RE W (MINORS) (WARDSHIP: EVIDENCE)

Court of Appeal

Neill, Butler-Sloss and McCowan LJJ

3 November 1989

Evidence – Wardship proceedings – Admission of statements made by children and reported by foster-parent – Admission of video-taped statements of children made when interviewed by doctors – Admission of statements made by children and audio-taped by a parent.

The background to the case

Wardship proceedings were taken in respect of three girls following an incident when one of the girls, T, fondled their father's penis. T went to live with her grandmother and a relation, G. T was then taken into the care of the local authority and placed with foster-parents. The other two girls, E and S, were also placed with the same foster-parents. Later E and S were placed with other foster-parents.

The judge heard the following evidence.

(1) The foster-mother said that she had kept a record of what the children had said to her. She recorded that T had told her about G, about having watched pornographic videos and having taken part in sexual acts with him; that T had later implicated her father and other relatives in sexual activities; that T also had spoken about the father having sexual activities with E and S; and that T had described her mother's reaction to her account of the father's involvement. She also recorded the girls' accounts of masturbation and bad language and that S had implicated her father and G in sexual activities with E and herself.

(2) T, in a video-taped interview by a child psychiatrist, repeated what she had said to the foster-mother, implicating her father and G in sexual acts with E and S.

(3) The interview was criticised by another doctor, in particular because during it there was an increasing pressure and insistence of questions. This other doctor made a report and himself gave opinion evidence to the court. He considered that unless the children's statements could be explained, there was a marked suspicion of sexual abuse by the father. That doctor modified his report by stating that he did not have the same anxieties about E and S as he had about T.

(4) The father vehemently denied the allegations.

(5) E and S were also interviewed by the same child psychiatrist who interviewed T, but those interviews were inconclusive with there being only one indication of sexual abuse.

(6) All three girls were examined by a consultant paediatrician. His findings were criticised by a clinical forensic practitioner called by the parents.

(7) The judge also received in evidence some audio-taped conversations made by the father during access visits.

(8) There was information about relationships and the characters of persons within the family.

The approach of the judge

The judge treated the children's statements as direct evidence through the videos and as hearsay through the foster-parents. He directed himself that the statements had to be shown to be true 'to a high degree of probability'. However, he relied upon the children's statements only to a limited extent and his findings (see below) could be inferred from the statements which were evidence of the children's states of mind and of their behaviour.

The findings and decision of the judge

The judge found that when the children had made allegations against their father they were telling the unprompted, unrehearsed truth. He found that they had been exposed to misbehaviour of a sexual nature. However, he did not find on a balance of probabilities that the father had sexually abused T, nor did he find that the father had not abused her. The judge accepted the records of the foster-mother. He accepted that T did tell untruths, but also found that T had been exposed to inappropriate sexual experiences. He also found that E and S had also been so exposed, though by whom he did not make any specific finding. Because of this exposure, he considered that the parents had seriously failed to bring them up properly. He took account of what the girls had said outside of court to others and found that if they were fantasising there was serious concern for their upbringing or, alternatively, if they were relating what had in fact happened to them, there was also serious concern about the ability of their parents to rear them. The only specific finding of sexual abuse was in respect of T by G. The judge did not rely upon the medical evidence to make findings of sexual abuse but pointed out that it did not follow that any sexual abuse had not occurred. Although he found a number of factors in favour of the family, he did find the father to have an abnormal, unbalanced, uncontrolled and hysterical character. He found that G had misconducted himself sexually with T and that he was a danger to the children. He found that the grandmother played a dominant role in the family and was concerned about her and G's continued association with the children. He feared that she might resume her dominant role within the family and considered that an undertaking to keep the grandmother and G out of the children's lives would be ineffective. He considered that the children could not be returned home under strict supervision because such a regime could not be enforced.

The judge ordered that the children be placed for adoption and terminated contact with the parents who appealed, but only in respect of E and S. The Court of Appeal, in addition to reviewing the evidence admitted by the judge and his findings, received further evidence *de bene esse*.

Held:

(1) Wardship proceedings were not subject to the strict rules of evidence. Hearsay evidence was admissible generally: its admissibility was not restricted to where the court was considering keeping the child concerned within his home.

Per Neill LJ: hearsay evidence and the use to which it was put had to be handled with the greatest care and in such a way that, unless the interests of the child concerned made it necessary, the rules of natural justice and the rights of the parents were fully and properly observed (see p. 227G-H).

Per Neill LJ: in exercising the wardship jurisdiction, the court would be very slow to make a finding of fact against a parent if the only material before it had been untested by cross-examination. The court would examine with particular care the evidence of the person who communicated the hearsay evidence to it. However, as the welfare of the child was the paramount consideration, there was no escape from the conclusion that in some cases a court, in assessing the risks to which a child might be exposed, might be obliged to reach conclusions of facts which in other circumstances and in other proceedings it would not be free to do (see p. 228D-E).

Per McCowan LJ: although in the wardship jurisdiction judges were entitled to receive and have regard to hearsay evidence, it would be wrong for a judge to find sexual abuse proved against a particular person solely upon the basis of such evidence. However, regard could be had to such evidence to assist the judge in deciding upon the degree of risk involved for the future in permitting children to return to their parents (see p. 222B-C).

(2) The judge erred on the evidence in finding that there was a substantial risk to the children from the grandmother and G. There was no evidence to justify a finding that it would not be possible to keep the grandmother and G away from the

children. However, his finding that the parents had seriously failed to properly care for the children did not meet the essential point, which was the assessment of the risk to the children within the immediate family. His concern about the parents was not limited to risks of omission but included risks of commission. The judge erred by failing to deal with that area of risk. He erred in holding that it did not matter by whom the children had been exposed to inappropriate sexual behaviour. A finding should have been made in respect of which adults would cause the children to be at risk in the future.

It was important to evaluate that risk in considering the future protection and welfare of the children. In the light of all his findings, he should have found that there was a real probability of the children being exposed to sexual misbehaviour if returned to the parents. He was deflected by his anxiety to keep the children away from the grandmother and G from considering the real issue which was whether the risk of returning the children to their father, even under strict supervision, was too great. He did not decide this issue, but if he did do so by deciding in favour of the parents, he was plainly wrong.

(3) Once the court had decided that a child might be at risk, the court's powers were not limited merely to making wardship orders or supervision orders. In a proper case, the court might feel obliged to place the child in the care of the local authority, even though the evidence was not sufficient to prove that the child had been abused by a particular parent.

(4)The appellate court had to assess the risks of returning the children to their home. The absence of a cross-notice would not impede the court in carrying out the balancing act and exercising its own discretion. Having regard to all the evidence referred to by the judge and the additional evidence admitted *de bene esse*; there was a substantial risk to the well-being of two of the children from the father if they were to return home. The mother would fail to protect them from that risk and supervision by the local authority would be ineffective.

Per Butler-Sloss LJ: when considering the weight to be given to a statement of a child made to another person (who subsequently gives an account of the child's statement to the court), the reliability of that other person was of vital importance. In this case, the foster-mother was an entirely respectable and responsible person (see p. 218G).

Per Butler-Sloss LJ: it was important to remember that in all proceedings relating to the welfare of children the evidence of what a child had said was receivable for reasons other than [as evidence of what the child had said had happened], for instance as evidence of the state of mind of the child and as an indication of the child's wishes (see p. 213H). When admitting such evidence, the judge had a duty to look at it and consider what weight he should give to it. The weight given to the material was a matter of judicial discretion. Unless it was uncontroversial, it had to be regarded with great caution. In considering the extent to which, if at all, a judge should rely on the statements of a child made to others [outside of court], the following factors, *inter alia*, were relevant:

1. the child's age;
2. the context in which the statement had been made;
3. the surrounding circumstances;
4. the previous behaviour of the child;
5. the child's opportunities to have had knowledge from other sources;
6. any knowledge of a child's predisposition to tell untruths or to fantasise.

Helpful guidance on the judicial view of interviews with children for the purpose of so-called disclosures was to be found in the *special issue* of the *Family Law Reports* [1987] 1 FLR 269-346, especially *Re M (A Minor) (Child Abuse: Evidence), Note* [1987] 1 FLR 293. Statements of children which had been video-recorded were useful, but they did not have any greater status than other statements of children, although their impact, if well recorded, was more direct (see p. 214D-F).

Per Butler-Sloss LJ: the use of the word 'disclosure' to describe an interview

with a child for the purpose of eliciting whether or not there was something to disclose was viewed with alarm (p. 214G).

