RE M (A MINOR) (CARE ORDER: SIGNIFICANT HARM)

Court of Appeal

Balcombe, Rose and Peter Gibson LJJ

15 October 1993

Care – Threshold criteria for making care order – Meaning of 'is suffering' significant harm – Relevant time – Meaning of 'likely to suffer' significant harm – Children Act 1989, s 31(2).

The local authority made an application for a care order in respect of a boy now aged 2. When the child was 4 months old, his father murdered his mother in his presence and in the presence of his half-brothers and half-sister. The police obtained a place of safety order and the four children were accommodated by the local authority. The three eldest children went to live with the mother's cousin, Mrs W, who was subsequently granted residence orders. Mrs W felt unable to look after the boy as well and he was placed with a short-terms foster-mother. The place of safety order was not renewed and the child remained on a voluntary basis with the foster-mother where he thrived. He had regular contact with Mrs W and his half-siblings. However, he could not remain with the foster-mother indefinitely. After the local authority commenced the proceedings, the father received a sentence of life imprisonment. By this time, Mrs W felt that she would be able to cope with the child and sought a residence order. When the matter came before Bracewell J, the local authority was no longer pursuing the application for a care order and was supporting Mrs W. The father and the guardian ad litem supported the making of a care order with a view to an adoptive placement outside the natural family. Bracewell J held that the first of the threshold conditions was satisfied, in that the child had suffered ill-treatment by being deprived of the love and care of his mother and that the harm was attributable to the care given by the father in that he had deprived the child of a loving mother. She further held that if an order were not made, the child would be likely to suffer significant harm, in that he had no permanent home and the only person with parental responsibility, the father, was unable to exercise it appropriately because he was serving a life sentence. Accordingly, she made a care order and dismissed Mrs W's application for a residence order. Mrs W appealed, supported by the local authority.

Held – allowing the appeal and substituting a residence order in Mrs W's favour –

(1) The harm must be being suffered at the relevant time, which is when the court makes its decision whether or not to make a care order. It is not enough that something happened in the past which caused the child to suffer harm of the relevant kind if, before the hearing, the child has ceased to suffer such harm.

(2) The first of the threshold conditions is not fulfilled unless the court is satisfied at the date of the hearing: (a) that the child is then suffering significant harm; and (b) that harm is attributable to the care given to him not being what it would be reasonable to expect a parent to give to him.

(3) The judge had erred by concentrating on the father's murder of the mother, looking only to the care given by the father even though for the 16 months prior to the hearing he, being in prison, had been in no position to give care to the child, and ignoring the care actually given to the child by the foster-mother. On the facts, there was no material before the judge which entitled her to find that, as at the date of the hearing, the child was suffering harm of the relevant kind.

(4) As to the second of the threshold conditions, if at the date of the hearing the child had no longer been able to stay with the foster-mother and there had been no other suitable home within his family available, it might have been open to the

judge to find that the child was likely to suffer significant harm of the relevant kind. However, there was another family home available to the child with Mrs W and his half-siblings, and there was nothing to suggest that if he went to live with Mrs W he would be likely to suffer significant harm attributable to the care likely to be given to him.

(5) The fact that Mrs W might not be able to give the child the quality of emotional care which he, with his particular background, was likely to require was not the same as saying that if the child went to live with Mrs W he was likely to suffer significant harm of the relevant kind.

Statutory provisions considered
Children and Young Persons Act 1969, ss 1(2), 28(1), (6)
Adoption Act 1976, s 16
Children Act 1989, s 31(2)

Cases referred to in judgment
D (A Minor), Re [1987] AC 317, [1987] 1 FLR 422, [1986] 3 WLR 1080, sub nom *D (a minor) v Berkshire County Council* [1987] 1 All ER 20, HL
M v Westminster City Council [1985] FLR 325
Northamptonshire County Council v S and Others [1993] Fam 136, [1993] 1 FLR 554
W (An Infant), Re [1971] AC 682, [1971] 2 WLR 1011, [1971] 2 All ER 49, HL

Rodger Hayward Smith QC and *Laura Harris* for Mrs W
Elizabeth-Anne Gumbel for the father
Sandra Graham for the local authority
Joanna Dodson QC and *Mhairi McNab* for the guardian ad litem

Cur adv vult

BALCOMBE LJ:
On 30 July 1993 we allowed an appeal from a care order made on 12 February 1993 by Bracewell J under s 31 of the Children Act 1989 ('the Act'), saying we would give our reasons later. This we now do, and this is the judgment of the court.

