CUTTING THROUGH ALL THE NOISE. WHICH FACTORS CARRY WEIGHT WHEN THE COURT UNDERTAKES A HOLISTIC ANALYSIS OF PLACEMENT OPTIONS FOLLOWING RE B-S?

Introduction

1. There are generally two schools of thought about the President's decision in *Re B-S [2013] EWCA Civ 1146*:

   (a) The first is that Re B-S completely re-wrote the way in which local authorities, Guardians and the courts thought about non-consensual adoptions;
   (b) The second, is that the President did little more than cause us all to re-focus on the way in which the law and the principles established by the higher courts were to be applied by social workers, Guardians and courts. In other words, telling us all that we needed to pull up our socks in terms of how we rather sloppily used the materials available.

2. The truth, in fact, is probably somewhere in the middle of the two. The President remarked at paragraph 15 that: "Lurking behind the present case, and indeed a number of other cases before appellate courts…one can sense serious concerns and misgivings about how courts are approaching…non-consensual adoptions."

3. Any discussion about Re B-S cannot be carried out in isolation without bearing in mind the Supreme Court's decision in *Re B (A Child) [2013] UKSC 33*, particularly as the Appellant in Re B-S was given permission to appeal largely on the back of that decision. At paragraph 21, the President said that Re B was a forceful reminder of just what is required.

4. Commentary on www.communitycare.co.uk referred to the "adoption landscape" as having been volatile since those decisions. For reasons that I will come on to later, the way in which the courts routinely apply the law and undertake the required analysis, remains far from perfect, particularly when it comes to assessments of members of the extended families of the children concerned; and family friends.

Fundamental principals

5. The President made it clear between paragraphs 17 and 24 that there were a number of fundamental principles that the courts had to apply at every stage of the process. These were:

   (a) Article 8 of the European Convention on Human Rights (see below) – paragraph 18;
   (b) Section 52(1)(b) of the 2002 Act uses the word "requires" which should be read as "the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable…. That is a stringent test" – paragraph 20;

(c) Quoting the Supreme Court in Re B he said that adoption is a very extreme thing, a last resort only to be made where nothing else will do, where no other course is possible and must be in the children's interests – paragraph 22;
(d) Quoting Wall LJ (as he was then) in *Re P (Placement Order: Parental Consent) [2008] EWCA Civ 535* he said that: it must be shown that the child's welfare requires adoption as opposed to something short of adoption. A child's circumstances may require state intervention, perhaps may even require the indefinite or long term removal of the child from the family….but that is not to say the same circumstances will necessarily require that child to be adopted" – paragraph 24.

6. At paragraph 25, the President noted three important points that were emphasised by Lord Neuberger in Re B, namely:

(a) Although the child's interests are paramount, courts must not lose sight of the fact that those interests include being brought up by their birth family unless the overwhelming requirements of the child's welfare makes that not possible – Lord Neuberger at paragraph 77;
(b) That Section 1(3)(g) of the 1989 Act and Section 1(4)(f) of the 2002 Act required the court to consider all options (Lord Neuberger at paragraph 77). As Baroness Hale said at paragraph 128, it is necessary to "explore and attempt alternative solutions." These may include the placement with the parents (or one of them) under no Order, a Supervision Order or a Care Order; with relatives or friends under a Child Arrangements Order or Special Guardianship Order; or long term fostering;
(c) There must be no practical way of providing the required support. Local authorities cannot apply for a more drastic order, especially adoption, because it is unable or unwilling to support a less interventionist order.

7. In a rather damning comment on a number of cases that had come before the courts at that time, the President said that there was an inadequacy of analysis and reasoning in the evidence of many local authorities and Guardians; and in many judgments and that this needed to stop there and then.

Disputed facts

8. The following applies when looking both at the factual matrix for finding that the threshold criteria for the making of Section 31 order was made out; and the relevant welfare decisions, including under the 2002 Act.