Per Butler-Sloss LJ: grave allegations of sexual abuse made in a statement by a child naming a perpetrator presented considerable problems. Such allegations, if unsupported, would rarely be sufficiently cogent and reliable to satisfy a court on a balance of probabilities that the person identified as the perpetrator was the perpetrator. However, the evidence might reveal a clear indication that the child had been exposed to inappropriate sexual activities and might be sufficiently compelling to satisfy the judge that the child had been subjected to serious sexual abuse. Statements of a child might well be supported by the manner in which the child gave the description and in other aspects of his behaviour. The giving of the statement was unlikely to be neutral in the inferences to be drawn. Additional evidence to support the identity of the perpetrator was likely to be more difficult to adduce. However, the child might be at risk. If the alleged perpetrator was outside the family and the parents were able and willing to protect the child, the risk could be avoided and the child protected. If, however, the child named a member of the family and there was no evidence other than the child's statement and if the child's account was accepted after all the cautionary tests had been applied, the judge had a duty in wardship proceedings to treat the child's welfare as paramount and to take steps to protect the child. It was *not necessary* to make a finding of sexual abuse against a named person in order for the judge to assess the risks of returning the child to the environment [where the abuse had taken place]. There, the judge was assessing the possibilities for the future. That assessment was crucial for the protection of the child and the judge might consider the risk to be an unacceptable one. If the risk of a child having been sexually abused was a real, reasonable or distinct possibility, action should be taken. A probability did not have to be shown, but a real possibility (see p. 214G-215E).

Statutory provision considered

RSC Ord. 59, r. 10

Cases referred to in judgment

C v C (Child Abuse: Evidence) [1987] 1 FLR 321, FD
Davies v Taylor [1974] AC 207, HL
E (A Minor) (Child Abuse: Evidence), Re [1987] 1 FLR 269, FD
E (A Minor) (Wardship: Court's Duty), Re [1984] FLR 457; [1984] 1 WLR 156; [1984] 1 All ER 289, HL
F (Minors) (Wardship: Jurisdiction), Re [1988] 2 FLR 123, CA
Falkland v Bertie (1996) 2 Vern. 333
G (Minors) (Child Abuse: Evidence), Re [1987] 1 FLR 310, FD
G (No. 2) (A Minor) (Child Abuse: Evidence), Re [1988] 1 FLR 314, FD
H (A Minor); K (Minors) (Child Abuse: Evidence), Re [1989] 2 FLR 313, CA
H (Minors) (Child Abuse: Evidence), Re [1987] 1 FLR 332, FD
Kavanagh v Chief Constable of Devon [1974] QB 624, CA
M (A Minor) (Child Abuse: Evidence), Note, Re [1987] 1 FLR 293, FD
Myers v DPP [1965] AC 1001; [1964] 3 WLR 145; [1964] 2 All ER 881, HL
N (Minors) (Child Abuse: Evidence), Re [1987] 1 FLR 280, FD
Official Solicitor v K [1965] AC 201, HL
R v Gyngall [1893] 2 QB 232, CA
Scott v Scott [1913] AC 417, HL
Spence, Re (1847) 2 Ph. 247
Thompson v Thompson [1986] 1 FLR 212; [1986] Fam 38; [1985] 3 WLR 17; [1985] 2 All ER 243, CA
W (Minors) (Child Abuse: Evidence), Re [1987] 1 FLR 297, FD

APPEAL from an order of Anthony Lincoln J in wardship proceedings

Margaret Puxon QC and *Laura Harris* for the appellant parents
Jonathan Cole for the respondents

BUTLER-SLOSS LJ:
This is an appeal from the order of Anthony Lincoln J made on 20 July 1989 relating to the future of three little girls, T born on 1 February 1982, S born on 12 October 1984 and E born on 19 March 1986. The three children became wards of court in 1988 on the application of the local authority, who now apply for an order that all three children be placed for adoption. The judge granted their application and terminated contact with their parents, the appellants.

T is the daughter of the second defendant by a previous association and the other two girls are the daughters of both him and the first defendant (whom I shall call 'the mother'). The third defendant is the paternal grandmother, who has played no part in these proceedings.

T has had a disturbed upbringing with several changes of care within the family before she was taken into care by the local authority on 15 April 1987. T's mother played no part in her upbringing and she was cared for during the first 18 months by her father and grandmother. The judge found that the grandmother

> 'was a very powerful personality who dominated her family. She was also impulsive and hot tempered.'

In July 1983 the father set up house with the mother and T lived with them. Comments were made about the habits of T at that time which led the judge to the view that something was obviously wrong with her. On 15 August 1987 an incident occurred which triggered off all the subsequent proceedings. The father in bed woke to find T, then 5, fondling his penis. The judge set out the father's account and that he was in a state of shock. The father told the mother, who called the social services. The grand-mother in Norfolk was also telephoned and she agreed to take the child back with her for a while. The judge found it to be an extraordinary episode and if the father had not told the mother and she had not called in the social workers, nothing would have been heard of it. He said:

> 'I am quite unable to reach any conclusion about what happened in the father's bed on 15 August. I decline to find, on a balance of probabilities, that on that occasion the father sexually assaulted his daughter. On the other hand, if the father's description of the episode is correct, then his method of handling and managing it was deplorable.'

T's life was then split between Lincolnshire with the grandmother, and visits to London to the father and mother. The social workers lost touch with her and the judge was satisfied that the family hindered their efforts to find her. The local authority therefore issued wardship proceedings to trace her whereabouts. She was found a month later, well and happy. There were continuing disputes between the mother and father on the one side and his mother over the standard of care T was receiving and where she should live. She continued to move between the parents' home and the two homes of the grandmother. On 15 April 1988, in circumstances which are still in dispute before this court, T was placed by the family in the care of the local authority. It appears from the oral evidence of the social worker, Miss G, that the judge's assessment of the father's approach to the

handover was incorrect and that in fact, so far from being the instigator of the move, it was initiated by the grandmother and the father was a reluctant participator. The judge found that: 'it would be unthinkable to return T to such an environment'.

There is no appeal from that decision to place her permanently elsewhere. But, both before the judge and before this court the local authority rely heavily on the history of T to influence the court not to return the two younger girls to their parents, and her experiences are therefore relevant.

When T went into care there was some concern as to neglect and some allegations of physical abuse, both by an anonymous letter accusing the grandmother and her other son, G, who lived with her, and by the grandmother and G accusing the parents. But the question of sexual abuse did not at that stage arise. T was placed with foster-parents, who kept a record of her behaviour. The judge found that:

> 'They are a continuous record. I am not prepared to believe that they were concocted. There is too much detail, some of it trivial, some of it significant. I can see no reason for the H's to write fiction about the child.'

In July 1988 T began to describe her 'secrets' and told the foster-mother about Uncle G, about watching pornographic videos with him, and taking part in sexual acts with him. She later implicated her father and other relatives. She also implicated the father in sexual activities with the two younger girls. She described the reaction of the mother, who hit the father after being told by S and then smacked T. The father vehemently denied these allegations.

In a video-recorded interview with Dr G, a child psychiatrist (seen by the judge), T repeated these allegations implicating the father and G in sexual acts with the two little girls. The interview was criticised in some respects by Dr C, whose comments were endorsed by the judge, particularly with regard to increasing pressure and insistence of questions.

The judge recognised and took account of the fact that this child did tell untruths and was found to have done so on previous occasions. It is, however, accepted that T has been exposed to inappropriate sexual experiences, the extent of which has not been assessed in these proceedings, and Dr C recommended that T be removed from the family.

As a result of these allegations, S and E became wards of court on 31 August 1988, and were placed with different foster-parents from T. They were also interviewed by Dr G, on two occasions. The interviews were inconclusive and apart from one incident at the second interview, there were no allegations of sexual abuse. The judge said:

> 'There was an unexpected episode in the course of this interview when S suddenly lay prone on the floor and performed a sexual movement of her body saying "Daddy goes like this on me".'

The children, however, spoke more freely to their first foster-parents, who kept a running record which the judge accepted was not concocted. There were entries relating to masturbation and bad language. S spoke of secrets and implicated G and her father in sexual activities with E and herself. The judge set out what S had said, and said in his judgment:

> 'These are very disturbing descriptions. If the children are fantasising about their father and mother, their state of mind is so abnormal, sexually orientated and ugly that only a very poor upbringing could have brought about such results. If they are telling the truth, the parents' behaviour described by the girls must raise the most serious questions about the parents' mental and sexual state and their ability to rear children.'

The three girls were medically examined by a consultant paediatrician, whose findings were criticised by a clinical forensic practitioner called by the parents. The judge did not rely upon the medical evidence to support allegations of sexual abuse, but pointed out that it did not follow that other forms of sexual abuse had not occurred.

Dr C made a report and gave evidence. In his report he expressed his view about the mother:

> 'I am, however, quite clear that S and E love their mother, and that she is well able to look after them, give them a structure to their life and give them the emotional care they need.'

After expressing his concerns about the method of interviewing and the circumstances in which the younger children made their statements, he said:

> 'Having said this, it is my opinion that unless there is a clear explanation as to why and how the disclosures took place; a clear picture of whether or not there was a possibility of learnt responses from others (such as T or other children), it is inescapable that there is a marked suspicion of sexual abuse by the father and that there is therefore a risk if the children go home.'

In his evidence he modified his report and told the judge that he did not have the same anxieties about S and E as he had about T. He recommended, despite some worries, the return of the two younger children under supervision which he said was essential. A criticism of the judge by Mrs Puxon for the appellants was that he did not refer to, and appeared not to have recalled, the change of emphasis in Dr C's evidence.

