# Achieving Permanence: Case Law

Much case law has evolved that affects permanency planning. Case law can change from day to day.

This paper provides a summary of case law relevant to Achieving Permanence up to July 2017.

As many of the judgments are extremely long, this guidance extracts the key quotations from them for practitioners considering permanency planning.

The Community Care website http://www.communitycare.co.uk/ regularly updates information about significant decisions affecting legal precedent. These updates

1. provide the name of the case;
2. outlines the case judgement made;
3. explores the judgement's implications for practice.

www.bailii.org is free to access and publishes judgements in full.

Several legal blogs also regularly report and discuss cases that create legal precedent.

http://cases.familylorefocus.com/

The NAGALRO website has a news and comments section that is available to non-NAGALRO members: http://www.nagalro.com/

Establishing threshold

The Court cannot make a Care Order or Supervision Order without being satisfied that the threshold criteria are met.

When the Court is deciding whether a child is likely to suffer significant harm in the future, the question is approached from these, very specific perspectives:

1. what is the nature of the harm that it is said the child is likely to suffer from?
2. what are the facts that either are established, or can be established to show that there is such a likelihood?
3. what is the nature of the risk? The Court is considering both the chance of the harm coming to fruition and the severity of the impact on the child if it does.
4. is the Local Authority able to prove its assertions?

Re A 2015 http://www.familylawweek.co.uk/site.aspx?i=ed143260

This case had a significant impact on the responsibility of local authorities to prove the threshold criteria have been met.

> *i) Fact-finding and proof. It is for the local authority to prove, on a balance of probabilities, the facts upon which it seeks to rely. Findings of fact must be based*

*on evidence and not on suspicion or speculation (Re A (A Child) (No 2) [2011] EWCA Civ 12. If the local authority's case is challenged on some factual point it must adduce proper evidence to establish what it seeks to prove. Whilst reliance is often placed upon material to be found in local authority case records or social work chronologies which is hearsay (often second- or third-hand hearsay) a local authority which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it.*

*It is a common feature of care cases that a local authority asserts that a parent does not admit, recognise, or acknowledge something or does not recognise or acknowledge the local authority's concern about something. If the 'thing' is put in issue, the local authority must both prove the 'thing' and establish that it has the significance attributed to it by the local authority. In this respect the President also drew a clear distinction between evidence required to prove an assertion and the assertion of fact. It is the latter which should be pleaded in the formulation of threshold and schedule of findings sought. Allegations that "X appears to have" lied or colluded, that various people have "stated" or "reported" things, and that "there is an allegation" should not be used. The relevant allegation is not that "X appears to have lied" or "he reports"; the relevant allegation, if there is evidence to support it, is that "X lied" or "he did Y".*

*ii) The need to establish the link between facts relied upon in a threshold document and the conclusion that the child has suffered, or is at risk of suffering, significant harm. Sometimes the linkage will be obvious, as where the facts proved establish physical harm. Sometimes the linkage may be less obvious where the allegation is only that the child is at risk of suffering emotional harm or, as in this case, was at risk of suffering neglect. In this case, an important element of the local authority's case was that the father "lacked honesty with professionals", "minimised matters of importance" and "is immature and lacks insight of issues of importance". This did not however naturally feed through into a conclusion that A was at risk of neglect. The local authority's evidence and submissions must set out the argument and explain explicitly why it is said that, in the particular case, the conclusion indeed follows from the facts. The President highlighted the judgement of Macur LJ in Re Y (A Child) [2013] EWCA Civ 1337, para 7, in a judgment agreed by both Arden and Ryder LJJ:*

*"No analysis appears to have been made by any of the professionals as to why the mother's particular lies created the likelihood of significant harm to these children and what weight should reasonably be afforded to the fact of her deceit in the overall balance "*

*iii) The temptation of social engineering and the need to recognise the inevitable diverse and unequal standards of parenting. The President reminded judges and practitioners of the judgment of Hedley J in Re L (Care: Threshold Criteria) [2007] 1 FLR 2050, para 50:*

*"society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children*

*will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done."*

*Further, the President expressly approved the judgement of His Honour Judge Jack in North East Lincolnshire Council v G & L [2014] EWCC B77 (Fam) where he said,*

*"The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive parents. So we have to have a degree of realism about prospective carers who come before the courts."*

In Re B 2015 the Supreme Court stated that when the Court decides what is the right outcome for the child and whether it is proportionate in accordance with Article 8, what they are weighing the orders against is the harm or likely harm to the child if such an order was not made, so identifying with precision and accuracy and supporting by evidence exactly what the harm or likely harm to the child is and being able to prove it is an essential component of permanence planning. If the worker is not clear as to what the harm or risks are, how can they properly assess whether option A, B or C will be able to keep the child safe from such harm?

