England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2006] EWCA Civ 1282
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IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM TAUNTON COUNTY COURT
(HHJ O'MALLEY)
[LOWER COURT No: TA05COOO57]

Royal Courts of Justice
Strand
London, WC2
25 August 2006

B e f o r e :

LORD JUSTICE KEENE
LORD JUSTICE WALL
LORD JUSTICE WILSON

L (CHILDREN)

(Computer-Aided Transcript of the Stenograph Notes of
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MR RICHARD HICKMET (instructed by Messrs Alletsons, Somerset TA6 3DB) appeared on behalf of the 1st Appellant, the father.
MISS ANNE BELL (instructed by Messrs Padoes, Somerset TA6 3YB, through the Official Solicitor) appeared on behalf of the 2nd Appellant, the mother.
MISS SUSAN CAMPBELL (instructed by Somerset County Council, Somerset TA1 4DY) appeared on behalf of the

Respondent, the local authority.

HTML VERSION OF JUDGMENT

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1. LORD JUSTICE KEENE: I shall ask Wilson LJ to give the first judgment.

2. LORD JUSTICE WILSON: In my long and recent experience of hearing applications for care orders in the Family Division, I have formed views that:

   (a) One of the most difficult categories is that in which the case against the parents is not that they have actively mistreated their child but simply that, by reason of their learning difficulties or other such deficits, they lack the mental and other resources with which to provide him with adequate emotional or physical care.

   (b) A situation pregnant with almost intolerable injustice to the parents but which nevertheless has - sometimes but only after the closest enquiry - to be tolerated in the interests of the child, is that in which his removal into interim foster care is prompted by an allegation which turns out to be entirely false but in which other quite different material has later emerged which is said to justify his continued, long-term removal.

   (c) If the evidence is that the child is thriving in interim foster care, it is easy for a judge, tempted by the prospect of a full care order, to fail to scrutinise the evidence with the necessary rigour before holding that the threshold to the making of a care order, set by s.31(2) of the Children Act 1989, is crossed.

   (d) In proceedings in which in the interests of the child there are few limits to the nature of the material capable of being presented to the court, to its sources, or to the mode of its adduction or analysis, it is easy for a judge to forget that, as was stressed by Lord Nicholls in Re H and R (Child Sexual Abuse: Standard of Proof) [1996] 1 FLR 80 at 102 B-D, neither limb of the threshold can be crossed save upon *proof* of relevant *facts*. So, when considering the threshold, the judge must, as it were, shake the material before him through a sieve; and it is only by reference to the residue of hard factual averments, which the local authority should have sought to identify in their threshold document and which the parents should have been given a full opportunity to challenge, that he can, if he finds them established, proceed to hold that the threshold is crossed.

3. This appeal confirms to me that these views have some validity.

4. The appeal is brought by parents against a decision of His Honour Judge O'Malley, sitting in the Taunton County Court on 22 June 2006, in the course of care proceedings brought by Somerset County Council ("the local authority") in relation to a girl (so I will call her G) who was born in November 1995 and is therefore aged 10 and to a boy (so I will call him B) who was born in February 1999 and is therefore aged seven. Under a Police Protection Order G and B were taken into interim foster care on 13 September 2005; and there they remain, having contact with the parents three times each week.

5. The judge's decision was that on 13 September 2005 G and B were, in the words of s.31(2), both suffering and likely to suffer significant harm; and that the harm and likelihood of harm were attributable to the care given to them, and likely to be given to them if care orders were not made, not being what it would be reasonable to expect a parent to give to them. The judge thereupon directed that the hearing of the application for care orders should be adjourned for conclusion in November 2006.

6. The local authority, supported by the Children's Guardian but wisely only in the form of a letter, oppose the appeal.

7. Prior to 13 September 2005 G and B had always lived with their parents, who are married, in Somerset.

8. Both parents have learning difficulties and have been known to the social services department of the local authority since they themselves were children. Since then - and in particular since G and B were born - the local authority have provided an admirable amount of assistance for the family. By September 2005 they were providing visits to the home for ten hours each week, mainly by support workers under the direction of the authority's Adult Learning Difficulties team. Until September 2005 the local authority never issued care or other proceedings in relation to the children.

9. The mother, now aged 35, has greater learning difficulties than does the father. Her IQ is on the first percentile. She has particular difficulty not only in understanding and expressing herself in words but in remembering. She lives in the here and now. She has in general a sunny disposition and her relationship with the children was and remains positive and deeply loving. Her limited understanding so disables her from conducting her defence of the local

authority's application that she is, for this purpose, incapable of managing her property and affairs by reason of mental disorder and so the Official Solicitor acts as her Guardian ad Litem. She did not give oral evidence before the judge because she was considered unlikely to be able to address the questions adequately.

10. According to tests conducted in 2004, the father, now aged 40, has a comparatively high performance scale IQ, namely 100, and he is, for example, particularly good at seeing how things fit together and can be made to work; but he has a verbal scale IQ of only 77, which is on the borderline of disability. The verbal scale relates to reading, understanding, thinking and memorising as well as talking and writing. The father is, in effect, illiterate. He has always been the dominant figure in the household and to a large extent has cared for the mother as well as for the children. As in the mother's case, his relationship with the children was and remains positive and deeply loving. For reasons similar to those in relation to her, he also gave no oral evidence to the judge.

11. In 2003 the father allowed a man whom he knew to be a Schedule One offender to stay in the family home; and the man sexually assaulted G. The father, who was extremely distressed by the assault, claims that it was he who reported it to the police and was instrumental in securing the man's conviction and ten year sentence. For a year the local authority arranged for extra workers to do "keep safe" work with the children; and the parents cooperated with it. In November 2004, however, the local authority seem to have resolved that the children would be likely to be adequately protected from any further such abuse; and in effect they closed their file on it. Certainly there was no evidence before the judge that in September 2005 G was continuing to suffer significant emotional harm as a result of the assault in 2003 or as to the precise extent of the parents' culpability in having failed to protect her. And, although (as I will explain) the assault figured in the local authority's two threshold documents, the judge indicated at an early stage of the hearing that, in the light of the fact that in 2004 the local authority had in effect closed their consideration of it, the assault could not reasonably figure in his enquiry; and thereafter it did not do so.