This was a long hearing spread over a considerable period of time, with two long adjournments. The problems were very difficult and complicated; there were underlying and deep-seated family relationships and animosities, particularly between the grandmother and G on the one side and the parents on the other side; but they united from time to time and showed a common front to outsiders, particularly social workers; the grandmother dominated the rest of the family; there was unpredictability, temper and hysteria shown both by the grandmother and by the father-described by counsel as 'having a short fuse'. The judge formed an adverse view of the father and had a unique opportunity to do so over the prolonged hearing. He said:

> 'There is something abnormal, uncontrolled and hysterical about the father's temperament and character . . . The father is an unbalanced and hysterical person whose behaviour is unpredictable.'

There were no medical findings upon which he could rely. He had the behaviour of the children and the statements they had made to foster-mothers, social workers and to Dr G. The judge received in evidence the statements of the children both as reported by the foster-parents and from the video recordings which he viewed. He also received in evidence audio tapes made by the father of conversations during access visits.

The judge approached the consideration of the statements of the children on the basis that they were put before him 'both directly through the videos and by way of hearsay through the foster-parents'. He also directed himself that there 'must be shown to be a high degree of probability that they are true'. In the passage to which I referred earlier, he considered the alternative possibilities of truth and fantasy.

One factor in the judge's balancing exercise was his real and justifiable concern about the grandmother and G, and their continued association with the children. He was convinced that G had sexually misbehaved with T and that 'he was a thoroughly bad and dangerous presence in the lives of the children'. The appellants do not disagree with that assessment of the father's brother.

The judge pointed out the ambivalent approach of the father to his mother and that, although he was calling her a 'Judas' during the hearing, she might resume her dominant role in the family in the future. He went on to say:

> 'I would not be in the least confident about an undertaking to keep grandmother and G out of the parents' or the children's lives.'

He then listed with great care six points in favour of the parents, to which I will refer later, and said:

> 'On the other side I put the very real risk of G's re-entry into the lives of E and S and if their reports of sex games are true, of their further involvement in such evil goings-on.'

The judge went on to assess the allegations made against the father:

> 'What should I put in the scales with regard to the allegations against the father? All three children have made them. The fingers of all three point at the father. I have hesitated, as Dr C has, in reaching a conclusion, not because I disbelieve these three children but because of the dangers of making a mistake in such extremely difficult and emotional cases. I have finally decided that I can go a little further than Dr C. I entertain a very considerable suspicion that the three children were telling the unprompted, unrehearsed truth. I do not either acquit the father of abusing his children nor condemn him. The matter does not stop there. Whether he abused E or S or not, I am satisfied that they have been exposed to misbehaviour of a sexual nature (whether by G, the father or anyone else matters not); that they have an unhealthy and precocious knowledge of the male and female organs; and that they are capable of behaving in a sexual manner not to be found in girls who have been brought up with care. The parents have, it seems to me, been guilty of serious failure in this respect.'

The judge summed up his concerns, both as to the parents and the grandmother and G, in the final paragraph of his judgment in these words:

> 'I put these matters in the scales against the parents and the scales weigh heavily against them. I have asked myself the question whether it would be right, nonetheless, to allow the children to be returned under strict supervision. Because of the difficulties of enforcement I have already referred to, the answer must be 'no.' If they could have been overcome, I would have returned the children.

Mrs Puxon raised a number of issues in her notice of appeal. Her primary point related to the admissibility of hearsay evidence in wardship cases. She argued that the rules of evidence apply to wardship hearings in exactly the same way as any other child application or other civil proceedings and that the restrictions of the Civil Evidence Act 1968 are applicable to wardship.

In the way in which the judge came to his conclusion and made his findings this issue does not strictly arise. He admitted the statements of the children made to others and on the video recordings which he viewed, but relied upon them in this case only to a limited extent. His findings of in appropriate sexual knowledge and behaviour of the children might equally be inferred entirely properly from the evidence showing the state of mind of the children and the way in which they were behaving. His finding of sexual impropriety by G towards T is not the subject of appeal. No finding of sexual abuse of the two younger children was made, nor any finding of sexual impropriety by the father. However, the issue of hearsay arises more directly from the further evidence which this court has received *de bene esse* and to which I shall refer later. The admissibility of the further evidence, the use to which it might properly be put and the weight, if any, to be placed upon it, if relied upon, all fall to be determined.

In order to consider whether and for what purpose hearsay evidence may be admitted in wardship proceedings, it is necessary first to look at the position of wardship itself.

The wardship jurisdiction

The earliest origins of wardship arose in feudal times when it was an incident of tenure arising when a tenant died leaving an infant heir. The Crown exercised the prerogative rights on the death of a tenant-in-chief and in 1540 a Court of Wards was set up to enforce the right of the Crown and the execution of its duties in connection with wardship. Although the Court of Wards was abolished in 1660, the wardship jurisdiction did not die. The Court of Chancery claimed jurisdiction over children, based upon the original jurisdiction of the Lord Chancellor prior to the setting up of the special court which, with its abolition, was held to revert to him and through him to the Court of Chancery. In *Falkland v Bertie* (1696) 2 Vern. 333,342, the court held:

> 'In this court there were several things that belonged to the King as *pater patriae* and fell under the care and direction of this court, as . . . infants . . . and afterwards such of them as were of profit and advantage to the King were removed to the Court of Wards by the statute; but upon the dissolution of that court, came back again in the Chancery' [see generally Lowe and White *Wards of Court*, 2nd edn., chap. 1].

In the hands of the Court of Chancery the modern protective jurisdiction over children was developed. Lord Cottenham LC in *Re Spence* (1847) 2 Ph 247, 251 said:

> 'I have no doubt about the jurisdiction. The cases in which the court interferes on behalf of infants are not confined to those in which there is property . . . This court interferes for the protection of infants *qua* infants by virtue of the prerogative which belongs to the Crown as *parens patriae* and the exercise of which is delegated to the Great Seal.'

At the end of the nineteenth century the statutory concept of the welfare of the child was introduced by the Guardianship of Infants Act 1886. In *R v Gyngall* [1893] 2 QB 232,248, Kay LJ said of wardship that it:

> '. . . is essentially a parental jurisdiction, and that description of it involves that the main consideration to be acted upon in its exercise is the benefit or welfare of the child. Again the term 'welfare' in this connection must be read in its largest possible sense, that is to say, as meaning that every circumstance must be taken into consideration and the court must do what under the circumstances a wise parent acting for the true interests of the child would or ought to do. It is impossible to give a closer definition of the duty of the court in the exercise of this jurisdiction.'

It is clear that the jurisdiction of the High Court in wardship is an ancient one which has been invoked for centuries. From 1660 until 1970 it was exercised by the Court of Chancery and then the Chancery Division. It is now exercised by the Family Division and to some extent remitted to the county court (Matrimonial and Family Proceedings Act 1984, s. 38).

It is a special jurisdiction and not dependent upon statute for its exercise. Lord Esher MR in *R v Gyngall* (above) said at p. 239:

> '(Wardship) was a parental jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.

This special parental jurisdiction, inquisitorial rather than adversarial, has been referred to in many subsequent decisions of the House of Lords and of this court. Viscount Haldane LC said in *Scott v Scott* [1913] AC 417, 437:

> 'Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction.'

Lord Scarman said in *Re E (A Minor) (Wardship: Court's Duty)* [1984] FLR 457, 488F

> '. . . a court exercising jurisdiction over its ward must never lose sight of a fundamental feature of the jurisdiction that it is exercising, namely that it is exercising a wardship, not an adversarial, jurisdiction.'

The present wardship procedure is to be found in RSC Ord. 90 and stems from the Supreme Court Act 1981 and the 1984 Act (to which I have

already referred) but reflects the inherent jurisdiction of the High Court to deal with children, and Ord. 90 is the convenient procedure adopted to bring the matter before the High Court. The carrying out of this special jurisdiction requires a different approach from the court, to some extent at least, from other civil litigation and even other applications relating to the welfare of children based upon a statutory jurisdiction, however anomalous the result may be (see *Re H (A Minor); Re K (Minors) (Child Abuse: Evidence)* [1989] 2 FLR 313).

Lord Devlin recognised this position of wardship in *Official Solicitor v K* [1965] AC 201, 242:

> 'Here the test of convenience is the right one. It is agreed that the practice always has been to admit hearsay . . . the jurisdiction itself is more ancient than the rule against hearsay and I see no reason why that rule should now be introduced into it.'

In that case the House of Lords was considering hearsay evidence contained in a confidential report of the Official Solicitor. Lord Evershed MR, at p. 219, approved the observations of the trial judge, and said:

> 'The jurisdiction is not only ancient but it is surely very special, and being very special, the extent and application of the rules of natural justice must be applied and qualified accordingly. The judge must, in exercising this jurisdiction, act judicially; but the means whereby he reaches his conclusions must not be more important than the end. The procedure and rules, in the language of Ungoed Thomas J should serve and not thwart the purpose.'

Lord Devlin said, at p. 238:

> 'A principle of judicial inquiry, whether fundamental or not, is only a means to an end. If it can be shown in any particular class of case that the observance of a principle of this sort does not serve the ends of justice, it must be dismissed; otherwise it would become the master instead of the servant of justice.'

