



Neutral Citation Number: [2021] EWCA Civ 1212

Case No: B4/2021/0596

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LEEDS
Her Honour Judge Campbell
LS19C00837

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 August 2021

Before :

LORD JUSTICE LEWISON
LORD JUSTICE PETER JACKSON
and
SIR CHRISTOPHER FLOYD

F-S (A Child: Placement Order)

Alex Taylor (instructed by **King Street Solicitors LLP**) for the **Appellant Mother**
Lucy Sowden (instructed by **City of Wakefield Council**) for the **Respondent Local Authority**
Natalia Levine (instructed by **Brearley's Solicitors**) for the **Respondent Child by their**
Children's Guardian

Hearing date : 29 July 2021

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be at 10:30am on Monday, 2 August 2021.

Lord Justice Peter Jackson :

Introduction

1. After hearing this appeal, we informed the parties that it would be dismissed. These are my reasons for agreeing with that decision.
2. The appeal is from a placement order made on 8 March 2021 in relation to B, a boy now approaching his sixth birthday. In making the order, Her Honour Judge Campbell ('the Judge') dispensed with the consent of B's mother, who now appeals with permission granted by Baker LJ.
3. B is a lovable child with global developmental delay, as to which the outlook is uncertain. He is described by his Children's Guardian as requiring a high level of consistent parenting. It is unclear whether he will be able to live independently as an adult. He is the eldest of his mother's four children. His father has played no part in his life. The same is true for his half-brother A (4). His other half-brother C (2) and his half-sister D (1) are the children of the mother and a Mr S.
4. Care proceedings in relation to all four children began in November 2019. They were removed from the mother and Mr S and placed in foster care, B being placed on his own. The Judge's decision after a final hearing lasting eight days was that:
 - (1) B was made subject to a placement order with a view to an 'open' adoption by his foster carers. The plan is for him to have ongoing sibling contact each month and contact with his mother every two months.
 - (2) A was made subject to a placement order with a view to adopters being found for him.
 - (3) C and D being placed with their paternal grandparents under a care order.
5. The mother's appeal relates to B only. However, acting as a litigant in person, she almost immediately applied to revoke the placement order in relation to A. On 26 April, the Judge dismissed that application and on 17 June, permission to appeal was refused by Baker LJ.
6. There is no dispute about the background so far as it relates to the appeal. The children were removed from the mother and Mr S in November 2019 as a result of domestic violence and unacceptable home conditions. The three younger children had unexplained bruising and at the hearing the Judge found that Mr S was responsible for causing facial bruising to A. Interim care orders were made.
7. B has thrived with his foster carers. He has a strong relationship with them and with his mother and siblings, whom he has been seeing weekly.
8. In 2020, the local authority's original plan was to reunite B and A with their mother. She had engaged with courses on domestic abuse and in June 2020 she had apparently ended her relationship with Mr S. However, in September 2020 it was discovered that the relationship had secretly been continuing and the rehabilitation plan was therefore abandoned. The Judge found that the mother and Mr S had purposefully deceived the local authority and the court.

The judgment

9. The final hearing began in January 2021, when four days of evidence was heard. It was then adjourned to March 2021 for further police disclosure. A written judgment running to 50 pages was delivered on 8 March 2021. It contains a methodical account of the history, the law, the evidence, and the decisions reached. Most of its contents relate to matters with which we are not concerned. I therefore focus on those passages that underlie the decision about B.
10. At [16-23] the Judge gave herself a careful legal self-direction, about which there is, and could be, no complaint. In the course of it, she set out the proper approach to care plans involving adoption:

“22. There have been a number of judgments setting out the approach which the court should take in cases where the local authority’s care plan is one of adoption. The case of *Re BS* [2013] EWCA Civ 1146 gave clear and firm guidance in cases involving adoption and reflected the words of the Supreme Court in *Re B* [2013] UKSC 33. In this particular case I remind myself of the following;

(i) The children’s welfare is paramount and in considering the outcome I must have regard to the welfare checklist at section 1(3) Children Act 1989.

(ii) The case of *Re C* [2013] EWCA Civ 1257 emphasises the need for the court to consider, in deciding whether to approve a care plan of adoption (before moving to consider the placement order), not only the welfare checklist at section 1(3) of the Children Act 1989 but also the enhanced welfare requirements in the Adoption and Children Act 2002 section 1 and section 52.

(iii) 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.

