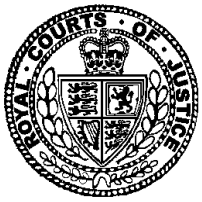

Neutral Citation Number: [2022] EWCA Civ 930

Case No: CA-2022-000716

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT BEDFORE
HH Judge Gargan
LU20C03361

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 July 2022

Before :

LORD JUSTICE BAKER
LADY JUSTICE CARR
and
LORD JUSTICE WARBY

- -

CV (A CHILD) (PLACEMENT ORDER)

- -
- -

Lucy Fairclough (instructed by **Machins**) for the **Appellant mother**
Xenia Manassi (instructed by **Local Authority solicitor**) for the **First Respondent**
Rebecca Davies (instructed by **Reed Solicitors LLP**) for the **Second Respondent**
Alison Brooks (instructed by **Fahri Jacobs**) for the **Third Respondent by her children's guardian**

Hearing date : 28 June 2022

- -

Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on 6 July 2022.

LORD JUSTICE BAKER :

1. This is an appeal against the placement order made under the Adoption and Children Act 2002 in respect of a three-year-old girl, C. The appeal is brought by the child's mother, supported by her father, and opposed by the local authority and the guardian.

2. The central issue is whether the judge correctly identified the realistic options for the child's future care, properly analysed the advantages and disadvantages of each option, and sufficiently explained her reasons in the ex tempore judgment delivered at the conclusion of the hearing. For the past two years, C, who requires a particular level of care as a result of a number of medical conditions, has been living in the care of specialist foster carers. The appellant argues that the judge failed to give proper consideration to the option of C remaining with those carers in long-term foster care.

3. The approach to be followed by judges in making decisions in care proceedings is clearly established by case law, in particular the decision of the Supreme Court in *Re B (Care Proceedings: Appeal)* [2013] UKSC 13 [2013] 2 FLR 1075 and the subsequent series of decisions of this Court of which *Re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA Civ 965 and *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146 are the most frequently cited.

4. In *Re G*, McFarlane LJ said:

> "49. 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.
>
> 50. The linear approach, in my view, 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.
>
> …
>
> 54. In mounting this critique of the linear model, I am alive to the fact that, of course, a judgment is, by its very nature, a linear structure; in common with every other linear structure, it has a beginning, a middle and an end. My focus is not upon the structure of a judge's judgment but upon that part of the judgment, indeed that part of the judicial analysis before the written or spoken judgment is in fact compiled, where the choice between options actually takes place. 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."

5. Very recently, this approach was endorsed by the Supreme Court in ***Re H-W (Children), Re H-W (Children) (No. 2)*** [2022] UKSC 17 in which Dame Siobhan Keegan, with whom the other members of the Court agreed, observed (at paragraph 47):

> "This is now rightly the accepted standard for the manner in which a contemplated child protection order must be tested against the requirement that it be necessary and proportionate."

6. In practical terms, as this Court stated in ***Re B-S***, this means that it is incumbent on (a) the local authority that applies for care and placement orders, (b) the children's guardian entrusted with representing the children in the proceedings, and (c) the court to carry out a robust and rigorous analysis of the advantages and the disadvantages of all realistic options for the child and, in the case of the court, set out that analysis and its ultimate decisions in a reasoned judgment.

7. There is a long and complex background to this appeal, but the relevant matters can be summarised briefly as follows. C, born in January 2019, is the youngest of four children of the mother and father, who are not married but have been in a relationship for over 25 years, though living in separate households. Her three older siblings were all subject of care proceedings in which they were removed from their parents' care and placed with family members, although the eldest child, now aged 18, has now returned home.

8. C suffers from a range of serious medical conditions, in particular hypopituitarism and central incisor syndrome with piriform stenosis, with a number of associated symptoms including development delay, dysmorphic features and heart abnormalities. As a result of her condition, she has to take regular medication, including hydrocortisone every six hours and a number of other drugs taken daily under a regime which must be followed precisely. In case of medical emergencies, carers must follow an adrenal crisis management plan. Her condition makes her extremely vulnerable to stress.

