Placed on Rock or Sand? Placement Orders, Setting Aside and the Relationship with Care Proceedings

Introduction: The Current Context

1. Since the decisions in ***Re B (A Child)*** **[2013] UKSC 33** and ***Re B-S (Children)*** **[2013] EWCA Civ 1146** in the Supreme Court and Court of Appeal respectively, it has been clear that adoption, particularly non-consensual adoption, is a matter of last resort. In ***Re B***, **Lady Hale** reasoned that

> it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by *overriding requirements* pertaining to the child's welfare, in short, where nothing else will do (**para 198**).[1]

2. These judicial developments, particularly confusion regarding their implications, led to a fall in placement orders and adoption orders. Given the time delay between placement applications and orders and adoption orders, the former act as a better indicator of the impact of changes in practice. In September 2017, the Department for Education summarised the position as follows:

> Over the past four years the numbers of placement orders has fallen. At 31 March 2013, the numbers of children looked after under a placement order peaked at 9,800 and have fallen steadily since to 5,440 at 31 March 2017. In 2013, placement orders represented 14% of looked after children at 31 March whereas in 2017 only 7% of looked after children are on placement orders.[2]

The decline is notable, but not unexpected given that placement orders represent a critical stage in the adoption process.

3. The Department for Education in its March 2016 policy paper, *Adoption – A Vision for Change*, committed to 'act[ing] to address unexpected falls in adoption decisions',

[1] Emphasis in original.

[2] Department for Education, *Children looked after in England (including adoption), year ending 31 March 2017* (SFR 50/2017, 28 September 2017).

particularly by 'chang[ing] the law to ensure that quality of care and stability of placement are properly prioritised'.[3] The continued decline in the number of placement orders and adoption orders, however, highlights the need for much more to be done.

4. The aim of the placement order regime under the Adoption and Children Act 2002 is three-fold:

- to ensure that decisions that affect children's long-term stability are resolved before they have been placed;
- to minimise uncertainty for prospective adopters; and
- to make it less likely the final adoption hearing serves as a 'fait accompli' for birth families.[4]

Are Placement Orders Fulfilling their Aim? Statistical Evidence

5. Statistical evidence may offer some insight into whether the placement order regime is fulfilling its aims. In response to the decline in adoptions, a key aspect of recent Department for Education strategy has been to focus on increasing the use of Fostering for Adoption (FfA) placements,[5] which are not accompanied by a placement order or parental consent to place for adoption, though foster carers in FfA placements are also approved prospective adopters (**Children Act 1989, s22C(9B)**). One might expect only a deferral in placement orders to result from the use of FfA placements since the local authority can make such a placement decision only where it is considering adoption and satisfied that the child ought to be placed for adoption but does not have either a placement order or parental consent (**CA 1989, s22C(9A)**). But it could also be that changes to the care plan during the course of the FfA placement reduce the likelihood that the case proceeds to adoption, via a placement order or otherwise. Unfortunately, the DfE's statistics do not address FfA placement rates specifically, though do note that '[t]here has continued to be a fall in children placed with prospective adopters'[6] and, of the 53,420 children in foster placements as at 31 March 2017, 380 children (1%) were subject either to an FfA placement or concurrent planning.[7] The

[3] Department for Education, *Policy paper: Adoption – A Vision for Change* (HMSO 2016) 8.
[4] *Clarke Hall and Morrison on Children* (Butterworths) Part 10, Ch 4: [92].
[5] DfE, *Adoption – A Vision* (n 3) [1.10].
[6] DfE, SFR 50/2017 (n 2) 8.
[7] ibid.

numbers involved, however, suggest that this has not had a significant impact on the outcomes in terms of placement orders and adoption orders.

