

# Re B-S (Children) (2013)

**[2013] EWCA Civ 1146**

17/09/2013

## **Barristers**

Alex Verdan KC

## **Court**

Court of Appeal (Civil Division)

## **Practice Areas**

Public Children Law

## **Summary**

The Court of Appeal gave guidance on the correct approach to be followed by local authorities and guardians when applying for an adoption order, and on the correct application of the test under the Adoption and Children Act 2002 s.47(5) for determining whether a parent should be granted leave to oppose adoption.

## **Facts**

The appellant mother (M) appealed against a refusal of her application under the Adoption and Children Act 2002 s.47(5) for leave to oppose the making of adoption orders in relation to her two children (X).

X had been made the subject of care and placement proceedings. They were placed with prospective adopters and an application for adoption followed. M applied under s.47(5) for leave to oppose the adoption on the basis that there had been a change in circumstances since the care and placement orders were made. The judge said that she was satisfied that there had been a change of circumstances. However, she referred to the welfare checklist, noting that X were in particular need of stability and care, and concluded that it was entirely improbable that M would succeed in opposing adoption if granted leave. The issues were (i) the appropriate approach to be followed by an applicant for an adoption order; (ii) the correct analysis of the test under s.47(5); (iii) whether the judge erred in refusing M's application.

## **Held**

(1) There were real concerns about the recurrent inadequacy of the analysis and reasoning advanced in support of adoption, both in the materials advanced by local authorities and guardians and in too many judgments. Two things were essential when the court was being asked to approve a care plan for adoption or to make a non-consensual placement or adoption order. First, there had to be proper evidence from the local authority and the guardian which addressed all the realistically possible options and contained an analysis of the arguments for and against each option, R (Children), Re [2013] EWCA Civ 1018, S (A Child), Re [2013] EWCA Civ 926 and G (A Child), Re [2013] EWCA Civ 965, (2013) 157(31) S.J.L.B. 31 followed. An analysis of the positives and negatives and a fully reasoned recommendation

were necessary if the exacting test set out in *B (A Child) (Care Proceedings: Appeal)*, Re [2013] UKSC 33, [2013] 1 W.L.R. 1911 and the requirements of the European Convention on Human Rights 1950 art.6 and art.8 were to be met, *B (A Child)* followed. Second, an adequately reasoned judgment was essential. The judge had to grapple with the factors at play in the particular case and give proper focussed attention to the specifics, *P (A Child)*, Re [2013] EWCA Civ 963 followed. The judicial task was to evaluate all the options, undertaking a global, holistic and multi-faceted evaluation of the child's welfare which considered all the negatives and positives of each option, *G (A Child)* followed (see paras 30, 33-34, 41-42, 44 of judgment). (2) Nothing said in *W (A Child) (Adoption Order: Set Aside and Leave to Oppose)*, Re [2010] EWCA Civ 1535, [2011] 1 F.L.R. 2153 about the approach under s.47(5) was inconsistent with the analysis in *P (A Child) (Adoption Order: Leave to Oppose Making of Adoption Order)*, Re [2007] EWCA Civ 616, [2007] 1 W.L.R. 2556. There was a two-stage process under s.47(5). In deciding how discretion was to be exercised at the second stage, the court had to consider the parent's ultimate prospects of success if leave was given, and the child's welfare was paramount. However, the instant court had misgivings about the fact that the court in *W (A Child)* had said that permission to oppose would only be granted in "exceptionally rare circumstances", and with the fact that the court in *C (A Child) (Adoption Proceedings: Change of Circumstances)*, Re [2013] EWCA Civ 431, [2013] Fam. Law 785 had used the word "stringent" to describe the test to be applied on a s.47(5) application. Both phrases were apt to mislead with potentially serious adverse consequences. In light of the recent Supreme Court decision in *B (A Child)*, they conveyed the wrong message and their use in relation to s.47(5) had to cease, *B (A Child)* followed, *W (A Child)* and *C (A Child)* not followed. The court had to ask itself two questions: whether there been a change in circumstances, and if so whether leave to oppose should be given, *P (A Child)* followed. If there had been a change, the court had to consider all the circumstances, and in particular the parent's ultimate prospect of success if given leave to oppose and the impact on the child if the parent was granted leave (paras 59, 68, 73). (3) The question for the instant court was whether, having regard to the proper approach to applications under s.47(5), the judge's refusal of leave was wrong, *B (A Child)* followed. The judge's decision was not wrong. She accepted that there had been significant change, and recognised both that adoption was not a universal solution when a parent was unable to give a child good enough parenting and that adoption was not to be undertaken without compelling reason. She made no reference to the "exceptionally rare circumstances" approach, but went through the relevant welfare checklist, recognising correctly that X's interests were paramount. She also drew attention to a number of key facts, including that X had had terrible experiences which had an effect on them, the fact that they were consequently at risk of reverting to their previous emotionally deregulated behaviour, and that accordingly they needed stability and care. In those circumstances, it was understandable that she concluded that it was entirely improbable that M would succeed in opposing adoption, and that M's application should be refused in X's best interests (paras 84, 100-103).

## Permission

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