9. C spent the first 16 months of her life in a succession of hospitals. During this period, her mother was with her throughout, save for four days when her father was present. In March 2020, in anticipation of her discharge from hospital, the local authority started care proceedings, asserting that C was likely to suffer significant harm in her parents' care. They raised concerns about the mother's lack of control of her diabetes, the parents' volatile relationship and history of substance abuse, and the mother's challenging behaviour towards professionals. Following the making of an interim care order, C was placed with specialist agency foster parents, Mr and Mrs D, with whom she has remained for the past 15 months. Mr D is a fireman, Mrs D a nurse. They both work part-time so that one of them is available to care for C at all times. They have undergone training to enable them to meet C's complex needs. Mrs D's parents are also trained to step in as short-term carers if required. But for their obligations to care for C, both Mr and Mrs D would be able to extend their working hours. As a result, their earnings are significantly lower than they would be if she were not living with them. At the moment, as specialist agency carers, they receive a fostering fee and allowance in the sum of £2,730 per month, together with disability living allowance at £358. The fostering fee and allowance paid to these agency foster carers are significantly larger

than the sums that would normally be paid to foster carers engaged by the local authority or to adopters.

10. During the proceedings, C's maternal aunts came forward offering to look after her, and were given a positive special guardianship assessment. Mr and Mrs D also applied to be considered as special guardians and they too received a positive assessment. In June 2021, a hearing took place before HH Judge Gargan, who has conducted all substantive hearings in the proceedings, at which the court concluded that a placement of C with her parents was not a realistic option. In July 2021, a supplemental report reversed the positive assessment of the maternal aunts as special guardians. In October 2021, the local authority informed the court that Mr and Mrs D had withdrawn from seeking a special guardianship order as they were unable to reach agreement on the level of financial support. The local authority therefore put forward an amended care plan proposing that C be adopted, and filed an application for a placement order.

11. At an issues resolution hearing in November 2021, the local authority was directed to file a further statement addressing the option of C being rehabilitated with her mother and, alternatively, remaining with Mr and Mrs D in long-term foster care. The statement was filed on 26 November. It is unnecessary for the purposes of this appeal to consider what was said about the mother, save to record that the local authority continued to recommend that C should not be placed in her care. So far as Mr and Mrs D were concerned, the statement set out the arguments identified by the local authority for and against a long-term foster placement with the Ds. The arguments in favour were said to include: (1) that C had been cared for by the Ds for a significant period of time and was settled in the placement; (2) that she would not need to transition to another placement which was likely to be stressful for her; and (3) that the local authority would continue to provide support around contact with the birth family. The arguments against were said to be: (1) that C would not be cared for within her birth family; (2) that long-term foster care did not offer permanency; (3) that Mr and Mrs D could end the placement at any time, a risk which was of greater consequence here because of the potential for ongoing disruption to the placement from the mother; and (4) that C would remain a looked after child and subject to the intrusion and stigma that attached to a child in care. Balancing those arguments, the local authority had concluded that this option was not in C's best interests.

12. The guardian's final report, filed in December 2021, considered the various options, including C remaining with Mr and Mrs D as long-term foster carers. Within her child impact analysis, she wrote:

> "Emotionally, I would advocate C is 'home', and this is who she sees as her parents. Many children have to consider the detachment process from their foster carers when adoption and permanency is needed to 'tip the balance' for the longer term stability. For C this is going to be no easy transition. Stress and the impact on her adrenal function could impact on the length and impact of transition or in the worst scenario effect C's health. This may end up with her prospective carers needing to be ready to take time off work at short notice, and be medically trained, both of which I feel does seriously and significantly narrow her potential to be matched with suitable adopters. The balance in my view is so narrow, about whether C should be able to stay

> with her current carers whom she sees as her family, in spite of the obvious and worrying instability that brings, or whether the 'risk' is worth it to consider permanency through adoption so that she doesn't have to spend potentially upwards of 15 years in long term foster care.
>
> 12. For these reasons I feel it is important to set out, specifically, with these foster carers (which I know is no assurance as a long-term fostering placement) about which placement with fostering versus adoption could meet her needs and how [sic]. Practically I know that long term fostering doesn't guarantee carers; Mr and Mrs D are specialist agency carers (by virtue that they are specialist to be able to foster children with additional medical needs) they have not been to matching fostering panel nor agreed by the local authority to be long term financially matched at the higher rate placement cost that for example an 'in house' fostering placement would cost. I am deeply saddened that any and every route to try to keep C in the home she is settled in is not being explored, and that matters of money and finances have played a large part in the decision making that is going to have such an impact on her welfare. From a sentimental perspective it just feels wrong."

