There is no further assessment of his parenting capacity.

79. In paragraph 49 the judge dismisses the alternative put forward by the local authority as not in CJ’s best interests (considering a child of CJ’s needs), and there is a final passing reference to Dr. Lucey who is reported as stating: “If the aunt (Sabrina) can do it, i.e. provide support for CJ in therapy then “it would be all right for CJ to remain with the aunt”.

80. The judge’s conclusion is expressed in paragraph 50 thus: -

“I, therefore, conclude, having done the balancing act I have to, and in considering all the evidence, that there are more risks

than benefits to CJ in the long-term as well as in the short-term if I were to approve the care plan and make a care order. I, therefore, do not approve this care plan for CJ.”

81. The judge then regrets the fact that the manner in which care proceedings operate prevents her from requiring the local authority to provide Sabrina with the support package she requires. That comment strikes a responsive echo in the heart of any judge who has heard care proceedings. However, the local authority’s position was entirely legitimate. It was acting on expert advice supported by the guardian. The judge was taking a course with which it strongly disagreed, and which it believed to be contrary to the interests of the child. Furthermore, it was technically correct. The conclusion of the care proceedings by a residence order in favour of Sabrina, who lived in a different borough, terminated Lewisham’s responsibility for CJ.

Analysis

82. Although the point at which I have now arrived could, no doubt, have been reached more succinctly and without the level of quotation from the papers which I have allowed myself, the critical flaw in the judge’s reasoning is, I think, exposed. She was disagreeing with the analysis of two psychiatric experts and the advice of the guardian. Self-evidently, she needed to explain why she felt able to do so. In particular, she was dissenting from a joint opinion that Sabrina lacked the parental capacity to care for CJ in the long term. What were her reasons for rejecting the experts’ advice?
83. The answer has to be found in paragraphs 43, 46 and 47 of the judgment, which I have set out at paragraph 77 above. I will take each in turn.
84. As far as paragraph 43 is concerned, I have set out Dr. McClintock’s opinion in paragraph 49 above. I confess to some difficulty in understanding the point the judge is making. Dr. McClintock’s view was that Sabrina did not have any mental health difficulties and did not have a personality disorder. Her appalling childhood experiences had not affected her in the way they had affected Samantha, and Sabrina did not need any medical or psychotherapeutic treatment.
85. Dr. Freedman and Dr. Lucey, however, were making a quite different point. Their point was that in order to assist CJ through therapy Sabrina had to have an

appreciation of CJ's experiences and the effect of therapy on him. As Dr. Freedman put it in answer to cross-examination by Samantha in one of the extracts cited above: -

“What I am saying is that we have indications, the most important of which is that your sister does not remember her childhood. We have indications that she suffered a traumatic childhood, and the fact that she does not remember it, does not wish to remember it, handicaps her in her care of children because she has an area of her experience that she has closed herself off do. I am not by any means saying that anyone who had a traumatic childhood cannot parent children. What I am saying is that it is a real problem for (your) sister that she has closed herself off to a part of her experience. That is what worries me.”

86. On this point, there was no real disagreement between the experts. Dr. McClintock acknowledged that Sabrina's lack of recall of the unpleasant events of her childhood did not mean that they had not had any effect on her – hence his concern about the evidence of self-harm when she was 15. On Sabrina's capacity to parent CJ, Dr. McClintock was very concerned about her rosy perception of him when compared to the professionals' assessments. There is little if anything in paragraphs 2 to 5 of Dr. McClintock's opinion with which Dr. Freedman and Dr. Lucey disagreed, and in so far as any areas discussed were within the province of a child psychiatrist (Dr Lucey) Dr. McClintock made it clear that he would defer to that psychiatrist's opinion.
87. I therefore do not think that any weight can be given to paragraph 43 in support of the judge's overall conclusion.
88. As to paragraph 46 (also set out at paragraph 77 above) the judge's reason in this paragraph for rejecting the evidence of Dr. Freedman and Dr. Lucy appears to be that their assessments of Sabrina were defective because when they assessed her she had not committed herself to CJ having therapy. In my judgment, this reasoning is undermined by two straightforward considerations. Firstly, it does not address the experts' fundamental conclusion, which (for the reasons they gave) was that Sabrina lacked the parental capacity successfully to care for CJ. Secondly, it ignores the fact that both Dr. Freedman and Dr. Lucey adhered to their opinion about Sabrina's parental capacity after being informed of and cross-examined about her acceptance of therapy for CJ. In these circumstances, an analysis of their evidence under cross-examination seems to me a pre-requisite of any rejection of it by the judge. No such analysis appears in the judgment.
89. The judge makes the same point, without any further elaboration when, in paragraph 47, she acknowledges that it is rare not to accept the recommendations of two experts

such as Dr. Freedman and Dr. Lucey. That acknowledgement is not, however, in my judgment an explanation, and the same objection to her conclusion arises.