12. Mr Hickmet on behalf of the father submits that in this regard the judge was clearly correct not to have regard to the assault and he goes so far as to suggest that it would not have been open to the judge to have regard to it. Mr Hickmet cites a passage in the speech of Lord Mackay in Re M (A Minor) (Care Order: Threshold Conditions) [1994] 2 FLR 577 at 583F as follows:

> "If after a local authority had initiated protective arrangements the need for these had terminated, because the child's welfare had been satisfactorily provided for otherwise, in any subsequent proceedings, it would not be possible to found jurisdiction on the situation at the time of initiation of these arrangements."

13. I am not convinced that Lord Mackay's dictum is in point. In my view he was suggesting that it was only in the case in which a child had not only been taken into interim foster care prior to the threshold enquiry but had continuously so remained until the date of it that it was proper to backdate the enquiry to the date when he had been taken into care. So, while I am satisfied that, in the light of the lack of evidence to that effect, the assault could not have contributed to a finding that in September 2005 G was suffering significant harm, it would go too far to say that, as a matter of law, it could not have figured in the assessment whether the children were then likely to suffer significant harm. Nevertheless it did not figure in that assessment; there is no Respondent's Notice by which the local authority might have contended that it should have figured in it; and in any event it would have been hard for them to make much of it.

14. It seems that in the months prior to September 2005 the Adult Learning Difficulties team which was continuing to support the family became concerned about rows between the parents, mainly verbal but sometimes physical, and about their possible effect on the children. Indeed at times the mother was saying that she wanted to leave the father. So the team referred the family back to the Children and Family section, which began an assessment. It is unclear whether the removal of the children from the home was even on the agenda. But in September 2005 there was a supervening event, as a result of which the assessment was never completed. The event was a report by a pupil at the children's school that she had seen the father whipping them with belts. The report led the local authority to initiate the care proceedings and to apply successfully for continuation under interim care orders of the right to keep the children in foster care.

15. Both in their original threshold document dated 4 December 2005 and in their supplementary threshold document dated 22 May 2006 the local authority advanced their case, which the judge was later to accept, under both limbs of s.31(2), namely that in September 2005 the children both were suffering significant harm and were likely to suffer it. Although it referred to domestic violence and to the sexual assault, their first document relied heavily on the allegation that the father had whipped the children with belts. It seems, however, that by May 2006 the local authority realised that they were highly unlikely to establish that allegation. The paediatric evidence did not

corroborate it; the father completely denied it; the children never said anything indicative of it; and there was no surrounding history of any other violence on the father's part towards the children. So the local authority perceived the need for the supplementary threshold document, in which they

(a) alleged that the father was prone to be aggressive with the mother, with neighbours and others, and that at times he criticised the mother in front of the children and so placed them at risk of emotional and physical abuse;

(b) reiterated the allegation of failure to protect G from the assault in 2003;

(c) suggested that the deficiencies of the parents exposed the children to the risk of harm and neglect;

(d) asserted that the children had exhibited evidence of emotional disturbance at school; and

(e) contended that the children had suffered significant emotional harm in the care of the parents by exposure, in the case of G, to the assault in 2003 and, in the case of both children, to violent emotions when exposed to serious rows between the parents, including physical assaults by the father upon the mother and her reaction to them in banging her head against the wall.

16. It seems that the reformulation of the local authority's case was largely based upon a report by Mrs Westmacott, a chartered psychologist, dated 2 February 2006, which the court had permitted the parties to procure on joint instructions and which clearly had a profound effect on the local authority's thinking. In the event, although he did not go nearly as far as, by their threshold documents, the local authority had invited him to go, the judge held that the threshold was crossed by reference - and, so it seems, only by reference - to the evidence of Mrs Westmacott. In his written, reserved judgment he succinctly explained the basis of his decision as follows:

> "When I had heard submissions on the threshold criteria from counsel for the two parents I told the other advocates that I would not need to hear from them as I was minded to find that the threshold criteria were satisfied. I do so on the basis that at the material time the children were suffering significant harm and were likely to suffer significant harm due to deficiencies in the care given them by their parents. There is evidence that the children were exposed to rows between the parents that led to violence inflicted by the father on the mother or by the mother on herself and that the children suffered some emotional harm in the result. In this respect I accept the evidence of Mrs Westmacott, which was thorough and cogent. As to the 'belting' allegation, [this was] not only not proved to the high degree of cogency required, but I consider for a variety of reasons that it is very unlikely that the father ever used a belt on his children. The allegation did however lead to the removal of the children and to the scrutiny of these two unfortunate parents by Mrs Westmacott, which has in turn led to the conclusion, which again I accept, that there is a likelihood of further harm if the court's powers are not exercised."

17. Indeed, when refusing permission to appeal, the judge observed only that his decision was supported by his acceptance of the evidence of Mrs Westmacott.

18. Thus we reach the heart of this appeal: was it open to the judge to hold that the threshold was crossed by reference in effect only to the evidence of Mrs Westmacott? The answer requires me to analyse her contribution in some detail.

19. **First**, Mrs Westmacott was requested to prepare a report for the court's assistance in relation not to the threshold enquiry but, were the threshold held to be crossed, to its final determination of the application for care orders. Until April 2006 it had been considered possible that, at the three day hearing to be conducted by the judge beginning on 31 May, the application might be finally determined. This aspiration was, however, always subject to the fact that the parents had issued an application under s.38(6) of the Act for a direction for a residential assessment of them with the children; and it was recognised that, if that application, opposed though it was by the local authority and the guardian, were to succeed, the hearing would need to be adjourned. When, however, in April 2006 a paternal aunt of the children put herself forward as a candidate for their care in the event that they were not to be returned to their parents, it was recognised that, in the event that the threshold was held to be crossed, the application would have in any event to be adjourned for her candidacy to be fully assessed. In the event, therefore, the judge was asked to rule only upon the threshold and the application under s.38(6). Meanwhile, however, the case had also been prepared for final determination; and Mrs Westmacott's contribution had been intended to be in aid of that.

