[2010] EWCA Civ 1000

Case No: B4 / 2010 / 1865

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BIRMINGHAM DISTRICT REGISTRY
(MR JUSTICE MOSTYN)

Royal Courts of Justice
Strand, London, WC2A 2LL

10th August 2010

B e f o r e :

LORD JUSTICE MUMMERY
LORD JUSTICE HUGHES
and
LORD JUSTICE STANLEY BURNTON

IN THE MATTER OF D (A Child)

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Official Shorthand Writers to the Court)

Mr Clive Newton QC (instructed by Birmingham City Council) appeared on behalf of the Appellant, the Local Authority.
Mr Paul Lopez (instructed by Brendan Fleming & Co Solicitors) appeared on behalf of the First and Second Respondents, the parents.
Mr Alistair Macdonald (instructed by Carvill and Johnson Solicitors) appeared on behalf of the Third, Fourth, Fifth, Sixth, Seventh and Eighth Respondents, the Children, acting by their Children's Guardian.

HTML VERSION OF JUDGMENT

Lord Justice Hughes:

1. The mother and the father have six children: J (a girl) is now about nine and a half, R (a boy) is now eight, T (a boy) is five and a half or thereabouts, M (a boy) is four and a half, L (a girl) is three and F (a girl) is sixteen months. There have been care proceedings of one sort or another affecting the children from time to time living since 2005. In the course of the five years since then, the plans of the local authority have changed on several occasions. Sometimes they have been for removal of the children for adoption, sometimes they have been for the care orders with the children placed at home, and sometimes they have been for unconditional return home without any order at all.

2. Over approximately 12 days of hearing a fortnight or so ago it fell to Mostyn J to decide the issue of whether these children should henceforth be subject to care orders or not. In form the proceedings were twofold. There were longstanding but undealt-with applications by the parents to discharge care orders which were extant on the four elder children, and secondly there were applications by the local authority for new care orders in relation to the two youngest girls. Behind that form of proceedings the real issue was where they should all live and in particular whether they should or should not continue to enjoy a family life with their parents. The local authority's case was that that was impossible. The younger two, it said, should be adopted and the elder four should live in long term fostering, permanently separated from their parents and with only minimal, in effect identity, contact with them.

3. In the event the judge decided that all but one of the children should be permitted to return home. He discharged the care orders for all except T and he refused to make fresh care orders for the youngest two girls. Those decisions are challenged here by the local authority, supported by the guardian, who seek leave to appeal. The principal ground raises an arguable issue and I would at the outset give leave to appeal. Because of the urgency of the decision about these children the appeal has been listed to proceed before us immediately after the application, and we have heard the submissions in conventional rolled up form. We have been able to hear it in vacation and only about ten days after the judgment was delivered.

Outline history

4. The history of the dealings between these parents and the local authority is, as sometimes happens, long and somewhat involved. I am not going to attempt to set it out in full but it is necessary in order to understand the issues to have at any rate the principal landmark events in mind. They are these.

i) In May 2005 the three children then born, the three eldest, were removed from home because conditions in the house were then squalid and the children were neglected. Care proceedings were begun upon care plans for adoption. The threshold was admitted. The District Judge made care orders in January 2007 (by now for the four eldest children) after an eight day hearing.

ii) After the birth of L in March 2007 she was allowed by the local authority to remain at home under an interim care order. Some time around either the end of that year or the beginning of the next, roughly 2007 and into 2008, the elder four children were returned home, at first for trial periods and then permanently. During those periods the family was watched and assessed by an independent social worker, Mrs Codrington, who appears to have lived with the family at any rate for some of the time. From then until the middle of that year, 2008, a series of reports upon the parents indicated that they had made real changes and particularly that L was thriving. There were, as might be expected, some hiccoughs in the return of children who had been living away but basically the returned children did well. The result was that the local authority after careful consideration proposed that the care orders be discharged and that the then five children lived at home with no order at all.

iii) On 4 September 2008, during a statutory medical of the children, mother became rather excited. The doctor's record showed that she told him that the elder boys were badly behaved and she went on to say that she did not love them or want them. In consequence the local authority altered its stance and proposed that care orders should remain in place but that under those care orders the children should continue to live at home.