(iv) Adoption is ‘a very extreme thing’, ‘a last resort’. Placement orders should 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’, where no other course is possible in the child’s interest.

(v) Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms is engaged. The overarching principle remains as explained by Hale LJ, as she then was, in *Re C and B* [2001] 1 FLR 611, para 34:

“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.”

An order should only be made if it is necessary and proportionate.

(vi) As set out at paragraph 23 of *Re BS* the well-established principle derived from s1(5) of the Children Act 1989 read in conjunction with s 1(3)(g), and embodied in s 1(6) of the Adoption and Children Act 2002 Act is that the court should adopt the ‘least interventionist’ approach.

(vii) 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.

(viii) *Re BS* also emphasises that there must be proper evidence from the local authority and 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. There needs to be a ‘global holistic evaluation’ by the court evaluating all the options, taking into account all the negatives and positives of each.

(ix) Section 52(1)(b) of the Adoption and Children Act 2002 provides that the consent of a parent with capacity can be dispensed with only if the welfare of the child “requires” this.”

11. The Judge then reviewed the evidence and made her findings of fact. She noted that on 7 January 2021 the mother had conceded in a statement for the first time that she could not resume the care of B and A ‘at this time’ and proposed that they be cared for by her mother, the maternal grandmother, who had been subject to two negative social work assessments. If that could not happen, the mother opposed adoption for B and A and wanted them to remain in foster care so that she might resume care of all four children when she had completed further work.
12. The Judge gave credit to the mother for the difficult decision not to seek the boys’ return, but she noted that she and Mr S were untruthful and that it was very difficult to conclude what exactly had happened in respect of many of the incidents between them. They had sought to minimise the domestic abuse and the impact it had had on the children. In a passage that is in my view of importance for the final decision, the Judge made these findings about the mother’s current position:

“104. Although the mother does not currently seek to care for the children, given this very recent change in stance it is important

that some comments are made about the mother's decision making in these proceedings. The mother's decision to resume the relationship with the father shortly after separating demonstrates her inability to prioritise the children above her relationship with the father for a number of reasons:

(1) Mother was aware that it would jeopardise the plan for rehabilitation and one of the options being explored for the children was permanence outside the family. The stakes could not have been higher.

(2) The mother told me in oral evidence that she intended to tell the social worker that she had been in an ongoing relationship with father once A and B were fully returned to her care. I reject that assertion entirely. I am satisfied that the only reason the subterfuge between the parents and extent of their deceit came to light was a result of the father breaking into the mother's property and being reported by the neighbour. I am satisfied the volatile relationship between the parents would have continued if the children had been returned to mother's care thus exposing the children once again to significant harm. In any event the mother conceded that she knew that if the children were fully rehabilitated to her care and she then told the social worker that this would result in A and B's immediate removal which would have had a devastating impact on their emotional well-being.

(3) Mother was aware at the time of the separation that the medical expert's evidence was that A's injuries were likely to be as a result of a slap mark. She therefore knew that it was likely that father had assaulted A.

(4) The mother tells me that as a result of an incident of domestic violence in July 2020 when she once again challenged father about A's injuries that she was of the clear view from that time that father had deliberately inflicted these injuries to A. She did not report this to the court or any of the professionals at the time and continued her relationship with father. The mother chose to prioritise her own needs and resumed the relationship.

(5) At the time of the rehabilitation process the mother had undertaken a huge amount of educative work in respect of domestic abuse, had a lot of support from the social worker, seeing her numerous times a week and support from her legal team. Despite all this support she could not separate from father.

105. I agree with the Guardian and the social worker that the mother has an awful lot more work to do than she has acknowledged and that this work will take some time. There are real issues relating to her vulnerability to unhealthy relationships, her understanding of domestic violence and abuse, her ability to work openly and honestly and her ability to

understand and meet the needs of her children and protect them from harm. In my judgement there are likely to be issues from her own childhood and her relationship with her own parents to address.”

13. The Judge then set out her welfare analysis in respect of each of the children. She considered the statutory welfare checklists in relation to B and A and ruled out a placement with the maternal grandmother. She identified the only realistic options for B as being on the one hand long-term fostering with a view to a special guardianship order in the future, and on the other hand adoption. She then set out a balance sheet of the advantages and disadvantages of each option:

“Adoption for B - advantages

132. The following advantages are apparent;

(i) The prospective adopters for B are his current carers who are offering a high standard of care for B and no-one suggests they are not in a position to meet his needs fully. The social worker told me in oral evidence that she has had several conversations with B’s foster carer about the fact that they wish to adopt B in preference to being his long term foster carers or his special guardians. The Guardian also advised me that she is clear that she has explained the difference between special guardianship order and adoption order. They have a strong desire to adopt him and feel this is the most appropriate order.