6. In addition to the (likely very limited) impact of FfA placements, there is new research on the significance of special guardianship orders. In 2016, Harwin *et al* examined the use of supervision orders and special guardianship (SGOs).[8] They summarise their key findings on the relationship between SGOs and placement orders as follows:

> [O]ur analysis comparing SGOs with placement orders over the last 5 years does not simply reflect more children entering care, rather it suggests a striking shift in the pattern of use of the range of permanency options. What we are seeing for the first time ever is a near convergence in the percentage of children subject to special guardianship and placement orders.[9]

And in terms of the particular statistics, which resulted from analysis of the Cafcass database:

> SGOs were made for 20.1% of all children subject to s 31 care or supervision or placement applications in 2014/15, less than 1% difference in the proportion given a placement order (20.9%). It is also the first time that this near convergence in the numbers of special guardianship (3,591) and placement orders (3,749) has been found. After care orders, SGOs and placement orders were the next most frequent disposals in 2014/15. This changing trend in ratio of use of SGOs and placement orders which began in 2012/13 and accelerated most rapidly in the subsequent two years, lends weight to the view that special guardianship is being used increasingly as an alternative to the adoption route.[10]

7. The decreasing use of placement orders in direct correlation to the increase in SGOs, and the increased judicial perception of special guardianship as a 'valid, widely used, and important alternative'[11] legal permanency option suggests that cases that proceed to placement order ought now to be those cases in which adoption is very clearly the best option. Assuming legal procedure has been followed correctly, this should mean that set aside is correspondingly rarer. What is the case law evidence in this regard? Does the

[8] Judith Harwin, Bachar Alrouh, Melanie Palmer, Karen Broadhurst, Stephen Swift, 'Considering the case for parity in policy and practice between adoption and special guardianship: findings from a population wide sutdy' [2016] Family Law 204-207.
[9] ibid 206.
[10] ibid 206.
[11] Harwin *et al* (n 8) 207.

current picture suggest the aims of stability for children and prospective adopters are being realised? Are birth family's rights being adequately respected? Are placement orders being made when they are most appropriate legal permanency option in the context of care proceedings?

Are Placements Orders Fulfilling their Aim? Evidence from Setting Aside

8. As a brief reminder, the core characteristics of a placement order are as follows:

- Only a local authority can apply for the order (**Adoption and Children Act 2002, s21(1)**);
- If granted, the order gives them the authority to place the child for adoption with any prospective adopters who they may choose (**ACA 2002, s21(1)**);
- The order remains in force until it is either revoked, an adoption order is made in respect of the child, the child marries or enters into a civil partnership, or reaches the age of 18 (**ACA 2002, s21(4)**).

Revocation of a Placement Order

9. There are two routes to the revocation of a placement order. The first requires an application to revoke the placement order, which may be made by any person (**ACA 2002, s24(1)**). The prerequisites for an application for revocation depend on the party seeking to have the placement order revoked:

(a) Either the child or the local authority can apply to have the placement order revoked at any time (**ACA 2002, s24(2)**). If the local authority makes the application, it can demand that the child is returned within seven days (**ACA 2002, s35(2)**), and then apply for revocation;

(b) Any other person, including the child's parents, may not apply for revocation unless the following pre-conditions are met:

(i) The court is satisfied that 'there has been a change in circumstances since the order was made' (**ACA 2002, s24(3)**); and

(ii) The child is not 'placed for adoption' by the local authority (**ACA 2002, s24(2)(b); *Re B (Children) (Adoption)* [2013] 3 WLR 208 (EWCA)**).

Following an application from the child or the local authority, or the satisfaction of the pre-requisites from any other person, the court's decision to grant leave to apply for revocation is an exercise of discretion (**ACA 2002, s24(2)(a)**).

10. The opportunity for the local authority to seek to revoke the placement order via **ACA 2002, s35(2)** and an application under **ACA 2002, s24(1)** is complicated by the increasing emphasis on the family life that may be found to exist between the child and the prospective adopters (see, eg, ***DL and ML v Newham LBC and Secretary of State for Education*** **[2011] EWHC 1127 (Admin)**).

11. The second route to revocation does not require an application to revoke the placement order: If an application is made for an adoption order, and the court determines not to make the order, it may exercise its discretion to revoke the placement order (**ACA 2002, s24(4)**). Of course, the court can decide that the child should still be placed for a future adoption, in which case it may order that the placement order continues.

