Re G (A Child) [2007] EWCA Civ 1054

Case No: B4/2007/1523

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EXETER COUNTY COURT
(HIS HONOUR JUDGE NELIGAN)
(LOWER COURT No. EX06CO0024)

Royal Courts of Justice
Strand, London, WC2A 2LL

20 July 2007

B e f o r e :

LORD JUSTICE WILSON
and
LORD JUSTICE TOULSON

IN THE MATTER OF G (a Child)

(DAR Transcript of
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Official Shorthand Writers to the Court)

Mr Michael Keehan QC and Miss Penelope Ireland (instructed by Messrs Hooper Wollen) appeared on behalf of the Applicant, the Mother.
Miss Janet Bazely QC & Miss Deborah Archer (instructed by Torbay Council) appeared on behalf of the First Respondent, the local authority.
Miss Evans (instructed by Gowmans Solicitors) appeared on behalf of the Second Respondent, the Father.
Mr Mark Whitehall (instructed by Tozers Solicitors) appeared on behalf of the Third

Respondent, the child by her Guardian.

HTML VERSION OF JUDGMENT

Lord Justice Wilson:

1. Mrs G, the mother, applies for permission to appeal against orders made by HHJ Neligan, in the Exeter County Court albeit sitting in Torquay, on 10 July 2007. The orders were made in relation to the mother's daughter, E, who was born on 22 May 2006 and is thus now 14 months old. They were to the effect that E should be subject to a full care order in favour of Torbay Council ("the local authority") and that, pursuant to section 21 of the Adoption and Children Act 2002, the local authority should be authorised to place her for adoption. At a hearing on 11 July 2007, at which this court directed that execution of the judge's orders should be stayed, and therefore that the mother should be permitted to continue to care for E until the proceedings in it were concluded, it also provided that the application for permission should be heard orally yesterday, on notice to all other parties and upon the basis that, were permission to be granted, the hearing of the substantive appeal should follow forthwith. We therefore heard argument yesterday and now deliver our judgments thereon.

2. In the proceedings before the judge the local authority were the applicants; the mother was the first respondent; Mr G, the father, was the second respondent; and E, acting by her Children's Guardian, Mrs Taylor, was the third respondent.

3. In the proceedings before the judge the guardian supported the local authority's applications for care and placement orders. The mother opposed the applications. Her case was that the situation which had obtained in the months prior to the hearing, in which the local authority held a succession of interim care orders over E pursuant to which they placed her with the mother, should be continued, perhaps for about three months, while a further assessment of E in her home was undertaken. The father, who had recently separated from the mother, supported the mother's case against adoption and removal and in favour of continued placement of E with her. Analogously the mother's application to this court is supported by the father but opposed not only by the local authority but also by the guardian.

4. The hearing before the judge proceeded for seven working days. Between 2 and 6 July he received evidence; on 9 July he received submissions; and at 2 pm on 10 July he delivered a lengthy oral judgment. The judge must have delivered the judgment from the foot of fairly detailed notes. The note of judgment with which we have been provided has been prepared by the mother's solicitor, who was in court typing it on her computer while it was delivered and who, with the judge's prior permission, also had in court a machine for recording it: her note is the product of her typed note and her recourse to the audio-recording. On any view it is an excellent note; and, because of the urgency of the matter, the judge, subject only to a few minor corrections, very swiftly approved it as an accurate note of what he said. Nevertheless, when Mr Keehan QC, who represents the mother in this appeal as he did before the judge, makes textual criticisms of the judgment, and in particular points to inconsistencies in different parts of it, it crosses my mind that, had there been time for the usual course to be taken, namely for an official transcript to be prepared and, at reasonable leisure, to be considered by the judge, in case -- as judges usually find -- there is need to improve the terminology so as to make the intended meaning

clearer, such would have been more satisfactory and, perhaps in particular, fairer to the judge. Nevertheless, as this judge would be the first to recognise, fairness to him is not our prime concern; and we must do the best with the materials very well prepared for our use, at such extremely short notice, by the mother's solicitors.

5. In effect all sides agree that the basic decision which fell to be made by the judge, namely whether permanently to remove E from the mother and to authorise her placement for adoption, proved agonisingly difficult for him. In judgment the judge said:

> "… I have found myself unaccustomed emotionally moved with sympathy for the Mother who deliberately became sterilised after [E]'s birth so that she would not have the distractions from caring for [E] by giving birth to another child or children."

No one present at the hearing has sought to suggest that there was anything insincere in the judge's expression of the call which the case made on his emotions in addition to the usual demands upon his professional qualities.