<u>The principle of least intervention</u>

Re O (Care or Supervision Order) [1996] 2 FLR 755, 760 created the principle of least intervention:

*"the court should begin with a preference for the less interventionist rather than the more interventionist approach. This should be considered to be in the better interests of the children … unless there are cogent reasons to the contrary."*

All things being equal, the Court should prefer to make no order than a Supervision Order and prefer to make a Supervision Order than a Care Order and prefer to make a Care Order than a Placement Order - they need solid reasons to make the more serious form of order. And it is for the person seeking such an order to satisfy the Court why the more serious form of order is required.

<u>The ‘right’ to be brought up by the birth family</u>

Until 2016, most professionals involved in care proceedings would have said that each child has the right to be brought up by their birth family.

Re W (A child) 2016 overturned that assumption.

http://www.bailii.org/ew/cases/EWCA/Civ/2016/793.html

The Court of Appeal criticised the child's Guardian and an independent social worker for having said that the child had a right to be brought up by grandparents (if they were suitable carers) rather than the prospective adopters that she was placed with.

> *"With respect to them, it is clear to me that both the Children's Guardian and the ISW fell into serious error by misunderstanding the need to evaluate the question of A's future welfare by affording due weight to all of the relevant factors and without applying any automatic "presumption" or "right" for a child to be brought up by a member of her natural family. The extracts from the reports of both of these witnesses indicate that they determined their recommendation for A on just that basis. Mrs Fairbairn repeatedly described the child as having a "right" to be brought up by the natural family where there is a viable placement available. The Guardian advised that adoption is not in A's best interests because the grandparents can provide her with a home. Putting the correct position in lay terms, the existence of a viable home with the grandparents should make that option "a runner" but should not automatically make it "a winner" in the absence of full consideration of any other factor that is relevant to her welfare; the error of the ISW and the Guardian appears to have been to hold that "if a family placement is a 'runner', then it has to be regarded as a 'winner'".*
>
> *The repeated reference to a 'right' for a child to be brought up by his or her natural family, or the assumption that there is a presumption to that effect, needs to be firmly and clearly laid to rest. No such 'right' or presumption exists. The only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life (in an adoption case) in a manner which is proportionate and compatible with the need to respect any ECHR Art 8 rights which are engaged.*
>
> *As the judgments in Re B, and indeed the years of case law preceding Re B, make plain, once the s 31 threshold is crossed the evaluation of a child's welfare in public law proceedings is determined on the basis of proportionality rather than by the application of presumptions. In that context it is not, in my view, apt to refer to there being a 'presumption' in favour of the natural family; each case falls to be determined on its own facts in accordance with the proportionate approach that is clearly described by the Supreme Court in Re B and in the subsequent decisions of this court."*

Placing a child, subject to a care order, at home with a parent

Practice varies in relation to this across the country. Some local authorities make regular use of Care Orders at home, in others, they are rarely seen at all. Those authorities that use this strategy argue for the benefit of having the power to remove the child if things go wrong. The High Court has looked at exactly what the restrictions

on use of such power is, and provided guidance in the case of Re A Father v SBC 2014: http://www.bailii.org/ew/cases/EWFC/HCJ/2014/6.html

The High Court judgement in this case concluded that:

> *"To my mind, where a care order has been granted on the basis of a care plan providing that the child should remain at home, a local authority considering changing the plan and removing the child permanently from the family is obliged in law to follow the same approach (as in Re B-S). It must have regard to the fact that permanent placement outside the family is to be preferred only as a last resort where nothing else will do. Before making its decision, it must rigorously analyse all the realistic options, considering the arguments for and against each option. This is an essential process, not only as a matter of good practice, but also because the local authority will inevitably have to demonstrate its analysis in any court proceedings that follow the change of care plan, either on an application for the discharge of the care order or an application for placement order under the Adoption and Children Act 2002. This process of rigorous analysis of all realistic options should be an essential feature of all long-term planning for children. And, as indicated by Munby J in Re G, the local authority must fully involve the parents in its decision-making process.*
>
> *While this process is being carried out, the child should remain at home under the care order, unless his safety and welfare requires that he be removed immediately. This is the appropriate test when deciding whether the child should be removed under an interim care order, pending determination of an application under s.31 of the Children Act: Re L-A (Children) [2009] EWCA Civ 822. The same test should also apply when a local authority's decision to remove a child placed at home under a care order has led to an application by the parents to discharge the order and the court has to decide whether the child should be removed pending determination of the discharge application. As set out above, under s.33(4) of the 1989, the local authority may not exercise its powers under a care order to determine how a parent may exercise his or her parental responsibility for the child unless satisfied it is necessary to do so to safeguard or promote the child's welfare. For a local authority to remove a child in circumstances where its welfare did not require it would be manifestly unlawful and an unjustifiable interference with the family's Article 8 rights.*
>
> *In submissions before the district judge, and before this court, it was argued on behalf of the local authority that its removal of D from the family home was lawful simply by reason of the care order. That submission is fundamentally misconceived. The local authority's removal of the child would only be lawful if necessary to safeguard or promote his welfare. Any other removal, or threatened removal, of the child is prima facie unlawful and an interference of the Article 8 rights of the parents and child. In such circumstances, the parents are entitled to seek an injunction under s.8 of the HRA."*

Planning for long-term fostering as an alternative to adoption

In the case of Re B-S 2013 which is dealt with in more depth later, the judgement found that if the Court is making a Placement Order the Court needs to be satisfied in the individual case that a plan of long-term fostering would not meet the child's needs and not be sufficient to do so.

Re V (Children) [2013] EWCA Civ 913 further clarified this issue:

http://www.familylawweek.co.uk/site.aspx?i=ed115290

i. *"Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely therefore to "feel" different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.*
ii. *Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is made, it is made for all time.*
iii. *Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) Children Act 1989). The contact position can, of course, be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions, where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the adoption order has been made, the natural parents normally need leave before they can apply for contact.*
iv. *Routine life is different for the adopted child in that once he or she is adopted, the local authority have no further role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example)."*

Placement orders and adoption

The Adoption and Children Act 2002 says that to make a Placement Order which authorises the local authority to place a child with prospective adopters, the Court must either have the consent of the parents or to dispense with their consent because the child's welfare requires it.

The law on adoption has developed through case law to a principle that 'adoption is the last resort' to be undertaken only where all other options for the child are ruled out.

This principle was emphasised by the European Court of Human Rights in the case of YC v UK 2012:

http://www.bailii.org/eu/cases/ECHR/2012/433.html

> “family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to ‘rebuild’ the family”

In Re B (a child) 2013 the Supreme Court subsequently introduced the concept of “proportionality” as a key feature in determining whether adoption is the right plan for a child, and formulated this test:

> *“an order compulsorily severing the ties between a child and her parents can only be made if "justified by an overriding requirement pertaining to the child's best interests". In other words, where nothing else will do”*

The Supreme Court was also clear that where Local Authorities seek a plan of adoption, they must demonstrate what efforts they have made to address the family’s problems and why a lesser form of intervention could not work.

In many cases, and particularly where the feared harm has not yet materialised and may never do so, it will be necessary to explore and attempt alternative solutions.

Re C and B [2001] 1 FLR 611, at para 34, underlined that it is necessary to explore and attempt alternative solutions where harm is feared but has not yet materialised

> *“Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child.”*

Both judicial practice and local authorities have been criticised in relation to adoption.

The Court of Appeal made this detailed and complex judgement in Re B-S 2013:

http://www.familylawweek.co.uk/site.aspx?i=ed117048

> *“22. The language used in Re B is striking. Different words and phrases are used, but the message is clear. Orders contemplating non-consensual adoption – care orders with a plan for adoption, placement orders and adoption orders – are "a very extreme thing, a last resort", only to be made where "nothing else will do", where "no other course [is] possible in [the child's] interests", they are "the most extreme option", a "last resort – when all else fails", to be made "only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do": see Re B paras 74, 76, 77, 82, 104, 130, 135, 145, 198, 215.*
>
> *23. Behind all this there lies the well-established principle, derived from s 1(5) of the 1989 Act, read in conjunction with s 1(3)(g), and now similarly embodied in s 1(6) of the 2002 Act, that the court should adopt the 'least interventionist' approach. As Hale J, as she then was, said in Re O (Care or Supervision Order) [1996] 2 FLR 755, 760:*

