Neutral Citation Number: [2019] EWCA Civ 742

Case No: B4/2019/0083

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT SITTING AT CARDIFF
HIS HONOUR JUDGE HARRIS-JENKINS
CF18C00599

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/05/2019

Before :

THE PRESIDENT OF THE FAMILY DIVISION
(LORD JUSTICE McFARLANE)
LORD JUSTICE FLOYD
and
LADY JUSTICE KING

- -

IN THE MATTER OF T – S (CHILDREN)

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- -

MISS RUTH HENKE QC AND MR MATTHEW REES
(instructed by **THE VALE OF GLAMORGAN COUNCIL**) for the **Appellant**
MR IAIN ALBA
(instructed by **PASSMORES SOLICITORS**) for the **Second Respondent**
MR JAMES TILLYARD QC AND MISS CATHERINE HEYWORTH
(instructed by **JNP LEGAL**) for the **the Guardian ad Litem**
THE FIRST RESPONDENT MOTHER AND FOURTH RESPONDENT GRANDMOTHER
NOT REPRESENTED BUT APPEARING IN PERSON

Hearing date : 20 MARCH 2019

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Approved Judgment

THE PRESIDENT OF THE FAMILY DIVISION :

1. On 20 November 2018, His Honour Judge Harris-Jenkins concluded a 14 day hearing in care proceedings concerning three children, all boys, one aged eight years, one aged four years and one only 21 months old. This appeal is focussed solely upon the welfare determination made with respect to the middle child, J, who is now aged five years. It is not therefore necessary to give more than a summary of the overall proceedings or of the outcome insofar as it related to the other two boys. The question raised by the appeal arises from a difference of opinion between the judge and the local authority around the question of whether J should be placed for adoption or placed in long-term foster care.

2. The statutory threshold criteria in Children Act 1989, s 31 ["CA 1989"] were conceded on the basis of evidence of poor and chaotic parenting over the course of four years. The children had remained in their mother's care throughout the court proceedings, but, on the judge's order, were removed from her home shortly before the conclusion of the case.

3. With respect to the eldest child, B, the judge made a full care order, thereby endorsing a care plan for long-term fostering with therapeutic support. The youngest child, K, was made the subject of a full care order together with an order under Adoption and Children Act 2002, s 21 ['ACA 2002'] authorising the local authority to place him for adoption. There is no appeal concerning the orders made with respect to either of these two boys.

4. In relation to the middle child, J, there was substantial dispute on the expert and professional evidence concerning his care plan. As is well known, the statutory scheme, to which I will turn shortly, requires a local authority to apply for a Placement for Adoption order if it is satisfied that the child 'ought to be placed for adoption' [ACA 2002, s 22(1)(d)]. The local authority cannot be so "satisfied" unless an agency decision-maker ["ADM"] has so determined.

5. During the course of the hearing the judge heard oral evidence from the ADM who had concluded that J's welfare would best be served by a long-term fostering placement and had therefore not declared herself satisfied that J ought to be adopted. In reaching her decision the ADM had placed substantial weight upon the evidence of the local authority social worker which evaluated the attachment between J and his older brother B as being of importance.

6. The local authority, who sought to prioritise his relationship with the elder boy, B, who was his full sibling (in contrast to the younger child, K, who has a different father), favoured long-term fostering for J. In contrast, the evidence of an independent social worker who had been instructed to assess the children's attachments to their parents and siblings, together with the children's guardian, advised that J's welfare required adoption, if possible with his younger half-sibling, K.

7. The judge, in a lengthy judgment, having reviewed all of the relevant evidence, moved on to conduct his welfare evaluation with respect to J. In doing so the judge applied the welfare checklist in CA 1989, s 1(3) together with the adoption welfare check-list in ACA 2002, s 1(4).

8. The judge concluded that the assessment of attachment conducted by the social worker was both superficial and "fatally flawed". The judge stated that he "much preferred" the evidence of the independent social worker and the children's guardian.

9. As the focus of this appeal is upon the consequences of the judge's welfare determination, rather than its internal merits, and as the conclusion of this court is that the issues concerning J's welfare now need to be re-determined by a different judge, it is neither necessary nor appropriate to descend to any greater detail.

10. Insofar as the ADM had based her assessment on the local authority social worker's own assessment, which the judge had found to be flawed, for that reason, and for others identified by the judge, he concluded that the local authority should be invited to reconsider the care plan for J.

11. At the conclusion of his judgment, and following a full evaluation within the structure of the adoption welfare checklist in ACA 2002, s 1(4), the judge expressed his conclusion with respect to J (at paragraph 146) as follows:

> "This has been the most difficult and most contentious part of this hearing. I am satisfied that J cannot be cared for within his birth family. The decision is then whether he should be placed in long-term foster care or given the opportunity of being placed for adoption. The local authority has not satisfied me that the current amended care plan for long-term fostering best meets his welfare needs throughout his life. Standing back, looking at the whole of the evidence and considering the arguments that have been advanced on each side, I reach the conclusion, that his lifelong welfare interest is best met by his being placed for adoption if possible and if that is managed with K, then that is the best outcome of all. It should be noted, that this was mother's secondary position. I therefore invite the local authority, to reconsider their position in respect of J and to make a placement application. In the meantime, I will continue an interim care order with his remaining in the current foster placement until the case can be returned to me. I will indicate that if such a placement application is made then I will make the same and dispense with the parents' consent. If, the local authority do not take up that invitation, then the Guardian has already stated that she will consider the question of judicial review. That process is likely to cause further unwelcome delay for J's plan for permanency. Therefore, care will need to be taken."