6. The judge was confronted with the need to make a decision about a child who, by agreement, had not suffered significant harm whether physical or emotional; who seemed happy and well adjusted; and who had reached her developmental mile-stones. He had before him a mother who desperately wished to continue to care for her child; who, albeit with a vast amount of local authority support during the previous 11 months, had managed to provide overall just about an adequate level of care for her; in relation to whom the spectre of deliberate ill-treatment towards her child was wholly absent; and whose difficulties in presenting her candidacy for her child's long-term care were none of her own making, originating as they did partly in her inheritance of borderline learning difficulties (her IQ lies within the bottom 5 % percentile) and partly in a highly dysfunctional childhood.

7. The case against the mother lay almost entirely in the history of her abject failure to provide adequate parenting for her five older children. The case for the mother was that she had done enough to demonstrate that, with a substantial level of local authority support, her parenting of E would be likely to be different from that which she had provided to the other children and that the likelihood of difference was sufficiently substantial to disable the court from being driven to condemn E to the loss of her birth family.

8. The five older children are, first, a girl, R, who was born in May 1992 (i.e. when the mother was 18) and so is now aged 15; second, a girl, S, who was born in January 1994 and so is now aged 13; third, a girl, L, who was born in October 1996 and so is now aged ten; fourth, a boy, M, who was born in November 2000 and so is now aged six; and fifth, T, who was born in September 2003 and so is now aged three. S and L had the same father but the three other children had separate fathers. Thus, in all, the five children had four fathers.

9. Between 1992, when R was born, until October 2004, when the five older children went into short-term foster care, there was a lengthy history of professional concern on the part of the authorities in Somerset, Cornwall and Devon, in which the mother at different times resided; of concern in particular about the mother's neglect of the children's elementary physical and emotional needs; of provision of professional support for the family, which gave rise to improvement, and thereupon of its withdrawal, which gave rise to deterioration; of registrations of the children on the Child Protection Register followed by de-registration and then by re-registration; and of concern in particular at the apparent disposition of the mother to move, almost seamlessly, from one short and shallow, though intimate, relationship with one man to

another, thence to another, and so on, each of the men being put into the position of a father figure but only temporarily.

10. In September 2004, shortly prior to the accommodation of the five children, the local authority began proceedings, initially for supervision orders and then for care orders; and they culminated in a hearing which lasted eight days before HHJ O'Malley in the Plymouth County Court, at the end of which, on 13 October 2005, he made full care orders in relation to the four older children. The fifth child, namely T, is subject to ongoing proceedings and meanwhile resides with his father. Pursuant to HHJ O'Malley's orders the three oldest children, namely R, S and L, are in long-term foster homes and the fourth child M has been adopted. In recent months R has on occasions absconded from her foster home and returned to the mother, who has responded to the problem entirely appropriately; there is, however, a possibility that in May 2008, when R becomes 16, she will wish and be able to live again with the mother.

11. Mrs Taylor acted as the Children's Guardian in the proceedings relating to the older children just as she has in the present proceedings; and in those proceedings, as in these, she took a strong line that there was no acceptable alternative to placement away from the mother. A judgment handed down by HHJ O'Malley on 13 October 2005 was, inevitably, accepted into evidence in the present proceedings and indeed on the basis that his findings of fact could not be challenged. He summarised his conclusions in this way:

> "The children suffered from physical and emotional neglect for most of the time for most of their lives … The findings in respect of the mother … which I accept, put beyond argument the attribution of the harm to the children to the deficiencies in the mother's parenting capacity. [The mother's then counsel] may well be correct in saying that male partners from time to time contributed to the deficits of parental care, but the mother's own shortcomings played a major part. It is a very sad situation because it is accepted that the mother loves the children in her own way. Her shortcomings are largely the product of her cognitive disabilities and the deficiencies of her own upbringing. She cannot be blamed for either of these."

12. In the present proceedings it was conceded on behalf of the mother, and indeed of the father, that the threshold set by section 31 of the Children Act 1989 to the making of a care order was crossed. There should have been a document which reflected not just the local authority's assertions of the facts by reference to which they submitted that the threshold was crossed but also, and this is lacking, of the extent of the admissions on behalf of the parents as to those matters. It is clear, however, that it was in effect the findings by HHJ O'Malley referable to the five older children by reference to which in the present proceedings the parents conceded not that E had suffered significant harm but that there was a likelihood, in the form of a real possibility, that she too would suffer significant harm as a result of deficits in her parenting and, in particular, pursuant to the definition of "harm" and "development" in section 31(9) of the Act, would suffer impairment of her physical and emotional development.