12. *Two-stage test for leave*: In respect of parents (and anyone other than the child or the local authority) making an application, the above-described test for leave to apply to revoke placement orders is commonly framed as a two-stage test (eg. ***Re B-S*****, Sir James Munby P, para [7]**). In ***Re T (Application to Revoke Placement Orders: Appeal)*** **[2014] EWCA Civ 1369**, **Russell J** outlined the test as follows:

> … [T]here are two stages, the first being has there been a change in circumstances? The second, if so should leave be granted? While the first is primarily a factual question for the judge to decide the second is subject to judicial discretion when the court has to decide whether there is a real prospect of success. (**para 41**)

This construction of the test may follow from the fact that, as mentioned below, there are circumstances in which 'plac[ing the child] for adoption' may be successfully judicially reviewed to enable the application for leave to revoke to proceed. Otherwise, the prerequisite that the child not to be 'placed for adoption' should not be overlooked despite its absence from the standard formulation.

13. In ***Re B-S***, Sir James Munby P, neatly summarised the questions to be asked at each stage of the two-stage test:

The change in circumstances does not have to be "significant", but needs to be of a nature and degree sufficient to open the door to a consideration of whether leave to apply should be given: ***Re P (Adoption: Leave Provisions)*** **[2007] EWCA Civ 616**, [2007] 2 FLR 1069. At the second stage, the child's welfare is relevant but not paramount: ***M v Warwickshire County Council*** **[2007] EWCA Civ 1084**, [2008] 1 FLR 1093. The question for the court is "whether in all the circumstances, including the mother's prospect of success in securing revocation of the placement order and T's interests, leave should be given": ***NS-H v Kingston upon Hull City Council and MC*** **[2008] EWCA Civ 493**, [2008] 2 FLR 918, para 27.

14. ***Stage 1 of the two-stage test*****:** The test for 'change in circumstances' under **ACA 2002, s24(3)** is the same as that in respect of adoption orders under **ACA 2002, s47(5) and s47(7)**. In respect of the latter, **Wall LJ** in ***Re P (Adoption: Leave Provisions)***, held as follows:

> We do not think it permissible to put any gloss on the statute, or to read into it words which are not there. The change of circumstances since the placement order was made must, self evidently and as a matter of statutory construction, relate to the grant of leave. It must equally be of a nature and degree sufficient, on the facts of the particular case, to open the door to judicial discretion...
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> .....the importation of the word 'significant' puts the test too high. Self – evidently, a change in circumstances can embrace a wide range of different factual situations. Section 47 (7) of the 2002 Act does not relate the change to the circumstances of the parents. The only limiting factor is that it must be a change in circumstances "since the placement order was made". Against this background, we do not think that any further definition of the change in circumstances involved is either possible or sensible.
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> We do, however, take the view that the test should not be set too high...parents should not be discouraged from either bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable. We therefore take the view that whether or not there has been a relevant change of circumstances must be a matter of fact to be decided by the good sense and sound judgment of the tribunal hearing the application. (paras 30-32)

Quoting this in full in the recent decision in ***Re G (A Child)*** **[2015] EWCA Civ 119**, Macur LJ noted that '[t]his interpretation has been approved without deviation by successive and

different constitutions of the Court of Appeal to date and Re P remains the leading authority on this point' (**para 13**).

15. Recent case law has addressed the impact of change in the child's circumstances alone and (focus on) change in the applicant parent's circumstances alone. In respect of the former, the Court of Appeal in ***Re G (A Child)*** held that that was unlikely to be sufficient. The Court was concerned with a mother's appeal against a decision to refuse her leave to apply to revoke a placement order. Giving the substantive judgment of the court, **Macur LJ** reasoned that the mother's change in circumstances were such as to allow the appeal (**para 22**). In respect of the change in the child's circumstances, **Macur LJ** commented, *obiter*, that

> Depending upon the facts of the case, the child/ren's circumstances may themselves have changed in the interim, not least by reason of the thwarted ambitions on the part of the local authority to place them for adoption in a timely fashion. I would regard it as unlikely for there to be many situations where the change in the child's circumstances alone would be sufficient to open the gateway under section 24(2) and (3) and I do not suggest that there needs to be an in-depth analysis of the child/ren's welfare needs at the first stage, which are more aptly considered at the second , but I cannot see how a court is able to disregard any changes in the child/ren's circumstances, good or bad, if it is charged with evaluating the sufficiency of the nature and degree of the parent's change of circumstances (**para 23**).

This is a timely reminder of the need to keep the distinct the role played by the child's circumstances at stage 1 and stage 2 of the test for leave to apply to revoke a placement order, and also helps explain why there are 'unlikely to be many situations' in which a change in the child's circumstances are sufficient to satisfy the requirement of stage 1.