13. The guardian then identified factors for and against, on the one hand, long-term fostering with Mr and Mrs D and, on the other, placing C with adoptive carers. She then set out a "permanence analysis" by reference to the checklist in s.1(4) of the 2002 Act. She concluded:

> "l have outlined to the Court that there is a fine balance between the risks of placing C with adopters. outside of her birth family and away from her foster carers due to her specific additional needs. However, there are also risks in her remaining in long term foster care. It has not been a decision that l have taken lightly to consider removing C from a place where she has thrived, is happy, and is offered a 'forever' home through fostering (or SGO if the support package had been agreed) but to deny her a chance to know another permanent home is wrong, and in my view it has to be explored for her. Adoption is the 'least disruptive' care plan for C, but as I have already set out to the Court, is not risk free in C's exceptional circumstances."

14. Shortly before the final hearing, the local authority social worker filed a further statement dated 18 February 2022, in which she said that

> "Mr and Mrs D have repeatedly informed the local authority that without agreement of their request for financial support in full, they will not pursue any long term placement of C in their care under any order."

Later, under the heading "Analysis of harm, risk and protective factors", she said:

> "… the local authority remains of the view that their extensive request for financial support is in excess of that which is proportionate to C's needs and beyond that which the local authority are able to support. Mr and Mrs D have clearly stated repeatedly that they are unable to secure C's permanency in their care under any order, with such support which raises significant concern for the local authority as to their motivation and commitment to C. In addition to this, the local authority have concerns regarding C's welfare, given Mr and Mrs D's strongly held views relating to ongoing contact between C and her birth family and their involvement in decision making for C."

The statement proceeded to set out a child impact analysis by reference to the checklist in s.1(3) of the Children Act 1989, not s.1(4) of the Adoption and Children Act 2002. The "realistic options" analysis considered factors for and against (1) adoption via full care and placement orders, (2) a special guardianship order in favour of Mr and Mrs D, (c) long-term foster care (generally, without specific reference to Mr and Mrs D), and (4) return to mother with a supervision order or no order. The statement did not contain a further analysis of the factors in favour and against C staying with Mr and Mrs D as long-term foster carers. The recommendation at the end of the report was for care and placement orders.

15. For the final hearing starting on 28 February 2022, the parties filed case summaries or position statements summarising their respective cases. The local authority sought care and placement orders. The mother proposed that C be placed in her care or, if that was not possible, that she remain with the Ds in long-term foster care. The father simply supported the mother's case. The maternal aunts, who had withdrawn their application for a special guardianship order but remained parties to the proceedings, initially supported the local authority care plan but, according to the order made at the end of the hearing, "upon hearing evidence changed their position and supported a plan of long-term foster care with her current carers."

16. In the position statement filed on behalf of the guardian, it was recorded that she "despairs at the thought of this placement breaking down for financial reasons and inflexibility on both sides". It continued:

> "16. … the guardian has tried through all avenues she could think of, to consider what other support could be put in place to enable C to remain in this placement which best meets her welfare needs and where going forward she could have the best of both families she knows, contact with her birth family and stay with Mr and Mrs D.
>
> 17. Sadly this level of prescription or involvement in care planning is beyond the scope of the guardian's role or influence, and so sadly she finds herself having to support the orders sought by the Local Authority as the 'next best' outcome for C - even though she can see the potential for this being detrimental for C compared to keeping her where she is, even if that was by way of long term foster care."

Her support for the placement order was, however, subject to the following condition:

> "20. The guardian as set out above is realistic about the reality of finding a placement for a child with C's needs and recommends that this be time limited to 6 months to offer C a chance of permanence. C deserves the chance for permanence to be sought as her primary option, but hopes that if this cannot be achieved and the plan does then revert back to that of long-term foster care, that the Local Authority will do everything in their power not to unsettle C for the sake of money and to keep her within her same fostering placement long-term."

17. At the hearing oral evidence was given by the local authority family finder, the social worker, the mother, father and guardian. We were given a note of the oral evidence agreed by counsel, though not approved by the judge. Much of the focus of the hearing was on the option of C remaining in long-term foster care with Mr and Mrs D. The social worker agreed that they were a "viable option". The mother's counsel asked:

> "If the court is satisfied the carers are committed to C in long term, agree that is the best place for her?"

The social worker responded:

> "I cannot answer that yes or no, with regard to impact emotionally – transition – yes but not without reservations as to the Ds' views of ongoing contact …."