iv) On 6 January 2009 all five children were peremptorily removed by the local authority who attended with the support of a number of policemen. The occasion was T having said to a supply teacher at the school that his dad had hit him with a red belt which he said that he, T, had painted, and indeed he said that Dad had kicked and punched him as well. To anticipate, at the hearing with which we are concerned the judge heard all the evidence about this suggestion and he concluded that whatever T had said, his father had not hit him nor indeed was there any sign of injury beyond what might have been an old bruise.

v) L was returned home within the month. By February 2009 the local authority had decided that the other children should also be returned but not immediately. There were a number of hearings at court during which the local authority maintained that same stance. The guardian supported that stance although she expressed some doubts about the parents, particularly about mother. In consequence, except for T, the children were returned in August of that year 2009.

vi) On 18 January 2010 the local authority again peremptorily removed the children from home, again arriving with the support of a number of policemen. There was a thoroughly regrettable scene with the children being wrestled away from mother. It was at a stage when the two little girls were both being breast fed and one of them may have been being breast fed at the time. The occasion for this removal was that on that same day the little boy, M, had gone to school and had been seen to have a red mark on his neck which looked as if it might be a scratch or perhaps a carpet burn. When he was asked about it he said that his mother had done it and that she wanted him dead. The medical examination of the mark was

inconclusive. The judge in due course heard all the evidence and concluded that mother had not hit M nor caused the mark.

vii) This event, however, resulted in another and at this stage the last change of plan. It now became permanent removal of all the children. The youngest girl, F, was returned home about six weeks later. Application was made for an interim care order in respect of her but it was refused by Holman J, who made an interim supervision order instead. The other five children, however, remained placed with different foster parents and that is where they were at the time of the hearing before the judge last month.

The issue

5. The judge was presented with a very large volume of material indeed. There were nine very full lever arch files of written material, running to about 3000 pages. He heard the oral evidence of fourteen witnesses and read the evidence of several more. The hearing before him lasted for 12 days. At the end, however, as is not infrequently the case, this very large volume of material disclosed an issue which is simple enough to state, if not necessarily simple to decide. The local authority rested its case not substantially upon any history of ill treatment or indeed of any past significant harm suffered by any of the children. They did reinstate and put in evidence the original facts which had led to the admission in 2005 that the threshold conditions were then passed in relation to the eldest three children, but that was all long in the past and since then conditions at home had much changed and the local authority had formed the view that the children ought to go home.

6. Substantially the local authority case rested upon a psychological assessment of the parents, and especially of mother, by a professional and experienced child and adult psychologist, Dr Gillett. Dr Gillett's conclusion was that the personality of mother in particular, and of mother and father in combination, was such that the parents were unlikely to be able effectively to parent any of their children throughout their minority.

7. The issue for the judge was therefore this: ought that assessment to prevail despite the absence of any history of significant ill treatment or harm and indeed over positive empirical evidence that mother and father had been observed to be coping sufficiently? That was the issue in the case. Alongside that central issue lay a number of subsidiary issues which related largely to the actions of the local authority. They are properly to be regarded as subsidiary only but they were in a number of respects subjected to critical examination. The judge was trenchant in his criticism of the peremptory removal of these children in January 2010. Nobody has suggested that he was not entitled to be and it is quite clear that he was. It must of course be remembered that at that time the local authority could not know that M's red mark would turn out not to have been caused by mother. More generally, any court must always be conscious of the quite enormous pressures which our society places upon social workers when there is any suggestion or hint of physical harm to a child. Social workers are, as Wall LJ aptly observed in EH v LB Greenwich [2010] EWCA Civ 344, peculiarly liable to be damned if they act and equally damned if they do not. All that said, the single mark on M, and a four year old's over-dramatised statement about his mother when there was simply no history of physical abuse beyond perhaps the occasional inappropriate slap, was simply never a proper basis for a sudden removal of the kind that was undertaken. Because it was sudden and reinforced by police officers and thus resulted in an entirely predictable physical tussle, it must also have been distinctly harmful to the children.

8. It has to be said that this followed the earlier peremptory removal on equally slender grounds in January 2009. In the aftermath of that earlier removal, representatives of the local authority had proposed at the next court hearing a plan for permanent removal of all the children when such a proposal could not lawfully be made without the endorsement of a statutory review. There had actually been a statutory review but the proposal had never even been tabled let alone decided. On that earlier occasion the unlawful nature of the local authority's stance had been reported to the court in a later statement very properly made by the allocated social worker. It had prompted a sharp order from a different High Court judge, Wood J, who had called for a written explanation from the Director of Social Services.