(ii) It is the most permanent form of order and the only option that extends beyond childhood.

(iii) B has global development delay, his needs may well extend beyond childhood and thus the permanency provided by adoption and ‘forever’ nature of adoption has a particular benefit in this case.

(iv) Adoption has greater stability than long-term foster care with a much lower risk of placement breakdown albeit I recognise in this case it would be the same proposed carer.

(v) Adoption would mean that B was no longer a looked after child. Being a looked after child means that they would be subject to statutory intervention, requiring social work visits, authorisation for particular activities and interference in family life.

(vi) If an adoption order was made in due course B would not be vulnerable to further proceedings unlike the situation if there were a final care order or special guardianship order.

Adoption for B - Disadvantages

133. The disadvantages are as follows;

(i) Cease to be part of his birth family legally if adopted albeit the plan is for continued contact.

(ii) Adoption is no panacea and adopters face all the vicissitudes of life encountered by other parents with the added complication that they are caring for a child who is not their birth child. I also accept that the fact that a child is not brought up by its birth family can also cause that child emotional harm. Adoptions can and do breakdown, sometimes with disastrous consequences. However B has been with his current carers for over 15 months and they are totally committed to him, so much so that they want him to be a part of their family for the rest of his life.

Long-term foster care for B

134. The advantages of long term fostering under a care order is that it does not sever the legal relationships between B and his birth family. Long term fostering would still allow B's current carers to care for him and contact is proposed whatever the legal nature of the placement. However a final care order would mean that B's foster carers did not have parental responsibility, it does not offer the same kind of permanence, has the continued intrusion of the local authority and makes the placement more vulnerable as it is likely that the mother will make applications in the future for B to be returned to her care. It does not extend beyond childhood.

Special guardianship order for B

135. There is no application before the court for special guardianship order and the necessary reports have not been filed. However it was properly explored by mother's counsel as a potential outcome for B instead of adoption and is referred to as an alternative in his care plan. This type of order would mean that B's carers would have enhanced parental responsibility and would mean that he would not be a looked after child with the intrusion that brings in family life. B would still be vulnerable to proceedings by his mother in the future and this order would not extend beyond his childhood. His current carers also want to adopt B rather than be his special guardians."

14. The Judge then came to her decision in this way:

"Conclusion re placement for B

136. Having weighed the above factors I consider that the following factors, taken together, lead me to conclude that the making of a placement order for B is the one that best meets his welfare needs:

(1) B has global developmental delay and it is considered that this may cause difficulties for B beyond his childhood.

(2) A special guardianship order or final care order only lasts until B is 18 whereas adoption would be for all of B's life;

(3) Adoption would cement legally in a permanent way the relationship between B and his foster carers, they would become his adoptive parents and not simply his foster carers or special guardians.

(4) Although the mother recognises that the foster carers offer B a high level of care she is not able to agree to his current placement there, her preference being that he be moved to the care of maternal grandmother and in time her desire being that he is rehabilitated to her own care. This therefore presents potential instability for B and uncertainty.

(5) If the plan was simply long term foster care this would mean that B could experience further disruption in the future and would have the interference of the local authority in his family life.

PLACEMENT ORDER

137. On the application for a placement order, the court applies section 1 of the Adoption and Children Act 2002. I have already had regard above to the checklist of factors to be taken into account in this case set out in section 1(4) of the 2002 Act and concluded that A and B's welfare needs throughout [sc. their lives] can only be met by their placement for adoption.

138. The making of a placement order enables the local authority to progress the plan for adoption. Under section 21(3) of the 2002 Act, a court may not make a placement order unless satisfied either that the parent has consented to the child being placed for adoption or that his or her consent should be dispensed with. In this case only mother has parental responsibility. She does not consent to either of them being placed for adoption. In light of my conclusions in this case I dispense with their consent on the basis that the welfare of each child requires it."

The appeal

15. The grounds of appeal assert that the making of a placement order was wrong in law for three reasons:

"1. In the circumstances of the case where the Local Authority only contemplates placement with the current foster carers who are prepared to continue to care for the child without a placement order, it was unreasonable to conclude that a placement order

was necessary and the dispensing of parental consent was required.