It is, in my view, of some significance that neither in the speeches in *Myers v DPP* [1965] AC 1001 nor in argument in that case was there any reference to the special jurisdiction of wardship. I do not consider that thereafter an administrative and non-adversarial procedure stretching back several centuries, seen in its application to be different from other civil proceedings, would without any adverting to its existence be subjected to a new set of rules by the Civil Evidence Act 1968. Moreover, s. 18(1) of the Civil Evidence Act recognised 'civil proceedings in relation to which the strict rules of evidence do not apply'.

In my judgment, wardship hearings are not subject to the strict rules of evidence and a judge exercising the wardship jurisdiction may admit evidence classed as hearsay which would otherwise be excluded. It is important, however, to remember that in all proceedings relating to the welfare of children the evidence of what children have said is receivable for other reasons, such as, for instance, the state of mind of the child, an indication of the child's wishes, or arising from an interview the child might have with the judge privately at the hearing.

Mrs Puxon sought to persuade us that in his approval of the use of hearsay in wardship proceedings Lord Devlin saw its use as limited and as a matter of convenience in connection with reports of the Official Solicitor or a court welfare officer. She relied upon a passage from his speech at p. 242, where he said:

> 'I agree that the liberty to tender hearsay evidence could be abused. I cannot imagine that any judge would allow a grave allegation against a parent to be proved solely by hearsay, at any rate in a case in which direct evidence could be produced.'

She also relied upon the decision of this court in *Thompson v Thompson (Note)* [1986] 1 FLR 212 which was considering hearsay material in a welfare officer's report and drew a distinction between comparatively uncontroversial matters which were unobjectionable and acutely controversial matters where the welfare officer should report his own observations and assessments. However, both in 1963 and 1975 (when *Thompson v Thompson* was decided) the problem of how to treat statements of children revealing allegations of sexual abuse did not arise and was not, I am sure, within the contemplation of either court.

In wardship, therefore, the rules as to the reception of statements made by children to others, whether doctors, police officers, social workers, welfare officers, foster-mothers, teachers or others, may be relaxed and the information may be received by the judge. He has a duty to look at it and consider what weight, if any, he should give to it. The weight which he places upon the information is a matter for the exercise of his discretion. He may totally disregard it. He may wish to rely upon some or all of it. Unless uncontroversial it must be regarded with great caution. In considering the extent to which, if at all, a judge would rely on the statements of a child made to others, the age of the child, the context in which the statement was made, the surrounding circumstances, previous behaviour of the child, opportunities for the child to have knowledge from other sources, any knowledge, as in this case, of a child's predisposition to tell untruths or to fantasise, are among the relevant considerations. Helpful guidance as to the court's view of interviews with children for the purpose of 'disclosures' is to be found in a number of decisions in the [1987] *Family Law Reports*, principally, Latey J in *Re M (A Minor) (Child Abuse: Evidence), Note* [1987] 1 FLR 293. (See also *Re H (A Minor); Re K (Minors)* (above). I agree with Latey J as to the usefulness of a video recording, but its status cannot be greater than other statements of children, although its impact, if well recorded, is more direct. I would just add that I view with some alarm the use of the word 'disclosure' to identify an interview with a child for the purpose of eliciting whether or not there is something to disclose.

Grave allegations of sexual abuse made in a statement by a child naming a perpetrator present considerable problems. Such allegations would, unsupported, rarely be sufficiently cogent and reliable for a court to be satisfied, on the balance of probabilities, that the person named was indeed the perpetrator. The evidence may, however, reveal a clear indication that the child has been exposed to inappropriate sexual activities and may be sufficiently compelling to satisfy the judge that the child has been subjected to serious sexual abuse. Statements of a child may

well be supported by the manner in which the child gives the description and in other aspects of his or her behaviour. The giving of the statement is unlikely to be neutral in the inferences to be drawn.

Additional evidence to support the identity of the abuser is likely to be more difficult to adduce. But the child may be at risk. If the alleged perpetrator is outside the family and the parents are able and willing to protect the child, a problem is unlikely to arise for that child. The risk can be avoided and the child protected. If, however, the child names a member of the family and there is no evidence other than the statement of the child, and if the judge accepts the child's account after having applied all the cautionary tests, in my judgment, he has a duty in wardship proceedings to treat the welfare of the child as paramount and to take steps to protect the child. It is not necessary to make a finding of sexual abuse against a named person in order for the judge to assess the risks to the child of return to that environment. He is engaged in a different exercise, that of the assessment of the possibilities for the future. The assessment of the possibilities is crucial for the protection of the child and he may decide, as Sheldon J said in *Re G (No. 2) (A Minor) (Child Abuse: Evidence)* [1988] 1 FLR 314, 321D, that it is an 'unacceptable risk'. Purchas LJ in *Re F (Minors) (Wardship: Jurisdiction)* [1988] 2 FLR 123, 128C approved a passage in Hollis J's judgment:

> '. . . if the risk of a child having been sexually abused while in his or her family environment is a real, reasonable or distinct possibility, action should be taken . . . I do not consider that a probability has to be shown but a real possibility. In that way, the interests of the child will be safeguarded.'

This exercise is not unique to the family work. Lord Reid in *Davies v Taylor* [1974] AC 207, 212 D, said:

> 'To my mind, the issue and the sole issue is whether that chance or probability was substantial. If it was it must be evaluated. If it was a mere possibility it must be ignored. Many different words could be and have been used to indicate the dividing line. I can think of none better than substantial', on the one hand, or 'speculative' on the other. It must be left to the good sense of the tribunal to decide on broad lines, without regard to legal niceties, but on a consideration of all the facts in proper perspective.'

In that case the claim was by a widow after a fatal accident and the House of Lords were evaluating the possibility of reconciliation between the deceased and the widow. But the words may helpfully be applied to the exercise of a judge's discretion in child applications.

Mrs Puxon accepted that a judge was entitled to rely upon hearsay evidence in order to provide protection for the child against future risks, by way of continuation of the wardship (see *Re F* (above)) and orders such as supervision, injunctions or undertakings. She drew a distinction between such orders which kept a child within the home, even one where there was considerable suspicion, and an order removing the child from that home. She argued that the latter course was unjustified in reliance

upon the statements of a child which amounted to hearsay evidence in that it involved a change of status of the child. If the judge is entitled to take account of the information for the purpose of protection of the child, I cannot, for my part, see why the line should be drawn at a stage of inadequate protection, such as an ineffective supervision order, and the judge precluded from taking the practical step of removing the child from an environment which was seen to be adverse to the welfare of the child. Under the existing legislation, by s. 7(4) of the Family Law Reform Act 1969, a judge in wardship may, in exceptional circumstances, make a supervision order, or by s. 7(2) may commit a child to the care of the local authority. A decision to make one or other order ought not to be dependent upon different procedural rules but should be a matter for the discretion of the judge, taking into account that it is a serious step to remove a child from home and family and one which s. 7(4) and 7(3) require to be in exceptional circumstances. It is always a matter of balancing the need to protect the child against the importance of preserving the unity of the family.

Turning now to Mrs Puxon's other main ground of appeal, she submitted that the judge's decision in the last paragraph of the judgment to remove the children permanently was based upon the difficulties of enforcement. That enforcement, according to her, related to fears that G and the grandmother might re-enter the children's lives and the judge's decision on the facts was unjustified. Mr Cole sought to show that the enforcement which concerned the judge was not limited to the grandmother and G, but also included the impossibility of enforcing a strict 24-hour supervision over the parents themselves. His difficulty was that, as he informed us, concerns as to the impossibility of supervising the children on a 24-hour basis to protect them from risks within the immediate family were not canvassed before the judge.

I find it difficult, I have to confess, entirely to understand the final basis upon which this very experienced judge made his decision. If it was limited to the difficulties of enforcement of any order protecting the children from contact with G and the grandmother, I agree with Mrs Puxon that the extreme step of removal of the children from their home and immediate family for that reason was unsupported by the evidence. It is common ground that the threat from G and the grandmother was never a live issue during the hearing before the judge. In his judgment he set out six points in favour of the parents:

(1) that they are the natural parents;
(2) the strong bond of affection and love between them and the two younger children;
(3) the children would be greatly distressed at being removed since they wished to rejoin their parents;
(4) other than the sexual allegations, the mother had given them good care;
(5) that perhaps the parents may have learnt from the proceedings; and
(6) that placements for adoption may go wrong, particularly for these children with all that they had gone through.

The judge also referred to the evidence of Dr C and said:

> 'He considered, as I do, that E and S loved their mother and she can well look after them, giving a structure to their life and the emotional care they need.'

These were powerful factors in favour of the parents. If the inappropriate sexual knowledge of the children and their exposure to unsuitable experiences, to which he referred earlier, was not so serious as to require in itself the removal of the children, having regard to all other considerations, then the issue of enforcement of a ban on the grandmother and G was not, in my was not, in my judgment, standing alone, sufficient ground for such a decision and he was in error in removing the children.

One has, however, to read the judgment as a whole. The judge was concerned about the disturbing descriptions given by the children, and he concluded that he entertained a very considerable suspicion that the children were telling the truth about their father. The judge said that he could neither acquit nor condemn the father. On the balance of probabilities a finding of sexual abuse by the father on the evidence available (taking into account that it was hearsay) would have been unjustified. But the matter does not stop there. I do not share the judge's view that it does not matter which of the adults had exposed the children to misbehaviour of a sexual nature. For my part, I consider that some view must be formed as to the direction from which the children will be at risk in the future. It may often be difficult to evaluate, but, if it can be done, it is clearly important to evaluate that risk in considering the future protection and welfare of the child.