12. The judge therefore extended the interim care order with respect to J for a short time to enable the local authority to reconsider its care plan for J.

14 December 2018

13. The case returned to court before the judge on 14 December 2018. Unfortunately, there is no transcript of that hearing and, for reasons that I will explain, no further judgment was given. It is, however, possible to piece together what took place from

the documents in the case and from accounts given to this court during the oral appeal hearing.

14. The key development, prior to the hearing, was that the ADM had prepared and filed a written statement at the conclusion of which she stated that she remained of the view that adoption was not in J's best interests. This statement is plainly important. The ADM summarised the information upon which her opinion was based as follows:

> "In addition to the information I considered when making and then revisiting my decision in October, I have had the opportunity to consider the verbal judgment and the conclusions reached by the Court. I have also been able to consider the recordings of the foster carer and the social worker and the draft minutes of the Children Looked After Review which took place on 3.12.18, chaired by Mr X and attended by the foster carer, the social worker, the school and the health visitor. I have also had the opportunity to receive updated information regarding the position of Mr T (J's father)."

15. Pausing there, the ADM's reference to having "had the opportunity to consider the verbal judgment and the conclusions reached by the Court" is the only point in the statement at which its author refers to the judge's judgment save that in the concluding paragraph she states that "the decisions made have been carefully thought through having regard to all of the evidence before the Court and the Court's judgment in the case."

16. This court was given clarification as to the reference to "verbal judgment" and was told that the ADM had been present in court when the judge had delivered his lengthy oral judgment. She had also had the benefit of notes of the judgment provided by one or more of the local authority team. Unfortunately, attempts to prepare a full transcript of the judgment prior to the ADM retaking her decision failed and the transcript that this court now has before it was not available to her at the time that she made her statement.

17. The body of the ADM's statement contains six paragraphs describing recent information in relation to J and K and, separately, J's father. The ADM then stated the basis of her conclusion as follows:

> "I have considered J individually as I am required to do. I have revisited my balance sheet attached at Appendix 1 and remain of the view that adoption is not in J's best interests. The rationale for my thinking is set out in that document and has been further informed with the opportunity to consider the most up-to-date information available."

18. Reference to a "balance sheet" is to a helpful four-page document setting out the pros and cons with respect to the choice as between long-term fostering or adoption for J. We were told that the "balance sheet" was an un-amended repetition of the "balance sheet" produced to the judge during the November hearing.

19. At court on 14 December it is clear that the judge had the ADM's recent statement. He did not apparently have any other material, for example any document recording the Looked After Children Review or any of the other new material arising since the November judgment upon which the ADM had based her decision.

20. In the light of the fact that the court had adjourned for the local authority to reconsider its care plan, and the fact that the ADM had filed a statement purporting to re-evaluate the plan in the light of the court's conclusions, one might have anticipated that the December hearing would proceed with the judge reconsidering J's welfare in the light of the ADM's statement and either accepting the local authority's position and making a final care order or, if he continued to be concerned as to the adequacy of the local authority's decision-making process, once again adjourning the proceedings with an invitation to the local authority to reconsider its care plan further. Contrary to that expectation, the December hearing proceeded in an altogether different direction as the local authority applied, at the start of the hearing, for permission to appeal the court's 20 November determination. The judge granted permission to appeal for the following reasons:

> "This case in respect of J has reached an impasse. The expert evidence and the Guardian were of the opinion that J's best welfare decision throughout his life was for him to be placed for adoption (with K if possible). The LA refused to issue a placement order application. I agreed with the evidence of the expert and the Guardian and invited the Applicant to reconsider their decision and plan for J. They declined to amend their final care plan (long-term foster care) and/or issue a placement order application. Therefore an appeal to the Court of Appeal is the only way of breaking the deadlock."

21. The substantive part of the court order for 14 December simply records the granting of permission to appeal. The implication is that the interim care order for J continued to run. The judge did not establish any further process for the review of the local authority care plan, no doubt leaving that matter in abeyance pending the decision of this court.

The Appeal

22. On 14 December, the local authority's application for permission to appeal was limited to the decision made on 20 November and the judge granted their application on that basis. The local authority's Notice of Appeal, filed on 10 January 2019, states that the date of the decision appealed against is '20 November 2018'. However, in the box indicating the order (or part of the order) against which the appeal is made, it is stated that the local authority "seeks to appeal the order of HHJ Harris-Jenkins of 14 December 2018" on the basis that, on that occasion, he refused to make a final care order. In a document, accompanying the Notice of Appeal, dated 3 January 2019, prepared by Miss Ruth Henke QC and Mr Matthew Rees, on behalf of the local authority, it is stated that the appeal is against the order made on 14 December 2018. At the oral hearing of the appeal no point was taken as to the apparent disparity between the grant of permission to appeal, which is limited to the November hearing, and the alternative focus upon the December hearing in counsels' document. The court entertained submissions in relation to the process conducted at both hearings

and, if it is needed, the permission to appeal was extended to cover the 14 December hearing.