9. In those various circumstances the judge's powerful criticism of the removal in January 2010 was merited. He was also highly critical of a particular assistant social worker who had told the children's school in December 2008 that the guardian "wants the children removed from the parents". That observation the judge described, expressing his regret at having to do so,

as a "flat lie". The reality was that at that time the guardian's position, which has varied from time to time, was, according to her report of September 2008, that the care order should stand, with the children placed at home. Her report contained specific reference to a "vast improvement" in the parenting of the children. It is, however, also certainly true that the guardian has had significant reservations throughout about the family's ability to cope. It seems to me at least possible that the assistant social worker had picked these up and, speaking only for myself, I would have thought that that was as likely an explanation for the remark to the school as that it was a malicious untruth. It is, however, not difficult to share the judge's regret that such a thing should have been said. That is because there was an obvious danger that it might induce the school to view the case from the wrong standpoint, might induce it to assume that the position at home was much worse than it actually was and might lead to it being treated as an invitation to provide evidence to support a conclusion which had already been arrived at in principle, when it had not.

10. The judge was, however, wisely reminded by counsel for the guardian of the dangers of permitting any indignation at these various events to intrude into the judgment decision that he had to make. He expressly accepted that submission at paragraph 122 of his judgment, and he reminded himself correctly at the following paragraph that even if the local authority had no proper basis for peremptory removal of the children in January 2010, that did not necessarily mean that it was wrong in its present submission, on the basis of the psychological report, that it was not safe to allow them to go back.

11. There was further criticism during the hearing of the local authority's changes of stance. The judge also chronicled in his judgment the frequency of changes of allocated social worker. To the extent that the judge was critical of those two aspects of the case, he was on very much less firm ground and it is a pity that criticisms were made. It is obvious of course that changes in the planning for the future of children are to be avoided wherever possible. They are, however, inevitable when the circumstances change as they often do in ordinary human families. Even without what are conspicuously oscillating public pressures on social workers, first one way then the other, a change of direction may -- I emphasise may -- be no more than a reflection of changed circumstances. These particular parents, for example, had clearly been keeping an untidy and insanitary house in early 2005 whereas by 2007/2008 they were keeping a house that was entirely satisfactory. Later changes in planning are less satisfactorily explained but I can see no reason to think that the local authority was not collectively doing its best to discharge its duty to these children, even if sometimes it was wrong. As to frequent changes in allocated social worker, those, it is sad to say, are symptomatic of the intense practical difficulties which social services experience all over the country but especially in large cities, which this was. Such changes are generally attributable to a high turnover in staff, to a consequent preponderance of officers with less experience than they need, and to really quite enormous caseload pressures. Generally speaking, no one in social services management desires frequent changes of allocation. They are no doubt as frustrated by them as judges are. Judges who deal regularly with care cases know that, without intimate knowledge of the internal management of the social services department concerned, it is quite unsafe to conclude that such changes are a proper subject for criticism - as distinct from a proper subject for regret.

12. All those, however, which it has been necessary to rehearse, were side issues in this case. What mattered was whether the children could be allowed to live at home with reasonable safety or not. Could the parents provide good enough parenting? That turned substantially on the psychological assessment and the factual evidence.

The psychological assessment

13. Dr Gillett's assessments were made after the January 2010 removal. They involved many of the customary psychometric tests. She saw both parents on two different occasions. She saw the children alone or with their foster carers, and in some cases she observed contact sessions between the children and their parents. Her reports were long, very long, and supplemented by oral evidence. It is unnecessary and would be wrong to attempt a detailed summary.

14. The psychological point of departure is that mother has quite substantial learning difficulties. Her verbal IQ was measured at about 61, though her performance test at about 89. Overall, a full score of around 73, which would thus be indicated, subject to caution because of the large

difference between the two components, is significantly low. One test suggested a marked tendency to depression and to self reproach, although another suggested a higher than ordinary self image. Dr Gillett attached significance to her conclusion that mother's thinking was "concrete", which in the language of these tests does not mean inflexible but rather unfamiliar with abstract concepts. Like many others of mother's overall abilities, she has a definite tendency to blame others rather than herself when things go wrong. In her case that is now coupled with a very marked hostility to social workers, whom she does not trust. She has poor impulse control and the assessment of her as prone to outbursts is amply supported by empirical examples of her rudeness and anger when dealing with decisions against her made by social workers. She lacks the level of insight into the feeling of others which more capable people might be expected to display, although they do not, of course, invariably do so.