The judge found there to be a substantial risk from the extended family. But his finding that the parents had been guilty of serious failure towards the children failed, in my view, to meet the essential point, which is the assessment of the risk to the children within the immediate family. The concern about the parents was not limited to risks of omission but included risks of the commission within the home. In aiming to deal specifically with this areas of risk the judge was also in error. Having erred in two material respects, in my judgment, the grounds for his decision cannot stand. Since we are dealing with the welfare of the children and in the wardship jurisdiction, we cannot, however, just set aside his order and return the children to the parents.

I turn now to the additional evidence. We heard it *de bene esse*, but in the light of what I have already said, I, for my part, am satisfied that it was right to receive it. The judge's reasons cannot be upheld; the evidence relates to children in wardship; it was not available at the trial.

Unlike the facts in *M v M (Transfer of Custody: Appeal)* [1987] 2 FLR 146, this court was able to hear oral evidence of two witnesses and the situation which arises is entirely different.

We first heard evidence from Mrs F, who is the foster-mother of S and E. She had sworn an earlier affidavit and given evidence before the trial judge. Her evidence to this court related to two occasions shortly after the decision of the judge on 20 July. Mrs F told us that both children were throughout aware that a judge would decide whether they were to go home to their parents. Their parents had told them of it and so had she. S was expecting to be given the decision on 21 July. She was also accustomed to seeing her mother on access visits each Friday. According to Mrs F, S is a

very mature child for her age, very aware of what is going on around her and 'never forgets anything'. Mrs F told us that she went in about 8.30 a.m. to S's bedroom. She was in bed and alone. Mrs F said:

> 'S asked me if she and E were going to see Mummy that day. I told her that the judge had made a decision that they were not going to go back to live with Mummy and Daddy. I said to her "Do you think you know why the judge said this?" She said "Yes, I think it is because of the rude secret that Daddy did to me". I then asked her what Daddy did to her. She said "He was in my bed and pulled his pants down and laid on top of me and it hurt me". I then asked her if she told Mummy. She said "Yes, Mummy was cross. They were shouting and Daddy was throwing things. Mummy told Daddy to go back to . . . and stay there".'

The little girl said she did not want to talk about it and Mrs F said that they would not keep talking about it but she must tell the social worker, Miss G. She was nervous and agitated when she spoke about it. According to Mrs F, apart from the occasion when it was discussed with Miss G on 28 July, to which I shall refer in a moment, there was no further reference to this by the child or by Mrs F.

The second occasion when S spoke of this was on the visit of Miss G on 28 July. The foster-mother was present. We have had the accounts from both witnesses. According to Miss G, S came rushing into the room in an anxious state, with something she needed to tell Miss G. She was calmed down. She then gave a description similar to that she gave to Mrs F, both as to the father's behaviour and the mother's reaction. This was after a slightly odd introduction where, according to Miss G, when asked if she knew why she said she would not see her Mum and Dad she said 'No' and asked Mrs F 'Do I ?' However, the overall impression in my mind is of a child giving more or less the same account on each occasion.

Mrs Puxon has sought to persuade us that the additional evidence should not be admitted since it was hearsay, but for the reasons I have already given I am satisfied that hearsay evidence is admissible in wardship proceedings. In any event, Mrs Puxon argued that no weight nor reliance should be placed upon it. She has raised discrepancies between the accounts of S over secrets in the past, over the description of what was called 'the carrot game' and questioning on this subject in the past. The child had never told either Mrs F or Miss G about rude secrets in the past, nor made that specific allegation to anyone except on one occasion to Mrs D the previous year. She had, however, demonstrated something similar to Dr G, an incident to which I have already referred. The two occasions on which S made the allegation in July 1989 were after she knew that she would not be having access nor seeing her parents again.

The reliability of the person relating what the child said is of vital importance. Mrs F is an entirely respectable person, a responsible and experienced foster-mother of many years, and was clearly doing her best to give an accurate account. As Mrs Puxon pointed out, she was and needed to be in the picture as to the background to the children in her care. She said she did not initiate the secrets conversation on the 21 July. She did, however, question S earlier in the year about 'the carrot game', although she said she was asked not to talk about these things. 'The carrot game' had featured as a matter of concern before the judge. The local authority

had placed much emphasis upon this as being of a sexual nature. But to Mrs F, S gave a wholly innocent explanation for it. I am uncertain whether Mrs F may have innocently prompted the child to say something on 21 July. If she did, it would explain the odd discrepancy between her evidence and that of Miss G on 28 July. I have no reason to doubt, however, the accuracy of her account of what the child herself said on 21 July, and indeed the judge accepted her earlier evidence.

What weight should be placed upon this additional evidence and what effect should it have upon the outcome of this case? I do not, for my part, consider that it carries the case very much further forward from the position before the judge. The value of this additional evidence is to underline the earlier evidence of which, in my view, the judge took too little account.

The issue in this appeal, in my view, is the assessment of the degree of risk attaching to the return of the children to their own home. Mr Cole has sought to uphold the judgment as it stands and there is, somewhat surprisingly, no cross-notice to ask this court to uphold the judge's decision on other grounds. In substituting its own decision for that of the judge, in the absence of a cross-notice, ought this court to set aside the entire decision-making process, or only the final decision as to the risk from the extended family, which was clearly wrong? In my view, this court has to do the balancing act and weigh all the factors in the scale in the light of my view that he erred in two material respects. The absence of a cross-notice ought not to impede this court from exercising its own discretion in this case. RSC Ord. 59 r. 10(4) provides that this court may exercise its powers notwithstanding no notice of appeal or respondent's notice has been given, and

> 'the Court of Appeal may make any order, on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties'.

In the special jurisdiction of wardship with the welfare of the child paramount, in my view, we have a duty in this case not to be fettered by technical considerations and we ought to do what we believe to be right in the best interests of S and E.

Taking into consideration all the evidence set out by the judge, including the view of Dr C in his oral evidence that with safeguards the two children could return to their parents, and the additional evidence about S, I, for my part, am satisfied that there is a substantial risk to the well-being of both children from the father if they were to return home. I also consider that there is a substantial risk that the mother will fail to protect the children from that risk. I am entirely satisfied that risks of commission would be extremely difficult to monitor and prevent by any form of supervision available to any social services department, and supervision would be ineffective to meet this type of risk. For all these reasons, I consider the judge was right to remove the children and that this court ought not to return them. I would dismiss this appeal.

McCOWAN LJ:

The last evidence the judge heard was from Dr C called on behalf of the appellants. The last question put to that witness was by the judge. He asked:

> 'Supposing that at the end of this case, after the submissions of counsel, Dr C, I reach the following conclusion with regard to E and S, that I can neither acquit nor condemn either parent themselves of being directly implicated, but that I share your worries, would you still say that they should go back, provided there is supervision?'

The doctor answered:

> 'Yes, provided there is supervision.'

That was on 24 April 1989.

The case was then adjourned to await the decision of the Court of Appeal in *Re H (A Minor); Re K (Minors)* (above). Eventually, the court reassembled on 27 June 1989 and the judge heard submissions from Mrs Puxon and Mr Cole. In the course of Mrs Puxon's submissions the judge indicated his provisional view of the case. He said to Mrs Puxon:

> 'I feel there is sufficient wrong in that situation without regard to the truth of the allegation for T to be removed; whereas as far as E and S are concerned, I thought that their state of mind as a result of the interview they had was such that they would not be removed but that they should be subject to very careful inspection and supervision by the local authority.'

Mrs Puxon indicated that her clients would, with reluctance, accept that situation. However, Mr Cole, after an adjournment to take instructions, responded that he was unable to accept the judge's invitation. Argument was therefore resumed and concluded that day. The judge then reserved his judgment and eventually gave it on 20 July 1989.

Having spent a good deal of time considering the concluding pages of the judge's judgment, I do not find it easy to conclude that he meant other than what he said, namely:

> 'Because of the difficulties of enforcement I have already referred to, the answer must be "no". If they could have been overcome, I would have returned the children.'

That sounds plain enough. What, then, were the difficulties of enforcement which he had already referred to? I can be in no doubt that he was referring back to these passages of his judgment, namely:

> 'I would not be in the least confident about an undertaking to keep grandmother and G out of the parents' or the children's lives . . . On the other side, I put the very real risk of G's re-entry into the lives of E and S and if their reports of sex games are true, of their further involvement in such evil goings-on.'

It must be remembered also that, while the judge had not felt able to conclude that the children's father had sexually abused them, he had (rightly or wrongly) found:

> 'The earliest and therefore most significant disclosure of T related to G and convinced me that he had sexually misbehaved with her and that he was a thoroughly bad and dangerous presence in the lives of the children.'

Hence, were it not for the judge's belief that it would be impossible to keep the grandmother and G, and particularly the latter, out of the lives of E and S if returned to their parents, the judgment appears to say that he would have returned them to their parents under strict supervision.