9. The burden of making out the case lies with he who asserts, which is usually the local authority and must be proved to the ordinary civil standard of proof – The leading case in this regard is *Re B (Care Proceedings: Standard of Proof) [2008] UKHL 35* and in particular, the opinion of Lord Hoffman who said at paragraph 2:

If a legal rule requires a fact to be proved (a "fact in issue") a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

10. At paragraph 4, he continued:

    Re H (Minors) [(Sexual abuse: Standard of Proof) [1996] AC 563] makes it clear that it [the court] must apply the ordinary civil standard of proof. It must be satisfied that the occurrence of the fact in question was more likely than not.

11. At paragraph 13, Lord Hoffman held:

    I think that the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.

12. In terms of how the local authority had to prove that the matters it asserted did occur, the following would have applied:

    (a) In *Devon County Council v EB and Others [2013] EWHC 968 (fam)* Baker J held at paragraph 56 that:

    When considering cases of suspected child abuse, the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all other evidence.

    (b) Munby LJ (as he then was) in *Re A (A Child) (Fact Finding Hearing: Speculation) [2011] EWCA Civ 12* held that:

    It is an elementary proposition that findings of fact must be based on evidence, including inferences that can properly be drawn from the evidence and not on suspicion or speculation.

13. In Re A (citation below), the President said that concerns without evidence are not sufficient.

14. It is here that I would say that the law still lets down children, particularly insofar as prospective family and friends carers are concerned.

15. In many cases, either at the stage of the undertaking of a viability assessment or a full assessment, the assessing social worker will conclude that he or she will not recommend that the child lives with the family member because of the number of

"concerns" that have been raised during the assessment. These are often matters that have arisen when the social worker has obtained information after the assessment has been concluded but before it was written up. These are often matters that have never been before the court or have been otherwise proven or accepted. Prospective carers often feel powerless to challenge these matters due to their lack of funds and/or the lack of public funding available to them to challenge the report in the care proceedings.

16. Recent examples that I have come across are:

    (a) A family member's son had made allegations against his step-father many years ago. These were disputed and had never been before a court. The child concerned was not spoken to about these during the assessment;
    (b) A family member had cared for children under a Care Order, but they had been removed under disputed circumstances;
    (c) An allegation of domestic violence where both parties to the incident said that the injury was caused by a dog and that the allegation was made by a third party who was sweet on the man;
    (d) A case where the family member was an anorexic and the paediatrician undertaking the adoption medical commented that this might impact on the prospective carer's life expectancy;
    (e) A case where the female carer was obese and that this might take 10 years off her life expectancy;
    (f) A prospective carer had used physical chastisement on her own child.

17. In many of the examples above, the social worker had spoken to none of the relevant people, no first-hand evidence (such as evidence from the Police or medical professionals) had been put before the court; and any question about individual "concerns" was batted off (by both social workers and Guardians) with comments about the sheer number of the concerns being a key consideration.

18. In my opinion, this is an approach that offends the principles behind Articles 6 and 8 of the Convention, Re B [2008], Re B [2013], Re B-S and Re A. We await the right case to bring to the attention of the appellate courts.

Statutory law

19. When looking at the matters that carry weight when applying Re B-S and other case law, the statutory law is, of course, highly, relevant. I shall not go through this orally save for where it is necessary to do so.

20. The court cannot make a Care Order or a Supervision Order unless it is first satisfied that, at the time that protective measures were first taken, the position with regards to the children was as set out at Section 31(2) of The Children Act in that:

    (a) The child concerned is suffering, or is likely to suffer, significant harm; and

(b) That the harm, or likelihood of harm, is attributable to –

(i) The care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
(ii) The child's being beyond parental control.

21. From a statutory perspective, Section 1(1), Section 1(3) and Section 1(5) of The Children Act 1989 apply; as do Articles 6 and 8 of The Human Rights Convention.

22. Section 1(1) provides that "when a court determines any question with respect to –

(a) The upbringing of a child; or
(b) [Not applicable to the case currently before the court]

The child's welfare shall be the court's paramount consideration.