16. **Macur LJ** also rejected the more general point that

> the nature and degree of the change of circumstances which a parent does successfully establish, is demoted by it being a recent change. This does add gloss to the words of the statute and should be resisted' (**para 21**).

The need to resist any gloss to the statute is a useful point to bear in mind in practice.

17. ***Re T (Application to Revoke Placement Orders: Appeal)*** concerned an appeal from a decision in which the court below had focused exclusively on the change in the father's

circumstances. **Russell J** cited ***Re P (Adoption: Leave Provisions)*** and noted that the approach taken in relation to **s47(7)** applies equally here. **Russell J** reasoned that

> The change has to be *relevant* to the circumstances of the case. Section 24(3) … does not relate the change to the circumstances of the parent or parents and it would be unacceptable on any level to exclude any change in circumstances to the children who are subject of the orders (**para 44**).[12]

The father's appeal was allowed on the basis that the court below had incorrectly focused solely on the father's circumstances and not considered the children's (**para 51**). Care proceedings had been initiated because of the impact on the children of domestic violence between the parents. But the father was now in the process of divorcing the mother and in a new relationship with another woman (**para 25**). The behaviour of the two younger children subject to placement orders had deteriorated and their distress was evident; the distress of the two older children at having contact terminated with the two younger children to facilitate placement with an adoptive family was also clear (**para 26**).

18. ***Stage 2 of the two-stage test*:** In respect of the role for the child's welfare at the second stage, the exercise of discretion whether to grant leave, it is worth briefly revisiting the Court of Appeal's analysis in the leading case of ***M v Warwickshire County Council***. Here, **Wilson LJ** reasoned that

> … on establishment of a change in circumstances, a discretion arises in which the welfare of the child and the prospect of success should both be weighed. My view is that the requisite analysis of the prospect of success will almost always include the requisite analysis of the welfare of the child. For, were there to be a real prospect that an applicant would persuade the court that a child's welfare would best be served by revocation of the placement order, it would surely almost always serve the child's welfare for the applicant to be given leave to seek to do so. Conversely, were there not to be any such real prospect, it is hard to conceive that it would serve the welfare of the child for the application for leave to be granted. (**para 29**)

Appealing a Placement Order

[12] Emphasis in original.

19. Placement orders may also be appealed. One particular issue that repays careful attention post-***Re BS*** is the proportionality of the placement order as a legal permanency option. ***Re S (Care Order: Appeal)*** **[2013] EWCA Civ 1073** was decided shortly before ***Re B*-S**, though serves to highlight the issue well. Care proceedings had been commenced when the child was only one day old. The child's mother had a mild learning disability and her two other children had been taken into care. As the local authority acted so promptly, the threshold test could be satisfied only on the basis of 'likely future harm'. The court below considered the threshold met, and a placement order with a view to adoption had been made. The question was whether the care and placement orders had been 'disproportionate'. The Court of Appeal held that it was. Giving the only substantive judgment, **Black LJ** reasoned that, in the court below

> [There] was not, in my view, sufficient recognition that the orders that the judge was proposing to make were of huge consequence for M and K [the child] and were only to be made as a last resort. (**para 38**)

20. The more recent emphasis on proportionality, and the developing case law in that regard, especially in the adoption context, highlights the current uncertainties surrounding appeal of placement orders. Consider, for example, the clarification of the phrase 'nothing else will do' provided in the adoption orders context in ***Re W (A Child)*** **[2016] EWCA Civ 793**. Giving the lead judgment of the court, McFarlane LJ reasoned that

> Since the phrase "nothing else will do" was first coined in the context of public law orders for the protection of children by the Supreme Court in Re B, judges in both the High Court and Court of Appeal have cautioned professionals and courts to ensure that the phrase is applied so that it is tied to the welfare of the child as described by Baroness Hale in paragraph 215 of her judgment:
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> > "We all agree that an order compulsorily severing the ties between a child and her parents can only be made if "justified by an overriding requirement pertaining to the child's best interests". In other words, the test is one of necessity. Nothing else will do."
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> The phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase "nothing else will do" is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the ECHR and reflected in the need to afford

paramount consideration to the welfare of the child throughout her lifetime (ACA 2002 s 1). The phrase "nothing else will do" is not some sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons (see *Re B-S* [2013] EWCA Civ 1146, *Re R* [2014] EWCA Civ 715 and other cases).

