Children and Families Act 2014
The Changes to Adoption

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4pb Four Paper Buildings

The Court Timetable

- Period within which application for order under must be disposed of is 26 weeks – s. 32 Children Act 1989

  This deadline can be met, it must be met, it will be met. And remember 26 weeks is a maximum, not an average or a mean. So many cases will need to be finished in less than 26 weeks

  Re S (A child) [2014] EWCC B44 (Fam)

- An interim order shall have effect for such period as may be specified – s. 38 Children Act 1989

Extensions to the timetable: statutory guidance

- The timetable can be extended by increments of 8 weeks only if necessary to resolve the proceedings justly – s 32(7) Children Act 1989
- Court to have regard to:
  - The impact on the welfare of the child
  - The impact on the duration and conduct of the proceedings
- 4 examples of cases where may be necessary:
  - Complex fact finding hearings
  - Unexpected changes in proceedings – allegations of sexual abuse emerge
  - Litigation failure
  - Re B-S circumstances where the court does not have the evidence

Extensions to the timetable: judicial guidance

- In *Re S (A Child) [2014] EWCC B44* Sir James Munby P provided guidance about extensions beyond the 26-week timetable. He reiterated that the deadline can and must be met but ratified Pauffley J's judgment in *Re NL (Interim Care Order: Facts and Reasons)* [2014] EWHC 270 (Fam) that 'justice must never be sacrificed upon the altar of speed'.
- Any extension to the timetable should be determined on a case by case basis, typically addressing three questions as set out at para [38] of the President's judgment.
  1) Whether there is some solid reason based on evidence to believe the parent is committed to making the necessary changes.
  2) Whether there is some solid reason based on evidence to believe that the parent will be able to maintain that commitment.
  3) Whether there is some solid reason based on evidence to believe the parent will be able to make such changes within the child's timescale.

Placement of children with prospective adopters

- Section 2 Children and Families Act 2014 introduces new provision at sections 9 and 22 of the Children Act 1989.
- Where a LA is considering adoption (but does not yet have a placement order or parental consent) the LA must consider placing the child with a relative, friend or other person connected with the child. If the LA decides that is not the most appropriate placement for the child the LA must consider placing the child with a LA foster parent who has been approved as a prospective adopter.
- Focus is achieving stability at an early stage. Lisa Nancy MP in committee stage of Bill in HC: *"Stability should be seen in its own right as a safeguarding factor for children in the care system".*
- This new duty trumps other considerations that would otherwise apply in subsections (7)–(9) of s 22C, such as proximity to the child's home, disruption of the child's education or training, placement with siblings, disability needs (if any).
- It is of course ultimately for the court to decide whether adoption is in the child's best interests. Any stability achieved through such a placement during the course of proceedings can therefore only be viewed as provisional. IN FORCE FROM 25 JULY 2014

Repeal of ethnicity requirement

- The requirement to give consideration to a child's religious persuasion, racial origin and cultural and linguistic background now only applies to adoption agencies in Wales and **not** England.
- This is set out in section 3 of the new Act and amends section 1(5) of the Adoption and Children Act 2002 accordingly.
- IN FORCE FROM 25 JULY 2014

Post Adoption Contact – s. 51A Adoption and Children Act 2002

- The court can no longer make a s. 8 contact order with an adopted child
- Applicant must apply under s.51A Adoption and Children Act 2002 or s. 51B to prohibit contact
- The child, LA or adoptive family may apply for the child to visit or stay with:
  - Any person who would be related to the child by blood, marriage or civil partnership
  - Any former Guardian
  - Any person who had PR immediately before the making of the adoption order
  - Any person entitled to make an application for an order under s. 26
  - Any person with whom the child has lived with for a period of at least one year – need not be continuous and must not have begun more than five years before the adoption order

- Birth family members can apply to visit or stay but need leave.
- Court must consider
  - Any risk there might be of the proposed applicant disrupting the child's life to such an extent he or she would be harmed by it;
  - The applicant's connection with the child;
  - Any representation made to the court by the child; or
  - A person who has applied for the adoption order or in whose favour the adoption order is or has been made.