20. Thus Mrs Westmacott was not asked by the parties to offer a view as to whether in September 2005 the children were either suffering significant harm or likely to do so. Instead she was asked to undertake a psychological assessment of each parent and each child; of their mutual attachments; of the dynamics of the parents' relationship; of their capacity to meet the children's needs, with or without professional assistance; of any need for change in

that regard; and, if so, of their capacity to achieve it.

21. **Second**, the letter of instruction to Mrs Westmacott was along conventional, yet crucial, lines. By it she was reminded that the welfare of the children was paramount; with it were enclosed the documents filed in the proceedings; and in it she was invited to interview the parents and the children. The letter continued:

> "It is understood that you will not deal independently with any one party without reference to the others and it is essential that there are no informal unrecorded discussions ... with any of the professionals ... involved in the case ... If documents are exchanged with one party, please copy them to all others."

22. But there was a wholesale departure on the part of Mrs Westmacott from this last instruction. I feel sure that she departed from it with the utmost bona fides, in the interests (as she saw it) of the children. Instead she acted rather like a guardian in the compilation of a report for the disposal stage of a hearing. So Mrs Westmacott went to the children's school; studied their special educational needs files and interviewed their teachers; and from one or both of such sources extracted information which seems to have proved highly influential in the development of her Opinion. The lawyers for the parents have not seen those files nor any note of those interviews. Furthermore, when Mrs Westmacott attended the offices of the local authority, she spoke to the social workers and requested to read their voluminous files referable to the family; and the local authority, so Miss Campbell (their counsel) tells us, acceded to her request without demur. Yet the lawyers for the parents have never seen these files. Thus arises a vast question, never considered by the judge: to what extent was the crucial evidence of Mrs Westmacott that the children were suffering, and were likely to suffer, significant harm informed by material to which the parents were afforded no access?

23. **Third**, Mrs Westmacott, while inevitably deciding that the mother was not suitable for psychometric testing, nevertheless decided to administer such tests to the father. She did so notwithstanding the conclusion reached in 2004, which she accepted, that the scale of his IQ relevant to the capacity to undertake such tests, namely the verbal scale, was on the borderline of disability. Astonishingly her single interview with the father lasted for about seven hours; and, within that period, she administered six psychometric tests, which proceeded for some two-and-a-half hours. Of the six tests, four were questionnaires and two were in the nature of discussions. In that the father can scarcely read or write, Mrs Westmacott read out the four questionnaires and wrote down the father's answers. The four questionnaires comprised 325 questions. In cross-examination Mr Hickmet asked Mrs Westmacott to disclose to him the completed questionnaires; she refused to disclose them to him, apparently on the advice of her professional body. When later he asked to see merely a blank questionnaire, Mrs Westmacott again refused; whereupon the judge simply observed to Mr Hickmet that its disclosure would be "liable to misinterpretation by advocates and judges".

24. In the event Mrs Westmacott's concluding Opinion was apparently to prove more greatly influenced by the results of the second and sixth psychometric tests administered to the father than by the results of the others. The second was the Anger Disorders Scale. She reported that it confirmed the suspicion that the father was a violent and manipulative man who controls by force. In her Opinion she said that it revealed that his responses were high with anger and that he was vengeful, resentful and likely to coerce others. The sixth was the Child Abuse Potential Inventory. She reported that the father's score was extreme and in her Opinion she stated that, in the light of the other history which - from one source or another - she had collected, "these scores indicate that he is highly likely to physically abuse or place at risk a child in his care". Thereupon she referred to the allegation that the father had whipped the children with belts.

25. In Re S (Care: Parenting Skills: Personality Tests) [2005] 2 FLR 658 a psychologist had administered to a mother two of the six psychometric tests administered in the present case to the father. As a result of one of them he concluded that the mother was abnormally disposed not to be candid about past or future problems which she had encountered or might encounter in relation to the child; and this led the trial judge to favour adoption. This court reversed his decision. In all three judgments doubts were expressed about the value of psychometric testing in care proceedings. Although Re S might be distinguished on the footing that issues about a parent's honesty are pre-eminently for the court, the judgments are couched in general terms. At paragraph 57 Ward LJ said that such tests were "more likely to obfuscate the judicial process than assist it" and at paragraph 67 Arden LJ said that "personality testing of this kind cannot be used to resolve issues such as parenting skills unless they are validated by other evidence". I consider that, particularly in the light of the father's borderline disability (which was not a factor in relation to the mother in Re S), it was at least necessary for the judge, before adopting the evidence of Mrs Westmacott, to seek to weigh the extent to which her central conclusions were based on the results of the tests; and to ask himself whether, in that regard and in particular in the light of Re S, her conclusions had a sufficiently solid

foundation.

26. **Fourth**, Mrs Westmacott gave important evidence about the relationship of the children with the parents. She concluded that the children had a secure attachment to them and that it was this which had enabled them to settle well with their foster carers. The family, she suggested, was well knit together by close emotional connection and mutual dependency. Her administration to each child of the Bene Anthony Family Relations Test yielded results which - so she said - surprised her: for not only did the children post to the parents the vast majority of positive messages which she had presented to them but, notwithstanding the passage of four months in a good foster home, they posted no positive messages and indeed very few negative messages to the foster parents. It was Mrs Westmacott's view that the children regarded themselves not as living with the foster parents but only as staying there temporarily pending return to the parents. The children made clear to Mrs Westmacott, as they did to the foster parents and the guardian, that they wanted urgently to return to live with the parents; and she conceded that, were the court to direct a residential assessment, they would be "thrilled to bits to be with their parents again" but added that they would be devastated if later they were again to be removed from them.

