National
Adoption
Leadership
Board

Impact of Court Judgments on Adoption

What the judgments do and do not say

November 2014

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Context

1. Over recent years we have seen more children finding permanent and loving homes through a more timely adoption system.

2. But in the last 12 months we have witnessed a significant reduction in the number of placement orders made and in the number of decisions made by local authorities to pursue care plans for adoption. These changes risk reversing the substantial progress made.

3. The national Adoption Leadership Board, Family Justice Board, and the Department for Education have heard regularly that these changes are a response to a number of high profile court judgments on care and adoption order cases, notably *Re B* and *Re B-S*[1]. Some of this feedback suggests a degree of misinterpretation of these judgments. This appears to have resulted in inaccurate assumptions being made about the judgments which, in reality, do not alter the legal basis for the making of care and placement orders.

4. In response, the Adoption Leadership Board has developed this short guide with support from an experienced Queen's Counsel to clarify the meaning of the key court judgments.

5. The principal messages from the guide are:

The judgments do <u>not</u> alter the legal test for adoption.

Courts must be provided with expert, high quality, <u>evidence-based</u> analysis of all <u>realistic</u> options for a child and the arguments for and against each of these options. This does not mean every possible option. The judgment in *Re B-S* clearly states that the "evidence must address all the options which are realistically possible".

Where such analysis has been carried out and the local authority is satisfied that adoption is the option required in order to meet the best interests of the child, it should be confident in presenting the case to court with a care plan for adoption.

[1] A summary of the key cases is provided in the Annex.

MYTHS

6. Five principal myths appear to be prevalent at present:

MYTH 1 – the legal test for adoption has changed

7. It is clear that the judgment in *Re B-S* did not change the legal test for adoption.

8. Adoption is – and has always been – a "last resort". It involves permanently severing ties between a child and his or her birth family. It is, therefore, quite right that in cases of non-consensual adoption, a court needs to be satisfied that no other realistic course will be in the interests of the child, whose welfare throughout his or her life is paramount.

9. Just because adoption is a "last resort", it does not follow that it is not also the option that is necessary for a significant number of children in order to find them a permanent and loving home. If no other realistic option is available, adoption may well be required to meet the child's best interests. It has always been the case that the court must be satisfied of this before approving a care plan for adoption or making a placement or adoption order.

10. The law has not changed. It is exactly the same law under which we have seen a significant increase in numbers of adoptions over recent years.

MYTH 2 – to satisfy the courts, *all* alternative options must be considered

11. In *Re B-S*, the President stated:

> "First, there must be proper evidence both from the local authority and from the guardian. The evidence must address all the options which are realistically possible and must contain an analysis of the arguments for and against each option." *[emphasis added]*

12. The court does not need to see in-depth analysis of options which are not realistic for the child concerned, nor an assessment of every option that is put

forward by a family. Feedback from local authorities suggests that some families may be asking for multiple and unrealistic assessments of numerous and unsuitable connected persons. It is absolutely right that decisions must not be rushed due to a need for speed – and this was re-stated in both *Re B* and *Re B-S*. However, everyone involved in the decision-making process must at all times balance the need for fairness with the impact of any delay on the child. The law is clear that any delay in coming to a decision is likely to prejudice the child's welfare (section 1(2) of the Children Act 1989 and section 1(3) of the Adoption and Children Act 2002), and that this must be borne in mind when making decisions.

13. Given this, the courts and local authorities must consider whether such assessments are proportionate. If a local authority can demonstrate that assessing another connected person would cause unacceptable delay to a child, this is a legitimate reason under the law for not doing so.

14. The Court of Appeal recently restated this principle. The judgement in *Re M* (handed down October 2014) states that:

> "The fact that speedy action will improve the prospects of a successful adoption for a particular child of a particular age must take its place in the overall appraisal of the case. Sometimes when considered with all the other factors, it will dictate that the court approves a plan for adoption of the child, even when full weight is given to the important reminders in recent cases, starting of course with *Re B*, that steps are only to be taken down the path towards adoption if it necessary."

15. The courts do, however, need to see expert, high quality, evidence-based assessments of all <u>realistic</u> options: only after evaluating all the pros and cons of such options can the court conclude that only adoption is consistent with the child's welfare throughout his or her life.

MYTH 3 – If adoption is only appropriate where "nothing else will do", foster care or special guardianship should be pursued instead

16. In *Re B* the Supreme Court stated that making a care order which is likely to result in the child being adopted against the parent's wishes is a "very extreme thing". Accordingly, the court must be satisfied that it is "necessary" to do so in order to protect the interests of the child, and that "nothing else will do".