*"the court should begin with a preference for the less interventionist rather than the more interventionist approach. This should be considered to be in the better interests of the children … unless there are cogent reasons to the contrary."*

*24. Linked with this is the vitally important point made by Wall LJ in Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625, para 126:*

*"Section 52(1) is concerned with adoption – the making of either a placement order or an adoption order – and what therefore has to be shown is that the child's welfare 'requires' adoption as opposed to something short of adoption. A child's circumstances may 'require' statutory intervention, perhaps may even 'require' the indefinite or long-term removal of the child from the family and his or her placement with strangers, but that is not to say that the same circumstances will necessarily 'require' that the child be adopted. They may or they may not. The question, at the end of the day, is whether what is 'required' is adoption."*

*25. Implicit in all this are three important points emphasised by Lord Neuberger in Re B.*

*26. First (Re B paras 77, 104), although the child's interests in an adoption case are paramount, the court must never lose sight of the fact that those interests include being brought up by the natural family, ideally by the natural parents, or at least one of them, unless the overriding requirements of the child's welfare make that not possible.*

*27. Second (Re B para 77), as required by section 1(3)(g) of the 1989 Act and section 1(6) of the 2002 Act, the court "must" consider all the options before coming to a decision. As Lady Hale said (para 198) it is "necessary to explore and attempt alternative solutions". What are these options? That will depend upon the circumstances of the particular cases. They range, in principle, from the making of no order at one end of the spectrum to the making of an adoption order at the other. In between, there may be orders providing for the return of the child to the parent's care with the support of a family assistance order or subject to a supervision order or a care order; or the child may be placed with relatives under a residence order or a special guardianship order or in a foster placement under a care order; or the child may be placed with someone else, again under a residence order or a special guardianship order or in a foster placement under a care order. This is not an exhaustive list of the possibilities; wardship for example is another, as are placements in specialist residential or healthcare settings. Yet it can be seen that the possible list of options is long. We return to the implications of this below.*

*28. Third (Re B para 105), the court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer. So "before making an adoption order … the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support." In this*

*connection it is worth remembering what Hale LJ had said in Re O (Supervision Order) [2001] EWCA Civ 16, [2001] 1 FLR 923, para 28:*

*"It will be the duty of everyone to ensure that, in those cases where a supervision order is proportionate as a response to the risk presented, a supervision order can be made to work, as indeed the framers of the Children Act 1989 always hoped that it would be made to work. The local authorities must deliver the services that are needed and must secure that other agencies, including the health service, also play their part, and the parents must co-operate fully."*

*That was said in the context of supervision orders but the point is of wider application.*

*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.*

*Adoption – our concerns*

*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.*

*31. In the last ten days of July 2013 very experienced family judges in the Court of Appeal had occasion to express concerns about this in no fewer than four cases: Re V (Children) [2013] EWCA Civ 913 (judgment of Black LJ), Re S, K v The London Borough of Brent [2013] EWCA Civ 926 (Ryder LJ), Re P (A Child) [2013] EWCA Civ 963 (Black LJ) and Re G (A Child) [2013] EWCA Civ 965 (McFarlane LJ). In the last of these, McFarlane LJ was explicit (para 43):*

*"The concerns that I have about the process in this case are concerns which have also been evident to a greater or lesser extent in a significant number of other cases; they are concerns which are now given sharper focus following the very clear wake-up call given by the Supreme Court in Re B."*

*32. It is time to draw the threads together and to spell out what good practice, the 2002 Act and the Convention all demand.*

*Adoption – essentials*

*33. Two things are essential – we use that word deliberately and advisedly – both when the court is being asked to approve a care plan for adoption and when it is being asked to make a non-consensual placement order or adoption order.*

*Adoption – essentials: (i) proper evidence*

*34. First, 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. As Ryder LJ said in Re R (Children) [2013] EWCA Civ 1018, para 20, what is required is:*

*evidence of the lack of alternative options for the children and an analysis of the evidence that is accepted by the court sufficient to drive it to the conclusion that nothing short of adoption is appropriate for the children."*

*The same judge indicated in Re S, K v The London Borough of Brent [2013] EWCA Civ 926, para 21, that what is needed is:*