23. In prosecuting the local authority's appeal Miss Henke and Mr Rees rely upon five grounds:

    i) That the judge erred in concluding that he was in a far better position than the ADM to determine the best outcome for J, rather than considering whether the ADM's decision could be successfully challenged on public law grounds.

    ii) That the judge erred in failing to reconsider his decision in the light of the ADM's December witness statement which took account of the judge's determination and which cannot be properly challenged on public law grounds.

    iii) Parliament has given the decision to determine whether a child "ought to be placed for adoption" to the local authority rather than the Court.

    iv) As the decision to apply for a Placement for Adoption order is one solely within the determination of the local authority, and as the ADM had reconsidered her decision in a manner that is not open to challenge on public law grounds, the judge was in error in continuing to refuse to endorse the care plan and make a final care order.

    v) Given that the s 31 statutory threshold criteria were satisfied and the court determined that J could not return to the care of his family, the court should have made a final care order on 20 November 2018.

24. As the summary of the local authority's basis of appeal demonstrates, there is no challenge to the judge's welfare assessment. Miss Henke confirmed that this was so and informed the court that the local authority accepted the judge's criticisms of the social worker's assessment. Miss Henke submitted that if the local authority was successful in its appeal, the case would have to go back to the judge to redetermine the question of what final order should be made. Whilst accepting that the existing case law contemplated a process of consideration and then re-consideration between the court and the local authority, Miss Henke submitted that at some point there must come a stop to that process and that point was reached when the ADM had made a decision which was not vulnerable to challenge on public law grounds; her case was that that point had been reached in this case either in November or, at the latest, at the December hearing.

25. The children's mother, who does not have legal aid for the appeal process, attended the appeal hearing and bravely addressed the court to say, in sadness, that, if J cannot return to her care, she considers it is better for her son to be adopted. She therefore supported the course that was being followed by the judge.

26. J's father took the contrary view. He supported the local authority appeal. In addition, by a Respondent's Notice for which the court has given permission, his counsel, Mr Alba, advanced four additional grounds of appeal:

    i) The judge was in error in applying the adoption welfare checklist in ACA 2002, s 1(4) when no application for a Placement order had been made.

ii) The judge pre-determined any potential application for a Placement order and, in particular, pre-determined the question of whether the parents' consent should be dispensed with under ACA 2002, s 52 at the November hearing when the issue of parental consent had not been before the court and, because the only issue for the court's determination was the making of the full care order, the father had not given any oral evidence.

iii) The judge was wrong to treat the making of a Placement order as a "realistic option" when there was no application for such an order before the court.

iv) In the course of his judgment the judge held that the father's prospect of caring for J in the future was "fanciful thinking". The judge was in error in so doing when the evidence of the social worker, which looked favourably on the father's prospects, had not been explored in cross-examination and the core assessment did not rule the father out as a future carer.

27. On behalf of the children's guardian, Mr James Tillyard QC leading Catherine Heyworth, opposed the appeal. Whilst Mr Tillyard opened his oral submissions to this court by stating that the position reached in the case was "a bit of a mess", he nevertheless sought to uphold the legal integrity of the process undertaken by the judge on the basis of the established case law, to which I will turn, which provides for there to be a process of mutual respect as between a court and a local authority on the rare occasions when a stand-off such as the present arises. The guardian's core submission was that the process of mutual respect that is to be expected of a local authority and the court in this situation had not run its course and the judge was justified in expecting proper reconsideration of the adoption decision by the ADM in the light of his judgment.

The legal context

Care Plans

28. CA 1989, s 31A provides:

> "(1) Where an application is made on which a care order might be made with respect to a child, the appropriate local authority must, within such time as the Court may direct, prepare a plan ("a care plan") for the future care of the child.
>
> (2) While the application is pending the authority must keep any care plan prepared by them under review and, if they are of the opinion some change is required, revise the plan, or make a new plan accordingly.
>
> …
>
> (6) A plan prepared, or treated as prepared, under this section is referred to in this Act as a "section 31A plan"."

29. CA 1989, s 31(3A) and (3B) provide:

> "(3A) A court deciding whether to make a care order –

(a) is required to consider the permanence provisions of the section 31A plan for the child concerned, but

(b) is not required to consider the remainder of the section 31A plan, subject to section 34(11).

(3B) For the purposes of subsection (3A), the permanence provisions of a section 31A plan are –

(a) such of the plan's provisions setting out the long-term plan for the upbringing of the child concerned as provide for any of the following -

(i) the child is to live with any parent of the child's or with any other member of, or any friend of, the child's family;

(ii) adoption;

(iii) long-term care not within sub-paragraph (i) or (ii);

(b) such of the plan's provisions as set out any of the following–

(i) the impact on the child concerned of any harm that he or she suffered or was likely to suffer;

(ii) the current and future needs of the child (including needs arising out of that impact);

(iii) the way in which the long-term plan for the upbringing of the child would meet those current and future needs."

30. It is to be noted that CA 1989, s 31(3A) only requires the court to "consider" the section 31 plan and, further, that requirement to consider is limited to the "permanence provisions" (as defined in subsection (3B)) of a plan. There is no requirement for the court to approve the care plan, but, plainly, where a court makes a final care order on the basis of a specific s 31A plan it does so knowing that that will be the plan for the child, subject, of course, to any change of circumstance and/or any change in the opinion of the local authority following the conclusion of the court process.

Application for Placement for Adoption order

31. Under ACA 2002 only a local authority may apply for an order authorising them to place a child for adoption. The court does not have jurisdiction to make such an order of its own motion.