17. "Nothing else will do" does not mean settling for an option which will not meet the child's physical and emotional needs. Nor does it mean that adoption should be dismissed because a child might otherwise be brought up in foster or residential care.

18. This was set out by the Court of Appeal in *Re M-H*, handed down only last month (October 2014). This stated that:

> "the fact that there is another credible option worthy of examination will not mean that the test of "nothing else will do" automatically bites. It couldn't possibly." *[emphasis added]*

19. In the same judgment the Court of Appeal also stated that:

> "the terminology frequently deployed in arguments to this court and, no doubt to those at first instance, omit a significant element of the test as framed by both the Supreme Court and this court, which qualifies the literal interpretation of "nothing else will do"."

20. Under the law, adoption should be pursued where it is necessary in the interests of a child's welfare. Necessary in the interests of the child's welfare will include where the child will benefit from belonging to a life-long, legally permanent family (in comparison to remaining a looked after child, or being placed with someone unrelated to them under a special guardianship order which would cease at the age of 18). The benefits of adoption should, therefore, be weighed up against the loss created by severing the legal bond between the child and his or her birth family. This requires an evidence-based balancing of the gains and losses in

terms of the child's welfare that takes into account the "enhanced welfare checklist" set out in the Adoption and Children Act 2002.

21. This means that if the appropriate analysis has demonstrated that adoption is plainly better than any other outcome (in the sense that it is the only and best way of meeting the child's needs), adoption should be pursued.

22. The law makes clear that, if a child cannot be cared for by his or her birth family, the local authority must consider whether any connected person (such as extended family or friends) could care for the child. Any assessment of a connected person needs to consider whether that person is capable of providing good enough care (with appropriate support) until the child achieves his or her majority or is old enough to live independently. The child has the right to live in their extended family and realistic options must be properly considered. But living in their extended family should not be at the cost of having their physical and emotional needs met. Children should only be placed with a connected person where the court is satisfied that the assessments reveal no real likelihood of the child coming to significant harm.

MYTH 4 – because it is a "last resort" planning for adoption must wait

23. Local authorities should plan at the earliest possible stage for the possibility of adoption where it seems possible that other options - such as reunification with family, or care by family or friends - might not prove a realistic course of action. That does not mean pre-empting any decision. Nor does it remove the need to provide expert, high quality, evidence-based assessments of all realistic options to the court – which is essential in every case. But planning ahead is necessary to avoid delay and allows for a more timely process in achieving the right outcome for the child.

MYTH 5 – the 26 week rule applies to placement orders

24. Under the law as it came into force on 22 April 2014, any application for a care order or a supervision order must be completed within 26 weeks (unless the court is satisfied that delay is necessary, in which case a court may grant an extension). Placement order applications are not subject to the 26 week time limit. However, if the case is one in which the care plan is for adoption, if it is possible to complete the placement order application within the 26 week time limit, then that is likely to be in the best interests of the child, as we know that delay damages children.

TRUTHS

TRUTH 1 – high quality assessment and evidence is essential in all cases

25. In *Re B-S* the President reflected on the adequacy of the local authority and CAFCASS evidence that had been presented in some cases and the ability of the courts to form robust judgments as a result.

26. High quality, reflective, evidence-based assessment is essential to underpin all social work and ensure that every decision taken is in the best interests of children. The decision to pursue a plan for adoption for a child is absolutely no different in terms of these requirements.

27. Good quality evidence, presented to the courts, needs to be more than just history and narrative, but provide clear assessment and analysis. That applies to evidence from the local authority itself and from expert reports. (See 'The process of reform: the revised PLO and the local authority', [2013] Fam Law 680, and 'The process of reform: expert evidence', [2013] Fam Law 816). It also applies to pre-proceedings work which must be carried out diligently to identify those families where the provision of support might make the difference to them being able to provide good enough care to meet the child's needs, or to identify family or friends who could do likewise.

28. What the court needs is expert analysis, from both the social worker and the guardian, which is evidence-based and focused on the factors in play in the particular case, which analyses all the realistically possible options, and which provides clear conclusions and recommendations, adequately reasoned through and based on the evidence.

29. Where local authorities have carried out such assessments and concluded that only adoption will do, they should continue to be confident in presenting cases to court with adoption recommendations.

30. The new social worker evidence template, along with training materials, launched in July 2014, is designed to help social workers better present evidence to the court. The template has been agreed with the President of the Family Division and is compliant with the requirements on local authorities.