Step-Parent Adoption – Re P [2014] EWCA Civ 1174

- Children aged 14 & 12
- No contact with their fathers who lived in Poland
- One father held PR the other did not
- Mother's new partner applied to adopt the children
- Application dismissed – the court finding that the child's welfare did not require the parent's consent to be dispensed with nor would the child's welfare be prejudiced significantly if an adoption were not made
- Court of Appeal made adoption orders
- Same statutory provision applies to care proceedings adoptions and step parent adoptions but they are to be applied differently
  - Step parent adoptions the level of interference with parental rights is lower and more justified
  - The question in dispensing with parental consent is one of proportionality
- There is no need to find that the child's welfare would be prejudiced if the order were not made.

Permission Applications under the ACA 2002

1. Permission to oppose the adoption order.

47 Conditions for making adoption orders

(1) An adoption order may not be made if the child has a parent or guardian unless one of the following three conditions is met; but this section is subject to section 52 (parental etc. consent).

(2) The first condition is that, in the case of each parent or guardian of the child, the court is satisfied–

(a) that the parent or guardian consents to the making of the adoption order,

(b) that the parent or guardian has consented under section 20 (and has not withdrawn the consent) and does not oppose the making of the adoption order, or

(c)that the parent's or guardian's consent should be dispensed with.

(3) A parent or guardian may not oppose the making of an adoption order under subsection (2)(b) without the court's leave.

(4) The second condition is that–

(a) the child has been placed for adoption by an adoption agency with the prospective adopters in whose favour the order is proposed to be made,

(b) either–

(i) the child was placed for adoption with the consent of each parent or guardian and the consent of the mother was given when the child was at least six weeks old, or

(ii) the child was placed for adoption under a placement order, and

(c) no parent or guardian opposes the making of the adoption order.

(5) A parent or guardian may not oppose the making of an adoption order under the second condition without the court's leave.

(6) .....

(7) The court cannot give leave under subsection (3) or (5) unless satisfied that there has been a change in circumstances since the consent of the parent or guardian was given or, as the case may be, the placement order was made....

2 Permission to revoke the placement order

24 Revoking placement orders

(1) The court may revoke a placement order on the application of any person.

(2) But an application may not be made by a person other than the child or the local authority authorised by the order to place the child for adoption unless

(a) the court has given leave to apply, and

(b) the child is not placed for adoption by the authority.

(3) The court cannot give leave under subsection (2)(a) unless satisfied that there has been a change in circumstances since the order was made.

(4) If the court determines, on an application for an adoption order, not to make the order, it may revoke any placement order in respect of the child.

(5) Where –

(a) an application for the revocation of a placement order has been made and has not been disposed of, and

(b) the child is not placed for adoption by the authority,
the child may not without the court's leave be placed for adoption under the order.

3 When determining whether or not to grant leave to oppose an adoption order the Court should apply a two stage test:

(1) has there been a sufficient change of circumstances, and

(2) in the exercise of the Court's discretion should leave be granted.

Change of circumstances

4 The use of the "change of circumstances" test is throughout the 2002 Act and appears in both the provisions relating to applications for leave to apply to revoke a placement order as well as applications for permission to oppose an adoption order. **Re P (Adoption: Leave Provisions)** [2007] 2 FLR 1069 sets out the test to be applied in applications for permission to oppose an adoption order and is described as follows (from the Judgment of Wall LJ):

> **[55]** In summary, therefore, judges hearing applications by parents for leave to defend adoption proceedings after a placement order has been made need to undertake a two stage process. First, they need to be satisfied on the facts of the case that there has been a change in circumstances since the order was made which is material, and of a nature and degree which is sufficient to open the door to a consideration by the court of the exercise of its discretion to give the parents leave to defend.

5 The production of fresh evidence is not capable of amounting to a "change of circumstances" in the absence of an appeal (or re-opening) of the earlier order, **Re M (Adoption: Leave to Oppose)** [2010] 1 FLR 238. In that case the fresh evidence related to the presence of a metabolic bone disorder which, the new expert said, went to the findings of fact originally made. That fresh evidence was not a "change of circumstances"

> "To permit belatedly obtained fresh evidence, which went to the findings in the original proceedings in order to found an application for leave to oppose adoption proceedings would undermine the purpose of this part of the statute: that purpose was to resolve issues around parental consent at an early stage, before a placement order was made, thereby avoiding delay and protecting the child's welfare. Logically, even if the adoption court were completely convinced by evidence challenging the original findings, there would still be no change of circumstances, and the new evidence would remain a matter for the Court of Appeal, not the adoption court."