32. ACA, s 22 makes provision for the circumstances in which a local authority "must", on the one hand, apply to the court for a placement order or, in other circumstances, "may" apply to the court for a placement order as follows:

"22.

(1) A local authority must apply to the court for a placement order in respect of a child if –

(a) the child is placed for adoption by them or is being provided with accommodation by them,

(b) no adoption agency is authorised to place the child for adoption,

(c) he child has no parent or guardian or the authority consider that the conditions in section 31(2) of the 1989 Act are met, and (d) the authority are satisfied that the child ought to be placed for adoption.

(2) If –

(a) an application has been made (and has not been disposed of) on which a care order might be made in respect of a child, or

(b) a child is subject to a care order and the appropriate local authority are not authorised to place the child for adoption, the appropriate local authority must apply to the court for a placement order if they are satisfied that the child ought to be placed for adoption.

(3) If-

(a) a child is subject to a care order, and

(b) the appropriate local authority are authorised to place the child for adoption uder section 19, the authority may apply to the court for a placenment order."

33. By the Adoption Agencies (Wales) Regulations 2005 ["AA(W)R 2005], reg. 17, in a case where an adoption agency is a local authority and is considering whether the child ought to be placed for adoption and the case is one where, if the authority is satisfied that the child ought to be placed for adoption ACA 2002, s 22(1) or (2) apply, the decision whether the child "ought to be placed for adoption", is not taken by an adoption panel but by an agency decision-maker. Similar provisions appear in the Adoption Agency Regulations 2005, reg. 17 which apply to England.

34. By AA(W)R 2005, reg. 17(2D) the ADM must consider the following material:

i) A written report setting out the information required by reg. 17(1);

ii) A written report on the state of the child's health (unless a medical adviser advises that the is not necessary), and

iii) Information relating to the health of the child's natural parents.

Case Law

35. A cardinal principle embedded into the structure of the CA 1989 and the ACA 2002 is that a local authority and the Family Court have different spheres of responsibility with respect to the making of orders, on the one hand, and, on the other hand, the determination of the care plan to be followed for a child once an order has been made. The former is the exclusive responsibility of the court, whilst the latter is the exclusive responsibility of the local authority.

36. In almost all cases there is, at least by the conclusion of the court process, unanimity of view as between the local authority and the court over the care plan that is to be followed if a particular order is made. Where, as is currently the position in the present case, the view of the court and that of the local authority diverge on a central element of the plan for the child's future welfare, previous authority holds that a process of mutual respect and reconsideration should be undertaken with the expectation that, by the end of that process, sufficient common ground may be achieved to enable the court to make an order on the basis of a care plan that accords with an accepted view of the child's welfare needs. Where, however, an impasse remains, the court may have to choose between the 'lesser of two evils' or, where the circumstances merit it, contemplate formal challenge to the local authority's decision by judicial review.

37. The leading authorities which establish the law as I have described it are, firstly, *Re A and D (Children: Powers of Court)* [1995] 2 FLR 456, in which the Court of Appeal (Balcombe, Staughton and Rose LJJ) contemplated a situation where a local authority's care plan was for the return of two children to their mother, who, in the language of that time, 'suffered from Munchausen's syndrome by proxy'. The judge, who disagreed with this plan, had made an injunction preventing the removal of the children from their foster home. By the time of the appeal hearing, the local authority had altered its care plan in the light of developments and was no longer recommending a return home, with the result that there was, by then, no difference between the local authority and position favoured by the judge. The appeal was allowed on that basis and a full care order was made.

38. In the leading judgment of Balcombe LJ, reference was made to an earlier decision of *Re T (A Minor) (Care Order: Conditions)* [1994] 2 FLR 423 in which it was established that the court did not have power to make a care order containing either a direction or a condition requiring the local authority to place a child in a particular home. Having referred to the requirement, in CA 1989, s 1(1), to accord paramount consideration to the child's welfare, and the requirement in s 1(5) only to make an order if the court 'considers that doing so would be better for the child than making no order at all', Balcombe LJ continued:

> "The judge is therefore faced with the dilemma with which the judge was faced that, if he makes a care order, the local authority may implement a care plan which he or she may take the view is not in the child or children's best interests. On the other hand, if he makes no order, he may be leaving the child in the care of an irresponsible, and indeed wholly inappropriate parent.

> It seems to me that, regrettable though it may seem, the only course he may take is to choose between the lesser of two evils. If has no other route open to him … then that is the unfortunate position he has to face.
>
> … He has to choose what he believes to be the lesser of two evils. That may be making a care order with the knowledge that the care plan is one which he does not approve, or it may be making no order with the consequence to which I have already adverted."

39. In *Re C (Adoption: Religious Observance)* [2002] 1 FLR 1119, Wilson J (as he then was) considered an application for judicial review brought by a children's guardian against a local authority care plan on the basis that the adoptive home chosen for a 2-year-old Jewish girl born to non-religious parents was 'too Jewish'. When dismissing the judicial review application Wilson J observed, in a postscript to his judgment, that there was a need for local authorities to work in partnership with the court in order to achieve an outcome that was acceptable to both:

> "[51] The guardian argues that not even a judge of the Family Division has power to quash a local authority decision and that a damaging impasse can develop between a court which declines to approve their care plan and the authority which decline to amend it. The impasse is more theoretical than real: the last reported example is *Re A and D (Children: Powers of Court)* [1995] 2 FLR 456. For good reason, there are often, as in this case, polarised views about the optimum solution for the child: in the end, however, assuming that they feel that the judicial processing of them has worked adequately, the parties will be likely to accept the court's determination and, in particular, the local authority will be likely to amend their proposals for the child so as to accord with it. The event of a failure to make amendment in such circumstances would be the proper moment for a guardian to consider taking proceedings for judicial review… In the normal case let there be – in the natural forum of the family court – argument, decision and sometimes, no doubt with hesitation, acceptance: in other words, between all of us a partnership, for the sake of the child."