The child concerned is M, born on 28 June 1991, who is now 2 years old. His mother's family came from Jamaica but she was born in England on 28 May 1959. The mother had three children before M: a son, L, born on 27 March 1984 (now aged 9) and twins, A and B, born on 12 June 1987 and now aged 6. The fathers of the twins was a different man from L's father. Neither of these fathers retained contact with their children. In January 1990 the mother married, in this country, a Nigerian ('the father') and M was the son of this marriage. After M's birth he lived with his mother, his half-brothers and his half-sister in a home which was visited by the father, who had retained his own accommodation. On 12 October 1991 the father murdered the mother at her home in the presence of all four children: M was 4 months old at the time. It was a very brutal and violent murder in which the father used a meat cleaver and a knife. He also assaulted the mother's boyfriend.

The police immediately obtained a place of safety order and the four children were accommodated by the local authority. After a week the three eldest children went to live with the mother's maternal cousin, Mrs W. Mrs W, who is also of Jamaican origin, was born on 29 March 1938 and so is now aged 55. She lives in a three-bedroomed council maisonette in south-west London. She is separated from her husband, by whom she had

two teenage children. The mother's three eldest children have since lived with Mrs W and it is common ground that they have thrived under her care. On 11 August 1992 a residence order in respect of the three children was made in her favour.

At the time of the mother's death, Mrs W did not feel able to look after M, because he was so young and because of the attention which the three eldest children would require to help them cope with their mother's violent death. So M stayed with a short-term foster-mother, a Mrs C, with whom he was living at the time of the appeal. He had, however, retained regular contact with Mrs W and his half-siblings. The place of safety order was not renewed and M remained with Mrs C on a voluntary basis and with her he thrived; however, as a short-term foster-parent she could not look after him indefinitely.

On 15 May 1992 the local authority applied for a care order in respect of M. At that time the father was still awaiting trial for the murder of the mother and his position was unclear, while Mrs W had not then told the local authority that there had been a change in her initial reluctance to care for M.

Between the date of the local authority's application and the date of the hearing before the judge a number of events occurred. First, on 7 June 1992 the father was found guilty of the murder of the mother, and of causing grievous bodily harm to the mother's boyfriend. He was sentenced to a term of life imprisonment for the murder and to 3 years' imprisonment for the offence of grievous bodily harm. There was a recommendation that he should be deported to Nigeria upon his release. He is currently serving his sentence in one of Her Majesty's prisons. Secondly, a guardian ad litem was appointed for M in the care proceedings. Thirdly, two members of the father's family, M's paternal aunts both resident in the USA, as well as Mrs W, all separately applied for residence orders in respect of M. The other three children had then settled so well that Mrs W considered that she could cope with M, who was no longer a tiny baby. Finally, various medical and psychiatric reports about M were obtained.

By the time the case came before the judge, the two American paternal aunts were no longer pursuing their applications for residence orders. The local authority no longer pursued their application for a care order, but supported Mrs W's application for a residence order. The father and the guardian ad litem both supported the making of a care order in respect of M with a view to an adoptive placement outside his natural family.

Thus there were three main issues before the judge:

(1) Were the 'threshold criteria' for the making of a care order under s 31 of the Act satisfied?
(2) If so, should a care or supervision order be made?
(3) Should a residence order be made in favour of Mrs W?

The judge decided that the threshold conditions were satisfied, that there should be a care order (with a view to adoption outside the family) and that Mrs W's application for a residence order should be dismissed; her order of 12 February 1993 reflects those decisions. From that order Mrs W, supported by the local authority, appealed; the guardian ad litem and the father sought to uphold the judge's order.