27. **Fifth**, although she had not been asked to assess whether in September 2005 the children were suffering or were likely to suffer significant harm, Mrs Westmacott in her report offered a view upon that subject which, particularly when expanded in her oral evidence, was to prove pivotal. In relation to G she wrote:

> "In my view [G] has already suffered significant harm in the care of her parents through being exposed to sexual abuse, violent emotions and physical assaults on her mother by her father and a degree of neglect of her medical needs. She has significant learning difficulties, related to language and communication which are similar to those of her parents and thus their ability to support her educationally is compromised. Her behaviour as reported by the school is very significantly different to that of her peers and there is evidence of considerable emotional disturbance."

28. In relation to B Mrs Westmacott chose different words by which she seems to stop short of suggesting that he had suffered significant harm:

> " There are indications that [B] did not flourish in his parents' care and that his physical, behavioural, intellectual and social development were compromised by their inability to give him appropriate stimulation and support. Since he has been in the care of [the foster parents] there has been a marked change in his behaviour and competence within school. The school reports suggest that he is having difficulty with interpersonal relationships and that there is some evidence of emotional disturbance. He is not meeting his potential."

29. Later in the report, however, Mrs Westmacott seems to have made her evidence firmer, as follows:

> "It is highly likely that if the children were to return to their care there would be further episodes of violence and they would be at risk of further significant harm, emotionally, socially and physically."

30. Indeed, in her oral evidence, when asked about the effect of exposure of the children to rows between the parents, Mrs Westmacott said:

> "All of that seems to have created an emotional distress factor for them. Then there is the problem of [G] being sexually assaulted, which undoubtedly caused her significant harm and would have had a backlash on [B] as well. I would not subscribe to the view that their developmental delay was in any way -- if I can use the word -- the 'fault' of the parents, because I don't feel that they came to harm in that context specifically but I do think they came to emotional harm and I think that they have both probably been very, very damaged."

31. **Sixth**, there were in my view, however, four other features of Mrs Westmacott's evidence which placed substantial questions against her at times robust assertions of significant harm; and I cannot understand why this assiduous and highly regarded judge failed even to consider them:

(a) In her report, just above her paragraphs set out at [27] and [28] above about G and B respectively, Mrs Westmacott had written:

> "The difficulty with the ... family is not that there is obvious harm. Although there are allegations, this is not a situation where there is explicit malicious abuse or extreme abuse. On the contrary my concern in this family relates to the more subtle and ambiguous consequences on the children

flowing from parental deficiencies."

And in cross-examination there was the following exchange between Mr Hickmet and Mrs Westmacott:

"Q ... What do you mean by 'ambiguous consequences'?

A. I am talking about the way that you can interpret things in different ways and how you can interpret behaviour differently and how -- it's all -- this is all very subtle. By 'ambiguous' I mean some of the consequences have been good of their behaviour, some of the consequences have been bad. It's difficult to get clear on this case.

Q. ... You are not clear ... what the consequences are for the future for the children flowing from these parental deficiencies that you have outlined?

A. No, I'm not clear. I can only do an estimate of risk."

So which was it? "Significant harm" or "subtle and ambiguous consequences"? Speaking for myself, I regard the two concepts as mutually exclusive.

(b) Miss Trumper, who appeared for the mother in the court below, elicited from Mrs Westmacott that, had she been asked to assess whether the children had suffered significant harm, she would have done further work. Faced, however, with the inevitable supplementary suggestion that, in the absence of such further work, her assertion of significant harm was not firmly founded, Mrs Westmacott reiterated her opinion that such harm had occurred "in emotional areas and specifically in relation to the after-effects of the sexual assault on [G]". In my view Mrs Westmacott's recognition of the need for further work substantially devalued her opinion.

(c) Miss Trumper, perhaps boldly, also chose to ask Mrs Westmacott whether in her opinion the parents were "good enough" parents. She reminded Mrs Westmacott that in 2001 a social worker had expressly recorded that the father was good enough as a father and as a carer and that, as recently as November 2004, the local authority, in closing the file on the sexual assault, must have considered likewise. Mrs Westmacott's response was that she could not answer the question whether the parents were good enough. It seems to me that, were the children suffering significant harm in the care of their parents and likely to continue to do so, there was, in the absence of any evidence of likely change in their parenting, only one answer to that question, namely that the parents were not good enough. In my view the fact that Mrs Westmacott felt unable to say so compounded the devaluation of her opinion.

(d) Upon what, therefore, did Mrs Westmacott found her opinion of actual and likely significant harm? Notwithstanding intensive re-reading of her report and of the transcript of her oral evidence, I have encountered real difficulty in answering this question. Clearly her reading of files not made available to the parents influenced her. Clearly she did not dismiss - though equally she did not appear to assume to be true - the allegation that the father had whipped the children with belts. Clearly she paid substantial regard to the sexual assault on G, which the judge had soon dismissed as an inapt strut for the support of a finding of significant harm. Furthermore, so Miss Campbell submits, Mrs Westmacott relied to a considerable extent on her conversations with the children's teachers, records of which, if any, were never vouchsafed to the parents. In this regard it is no doubt important to remember that, by virtue of s.31(9) of the Act, "significant harm" includes the significant impairment of intellectual or social development. Mrs Westmacott reported that G's teacher had told her that since September 2005 there had been a marked difference in G's confidence, in her ability to make friends and in her receptive and expressive language; that B's special needs coordinator had told her (inconsistently with Mrs Westmacott's own finding, which was that he had an overall IQ of 98, i.e. much the strongest intellect in the family) that B was very poor intellectually; that B's teacher had said that he had settled better since September 2005; and that all the school staff agreed that the children had responded well to living in a stimulating foster home with many learning opportunities which the parents were unable to offer. The courts, however, do not - nor ever should - remove children from their biological parents on the basis that substitute parents would provide greater intellectual stimulus for them than they could.