6. In *Re B-S (Children)* the Court of Appeal considered the approach set out in *Re W (Adoption Order: Set Aside and Leave to Oppose)* in the light of the subsequent decision of the Supreme Court in *Re B*. The court held that the guidance in *Re W*, to the effect that courts should adopt a 'stringent approach' to applications for leave to oppose the making of an adoption order, and that it would only be in 'exceptionally rare circumstances' that these applications would be granted, was no longer to be followed. If s 47(5) was to provide a real remedy, rather than a merely illusory one, the fact that the child was already placed with prospective adopters, or that much time had elapsed since placement, could not of themselves act as a bar to an application for leave to oppose the adoption order: these factors would be present in the majority of applications

Exercise of discretion

7. In the exercise of discretion on the issue of whether to grant leave to apply for the revocation of a placement order the child's welfare is a relevant but not the paramount consideration, M v Warwickshire.

8. In this regard, such an application is materially different from the discretionary stage of an application for leave to oppose an adoption. The authority for that difference in discretion is **M v Warwickshire County Council** [2007] EWCA Civ 1084, [2008] 1 FLR 1093. **Wilson LJ said this:**

> **[22]** It is as clear that s 1 of the 2002 Act *does not apply* to an application for leave to apply to revoke a placement order under s 24(2) as it is that it *does apply* to an application for leave to oppose the making of an adoption order under s 47(5). In the end such was agreed between both sides before the judge in the

present case; and he accepted it. The reason lies, of course, in the wording of s 1(7). To determine an application for leave to apply under s 24(2) is to come to a decision about granting leave for the 'initiation' of proceedings by an individual under the Act; and so it does not fall within s 1(7)(b). Nor does it fall within s 1(7)(a) because, as was also held in *Re P*, at para [22], the determination of an application for leave is not a decision whether to make the substantive order which the applicant aspires ultimately to secure or to prevent. So the determination of an application for leave under s 24(2) is not 'included' in either limb of s 1(7). But the matter is put beyond doubt by the final 15 words of s 1(7) which, importantly, are not part of the second limb, at (b), but qualify the whole subsection. Their effect is not only that the determination of an application under s 24(3) for leave to initiate revocation proceedings is not specifically included under s 1(7)(a) or (b) in the phrase 'coming to a decision relating to the adoption of a child' but also that it is positively excluded from it. In *Re P*, at para [23], this court suggested that the final words of s 1(7) might refer to applications for leave under different statutes, such as an application for leave to apply for a special guardianship order under s 14A(3)(b) of the 1989 Act. To the charge that such may be far-fetched, the court's response might be that, had the requirement for leave to apply for revocation under s 24(2)(a) been brought to its attention, it might have identified that more obvious example of a situation to which the words apply.

9 In **Re B-S (Children)** [2013] EWCA Civ 1146, was an application relating to the issue of leave to oppose an adoption and did not involve an application for leave to apply to revoke a placement order. However, because of the overlap of statutory language the Judgments in the Court of Appeal did touch upon both applications. The President said this:

> 7. A parent who seeks the revocation of a placement order must first be given leave to apply: section 24(2)(a). The court "cannot" give leave "unless satisfied that there has been a change in circumstances since the order was made": section 24(3). There is therefore a two-stage process: Has there been a change in circumstances? If so, should leave to apply be given?
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> 8. 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.

10 The Court of Appeal in Re B-S were troubled by the dicta of Thorpe LJ in Re Re W (Adoption Order: Set Aside and Leave to oppose) [2011] 1 FLR 2153 when that Judge said

> "However, it cannot be too strongly emphasised that that is an absolute last ditch opportunity and it will only be in exceptionally rare circumstances that permission will

be granted after the making of the care order, the making of the placement order, the placement of the child, and the issue of the adoption order application."