40. In *Re P-B (A Child)* [2006] EWCA Civ 1016, [2007] 1 FLR 1106, the Court of Appeal (Thorpe, Arden and Wilson LJJ) stressed the importance of the statutory procedure under the Adoption Agencies Regulations which must be followed before a local authority, as an adoption agency, can conclude that a child 'ought to be adopted' for the purposes of ACA 2002, s 22. Having summarised the detailed statutory requirements, Thorpe LJ concluded:

> "[19] It is in their role as an adoption agency that the local authority must be satisfied, and that process cannot be achieved until there has been complete compliance with the requirements of the 2005 Regulations, namely that the appointed officer has taken the positive decision to endorse the recommendation of the panel."

Reference to 'the panel' has now been superseded by amended regulations so that the decision is now that of the ADM alone in a placement order case.

41. The following year, in *Re S and W (Care Proceedings)* [2007] EWCA Civ 232, [2007] 2 FLR 275, the Court of Appeal (Thorpe, Wall and Hooper LJJ) considered a

case in which there was an impasse between a judge and a local authority over the placement of a child with his maternal great aunt and uncle; the placement (under a care order) was favoured by the local authority, but not by the judge, who, declining to make a full care order, adjourned the case under an interim care order for the local authority to reconsider its position. The local authority appealed. The judgment of the court, given by Wall LJ, makes it clear that the Court of Appeal would have preferred to refuse permission to appeal and uphold the judge's decision but, in light of the local authority's determined stance not to alter its plan, the outcome was that the appeal was allowed and the case remitted for hearing before a judge of the Family Division who was also authorised to sit in the Administrative Court.

42. The judgment in *Re S and W* is important not only for the similarity of the position in that case with that reached in the present proceedings, but also for the clear statement of the law that it contains. I will therefore set out the relevant paragraphs in detail:

> "**[25]** Before turning to examine the local authority's decision-making processes in these proceedings, we regret to say that we think it necessary to set out what we had previously thought to be some elementary principles of family law and practice as they affect the relationship between a judge hearing proceedings under Part IV of the 1989 Act, and the local authority which brings them.
>
> **[26]** We fully endorse the statement of the law set out in para 2 of Wall LJ's reasons for listing the applications for oral hearing. The division of responsibility between the local authority and the court in care proceedings is, we think, well known, although we acknowledge that it is sometimes difficult to implement it in practice. It plainly needs, however, to be restated.
>
> **[27]** Parliament has placed the responsibility for making care orders on the court, not on the local authority which brings the proceedings. Before a care order can be made, the local authority has to satisfy the court that the threshold criteria under s 31 of the 1989 Act are satisfied, and the court also has to be satisfied that a care order is in the best interests of the child concerned. To the latter end, the court is under a duty rigorously to scrutinise the care plan advanced by the local authority, and if the court does not think that it meets the needs of the child concerned, the court can refuse to make a care order. So much is elementary.
>
> **[28]** The significance of local authority care plans was, we think, both recognised and reinforced by Parliament in the enactment of s 31A of the 1989 Act through the medium of s 121(2) of the 2002 Act. There is now a mandatory duty on local authorities to prepare a care plan for each child who is the subject of care proceedings, to keep that care plan under review and if some change is required, to revise the care plan or to make a new plan accordingly – see s 31A(1) and (2) of the 1989 Act. This case, it seems to us, is about both the merits of the local authority's late changes of plan on the facts, and the methodology of its decision-making processes.
>
> **[29]** What, however, is equally elementary is that once the court has made a final care order, responsibility for its implementation passes to the local authority, and save for the powers identified by the House of Lords in the case of *Re S (Minors) (Care Order: Implementation of Care Plan); Re W (Minors) (Care*

Order: Adequacy of Care Plan) [2002] UKHL 10, [2002] 2 AC 291, [2002] 1 FLR 815 (hereinafter *Re S; Re W*), neither the court nor the children's guardian has any further role in the children's lives.

[30] What appears not to be understood, however, and thus needs to be clearly repeated, is that not only does the court have the duty rigorously to scrutinise the care plan and to refuse to make a care order if it does not think the plan in the child's best interests; the court also has the right to invite the local authority to reconsider the care plan if the court comes to the conclusion that the plan – or any change in the plan – involves a course of action which the court believes is contrary to the interests of the child, and which would be likely to lead the court to refuse to make a care order if the local authority were to adhere to the care plan it has proposed.

[34] Once again, in oral argument, counsel agreed that the second sentence of this ground of appeal should be struck through as erroneous. However, in our judgment, the first sentence is also plainly wrong. The 'lesser of two evils' test arises from the well-known judgment of Balcombe LJ given in this court in *Re S and D (Children: Powers of Court)* [1995] 2 FLR 456, at 634G–635C, citations from which we set out below. In the instant case, however, the local authority's reliance on *Re S and D* is manifestly misconceived for the simple reason that the judge had not reached the point identified by Balcombe LJ. Had the local authority (as it should have done) accepted his invitation to reconsider after reading his judgment and then restored the case to the judge's list, it might well *then* have been the case that the judge was faced with either making the care order sought by the local authority with its unacceptable care plan or making no order. But the judge had not reached that point, and was – in our view wholly properly – striving to avoid it.