*"An assessment of the benefits and detriments of each option for placement and in particular the nature and extent of the risk of harm involved in each of the options".*

*McFarlane LJ made the same point in Re G (A Child) [2013] EWCA Civ 965, para 48, when he identified:*

*"the need to take into account the negatives, as well as the positives, of any plan to place a child away from her natural family".*

*We agree with all of this.*

*35. Too often this essential material is lacking. As Black LJ said in Re V (Children) [2013] EWCA Civ 913, para 88:*

*"I have searched without success in the papers for any written analysis by local authority witnesses or the guardian of the arguments for and against adoption and long term fostering … It is not the first time that I have remarked on an absence of such material from the evidence, see Plymouth CC v G (children) [2010] EWCA Civ 1271. Care should always be taken to address this question specifically in the evidence/ reports and that this was not done here will not have assisted the judge in his determination of the issue."*

*In the Plymouth case she had said this (para 47):*

*"In some respects the reports of the guardian and the social worker, and the social worker's statement, are very detailed, giving information about health and likes and dislikes, wishes and feelings. However there is surprisingly little detail about the central issue of the type of placement that will best meet the children's needs … In part, this may be an unfortunate by-product of the entirely proper use, by both witnesses, of the checklist of factors and, in the case of the social worker's placement report, of the required pro forma. However, the court requires not only a list of the factors that are relevant to the central decision but also a narrative account of how they fit together, including an analysis of the pros and cons of the various orders that might realistically be under consideration given the circumstances of the children, and a fully reasoned recommendation."*

*36. Black LJ has not altered the views that she expressed on these earlier occasions and the other members of the court agree with every word of them. We*

*draw attention in particular 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 and the requirements of Articles 6 and 8 of the 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, albeit in a very different context, in Re A (Male Sterilisation) [2000] 1 FLR 549, 560.*

*37. It is particularly disheartening that Black LJ's words three years ago in the Plymouth case seem to have had so little effect.*

*38. Consider the lamentable state of affairs described by Ryder LJ in Re S, K v The London Borough of Brent [2013] EWCA Civ 926, where an appeal against the making of a care order with a plan for adoption was successful because neither the evidence nor the judge's reasoning was adequate to support the order. It is a lengthy passage but it merits setting out almost in full (paras 22-26):*

> *"22 … what was the evidence that was available to the judge to support her conclusion? … Sadly, there was little or no evidence about the relative merits of the placement options nor any evidence about why an adoptive placement was necessary or feasible.*
>
> *23 The allocated social worker in her written statement recommended that [S] needed:*
>
> *"a permanent placement where her on-going needs will be met in a safe, stable and nurturing environment. [S]'s permanent carers will need to demonstrate that they are committed to [S], her safety, welfare and wellbeing and that they ensure that she receives a high standard of care until she reaches adulthood*
>
> *Adoption will give [S] the security and permanency that she requires. The identified carers are experienced carers and have good knowledge about children and the specific needs of children that have been removed from their families …"*
>
> *24 With respect to the social worker … that without more is not a sufficient rationale for a step as significant as permanent removal from the birth family for adoption. The reasoning was in the form of a conclusion that needed to be supported by evidence relating to the facts of the case and a social worker's expert analysis of the benefits and detriments of the placement options available. Fairness dictates that whatever the local authority's final position, their evidence should address the negatives and the positives relating to each of the options available. Good practice would have been to have heard evidence about the benefits and detriments of each of the permanent placement options that were available for S within and outside the family.*
>
> *25 The independent social worker did not support adoption or removal but did describe the options which were before the court when the mediation opportunity was allowed:*
>
> *"Special Guardianship Order: This is the application before the Court and which would afford [S] stability, in terms of remaining with the same primary carer and*

*the opportunity to be raised within her birth family. I do not consider that the situation within the family is suitable at present for this Order to be made.*

*Adoption: [S] could be placed with a family where she should experience stability and security without conflict. This may be the best option for [S] if current concerns cannot be resolved in a timely manner."*

*26 In order to choose between the options the judge needed evidence which was not provided. The judge's conclusion was a choice of one option over another that was neither reasoned nor evidenced within the proceedings. That vitiated her evaluative judgment which was accordingly wrong."*

*39. Most experienced family judges will unhappily have had too much exposure to inadequate material as that described here by Ryder LJ.*