TRUTH 2 – The judgments criticised some cases where the test for granting leave to oppose the making of an adoption order had been applied too harshly

31. The *Re B-S* judgment found that, in some cases, some courts had too harshly and too narrowly applied the test for granting birth parent(s) "leave to oppose" the making of an adoption order. However, the test that a court applies when birth parent(s) apply for leave to oppose an adoption order has not changed. The overriding consideration is, and always has been, the welfare of the child throughout his or her life.

32. Section 47 of the Adoption and Children Act 2002 states that the court may not give leave to oppose unless it is satisfied that there has been a change in circumstances. This is a two stage test – first, the court has to be satisfied that there has been a change in circumstances, and, if there has been such a change, the court then has to decide whether to grant leave.

33. Previously, some courts had described the test as "stringent" and had held that leave should only be granted to parent(s) in "exceptionally rare circumstances".

The Court of Appeal in *Re B-S* criticised this interpretation and re-stated the two-stage test for considering leave to oppose:

a) Has there been a change in circumstances?
b) If so, should leave to oppose be given, bearing in mind all the circumstances in the case and particularly a) the parent(s)' ultimate prospects of success of resisting the making of an adoption order if given leave, and b) the impact on the child if the parent(s) are or are not given leave to oppose, taking into account his or her welfare throughout his or her life. The child's welfare is paramount in this consideration.

34. The law is clear that the child's welfare is paramount and overrides parents' rights. For example, the welfare of the child might require a child to remain in an adoptive placement even though the circumstances of the birth parents have significantly changed, such as where a child is likely to suffer significant emotional or psychological harm (as opposed to short-term distress) in the event of an adoptive placement being disrupted.

35. The judgment does not make it easier to obtain permission to oppose an application for an adoption order. The test remains the welfare of the child throughout his or her life.

ANNEX A

Case Law: Summary of Facts

Re B

i. The parents challenged the making of a care order based on a care plan that the child should be placed for adoption.

ii. F had a long criminal history. He had spent 15 years of his adult life in prison and had previously used Class A drugs.

iii. M's life had been "hugely dysfunctional". In 1986, when M was 15 years old, her step-father began a sexual relationship with her and, in 1999, they had a daughter together. M's relationship with her eldest daughter ended when M left the family home in 2009 and care proceedings in respect of that daughter were still ongoing when this case came before the Supreme Court. In 2003, M was found guilty of a series of frauds and sentenced to two years in prison. She was later sentenced to a further 27 months for attempting to pervert the course of justice. Consultant psychiatrists instructed in connection with the criminal proceedings diagnosed her with a chronic psychiatric disorder that led her to exaggerate physical symptoms and make multiple complaints in order to elicit care from others.

iv. M and F began a relationship in 2009 and this case concerned their daughter, 'Amelia', born on 22.04.2010. Amelia had been removed at birth, but the parents had attended every contact session (3-5 times a week) and they had not put a foot wrong during contact.

v. The trial judge found that there was a risk that Amelia would suffer significant emotional and psychological harm. There was a risk that she would be presented for medical treatment she did not require due to M's psychiatric condition, and there was a mass of evidence that the parents were fundamentally dishonest, manipulative and antagonistic towards professionals. The experts disagreed as to whether Amelia could be safely placed with her parents but all agreed that she could only be placed with the provision of multi-disciplinary support which would require honest co-operation from the parents –

the court found that the parents were unable to co-operate in this way. Care orders were made based on a care plan that Amelia would be placed for adoption.

vi. The majority in the Supreme Court agreed with the trial judge's findings that the parents would not co-operate with professionals, with whom contact would be essential for Amelia's well-being and found that the decision to make a care order with a view to adoption was necessary and proportionate in the light of those findings. The appeal was therefore dismissed and the care order stood.

Key points of the Supreme Court judgment:

<u>The threshold for making of a care order is set by s31(2) of the Children Act 1989</u>

vii. The Supreme Court reaffirmed that a likelihood of significant harm means "no more than a real possibility that it will occur but a conclusion to that effect must be based upon a fact or facts established on a balance of probabilities". The more significant the harm, the less the required level of likelihood and vice versa. Deficiency in parental character alone is not enough; the link between the parental character deficiency and the deficiency in the care given to the child must be demonstrated. Further, the resulting deficiency in care must either cause significant harm or create a likelihood of significant harm. Article 8 of the European Convention on Human Rights has no part to play in deciding whether the threshold has been crossed, although it comes into play when considering whether it would be proportionate to make a care order taking into account how the threshold was crossed.

<u>Making care orders</u>

viii. Making a care order that is likely to result in the child being adopted against the parent's wishes is a "very extreme thing", "a last resort". The judge must be satisfied that it is "necessary" to do so in order to protect the interests of the child, in other words, that "nothing else will do". The child's interests are paramount and those interests include being brought up by his or her natural family, ideally his or her natural parents. Only in exceptional circumstances,

when no other course is possible in the child's interests, is a care order justified, based on a care plan for adoption.