23. The so-called welfare checklist is set out by Section 1(3) which requires the court to have particular regard to:

(a) The ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) His physical, emotional and educational needs;
(c) The likely effect on him of any change in his circumstances;
(d) His age, sex, background and any characteristics of his which the court considers relevant;
(e) Any harm which he has suffered or is at risk of suffering;
(f) How capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) The range of powers available to the court under this Act in the proceedings in question.

24. Under Section 1(5), the court should not make any order with regards to a child unless it is satisfied that it is better for the child to make that order rather than to make no order at all.

25. As far as the making of a Placement Order is concerned, Section 21(2) of The Adoption and Children Act 2002 provides that the court may not make such an order unless:

(a) The child is subject to a care order;
(b) The court is satisfied that the conditions in Section 31(2) of the 1989 Act are met; or
(c) The child has no parent or guardian.

26. Section 21(3) provides that the court may only make a Placement Order unless the court is satisfied that:

(a) The parent has consented to the child being placed for adoption with any prospective adopters who might be chosen by the local authority and has not withdrawn the consent; or
(b) The parent's consent should be dispensed with.

27. Section 52(1) provides that the consent of the parents to the placement of the child can only be dispensed with by the court if the court is satisfied that:

(a) The parent or guardian cannot be found or is incapable of giving consent, or
(b) The welfare of the child requires the consent to be dispensed with.

28. When looking at the question of welfare, Section 1 of the 2002 applies. This includes Section 1(2) which provides that the paramount consideration of the court or adoption agency must be the child's welfare throughout his life.

29. Section 1(4) of the 2002 Act provides that the court must have regard to the following matters amongst others:

(a) The child's ascertainable wishes and feelings regarding the decision (considered in light of the child's age and understanding);
(b) The child's particular needs;
(c) The likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person;
(d) The child's age, sex, background and any of the child's characteristics which the court or agency considers relevant;
(e) Any harm which the child has suffered or is at risk of suffering;
(f) The relationship that the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including:

I. The likelihood of any such relationship continuing and the value to the child of its doing so;
II. The ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs;
III. The wishes and feelings of the child's relatives, or of any such person, regarding the child.

30. Courts should not merely acknowledge the existence of the welfare checklist – as per Macur LJ in *Re S [2014] EWCA Civ 135.*

31. Section 1(6) of the 2002 replicates Section 1(5) of the 1989 save that it also provides that the court must consider the full range of powers open to it under both the 1989 and 2002 Act.

32. Article 8 of The European Convention on Human Rights provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the provision of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

What is good enough?

33. There is a wealth of authorities that consider what is good enough parenting. A few will be considered here.

34. Fitzgibbon LJ in *Re O'Hara* [1900] 2IR 232 held that:

"In exercising the jurisdiction to control or to ignore the parental right, the court must act cautiously, not as if it were a private person acting with regard to his own child, and acting in opposition to the parent only when judicially satisfied that the welfare of the child requires that the parental right should be suspended or superseded."

35. This principle was developed further by Lord Templeman in *Re KD (A Minor) (Ward: Termination of Access)* [1988] 1AC 806 who, in a well-known and much quoted passage from his opinion, held that:

"The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature."

36. Perfection in parents and other family or friends carers is not required. Human foibles and frailties should be tolerated provided that they are not such that they fall below what would, in the circumstances of the child concerned, equate to good enough parenting. It would also be wrong to compare what a family member or a family friend offering an alternative to adoption would offer in terms of the level of care or materialistic matters to that which could be offered by a, usually, unknown adopter.

37. The court must also bear in mind the dictum of The President in *Re A (A Child)* [2015] EWFC 11 (also known commonly as "The Darlington case") when he quoted, with approval, the decision of His Honour Judge Jack in *North East Lincolnshire Council v G and L* [2014] EWCC 877 (Fam) who held:

"I deplore any form of domestic violence and I deplore parents who care for children when they are significantly under the influence of drink. But so far as Mr and Mrs C are concerned, there is no evidence that I am aware of that any domestic violence between them or any drinking has had an adverse effect on any children who were in their care at the time when it took place."