There has been in this case no cross-notice and Mr Cole at the outset of the hearing before us indicated that all he sought to do was to uphold the judge's finding. However, that submission was based upon his interpretation of what the judge had held, namely that it would be impossible to supervise the children if returned to their parents, and that keeping G out of their lives had nothing to do with it. As I have indicated, I am wholly unable to accept that interpretation.

In fact Mr Cole conceded that he had never argued before the judge anything about enforcement problems (whether in relation to G or supervision). He also conceded that the judge never asked Mrs Puxon to deal in argument with whether it would be possible to enforce an undertaking to keep the grandmother and G out of the children's lives. That in itself, in my judgment, would make his decision of the case on that point unsatisfactory. But the matter does not rest there. Mr Cole made the further concession before us that he had never contemplated that there would be difficulty in keeping the grandmother and G out of the lives of E and S; that it was in fact never a live issue of the case; and that the local authority were worried, not about G, but about the father. Indeed there was, in my judgment, no evidence before the court to justify the judge in making a finding that it would be impossible to keep the grandmother and G out of the children's lives if they returned to their parents. On the contrary, in the court welfare officer's subsidiary report of January 1989 it was stated that the parents had moved from [town], partly to distance themselves from the grandmother and G, and had decided to cut off relations with them in the interests of the children and themselves as a family. In earnest of that was a solicitor's letter on their behalf dated 25 October 1988, from which I quote, beginning in the middle of the second paragraph:

> '. . . our clients have now reached the decision that there should be no further contact whatsoever, between either of yourselves, and our clients and their children. We would make it clear that this is a decision reached after much thought following the discussions with social services. It is, however, firmly believed that this would be in the best interest of the children, and our clients as a family.
>
> In the above circumstances, would you therefore please refrain from attempting any contact with our clients, or their children, and we have to advise you that should any attempts of contact be made, we are instructed to commence court proceedings to obtain an appropriate order against you.'

It is not in dispute that after 14 October 1988, when the father learned what T was saying G had done to her, there was no contact between the parents on the one hand and the grandmother and G on the other, and that the following month the parents moved from [town]. The grandmother was, it is true, a party to these proceedings and turned up at court on the first day, but only to announce that she intended to take no part in them. She then left the court, along with G, never to re-appear.

For all those reasons, I find it impossible to justify the basis on which the judge decided the case.

The judge did not find it proved that the father had sexually abused any of his children. In my judgment, he was right to take that course. The only evidence that was before him to that effect was, as the judge said:

> '. . . the statements and behaviour of T, E and S by video and by report of the foster-parents.'

That was all hearsay evidence. I accept that wardship is a special jurisdiction in which judges are entitled to receive and have regard to hearsay evidence, but, in my judgment, it would be wrong for a judge to find sexual abuse proved against a particular person solely on the basis of hearsay evidence. What he can do, however, is to have regard to hearsay evidence to assist him to form a view as to the degree of risk involved for the future in permitting children to return to their parents.

My view being, as I have indicated, that the judge was clearly wrong to decide this case on the basis that G and the grandmother could not be kept out of the children's lives, the question that has troubled me is what to make of his remark that if those difficulties of enforcement could have been overcome, he would have returned the children to their parents. Can it be said that he properly weighed the risk of further exposure of the children to sexual misconduct if returned to their parents and found it not a real possibility? Had he heard counsel on the difficulties of enforcement, which were worrying him, and appreciated that it was common ground that they posed no problem, would he in fact have ordered that the children return to their parents under strict supervision?

It is certainly right to say that the judge put into the scales findings that he made which were favourable to the parents. He said, referring to the evidence of Dr C:

> 'He considered – as I do – that E and S love their mother and she can well look after them, giving a structure to their life and the emotional care they need.'

[There is another] passage in this context:

> 'In carrying out the necessary balancing exercise, I put on the one side in favour of the parents:
>
> (*a*) that they are the natural parents;
> (*b*) that there is a strong bond of affection and love between them and their two children, E and S;
> (*c*) the children will be greatly distressed at being removed since they wish very much to rejoin their parents;
> (*d*) apart from the sexual allegations, the mother had given them good care;
> (*e*) that perhaps – and it is a big perhaps – the father and mother may have learned much from these proceedings; and
> (*f*) what is frequently forgotten, that placements for adoption and adoption itself may go wrong, particularly after these gruelling years of change and interrogation experienced by E and S.'

The judge then went on to say:

> 'What should I put in the scales with regard to the allegations against the father? All three children have made them. The fingers of all three point at the father. I have hesitated, as Dr C has, in reaching a conclusion, not because I disbelieve these three children but because of the dangers of making a mistake in such extremely difficulty and emotional cases. I have finally decided that I go a little further than Dr C. I entertain a very considerable suspicion that the three children were telling the unprompted, unrehearsed truth.'

By this he must, I believe, have meant, 'in so far as they made allegations against their father of a sexual nature'.

The judge went on to make three very important findings. First, he said that he was satisfied that E and S had been exposed to misbehaviour of a sexual nature. (His following remark 'whether by G, the father or anyone else matters not' is curious, because it would obviously matter very much as far as returning the children to the father was concerned. He must, I think, have meant no more than 'leaving aside who was actually guilty of the sexual misbehaviour'.)

Secondly, he found that E and S had an 'unhealthy and precocious knowledge of the male and female organs'.

Thirdly, he found that they were 'capable of behaving in a sexual manner not to be found in girls who have been brought up with care'.

In the light of those findings he held that the parents had been 'guilty of serious failure in this respect' and added 'I put these matters in the scales against the parents and the scales weigh very heavily against them'.

So they do. After much anxious consideration, I find it impossible to understand how in the light of those findings the judge could have come to any view other than that there was a real possibility of exposure of the children to misbehaviour of a sexual nature if returned to their parents.

I conclude that the judge was deflected by his anxiety to keep the children from contact with G and the grandmother from considering the real issue which he had to decide, which was whether the risk of returning the children to their father, even with strict supervision, was too great. I do not believe he ever really decided this issue. If he did and in favour of the parents he was, in my judgment, plainly wrong.

That being my view, I do not consider it would be right in a wardship case for me to be influenced by the respondents' failure to serve a cross-notice justifying the judge's decision on grounds other than those he himself gave.

I should add that I agree that it was right for this court to receive the additional evidence, but I have not, for my part, found that it affected my decision.

For the reasons I have given, I too would dismiss the appeal.

NEILL LJ:

Before I give my judgment it might be convenient to give a reminder that this case involves children and nothing should be published which would be likely to identify them or any of them.

This is an appeal from the order of Anthony Lincoln J dated 20 July 1989 in wardship proceedings relating to three children, T (born on 1 February 1982), S (born on 12 October 1984) and E (born on 19 March 1986).

By his order the judge ordered that the children should remain wards of court, that they should be placed in the care of the local authority pursuant to s. 7(2) of the Family Law Reform Act 1969, and that they should be prepared for adoption. There is no appeal against the order in so far as it relates to T, but the parents of S and E appeal against the order for the placement of S and E in the care of the local authority. The parents seek return of these two children to their care, though they accept that they should remain wards of court and that they should be subject to close supervision.

In support of the appeal counsel for the parents advanced four main arguments:

(1) That in reaching his conclusion that the children should be placed in care the judge had relied on hearsay evidence and had made findings based on this evidence which he was not entitled to make.
(2) That in any event in the cases of S and E his findings were contrary to the weight of the evidence and that his conclusion that they should be placed in care was inconsistent with the findings which he made as to the parents' qualities as parents.
(3) That moreover his decision to place the children in care was based solely on his mistaken conclusion that the children's grandmother and uncle would make the enforcement of any order for supervision impossible.
(4) That no further evidence should be admitted because any evidence from the present foster-mother would be no more than additional hearsay evidence on which no relevant findings could be based.

I propose to consider these arguments under three headings.

A. The admissibility and use of hearsay evidence in wardship proceedings

Counsel for the parents was prepared to concede that hearsay evidence was regularly admitted in practice in wardship proceedings and indeed that many welfare and other reports were based in large measure on hearsay material. Counsel was further prepared to concede that a court is entitled to rely on hearsay evidence for the purpose of making or continuing an order for wardship or making orders for supervision.

She submitted, however, that such evidence could not properly be used:

(*a*) to make adverse findings of fact against a parent or another individual; or
(*b*) to make orders which changed the status of the child or which had the effect of removing the child completely from the care of the parents.

For my part, I find difficulty in finding a satisfactory basis for the suggested distinction between the types of order for which hearsay evidence may be used. Nevertheless, the use of hearsay evidence in wardship proceedings raises a question of principle which requires to be addressed.

Counsel for the parents put in the forefront of her argument the provisions of the Civil Evidence Act 1968. Thus s. 1 provides:

> '(1) In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible

> as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this Part of this Act or by virtue of any other statutory provision or by agreement of the parties, but not otherwise.'

'Civil proceedings' are defined in s. 18 of the 1968 Act. Section 18(1) provides:

> 'In this Act "civil proceedings" includes, in addition to civil proceedings in any of the ordinary courts of law –
>
> (a) civil proceedings before any other tribunal, being proceedings in relation to which the strict rules of evidence apply; and
> (b) an arbitration or reference, whether under an enactment or not, but does not include civil proceedings in relation to which the strict rules of evidence do not apply.'