15. Mother's hostility to social workers raises a problem which is all too familiar in the family courts. A parent whose capacity to care for his or her children is put in question is likely to resent it. Social services on the other hand have a duty to inquire and in some circumstances to take action. Often there will be an important question whether with a measure of support the parent or parents can achieve good enough parenting. If the parent has become resentful of the social workers, whether for good cause or for bad, it will for that reason be that much more difficult to provide support. This very often leads to the parent being criticised for lack of cooperation with the social workers, and, in turn, to the parent's resentment of the social workers' intrusion growing rather than diminishing. It becomes a vicious circle. It can sometimes then be easy for social workers to think that an uncooperative parent is *for that reason* also an inadequate parent, but the one does not follow from the other. The judge was accordingly right to say that a refusal to do the social workers' bidding or even to be polite to them, whilst it may be regrettable, is not by itself any justification for the making of the care order. It may of course contribute in some cases to the unhappy conclusion that there is no scenario in which the parent can be supported to the extent that he or she needs. In other cases it may contribute to the yet more unhappy conclusion that the anger displayed towards the social workers is simply an example of generalised angry violence to which the children are likely to be subject as well. But neither of those conclusions are necessary ones. It all depends on the facts of the case. It is not uncommon for hostility and lack of cooperation to be confined to those who are perceived, however unfairly perceived, to be wrongly interfering in the family; and if that is the case it is quite often possible to find other agencies who can establish a working relationship with the parent and provide the necessary support. To try to do that is part of the job of the social worker.

16. Father is a different personality. He has a much better reading capacity and a full scale IQ in the general region of 80 or thereabouts. He too is criticised for concrete thinking in the sense explained (he described a shirt and jacket as something you wear rather than as clothes, which is said to display an inability to cope with abstract concepts). He is assessed as basically submissive or dependent and rather naïve, with a contented attitude which was described as "Pollyanna-ish"; in other words, he looks on the bright side, which can of course sometimes be unrealistic. He was found to be angry about the assessment and at what had happened to his family, but to be controlling his anger. Otherwise his anger responses were within entirely normal range. He did react strongly to criticism.

17. Those are the barest summaries of a very detailed assessment made by Dr Gillett. I for my part agree with the description given to her reports by Mr Newton QC. They are thorough and they must have involved a very considerable amount of effort. On the basis of her very detailed assessments, Dr Gillett reached the conclusion that these two parents as a couple were "unlikely to have the capacity to parent one or more of their children successfully through their minority". She went on to say in relation to the two youngest children that although there was an apparent attachment and an absence of significant difficulties at present affecting them, the parents did not sufficiently appreciate their own emotional needs and how those of the two little girls will change over time. Her conclusion was that the parenting provided to those children also was likely to fall below the good enough standard as the children mature, the more so if other children were born after them.

The factual evidence

18. The judge was obliged to consider this psychological assessment, supported as it was by the expert opinion of the guardian as such, alongside the evidence of the family's performance.

As I have already pointed out, there was plenty of support for mother's angry distrust of social workers and it was clear that she extended this also to Dr Gillett and to the guardian, whom she regarded wrongly but understandably as operating in conjunction with the local authority. The judge called for, was given, and set out exhaustively at paragraph 84 of his judgment all the instances of conduct which was criticised anywhere in the evidence. There were some instances of bad language. J had been found on more than one occasion to have severe head lice infestation. Mother and father had sometimes said that the boys were wild. Generally, however, the allegations of criticised conduct were aptly described by the judge as largely trivial.