32. For the above reasons I believe that the evidence of Mrs Westmacott, whose excellence as a chartered psychologist I have no reason to doubt, was a wholly inapt foundation for the judge's conclusion that the threshold was crossed. In the crucial passage of his judgment which I have quoted at [16], the judge did no more than:

(a) positively to reject the allegation of whipping;

(b) twice to reiterate his overall acceptance of the evidence of Mrs Westmacott, which he described as "thorough and cogent"; and

(c) to make only one specific finding, namely that the children had been exposed to rows between the parents, including violence by the father towards the mother or by the mother towards herself, which had led to the children suffering "some" (he did not say "significant") emotional harm. Although there was indeed evidence, including admissions on the part of the father to Mrs Westmacott, which entitled the judge to make that general finding of domestic violence, he had been right at an earlier stage of his judgment to observe that "the older allegations of domestic violence remained almost incapable of specific proof due to the mother's inconsistencies and her inadequacies as a witness".

33. My overview is therefore as follows:

(a) until September 2005 the children lived for all their lives, i.e. nine and six years, with their parents;

(b) (being a point not even addressed by the judge) until that time the local authority, although intimately involved in supporting the family, never sought to suggest, whether in care proceedings or otherwise, that the children's interests required their removal from the home of the parents;

(c) in September 2005 the children were summarily removed from the home on the basis of an allegation which the judge found to be not only not proved but very unlikely;

(d) since their removal the children, being of an age at which their wishes are significant, have continually expressed wishes and indeed demands to return to the parents;

(e) upon a profoundly flawed basis the judge has held that the threshold set by s.31(2) of the Act has been crossed;

(f) he has then proceeded to dismiss the application of the parents under s.38(6) of the Act for the direction of a residential assessment and, in doing so, he observed that, were the assessment to be negative, it would be a particularly bitter blow to the children;

(g) the guardian, who, by reason of the possibility of final disposal at the hearing before the judge, cannot be criticised for having reached her conclusion so early, has already reported that she cannot support the return of the children to the care of the parents; and

(h) the local authority, in contrast to their stance during previous years, are now so conclusively of the view that the children should never return to the parents that at the outset of the hearing before the judge they made a most unusual application to him, namely that, in the event that he was to hold that the threshold was crossed, he should thereupon proceed to direct that in the remainder of the proceedings no further consideration should even be given to whether the children should return to live with the parents.

34. Inevitably the judge declined to proceed to give that direction and indeed he indicated that in November 2006 all options would remain open. Nevertheless it seems to me, in the light

(a) of the findings that in the care of the parents the children were suffering significant harm and were likely to continue to do so;

(b) of the absence of any realistic opportunity for the parents to demonstrate, whether in residential assessment or otherwise, that in the future such risks will be reduced; and

(c) of the firm opposition already expressed by the local authority and the guardian to the children's return to the parents

that, as things stand, the children have almost undoubtedly already in reality lost the chance of being reunited with the parents.

35. In the light of the way, described above, in which it has arisen, this state of affairs would be unacceptable in Strasbourg; is unacceptable in London; and should have been unacceptable in Taunton.

36. So what should this court do now? Mr Hickmet, supported by Miss Bell who appears in this court on behalf of the mother, mounts a strong argument that we should not only set aside the judge's determination but substitute a determination that the threshold has not been crossed, with the result - of course - that the children would return forthwith to the care of the parents. My Lords, however, both firmly favour remission of the threshold enquiry for fresh consideration by a different judge; and I have become convinced that they are correct. A remarkable feature of the appeal is that the written evidence of the local authority before the judge, contained in at least three statements, has not been included in the papers filed for this appeal. In this respect the lawyers for the parents can

hardly be blamed: for the judge did not purport to rely on anything other than the evidence of Mrs Westmacott. More surprising is that the local authority did not file a Respondent's Notice by which they could have sought to persuade this court to uphold the decision of the judge by reference to evidence additional to that of Mrs Westmacott and in particular the evidence of their social workers; such would no doubt have triggered inclusion of their statements in the bundle. It may of course be that the statements add nothing of significance in relation to significant harm. But it is far too dangerous for this court to bring these proceedings to an end and to cause the children to be returned to the parents without even having had sight of the local authority's own evidence in support of their application.

37. Thus I favour an order which sets aside the judge's decision that the threshold set by s.31(2) of the Act has been crossed and which merely remits the entire application for care orders, including the threshold enquiry, for hearing by a High Court judge. We understand that Coleridge J., the Family Liaison Judge for the Western Circuit, can give directions in the proceedings in London at 2:00pm on 13 September 2006; and I would direct that the application be listed before him then so that, as I hope, he can arrange for himself or another High Court judge to hear the whole application afresh, but, in the light of the damaging passage of time, ideally on a composite basis, on the Western Circuit in the forthcoming Michaelmas Term.

38. LORD JUSTICE WALL: I agree with my Lord, Wilson LJ, that this appeal should be allowed and that the judge's finding that the threshold criteria under section 31 of the Children Act 1989 were satisfied should be set aside. As my Lord has indicated, however, I do not think it would be appropriate for us to discharge the proceedings. I would accordingly, like him, direct that the local authority's applications for care orders be heard as swiftly as possible by a Judge to be allocated to the case by the Family Division Liaison Judge for the Western Circuit, Coleridge J; and if, as he anticipates, that judge is not to be himself, but another High Court judge on stand by, the allocation will of course need to be made in consultation with the President of the Family Division. I welcome the news that Coleridge J is able to conduct a directions hearing in London during the vacation on 13 September, and I very much hope that it will prove possible to hold to the dates already fixed for the case, namely 15 to 17 November 2006.

39. Like Wilson LJ, I am satisfied that the judge's determination that the threshold criteria under the Act have been met is flawed and must be set aside. However, I am equally satisfied that the more limited threshold under section 38(2) of the Act is met and that, until the final hearing or further order of the judge allocated to the case, the children should remain in the interim care of the local authority. I add a short judgment of my own, as I regard this as a difficult and worrying case which appears to have a number of unsatisfactory features to it.

40. The first of those features is that the local authority now seeks to establish the section 31 criteria on a basis which is different from that which caused it to institute the proceedings.