In re-examination, she agreed that a placement with the Ds in long-term foster care may be in C's interests, although she expressed concern about the placement being "destabilised" at some point and about what would happen about contact.

18. In her evidence, the guardian painted a very positive picture of C's life and care in the Ds' home where she is "the centre of the family". The guardian expressed frustration, however, that Mr and Mrs D had limited knowledge about the level of financial support available, and in particular that they did not understand that it was not possible for the local authority to waive the requirement for periodic reviews of the level of support. She described what they were asking for as "unrealistic". But she also said:

> "If we could keep her with the Ds and keep contact with everyone that is best. [That is] not the care plan and not one I have say or influence over. That is what I believe would be right for her."

For the reasons set out in her report, however, she adhered to her recommendation in favour of a placement order, but stressed that the search for prospective adopters should be time-limited.

19. After oral submissions, the judge delivered an ex tempore judgment. She summarised C's difficulties, describing her as "one of the most vulnerable children to come before this Court". She recorded the progress C had made in the care of Mr and Mrs D and the quality of the care they had provided, but noted that they had not been able to reach any

form of agreement with the local authority on financial support, whether as special guardians or long-term foster carers, that although they had been approved as long-term foster carers they had not been matched with C, and although they had indicated a wish to adopt C, they had not been approved as adopters and that "the harsh reality is unless there is some thinking outside the box that is likely to falter on the need to have sufficient funds."

20. At paragraphs 24 to 25, the judge made a striking observation:

> "24. If I were satisfied that C could not return to her parents, and I had a magic wand, I would be waving it incredibly hard to have this little girl stay where she is. For reasons I will come on to when I deal with the evidence I have heard, and the plans for her, there are a number of reasons for that. It would avoid disruption for her. She would remain in a settled family home that she regards as her family. Her medical needs would all be met. She would have no disruption of her medical care. She would have a progression into the school she currently thinks she is going to in September, which is just up the road. In addition, most significantly, she would continue in some form or other to have contact with her birth family.
>
> 25. However, I do not have a magic wand, and for all the efforts of the parents themselves, for whom the foster carers are a backup plan, and the Guardian, and even the aunts who now support them, I cannot make it happen."

21. The judge then made a brief reference to the law:

> "I have to be satisfied that nothing else will do but that this child is placed for adoption. In doing so, I must consider all the realistic possibilities for this child. That does not mean any possibility. It means a realistic possibility, and with a child of her needs that is significant."

She referred to the two statutory welfare checklists and the need for any interference with Article 8 rights to be "necessary, proportionate and justified in the welfare interests of the child."

22. She summarised some of the evidence she had heard from the family finder about the prospects of finding appropriate adopters. At paragraph 55, she said:

> "What I could not get from the Local Authority was the degree to which these current foster carers would be treated as frontrunners, I suppose, is my phrase, because they had had the care of C for two years, whether they were putting themselves forward as adopters or long-term foster carers. That would be taken into account but it could not give them an advantage over already approved adopters, or over other long-term carers, who could meet her needs. I have to say, I think that is tragic for this little girl, potentially."

23. The judge then summarised the evidence given by the social worker, mother, father and guardian. She characterised the guardian's view in these terms:

> "98. …. Although the idea of long-term foster care is that it is exactly that, long-term foster care, it can be and is, sadly, terminated for all sorts of reasons.
>
> 99. Therefore, the idea of a child with C's needs potentially having multiple moves just does not bear thinking about. If there was any way that they knew she could remain with the Ds that would be different. If there is any way there could be a special guardianship order, and stay in the placement she is in, that would be different. If there is any way they could adopt her that would be wonderful. However, the idea where she, as a guardian, is dealing with only the three options, return to parents, placement order, or long-term foster care for a child of this age, she felt, very clearly, she had to give this child a chance at permanence."

24. Having summarised the evidence, the judge then set out her final analysis, saying:

> "It is a remarkably difficult call. As I have said, right at the beginning, my heart says one thing but what my heart says is not available to me as a judge in these proceedings."

She concluded that the mother was "not … yet able to meet this little girl's needs". She identified losses that C would suffer if moved from her current placement, but observed:

> "all of those losses are ones that she is as likely to suffer, whether I make the placement order or a care order."