19. Other evidence of past performance was very much more positive. Again, I attempt no more than the barest summary but it came to this:

i) There was a complete *absence* of some of the common features of harm or abuse which sadly often characterised cases of this kind. The parents, for example, had been an established couple for ten years. Father is the parent of all the children. He is a hard working man with a decent employment history. There is no history of drug or alcohol abuse. There is no history of significant violence although there have been occasional reports of noisy rows between the parents and some suggestion that the children are slapped. There is no sign of the children being disturbed or misbehaved, still less that they are out of control. There is no hint anywhere of sexual misbehaviour by the parents or sexualised behaviour on the part of any of the children. There is no question of any dangerous visitors being entertained in the house. The house is adequately cared for, clean and looked after. The children are well enough fed. Neither parent has been in any trouble with the police. Of course an absence of those more obvious features of harm only goes so far in meeting what was in this case substantially an assessment of a risk of future emotional damage owing to the inadequacies of, in particular, mother's personality. However, there was in addition other evidence.

ii) The independent social worker (Mrs Codrington) who had observed and assessed the parents at the end of 2007 and in early 2008 when they had with them first L alone and then the older four as well, reached the unqualified conclusion that they provided adequate parenting and an adequate, indeed perhaps in some respects more than adequate, home. There was a good routine. The children were well turned out. Meals were satisfactory. She saw mother helping J and R with jigsaw puzzles and devising some sums and spelling for J to do, which is perhaps an interesting sidelight on mother's undoubted limitations. She watched the parents deal with an outbreak of a virus infection which affected large numbers of the population. There were certainly some difficulties with selfish behaviour from the children having recently returned home from foster care, but overall Mrs Codrington spoke of "visible improvements in parenting". Again I only summarise, but it was as a result of this report, very largely, that the local authority confirmed in March 2008 that the children should remain formally placed at home, and indeed went on to conclude that the care orders should be discharged.

iii) At around this same time the parents referred themselves to 'Home-Start', which is as I understand it a Government-sponsored independent voluntary organisation providing support in the home. The supervising representative, Mrs Silverton, reported that she continued to see the family weekly and their support volunteer had been with them for some little time. By the time of this hearing the parents' relationship with Home-Start was over three years in duration. All the work that had been done had been successful. The parents showed a genuine wish to cooperate. Father went further and accepted counselling. Mrs Silverton was described by the judge as an impressive and worldly witness.

iv) The health visitor, Mrs Johnson, was a lady of considerable experience. She too had been visiting for more than three years from 2007. Her report and her evidence given orally to the judge were both entirely positive. The various children were developing at age appropriate rates and the parents were cooperative and receptive to advice. Mrs Johnson made it clear that she was quite used to reporting areas of concern, where she had them, to social services. She had none at all about this family; indeed she used the perhaps unusual epithet "excellent" about them. The judge described Mrs Johnson as an exceptionally impressive witness. He was conscious that she had seen thousands of families from all walks of life. True, of course, that she was an occasional visitor, but she had had ample opportunity to observe this family.

v) There were in substance no real criticisms of father as a parent except that he was of somewhat submissive character so that there was a fear that he might not stand up to mother if she were determined.

vi) The judge had the clearest evidence that the eldest of the children, J, had voiced very clear and anxious wishes to return home and indeed she had written movingly to the judge himself.

20. This evidence was of significance. First, it revealed that the parents appeared to have abilities to cope. Second, an important feature of it was that it demonstrated that they were willing to cooperate and to accept advice, and that was true of not only father but also of mother once her trust was obtained. In other words the hostility to social workers was not mirrored by similar hostility to other outsiders.

21. Given the legitimate criticisms of some of the actions taken by local authority representatives, that there should be naked hostility in a mother of very limited abilities is perhaps unsurprising; but what is significant is that her hostility does not appear to be generalised. True it may be that the occasions for a health visitor, for example, to be in confrontation with mother are no doubt less than the occasions for a social worker to be, but the factual evidence before the judge had included that of an experienced independent social worker placed there to assess the parents -- that is, Mrs Codrington -- and whilst the Home-Start supporters were no doubt proceeding from a supportive footing, it would be very surprising if opportunities for disagreement or confrontation had not sometimes presented themselves. Mrs Silverton from Home-Start was asked specifically about mother's regrettable rudeness to the guardian, which she had seen for herself. Mrs Silverton said:

> "she can be awkward, and very confrontational, but I've never seen it directed to the children; it's always towards the authorities, I'm afraid."