38. The local authority and court, when considering the parenting that the child is likely to receive, must also consider the decision of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 at paragraph 80 where he held:

"Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."

39. Lord Wilson of Culworth in *Re B* [2013] UKSC 33 at paragraph 28 said:

"[Counsel] seeks to develop Hedley J's point. He submits that:

"Many parents are hypochondriacs, many parents are criminals or benefits cheats, many parents discriminate against ethnic or sexual minorities, many parents support vile political parties or belong to militant religions. All of these follies are visited upon their children, who may well adopt or model them in their own lives but those children should not be removed for those reasons."

I agree with [counsel]'s submissions."

40. Baroness Hale, at paragraph 143 of the same opinion, held:

"We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the state does not and cannot take away the children of all of the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities or who espouse antisocial political or religious beliefs."

Analysing the options

41. One of the most commonly referred to matters that came from this case is the so-called Re B-S analysis.

42. The Supreme Court in *Re B (A Child) [2013] UKSC 33* held at paragraph 34 that it was not enough that it would be better for the child to be adopted than to live with his natural family, the court must first conclude that the child's welfare requires that he is adopted. At paragraph 76, that was further defined as being where "*nothing else will do*."

43. In *Re B-S [2013] EWCA Civ 1146,* The President (at paragraph 44) said that:

"The judicial task is to evaluate all the options, undertaking a global, holistic and multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option. To quote McFarlane LJ again….:

'What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against competing options or opinions.'

44. This was described by the President at paragraph 36 to be the balance sheet approach. Black LJ (as she then was) in *Re V [2013] EWCA Civ 913* lamented that this was all too often missing.

45. At paragraph 34, the President made reference to earlier judgments of Ryder LJ and McFarlane LJ where they referred to the requirement for:

    (a) Proper evidence of the lack of sufficient alternative options for the child and an analysis of this evidence and these options;
    (b) An assessment of the benefits and detriments of each type of placement and, in particular, the nature and extent of them;
    (c) The negatives and positives of placing the child away from the natural family. There should be a global, holistic evaluation of each of the options available before deciding which best meets the duty to afford paramount consideration to the child's welfare – *Re G [2013] EWCA Civ 965.*

46. In *Re ND [2014] EWCA Civ 1226*, the Court of Appeal upheld an appeal against the making of a Placement Order where the Judge had accepted the recommendations of the local authority and Guardian but had failed to explain why he preferred their evidence to the alternative.

47. McFarlane LJ in *Re W [2016] EWCA Civ 793* described (at paragraph 68) the phrase "nothing else will do" as meaningless and dangerous if it is applied to some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. He added that, used properly, it is no more and no less than a useful distillation of the proportionality and necessity test as embodied in the Convention and reflected in the need to afford paramount consideration to the welfare of the child throughout his lifetime. McFarlane LJ went on (at paragraph 69) to say that this test can only be properly deployed once an analysis of the welfare and the pros and cons had been undertaken.

48. John Simmonds of CoramBAAF, commenting after the decision in Re W, said that the phrase *"[nothing else will do] has come to be constructed as the highest of hurdles only capable of being surmounted by a world-class Olympian, rather than a useful distillation of the proportionality and necessity test as embodied in the ECHR."*

49. Sir Martin Narey, former advisor to the Secretary of State for Education on children's social care said that Re W would address the situation of "local authorities and courts favouring any disposal other than adoption."

50. In *Re S-F (A Child) [2017] EWCA Civ 964,* Ryder LJ said, at paragraph 8 that:

    "The proportionality of interference in family life that an adoption represents must be justified by evidence not assumptions that read as stereotypical slogans. A conclusion that adoption is better for a child than long-term fostering may well be correct but an assumption as to that conclusion is not evidence even if described by the legend as something that concerns identity, permanence, security and stability."

51. Ryder LJ went on to say that the child's permanency report and the agency decision maker's record must both contain the correct analysis and reasoning and were disclosable. He said that, in any event, they should be scrutinised by the Guardian.

14th November 2017

Damian Stuart
FOURTEEN