41. As a matter of law, as my Lord has explained, the date at which the local authority is required to prove that the two children in this case either were, or were likely to suffer significant harm attributable to their parents' care (or lack of it) was the date on which it instituted the proceedings:- see the decision of the House of Lords in Re M (a minor) (care orders: threshold conditions) [1994] 2 AC 424 (to which my Lord has referred). On the facts of this case, it is not in dispute that the reason the local authority took care proceedings was its erroneous belief that the children's father had seriously assaulted both G and B, thereby causing them significant harm. That allegation became known in the proceedings as the "belting" incident. As the judge commented in paragraph 11 of his judgment, "it rapidly became clear during the hearing that the 'belting' allegation was unlikely to be substantiated against the father", and the case was opened to him by counsel for the local authority on that basis. This had the inevitable consequence that, once again as the judge put it in the same paragraph:- "the emphasis of the local authority's case therefore shifted to more historical allegations of domestic violence against the father, the failure to protect G from sexual assault, which was also historical, and the general inadequacy of the father and mother as parents, which came to be identified by Mrs Westmacott in the course of her psychological assessment of the family."

42. As a matter of law, it is open to a local authority to advance a case on the satisfaction of the threshold criteria which is different from the basis upon which it instituted the proceedings. It sometimes happens that emergency intervention on ground A reveals additional grounds B and C, which were unknown to the local authority when it took proceedings based on ground A. Provided that the basis for the satisfaction of the threshold criteria existed (albeit co-incidentally) at the date proceedings were instituted, there is, as a matter of law, nothing to prevent a local authority which has instituted proceedings on ground A relying on grounds B and C in order to establish the threshold criteria. Provided the parents are given good notice of the grounds on which the local authority is seeking to satisfy the threshold criteria, and have adequate time to prepare, their ECHR Article 6 rights are not breached by such a change of course on the local authority's part.

43. What makes this case different, of course, is that the local authority has throughout been fully aware both of the

difficulties in the parents' relationship and their perceived inadequacies as parents. As my Lord has pointed out, its policy prior to September 2005, in accordance with good practice, was to work with the family in an attempt to keep it together and avoid the institution of proceedings. Thus even when, in 2003, the parents (in particular the father) allowed a known paedophile to stay in their home, with the consequence that G suffered a serious sexual assault, the local authority did not take care proceedings, as they could well have done, on the grounds that G had suffered significant harm (as she plainly had) and that B was at risk of such harm: to the contrary, it worked with the family, who co-operated in the institution of criminal proceedings against the perpetrator who, as a result, received a long prison sentence. Thereafter, as my Lord has related, the local authority, very properly, undertook "keep safe" work with the children, a process in which, once again, the parents cooperated. The local authority must have felt a degree of confidence that their strategy had been successful, because in 2004 the work ceased and, as my Lord has said, they effectively closed the file.

44. In such circumstances as these, the abandonment by the local authority of the principal basis upon which it instituted proceedings inevitably leads to a strong feeling of resentment and injustice on the parents' part. This sense of injustice is, moreover, exacerbated because the parents themselves are unable to understand the finer points of family jurisprudence. From their point of view this case is very simple. They (and the father in particular) were accused of something which they had not done ("belting" their children). Their children were taken away as a result. The "belting" allegation is now abandoned, but their children are not returned, even though the "belting" allegation does not appear to have originated from either of the children, nor had either alleged it, and the children themselves undoubtedly wish to return to their parents' care.

45. On this first point, I have considerable sympathy with the parents. It seems to me, on the limited amount of material available to us, that the local authority has not handled the matter well. However, for reasons on which I will expand later in this judgment, I am satisfied that the case cannot be compartmentalised in the way the parents would wish. I am satisfied that there is a wider case to be investigated, as set out in the threshold criteria prepared on behalf of the local authority and dated 22 May 2006, which supplemented the original statement dated 4 December 2005, and that it would not, accordingly, be appropriate for this court to decide that the threshold criteria under the Act not only were not satisfied in the hearing before Judge O'Malley but are incapable of being satisfied on a proper examination. This is one of the reasons why I would not allow the appeal to the extent sought by the parents.

46. In taking that view, I wish to emphasise that if, at the final hearing, the judge does find the threshold criteria under the Act satisfied, that fact does not mean that a care order and placement of the children outside the family is inevitable. I will return to this point later. It is, however, necessary to emphasise that the satisfaction of the threshold criteria is only the first step in a process. It opens the door to the exercise of a judicial discretion to take one of a number of different courses. But that is all it does.

47. Closely aligned to the first point, however, is a second which also troubles me. The case, as presented to this court, seems to me to carry with it the danger that the court and the local authority can both be accused of engaging in the impermissible process of social engineering. In saying that, I acknowledge that it may well be that this is one of those cases which looks quite different on the ground from the way it appears in the papers presented to us. My following remarks must be read with that caveat in mind.

48. Most unfortunately, in my judgment, we have not been shown the evidence filed on behalf of the local authority. The judge, however, did not just hear evidence from Mrs Westmacott: he refers to taking the oral evidence of three social workers in addition to the guardian and another witness. As we have neither had copies of the written evidence nor a transcript of what these witnesses said, and as the judge relied almost exclusively on the report and the evidence of Mrs Westmacott, this court is unable to gauge either the extent or the force of the social work evidence in the case. Thus, if my anxieties about social engineering are, as a result, either unwarranted or exaggerated, it is because we have not been shown the full picture and because the judge does not refer to the point.

49. As this matter is to be re-heard, however, and as our judgments are being given in public and may well be reported, I think it appropriate to re-state, as clearly and as forcibly as possible, that the family courts do not remove children from their parents into care because the parents in question are not intelligent enough to care for them or have low intelligence quotas. Children are only removed into care (1) if they are suffering or likely to suffer significant harm in the care of their parents; and (2) if it is in their interests that a care order is made. Anything else is social engineering and wholly impermissible.