Basing herself on these statutory provisions, counsel submitted that as wardship proceedings took place in an ordinary court of law hearsay evidence could not be admitted otherwise than as provided in s. 1(1) of the 1968 Act. It is therefore necessary to consider the nature of wardship proceedings and whether in such proceedings the 'strict rules of evidence' apply.

It is possible to trace the origins of the wardship jurisdiction to a period long before the establishment of the Court of Wards in 1540. I am content, however, to start my examination of the exercise of this jurisdiction with *R v Gyngall* [1893] 2 QB 232.

In that case the mother of a 15-year-old girl applied for a writ of habeas corpus in the Queen's Bench Division. The father of the girl was dead. At the material time the child was living with a lady who kept a convalescent home in Weymouth. The case is instructive because in the course of his judgment Lord Esher MR considered the two types of jurisdiction which might have been exercised before the Judicature Acts. It is also to be noted that the court had before it a statement by the child of her recollection as to the history of her past life. This statement was exhibited to an affidavit by the lady in whose custody she was living. At p. 238 Lord Esher said:

> 'It seems to me that before the Judicature Act there were two distinct heads of law, under either of which there might have been an application in the present case. There was a common law jurisdiction, under which the courts used to deal with these matters by habeas corpus. That jurisdiction was exercised for the purpose of determining as between two or more persons their rights . . . That jurisdiction might be exercised in cases where there was no question of the relation of parent and child, or it might be exercised as between parents and other persons. In such latter cases, where the dispute was with regard to the custody of a child, the question arose whether the party detaining the child had a right to detain it as against the parent. I take it that at common law the parent had, as against other persons generally, an absolute right to the custody of the child, unless he or she had forfeited it by certain sorts of misconduct . . . Where the common law jurisdiction was being exercised, unless the right of the parent was affected by some misconduct or some Act of Parliament, the right of the parent as against other persons was absolute . . . But, there was another and an absolutely different and distinguishable jurisdiction, which has been

> exercised by the Court of Chancery from time immemorial. That was not a jurisdiction to determine rights as between a parent and a stranger, or as between a parent and a child. It was a paternal jurisdiction, a judicially administrative jurisdiction, in virtue of which the Chancery Court was put to act on behalf of the Crown, as being the guardian of all infants, in the place of a parent, and as if it were the parent of the child, thus superseding the natural guardianship of the parent.'

A little later Lord Esher continued, at p. 240:

> 'It is argued that . . . the Court of Chancery was bound to give the custody of the child to the parent, unless the parent had been guilty of misconduct to the extent which would in a common law court have destroyed the *prima facie* absolute right of the parent. The fallacy of this argument appears to me to consist in mixing up the two jurisdictions, and extending to one of them considerations which appertain solely to the other.'

It is clear that in that case Lord Esher was satisfied that the mother had not been guilty of any misconduct which as between her and other people had derogated from her right to the custody of the child. Nevertheless, the court was entitled, in the interests of the welfare of the child, to supersede the natural rights of the mother and refuse the order that the child be returned to her.

The special position of wardship proceedings was recognised by Viscount Haldane LC in *Scott v Scott* [1913] AC 417 where detailed consideration was given to the rights of a court to hear proceedings in camera. Lord Haldane clearly regarded wardship proceedings as being in a separate category when he said at p. 437:

> 'The case of wards of court and lunatics stands on a different footing. There the judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.'

The special nature of wardship proceedings was further recognised in the decision of the House of Lords in *Re K* (above). It was there held that as the paramount consideration of the Chancery Division in exercising its jurisdiction over wards of court was the welfare of the infants, the proceedings were not a mere conflict between parties and a parent was not entitled as of right to the disclosure of confidential reports submitted to the court. The court, however, left open the question, which had not been fully argued before it, whether it was proper to admit or act upon hearsay evidence. Nevertheless, it seems that in the Court of Appeal in the same case it was accepted that hearsay evidence was included in reports as a matter of practice. In the House of Lords, Lord Evershed (at p. 223) stated that he was content for the time being to accept the existing practice.

Counsel for the parents, however, placed reliance on part of a passage in the speech of Lord Devlin in *Re K* in which he expressed an opinion on the question of hearsay at p. 242:

> 'I turn now to consider the objection on the ground of hearsay. Here the test of convenience is the right one. It was agreed that the practice always has been to admit hearsay. None of the Lord Justices in the Court of Appeal disapproved of this practice nor were they invited to do so. Reports on such matters as conditions prevailing at the school to which it is proposed to send an infant or of a house in which he is to reside may often be of great assistance and I think that it might often adversely affect the interests of the infant if a judge were to be debarred from acting upon them. A judge in chambers is, of course, quite capable of giving hearsay no more than its proper weight. An inflexible rule against hearsay is quite unsuited to the exercise of a paternal and administrative jurisdiction. The jurisdiction itself is more ancient than the rule against hearsay and I see no reason why that rule should now be introduced into it.
>
> I agree that the liberty to tender hearsay evidence could be abused. I cannot imagine that any judge would allow grave allegations against a parent to be proved solely by hearsay, at any rate in a case in which direct evidence could be produced. I agree that in such a case if a lot of hearsay material was produced, a party might be embarrassed by not knowing what steps he ought to take to meet it. But I think that it is well within the inherent powers of a judge exercising this sort of jurisdiction to deal with such a situation. He can, in a proper case, indicate in advance that he will pay no attention whatever to grave allegations that are based only on hearsay. I do not think that the possibility of abuse should be allowed to outweigh the benefits of continuing existing practice.'

It was forcefully argued by counsel on behalf of the parents that in this passage Lord Devlin clearly recognised the distinction which she was seeking to draw between evidence about living conditions in a particular house or school on the one hand and evidence which involved grave allegations against a named person or persons. Lord Devlin, she said, warned against making any serious findings against a parent on the basis of hearsay evidence.

In my judgment, however, it is of crucial importance to take account of the saving which Lord Devlin himself introduced, namely, that a grave allegation against a parent would not be allowed to be proved solely by hearsay '*at any rate in a case in which direct evidence could be produced*'.

In my judgment, the correct approach to the matter is to recognise that in wardship proceedings, which are of a special kind and which involve to some extent the exercise by the court of a parental or administrative jurisdiction, hearsay evidence is admissible as a matter of law, but that this evidence and the use to which it is put has to be handled with the greatest care and in such a way that, unless the interests of the child make it necessary, the rules of natural justice and the rights of the parents are fully and properly observed.

Lord Esher himself in *R v Gyngall* (above) clearly recognised that the court had to proceed with great caution before it interfered with the rights

of a parent. Furthermore, in *Scott v Scott* (above) and in *Re K* (above) the speeches in the House of Lords emphasise that, though the jurisdiction is a special one, the judge who exercises it has to act judicially because he is exercising a judicial function.

There are cases in other branches of the law where the special nature of the jurisdiction which is being exercised permits, and indeed obliges, the court to admit evidence which would not be admissible if the strict rules of evidence referred to in s. 18(1) of the 1968 Act were observed. Thus in *Kavanagh v Chief Constable of Devon* [1974] QB 624 the Court of Appeal upheld the decision of the Divisional Court to the effect that the Crown Court when exercising its administrative functions was not governed by the rules of evidence normally applied in criminal and civil courts. Accordingly, in an appeal under the Firearms Act 1968 the court was entitled to take into consideration all matters including hearsay which the Chief Constable was at liberty to consider. The facts in *Kavanagh v Chief Constable of Devon* are, of course, far removed from those in the present case, but the judgment shows that where a court is exercising a function which is administrative rather than judicial the rules of evidence do not apply. In the case of wardship proceedings, the function of the court is perhaps best regarded as having a dual nature, being in part judicial and in part administrative.

In exercising this jurisdiction, the court will be very slow indeed to make a finding of fact adverse to a parent if the only material before it has been untested by cross-examination. Moreover, it will examine with particular care the evidence of the person who communicates the hearsay material to it. But as the welfare of the child is the paramount consideration, I see no escape from the conclusion that in some cases a court, in assessing the risks to which a child may be exposed, may be obliged to reach conclusions of fact which in other circumstances and in other proceedings it would not be free to do.

There may also be cases, however, where the court may not be in a position to make a positive finding on the evidence as to what has happened in the past, but may, nevertheless, come to the conclusion that a child may be at risk for the future. This situation was considered by the Court of Appeal in *Re H (A Minor); Re K (Minors)* (above) in two cases involving future access by a father. At pp. 344G-345A Stuart-Smith LJ said this:

> 'In the type of case with which we are concerned in these appeals there may be insufficient evidence upon which the judge can conclude that the father has sexually abused his children, nevertheless there may be sufficient evidence to show that there is a real chance, possibility or probability that he will do so in the future if granted access. That must be weighed against the disadvantage to the child of not seeing its father; the balance may come down against any access or unsupervised access. And the judge in the exercise of his discretion will act accordingly.
> I would only add this on the standard of proof. Where the court is concerned with what has happened in the past, this must be established on balance of probability. But where serious allegations are made, amounting to criminal or grossly immoral conduct, the degree of probability must be commensurate with the occasion and proportionate

> to the subject matter: see *Bater v Bater* . . . and *Hornal v Neuberger Products* . . .'