Once the comprehensive, full welfare analysis has been undertaken of the pros and cons it is then, and only then, that the overall proportionality of any plan for adoption falls to be evaluated and the phrase "nothing else will do" can properly be deployed. If the ultimate outcome of the case is to favour placement for adoption or the making of an adoption order it is that outcome that falls to be evaluated against the yardstick of necessity, proportionality and "nothing else will do". (**paras 68-69**)

21. Is the nature of the interaction between the proportionality analysis and 'nothing else will do' shorthand now sufficiently clear that so as not to cause confusion in appeals of placement orders?

22. The Court of Appeal's decision in ***Re Y (Children)*** **[2016] EWCA Civ 1091** suggests ongoing uncertainty, at least in courts of first instance. The case concerned an appeal from care and placement orders made in respect of two children, aged 7 and 4 years. It is worth noting that the father in the case was unrepresented and that, had he been, counsel would have no doubt drawn attention to the local authority's late change of plan for adoption, the stability of the children's current fostering placement, and the fact that the parents had earlier been able to provide good enough care suggestive of the possibility of eventual rehabilitation. Despite sympathy for the court below, the Court of Appeal noted that such proceedings were inquisitorial, hence the onus was on the court to consider these matters in any event. Whilst the parents accepted the inevitability of care orders, the Court allowed the appeal on the basis that the court below had failed to sufficiently consider 'all realistic options for placement prior to concluding that the only option which would meet their welfare needs was the making of a placement order' (**King LJ, para 46**). Long-term foster care was a realistic option:

> Had the judge analysed long term fostering as an option she may well have reached the same conclusion, namely that adoption is in the best interests of the children, however the fact remains that the social work professionals, together with the children's guardian, had concluded that long-term fostering was the order which was

in the best interests of these two children as recently as November 2015 at a time when all involved were fully well-aware that the parents had not seen the children for many months. **(para 47**).

23. Achieving a measure of certainty and consistency in the approach taken to the issues of 'proportionality' and its relationship to the requirement that 'nothing else will do' will be crucial to parsing cases apt for SGOs (and supervision orders) from those most suited to care and placement orders with a view to adoption.

Other Opportunities to Challenge a Placement Order

24. There are, of course, other opportunities to challenge placement orders beyond an application for revocation or the exercise of judicial discretion to revoke upon the decision not to make an adoption order. In particular:

- Appeal of the decision not to revoke the placement order or of the decision to refuse leave to apply to have the placement order revoked;
- Judicial review of the decision not to revoke the placement order or of the decision to refuse leave to apply to have the placement order revoked; and
- Application for a child arrangements order within the terms of **ACA 2002, s29(4)**. Pace **s29(3)**, the court cannot make such an order of its own motion.

25. ***Appeals of Decisions to Refuse Leave to Apply to Revoke Placement Orders*****:** ***Re T (Permission to Apply to Revoke Placement Orders: Appeal)*** **[2014] EWCA Civ 1369** provides a useful illustration of the appeal of the decision to refuse leave to apply to revoke placement orders. As discussed above in relation to 'change of circumstances', the appellant father had his appeal allowed. Given that appeals commonly centre on confusion over aspects of the test equally applicable to challenging placement orders and adoption orders, such as 'change of circumstances', yet the leading authority of ***Re P (Adoption: Leave Provisions)*** remains unchanged, one might wonder what more should be done to clarify the test for the judges who must apply it at first instance.

26. ***Judicial Review*****:** In the leading case of ***Re F (A Child)*** **[2008] EWCA Civ 439**, there is judicial *dicta* suggesting the availability of judicial review in this context. In that case, the

Court of Appeal considered a father's appeal against a decision that a local authority can place a child for adoption whilst the father is in the process of seeking leave to apply to revoke the placement order. A majority of two dismissed his appeal. The majority confirmed the decision of the judge below that the **ACA 2002, s24(5)** embargo on placement applies only when there is an application for revocation of a placement order in progress, and not when there is merely an application for leave to apply (**Wall LJ, para 33**). **Thorpe LJ** dissented on the basis that it was open to the court to draw on the **Human Rights Act 1998, s3** to read into **s24(5)** protection as of the date of the application for leave (**paras 25-28**). Whilst not allowing the appeal, **Wall LJ** reprimanded the local authority and suggested that

> any local authority / adoption agency seeking to repeat this authority's behaviour will almost certainly find itself the subject of an application for judicial review (**para 36**).