50. In the recent case of Re H (Freeing orders: publicity) [2005] EWCA Civ 1325, [2006] 1 FLR 815, this court was critical of a newspaper which had misreported care proceedings and had accused the two judges involved (Pauffley J and His Honour Judge Hayward-Smith QC) of removing the children concerned from their parents and freeing them for adoption because the parents' level of intelligence was insufficient to enable them to parent the children

properly. We found that nothing could be further from the truth, as an objective reading of the two judgments in question plainly demonstrated.

51. There are, of course, many statements in the law reports warning of the dangers of social engineering. One of the most powerful, in my view, remains the statement of Butler-Sloss LJ (as she then was) in Re O (a minor) (custody or adoption) [1992] 1 FCR 378. The case concerned a mother who wished to give her child up for adoption against the wishes of the child's father, who both wanted to and was capable of caring for him. In dismissing the mother's appeal from the judge's decision to make what was (in those days) a custody order in the father's favour, with a supervision order in favour of the local authority for one year, Butler-Sloss LJ said: [1992] 1 FCR 378 at 380-1:

> "If it were a choice of balancing the known defects of every parent with some added problems that this father has against idealised perfect adopters, in a very large number of cases children would immediately move out of the family circle and towards adopters. That would be social engineering and it is important to bear that in mind in looking at the problems which arise in this case. It was put far better than I could hope to put it by Lord Templeman in Re KD (A Minor) (Ward: Termination of Access) [1988] 1 AC 806 at p 812; [1988] FCR 657 at p 660D:
>
> 'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.'"

52. I have taken some time on this particular point because I wish the parents fully to understand - and for their lawyers to explain to them - that if, at the very end of this case, the court does find the threshold criteria established and makes a care order, it will not be because, to different extents, they both suffer from learning difficulties. It will be because the court will have found the threshold criteria under section 31 satisfied on the basis set out by Lord Nicholls in Re H (minors) (sexual abuse: standard of proof) [1996] AC 563 (Re H), and because the court has come to the view that a care order is in the best interests of the children.

53. I have also taken some time on this point because we were told at the Bar that the parents' perception is that Judge O'Malley has effectively written them off as potential carers for their children, and that, as a consequence, they have no prospect of regaining the care of their children at any final hearing.

54. I have to say that when I first read Judge O'Malley's judgment I too reached the conclusion that the judge was effectively excluding the parents as potential carers for their children. I came to that view at least in part from the fact that the judge had (a) refused a further assessment of the parents' (and in particular the father's) parenting capacity; and (b) that in so doing he had said:

> "I consider that it would be unfair to subject the parents, with all their disadvantages, to the stress of an assessment in an unfamiliar establishment of a kind likened in other case to a 'goldfish bowl'. Failure would be a particularly bitter blow to the children themselves and would make any eventual placement that much more problematic."

55. I acknowledge that the second sentence of that citation is ambiguous. However, in the context of a finding that the children were likely to suffer significant harm in their parents' care in the future, and the joinder of the children's maternal aunt as a party to the proceedings with a view to her assessment as a carer for the children, it seemed to me that the judge was effectively ruling the parents out as future carers.

56. We were, however, told at the Bar that the judge, at some point which was not recorded in the transcript or in the documentation before us, stated in terms that he was not ruling anything out for the final hearing, and that, to the contrary, all options, including the return of the children to their parents' care, were open. We were also shown (it was not in the bundle prepared for this court) an order made on 7 July by His Honour Judge Bromilow, in which a direction was given for the local authority to file and serve a parenting assessment prepared by a social worker and a psychologist, who were to advise on issues relating to learning disabilities by 18 September 2006. The parents were also directed to file statements.

57. Speaking for myself, I am, of course, prepared to accept at face value the judge's statement that in his mind all options were indeed open. To do otherwise would be implicitly to accuse the judge of deliberately misleading the parents. However, neither this information nor the order made by Judge Bromilow persuades me that Judge O'Malley should conduct the final hearing. It is clear to me that these parents do not think they stand any chance in Judge O'Malley's court and that justice would not be seen to be done if, having allowed the appeal as we do, the case were to be remitted to Judge O'Malley to re-examine the threshold criteria in the contact of a final hearing.

58. How this case is allocated will be a matter for Coleridge J and the President of the Family Division. I am, however, quite clear that justice requires a fresh and entirely open mind to be applied to this case. Whilst I am quite sure that Judge O'Malley would do justice, that would not be the parents' perception, and in my view, on the particular facts of this case, they are entitled to a different tribunal.

59. This leads me to a consideration of Judge O'Malley's reasoning in the instant case, and, in particular, his heavy reliance on the evidence of Mrs Samantha Westmacott. My Lord, Wilson LJ, has covered this ground very fully and I will, accordingly, limit my remarks to a few discrete areas.

60. Before doing so, however, I feel obliged to comment that, in my judgment, both the judge and Mrs Westmacott were put in a very difficult position. As my Lord has demonstrated, the hearing before the judge was meant to be the final hearing, and Mrs Westmacott's report was written for a final hearing. It was not addressed to the question of threshold: indeed, it is arguable in my view that this never was a case for a split hearing. The fact that one took place seems to me to have been entirely adventitious.

61. I am reluctant to be too categorical in my criticisms of the procedures in the court below, for the simple reason that the case was presented to us in an incomplete and, I have to say, unsatisfactory way. In this respect I do not refer to the oral advocacy, which was competent. I refer to the documentation. No doubt because of the judge's heavy reliance on the evidence of Mrs Westmacott, we were not given any of the other evidence filed (apart from the report of the guardian): we were not provided with a chronology of the proceedings, or with any of the interlocutory orders. Furthermore, the bundle of documents made available to us was both badly assembled and incomplete. Apart from its bewildering pagination, it lacked important pages including, in my case, the threshold document prepared by counsel and dated 22 May 2006.

62. This is a case to which the Protocol for Judicial Case Management in Public Law Children Act Cases ("the Protocol") [2003] 2 FLR 719, applies. There is precious little evidence in our papers that it was followed. This, in my judgment, is particularly serious in a case in which the local authority changes tack, as this authority has clearly done. In such a case, strong judicial case management and a proper adherence to the protocol are essential. As I say, there is precious little evidence on the papers before this court to show that either occurred.

