RE B (MINORS) (CARE: CONTACT: LOCAL AUTHORITY'S PLANS)

Court of Appeal

Butler-Sloss and Kennedy LJJ

17 December 1992

Care – Care orders – Two eldest children placed with foster-parents prior to adoption – Mother giving birth to boy and being placed in residential home – Marked improvements made in her care – Mother allowed to return home with boy – Mother having frequent contact with girls – Local authority wishing to terminate contact between mother and girls before adoption – Mother wishing for care order to be discharged and for girls to live with her – No assessment made of mother's ability – Whether local authority's plans able to reconsidered by court despite principle in A v Liverpool City Council.

The mother had two girls born in 1988 and 1990, and a boy born in 1992. The mother had lived with the father of the two girls for some time and their relationship had been violent. In 1990 the children had been left unattended in a twelfth-floor flat and had subsequently been made the subject of care proceedings. The girls had been returned to their mother, but a month later had been left unattended again and they had thereafter been placed with foster-parents. Care orders had been made in respect of the girls in February 1991 and plans for their adoption had then been approved by the Adoption Panel. The mother's contact with the girls had been erratic and she had written to the girls's foster-mother in November 1991, stating that she did not wish to have any further contact with the girls. After the boy had been born, the mother and the baby had attended a residential home. The boy was made the subject of an interim case order. The mother's care of the boy had been excellent during her period of assessment at the home. The mother had thereafter been able to set up home on her own with the boy. The mother had frequent unsupervised contact with the girls from March 1992. The local authority applied to the county court for authorisation to refuse contact between the mother and the two girls under s 34(4) of the Children Act 1989 in order to be able to place the two girls with the prospective adopters, who were not willing to accept ongoing contact with the mother. The mother had opposed the application and asked for the contact between herself and the two girls to be increased. The guardian ad litem was concerned that the mother's ability to parent all three children had not been assessed and she supported the mother's case. The county court judge authorised the local authority to refuse to allow contact between the two children and the mother. The guardian ad litem appealed.

Held – allowing the appeal –

(1) There was a presumption of continuing reasonable contact between the parent and the child in care unless or until a court order s 34(4) of the Children Act 1989, which did not exist under previous legislation.

(2) The question arose as to the interplay between the local authority's plans and the jurisdiction of the court and the proper exercise of its discretion under the wider range of orders available under the Children Act 1989. The principle laid down in *A v Liverpool City Council*, that the court had no reviewing power over the exercise of the local authority's discretionary decisions in carrying out its statutory role, was still applicable beyond the confines of child care law. *A v Liverpool City Council* not apply to the intervention of the court in response to an application which had been properly made or fettered the exercise of the judicial discretion in an application under the 1989 Act.

(3) Contact applications generally fell into two categories, those which asked for contact as such, and those which were attempts to set aside a care order. In the first category, the proposals of the local authority must be given consideration by the court, but Parliament had given the court, and not the local authority, the duty to decide on contact between the child and those concerned in s 34(1) of the 1989 Act. The court could therefore require the local authority to justify their long-term plans to the extent only that the plans excluded contact between the parent and the child. In the second category, it was only in unusual cases that a parent would be able to show a change of circumstances that required further investigation and consideration of the local authority's plan.

(4) In these exceptional circumstances the court was able to intervene. If the court was not able to do so, it would make a nonsense of the paramountcy of the welfare of the child which was the bedrock of the 1989 Act and would subordinate it to the administrative decision of the local authority in a situation where the court was seized of the contact issue. That could not be right.

Statutory provisions considered

Children and Young Persons Act 1969, s 1
Family Law Reform Act 1969,s 7(2)
Child Care Act 1980, s 12
Children Act 1989, ss 10(1)(b), (d), 31, 33(3), 34(1), (4), (6), (7), 44(13), 91(1) and 100

Cases referred to in judgment

A and W (Minors) (Residence Order: Leave to Apply), Re [1992] Fam 182, [1992] 2 FLR 154, [1992] 3 WLR 422, [1992] 3 All ER 872
A v Liverpool City Council [1982] AC 363, (1981) 2 FLR 222, [1981] 2 WLR 948 [1981] 2 ALL ER 385, HL
S (A Minor) (Access Application), Re [1991] 1 FLR 161
W (A Minor) (Wardship: Jurisdiction), Re [1985] AC 791, [1985] FLR 879, [1985] 2 WLR 892, sub nom *W v Hertfordshire County Council* [1985] 2 All ER 301, HL
West Glamorgan County Council v P (No 2) [1993] 1 FLR 407

