20 February 2013

PRESS SUMMARY

In the matter of J (Children) [2013] UKSC 9
On appeal from [2012] EWCA Civ 380

JUSTICES: Lord Hope (Deputy President), Lady Hale, Lord Clarke, Lord Wilson, Lord Sumption, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEAL

Section 31 (2) of the Children Act 1989 imposes a threshold which must be satisfied before a care or supervision order can be made in respect of a child. First the child must have suffered or be likely to suffer significant harm; secondly, that harm must be attributable to the care given or likely to be given to the child. If the threshold is crossed then the court will treat the welfare of the child as its paramount consideration when deciding whether to make an order.

The issue in this case is whether a child can be regarded as 'likely to suffer' harm if another child has been harmed in the past and there is a possibility that the parent now caring for him or her was responsible for the harm to the other child.

The local authority in this case brought care proceedings in respect of three children who are cared for by DJ and JJ. The two oldest are the children of DJ and his former partner, and have always lived with DJ. The youngest child is JJ's daughter, her third child with her former partner, SW. The local authority submitted that the three children were likely to suffer significant harm because JJ's first child with SW, T-J, had died of non-accidental injuries in 2004. In earlier care proceedings relating to JJ and SW's second child, who was subsequently adopted, a judge had found that either JJ or SW had caused the injuries to T-J and the other had at the very least colluded to hide the truth. In the present proceedings the local authority sought to rely solely on the finding that JJ was a possible perpetrator of the injuries to T-J. It submitted that this was a finding of fact sufficient as a matter of law to satisfy the s 31(2) threshold in respect of the three children now cared for by JJ and DJ.

The High Court held on a preliminary issue that likelihood of significant harm can only be established by reference to past facts that are proved on the balance of probabilities. Mere possibility was insufficient. The Court of Appeal dismissed an appeal by the local authority but granted permission to appeal to the Supreme Court.

JUDGMENT

The Supreme Court unanimously dismisses the local authority's appeal. The main judgment is given by Lady Hale, with whom all the justices agree. Lord Wilson expresses disagreement on one point, which Lord Sumption shares. Lord Reed gives an additional judgment, with which Lord Clarke and Lord Carnwath agree. Lord Hope agrees with Lady Hale and Lord Reed.

REASONS FOR THE JUDGMENT

It is a serious matter for the state compulsorily to remove a child from his family of birth. The section 31(2) threshold is an important measure to protect a family from unwarranted intrusion while at the same time protecting children from harm [**1**] [**75**]. The wording of Section 31(2) has been the subject of six appeals to the House of Lords and Supreme Court. Those cases have consistently held that a prediction of future harm has to be founded on proven facts: suspicions or possibilities are not enough. Such facts have to be proved on the simple balance of probabilities [**36**]. This approach is supported by the legislative history of section 31(2) [**45-46**] [**96**]. It would be odd if the first limb (actual harm) had to be proved to the court's satisfaction but the basis of predicting future harm did not [**47**].

Care cases in which the only matter upon which the authority can rely is the possibility that the parent has harmed another child in the past are very rare. Usually there will be many readily provable facts upon which an authority can rely [**5**]. Even in cases where the perpetrator of injuries could not be identified there may be a multitude of established facts from which a likelihood that this parent will harm a child in the future could be shown. However, the real possibility that the parent caring for the child has harmed a child in the past is not by itself sufficient [**54**]. In this case there were many potentially relevant facts found in the earlier proceedings against JJ which might have been relevant to an assessment of whether JJ would harm children in the future, such as the collusion with SW which prevented the court from identifying the perpetrator, the failure to protect T-J, and the deliberate failure to keep T-J away from health professionals [**56**]. Other relevant matters for the assessment would have been consideration of the household circumstances at the time of T-J's death and whether JJ's new relationship with DJ looking after much older children was different [**53**]. As the local authority had chosen not to rely on these facts, however, it would not be fair to the whole family to allow these proceedings to go on. JJ has been looking after these three children and a new baby for some time without (so far as the court is aware) giving cause for concern and, should the local authority wish to make a case that any of these children is likely to suffer significant harm in the future, it will be open to it to bring new proceedings [**57**].

Lord Wilson, while agreeing with Lady Hale for the most part and in the disposal of the appeal, identified an issue on which he differed from the majority. In his view, since the consignment of a person to a pool of possible perpetrators of injuries to one child could not constitute a factual foundation for a prediction of likely significant harm to another child in his or her care, then as a matter of logic, it could not become part of the requisite foundation in combination with other facts and circumstances [**80**]. Lord Sumption agreed [**92**].

References in square brackets are to paragraphs in the judgment