[35] It is, we think, worthwhile pausing for a moment to reflect on why a court is entitled to exercise a discretionary jurisdiction to adjourn in order to invite a local authority to reconsider. The answer, we think, is, like much of what we have already said, self-evident. Care proceedings are only quasi-adversarial. There is a powerful inquisitorial element. But above all, they are proceedings in which the court and the local authority should both be striving to achieve an order which is in the best interests of the child. There needs to be mutual respect and understanding for the different role and perspective which each has in the process. We repeat: the shared objective should be to achieve a result which is in the best interests of the child."

43. Wall LJ then referred to *C v Solihull Metropolitan Borough Council* [1993] 1 FLR 290 and *Re CH (Care or Interim Order)* before continuing:

"**[38]** Sadly, those words, and, as importantly, the spirit behind them, do not appear to have been absorbed by this local authority. Two members of this court sat for many years hearing care proceedings under Part IV of the 1989 Act. Neither can recall a case in which a local authority behaved as this authority has done. In the overwhelming majority of cases in which there is a disagreement between the local authority and the court over a child's care plan, that disagreement is resolved by careful reconsideration on both sides. In our experience, as a consequence, such disagreements are extremely rare. That is as it

should be. It is patently not in the interests of the already disadvantaged children involved in care proceedings for there to be a stand-off between the court and the local authority, the result of which, as here, is still further delay in resolving the children's future placements.”

44. Wall LJ then referred to the decision of Balcombe LJ in *Re S and D* which had identified that a stage might be reached where a judge had to choose the lesser of two evils:

> “**[43]** As will be plainly apparent from what we have already said, the judge in the instant case had not reached the point identified by Balcombe LJ in *Re S and D*. The local authority's reliance on this decision is accordingly, in our judgment, misplaced.

Before concluding at paragraph 47 by reference to the grounds of appeal:

> **[47]** In our judgment, nothing done by the judge in the instant case comes anywhere near the 'overzealous investigation' referred to: nor were the matters about which the judge was concerned 'properly within the administrative discretion of the local authority'. They went to the heart of the case, and the critical decision about CO's welfare which it was the function of the judge to make.
>
> **[48]** The judge is also criticised for making an interim care order in relation to CO pending the return of the case to his list after reconsideration of the care plan by the local authority. This is a criticism we simply do not understand. What other order was the judge to make? If he had made a care order he would have abnegated his responsibility for CO's welfare and the local authority would have placed him with Mr and Mrs W. If he had made no order, the outcome would have been in the manifestly inappropriate hands of CO's parents. A further interim order was the only order the judge could make in these circumstances.”

45. The division of responsibility between a local authority and the court during proceedings under CA 1989, Part 4 was extensively considered in the judgment of Ryder LJ (as he then was), sitting with Sir James Munby and McCombe LJ, in *Re W (Care Proceedings: Functions of Court and Local Authority)* [2013] EWCA Civ 1227; [2014] 2 FLR 431; paragraphs 79 to 81 are of particular relevance to the present appeal:

> “**79** This brings me to that part of the welfare evaluation which is the consideration of the section 31A care plan. It is part of the case management process that a judge may require a local authority to give evidence about what services would be provided to support the strategy set out in its care plan, that is to support the placement options available to the court and meet the risk identified by the court. That may include evidence about more than one different possible resolution so the court might know the benefits and detriments of each option and what the local authority would or would not do. That may also include requiring the local authority to set out a care plan to meet a particular formulation or assessment of risk, even if the local authority does not agree with that risk.

80 The court's powers extend to making an order other than that asked for by a local authority. The process of deciding what order is necessary involves a value judgment about the proportionality of the state's intervention to meet the risk against which the court decides there is a need for protection. In that regard, one starts with the court's findings of fact and moves on to the value judgments that are the welfare evaluation. That evaluation is the court's not the local authority's, the guardian's or indeed any other party's. It is the function of the court to come to that value judgment. It is simply not open to a local authority within proceedings to decline to accept the court's evaluation of risk, no matter how much it may disagree with the same. Furthermore, it is that evaluation which will inform the proportionality of the response which the court decides is necessary.

81 It is likewise not open to a local authority within proceedings to decline to identify the practicable services that it is able to provide to make each of the range of placement options and orders work in order to meet the risk identified by the court. That is the purpose of a section 31A care plan. If a local authority were able to decline to join with the court in the partnership endeavour of identifying the best solution to the problem, then there would be no purpose in having a judicial decision on the question raised by the application. It might as well be an administrative act. Parliament has decided that the decision is to be a judicial act and accordingly, the care plan or care plan options filed with the court must be designed to meet the risk identified by the court. It is only by such a process that the court is able to examine the welfare implications of each of the placement options before the court and the benefits and detriments of the same and the proportionality of the orders sought."