13. In evidence before HHJ O'Malley was a psychological report upon the mother by Miss Holt, in which concern was expressed about the number of male partners of the mother since R's birth, namely, according to Miss Holt's research of the papers, at least 12; about the circumstances in which the mother had met some of her new partners, namely by personal advertisements or through a text dating service; and

about the speed with which she developed and shed relationships. One of the partners to whom Miss Holt referred was no doubt the father, with whom the mother lived between about March and September 2004. It is not clear whether in her count Miss Holt included another man relevant to today's enquiry, namely Mr Nicholls, with whom the mother had a relationship between February and July 2005. In the event, within weeks of the end of that relationship, the mother's relationship with the father revived; and they were cohabiting at the time of the hearing in front of HHJ O'Malley. E must have been conceived by them only shortly before the hearing. Later, on 25 February 2006, the parents were married; such was the mother's third marriage.

14. Upon learning of the further pregnancy, the local authority were rightly concerned and, shortly before the birth on 22 May 2006, Miss Fidell, a clinical psychologist, suggested that a residential assessment of the parents with the baby would be an essential precursor to any safe placement of the baby with them. On 5 June 2006 the local authority issued the present care proceedings relating to E. Upon discharge from hospital E was placed with both parents in a holding placement with the admirable West Country resource, namely Families First; and a district judge provided that there should be a hearing in August 2006 of the parents' application for a residential assessment.

15. In July 2006 there were curious developments, now of no great relevance, which led to the arrival of the proceedings into this court, namely before Lord Justice Jacob and myself, on 17 July 2006. That proposed appeal, again on the part of the mother, had resulted from a sudden move on the part of the local authority in effect to pre-empt consideration of the parents' application for a residential assessment by the immediate removal of E from them, being a change which on 7 July 2006 was suddenly approved by a circuit judge other than HHJ Neligan. At the hearing in this court of the mother's proposed appeal against that order, the local authority, recognising that the removal of E from the parents had been premature, accepted that the *status quo ante* of E with the parents should be restored pending hearing of the parents' application.

16. That hearing was conducted by HHJ Neligan on 14 and 15 August 2006; and, although both the local authority and the guardian opposed the application, the judge acceded to it, as a result of which the local authority were obliged to place E with the parents for residential assessment. The placement of the family was not in an institution but rather with specialist foster carers, named Mr and Mrs Carr, under the auspices, as before, of Families First.

17. E and the mother were to remain with Mr and Mrs Carr until 1 February 2007. The father was also to remain there, subject to his departure between 26 November and late December 2006 following a temporary breakdown in the relationship between the parents.

18. Mrs Gage, a director of Families First, wrote an interim report, dated 20 December 2006 upon the placement with Mr and Mrs Carr. In it Mrs Gage repeated the upbeat conclusion about the placement which had been reached at a meeting of professionals on 6 November 2006, namely that the parents had demonstrated that, in the placement, they could together meet E's physical and emotional needs; that the progress of the mother in serving E's needs had defied professional expectation; that she was the parent more attuned to the needs of E; that development of adequate emotional parenting on the part of the parents had proved more challenging than any simple inculcation of the elements of practical parenting; and that M's confidence about her capacity as a parent was fragile but growing. Inevitably, however, Mrs Gage then went on to address the departure of the father from the placement on 26 November. Mrs Gage expressed concern that the mother was then on her own and history showed that, when she was on her own, the void was soon filled by somebody or other. Mrs Gage said:

> "21. The second matter that caused disquiet was that [the mother] was now presenting as sole carer for her child. This was particularly concerning because of [the mother]'s history in forming relationships. The records show that she has rarely been without a partner, rapidly seeking out a new partner almost immediately a previous relationship has come to an end - often to the detriment of her children.
>
> […]
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> 32. Clearly, the instability of the couple relationship is deeply concerning. It was unstable for several years prior to their marriage and [E]'s birth. [E]'s welfare depends on long term stability and security."

In the event, as foreshadowed in the report of Mrs Gage, the father swiftly returned to the placement.