She expressed her conclusion in these terms:

> "123. How does it balance? It balances in the somewhat trite comparison that we make in so many cases. If it is a choice between a certain move to either long-term foster care with an unknown family, which would keep alive a relationship with the birth family, or permanence for a little girl of three, who is going to be four by the time probably she is placed, I have to give her a chance.
>
> 124. I consider that the guardian's balance is right, that if she cannot stay where she is, it must be a placement order. In addition, I recognise that that does mean she loses the immediate contact with her family. There is indirect contact. I hope that that will be taken up by the family.
>
> 125. I hope that the mother and father will have an opportunity to meet any prospective adopters. I would like to think that any prospective adopters would be spoken to very carefully about the possibility of some form of contact with the birth parent or birth

> family, because here you also have three siblings, as well as parents and aunties.
>
> 127. In all the circumstances, and with a very heavy heart, I am satisfied that nothing else will do for this little girl that I make a placement order. I do, however, urge the Local Authority to, please, look at the possibility of the current carers adopting, if this what they want to do; they have said they wanted to do. Furthermore, if no adoptive placement is found for her, I urge this Authority to move heaven and earth to keep her where she is. I cannot order it, I cannot make it happen, but if she cannot have a forever family, I hope that they will look to keeping her where she is.
>
> 128. It is, therefore, proportionate and necessary that I make the order; I do so. In doing so, I dispense with the consent of the parents in the circumstances of the case demanding it."

25. The judge therefore made care and placement orders. An application on behalf of the mother for permission to appeal was refused.

26. On 13 April 2022, the mother filed a notice of appeal against the placement order. She no longer sought an outcome placing C in her care. Instead, she asked this Court "to invite the local authority to amend its care plan and to endorse a care plan of long-term foster care or alternatively remit the matter to the lower court". In her grounds of appeal she asserted that the judge's decision was wrong in five respects:

    (1) She wrongly concluded that "nothing else would do" when she did not have evidence that long term foster care with Ds was not a realistic option.

    (2) She erred in concluding that "nothing else will do" and that adoption was proportionate and in C's best interests when there was further information in respect of placement with the Ds as long term foster carers required to conduct this analysis and the court was not provided with the financial information sought in respect of fostering allowances.

    (3) She failed to undertake an analysis of (a) whether adoption was in fact a realistic option in light of the evidence of the family finder and (b) the impact of delay on C if an unsuccessful search is undertaken.

    (4) She failed to balance the risk of breakdown of an adoptive placement against the risk of placement breakdown with these particular carers, as opposed to long term foster care in general.

    (5) She failed to press the Local Authority for a contingency plan for the event that no adoptive placement is identified, when to do so would have revealed whether long term foster care with the Ds is a realistic option.

    In addition, it was asserted that there were compelling reasons for permission to be granted because of the need for guidance to be given by this Court as to the approach to be taken (a) where all professionals agree it is a child's best interests to remain in a

particular long term foster placement but the local authority will not confirm whether they will be matched; (b) where the only barrier to such a placement continuing is financial but the local authority will not commit due to the additional cost of agency carers; (c) where the local authority refuses to commit to a contingency plan.

27. On 23 May 2022, Peter Jackson LJ granted permission to appeal, observing:

> "An appeal from the placement order has enough prospect of success to justify the grant of permission in circumstances where, until the financial issue arose, the care plan was for the child to remain in her current placement. In the light of the child's very specific circumstances, it is arguable that the judge should have further explored the practical consequences and necessity of making a placement order before concluding the proceedings."

He gave directions for the filing of skeleton arguments by the respondents and ordered that the mother, local authority and guardian be represented at the appeal hearing, adding that the father and maternal aunts need not be represented unless they sought to make a distinct case to that of the represented parties. In the event, the father was represented at the hearing, supporting the mother's appeal. In addition, on the day before the hearing I asked the local authority to make arrangements for Mr and Mrs D, who are not of course parties to the proceedings, to be available in the hearing in some form. Mrs D was at work but Mr D was able to observe the hearing via the livestream link while looking after C at home.