Once the court has decided that the child may be at risk it seems to me to follow that the powers of the court are not limited merely to making wardship orders or orders for supervision. In a proper case, the court may feel obliged to place the child in the care of a local authority, even though the evidence is not sufficient to prove as a fact that the child has been sexually abused by a particular parent.

B. The judge's decision that the children should not be returned to the parents because of the difficulties of enforcement

Counsel for the parents drew our particular attention to the final paragraph of the judgment, which I must read, though it is necessary in order to judge its meaning and significance to read also the previous paragraph as well as two short passages on p. 18 of the judgment.

At p. 18 the judge said this, having set out the six factors which told in favour of the parents:

> 'What should I put in the scales with regard to the allegations against the father? All three children have made them. The fingers of all three point at the father. I have hesitated, as Dr C has, in reaching a conclusion, not because I disbelieve these three children, but because of the dangers of making a mistake in such extremely difficult and emotional cases. I have finally decided that I go a little further than Dr C. I entertain a very considerable suspicion that the three children were telling the unprompted, unrehearsed truth. I do not either acquit the father of abusing his children nor condemn him. The matter does not stop there. Whether he abused E or S or not, I am satisfied that they have been exposed to misbehaviour of a sexual nature (whether by G, the father or anyone else matters not); that they have an unhealthy and precocious knowledge of the male and female organs; and that they are capable of behaving in a sexual manner not to be found in girls who have been brought up with care. The parents have, it seems to me, been guilty of serious failure in this respect.
>
> I put these matters in the scales against the parents and the scales weigh heavily against them. I have asked myself the question whether it would be right nonetheless to allow the children to be returned under strict supervision. Because of the difficulties of the enforcement I have already referred to, the answer must be no. If they could have been overcome, I would have returned the children. I, therefore, accede to the local authority's applications.'

I must also read two earlier passages where the judge said this:

> 'I would not be in the least confident about an undertaking to keep grandmother and G out of the parents' or the children's lives . . . I put the very real risk of G's re-entry into the lives of E and S and if their reports of sex games are true, of their further involvement in such evil goings-on.'

It was clear, counsel submitted, that the reason, and the only reason, why the judge decided not to return the children under strict supervision

was because of the difficulties in enforcement. These difficulties were plainly difficulties concerning the grandmother and G, and did not relate to any difficulties of enforcement as far as the parents themselves were concerned. Thus, the judge specified the difficulties as those to which he had already referred and, moreover, it was extremely unlikely that he would have intended to refer to any difficulties of enforcement against the parents who, in the nature of things, could not be supervised otherwise than by means of periodic visits.

In my opinion, counsel's interpretation of the last paragraph of the judge's judgment is correct. It seems to me that in the context of the anxieties about the grandmother and G, expressed in the judgment, the phrase 'the difficulties of enforcement I have already referred to' means the difficulties of keeping the grandmother and G out of the children's lives. It is common ground, however, that any difficulties with regard to the extended family were not a serious factor in the case. In any event, the parents have now effectively severed relations with the grandmother and G, who live in Lincolnshire, and are unlikely to play any part in the children's life in the future. Furthermore, the argument that the grand-mother and G might be the source of some evil influence in the future was not put forward on behalf of the local authority at the trial. Counsel for the parents had no opportunity of dealing with it. I am quite satisfied that, in these circumstances, the judge's decision that the children should not be returned to the parents because of difficulties in enforcement cannot be supported on that ground.

C. The conclusion to which this court should come

It was strongly argued on behalf of the parents that once the judge's reason for his decision to refuse to return the children had been shown to be in error, it followed that his earlier view that had it not been for the problem of enforcement he would have allowed them to go back, though under strict supervision, should be followed and, indeed, that no other solution could properly be adopted. The local authority had not put in any cross-notice to support the decision on some other ground, and, accordingly, the appeal should be allowed. In addition, it was submitted, the judge's earlier conclusions about the culpability of the parents were open to serious objection:

(*a*) because they were largely based on inadmissible hearsay evidence; and
(*b*) because in a number of respects the judge had misinterpreted the evidence.

Speaking for myself, I must express some surprise that the local authority did not serve a cross-notice, because it seems clear from the final submissions put forward on their behalf that this court is being asked to find that there is a greater suspicion that these two children were being sexually abused by the father than the judge thought, and that, in any event, they are more at risk than the judge considered.

The absence of a cross-notice is not, however, conclusive. The duty of the court is to consider the welfare of the children. Moreover, RSC Ord. 59, r. 10(4) shows that the court is empowered to make such order as will

ensure the determination, on the merits, of the real question in controversy between the parties. RSC Ord. 59, r. 10(4) reads as follows:

> 'The powers of the Court of Appeal under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the court below or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such a notice; and the Court of Appeal may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.'

I am quite satisfied that no technical considerations should stand in our way.

In these circumstances it seems to me that, having decided that the judge's reason for refusing to return the children cannot be supported, it is incumbent on this court to look at the matter afresh.

We have had the advantage of a full and carefully reasoned argument by counsel for the parents in which she emphasised a number of matters, including the following:

(*a*) That the medical evidence which had earlier provided the local authority with grounds for concern had proved inconclusive when tested in cross-examination at the trial.

(*b*) That the evidence relating to 'the carrot game', which had also been a source of concern as indicating that the children had been exposed to wholly inappropriate sexual behaviour, had ceased to be of any value following S's latest account of the carrot game which she gave to Mrs F in July 1989. This account described the game in a manner which was wholly innocent.

(*c*) That the additional evidence, even if admitted, added nothing of importance to the earlier hearsay evidence by the children about sexual abuse and was quite insufficient to support even a finding of a reasonable suspicion that the children had been sexually abused by the father.

(*d*) That even if, contrary to her former submission, a finding of reasonable suspicion could be made, this was not sufficient to justify an order which would lead to a final and irrevocable breach between the parents and the children.

This is a difficult and anxious case. On the one hand are the important factors in favour of the parents which the judge listed in the judgment. To these are to be added the fact that some of the evidence against the parents was conflicting and unsatisfactory. But one has to look at the picture as a whole.

The judge set out some of the entries from the record which was kept by the first foster-parents who had charge of S and E. The judge gave his assessment of those entries. He said this:

> 'These are very disturbing descriptions. If the children are fantasising about their father and mother, their state of mind is so abnormal, sexually orientated and ugly that only a very poor upbringing could

> have brought about such results. If they are telling the truth, the parents' behaviour described by the girls must raise the most serious questions about the parents' mental and sexual state and their ability to rear children.'

It is to be noted that in the course of his judgment the judge stated that he was satisfied that the children had made the statements described by the foster-parents.

For my part I am satisfied, having seen Mrs F in the witness box, that on 21 July 1989 S did tell her about the 'rude secret'. Mrs F gave this account:

> 'S said that he [the father] got in my bed. He pulled his pants down and laid on top of me. And it hurt me.'

Mrs F then said:

> 'I asked her if she had told her mother. She said "Yes. Mummy was cross, they were throwing things. Mummy told Daddy to go back to . . . and stay there".'

I accept that that in substance was an accurate account of the conversation which took place at about 8.30 a.m. on 21 July 1989.

With that introduction, I must turn again to the judge's judgment. He said that he entertained a very considerable suspicion that the three children were telling the unprompted, unrehearsed truth. It seems to me to follow, though the judge was no doubt perfectly correct not to make a firm finding that the children had been sexually abused by their father, that he had a very considerable suspicion that they had. This is important, and I am unable to agree with the judge that it did not matter whether the sexual misbehaviour to which he was satisfied they had been exposed had been that of G, the father or anyone else. Looking at p. 19 of the judgment in the light of the earlier paragraph at p. 13 which I have already read, it seems to me to be clear the judge came to these conclusions:

(1) That the children had been exposed to misbehaviour of a sexual nature.
(2) That he had a very considerable suspicion that the children were telling the truth and, therefore, a very considerable suspicion that there had been sexual abuse by the father. Accordingly, it was likely they were not fantasising.
(3) That the children had an unhealthy and precocious knowledge of the male and female organs.
(4) That they were capable of behaving in a sexual manner not to be found in girls who had been brought up with care.
(5) That if the girls were telling the truth, the parents' behaviour raised the most serious questions about their mental and sexual state and their ability to rear children.

To my mind, these conclusions, coupled with the judge's assessment of the father's personality, seem to me to point inexorably to the further conclusion that there is a real or substantial possibility that these children would be at risk if they were returned to their parents. The fresh evidence, which I consider we were right to admit, does not add much to the overall

picture, but so far as it goes, it reinforces the view that the judge's decision must in the end be upheld.

For these reasons, I too would dismiss this appeal.

Appeal dismissed. Legal aid taxation. Leave to appeal to the House of Lords refused. Stay of execution for 3 weeks for the purpose of lodging petition to the House for leave to appeal.

Solicitors: The names of instructing solicitors are omitted in the interests of preserving anonymity for the parties.

ROBERT STEVENS
Barrister