

# Court of Appeal in Re D-S (A Child: Adoption or Fostering)

**[2024] EWCA Civ 948**

19/09/2024

## **Barristers**

Deirdre Fottrell KC  
Clarissa Wigoder

## **Court**

Court of Appeal

## **Practice Areas**

Private Children Law

For the full judgment, please click [here](#).

Deirdre Fottrell KC and Clarissa Wigoder represented the applicant Local Authority in a successful appeal against a judgment of HHJ Tolson. At first instance HHJ Tolson refused the Local Authority's application for a placement order in respect of an 11 month old child, and decided the child should be placed in long term foster care.

In an important judgment, in which it gave some guidance to practitioners, the Court of Appeal reiterated the obligation on judges to consider all of the possible options for children in care proceedings. The Court of Appeal determined that HHJ Tolson had fallen into error as follows:

The judge was wrong to find that there was a gap in the evidence or a flaw in the professionals' approach to it. When faced with a choice between adoption and fostering, the court's primary task is to take a decision as to whether one or the other is right for the child as a matter of principle. In order to do that, it will not usually have to have evidence about the availability of placements. As to the professional analysis, and the limited attention given to long-term fostering as an option for C, the Court of Appeal was satisfied that there was nothing deficient in the professional analysis, and observed that the focus should be upon the sensible and practical possibilities, not ones that are considered to be far-fetched. The judge's welfare analysis was flawed in that:

The judge erred in considering that the predominant welfare factor was the benefit to C of her parents and half-siblings being a regular presence in her life should she remain in foster care. The judge referred to C as having a bond with her mother, but for a child of her age, past and present family relationships are of far less significance than potential future relationships. The importance of her birth family will always be limited by the inability of her parents to be her carers.

The judge referred in his analysis to the advantages of maintaining family ties, but not to the manifest

disadvantages of a life in foster care.

While there is no rule that very young children who cannot live at home must always be adopted, the judge in this case failed to consider the benefits of adoption for C, which was a fundamental error of principle.

The judge's analysis leant on matters that were irrelevant to C's case. The evidence about her health was not of a kind that could affect her chances of being adopted, and nor was the possibility that she might share the parents' learning difficulties.

The judge failed to give good reasons for departing from the professional recommendations.

The judge erred in law in falling into the trap of using the slogan 'nothing else will do' as a substitute for a proper welfare evaluation. In this case the judge elevated fostering into something that in his view 'would do', and therefore ruled out adoption. That was an error of principle.

Unusually the Court of Appeal considered that it could substitute its decision for that of the Judge at first instance and it made a Placement order. Noting that the local authority could be expected to honour its care plan for current contact, and for a 3-month search for adopters who will accommodate meetings with family members, the Court declined to make a contact order sought by the parents.

**Permission**