*40. Such practice is simply unacceptable in a forensic context where the issues are so grave and the stakes, for both child and parent, so high.*

*Adoption – essentials: (ii) adequately reasoned judgments*

*41. The second thing that is essential is an adequately reasoned judgment by the judge. We have already referred to Ryder LJ's criticism of the judge in Re S, K v The London Borough of Brent [2013] EWCA Civ 926. That was on 29 July 2013. The very next day, in Re P (A Child) [2013] EWCA Civ 963, appeals against the making of care and placement orders likewise succeeded because, as Black LJ put it (para 107):*

*"the judge … failed to carry out a proper balancing exercise in order to determine whether it was necessary to make a care order with a care plan of adoption and then a placement order or, if she did carry out that analysis, it is not apparent from her judgments. Putting it another way, she did not carry out a proportionality analysis."*

*She added (para 124): "there is little acknowledgment in the judge's judgments of the fact that adoption is a last resort and little consideration of what it was that justified it in this case."*

*42. The judge must grapple with the factors at play in the particular case and, to use Black LJ's phrase (para 126), give "proper focussed attention to the specifics".*

*43. In relation to the nature of the judicial task we draw attention to what McFarlane LJ said in Re G (A Child) [2013] EWCA Civ 965, paras 49-50:*

*"In most child care 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.*

*The linear approach … 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."*

*We need not quote the next paragraph in McFarlane LJ's judgment, which explains in graphic and compelling terms the potential danger of adopting a linear approach.*

*44. 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 (see Re G para 51) multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option. To quote McFarlane LJ again (para 54):*

*"What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."*

*45. McFarlane LJ added this important observation (para 53) which we respectfully endorse:*

*"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.*

*46. These matters 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. And they are important in setting the context against which we have to determine the specific question we have to decide in relation to Re W (Adoption: Set Aside and Leave to Oppose) [2010] EWCA Civ 1535, [2011] 1 FLR 2153."*

Following the Re B and Re B-S decisions, several adoption cases were successfully appealed and re-heard. It became increasingly difficult to satisfy a Court that adoption was the right plan unless every other conceivable option for the child was ruled out.

Over time, subsequent judgements have added further nuance to this principle.

In Re R 2014 a judgement in the Court of Appeal spelled out:

http://www.familylawweek.co.uk/site.aspx?i=ed138081

> *"44. I wish to emphasise, with as much force as possible, that Re B-S was not intended to change and has not changed the law. Where adoption is in the child's best interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family at all costs.…*
>
> *52. At the end of the day, of course, the court's paramount consideration, in accordance with section 1(2) of the 2002 Act, is the child's welfare "throughout his life." In this regard I should refer to what Macur LJ said in Re M-H, para 8, words with which I respectfully agree:*
>
> > *"I note that the terminology frequently deployed in arguments to this court and, no doubt to those at first instance, omit a significant element of the test as framed by both the Supreme Court and this court, which qualifies the literal interpretation of "nothing else will do". That is, the orders are to be made "only in exceptional circumstances and where motivated by the overriding requirements pertaining to the child's best interests." (See In Re B, paragraph 215). In doing so I make clear that this latter comment is not to seek to undermine the fundamental principle expressed in the judgment, merely to redress the difficulty created by the isolation and oft subsequently suggested interpretation of the words "nothing else will do" to the exclusion of any "overriding" welfare considerations in the particular child's case."*
>
> *53. Likewise of importance is what Black LJ said in Re M, paras 31-32:*
>
> > *"31 … steps are only to be taken down the path towards adoption if it is necessary.*
> >
> > *32 What is necessary is a complex question requiring an evaluation of all the circumstances. As Lord Neuberger said at §77 of Re B, speaking of a care order which in that case would be very likely to result in the child being adopted:*
> >
> > *"It seems to me inherent in section 1(1) [Children Act 1989] that a care order should be a last resort, because the interests of the child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests."*
> >
> > *I emphasise the last phrase of that passage ("in her interests") because it is an important reminder that what has to be determined is not simply whether any other course is possible but whether there is another course which is possible and in the child's interests. This will inevitably be a much more sophisticated question and entirely dependent on the facts of the particular case. Certain*

*options will be readily discarded as not realistically possible, others may be just about possible but not in the child's interests, for instance because the chances of them working out are far too remote, others may in fact be possible but it may be contrary to the interests of the child to pursue them."*