APPEAL from Judge Gosling sitting in the Birmingham County Court

James Munby QC and *Mhairi McNab* for the guardian ad litem
Peter Horrocks for the local authority
Joanna Hall for the mother

Cur adv vult

BUTLER-SLOSS LJ:

This is an appeal from the decision of his Honour Judge Gosling in the Birmingham County Court on 18 September 1992 to authorise the local authority to refuse to allow contact between two children and their mother. The appellant is the guardian ad litem of the two children and of their younger half-brother. The guardian ad litem is supported on this appeal by the natural mother of the three children. The local authority, which has a care order in respect of the three children, opposes the appeal

The children are two little girls, L born on 16 December 1988, who is 4 years of age; K born on 3 July 1990, who is 2½; and a little boy, S born on 4 March 1992 aged 9 months. Neither the father of the girls nor the father of the boy took any part in this appeal. The mother is now aged 23. As a child she spent several years in care. She lived for some time with the

father of the two girls and their relationship was volatile and violent. Against this background the two girls were born into a life of chronic instability, with frequent changes of address, parental disputes, lack of proper care for either child; and L in particular was placed in and out of temporary care or with friends or relatives. This very unsatisfactory period culminated, on 17 August 1990, in the children being left unattended in a twelfth-floor flat. They were made the subjects of place of safety orders and, on 23 August 1990, interim care orders. They returned to their mother in October 1990 but, in November 1990, she left them again unattended. The children were again placed with foster-parents, and the mother was arrested for abandoning them. On 3 December 1990 the children were placed with their present short-term foster-mother, with whom they have remained for the last 2 years. The juvenile court made the care orders on 4 February 1991. Plans were made in May 1991 to arrange for the adoption of the two girls, which were approved by the adoption panel in October 1991. The mother, in the meantime, pleaded guilty to abandoning her children and was placed on probation. She kept in touch with the two girls, although erratically. She also wrote to the foster-mother in November 1991 saying that she did not want any more contact with the girls for their sakes. She was pregnant at the time, unsettled in her plans and remorseful about her treatment of the children. After the birth of S the local authority arranged for her to go with the baby into a residential home run by the National Childrens Home. This decision was a considerable commitment of social work resources. Although the plan got off to a bad start, after the making of an interim care order on S, the mother eventually co-operated with the social workers and the staff at the home and, after one or two further problems, completed her period of assessment. The staff at the home clearly put a great deal of effort into helping the mother, with remarkably encouraging results. In the home her care of S was excellent. She needed reminding and support, but she was able to leave the home with S and set up home with him on her own; at the time of the hearing it had only been for a period of 3 weeks. The social worker in charge, according to the judge, said:

> 'She has looked after S much better that we anticipated. She has made a very good job of S.'

There remained concerns about her ability to care for S and she continued to need a high degree of support. We have been told, without any details, that since the hearing her care of s has been adequate and there are no plans to remove him from her nor, however, to discharge the care order.

From about March 1992 the mother was seeing the two girls regularly and has had frequent unsupervised contact with them, collecting them from their foster-mother and taking them to her flat in the home. She has shown in the last few months determination and commitment to these contact visits, which has not been easy with two girls on two buses across a big city. She has cared for them on these visits very successfully; the girls have enjoyed them and the contact with their baby brother. Since the hearing before the judge the twice-weekly contact has continued at the mother's home.

At the hearing before the judge there were three applications. The first, by the local authority, was for a care order in respect of S. It was agreed by everyone, including the guardian ad litem, that there should be a care order but that he should continue to live with his mother. The second application was made by the mother to discharge the care order in respect of the two girls. There was no realistic chance of the girls going immediately to their mother and the application to discharge was dismissed, despite the request of the guardian to have it adjourned. The third application was by the local authority to authorise them to refuse to allow contact between the two girls and their mother under s 34(4) of the Children Act 1989 in order to be able to place them with prospective adopters. The mother opposed that application and asked for the contact to continue and to be increased. The underlying reason for the continuing contact was the hope of the mother that it might lead to rehabilitation and the return of the girls to her. The contact already taking place was incompatible with placing children with prospective adopters. The local authority accepted that they had never attempted to assess the mother's ability to care for three children. Their view was and is, that the mother has made significant strides in her ability to care for S but to expect her to care for three children is too much and will probably lead to the breakdown of all three placements, including the placement for S. They were concerned about the length of time the girls had lived with the shortterm foster-mother and the delay in placing them permanently. They considered that the children would not miss the contact with their mother, which the judge found to be true since their primary carer remains the foster-mother. But they accepted that the contact visits had been successful and enjoyable for the children. The local authority had identified particularly suitable potential adopters who were, like the children, of mixed race and who would not be willing to accept continuing contact with the mother.