19. Thereafter until 1 February 2007 the parents and E continued to live, in circumstances satisfactory to E, with Mr and Mrs Carr. Thereupon they moved back into the flat in Paignton which the mother had occupied prior to August 2006. A phenomenal amount of support was then devised by the local authority as being necessary in the interests of E. The programme was that support workers should visit the mother's flat every morning and each evening on every week day and should pop in at weekends; that the allocated social worker, Mr Stubbs, should make unannounced visits; that the parents should have a weekly session with a worker at a local authority resource; and that the parents should, with E, attend Sure Start with a view to the communal development of practical parenting skills. Just as the guardian had given evidence to HHJ O'Malley that, in her experience of over ten years, she could not recall a case in which so much attention had been directed by social services to a family to such little effect, so she observed in her report dated 24 June 2007 for the consideration of HHJ Neligan that in her view the parents had since August 2006 had more support than in her experience had ever been provided. Be that as it may, the general verdict upon the parenting of E following the move back into the community on 1 February 2007 until April 2007 was that it was an improvement and overall just about adequate; and late in February 2007 the local authority explained that their plan was that, at any rate on what might call a probationary basis, the placement with the parents should continue.

20. Thus it was that, when Mrs Gage wrote her final report dated 17 April 2007, it was upon her understanding that all parties agreed that the attempt to place E with the parents in the community should continue. Clearly Mrs Gage subscribed to that view. Nevertheless she sounded warning notes, as follows:

> "31. [The mother] is the more able parent. Were she to present as sole carer for her child, we would be concerned because of her history in forming relationships. There are clear indications that, when a relationship ends, she rapidly seeks out a new partner. In the past, this has often been to the detriment of her children. Were the relationship with [the father] to break down further assessment would be crucial.
>
> […]

> 33. When their relationship is good, these parents can co-parent their daughter. [The mother] is the more able parent. In our placement we observed that the parents worked extremely well together, their skills complementing each other … Were there to be signs that the father was leaving the bulk of the parenting to [the mother], this would increase our concern.
>
> […]
>
> 43. It is clear to us that this family will need a consistent level of support throughout [E]'s childhood."

21. On 19 April 2007, two days after the date of Mrs Gage's report, the local authority changed their plan to one for E's removal and placement for adoption.

22. On 27 April 2007 the father left the mother in circumstances which both of them contend represented the final breakdown of their marriage. The observations of Mrs Gage ten days earlier had indeed been prescient. On 28 April, hours after the father's departure from the home, the support worker made her morning visit. Her record of it hardly presents the normal picture of a woman, has hours earlier has suffered the breakdown of what had been intended to be a permanent relationship. The mother appeared "quite cheerful", "very relaxed" and "quite talkative"; and she told the worker that she did not love the father and thought that she had not done so for a long time.

23. One of the mother's complaints about the judge's judgment was that his collection of material from the records made by the support workers was, unfairly, of the material that was mildly negative towards the mother's capacity to parent E, for example the occasions when the worker noted a slowness on the part of the mother to interact with E or, for example, to intervene when, at Sure Start, E was trying to snatch a book from another child. So it is important to note that there were entries in April, May and June 2007 indicating adequate attention on the mother's part towards E, emotional as well as physical, and, in particular, a clear wish to continue to care for her and to improve the quality of her care for her.

24. The records also show that, in the weeks which followed the father's departure from the home, another man surfaced, or, rather, resurfaced, in the mother's life; for, from 8 May 2007 onwards, there are increasing references to Mr Nicholls. On 17 May the worker recorded a suggestion on the part of the mother that Mr Nicholls might be E's father. She told the worker that she had believed that such was possible for a long time but had previously considered that, were she to mention it, the local authority would take E from her. DNA tests were later to be conducted, which demonstrate the father's paternity of E. There was debate before the judge as to the significance of the mother's belated suggestion that Mr Nicholls might be E's father. One obvious inference is that, with Mr Nicholls moving back into her life, the mother considered that it would improve her case to present E as the daughter of Mr Nicholls rather than of the father; but the judge made no finding in that regard. One night at the end of May, perhaps 29/30 May, the relationship of the mother with Mr Nicholls again became a sexual one; and he stayed the night in the flat. Thereafter, however, the local authority made it a condition of E's continued residence in the flat that Mr Nicholls should not stay there overnight; and this condition was observed by the mother and Mr Nicholls. Nevertheless it was the mother's case to the judge, as it was that of Mr Nicholls as her witness, that they wished to resume cohabitation and jointly to parent E; and thus that the judge should favour an adjournment for a further assessment, in particular of the capacity of the mother and Mr Nicholls jointly to parent E.

25. On 17 May 2007, nineteen days after they had written that they dared not in E's interests reduce the level of support, the local authority, without notice to the guardian or to the mother, made a resolution, not recorded in a minute, that the level of support provided to the mother and E should be halved by the reduction of visits by support workers from twice to once each weekday. The resolution was implemented.