The President (in Re B-S) said:

> **Section 47(5) of the 2002 Act – fundamentals**
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> 68. We share McFarlane LJ's misgivings about Thorpe LJ's use of the phrase "exceptionally rare circumstances", as also about his use, followed by the President in *Re C*, of the word "stringent" to define or describe the test to be applied on an application under section 47(5). Both phrases are apt to mislead, with potentially serious adverse consequences. In the light of *Re B* they convey quite the wrong message. Neither, in our judgment, any longer has any place in this context. Their use in relation to section 47(5) should cease.
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> 69. Moreover, we suggest that too much must not be read into the use by McFarlane J in *X and Y v A Local Authority (Adoption: Procedure)* [2009] EWHC 47 (Fam), [2009] 2 FLR 984, para 15, of the phrase "entirely improbable." We read that as being merely his assessment of the applicant's prospects of success in that particular case. It was not intended as a test and should not be treated as such.
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> 70. Section 47(5) is intended to afford a parent in an appropriate case a meaningful remedy – and a remedy, we stress, that may endure for the benefit not merely of the parent but also of the child. Whilst we can understand what lay behind what Thorpe LJ said, we think that his use of the phrase "exceptionally rare circumstances" carries with it far too great a potential for misunderstanding, misapplication and indeed injustice for safety. The same, if in lesser measure, applies also to the word "stringent". Stringent, as we have said, is a word that appropriately describes the test that has to be surmounted before a non-consensual adoption can be sanctioned. It is not a word that comfortably describes the test that a parent has to meet in seeking to resist such an adoption.
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> 71. Parliament intended section 47(5) to provide a real remedy. Unthinking reliance upon the concept of the "exceptionally rare" runs the risk – a very real and wholly unacceptable risk – of rendering section 47(5) nugatory and its protections illusory. Except in the fairly unusual case where section 47(4)(b)(i) applies, a parent applying under section 47(5) will always, by definition, be faced with the twin realities that the court has made both a care order and a placement order and that the child is now living with the prospective adopter. But, unless section 47(5) is to be robbed of all practical efficacy, none of those facts, even in combination, can of themselves justify the refusal of leave.

11 The President described the proper approach to the second stage of the test on the issue of permission to oppose an adoption order in this way:

> 74. In relation to the second question – If there has been a change in circumstances, should leave to oppose be given? – the court will, of course, need to consider all the circumstances. The court will in particular have to consider two inter-related questions: one, the parent's ultimate prospect of success if given leave to oppose; the other, the impact on the child if the parent is, or is not, given leave to

oppose, always remembering, of course, that at this stage the child's welfare is paramount. In relation to the evaluation, the weighing and balancing, of these factors we make the following points:

i) Prospect of success here relates to the prospect of resisting the making of an adoption order, *not*, we emphasise, the prospect of ultimately having the child restored to the parent's care.

ii) For purposes of exposition and analysis we treat as two separate issues the questions of whether there has been a change in circumstances and whether the parent has solid grounds for seeking leave. Almost invariably, however, they will be intertwined; in many cases the one may very well follow from the other.

iii) Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave. The judge must keep at the forefront of his mind the teaching of *Re B,* in particular that adoption is the "last resort" and only permissible if "nothing else will do" and that, as Lord Neuberger emphasised, the child's interests include being brought up by the parents or wider family unless the overriding requirements of the child's welfare make that not possible. That said, the child's welfare is paramount.

iv) At this, as at all other stages in the adoption process, the judicial evaluation of the child's welfare must take into account *all* the negatives and the positives, *all* the pros and cons, of *each* of the two options, that is, either giving or refusing the parent leave to oppose. Here again, as elsewhere, the use of Thorpe LJ's 'balance sheet' is to be encouraged.

v) This close focus on the circumstances requires that the court has proper evidence. But this does not mean that judges will always need to hear oral evidence and cross-examination before coming to a conclusion. Sometimes, though we suspect not very often, the judge will be assisted by oral evidence. Typically, however, an application for leave under section 47(5) can fairly and should appropriately be dealt with on the basis of written evidence and submissions: see *Re P* paras 53-54.

vi) As a general proposition, the greater the change in circumstances (assuming, of course, that the change is positive) and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments based on the child's welfare must be if leave to oppose is to be refused.

vii) The mere fact that the child has been placed with prospective adopters cannot be determinative, nor can the mere passage of time. On the other hand, the older the child and the longer the child has been placed the greater the adverse impacts of disturbing the arrangements are likely to be.

viii) The judge must always bear in mind that what is paramount in every adoption case is the welfare of the child "throughout his life". Given modern expectation of life, this means that, with a young child, one is looking far ahead into a very distant

future – upwards of eighty or even ninety years. Against this perspective, judges must be careful not to attach undue weight to the short term consequences for the child if leave to oppose is given. In this as in other contexts, judges should be guided by what Sir Thomas Bingham MR said in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 129, that "the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems." That was said in the context of contact but it has a much wider resonance: *Re G (Education: Religious Upbringing)* **[2012] EWCA Civ 1233**, [2013] 1 FLR 677, para 26.