2. The Judge applied the wrong test at paragraph 136, indicating what course would best meet B's needs rather than setting out why no other course was possible.

3. The reasons set out in the judgment for making the order are insufficient to demonstrate that a placement order was required."

16. In his argument before us, Mr Alex Taylor accepted that the Judge directed herself correctly in law and that a care order was inevitable. He agreed that the realistic choice lay between making a final order on the basis of the care plan for adoption or in adjourning under an interim order to allow for a change of care plan involving an application for a special guardianship order. Mr Taylor's central submission was that the Judge was wrong to prefer adoption to special guardianship because the latter, less interventionist, order would offer equivalent benefits to B, and that the Judge gave insufficient reasons for preferring the former. All in all, the stringent test of necessity was not met.
17. Mr Taylor criticised the Judge's analysis at paragraphs 132-133:
- (1) The strong preference of the foster carers for adoption should not have been given much, if any, weight. Since they are prepared to continue to care for B the environment he will be brought up in will be substantially the same and a placement order is not necessary.
 - (2) The extent to which B's developmental delay will affect his later life is speculative. If this was to be relied on to show that B would have lifelong needs that could only be met through adoption, greater clarity was needed in the form of expert evidence. If it became appropriate, a placement order could be sought at a future date. As it is, B may benefit from his mother having the right to be involved in decisions throughout his childhood. The plan for continued contact does not mitigate the loss of her parental responsibility, and it is uncertain whether a contact order will in fact be made alongside an adoption order.
 - (3) The greater stability offered by adoption is not relevant in this case. The mother does not doubt the foster carer's commitment to B, irrespective of whether a placement order is made. What is welfare, Mr Taylor rhetorically asks, if not the care one gives to a child?
 - (4) It is right that adoption would mean that B would cease to be a looked after child, but that is not a justification for adoption.
 - (5) The suggestion that B would be vulnerable to future proceedings if an adoption order is not made is not a good reason for adoption. The mother would only succeed in discharging the care order for B if she could show that it was no longer in his best interests for him to be cared for by the local authority. If the current carers became special guardians, then the mother could only apply to discharge the order with leave of the court. A special guardianship order could be bolstered by an order under Children Act 1989 s. 91(14).

18. As to Ground 2, the Judge applied the wrong test. Deciding that a placement order best meets a child's needs does not indicate that the test of necessity has been met. The judgment needs to show why nothing less will do.
19. On Ground 3, the Judge gave insufficient consideration to the advantages of special guardianship, and her reasons for rejecting it were inadequate.
20. In response, Ms Lucy Sowden for the local authority argues that in the individual case the most interventionist order may be the one that is most appropriate for the child. In this case, the factors that underpinned the Judge's choice of adoption are B's particular needs and the vulnerability of any lesser order to challenge by the mother at any time. Her immediate challenge to the order in A's case shows that nothing short of adoption can achieve real permanence for B. The judge applied the right test, and her reasoning was clear. If any amplification was in fact necessary, it could have been requested.
21. B's Children's Guardian, through Ms Natalia Levine supports those submissions. The Judge was entitled to find that B needs a carer who can act autonomously within a placement that cannot be challenged.

Conclusion

22. This was a notably careful decision in which the Judge directed herself correctly in law and made a considered assessment of the particular features of B's situation and the form of order that was most appropriate for his future. Such decisions are extremely hard to unsettle on appeal: see the observations of my Lord, Lord Justice Lewison in *Re A (Children)* [2015] EWCA Civ 1254 at [37-39]. In my view the present decision comfortably survives Mr Taylor's thoughtful challenges.
23. First, I do not accept that the Judge made any error of law. If the statement at paragraph 136, where a placement order for B is described as the order "that best meets his welfare needs" reflected a process whereby the Judge compared the options like-with-like, it would indeed be an error of approach. However, a specialist judge can be assumed to know how to approach a familiar task unless the contrary is demonstrated, and an isolated turn of phrase, even at a key stage in the reasoning, must be seen in the context of the judgment as a whole. Here the Judge undoubtedly applied the correct test. She accepted the evidence of the Guardian, who had advised that "there is no other option" that would meet B's needs. She specifically directed herself at each individual subparagraph 22 (iii)-(ix) that a plan for adoption can only be approved if it is necessary; to take one example, at paragraph 22(iv), she affirmed that placement orders should only be made where 'nothing else will do'. Moreover, the statement at paragraph 136 is cheek by jowl with the statements at paragraph 137 ("B's welfare needs throughout his life can *only* be met by his placement for adoption") and paragraph 138 ("I dispense with their consent on the basis that the welfare of each child *requires* it") – my emphases.
24. Second, I do not accept that the Judge's reasons were inadequate. She meticulously assessed the advantages and disadvantages of the competing options, identifying the factors bearing on her assessment and explaining why certain factors prevailed. If further explanation was required (and I do not believe it was), it could have been requested. It was in the end for the Judge, having immersed herself in the evidence, to