The threshold conditions are contained in s 31(2) of the Act; they are, so far as relevant, as follows:

> '(2) A court may only make a care order or supervision order if it is satisfied –
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
> (b) that the harm, or likelihood of harm, is attributable to –
>
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him . . .'

Simply as a matter of the statutory language referred to above it seems clear that a court may only make a care order – for present purposes it is unnecessary to consider separately the case of a supervision order – if it is satisfied:

> (a) that the child is suffering significant harm, and that the harm is attributable to the care given to the child not being what it would be reasonable to expect a parent to give to him; or
> (b) that the child is likely to suffer significant harm, and that the likelihood of harm is attributable to the care likely to be given to the child if the order were not made not being what it would be reasonable to expect a parent to give to him.

The use of the present tense in the first of these alternatives –'is suffering' – makes it clear that the harm must be being suffered at the relevant time, which is when the court has to be satisfied of the fulfilment of the threshold conditions, ie when it decides whether or not to make a care order. This is clear from the language used; it is also consistent with other areas of the law relating to children. Thus, under s 16 of the Adoption Act 1976 the court may make an adoption order, notwithstanding the absence of a parent's consent, if it is satisfied that the parent is withholding his agreement unreasonably. It is well-established that the test is whether at the time of the hearing the consent is being withheld unreasonably – see *Re W (An Infant)* [1971] AC 682 at pp 698, 716, 723, 725. Of course, this does not mean that the child must be suffering significant harm at the precise moment when the court is considering whether the threshold conditions are satisfied: it is sufficient if there is a continuum in existence at that time. One of the threshold conditions under s 1(2) of the Children and Young Persons Act 1969 –which was replaced by s 31 of the Act – was if the child's 'proper development is being avoidably prevented or neglected or his health is being avoidably impaired or neglected or he is being ill-treated'. In relation to that provision Lord Goff of Chievely said in *Re D (A Minor)* [1987] AC 317 at p 350, [1987] 1 FLR 422 at p 437:

> 'The words "is being" are in the continuous present. So there has to be a continuum in existence at the relevant time, which is when the

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

Thus it is not enough that something happened in the past which caused the child to suffer harm of the relevant kind if before the hearing the child has ceased to suffer such harm. Of course, that would still leave it open to the court to be satisfied that the child is likely to suffer significant harm of the relevant kind.

That being our considered view of the meaning of s 31, we turn to consider whether there is any authority which requires us to reach a contrary conclusion.

We were referred to a decision of a Divisional Court of the Family Division, *M v Westminster City Council* [1985] FLR 325. This, too, was a decision on the provisions of s 1(2) of the 1969 Act, and it is significant that that section contained no provision equivalent to the 'likely to suffer' provision of s 31. The court was clearly much exercised about the anomalies that could arise if the words 'is being' were interpreted too restrictively, especially in relation to an injured child who had been in interim care for some time prior to the full hearing and had then recovered from his injuries. We do not find it necessary to express an opinion as to whether *M v Westminster City Council* was correctly decided; it is sufficient to say that it was a decision on a provision which is markedly different from s 31 of the Act which we are here considering.

In *Re D (A Minor)* (above) Lord Brandon of Oakbrook considered three questions relating to the meaning and effect of the expression 'is being' in s 1(2) of the 1969 Act. The first was whether the expression referred to an instant or a continuing situation, and he came to the conclusion that it referred to a continuing situation, a conclusion with which we would not disagree. His second question was: 'if it refers to a continuing situation, at what point of time should the court consider whether that continuing situation exists?' He answered that question by having in mind the purpose sought to be achieved not only by s 1, but also by s 28, of the 1969 Act. (Section 28(1) empowered a magistrate to make a place of safety order lasting up to 28 days; s 28(6) empowered a magistrates' court to make one or more interim care orders to last until the hearing for a full care order under s 1.) Clearly exercised by the same matters as exercised Bush J and Butler-Sloss LJ in *M v Westminster City Council* (above), he said at pp 346 and 434 respectively:

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

We find it difficult to reconcile this part of Lord Brandon's speech with that of Lord Goff in the same case which we have cited above. This difficulty does not seem to have troubled either Lord Griffiths or Lord Mackay of Clashfern, who agreed with both Lord Brandon and Lord Goff (pp 349 and 437 respectively). We have to say that we find the reasoning of Lord Goff the more convincing and, if we had to choose between the two, it is that of Lord Goff that we would prefer. However, it is sufficient for present purposes to say that Lord Brandon was referring to a provision significantly different from that which we have to consider.

Finally we refer to the decision of Ewbank J in *Northamptonshire County Council v S and Others* [1993] Fam 136, [1993] 1 FLR 554, a decision on the meaning of the expression 'is suffering . . . significant harm' under s 31(2)(a) of the Act. Ewbank J, purporting to follow Lord Brandon of Oakbrook in *Re D (A Minor)* (above), said at pp 140 and 557 respectively:

> 'In my judgment, the words "is suffering" in s 31(2)(a) of the Children Act 1989 relate to the period immediately before the process of protecting the child concerned is first put into motion, just as in the Children and Young Persons Act 1969. That means that the court has to consider the position immediately before an emergency protection order, if there was one, or an interim care order, if that was the initiation of protection, or, as in this case, when the child went into voluntary care. In my judgment, the family proceedings court was quite entitled to consider the position when the children were with the mother prior to going into care and correct in doing so.'

It will be apparent from what we have already said that we do not agree with this conclusion. The decision, being at first instance, is not binding on us and must be considered incorrect.

As is well known, before s 31 was enacted, this area of the law was considered by the *Review of Child Care Law*, by the Government in a White Paper and by the Law Commission. Paragraph 15.12 of the 1985 consultative document, *Review of Child Care Law*, provided:

> '15.12 In our view the primary justification for the State to initiate proceedings seeking compulsory powers is *actual or likely* harm to the child . . . Hence we recommend that in assimilated grounds it should be necessary to prove that there *is, or is likely to be*, harm to the child [our emphasis].'

Paragraph 59 of the 1987 White Paper, *The Law on Child Care and Family Services* (Cm 62 of 1987), echoes the last statement:

> '**Grounds for a care order**
> 59. A major proposal in the review which will be implemented is a recasting of the ground for an order in care proceedings and an assimilation to them of the grounds in family proceedings other than wardship. This involves the removal of specific grounds for making a care order such as the committing of an offence of non-attendance at school. There will be three elements in the grounds each of which must be satisfied for an order to be made. These are:
>
> a. evidence of harm or likely harm to the child; and that
> b. this is attributable to the absence of a reasonable standard of parental care . . .
>
> The current grounds are largely confined to an examination of the present and past defects in the development or well-being of the child. Where future harm is at issue, the local authority often make application to the High Court for wardship. It is intended that the inclusion of likely harm in the new grounds should allow those cases to be heard in juvenile courts in future and will cover children who are being cared for by the local authority on a voluntary basis where a return home is likely to harm them.'

The Law Commission in its 1988 *Report on Family Law, Review of Child Law, Guardianship and Custody* (Law Com No 172) was concerned only with putting into effect what the *Review of Child Care Law* had recommended and the Government by its White Paper had accepted. But in the Law Commission's draft Bill appended to the Report, the first of the threshold criteria was worded that the child concerned 'has suffered significant harm or that there was a real risk of his suffering such harm'. That recommended wording was not adopted in s 31(2). The substitution of 'is suffering' for 'has suffered' serves to emphasise the intention that it is not the past but the continuous present to which attention must be directed.

Accordingly, we are clear that the first of the threshold conditions is not fulfilled unless the court is satisfied, at the date of the hearing:

> (a) that the child is then suffering significant harm; and
> (b) that that harm is attributable to the care given to him not being what it would be reasonable to expect a parent to give to him.