*54. I repeat and emphasise: At the end of the day, the court's paramount consideration, now as before, is the child's welfare "throughout his life." …*

*58. The nature of that exercise has been helpfully illuminated by Ryder LJ in CM, para 33. Put more shortly, by Ryder LJ himself, in Re Y, para 24:*

*"The process of deductive reasoning involves the identification of whether there are realistic options to be compared. If there are, a welfare evaluation is required. That is an exercise which compares the benefits and detriments of each realistic option, one against the other, by reference to the section 1(3) welfare factors. The court identifies the option that is in the best interests of the children and then undertakes a proportionality evaluation to ask itself the question whether the interference in family life involved by that best interests option is justified."*

*I respectfully agree with that, so long as it is always remembered that, in the final analysis, adoption is only to be ordered if the circumstances meet the demanding requirements identified by Baroness Hale in Re B, paras 198, 215.*

*59. I emphasise the words "realistically" (as used in Re B-S in the phrase "options which are realistically possible") and "realistic" (as used by Ryder LJ in the phrase "realistic options"). This is fundamental. Re B-S does not require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage in the proceedings, can legitimately be discarded as not being realistic. Re B-S does not require that every conceivable option on the spectrum that runs between 'no order' and 'adoption' has to be canvassed and bottomed out with reasons in the evidence and judgment in every single case. Full consideration is required only with respect to those options which are "realistically possible".*

*60. As Pauffley J said in Re LRP (A Child) (Care Proceedings: Placement Order) [2013] EWHC 3974 (Fam), para 40, "the focus should be upon the sensible and practical possibilities rather than every potential outcome, however far-fetched." And, to the same effect, Baker J in Re HA (A Child) [2013] EWHC 3634 (Fam), para 28:*

*"rigorous analysis and comparison of the realistic options for the child's future … does not require a court in every case to set out in tabular format the arguments for and against every conceivable option. Such a course would tend to obscure, rather than enlighten, the reasoning process."*

*"Nothing else will do" does not mean that "everything else" has to be considered.*

*61. What is meant by "realistic"? I agree with what Ryder LJ said in Re Y, para 28:*

*"Realistic is an ordinary English word. It needs no definition or analysis to be applied to the identification of options in a case."*

Re W 2016. involves a child who had been placed with prospective adopters and then the grandparents wanted to challenge the adoption application and to care for the child themselves. At the initial hearing, the independent social worker and the child's Guardian both gave evidence to the effect that the grandparents would be suitable carers and therefore the child had a right to be placed with them rather than adopted. The Court of Appeal subsequently disagreed.

> *"Since the phrase "nothing else will do" was first coined in the context of public law orders for the protection of children by the Supreme Court in Re B, judges in both the High Court and Court of Appeal have cautioned professionals and courts to ensure that the phrase is applied as described by Baroness Hale in paragraph 215 of her judgment:*
>
> > *"We all agree that an order compulsorily severing the ties between a child and her parents can only be made if "justified by an overriding requirement pertaining to the child's best interests". In other words, the test is one of necessity. Nothing else will do."*
>
> *The phrase may be considered meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare.*
>
> > *As the judgments in Re B, and indeed the years of case law preceding Re B, make plain, once the s 31 threshold is crossed the evaluation of a child's welfare in public law proceedings is determined on the basis of proportionality rather than by the application of presumptions. In that context it is not, in my view, apt to refer to there being a 'presumption' in favour of the natural family; each case falls to be determined on its own facts in accordance with the proportionate approach that is clearly described by the Supreme Court in Re B and in the subsequent decisions of this court. '*
> >
> > *As Mr Feehan helpfully observed in his closing submissions, it is all very well to purport to undertake a balancing exercise, but a balance has to have a fulcrum and if the fulcrum is incorrectly placed towards one or other end of that which is to be weighed, one side of the analysis or another will be afforded undue, automatic weight. Taking that point up from where Mr Feehan left it, in proceedings at the stage prior to making a placement for adoption order the balance will rightly and necessarily reflect weight being afforded to any viable natural family placement because there is no other existing placement of the child which must be afforded weight on the other side of the scales. Where, as here, time has moved on and such a placement exists, and is indeed the total reality of the child's existence, it cannot be enough to decide the overall welfare issue simply by looking at the existence of the viable family placement and nothing else"*