The guardian ad litem has been in the unusually valuable position of having been appointed at an early stage in the care proceedings and who had come back into the case for the purpose of these applications. In 1991 she approved of the plans to adopt the two elder children and saw no prospect of rehabilitation with the mother. She has, however, since the mother's marked improvement during this year totally changed her view. A combination of the mother's increased maturity and demonstration of her ability to care for S, together with the very slow implementation of the adoption plan formulated as long ago as May 1991, has led the guardian to reconsider the possibility of the mother as a parent for all three children. She was very concerned that the mother has never been assessed on that basis and consequently she supported the mother's case before the judge and is the appellant in this court.

The main criticism of the decision of this very experienced judge by Mr Munby, for the guardian ad litem, is that he misapplied the provisions and powers of the new Children Act 1989. Passages in the transcript of evidence, as well as in the judgment, demonstrate that he was seeking the help of counsel as to the changes in the legislation and how those changes affected his jurisdiction. I think it would be fair to say that he did not get much help from counsel in his quest. I have great sympathy with the judge in his efforts to do his best for the children within the scope of this new

statutory framework not yet fully explored and with very little in the way of decisions on its effect.

This case first came to the juvenile court under the previous legislation and orders were made in accordance with the provisions of s 1 of the Children and Young Persons Act 1969, but the current applications are made under the Children Act 1989. The new Act is a major piece of reforming legislation, repealing most of the previous child statutes and regulations. The 1989 Act provides its own statutory framework which, together with the relevant rules, is comprehensive and self-sufficient. It marks a fresh start in this area of the law. Balcombe LJ in *Re A and W (Minors) (Residence Order: Leave to Apply)* [1992] Fam 182, [1992] 2 FLR 154 referred to the substantial changes created by the Act. I have my doubts as to the extent to which it will be helpful to pray in aid many of the earlier decisions of the appellate courts based on differently worded sections of now repealed legislation. The problems have not, of course, changed but there are marked differences in the statutory approach to many of them.

One major difference between the present and the former legislation is the entry into care. At the time of the 1991 care orders there were several different routes into care: in the juvenile court by a Children and Young Persons Act 1969, s 1 order, an order under the exceptional jurisdiction in the Matrimonial Causes Act 1973 or the magistrates' domestic proceedings legislations, in wardship under the provisions of s 7(2) of the Family Law Reform Act 1969, admission to voluntary care, or a parental resolution by the local authority under the Children and Young Persons Act 1948. Now there is one route only into care which is by a court order, and all courts exercise the same jurisdiction under Part IV of the Children Act 1989.

Contact is another example. Once a child was in care, by whatever route, before the Children Act 1989 the decision as to continuing contact between the parent and the child in care was an administrative decision for the local authority which, before January 1984,, a parent had no right to challenge. By the amendment to s 12 of the Child Care Act 1980, taking effect in 1984, a parent had the right to challenge a termination of access by a local authority after service of notice upon him. He had no right to challenge a reduction in access even to minimal levels. There is a dramatic shift in the philosophy of the legislation. By s 34(1) of the 1989 Act:

> 'Where a child is in the care of a local authority the authority shall (subject to the provisions of this section) allow the child reasonable contact with –
>
> (a) his parents: . . .'

There is a presumption of continuing reasonable contact between the parent and the child in care unless or until a court order under s 43(4):

> 'On an application made by the authority or the child, the court may make an order authorising the authority to refuse to allow contact between the child and any person who is mentioned in paragraphs (a) to (d) of subsection (1) and named in the order.'

The only power over contact left to the local authority in the absence of a court order is the emergency refusal of contact for a maximum of 7 days

(s 34(6)). Even on the making of an emergency protection order (s 44) there is a presumption of continuing contact (s 44(13)).