26. In his judgment the judge referred in fair detail to the evidence which he had received. The professional evidence came primarily from the following witnesses:

> (a) Dr Young. She was a consultant clinical psychologist instructed by the parents to make a report in August 2006 referable to the application for a residential assessment, which she supported, and, following a visit to the home in May 2007, to make a further report, which is dated 15 June 2007. She was, in the judge's words "if anything, supportive of mother's care". She gave evidence that the parents, and after 27 April the mother, had apparently cared adequately for E, even following the reduction on 17 May of the level of support. Her opinion was, and this was to prove a major plank of Mr Keehan's submissions to the judge, that, in the longer term, the mother could probably care adequately for E with an even reduced level of support, namely visits by support workers on two of the five week days rather than on each week day, supplemented by weekly visits by the allocated worker, presently Mr Stubbs, and the continuation of the mother's attendance at Sure Start. Dr Young was not prepared to accept that E's achievement of her developmental milestones was the result only of stimulation by the support workers and the work done at Sure Start. She was, however concerned, about the arrival back on the scene of Mr Nicholls. In her report she wrote:
>
> > "I visited [the mother] at her home on the 14th of May 2007 when she was occupying the role of sole carer to [E]. My own observations concurred with [the mother]'s comments that she was receiving positive feedback from the support team and from Mr Stubbs. She was adamant that her main priority was [E] and that she was determined to place [E]'s needs above her own. However, at the time of writing I understand that [the mother] has begun a relationship with Mr Nicholls, despite the ongoing assessment, and this has further complicated the situation and has indicated an inability to demonstrate her verbalised intention."
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> (b) Mrs Gage. She was extremely positive about the progress which the parents had made in her organisation's placement with Mr and Mrs Carr and, I infer, cautiously laudatory, other than in one respect, about what she had understood to be the quality of the care afforded to E since 1 February 2007. As foreshadowed in her reports, her principal concern was the mother's movement through short-lived intimate relationships and, in that regard, her understanding of the father's departure from the scene and of the arrival of Mr Nicholls back on to it. The judge recorded Mrs Gage's oral evidence that, were the mother's relationship with another partner to break down and thus another significant figure to exit from E's life, E would be likely to suffer emotional harm. The judge then said "That I identify as being a real risk in this case, which of course cannot sensibly be ignored". I fear that, in context, it is unclear whether the judge was there quoting from his notes of Mrs Gage's evidence and thus that it

was Mrs Gage who was putting forward the real risk or whether the judge was there interpolating a comment of his own. That is precisely the sort of ambiguity which, upon careful study of a draft official transcript, a judge is likely to wish to clarify. I suppose that, in the light of his conclusion, we can only assume that, even if it was Mrs Gage who purported to identify the real risk, the judge clearly accepted that the concern was valid.

(c) Miss Fidell. She is a clinical psychologist who on behalf of the local authority wrote a report dated 8 June 2007 which was not supportive of the mother's continued care of E but whom they did not call to give oral evidence. One of the comments in her report was that "should the child be returned to her mother, it is likely to make for an uneasy relationship with professionals". The comment seemed odd; and on enquiry, hard to believe though it is, it transpired that Miss Fidell believed that E had been removed from the mother on about 30 April 2007, being the date of a hearing at which the local authority had planned to seek approval for the immediate removal of E from the mother but had thought better of it. Although the quality of support provided by the local authority on the ground to the family, particularly after 1 February 2007, has been excellent, their conduct of E's case, at a higher level, in particular in the presentation of their case to the court ever since 7 July 2006, has been erratic to say the least; and to file a report by an expert like Miss Fidell, without apparently alerting her to the extraordinary misunderstanding which infected it, is only one of a number of steps in the proceedings which afforded Mr Keehan a quantity of material with which, legitimately, to find fault with their case. Wisely the judge put the contribution of Miss Fidell entirely to one side. In any event she had conducted only a paper exercise.

(d) Mr Stubbs. The judge described him as fair-minded and expressly accepted his evidence. Mr Stubbs stated that there was an attachment between the mother and E and that the mother was occasionally capable of good enough parenting, which had generally been maintained albeit as a result of the support which had been provided. He said however that he had real concerns about the mother's capacity to stimulate E, and, I assume in particular, of her awareness of the many occasions upon which, in one way or another, it would be appropriate to provide her with stimulation; and concerns, also, about male occupants of the household. Although Mr Keehan, and Miss Bazley QC who appears on behalf of the local authority but did not appear before the judge, are not quite *ad idem* about the precise evidence given by Mr Stubbs in this respect, it does seem that he broadly accepted that, in the context of a supervision order or in the context of adjournment for a further few months in aid of further assessment, the local authority would be able to provide the level of support which Dr Young had identified as sufficient.