ix) Almost invariably the judge will be pressed with the argument that leave to oppose should be refused, amongst other reasons, because of the adverse impact on the prospective adopters, and thus on the child, of their having to pursue a contested adoption application. We do not seek to trivialise an argument which may in some cases have considerable force, particularly perhaps in a case where the child is old enough to have some awareness of what is going on. But judges must be careful not to attach undue weight to the argument. After all, what from the perspective of the proposed adopters was the smoothness of the process which they no doubt anticipated when issuing their application with the assurance of a placement order, will already have been disturbed by the unwelcome making of the application for leave to oppose. And the disruptive effects of an order giving a parent leave to oppose can be minimised by firm judicial case management *before* the hearing of the application for leave. If appropriate directions are given, in particular in relation to the expert and other evidence to be adduced on behalf of the parent, *as soon as* the application for leave is issued and *before* the question of leave has been determined, it ought to be possible to direct either that the application for leave is to be listed with the substantive adoption application to follow immediately, whether or not leave is given, or, if that is not feasible, to direct that the substantive application is to be listed, whether or not leave has been given, very shortly after the leave hearing.

x) We urge judges always to bear in mind the wise and humane words of Wall LJ in *Re P*, para 32. We have already quoted them but they bear repetition: "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."

4 Paper Buildings
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16th September 2014

Re B-S: case law before and after

Re B (Care Proceedings: Appeal) [2013] UKSC 33; [2013] 2 FLR 1075 (12 June 2013)

The main focus of the Supreme Court's decision was on the meaning of 'significant harm' in the context of the Section 31 threshold criteria and, in particular, whether a risk of future emotional harm was sufficient to cross the threshold, and the principles to be applied to appeals. The background facts are similar to those in numerous standard care proceedings (harm to a previous child; no actual harm to the subject child; a positive relationship between the child and her parents during contact; questions as to the parents' ability to work honestly with professionals and therefore the management of risk; negative assessments due to the parents' underlying psychological profiles resulting from negative life experiences; likelihood of change through therapeutic involvement being outside a child's timescales). The plan for the child, as approved at first instance, as well as by the Court of Appeal (with misgivings) and, ultimately by the Supreme Court (Baroness Hale dissenting), was adoption. The case therefore constituted an important exploration by the Supreme Court of many of the issues faced on a daily basis by practitioners at every level of the family justice system, and the importance of the Judgment cannot be over-stated.

In the context of adoption, the passages of most long lasting significance were –

Lord Wilson at [34] "... [European Convention jurisprudence] demonstrates the high degree of justification which Art 8 demands of a determination that a child should be adopted or placed in care with a view to adoption... Domestic law makes clear that:

(a) It is not enough that it would be *better* for the child to be adopted than to live with his natural family ...; and

(b) A parent's consent to the making of an adoption order can be dispensed with only if the child's welfare so *requires* (s52(1)(b) of the Adoption and Children Act 2002) ...

The same thread, therefore, runs through both domestic and European Convention law, namely that the interests of the child must render it *necessary* to make an adoption order..."

Lord Neuberger at [74] "A care order in a case such as this is a very extreme thing, a last resort, as it would be very likely to result in [the child] being adopted against the wishes of both of her parents."

[76] "It appears to me that, given that the judge concluded that the s31(2) threshold was crossed, he should only have made a care order if he had been satisfied that it was necessary to do so in order to protect the interests of the child. By 'necessary', I mean, to use Baroness Hale of Richmond's phrase 'where nothing else will do'."

[77] "It seems to me to be inherent in s1(1) that a care order should be a last resort, because the interests of a child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests. That is reinforced by the requirement in s1(3)(g) that the court must consider all options, which carries with it the clear implication that the most extreme option should only be adopted if others would not be in her interests. As to Art 8, the Strasbourg court decisions cited by Baroness Hale of Richmond make clear that such an order can only be made in 'exceptional circumstances'..."

[104] "... they all added weight to the importance of emphasising the principle that adoption of a child against her parents' wishes should only be contemplated as a last resort – when all else fails. Although the child's interests in an adoption are 'paramount' ...a court must never lose sight of the fact that those interests include being brought up by her natural family, ideally by her natural parents, or at least one of them."