22. Dr Gillett had been provided with the statements of Mrs Silverton and Mrs Johnson and indeed, on an earlier occasion, of Mrs Codrington. She made relatively brief reference in the course of a single page of a very, very long report to the statements of the first two but did not, so far as anybody has been able to demonstrate, discuss the experience of Mrs Codrington at all. That is not necessarily a criticism of her but it is a limitation. Instead her report proceeded almost entirely upon the conclusions which she had decided needed to be drawn from her assessment of the personalities of the parents. By way of example only she drew on the assessment of their thinking as concrete in the particular sense that I have mentioned in the course of her oral evidence and said:

> "Unfortunately there are things in relation to parenting that are not practical and are not concrete and not non-theoretical."

23. On behalf of the local authority supported by the guardian, Mr Newton's submission is that the judge was simply not entitled to treat these several pieces of factual or empirical evidence in the same league as the psychological assessment of Dr Gillett. They are, he says, chalk and cheese. Dr Gillett, he says, was undertaking an assessment of the parents; the others were simply reporting facts. I do not agree with that. All these people and Dr Gillett were assessing the parenting abilities of these parents. They were doing it, to be sure, from different angles but that is what they were all doing. Mrs Codrington in particular had been put in as an independent social worker precisely to assess whether the children could safely be returned home or not. Nor do I agree that the treatment of the factual or empirical evidence by the judge was confined to setting it against the long list in paragraph 84 of his judgment of the relatively minor criticisms of conduct offered against the parents. Certainly the factual evidence that I have summarised did fall to be set against those largely inconsequential criticisms, but it went very much further than that, the judge was entitled to treat it as going very much further than that and it is absolutely clear beyond a peradventure that that is what he did. The evidence of the three principal witnesses, Mrs Codrington, Mrs Silverton and Mrs Johnson, occupies something like 17 pages in all of the judge's admittedly long judgment.

24. At root the question in this appeal is whether the judge was entitled to prefer this empirical or factual evidence to Dr Gillett's prognosis derived from her psychological profile. The answer to that is yes. I do not think that it was helpful for the judge to embark upon a comparison with the direction which is given in criminal cases to jurors when they are dealing with expert evidence. Those directions no doubt are designed to remind jurors that the ultimate decision

is for them, that the expert evidence must be evaluated and that if they disagree for a reason with the expert's conclusion they must do so, but that is to say no more than is the common coin of all litigation and jurors do not give reasons; judges do. In the context of a child care case, the judge is the decision maker, the expert is not. Where there is as here undisputed expert opinion evidence, the judge ought not to reject it without sound and articulated reason. This judge said at paragraph 171 that it was for him to weigh the evidence of Dr Gillett and the guardian in the context of all the evidence both oral and written in the case. To the extent that he parted company with the evidence or recommendations of Dr Gillett or the guardian, he recognised that he must give his reasons.

25. The judge did not in this case decline to adopt the prognosis of Dr Gillett or the similar conclusions of the guardian without reason. He declined to adopt them because he judged them against the empirical evidence and found them wanting. Where there is, as there often is, evidence of different kinds like this evidence -- part expert, part historic, part factual, part other expert opinion -- someone has got to weigh the overall effect of it taken together; that someone is the judge. That he should have done so was not simply permissible, it was the job that he was there to do. The judge did not fall into the trap of setting himself up as an amateur psychologist. What he did was to weigh the expert evidence against the empirical evidence, which is a different task. Nor did he simply rely on his own impression of the parents in the witness box, although he did make a passing reference to mother's presentation.

26. The empirical evidence in this case did not paint an idealised picture by any means. This is a family with many problems. Many of them do stem no doubt from mother's limitations, but that is true of a very large number of families. The judge was entitled to come to the conclusion that if these children had to be removed from home, then so would large numbers of families with parents with learning difficulties and psychological profiles such as mother's. He was no doubt conscious of the limitation of mother in for example discerning and prioritising the interests of the children, but sadly that is true of countless parents including many without any of the limitations of this mother.

27. The difficulty which arises in this case and which has undoubtedly led to this appeal is one which the judge created for himself in the language which he used in expressing his conclusion, perfectly permissible as that conclusion undoubtedly was. He allowed himself to refer in passing to Dr Gillett and the guardian as "ancillaries of the local authority". It seems to me that Mr Lopez is probably right in saying that when he did so he was making reference to the way that mother saw them rather than suggesting that he thought that they were in some way dependent upon the local authority. But assuming that to be the case, that kind of provocative expression should never have been used of either Dr Gillett or the guardian, at least unless it was made clear that this was simply mother's perspective and a wrong perspective. Rather more significantly, the judge in preferring the empirical evidence to the psychological prognosis was intemperate in his language of description of the latter. He went so far as to suggest that the evidence of Dr Gillett and the guardian had "lost professional objectivity, has become personal and is infected with ideological zeal". At a different point he referred to the treatment of mother by Dr Gillett and the guardian as having been "unfair and unprofessional" and involving "personalised attrition and a distorted ideology where complex scientific language and baleful prediction has sought to camouflage the emptiness of the actual historical empirical evidence".