(e) Mrs Woodward, the support worker, and Miss Witt, a more senior officer who had also conducted many of the visits to the home during the previous five months. They gave evidence, perhaps the latter rather more negatively than the former, about the usually just adequate level of parenting of E on the part of the mother. Their daily records certainly highlighted bright moments, when they noted good interaction and appropriate maternal attention, as well as the moments when they detected a continued delay in the mother's ability to appreciate what E needed in physical and in particular in emotional terms.

(f) The mother. The judge described her evidence as straightforward and honest and he stated that she spoke movingly and convincingly about her determination to continue to parent E.

(g) The father. The judge found that the father was very attached to E and supported the mother's case, partly because a placement for adoption would be likely to end his facility to have contact with E.

(h) Mr Nicholls. The judge described him as impressive. Clearly the judge's concern was not so much his prospective presence in the household but, rather, his later likely exit therefrom.

(i) The guardian. To her evidence I will return.

27. Mr Keehan does not challenge the legal principles by reference to which the judge purported to determine the applications. He reminded himself of the bias in the law towards a life for a child with a biological parent; of the right of the mother and E to respect for their family life under Article 8 of the Convention of 1950, but, in the event of conflict, of the paramountcy of the child's right thereunder; of the impermissibility of social engineering and, in particular, of removal of a child from a parent as a result purely of the latter's intellectual deficits; and of the need to differentiate a risk, perhaps even small, of really serious harm, which might justify intervention even though, by contrast, a greater risk of less serious harm might not do so.

28. Then there are ten relatively short paragraphs of the judgment, namely paragraphs 125 to 134, in some of which the judge's conclusions, such **as** they are (so Mr Keehan would add), are to be collected. In essence the judge's reasoning was that:

(a) there was a high risk that in future E would suffer physical harm in the form of physical neglect;

(b) there was a high risk that she would suffer emotional harm because of the mother's own inability to serve the emotional dimension of a child's needs and because of the likely continuation of the pattern of the entrance and exit of male figures into and out of E's life;

(c) once the spotlight of the court proceedings was removed, the more or less adequate level of care achieved by the mother, albeit with very substantial support, would fall away; and

(d) the needs of E for resourceful parenting would increase as she grew older, with a concomitant increase of pressure upon the mother which she would be unlikely to able to withstand.

29. The first two grounds of the mother's appeal relate to the judge's treatment of the positive evidence of the mother's care for E not only between August 2006 and January 2007 but thereafter. The first ground is that the evidence was not properly described and the second ground is that it was not properly weighed.

30. Although in relation to all other areas of the evidence, whether of fact or by way of professional appraisal, he has to accept that at least the judge properly recited it, Mr Keehan does complain of the allegedly inadequate expression of the thrust of the evidence about the mother's care of E, particularly after 1 February 2007. He says that the thrust was of significant strides and significant success, at least in comparison with the mother's parenting of the other children, and that the judge's presentation was, by contrast, unfairly derogatory. I cannot accept this criticism. I have counted ten paragraphs of the judgment in which, in one way or another, the

judge addressed improvements, indeed in places, as Mr Keehan heavily stressed to him, improvements contrary to professional expectation, in the mother's care of E not only at the home of Mr and Mrs Carr but, more importantly, thereafter. Mr Keehan complains that, of the numerous records made by the support workers, the judge chose to refer to seven records in May and June 2007 which were the more negative. To be fair, however, the judge was there seeking to summarise the submissions made by Mr Whitehall on behalf of E; and it was those records to which Mr Whitehall had referred. I cannot accept that the judge's reference to them occluded his acceptance that there were also more positive records. Then, again, Mr Keehan complains that it was, to put it mildly, churlish of the judge to say that, following reduction in the level of support on 17 May, there had been "no crisis" in the mother's home. But the fact was that had been no crisis and I am not persuaded that the overall evidence of the period after 17 May demanded any different summation.