In terms of whether placement orders are meeting their aim, the judgment in ***Re F (A Child)*** casts doubt on whether the appropriate balance has been struck between the competing rights and interests of affected parties. Does respect for parties' ECHR rights, including parents' and children's **Art 8 ECHR** rights, require extending the protection of the embargo to the date of the application for leave to apply to revoke a placement order?

27. ***R (On the Application of EL) v Essex County Council*** **[2017] EWHC 1041 (Admin)** provides a notable example of successful judicial review of a placement order. The mother had two children, one of whom, the older child (12 years) remained in foster care. The local authority's decision to place the younger child (aged 6 years) was done in the knowledge that the mother intended to apply for leave to apply to revoke the placement order under **ACA 2002, s24(2)**. **Charles J** reasoned that

> In this case, what the Claimant knew or ought to have known about her rights under s. 24 of the 2002 Act and of the stage reached by the local authority under its adoption plan are relevant to the question whether the decision to place made by the local authority on 4 October 2016 and its implementation was procedurally fair and so lawful.
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> So, issues arise as to whether the Claimant knew or had been provided with sufficient information to enable her to know that:
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> i) the next steps open to her if, as she did, she wanted to oppose the adoption of the child, were (a) to seek leave to make an application to revoke the placement order, (b) to seek an assurance from the local authority that it would not place the child before her application was determined by the court and if

leave was granted before she had made the application to revoke and (c) to seek an injunction if that assurance was not given (see *Re F*),

ii) ii) if she did not get leave to make and make such an application the local authority could place the child for adoption without the leave of the court,

iii) it was likely that her next chance to challenge the adoption of the child would be under s. 47 of the 2002 Act when the application for adoption was made,

iv) the local authority was likely to place the child in the near future, and

v) when the child would be placed. (**paras 28-29**).

Concluding that the local authority had acted unfairly, hence unlawfully, in placing the child for adoption, Charles J quashed the decision to place and granted injunctive relief to the mother to prevent placement before final disposal of the mother's **ACA 2002, s24(2)** application.

28. ***Child Arrangements Orders*:** The **ACA 2002, s29(4)** option for challenge is particularly valuable since it can assist an individual, who is ineligible to apply for revocation of the placement within **ACA 2002, s24(2)(b)** because the child has been placed for adoption at the time they bring proceedings, and ineligible to oppose the adoption within **ACA 2002, s47** because they are not a 'parent' or 'guardian' within the meaning of the statute (defined in **ACA 2002, s52(6)** and **s144** respectively). Whilst **s29(4)(b)** does not represent a direct challenge to the placement order, any child arrangements order made would 'supersed[e] the placement order and dispos[e] of the adoption application'.[13] **McFarlane LJ** in ***Re G (A Child)*** **[2014] EWCA Civ 432** asked

> … is an application for leave to apply for a residence order under s 29(4)(b) an application for leave for "the initiation of proceedings" or not? It is, in my view, not possible in this context to distinguish between an application for leave to apply to revoke a placement order and an application for leave to apply for a residence order in ongoing adoption proceedings. (**para 26**)

In contrast to leave to apply to revoke a placement order, however, the applicant is not separately required to demonstrate a 'change in circumstances' in order to be granted leave to apply under **s29(4) (McFarlane LJ, para 29)**. Yet, 'any change in the underlying circumstances will be of great relevance both when the court assesses the prospects of

[13] *Clarke Hall and Morrison on Children* (n 4) Part 10, Ch 5: [152].

success for the proposed residence application and when considering the welfare of the child' (**McFarlane LJ, para 28**).

Are Placement Orders Fulfilling their Aim? The Relationship with Care Proceedings

29. Why do applications for placement orders routinely get made alongside care orders? Care orders loom large in the pre-requisites for the making of a placement order. More particularly, the court may not make a placement order unless:

- The child is already subject to a care order (**ACA 2002, s21(2)(a)**);
- The court is satisfied that the threshold conditions for making a care order are met (**ACA 2002, s21(2)(b)**);
- The child has no parent or guardian (**ACA 2002, s21(2)(c)**).