28. There had been no suggestion of unprofessionalism or unfairness or distorted ideological zeal made either to Dr Gillett or to the guardian at any stage in the course of their evidence by anybody, including by the judge. Nobody had suggested it in closing submissions. I am sorry to say that these descriptions were simply wholly unjustified. If the judge meant that the psychological evidence and the guardian's report paid too much attention to the personality of mother and especially to her hostility, that could legitimately be said. What he found was that Dr Gillett's evidence and the opinion of the guardian were overly theoretical and test-based and had not sufficiently considered the empirical evidence. That too it was open to him to say, but to say either of those things is a very long way indeed from a lack of professionalism and that should never have been suggested.

29. These unnecessary comments have created the need to bring to this court a case which actually depended on factual findings and a judgment call of the kind which is presented daily to family judges. They have led to the submission, moderately and entirely understandably made by both Mr Newton and by Mr Macdonald for the guardian, that the judge had rejected

the evidence of Dr Gillett and the guardian for no reason at all founded upon any evidence. If that had been what he had done then it is probable that his whole decision would have been vitiated; it would not, in that event, have been possible for this court to have worked out what it might have been if he had balanced the evidence.

30. Moreover the comments certainly raised the question whether the judge had himself fallen into the error which he attributed to the local authority, namely of allowing judgment to be effected by a personal agenda. For the reasons which I have endeavoured to set out, I am satisfied that he did not in fact do this anymore as far as I can see than the local authority did. Having had the opportunity to examine this long judgment in depth with the help of constructive submissions on all sides, it seems to me that the judge's reasoned decision was in fact based on a proper evaluation and a weighing of the different sources of evidence. I cannot, however, leave the case without emphasising the vital importance of avoiding wherever possible intemperate language in the highly charged context of a care case. Quite apart from anything else, it is distinctly likely that there may be occasions in the future when some dealings between local authority social workers and these parents are necessary. Everybody needs to do whatever they can to try to achieve restraint and understanding on both sides if that should occur.

31. There were features of this local authority's actions which justified robust criticism, in particular the two abrupt removals, and those have not been defended here. The conclusions of Dr Gillett and the guardian were ones which the judge was entitled to find erroneous on the facts of the case, but it needs to be made clear to everybody, and I unhesitatingly do so, that there simply can be no suggestion whatever that these various people were not doing their best as they saw it to act in the interests of the children.

Disability

32. There is a second ground raised which needs to be dealt with. In the course of his judgment the judge observed that mother's learning difficulties could be described as a disability, and at two points in his judgment he posed questions relating such a disability in some manner to the threshold test contained in section 31(2) of the Children Act 1989. At paragraph 26(ii) of his judgment, referring to section 31(2), he said this:

> "The use of the indefinite article when referring to 'parent' signifies that the comparator is that elusive creature the hypothetical reasonable parent. An interesting question is whether the hypothetical reasonable parent is to be taken as possessing the same social, intellectual and psychological profile as the actual parent under consideration."

33. At the end of his judgment (paragraph 178 (ii)) he said this in relation to the question of whether there was a likelihood of future significant harm to L and F:

> "In making this assessment the standard of hypothetical reasonable care to be applied must have regard to the psychological profiles of these particular parents. Any other approach would be discriminatory."

34. Unsurprisingly that prompted the applicants present to raise with the judge after his judgment the question whether he had misdirected himself as to the threshold test. He responded by a short supplemental judgment, in the course of which he said this:

> "By way of clarification I would say this ... I did not state that a hypothetical reasonable parent must be endowed with the psychological profiles of the parents in question. Rather, at paragraph 178(ii) I stated … [and then he quoted the relevant paragraph]"

35. I will accept that this does demonstrate that the judge has not made what would have been a fundamental and most elementary error; indeed it would have been astonishing if he had, not least because he had been helpfully presented by counsel on all sides with an impeccable statement of law which made the objective nature of the test under section 31(2) entirely clear. For the avoidance of doubt, the test under section 31(2) is and has to be an objective one. If it were otherwise, and the "care which it is reasonable to expect a parent to give" were to be judged by the standards of the parent with the characteristics of the particular parent in question, the protection afforded to children would be very limited indeed, if not entirely illusory. It would in effect then be limited to protection against the parent who was fully able to

provide proper care but either chose not to do so or neglected through fault to do so. That is not the meaning of section 31(2). It is abundantly clear that a parent may unhappily fail to provide reasonable care even though he is doing his incompetent best.

