

## What are the limits to the involvement of potential adopters in care proceedings?

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**Family analysis: How should the courts deal with issues surrounding the involvement of potential adopters within ongoing care proceedings? John Tughan QC at 4 Paper Buildings examines the case of *Re T (A Child) (Early Permanence Placement)*.**

### Original news

*Re T (A Child) (Early Permanence Placement)* [2015] EWCA Civ 983, [2015] All ER (D) 118 (Sep)

*The Court of Appeal allowed the appeals of both the father and the local authority, and held, among other things, that the prospective adopters ought not to have been joined as parties to the care proceedings. The care judge was concerned at most with consideration of adoption in principle, not with evaluating the merits of particular proposed adopters. There was no need for the prospective adopters to be joined and there was nothing in the status or function of an early permanence placement foster carer which either justified or required any change in the conventional and long-established approach.*

### What were the key issues in this case?

The key issues in the case centred on the involvement of potential adopters within ongoing care proceedings. At an interim stage the child was placed with short term foster carers with a view to adoption. This was an early permanence placement within the meaning of section 22C(9A) of the Children Act 1989. The proceedings before the court were the ongoing care proceedings and the application by the adopters for leave to apply for adoption. The court of first instance granted leave to apply for adoption and joined the proceedings so the holistic determination of the welfare issues could be considered.

The Court of Appeal decided that the history of care proceedings involved the court 'setting its face' against the joinder of foster carers or prospective adopters. Based on both past authority and present experience Munby P held that the care court was the forum for approving (or not) a care plan for adoption but was not deciding the identity of the placement of the children.

There was nothing to suggest that there should be a change of approach and so it remained the case that (para [50]):

'The care judge is concerned at most with consideration of adoption *in principle*, not with evaluating the merits of particular proposed adopters.'

Given the principles involved, the involvement of the adopters in the care court's decision-making would be an illegitimate forensic investigation. The court had first to decide that adoption was the correct plan for the child and this was a case in which there were family members who were putting themselves forward to care for T.

The recent line of authority that emphasises the court's examination of all realistic options for a child (which line of authority includes *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2013] 3 FCR 481) was concerned with the court considering the local authority care plan. Munby P said this (at para [57]):

'It would turn the *In Re B-S* learning on its head to assert that, in a case where the local authority is not seeking any order which brings *In Re B-S* into play, the requirement to consider every realistic option justifies, let alone requires, the joinder of a party to argue for the adoption for which the local authority itself is not applying. In my judgment, the *In Re B-S* learning applies where the local authority is inviting the court either to approve a care plan for adoption or to make a non-consensual placement order or adoption order. It does not apply where, as here, the local authority is seeking none of these things.'

Accordingly, leave to the adopters to apply for adoption should not have been granted and they should not have been joined to the proceedings.

### How does this further the discussion around early permanence placements?

Munby P emphasised the importance of complete frankness (para [67]):

'In every case of an early permanence placement there must, from the outset and at every stage thereafter, be complete frankness coupled with a robust appraisal of the realities.'

This case shows the difficulties faced by early permanence foster carers who seek adoption of the child that is placed with them. Such a placement does not involve a child that is to be adopted. It does involve a child that is subject to ongoing proceedings that might conclude that adoption is the correct outcome. That is why Munby P emphasised the frankness needed together with a robust appraisal of the realities. Clearly, as family members emerge for assessment within the care proceedings and the assessment process points to a positive outcome for those family members the likelihood of the foster carer being able to adopt the child resiles.

### **What are the issues facing the court where foster parents or grandparents are joined to proceedings?**

This decision affirms the line of authority that pre-dated *Re B-S*. It will only be in exceptional circumstances that foster carers or adopters are joined to proceedings. Wilson LJ (as he then was) and Munby P could not remember a case in which there was such joinder and neither can this practitioner.

As Waite LJ said in *Re G (Minors) (Interim Care Order)* [1993] 2 FCR 557:

'In ordinary circumstances I would not expect the court to regard it as appropriate to join foster-parents as parties to proceedings of this kind. To do so would in most cases run counter to the clear policy of the Act reflected in ss 9(3) and 10(3). The assistance afforded by foster-parents to the effective functioning of any system of child care is invaluable and should never be discouraged. Theirs is not a role, nevertheless, which would normally make it necessary for them to be joined formally as parties to proceedings in which the future upbringing of the children in their temporary care is in issue. There will generally be ample means for making their views known to the court, either directly as witnesses or indirectly through the inquiries of the guardian ad litem, without the necessity of adding them formally as parties.'

The obvious practical implication is the re-affirmation of the very high test that a foster carer or adopter has to meet in order to achieve joinder.

### **What should lawyers take from this case?**

Practitioners can take a very clear message from this case. The pre *Re B-S* authorities remain good law and the recent jurisprudence has caused there to be no change in the principles involved. Although the court must consider the realistic options for the child, that consideration is governed by the well-established principles of public law decision-making. Parents and natural family come first and it is inappropriate to compare the natural family with potential adopters.

*John Tughan QC's practice encompasses both private law and public law proceedings relating to children. He is experienced in the most complex cases and he regularly appears in high profile and complex matters.*

*Interviewed by Alex Heshmaty.*

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