That explains the opportunity for making placement orders. The fact the rise in SGOs directly corresponds to the decline in placement orders, as discussed above, suggests that applications for placement orders are made where the local authority has carefully considered available legal permanency options and concluded that adoption, requiring a placement order, is the best option.

30. A placement order application may be made whilst care proceedings are live. Where there are ongoing care proceedings, the court has the power to consolidate care and placement proceedings (**FPR 2010, r.4.1(3)(h)**). There is no statutory guidance on the interplay, and the 29 January 2007 note from the Family Justice Council's Children in Safeguarding Proceedings Committee, updated 7 July 2008, remains the most useful assistance. To which end, I extract the key parts in full:

> **There will be some, perhaps few, cases where, even before the Local Authority commences care proceedings, it has a clear plan for adoption. In these cases it is incumbent on the Local Authority to ensure that a placement order application is issued simultaneously with, or as soon as possible after, the issue of the care proceedings**. We note the decision in C v XYZ County Council 2007 EWCA Civ 1206 which emphasises that care and placement order proceedings are likely to be inappropriate in cases where the only parent with parental responsibility is willing to consent to placement for adoption.

This paper addresses the more usual situation where the Local Authority has issued care proceedings and is likely to present a plan for adoption to the court, but is unable to issue an application for a placement order at the outset. Re P-B (A Child) [2006] EWCA Civ 1016 makes it clear that the Local Authority cannot issue a placement order application without the adoption panel having considered the case and made a recommendation to the agency decision maker. The adoption panel is in turn usually unable to make such a recommendation until all relevant assessments directed by the court during the care case are concluded. The potential for harmful delay is obvious.

We hope that each Local Family Justice Council now has in place interdisciplinary arrangements which promote cooperation on this issue. Care judiciary, Local Authority solicitors, Senior Children's Services Managers, parents' legal advisors, CAFCASS, HMCS, adoption workers and, critically, adoption panel chairs and administrators all have their role to play. Different participants in the process must develop an understanding of the other pieces of the jigsaw and how each of those pieces can be made to fit together.

At each hearing the PLO requires that the court consider "The Timetable for the Child" (Para 3.3). The progress of any linked placement order application, or potential application, involves significant steps in the life of the child and accordingly constitutes an important facet of the timetable for the child which the court should record and take into account.

Essentially, we maintain our clear view that in the overwhelming majority of cases, the court should strive to determine the placement order application at the same hearing as the care case without any undue delay. The advice which follows is designed to achieve that objective. We do recognise that there will still be cases where full investigation and assessment will not take place until after the commencement of proceedings and it is important that the PLO timescale provides an opportunity for such work to be undertaken properly.

In judicial case management terms we respectfully suggest:

- At the latest, at the CMC in the care proceedings, try to anticipate the shape of the case if the Local Authority ultimately decide to issue a placement order application. Timetabling cannot wait until that decision has actually been reached since that is now likely to be at a very late stage in the proceedings.

- Identify and record on the order (Form PLO 3)
  (a) the proposed date of the relevant adoption panel - dependant on local procedures it may be necessary to have confirmation that it has been booked.
  (b) who will be preparing the documentation for panel?
  (c) when will the child have his/her adoption medical?
  (d) what is the last date upon which the date on which the documentation must be submitted to panel?
  (e) What is the latest date upon which any placement order application will be issued, making it clear that the application must be accompanied by a full Statement of facts and Annex B report.

  None of these dates should be permitted to fall outside the [protocol] PLO timetable for the care case without very good reasons. It is not, for example, acceptable for a court to be told that the next panel with an empty slot is "X" if that incorporates unnecessary delay for the child.
- Consider whether it is feasible to give uncontroversial prospective directions in relation to any placement order application when/if it is issued e.g. directing the appointment of the guardian, the filing of a response by the parents and listing for further directions at the IRH
- Fix key stages in the timetabling for the care proceedings so that the panel processes can run alongside. This will inevitably involve some delay in achieving a realistic final hearing but the aim should be to keep that delay to an absolute minimum, certainly within the [protocol] PLO time limits.
  Thus, for example,
  (a) It must be acknowledged that any expert evidence directed in the care case will need to be available for the panel
  (b) Any professionals' meeting will probably need to fall just before the panel date and the filing of Local Authority final statements and care plans immediately thereafter.
  (c) There is little point in requiring the guardian's final report until the Local Authority's position has been fully ratified.
- Try to identify and resolve at the CMC any of the issues which might preclude the adoption panel from reaching a timely decision. Most of this is ordinary

good practice and it is to be hoped that the encouragement given by the PLO to thorough pre-proceedings social work will assist. For example, has a father without parental responsibility been notified of the proceedings; have appropriate directions been given to identify potential family members as carers etc.