determine where it led her and, unless it can be shown that her assessment went seriously awry, there matters rest.

25. Third, I cannot accept Mr Taylor's central arguments, recorded at paragraph 17 above.

- (1) The fact that B's future carers want to adopt him is of course not decisive, but it was (as Mr Taylor accepted) relevant to B's welfare. The Judge was accordingly entitled to consider it as a factor in favour of adoption and to give it some weight. Had the carers not wanted to adopt, that would have been relevant, and had they only been prepared to care for him as an adopted child, that would have been relevant too. The argument that their willingness to continue to care for B without a placement order demonstrates that a placement order is not necessary is a *non sequitur*. The court's statutory assessment cannot be dictated, though it may be influenced, by the attitudes of individuals.
- (2) The Judge was clearly entitled to consider that, given B's developmental delay and his difficult start in life, it is essential that he receives the very best possible parenting, starting now and continuing for the rest of his childhood. It is obviously bad for him to postpone a decision about his status and in the light of his likely complex needs there is every reason why his permanent carers should have the freedom to make decisions for him without being answerable to the local authority or to the mother.
- (3) The argument that the greater stability offered by adoption is not relevant in this case is misguided. A child's welfare is not measured only by the care that he will receive, but also by what Pauffley J described in *Re LRP (A Child) (Care Proceedings - Placement Order)* [2013] EWHC 3974 (Fam) as "the enduring sense of belonging within a family". That sense of belonging is not 'transactional' but arises from the mutual commitment between adoptive parents and children in those cases where adoption is appropriate. Here, the Judge was absolutely entitled to regard it as a factor of critical importance.
- (4) Special guardianship also requires a high degree of commitment, but it is not irreversible. In this case it would require further litigation to establish it, and it might be unsettled by future litigation at any time. As the Judge explicitly found at paragraph 134, it is likely that the mother will make applications in the future for B to be returned to her care. That is a factor of real significance where the mother (a) wanted B and A returned to her as recently as January 2021, (b) wanted B and A placed with her mother as recently as March 2021, and (c) immediately tried to challenge the placement order in A's case. The seeds of disruptive future challenges to B's placement are plain to see. The fact that Mr Taylor raised the prospect of an order being made under s. 91(14) alongside a special guardianship order so as to restrict the mother's ability to apply as of right for s.8 orders (other than a 'live with' order), emphasises the real difference between special guardianship and adoption.
- (5) It is also significant that an open adoption is hoped for. Nowadays it is well recognised that the traditional model of closed adoption without contact is not the only arrangement that meets the needs of certain adopted children. If the argument made against this placement order were sound, it is difficult to envisage a case in which open adoption could occur without parental consent. B's

relationship with his mother and siblings is of importance to him and there is an opportunity for that to be preserved. The Judge was entitled to regard that as counting for more than the mother's loss of a parental responsibility that had sadly not served B well in the past. Whether or not there will be a contact order under s. 26 Adoption and Children Act 2002 when an adoption order is made will be a matter for the court at the time, and much will no doubt depend on the mother's attitude to the adoption, but the issue has been placed firmly on the agenda by the local authority's permanence plan, endorsed by the court.

- (6) Lastly, it is not enough to say that the Judge could have made a less interventionist order if the reality is that a lesser order would not adequately meet B's childhood and lifelong needs. In every sub-paragraph of paragraph 136 the Judge explained why a lesser order is not good enough for B. She was therefore fully entitled to make a placement order, indeed I would go further and say that, for what it is worth, I believe her decision was right.

26. It was for these reasons that I joined in the decision to dismiss the appeal.

Sir Christopher Floyd

27. I agree.

Lord Justice Lewison

28. I also agree.