There is another important difference of which the judge was well aware and which had a marked effect upon his approach to this case. Before the implementation of the Children Act 1989 the powers of the magistrates' court to make care orders did not extend beyond the making of the order. Thereafter, the local authority took over the care of the child and was not subject to the judicial control or monitoring other than by the limited remedy of judicial review: see *A v Liverpool City Council* [1982] AC 363, (1981) 2 FLR 222; *Re W (A Minor) (Wardship; Jurisdiction)* [1985] AC 791, [1985] FLR 879. By contrast, when a child was committed to care by a judge exercising the wardship jurisdiction in the High Court, or a Matrimonial Causes Act care order in the High Court or the county court, the judge was able to make directions and require the case to return for further consideration by the court. This monitoring by the court of a child in care has been specifically excluded by the 1989 Act. The earlier provisions have all been repealed. Section 100 excludes the wardship jurisdiction and the inherent jurisdiction of the High Court in respect of children to be placed in care or who are in care. Consequently, once a care order has been made, the court can no longer monitor the administrative arrangements for the child and has no say in those arrangements, unless there is an application before the court.

Towards the end of the evidence, the judge said:

> 'This is a new Act. It is a new procedure, very largely. We are not dealing with matters in the way we used to and the philosophy of this Act is that if you make a care order you have handed the child over and the court steps back; it does not keep on doing what it thinks is best. That is it, you have cut the painter. That is why you have to be very careful about making care orders.'

Insofar as the judge was drawing the distinction between the wardship power to monitor and the present legislation, he was entirely accurate in his assessment. In his judgment he said:

> 'In my judgment, however, there is a further and an important difficulty in the way of the mother's approach and the guardian's approach. This is that there are care orders in existence and no application is pursued to revoke them. The local authority's powers and duties are set out in s 33 of the Act. Since it is not suggested that the court should revoke the orders it does not seem to me that it is right for the court to seek directly or indirectly to force the local authority's hand and to influence them and put pressure on them to rehabilitate the girls with the mother.
>
> My view is that I should consider the application for leave to refuse contact with the mother in the context of the local authority's plan to place the children for adoption which I accept on the evidence that they will put into operation in the near future. In that context the issue must be whether the welfare of the children requires that contact should be refused.'

If the local authority's plan to place for adoption is not capable of reconsideration, the judge was clearly right in his decision that contact was not possible in this case. The question arises as to the interplay between the plans of the local authority and the jurisdiction of the court and the proper exercise of its discretion under the wider range of orders available under the new Act.

Mr Horrocks, for the local authority, submitted that the principle in *A v Liverpool City Council* (above) still inhibits the court from any interference with the adoption plans made for these two children and the judge's approach was entirely correct. *A v Liverpool City Council* is still, in my respectful opinion, of the greatest relevance beyond the confines of child care law and the principle set out by Lord Wilberforce is equally applicable today, that the court has no reviewing power over the exercise the the local authority's discretionary decisions in carrying out its statutory role. He said, at P 373:

> 'In my opinion, Parliament has marked out an area which, subject to the enacted limitations and safeguards, decisions for the child's welfare are removed from the parents and from supervision by the courts.'

In that case wardship proceedings were instituted in an attempt to obtain access leading to care and control, at a time when the natural parent had no right to access after a care order had been made. In *Re W* (above), another unsuccessful attempt to invoke the wardship jurisdiction to review a decision of a local authority, Lord Scarman said, at p 795:

> 'The ground of the decision in *A v Liverpool City Council* [1982] AC 363, (1981) 2 FLR 222 was nothing to do with judicial discretion but was an application in this field of the profoundly important rule that where Parliament has by statue entrusted to a public authority an administrative power subject to safeguards which, however, contain no provision that the High Court is to be required to review the merits of decisions taken pursuant to the power, the High Court has no right to intervene.'

The remedy for an abuse of power is judicial review, not the exercise of the wardship jurisdiction. As I have already indicated, the prohibition on the use of wardship is now given a statutory basis by s 100. I do not, however, believe the important principle set out in *A v Liverpool city Council* and *Re W* applies to the intervention of the court in response to an application which is properly made, or fetters the exercise of the judicial discretion in an application under the 1989 Act.