[105] "... Before making an adoption order in such a case, the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support."

Baroness Hale's Judgment, whilst constituting a lone and dissenting voice in the application to this particular case of the principles agreed between the entire tribunal, includes passages that have influenced much judicial and professional thinking.

[145] "We all agree that a court can only separate a child from her parents if satisfied that it is necessary to do so, that 'nothing else will do'."

Re G (Care Proceedings: Welfare Evaluation) [2013] EWCA Civ 965; [2014] 1 FLR 670 (30 July 2013)

Not an 'adoption' case as such but involving principles that apply to all care cases, including those where the plan is adoption. The decision in *Re G* was delayed until the

Supreme Court released its decision in *Re B*. The case involved an 8 year old child (diagnosed as being in the 'severe' range of childhood autism and with a moderate learning disability) whose Mother had effectively abandoned him to the care of public authorities on two occasions during his childhood. Nevertheless, McFarlane LJ allowed an appeal, setting aside the care order with the plan for the child to remain in long term foster care, and remitting the case for a re-hearing before a fresh tribunal. McFarlane LJ concluded that the District Judge had failed to undertake a 'holistic' proportionate evaluation of the child's welfare options which involved a balancing exercise in which each of the options' positives and negatives were compared side by side.

[49] "In most childcare cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most Draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most Draconian and that is, therefore, chosen without any particular consideration of whether there are internal deficits within that option.

[50] The linear approach, in my view, is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare.

[51] One only has to take an extreme example of the effect of linear consideration to see the potential danger for this approach. The linear model proceeds by evaluating and then eliminating each individual option in turn before selecting the option at the end of the line, without evaluation of its own internal merits or demerits, simply on the basis that it is the only remaining outcome. Much, therefore, depends on which end of the line the selector starts the process. Conventionally those judges who deploy a linear approach start, for understandable reasons, with the option of rehabilitation to a parent and end with the option of a care or adoption order. If, however, for the purposes of observing the dangers in the process, one were to start at the other end of the line and look at long-term foster care or adoption first, and were then to rule that out on the basis that there are risks and negatives attaching to it, the linear approach would soon arrive at 'rehabilitation to a parent' as the only remaining option and select that without any consideration of whether that is in fact the best outcome for the child. All would agree that such an approach would be untenable. I hope, however,

that this example demonstrates how inappropriate the linear model is for a judge who is tasked with undertaking a multi-faceted evaluation of a child's welfare at the end of which one of a range of options has to be chosen."

[53] "A further concern about the linear model is that a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most Draconian option', yet does not engage with the very detail of that option which renders it 'Draconian' cannot be a full or effective process of evaluation. Since the phrase was first coined some years ago, judges now routinely make reference to the 'Draconian' nature of permanent separation of parent and child and they frequently do so in the context of reference to 'proportionality'. Such descriptions are, of course, appropriate and correct, but there is a danger that these phrases may inadvertently become little more than formulaic judicial window-dressing if they are not backed up with a substantive consideration of what lies behind them and the impact of that on the individual child's welfare in the particular case before the court. If there was any doubt about the importance of avoiding that danger, such doubt has been firmly swept away by the very clear emphasis in *Re B* on the duty of the court actively to evaluate proportionality in every case."

Re B-S (Adoption: Application of s47(5)) [2013] EWCA Civ 1146; [2014] 1 FLR 1035 (17 September 2013)

The case involved a rather hopeless appeal against a decision to refuse the Mother permission to oppose an adoption order pursuant to s47(5) of the Adoption and Children Act 2002 (which the Court of Appeal had no difficulty in ultimately dismissing). The case was, however, used by the President to set down guidelines relevant not only to this application but to the conduct of care cases generally by both practitioners and the judiciary (due to "concerns and misgivings about how courts are approaching cases of what for convenience we call 'non-consensual ... adoption'", noting that four cases had come before the Court of Appeal at the end of July 2013 which had raised similar concerns) and to emphasise the principles voiced by the Supreme Court in *Re B*.

[18] Sir James Munby P set the context by quoting from the Strasbourg case of *YC v United Kingdom*: "family ties may only be severed in very exceptional circumstances and ... everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more

beneficial environment for his upbringing." He added "This is a stringent and demanding test." (before quoting extensively from *Re B* – see above).