63. An elementary example relates to the preparation and need for a split hearing to decide threshold. I quite understand that from the parents' perspective they wished to resist the proposition that the threshold criteria should be established by reference to the "belting" incident. But if there was to be a split hearing, it needed to be addressed specifically to that issue, and to any other clearly identified issues on which the local authority was seeking to rely. None of the counsel in court could provide us with a copy of the order which set up the discrete threshold hearing. Yet it is elementary that the reasons for such a hearing need to be carefully spelled out; the issues to be addressed need to be carefully specified, and the evidence designed to address them expressly identified. I was handed in court the additional grounds relied upon by the local authority and dated 22 May. But how did that document come into existence? Where was the order directing it? What did that order say?

64. As it happens, Coleridge J was one of the architects of the Protocol. Whether or not he takes this case himself, I respectfully invite him to examine the file in this case and to ascertain the extent to which the Protocol was either followed or ignored. As I have already said, it may have been the poor and inadequate presentation of the documentation in this court which is masking a greater adherence to good practice than is apparent to me on the face of the documents.

65. All that said, however, and as My Lord has demonstrated, there are several powerful criticisms which can properly be made of Mrs Westmacott's evidence which make the judge's almost exclusive reliance on it unsatisfactory. Mr. Hickmet (for the father) was able to make a number of trenchant criticisms. He criticised Mrs Westmacott for taking her information from reports and information in the local authority files which were neither in evidence nor made available to the parents. He criticised her for carrying out extensive psychometric tests on the father, comprising over 300 questions, with which he was manifestly ill-equipped to cope. He pointed to the fact that when giving her evidence she refused to show him documents which demonstrated her methods of work. He submitted, in effect, that she had been both judge and jury; that she had usurped the judge's function by treating as fact that which was properly only suggestion, and of condemning the father on material which it was not for her to judge. The result, he submitted, was that the judge himself effectively delegated his responsibility to the expert witness, and thereby failed properly to address the threshold criteria. By putting all his eggs into Mrs Westmacott's basket in paragraph 17 of his judgment, which my Lord has read and which I will not repeat, the judge had been plainly wrong and his threshold findings simply could not stand.

66. For the local authority, Miss Campbell's vigorous defence of Mrs Westmacott only partly assuaged my concerns. I find it difficult, I have to say, to disentangle the knots caused by poor case preparation, an apparently unheralded

threshold hearing and the fact that Mrs Westmacott had written her report for a final hearing. There is, for example, no reason in principle why an expert should not have access to local authority files, if he or she is to express an opinion and takes the view that an examination of those files is necessary to enable him or her to express that opinion. But the concomitant is obvious. The court and the parties, particularly in this case the parents, must have access to the same material. Nothing an expert does should be secret, or not open to examination by the other parties. How else are they to test the expert's methodology and the soundness of his or her conclusions? Equally, I find it unacceptable that Mrs Westmacott was not prepared to show the documents to counsel when asked to do so in cross-examination.

67. However, Mrs. Westmacott's report is dated 2 February 2006. She gave evidence to the judge on 1 June 2006. On the face of it there was ample time for the father's advisers to seek directions for the disclosure of the documentation on which she relied. Furthermore, Mrs Westmacott herself made it clear that had she been investigating the question of significant harm for threshold she would have done other work.

68. In my judgment, Mrs Westmacott's evidence may have a value when applied to a final hearing. Whether or not it does will be a matter for the judge who takes that hearing. Its value in relation to a threshold, however, and dispute over threshold, is, in my view, compromised. It was not appropriate for the judge to place such reliance on it in this context and in my judgment the fact that he did so is sufficient to vitiate his conclusion.

69. In this same context, the criticisms made by Mr Hickmet of Mrs Westmacott's use of psychometric testing and his reliance on the decision of this court in Re S (Care: Parenting Skills: Personality Tests) [2005] 2 FLR 658 are, in my judgment, both points well made. Once again, however, it seems to me that the error perpetrated by the judge stems from a confusion between what was proper evidence for threshold and what was proper evidence for final welfare resolution. As I pointed out as long ago as 1988 in Re CB and JB (Care Proceedings: Guidelines) [1998] 2 FLR 211, it is not for the expert to make findings of fact, nor is it usually appropriate for expert psychiatric or psychological evidence to be adduced (in that case relating to propensity) when the court is considering whether a parent has or has not behaved in a particular way. It was for the judge, in the instant case, to apply the principles of Re H and to decide whether or not the local authority had established a sufficient factual basis from which he could find that either of the two limbs of the threshold criteria had been satisfied. As a result of his exclusive reliance on the evidence of Mrs Westmacott, the judge, in my judgment, did not perform that vital exercise and his finding that the threshold were satisfied cannot, in my judgment, stand.

70. As I pointed out in argument, however, there is a major difference between a threshold purportedly based only on a discredited allegation of assault (which would result, in my view, in the dismissal of the proceedings) and a threshold which argues that the father's domestic violence is part of an overall pattern of inappropriate parental behaviour which in turn leads to an overall conclusion that the father does not have the capacity to parent children and is thus likely to cause them significant harm if they are returned to his care. It is the latter which now needs properly to be investigated, not in isolation, but as part of an overall review of this family's future. That task must now be undertaken as a matter of urgency by another judge.

71. I would, accordingly, like my Lord, set aside the judge's finding that the threshold criteria were satisfied. I would remit the care proceedings in their entirety to be re-heard by a judge to be allocated by Coleridge J (if necessary in consultation with the President of the Family Division) and I would order that the matter be listed for directions before Coleridge J sitting in London on 13 September 2006 at 2.00pm.

72. On this basis I would allow the appeal.

73. LORD JUSTICE KEENE: I agree with both judgments and the appeal will be allowed to the extent indicated and the application for care orders, including the threshold enquiry, is therefore remitted for hearing by a High Court judge and the application will be listed before Coleridge J for directions in London on 13 September at 2:00pm.