Mr Horrocks further submitted that s 34(1) should be read as if to include that court ought not to make a contact order if the effect was to undermine or thwart the long-term plans of the local authority charged with the responsibility for the care of the child. He relied upon a decision of this court in *Re S (A Minor) (Access Application)* [1991] 1 FLR 161, where we held that a juvenile court had the jurisdiction to make an order which was incompatible with the local authority's plans for the child, but it should not, without good reason, exercise its discretion in such a way as to inhibit or frustrate those long-term plan. The appeal was heard at a time when the s 12 legislation was in force; the Children Act 1989 was on

the statute book not yet implemented. My judgment recognised the imminence of the new legislation and stated the application of the law as it then stood prior to a statutory presumption of continuing contact. In *West Glamorgan County council v P (No 2)* [1993] 1 FLR 407, decided after the 1989 Act came into force, Rattee J followed our decision in *Re S* (above) and applied an even more stringent test. He did not consider for the purpose of the principle in *Re S* that there was any significant difference between the effect of the pre-Children Act 1989 law and the law as it is now. He said:

> 'Given that the legislature has plainly enacted that only the local authority shall have the duty and power to decide whether a child in the child's situation shall be placed for adoption, and given that the legislature has disabled the court from taking any part in that decision, it seems to me that in exercising such other powers as the court is given in relation to a child in that situation the court must start from the premise that, unless somehow the authority's decision can be attacked as being invalid on some ground such as capricious (as contemplated by the Court of Appeal in *Re S*), that decision will stand and the court, in exercising its other powers ought not to exercise them in a manner incompatible with that long-term decision of the local authority, unless satisfied by the most cogent evidence that for some reason the particular child's welfare requires an exercise of the court's powers in such a manner.'

I respectfully agree with his decision on the facts of that case but, in the light of the new child care legislation, I disagree with his formulation of the test to be applied. A s 34 application is clearly a substantive application in which the court is determining a question with respect to the upbringing of the child. The test applied by Rattee J requires to be read into s 34 restrictions which Parliament had the opportunity to insert and did not do so, unlike s 10(9)(d). This court drew the distinction in *Re A and W* (above) between an application for leave to apply for a s 8 order and a substantive application. On an application for leave, unlike a substantive application, it held that welfare is not the paramount consideration. By s 10(9)(d), on an application for leave to make an application for a s 8 order, the court shall have particular regard to the authority's plans for the child's future, if he is being looked after by the local authority. There is no such statutory requirement in s 34.

Decisions based on s 22 of the Child Care Act 1980, which has been repealed and not re-enacted, may not be equally applicable to applications under s 34 since the approach of the Children Act 1989 to contact is entirely different from the previous legislation. Consequently, the decision of this court in *Re S*, and particularly my judgment, must be read with considerable caution. I do not consider that my judgment adapts felicitously into the philosophy of the Children Act. The decision of this court in *Re S* would not, however, have been likely to be any different on the facts.

My understanding of the Children Act 1989 is that it aims to incorporate the best of the wardship jurisdiction within the statutory framework without any of the perceived disadvantages of judicial monitoring of

administrative plans. It provides for the court a wide range of options and the possibility of its own motion to set in train a line of investigation not contemplated or asked for by the parties. Like wardship, however, these wide powers are to be sparingly used.

The present position of a child whose welfare is being considered under Part IV of the Act appears to me to be that he will not be placed in care unless a court has been satisfied that the threshold conditions in s 31 have been met and that it is better to make a care order than not to do so. After the care order is made, the court has no continuing role in the future welfare of the child. The local authority has parental responsibility for the child by s 33(3). However, issues relating to the child may come before the court, for instance on applications for contact or leave to refuse contact, to discharge the care order or by an application for a s 8 residence order. The making of a residence order discharges the care order (s 91(1)).

At the moment that an application comes before the court, at whichever tier, the court has a duty to apply s 1, which states that when a court determines any question with respect to the upbringing of a child, the child's welfare shall be the court's paramount consideration. The court has to have regard to the prejudicial effect of delay, to the checklist including the range of orders available to the court and whether to make an order. On a s 34 application, therefore, the court has a duty to consider and apply the welfare section.

Contact applications generally fall into two main categories, those which ask for contact as such, and those which are attempts to set aside the care order itself. In the first category, there is no suggestion that the applicant wishes to take over the care of the child and the issue of contact often depends on whether contact would frustrate long-term plans for the child in a substitute home, such as adoption where continuing contact may not be for the long-term welfare of the child. The presumption of contact, which has to be for the benefit of the child, has always to be balanced against the long-term welfare of the child and particularly where he will live in the future. Contact must not be allowed to destabilise or endanger the arrangements for the child and in many cases the plans for the child will be decisive of the contact application. There may also be cases where the parent is having satisfactory contact with the child and there are no long-term plans or those plans do not appear to the court to preclude some future contact. The proposals of the local authority, based on their appreciation of the best interests of the child, must command the greatest respect and consideration from the court, but Parliament has given to the court, and not to the local authority, the duty to decide on contact between the child and those named in s 34(1). Consequently the court may have the task of requiring the local authority to justify their long-term plans to the extent only that those plans exclude contact between parent and child.