- Flexibility will be required. For example if the care case is identified at the first appointment as one which would otherwise require an Early Final Hearing (para 12.4) then the panel process may need to be expedited in order to meet that early hearing date. Where there will be an additional subsequent hearings outside of the PLO framework, for example a fact finding hearing or an application for s38 (6) assessment, it may be sufficient for consideration to be given to any prospective placement order timetable at that hearing rather than the CMC.
- In Re PB above, the application was issued on the 3rd day of the hearing of the care proceedings and the Court of Appeal held that there may be no unfairness to a parent in the late service of a placement order application, provided it has been made plain to them at a much earlier stage that such was the Local Authority's clear plan. However, it is to be hoped that the IRH will be fixed so that any application can be issued at least 7 days earlier so that all parties have a proper opportunity of considering their position prior to the advocates meeting and hearing. This will enable the court to treat the IRH as the first direction hearing under Rule 25 FP (A) Rules 2005 as well as considering the issues directly relevant to the hearing of the care case.

All of these steps will have to be approached with some sensitivity because it must be clear to the parents that these are preliminary steps which do not mean that the court has reached any final decision. Some thought should be given to communication with members of the extended family, whether they are parties to the proceedings or not.[14]

31. The Court of Appeal's decision in ***Surrey County Council v S*** **[2014] EWCA Civ 601** neatly reinforces the note's comment about 'striv[ing] to determine the placement order

[14] Children in Safeguarding Proceedings Committee, Family Justice Council, *Linked Care and Placement Order Applications: Updated Guidance* (29 January 2007, updated 7 July 2008), online: <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/FJC/Publications/Linked_care_and_Placement_orders_updated_2008.pdf>. Emphasis added.

application at the same hearing as the care case without any undue delay'. Giving the lead judgment of the court, **Ryder LJ** reasoned that

> Local authorities should be astute to timetable the decision of the agency decision maker so that all matters can be put before the court together without delay. There is no reason why concurrent applications would have caused delay and indeed they must not. It would be wrong to delay a necessary decision about a child's future. (**para 30**)

32. Whilst the Family Justice Council's note is helpful to practitioners, the failure to give statutory force or judicial authority to the requisite interplay between care proceedings and placement orders may be thought to undermine the ability of placement orders to fulfil their aim.

Conclusion: Looking Forward

33. Commenting on the decision in ***Re B-S***, Mason criticised the role for 'guidance judgments', whose content are aimed more at practitioners than the parties:

> The Family Justice Review (2011a, para. 44) recognised that improving practice required "Everyone in the system, including the judiciary, should share lessons". Guidance judgments are not a suitable way of doing this. Developing practice standards should be a matter for discussion from those within the relevant professions, not diktat from judges, and be based on a review of all the issues and their implications for all concerned, not developed through an adversarial analysis, focusing on one case (or even a handful). Practice standards are not independent of resources but constrained by what can be afforded.[15]

In relation to the interplay between placement orders and care proceedings, however, one might wonder if there might not be a role for a 'guidance judgment', or a PLO Practice Direction, to assist in clarifying the relationship between care and placement proceedings.

34. In respect of the revocation and appeal of placement orders, the above discussion highlights the need for greater clarity on the suitability of cases for SGOs (and supervision orders) rather than care and placement orders with a view to adoption. This has only been

[15] Judith Masson, 'The quality of care proceedings reform' (2014) 36(1) *Journal of Social Welfare and Family Law* 82-84, 84.

heightened by uncertainty over what it means to say that ‘nothing else will do’ than adoption. Whilst these matters remain unsettled, it is not clear that the aims of stability for children and prospective adopters are being realised as often as they should be, though greater respect seems to be being paid to birth family’s rights than previously.

Anthony Kirk, QC
1 King’s Bench Walk
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