46. More recently, in *Re T (A Child) (Placement Order)* [2018] EWCA Civ 650; [2018] 2 FLR 926, this court (McFarlane, Peter Jackson and Newey LJJ) considered a stand-off between a judge, who favoured placement of an 18 month old child with his grandmother, and a local authority which favoured placement for adoption. At the conclusion of the process in the Family Court, the judge had reluctantly concluded that a placement order should be made in the light of the local authority's refusal to change its care plan. The grandmother appealed. The appeal was allowed and the case was remitted for re-hearing. After reviewing the authorities, and having noted that the judgment of Ryder LJ in *Re W* appears in 'markedly more imperative' terms than that of Thorpe LJ in *Re CH* 20 years earlier, Peter Jackson LJ, giving the leading judgment, continued:

"[42] Although they touch upon the same subject, the decision of the Court of Appeal in *Re CH (Care or Interim Care Order)* [1998] 1 FLR 402 does not appear to have been cited in *Re W*. For my part, I would view the two decisions as seeking to make essentially the same point, though the tone in *Re W* is markedly more imperative. I particularly refer to the observations that it is not open to a local authority within proceedings to decline to accept the court's evaluation of risk (para [81]) and that a local authority cannot refuse to provide lawful and reasonable services that would be necessary to support the court's decision (para [83]). I would agree with these propositions to the extent that the court's assessment of risk is sovereign *within proceedings* and that a local authority cannot refuse to provide a service if by doing so it would unlawfully breach the rights of the family concerned or if its decision-making

process is unlawful on public law grounds. However, the family court cannot dictate to the local authority what its care plan is to be, any more than it can dictate to any other party what their case should be. What the court can, however, expect from a local authority is a high level of respect for its assessments of risk and welfare, leading in almost every case to those assessments being put into effect. For, as has been said before, any local authority that refused to act upon the court's assessments would face an obvious risk of its underlying decisions being declared to be unlawful through judicial review. That must particularly be so where decisions fail to take account of the court's assessments. Or where, as in this case, there is an impasse, there may have to be an appeal. But in the end, experience shows that the process of mutual respect spoken of by Thorpe LJ will almost inevitably lead to an acceptable outcome.

[43] It is clear from these decisions that the court has both a power and a duty to assert its view of risk and welfare by whatever is the most effective means. I cannot agree with the submission made on the behalf of the guardian – 'some judges might have pursued the matter further with the agency decision maker, but this judge cannot be said to have been wrong not to do so'. As McFarlane LJ remarked during argument, that amounts to a lottery, depending upon the inclinations of one judge as against another. The obligation upon the court is not merely to make its assessment, but to see it through. That is a matter of principle, and not one of individual judicial inclination.

[44] The present case is somewhat more complicated than *Re CH* or *Re W*. Here, as Ms Fottrell notes, the judge's preferred plan was dependent upon a separate step being taken by the local authority within a different statutory framework. Without the grandmother being approved as a foster carer, it would not be lawful to place Alan with her under a care order. I therefore examine the law as it applies to the approval of connected persons as foster carers."

Discussion:

47. At the conclusion of the oral appeal hearing we announced our decision, which was that the appeal would be allowed, and the case remitted to a different judge to determine what, if any, orders should be made. My reasons for agreeing to that outcome are not entirely straight-forward as they do not, in point, amount to full agreement with any of the local authority's grounds of appeal. My reasons are as follows.

48. Firstly, the approach of a court to a potential impasse with a local authority on an important element in the care plan for a child has been well established for over 20 years. Insofar as there has been movement, it has been in the direction of emphasising the role of the court *during* proceedings (see Ryder LJ in *Re W*), but, in like manner to the approach taken by Peter Jackson LJ in *Re T* (with whom I agreed in that case), I consider that when, as here, the focus is upon the care plan after the proceedings are concluded, there is a need for mutual respect and engagement between the court and a local authority.

49. The key authority in the canon of cases on this point is, in my view, *Re S and W*; subsequent authorities have confirmed the clear statement of the law given in the judgment of the court given by Wall LJ. Of particular relevance to the present appeal is the passage at paragraph 34:

> "Had the local authority (as it should have done) accepted his invitation to reconsider after reading his judgment and then restored the case to the judge's list, it might well *then* have been the case that the judge was faced with either making the care order sought by the local authority with its unacceptable care plan or making no order. But the judge had not reached that point, and was – in our view wholly properly – striving to avoid it."

And at paragraph 35:

> "There needs to be mutual respect and understanding for the different role and perspective which each has in the process. We repeat: the shared objective should be to achieve a result which is in the best interests of the child."

50. In this regard, I reject the grounds advanced by the local authority that I have numbered (i) and (v) at paragraph 23 to the effect that the judge, at this stage, should only have considered the ADM's decision through the prism of a potential public law challenge and/or he should have made a final care order on 20 November. Whilst, at the end of the process of mutual respect, cooperation and re-consideration a court may have to evaluate a local authority's position solely in terms of a public law challenge, the authorities are all to the effect that before that stage is reached, the court and the local authority must each use their best endeavours to achieve sufficient common ground in relation to the care plan and final orders.

51. Secondly, as the local authority concede, the judge was entitled to reach his determination on the question of J's welfare as he did and was, therefore, entitled to look towards a plan for adoption. There is no challenge to that finding and, indeed, the local authority accept that the judge was entitled to criticise the social worker as he did.

52. Thirdly, the position reached at the conclusion of the November hearing is, in my view, a textbook working out of that which is to be expected of a court and a local authority in circumstances such as these. The judge's decision and his order were entirely in keeping with the authorities to which reference has been made. There is, therefore, no ground upon which the judge's decision of November 2018 can be successfully challenged on appeal. In stating that conclusion, I reject grounds (ii) and (iv) of the local authority's appeal in that, because of the local authority's pre-emptive application for permission to appeal at the December hearing, the judge was not given any opportunity to reconsider his decision in the light of the ADM's statement and the judge never got to the stage of 'continuing to refuse to endorse the care plan and make a final care order'.