Bracewell J dealt with the first of the threshold conditions in the following passage from her judgment:

> '. . . I am satisfied that M is suffering significant harm within the meaning of s 31(2)(a) in that he has suffered ill-treatment by being permanently deprived of the love and care of his mother when she was murdered in his presence, and in the presence of his half-brothers and sister in October 1991. I am also satisfied that under s 31(2)(b) the significant harm is attributable to the care given to the child by the father not being what it would be reasonable to expect a parent to give to

> him, in that father deprived the child, by his actions, of the care of a loving mother . . .
> The relevant date for the words "is suffering" in s 31(2)(a) I find relates to the period immediately before the process of protecting the child is first put into motion, that is when father deprived the child for all time of his mother.'

In our judgment that finding is wrong in each of its two limbs. Each limb refers to the past event of the father's murder of the mother. The second limb also artificially looks only to the care given by the father, even though for the 16 months prior to the hearing, the father, being in prison, was in no position to give care to M, and it ignores the care actually given to M by the foster-mother. Neither limb refers to the circumstances existing as at the date of the hearing. In our judgment, on the facts as we have stated them, there was no material before the judge which entitled her to find that, as at the date of the hearing, M was suffering significant harm of the relevant kind.

The judge also dealt with the second of the threshold conditions –'likely to suffer significant harm' – as follows:

> 'I am also satisfied that if an order were not made the child would be likely to suffer significant harm in that he is a small child with special needs, has no permanent home, and the only person with parental responsibility is the father who is unable to exercise it appropriately or fully in that he is serving a life sentence with an order of deportation upon release.'

If the position at the date of the hearing had been that M was no longer able to stay with Mrs C (as was the case) and that there was no other suitable home within his family available for him, then it might well have been open to the judge to find that M was likely to suffer significant harm of the relevant kind. But there was another family home available to M – that offered by Mrs W where he would be with his half-brothers and sister. If M went to live with Mrs W, there was nothing to suggest that he would be likely to suffer significant harm, attributable to the care likely to be given to him (by Mrs W) if the (care) order were not made, not being what it would be reasonable to expect a parent to give to him. Admittedly, the judge, after deciding that she could make a care order, came down on balance against Mrs W and in favour of unknown adoptive parents. But the judge herself found it a very difficult case, and the professional witnesses were evenly divided: one of them said 'the decision hangs on a knife-edge and one does not know which way to go'. In the end the judge came to the view that Mrs W might not be able to give M the quality of emotional care which he, with his particular background, was likely to require. This is a thousand miles away from saying that if M were to live with Mrs W he was likely to suffer significant harm of the relevant kind and, having been taken by counsel through the material evidence, we are satisfied that there was no evidence before the judge which would have entitled her to find that the second threshold condition was fulfilled. We would observe that, on the way in which the judge held that the second threshold condition was satisfied, if M's parents had both been killed in a

motor accident, but there was an aunt or uncle willing to take him into his or her family and bring him up with his siblings and cousins, it would nevertheless be open to the court to say that the second threshold condition was satisfied and make a care order. This would amount to a form of social engineering which we are satisfied is wholly outside the intention of the 1989 Act.

As we are satisfied that the threshold conditions were not satisfied we do not need to consider whether the judge's exercise of her discretion to make a care order could have been successfully challenged.

Accordingly, we set aside the care order of 12 February 1993. It did not necessarily follow from that that we should make a residence order in favour of Mrs W. However, no sensible alternative to M residing with Mrs W was put before us, and the home offered to M by Mrs W with his halfbrothers and sister was clearly a viable proposition, strongly supported by the local authority. In those circumstances there was no reason for us to send the case back to the High Court to consider afresh the question of a residence order, and we made a residence order in favour of Mrs W.

Appeal allowed. No order for costs except legal aid taxation for those parties legally aided. Leave to appeal to the House of Lords refused.

Solicitors: *Hodgell & Partners* for Mrs W
Meaby & Co for the father
Local authority solicitor
Cliffords for the guardian ad litem

GABRIELLE JAN POSNER
Barrister