28. At the outset of the hearing of the appeal, I asked counsel to clarify what had been the "realistic options" for C's future care which had been considered during the hearing before the judge. All counsel agreed that there had been three such options but they did not agree precisely as to what those options were. Ms Fairclough for the appellant mother, supported by Ms Davies for the father, said that the realistic options were (1) rehabilitation with mother, (2) adoption, and (3) long-term foster care with Mr and Mrs D. Ms Manassi for the local authority, supported by Ms Brooks for the guardian, agreed with the first and second option but not the third. It was their view that the third realistic option considered by the court was long-term foster care generally and not with Mr and Mrs D specifically. On behalf of the local authority, Ms Manassi very fairly conceded that, if Ms Fairclough for the mother was right in saying that placement with Mr and Mrs D in long term foster care was a realistic option open to the court, it was arguable that the judge's analysis of the option was deficient. She submitted, however, that the judge had excluded long term foster care with the Ds as a realistic option because it was not open to the local authority to guarantee that the placement would continue and not open to the court to insist that it did. She accepted that the judge did not identify the realistic options in clear terms but submitted that it was "implicit" from paragraph 99 of the judgment set out at [23] above.

29. I posed the question to counsel because it was not immediately clear to me reading the judgment how the option of C remaining with Mr and Mrs D as long-term foster carers had been treated by the court. Having re-read the judgment in the light of submissions made at the hearing, I now think the judge's approach to and conclusions about this option were as follows.

30. It was clearly the judge's view that it is in C's interests to remain with Mr and Mrs D. ("If … I had a magic wand, I would be waving it incredibly hard to have this little girl stay where she is."). That was also the guardian's view ("If we could keep her with the Ds and keep contact with everyone that is best …. That is what I believe would be right for her.")

31. But Mr and Mrs D and the local authority had not reached an agreement about the level of financial support that would be provided to them were C remain in their care whether as long-term foster carers, special guardians or adopters. At that point, Mr and Mrs D were apparently saying that without financial guarantees they could not commit to caring for C in the long term. Furthermore, the local authority would not say whether the Ds would be treated as front-runners for adoption. In those circumstances, even though the social worker had described the option of C staying with them was "viable", the judge seems to have concluded that long-term fostering with the Ds was not a realistic option at that stage.

32. At paragraph 24 (quoted at [20] above), the judge identified some of the factors in favour of a continued placement with Mr and Mrs D, saying that she would "come on to" the reasons why C should stay in their care later in the judgment. In fact, she did not do so. She never analysed the advantages and disadvantages of the placement continuing, as she would have had to do if she regarded it as a realistic option. Instead, having concluded that the child could not be rehabilitated with the mother, the judge seems to have concluded that the realistic options were either (a) long-term foster care with different carers or (b) adoption with carers who may or may not be Mr and Mrs D.

33. The judge added, however, that, if no adoptive placement could be identified, the local authority should "move heaven and earth to keep her where she is". In saying that, she seems to have thought that the possibility that C might stay with Mr and Mrs D was a realistic option as a contingency plan if no adoptive placement could be found within the timeframe proposed by the guardian and that the local authority should explore ways in which that might be achieved. If keeping C in her current placement was, in the guardian's phrase "right for her" and long-term fostering with the Ds was an option which was worth pursuing as a contingency plan, it is difficult to see why it was not a realistic option to be evaluated alongside adoption as the principal plan for the child's future.

34. In the circumstances, it is unsurprising that counsel at the appeal hearing were not in agreement as to whether or not the court had treated the possibility of long-term foster care with Mr and Mrs D as a realistic option to be evaluated alongside the other options. Although she did identify some advantages and disadvantages of the various options at various points in the judgment, the judge did not in my view carry out the balancing exercise with the clarity and particularity required by the decisions of this court in *Re G* and *Re B-S* and now of the Supreme Court in *Re H-W*. The importance of a clear and reasoned judgment is to record and demonstrate that the court has carried out the evaluation of the realistic options with the rigour required by the case law. Given the lifelong consequences of decisions at the end of care proceedings, it is essential that the evaluation of the realistic options is fully explained in a judgment that may be read and understood by everyone involved, including at a later date the child herself.

35. In her first two grounds of appeal, Ms Fairclough asserted that the judge wrongly concluded that nothing else but adoption would meet the child's needs when (1) she did

not have sufficient evidence to conclude that long-term foster care with Mr and Mrs D was not a realistic option and (2) there was further information which could and should have been obtained before making that decision. In response, Ms Manassi submitted that the court heard compelling evidence as to why long-term foster care was not appropriate for child of this age even with the current carers and that adoption provides a quality of the different sort of permanence. The local authority had exhausted all avenues of communication with Mr and Mrs D in an effort to persuade them to accept regular reviews of support. Such reviews might have led to the identification of support packages under various legal frameworks which, as she put it in her skeleton argument, "might have been realistic placement options had it not been for that intransigence". The local authority was unable to agree paying financial payments at the current agency linked rate without ongoing reviews and, at the date of the hearing, Mr and Mrs D had been clear that they would not consider putting themselves forward for matching as long-term foster carers in those circumstances.