31. The second ground is that, granted that in all other respects the judge at least fairly recorded the evidence upon which the mother relied, there was no express analysis of that evidence in the crucial paragraphs in which the judge articulated his conclusions. There is, submits Mr Keehan in effect, a big hole in the judgment in that it passed seamlessly from a broadly fair recital of the evidence to conclusions explained with great brevity, and, in particular, without a weighing of the evidence, in particular that of Dr Young but also that of Mrs Gage, which had been significantly more optimistic about E's chance of an adequate upbringing with the mother. But, as I asked Mr Keehan yesterday, how often are we judges required to address relevant evidence? If we fairly summarise it once, is it to be said that we have taken no account of it if we decline to return to it again? I do not consider that it was incumbent upon the judge further to refer to that evidence; and, against the broader canvas painted before him, he was, as Mr Keehan of course concedes, entitled not to share the somewhat greater degree of optimism articulated by Dr Young and perhaps by Mrs Gage.

32. As a third ground of appeal Mr Keehan alights on three sentences in the judgment which, in his submission, betray significant error. The *third* relates to the guardian and I will address it later. The *first* is as follows:

> "[E] at thirteen months old is up to if not slightly exceeding her chronological development. Whether that is due to be promptings by sessional workers on a daily basis or due exclusively to the mother is an issue, but … I am afraid I am driven to favour the former rather than the latter, although I am bound to acknowledge there has been some improvement."

Mr Keehan complains that, as the judge was later to note, Dr Young had given clear evidence that E's satisfactory development could not be attributed only to professional support and yet here, in this earlier passage, before he addressed Dr Young's evidence, the judge is apparently rejecting it. I wonder whether Mr Keehan's argument gives proper value to the judge's use of the word "exclusively". The sentence is ambiguous but in my view the judge was probably rejecting the hypothesis that E's successful development was due exclusively to the mother and, by inference, accepting that it was due to a combination of the mother's efforts and professional support. The *second* is as follows:

> "The intensive support [the mother] has received since 18 August last year has shored up her own capacity, but that incapacity is not because she has borderline Learning disability but is due to her inability to provide consistent and good enough parenting and her inability to form relationships

> which last and when they break down she quickly seeks a replacement."

Here, says Mr Keehan, the judge wholly departed from the professional evidence accepted by HHJ O'Malley that the mother's incapacity arises not only from her dysfunctional childhood but her intellectual deficits. In my view Mr Keehan again probably misunderstands a statement, which, as it left the judge's lips, might have been more clearly expressed. I believe that there the judge was attempting to explain that his conclusion was not driven by an agendum of social engineering which would allocate children to carers with keener minds. He makes that point in a sentence which, with great respect, is arguably tautologous but contains no greater vice.

33. I come to what I regard as the final ground of appeal; and, it is the ground which has required of me the longest pause for thought. It relates to the contribution of the guardian. Notwithstanding the firm line on behalf of the older children which the guardian had taken against the mother in the proceedings before HHJ O'Malley, it was in accordance with normal practice that she should be chosen to be the guardian of E. It was the guardian who, I believe, had been substantially instrumental in the local authority's premature application on 7 July 2006 and, unfortunately, in that circuit judge's accession to it. Furthermore the guardian had strongly opposed the application for a residential assessment to which HHJ Neligan had acceded in August 2006. So the guardian had built up a record of very strong views that E's interests did not lie in a home with the mother. How important, therefore, it was for the guardian to demonstrate at the hearing before the judge in July 2007 that her mind had not been closed to the significance of subsequent developments!

34. In the event she wrote her report dated 24 June 2007, firmly hostile to the mother's case, without in effect having interviewed the mother or observed her with E, since 1 February 2007. I say "in effect" because two professionals' meetings had been held at the mother's flat, at which the guardian had been present. In that, as the guardian must have realised, the debate before the court would focus to a substantial extent upon the level of the mother's improvement in her capacity to care for a child beyond that evident in the proceedings before HHJ O'Malley, it was, as the judge accepted and as, according to Mr Whitehall, the guardian now accepts, a grave error to make her recommendation without having made a visit to the home for interview and observation. The guardian's explanation is that, so she considered, the home had been disturbed by numerous visits on the part of professionals; that she did not consider that the result of her visit would add to, or detract from, the evidence of the local authority in relation to current circumstances; and that in her mind the issue was not as to the current level of improvement but as to the mother's capacity to sustain it in future years. But, as I suggested to Mr Whitehall, even if those reasons had had validity, one would have expected the guardian in her report to record her unusual decision not to visit and to give her reasons therefore.