53. Fourthly, Mr. Tillyard's description of the December hearing as "a bit of a mess" is, unfortunately, apt. It is arguably the case that the statement of the ADM, which reproduced the previous "balance sheet" unchanged from the November hearing, indicates that she had failed to engage with the substance of the judge's analysis as described in the judgment. In addition, if, as this court has been told, the local

authority accepts the criticism of the social worker's assessment, there was a need to investigate how, if at all, this change of position had been taken into account by the ADM. Further, the ADM, as she was entitled to do, had relied on new material that had become known since the November hearing, however, this material was not submitted to the judge for his consideration.

54. As this matter is now to go before a different judge, I go no further than simply indicating these points at this stage. It will be for the new judge, in the light of whatever material is then before the court, to determine the issue in the light of the approach described in the cases and, most recently, by Peter Jackson LJ in *Re T*:

> "What the court can, however, expect from a local authority is a high level of respect for its assessments of risk and welfare, leading in almost every case to those assessments being put into effect. For, as has been said before, any local authority that refused to act upon the court's assessments would face an obvious risk of its underlying decisions being declared to be unlawful through judicial review. That must particularly be so where decisions fail to take account of the court's assessments."

In this regard, Miss Henke accepted that the ADM may well wish to re-consider her December statement to ensure that it adequately engages with the welfare analysis of HHJ Harris-Jenkins.

55. In accordance with the template established by the judge's November determination, the December hearing should have witnessed a re-joining of the judge and the local authority in a detailed analysis of the care plan, taking account of any new evidence, considering the ADM's statement and hearing submissions from all parties prior to a further judgment from the judge taking account of these developments. Instead, the December hearing was very short and simply involved the application for permission to appeal the judge's November determination, which the judge promptly granted on the basis that an impasse had been reached.

56. Although this is not strictly how the Local Authority formulated its grounds of appeal, I am driven to the conclusion that the judge was in error in conducting the December hearing as he did. No objection was taken to the point being put in this way, and I am satisfied that it was fully ventilated at the appeal hearing. In stating that conclusion I do not intend to be critical of the judge, who plainly found himself in an unwelcome situation and who may have been bounced into a speedy decision when the oral application for permission to appeal was made at the beginning of the hearing. There was, however, as I have stated, no basis upon which permission to appeal the November determination could have been granted. Further, it was, in my view, premature for the judge to hold that there was an impasse between the court and the local authority before he had undertaken a further evaluation process in the light of the ADM's statement. If, as may have been the case, following such an evaluation the court were to conclude that the ADM had failed to engage with the judge's reasoning, a further adjournment for reconsideration by the local authority may have been justified. In short, difficult though the situation undoubtedly was, the December hearing should have run its course rather than being terminated before it had really commenced by the grant of permission to appeal the November order. In coming to this conclusion I have the words of Wall LJ in *Re S and W* very much in mind:

> "**[43]** As will be plainly apparent from what we have already said, the judge in the instant case had not reached the point identified by Balcombe LJ in *Re S and D*. The local authority's reliance on this decision is accordingly, in our judgment, misplaced."

57. Fifthly, and separately from any of the grounds of appeal raised by the local authority, I am concerned by the clear statement that appears in the judge's November judgment concerning his approach were a placement for adoption application to be made:

> "I will indicate that if such a placement application is made then I will make the same and dispense with the parents' consent."

58. I consider that the father has made good his appeal on the basis that the judge was in error in stating a clear predetermined conclusion on the question of whether the parents' consent should be dispensed with under ACA 2002, s 52 in the event that, in future, the local authority applied for an order authorising placement for adoption. Although it is plain that the option of adoption was very much on the agenda for the November hearing, given the opinions of the independent social worker and the guardian, no formal application had been made and the father had not expressed a view with respect to consent or been called to give evidence on the issue. Further, it is apparent that no submissions were made to the judge that went beyond the concept of adoption and expressly addressed issues of consent or the formal making of a placement order.

59. The judge is not, however, open to criticism with respect to his reference to the adoption welfare checklist in ACA 2002, s 1(4) in the course of the welfare analysis conducted in November. In that analysis the judge gave proper consideration to the option of adoption, in that regard it was necessary for the structure of the adoption welfare checklist to be deployed.

60. As was accepted by all of the parties, if the appeal were to succeed the case would need to be returned to the Family Court for re-consideration. In view of the conclusion reached with respect to the father's criticism of the judge's premature determination of the issue of dispensing with parental consent, we reluctantly concluded that the task of giving further consideration to the welfare of this young boy within these proceedings should now be passed to a different judge. We are grateful for the arrangements that have been made for this case now to be heard by a circuit judge sitting as a deputy High Court judge in London in May 2019.

61. For the reasons that I have now given, the outcome of this appeal is that the appeal is allowed and the question of the final order to be made with respect to J's welfare is remitted to the Family Court for re-hearing. It will be a matter for the new judge how much regard is given to the welfare analysis conducted by HHJ Harris-Jenkins, although, as I repeat, that analysis has not been the subject of challenge in the course of this appeal.

62. King LJ: I agree.

63. Floyd LJ: I also agree.