***Re B-S* [2013] EWCA Civ 1146**

ix. M's two children were removed from her care in February 2011 when they were 2 and 3 years old. In October 2011, the mother's consent was dispensed with and the two children were made the subject of care and placement orders. Contact between the mother and the children ceased in December 2011 and the children were placed with prospective adopters in April 2012. In May 2013, the adoption application was listed for hearing and M applied for leave to oppose under s.47(5) of the Adoption and Children Act 2002.

x. The trial judge acknowledged that M had undergone "an astonishing change in circumstances" since the making of the care and placement orders. She had left her abusive partner, married a man serving in the forces, had a child with him and been assessed by two local authorities who had decided there was no need to start proceedings in relation to the new child. However, her application was refused on the basis that it was "entirely improbable" she would ultimately succeed in having the children returned to her care, and adoption orders were made.

xi. M appealed against the refusal of her application for leave to oppose. The Court of Appeal determined that the trial judge had been entitled to make findings on the evidence that the children had had "terrible experiences", they needed stability and care, and there was a risk that M might not be able to cope. They went on to decide that in the light of those findings, the trial judge had also been right to conclude it was in the children's best interests that M's application for leave to oppose was refused and M's appeal was dismissed.

xii. The Court of Appeal took the opportunity to reconsider the test to be applied to applications for leave to oppose in light of *Re B* and made some general comments on adoption proceedings.

Key points in relation to approving a care plan for adoption and granting a placement order

xiii. The Court of Appeal reiterated what was said in *Re B* about adoption being the most extreme of the permanence options available. It also warned judges to probe when there is any reason to suspect that local authorities may be pressing for a more drastic form of order because it is unable or unwilling to support a less interventionist form of order due to resourcing issues.

xiv. The Court of Appeal stated that, "We have real concerns, shared by other judges, about the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption". The court pinpointed two essential requirements when the court is being asked to approve a care plan for adoption or make a non-consensual placement order or adoption order:

- Proper evidence – there must be an analysis of the arguments for and against all options, which are realistically possible. This must be supported by evidence relating to the facts of the case and a fully reasoned recommendation; *and*

- Adequately reasoned judgment – there should be a global, holistic evaluation of all of the options, taking into account the pros and cons of each option before deciding which option is best for the child's welfare. The judge should not take a linear approach that isolates and rejects each option in turn for its deficits and then leaves only the most draconian option standing without considering the deficits and proportionality of that option.

xv. Reference was made to the 26 week timetable noting that, where the proposal before the court is non-consensual adoption, but the court does not have the required evidence to properly equip it to make a decision on such a grave issue, an adjournment should be directed, even if this takes the case over 26 weeks.

Key points in relation to applications for leave to oppose the making of an adoption order

xvi. Previous case law described the test for an application for leave to oppose made under s47(5) as "stringent" and the circumstances when such an application would succeed as "exceptionally rare". The Court of Appeal in *Re B-S* said these phrases should no longer be used in relation to these applications.

xvii. These applications will nearly always be made when a child is living with a prospective adopter following the making of a care order and a placement order. However these facts alone cannot justify a refusal because, otherwise the application to oppose will not provide a 'real remedy'. The Court of Appeal set out the proper approach to applications for leave to oppose as a two stage process:

- Has there been a change in circumstances?
- If so, should leave to oppose be given, bearing in mind all the circumstances in the case and particularly a) the parent's ultimate prospects of success of resisting the making of an adoption order if given leave, and b) the impact on the child if the parent is or is not given leave to oppose, taking into account his or her welfare throughout his or her life? The child's welfare is paramount in this consideration.

xviii. In answer to the second question, *Re B* should be at the forefront of the judge's mind. The judge must consider the pros and cons of giving and refusing leave and, the greater the positive change in circumstances, the more compelling the reasons must be for refusing leave.

xix. The mere passage of time since the child was placed with prospective adopters cannot be determinative, although the older the child and the longer they have been placed, the greater the adverse impact of disturbing arrangements is likely to be.

xx. The judge must also not attach undue weight to the short-term consequences and the adverse impact on the prospective adopters and the child of a contested adoption application, bearing in mind that the paramount consideration is the child's welfare throughout his or her life.

xxi. The Court of Appeal urged judges to bear in mind that "the test should not be set too high, because…parents…should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable" (Re P (Adoption: Leave Provisions) [2007] EWCA Civ 616).