[29] "It is the obligation of the local authority to make the order which the court has determined is proportionate work. The local authority cannot press for a more drastic form of order, least of all press for adoption, because it is unable or unwilling to support a less interventionist form of order. Judges must be alert to the point and must be rigorous in exploring and probing local authority thinking in cases where there is any reason to suspect that resource issues may be affecting the local authority's thinking."

[30] "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, both in the materials put before the court by local authorities and guardians and also in too many judgments. This is nothing new. But it is time to call a halt."

[34] Essential when the court is being asked to approve a care plan for adoption "... 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."

[36] having referred to Black LJ's Judgment in *Plymouth CC v G*, he continued "We draw particular attention to the need for 'analysis of the pros and cons' and a 'fully reasoned recommendation'. These are essential if the exacting test set out in *Re B (A Child)* and the requirements of Arts 6 and 8 of the European Convention are to be met. We suggest that such an analysis is likely to be facilitated by the use – which we encourage – of the kind of 'balance sheet' first recommended by Thorpe LJ in *Re A*."

[39] Having quoted from *Re S* in which Ryder LJ had criticised the quality of analysis from a social worker: "Most experienced family judges will unhappily have had too much exposure to material as anodyne and inadequate as that described here by Ryder LJ.

[40] This sloppy practice must stop. It is simply unacceptable in a forensic context where the issues are so grave and the stakes, for both parent and child, so high."

[44] From McFarlane LJ's Judgment in *Re G*: "We emphasise the words 'global, holistic evaluation'. This point is crucial. 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 pros and cons, of *each* option. ...

[46] We make no apologies for having canvassed these matters in such detail and at such length. They are of crucial importance in what are amongst the most significant and difficult cases that family judges ever have to decide. Too often they are given scant attention or afforded little more than lip service."

[48] In the context of the revised PLO: "Our emphasis on the need for proper analysis, argument, assessment and reasoning accords entirely with a central part of the reforms ... The President has repeatedly stressed the need for local authority evidence to be more focused than hitherto on assessment and analysis rather than on history and narrative, and likewise for expert reports to be more focused on analysis and opinion ... What the court needs is expert opinion, whether from the social worker or the guardian, which is evidence-based and focused on the factors in play in the particular case, which analyses *all* the possible options, and which provides clear conclusions and recommendations adequately reasoned through and based on the evidence.

[49] We do not envisage that proper compliance with what we are demanding, which may well impose a more onerous burden on practitioners and judges, will conflict with the requirement, soon to be imposed by statute, that care cases are to be concluded within a maximum of 26 weeks. Critical to the success of the reforms is robust judicial management from the outset of every care case. Case management judges must be astute to ensure that the directions they give are apt to the task and also to ensure that their directions are complied with. Never is this more important than in cases where the local authority's plan envisages adoption. If, despite all, the court does not have the kind of evidence we have identified, and is therefore not properly equipped to decide these issues, then an adjournment must be directed, even if this takes the case over 26 weeks. Where the proposal before the court is for non-consensual adoption, the issues are too grave, the stakes for all are too high, for the outcome to be determined by rigorous adherence to an inflexible timetable and justice thereby potentially denied."

Re W (A Child); Re H (Children) [2013] EWCA Civ 1177 (18 October 2013)

Munby P: application of *Re B-S* principles to s47(5) application.

Re C (A Child) [2013] EWCA Civ 1257 (24 October 2013)

McFarlane LJ: example of criticism of a judgment conducted on a 'linear' basis thereby failing to undertake a proper balancing exercise

Re LRP (Care Proceedings: Placement Order) [2013] EWCA 3974; [2014] 2 FLR 399 (12 December 2013)

Pauffley J upheld care and placement orders following an exploration of all the other possible 'realistic' options, including long term foster care (described as an "extraordinarily precarious legal framework for any child"), for a very young child

Prospective Adopters v IA & Others [2014] EWCA 331 (19 February 2014)

Moor J applying *Re B* and *Re B-S* principles

Re S (A Child) [2014] EWCA 135 (5 March 2014)

Court of Appeal found a lack of judicial reasoning in judgment, contravening *Re B-S* guidance. LA ordered to pay Appellant's costs (permission to appeal granted by Supreme Court on costs issue – decision awaited).

LUCY CHEETHAM
4 Paper Buildings
14 September 2014