90. Finally, the only direct reference to parental capacity appears in paragraph 49 when the judge quotes from her note of Dr. Lucey's evidence. I have to say I cannot find that quotation in the transcript of Dr. Lucey's evidence, but in any event, the point of criticism is the same. Dr. Lucey was not saying "the aunt can do it": her evidence was the reverse. The need for the judge to explain why she disagreed remains.
91. I am therefore left with the unhappy conclusion that the judge has wholly failed to explain the basis upon which she rejects the evidence of Dr. Freedman, Dr. Lucey and the guardian. The point goes to the very heart of the case, because if the judge had accepted the expert and professional evidence, the almost inevitable consequence would have been that it was in CJ's best interests to be removed from Sabrina's care under a care order. It is for this reason, in my judgment, that the judge's decision simply cannot stand.
92. Judge Pearlman is a judge of enormous experience in children's cases. I part company from her with reluctance and anxiety. A judge of her experience is entitled not to accept expert evidence, and is entitled to depart from the views of the guardian. But self-evidently, and as I have already said, a judge must give good reasons for taking such a course – the more so when the expert and professional evidence is so powerful.
93. I would therefore allow the appeal and set aside the order.

Outcome

94. This, in my judgment, is the most difficult and anxious part of the case, and I confess that my mind has wavered in relation to it.
95. On one level, it would be easy to accept Lewisham's argument and make the care order which it says the judge should have made. There is a simplicity and a logic to that outcome which is intellectually attractive. Foster parents have been found. The fact that CJ has to move twice is due to Sabrina's refusal to contemplate his ordered movement into an adoptive placement.
96. Against that outcome, however, there seems to me to be a series of factors. Firstly, the course proposed by the judge, had it been appropriately reasoned through, might well have survived an appeal by Lewisham. Sabrina had bucked the family trend. She was living in a stable relationship with a supportive partner. She had provided CJ with the longest period of stability in his short life. She had come round to psychotherapy for him. With a well structured package of support, it might well be arguable that the risks to CJ of removal from her care outweighed the risks of leaving him there.
97. Furthermore, more than three months have passed since the judge gave judgment. During those three months, CJ has remained with Sabrina. We have no reason to think he is not going to school; and the environment in which he is living appears to have

remained stable. Sabrina has not been provided with a package of support, but she had not been idle. She had done her best to obtain psychotherapy for CJ, even if she has had to do it on her own.

98. This case is not, of course, about Sabrina. It is about CJ. Sabrina's primary duty must be to her own child Skye. At the same time, I cannot ignore the fact that Sabrina remains CJ's only chance of being brought up by a blood relation.
99. By a narrow margin, I have come to the conclusion that this court should not impose closure on the case by making a care order. I have come to the conclusion that before a final decision is reached, the judge should be given the opportunity to reconsider her decision in the light of this judgment and of a further, short investigation by Dr. Lucey, if she is available, and the guardian.
100. We were told at the bar that if we wished Dr. Freedman to re-visit the case, we would have to wait until September for a further report from her. On that basis, we would be looking at a further hearing before the judge in the late autumn, or even the New Year. That time-scale is not acceptable.
101. In my judgment, Dr. Lucey is the appropriate expert to revisit the case and advise the judge on the current position. I am conscious that Dr. Lucey has expressed a firm view, whilst acknowledging that the case was finely balanced. She is, however, plainly an expert of complete professional integrity, and one whom I would expect to advise the judge if her view had changed or if circumstances now prompted a different result. This case, after all, is not about professional, or even judicial amour-propre: it is about the welfare of CJ.
102. I would expect the parties, and Sabrina in particular, to co-operate with Dr. Lucey and the guardian in their further enquiries. I would also expect Bromley to complete its core assessment and identify the package of support it would offer Sabrina were CJ to remain in her care. I would want the case to be heard by the judge if possible in either September or October 2005.
103. I would invite submissions from counsel as to both the time-table and any additional evidence which any party would wish to call. Before this judgment is handed down, I would like the guardian and the local authority to make enquiries of Dr. Lucey's availability to undertake the review and give evidence.
104. I would also invite submissions as to CJ's status pending the review hearing. My provisional view is that this court should make an interim care order in favour of Lewisham. That would, however, have to be on the clear basis that pending the review, CJ would continue to live with Sabrina and would not be removed from her care save in case of emergency. I think it important, for obvious reasons, that Lewisham remain in the case, and that the guardian also remains in post. Lewisham's retention in the case by means of an interim care order pending a final decision seems to me legitimate within section 105(6)(c) of the Children Act 1989.

105. Subject, therefore, to argument as to the details of the consequential order, which would need also to attempt to fix the date of the hearing of the review before Judge Pearlman, I would allow this appeal and set aside the judge's order.

Lord Justice Thorpe

106. I agree that this appeal must be allowed for the reasons given by my Lord. Like him I find the consequential decision the most difficult aspect of the appeal.
107. Dr. Lucey acknowledged that, although she had reached a clear conclusion, the choice between Sabrina and adoption remained very finely balanced. Judge Pearlman is a judge of very great experience and insight. She heard the oral evidence over nearly 5 days and reached the discretionary conclusion that CJ should stay with Sabrina, where he had thrived for the last 10 months despite the disruptions of his early life. There can be no doubt that Judge Pearlman alone bore the responsibility for that momentous decision. Her explanation for the decision is flawed. It does not follow that the decision itself was flawed.
108. As a matter of principle the court should not in these circumstances impose the option that the judge rejected. The principled outcome is a re-trial. However in the present case that is not an option, since there have been further hearings before Judge Pearlman and the clock cannot be reversed.
109. The management that my Lord proposes seems to me to restore the nearest equivalent to the pre trial status pending a re-appraisal by Judge Pearlman. An advantage of choosing the mechanism of a renewable interim care order is that it will enable the local authority to fast track the referral of CJ to psychotherapy. I expect to hear a clear time table for referral and commencement of psychotherapy when our judgements are handed down.