35. But there were other curious features of the guardian's report. It made no reference to the evidence as to the success of the parents in caring for E with Mr and Mrs Carr. The omission, submits Mr Keehan, is the sign of a closed mind. Moreover it included another extraordinary sentence, namely "since moving into the community the level of support has been consistent". How could that sentence have been written five weeks after the halving in the level of support? At the end of Mr Keehan's cross-examination of her, it was, frankly, unclear whether, when she made that error, the guardian was aware of the change on 17 May. In either event, however, the error gave no confidence that the guardian had approached the case with what no doubt is her usual industry.

36. In three paragraphs of his judgment the judge was severely critical of the guardian for having failed to visit the home prior to writing her ultimate report. He said that he 'heartily disagreed' with her suggestion that her failure to make the visit had not really

mattered and he concluded that her reasons for not making it were mistaken. Then, however, four paragraphs later, he said as follows:

> "Whilst on reflection Mrs Taylor might be wise to conclude it would have appeared fairer to the parents and particularly to this mother if she had actually gone to visit the mother and child at home, in my judgment her omission to have done so does not mean that her report or her evidence is flawed, less so fatally so."

I agree with Mr Keehan that there is an inconsistency between that paragraph and the three prior paragraphs. In that the later paragraph suggested that the absence of a visit related only to the appearance of fairness, it was inconsistent with the earlier paragraphs that it was, objectively, an omission in the guardian's proper preparation for her role in court. Further, although the judge was clearly entitled to conclude that the guardian's failure was not a fatal flaw in her report, I cannot marry the suggestion that it was no flaw at all with the criticisms which the judge had energetically articulated. In the event, however, I am not persuaded that the inconsistencies represent more than an unfortunate infelicity.

37. At the end of his judgment, following the presentation of his conclusions, the judge added:

> "I am afraid that, try as I have done, I cannot find any persuasive reasons to reject the Guardian's recommendation."

38. This is the *third* sentence in the judgment which attracts significant criticism by Mr Keehan. Recognising, though he does, that, before it rejects the recommendation of a guardian, a court needs to have expressed its reasons for so doing, Mr Keehan says that the judge's sentence betrays an erroneous understanding of the weight to be attributed to a guardian's recommendation, namely that, unless a court can manage to find reasons to depart from it, the recommendation is dispositive of the result. I read the paragraph slightly differently. I consider that here the judge was harking back to the bias in the law in favour of a home for the child with a natural parent; and that, in that the guardian's recommendation was for adoption, the judge was saying only that, try as he had, he could find no persuasive reason in E's interests to avoid the solution which is always, in principle, secondbest.

39. There is no doubt that, in that the guardian's evidence was susceptible to criticism, the evidence of Miss Fidell had to be placed entirely to one side and the evidence of the other experts, in particular Dr Young, was more favourable to the mother's case, the weighing of the rival arguments was particularly difficult for the judge. It by no means follows that his conclusion is particularly appealable. Nor should we forget that the officers of the local authority are themselves professionals and that, once tested, their evidence, in particular that of Mr Stubbs, was entitled to be afforded significant weight. It seems to me that it was the movement in the mother's personal life in April and May 2007 which probably proved pivotal to the conclusion and certainly renders it unable to be classified as "plainly wrong". The almost seamless movement of different men in and out of the mother's life had been a substantial element of her failure adequately to parent the older children. Then, two months prior to the substantive hearing of this case, we see first the ostensible breakdown of the marriage of the parents; then a movement out of the life of the mother and E on the part of the father in circumstances which carried no suggestion that the relationship between the parents had been of any depth; then the movement back into the mother's life of Mr Nicholls within weeks of the father's departure; and then an apparently casual ascription to Mr Nicholls of paternity of E. If the mother lacks the capacity to develop relationships with men of any depth and thus of any capacity to

withstand the inevitable stress, it is no fault of hers; but these developments confronted the court with the fact that the old pattern had not changed and clearly entitled it to infer that it would not be likely to change. This was a feature which even the mother's professional supporters acknowledged to be of great concern; and which made Mr Keehan's plea for a further assessment of the new situation, including Mr Nicholls, appear to be a plea for assessment only of a situation which was all too likely swiftly to change.

40. Yesterday, at the end of the argument, I reached the conclusion that the mother's approach to this court should fail. I was however then unclear whether the proper despatch was to allow the application for permission and then to dismiss the appeal or to refuse the application for permission. Having thought carefully about the case for most of my waking hours since then, I have concluded that yesterday Mr Keehan, superb advocate though he is, made points sound realistically arguable which were not realistically arguable; and now my proposal to my Lord is that the proper order is to refuse permission to appeal.

Lord Justice Toulson:

41. I agree.

Order: Application refused.