36. Quite what the judge did mean by paragraph 178 (ii) remains to me at least obscure, and the judge did not say. He may have meant that in deciding a care case the judge should examine the reasons why a parent is not living up to expectations. That I would agree a judge should do because once one knows the reasons one may be able to do something to cure the problem. He may have meant that in handling a parent with a handicap those who are dealing with him or her must remember who they are dealing with and adapt their approach accordingly. That must certainly be true of social workers, as of many others. It may be that that is what the judge had in mind because at the point in his judgment when he referred to the definition of disability at paragraphs 134 and 135, he went on to refer to a Department of Health and Department for Education and Skills document summarising good practice guidance on working with parents with a learning disability. However that may be in fact, in this case I agree with Mr Macdonald that the question of the correct construction of section 31(2)(b) was not reached by the judge because he did not find that there was any likelihood of significant harm – that is to say, section 31(2)(a) was not satisfied. That said, this court should I think make it abundantly clear the nature of the test under section 31(2), which is and has to be an objective one.

37. The judge's reference to discrimination is in any event generally puzzling. It may of course be that for the purposes of the Disability Discrimination Act 1995 section 1, mother's learning disabilities might amount to a disability if they were a mental impairment having a substantial and long term effect on her ability to carry out normal day to day activities; but whether they were or they were not, the Disability Discrimination Act has nothing whatever to say about care proceedings. It does contain a general duty upon public authorities not to discriminate in carrying out their functions (see section 21B(1)) but that does not apply to judicial acts (see section 21C(1)). It may be, as I have said, the judge was making no more than general reference to the proposition that those such as the local authority or social workers dealing with anybody with any kind of handicap must tailor their approach to the person they are dealing with, but that is a mile away from bringing either the disability or the concept of discrimination into the exercise of deciding whether the threshold conditions for the making of a care order are satisfied. No one has suggested that that should be done in this case. I want to make it completely clear that it should not. When the judge is addressing the threshold conditions it is absolutely clear that concepts of discrimination in relation to the parents are simply not helpful and should not be permitted to intrude.

38. There is, however, for the reasons that I have already set out, nothing in those slightly unclear remarks which vitiate the principal decision which the judge arrived at in this case.

39. For all those reasons, whilst I would grant leave to both the local authority and the guardian to appeal these decisions, having examined the case I would dismiss both appeals.

Lord Justice Stanley Burnton:

40. I agree that leave should be given to appeal. I also agree on the central issue in this case, that the judge was entitled to prefer a conclusion based on what has been referred to as empirical evidence to one based on expert prognosis, but the question remains whether the judge's treatment of the latter, by which I mean the evidence of Dr Gillett and the guardian, was such as to undermine his assessment or whether in substance he set aside or belittled their evidence for wholly unsound reasons. For my part, I have anxiously considered whether the judge's decision can stand having regard to the unjustified criticisms of the guardian and Dr Gillett to which my Lord Hughes LJ referred. Ultimately, however, I have concluded for the reasons given by my Lord that the judge's decisions should stand. I would particularly associate myself with all that he has said about the language of the judgment below and the subject of discrimination.

Lord Justice Mummery:

41. I agree with both judgments and I would like to associate myself particularly with what Hughes LJ has said about the judge's remarks, that the approach he referred to would be discriminatory. It is clear from documents supplied to the court that questions of discrimination did not feature at all in the agreed written legal submissions put to the court by the parties, nor

in their separate submissions. In my view questions of discrimination under the 1995 Act, from which the judge quoted section 1, are completely irrelevant to the type of proceedings which have been brought in this case. The comment which he made was misconceived and unfortunate. So for those reasons permission to appeal is granted but the appeal is dismissed.

Order: Application granted; appeal dismissed