In the second category, contact applications may be made by parents by way of another attempt to obtain the return of the children. In such a case the court is obviously entitled to take into account the failure to apply to discharge the care order, and in the majority of cases the court will have little difficulty in coming to the conclusion that the applicant cannot demonstrate that contact with a view to rehabilitation with the parent is a viable proposition at that stage, particularly if it had already been rejected at the earlier hearing when the child was placed in care. The task for the

parents will be too great and the court would be entitled to assume that the plans of the local authority to terminate contact are for the welfare of the child and are not to be frustrated by inappropriate contact with a view to the remote possibility, at some future date, of rehabilitation. But in all cases the welfare section has to be considered, and the local authority has the task of justifying the cessation of contact. There may also be unusual cases where either the local authority has not made effective plans or there has been considerable delay in implementing them and a parent, who had previously been found by a court unable or unwilling to care for the child so that a care order had been made, comes back upon the scene as a possible future primary caretaker. If the local authority with a care order decides not to consider that parent on the new facts, Mr Munby, counsel for the guardian ad litem, argued that it is for the court, with the enhanced jurisdiction of the Children Act 1989, to consider whether even at this late stage there should be some investigation of the proposals of the parent, with the possibility of reconsidering the local authority plans. Mr Horrocks, counsel for the local authority, argued that the court cannot go behind the long-term plans of the local authority unless they were acting capriciously or were otherwise open to scrutiny by way of judicial review. I unhesitatingly reject the local authority argument. As I have already said, their plan has to be given the greatest possible consideration by the court and it is only in the unusual case that a parent will be able to convince the court, the onus being firmly on the parent, that there has been such a change of circumstances as to require further investigation and reconsideration of the local authority plan. If, however, a court was unable to intervene, it would make a nonsense of the paramountcy of the welfare of the child, which is the bedrock of the Act, and would subordinate it to the administrative decision of the local authority in a situation where the court is seized of the contact issue. That cannot be right.

But I would emphasise that this is not an open door to courts reviewing the plans of local authorities. Generally, where parties choose not to pursue applications, they are well advised not to do so. But there is now a flexibility in the approach of the court to the problems of the child before it, and occasionally the court may wish to invoke s 10(1)(b) which provides that a court may, in any family proceedings, which includes care proceedings, make a s 8 order with respect to a child if the court considers that the order should be made, even though no application has been made. A court may also make a contact or an interim contact order and impose such conditions as it considers appropriate (s 34(7)).

In my view the judge was in error in not appreciating that he was able, if he thought it right, to have another look at the mother as a possible future carer and give appropriate directions for assessments to be made, He did not look at the relevant issues of possible rehabilitation and delay and came to conclusions adverse to the mother. But those decisions are very much influenced by his belie that he had no right to interfere in any way with the plans put forward by the local authority. His conclusion that his hands were tied, in my view, vitiated his exercise of discretion and his decision cannot stand.

This court, therefore, has to decide whether the mother should be assessed as the potential carer of all three children. There is a large question-mark over the wisdom of straining the placement for S by the

possibility of putting all three children together in the care of a relatively untried mother. But the guardian ad litem and the social worker saw a real possibility that she might become an adequate mother for all three children. The decision requires consideration of the competing factors that on the one side there is the prospect that mother may come up trumps and, if so, the enormous advantage for these three children to be brought up together by their own mother in preference to a substitute family, however suitable. On the other side there is the real danger that the problems would be too great, that the assessment would be disappointing and, most worrying of all, the danger that this attempt might imperil the relationship between the mother and S, who would be devastated by losing his mother at this stage. We must add to those factors the need to settle these children and the fragility of their present placement from which they will have to move in any event, and the question to delay is very important. However, I have come to the clear conclusion that the mother's potential must be investigated and not to do so would be unfair to the children and, if the prospective adoption application were to be made, might create a serious obstacle on the special facts of this case.

Since there is some urgency to have these matters looked at as soon as possible, we allowed the appeal last week, for reasons which we are now giving, and invited counsel to agree an order.

The appeal will be allowed on the terms of the order handed in.

KENNEDY LJ:
I agree.

Order accordingly.

Solicitors: *Local authority solicitor*
Young & Lee for the guardian ad litem and children
Hall-Wright and Birks for the mother

DEBORAH DINAN-HAYWARD
Barrister