36. In her skeleton argument for the appeal, however, Ms Manassi provided further information about developments that have taken place since the hearing before the judge, including information about the search for prospective adopters. In addition, she stated that the family finding team had "received an email from the Ds' social worker on 17 June 2022 expressing that the Ds were willing to show flexibility and wished to be considered as her adopters and that the family finding team are checking package options with their head of service".

37. This information about possible development in Mr and Mrs D's position plainly satisfied the ***Ladd v Marshall*** criteria and we therefore asked to see the email. It read as follows:

> "I have had numerous conversations with Mr and Mrs D following last week's PPM [permanency planning meeting].
>
> The reality of C potentially moving to another family has made them reflect and reassess their position. First and foremost, they are worried that a move from their family will cause C disruption, upset and loss, they have made it clear that they wish to continue to care for C and find the thought of her leaving their family upsetting, they want to do all in their power to provide her permanence.
>
> Since C's care plan changed to adoption Mr and Mrs D voiced that they wanted to adopt C but were hesitant to pursue adoption under an arrangement where allowances were means tested and reviewed annually (as this did not provide family financial security).
>
> A full financial assessment that would help Mr and Mrs D know what an adoption allowance would look like has not been completed.
>
> I understand the financial assessment forms were sent to them in February2022, following a PPM and ahead of a court hearing. Mr and Mrs D were asked to submit this in a short time

> frame, they were unable to collate the required documents in the required time so the assessment was not completed; they asked for an estimate of what their allowance would look like in terms of their income but were told it was not possible to provide this.
>
> Mr and Mrs D understand that any adoption allowance would be means tested and reviewed annually, the reality of C having to move has made them reflect that they do not want this to prevent them continuing to care for C long term. Mr and Mrs D want to let the LA know that they want to be considered as prospective adopters.
>
> They understand that any adoption allowance would be lower than the fostering allowance they have been receiving and means tested annually.
>
> Unquestionably, it will be in C's best interests to be adopted by the Ds and we hope the LA will thoroughly explore them as potential adopters. It seems that the Ds' reluctance to enter a financial arrangement that was means tested and reviewed annually is what has prevented the matter being pursued, now they are willing to proceed knowing any allowance will be annually reviewed."

38. On seeing this email, we asked the local authority to enquire of Mr and Mrs D whether they were now prepared to show the same degree of flexibility in respect of long-term foster care. After the short adjournment, we were shown the following email sent direct by Mrs D:

> "In response to your email we would unquestionably look after LV under long term foster care arrangement with [the agency]. The therapeutic support offered to C and carer support offered to us at present are highly valuable. Going forward we believe this will be highly beneficial as C continues to physically emotionally develop. We love C very much as a member of our family and are committed to doing all we can to secure permanency within our care.
>
> We are of course willing to be flexible, and have only ever over the proceedings tried to be as flexible as possible with the information provided to us."

39. The terms of the email sent by the Ds' support worker was considerably more expansive than the information set out in Ms Manassi's skeleton argument. That email, and the supplementary email sent by Mrs D, added weight to the arguments raised in Ms Fairclough's first two grounds of appeal, that the judge did not have sufficient evidence to conclude that long-term foster care with Mr and Mrs D was not a realistic option and that was there was further information which could and should have before making that decision. To my mind, these latest emails give rise to real hope that the outcome which the judge plainly believed to be the best option for C may now be within reach.

40. To sum up, there was strong evidence to support the view that it was in the interests of C's welfare to remain with Mr and Mrs D. She is settled there, receiving high quality care. She has formed a close relationship with her carers and members of their family. It is the only home she has ever known. She has very complex and demanding medical and therapeutic needs which Mr and Mrs D are able to meet. She is highly vulnerable to suffering a serious, possibly life-threatening, adverse reaction to stress from disruption to her routine. She is expecting to go to a local school in the vicinity of the Ds' house. Although there have been difficulties with contact, remaining with Mr and Mrs D would allow her to retain an element of direct contact with her birth family. In my view, long-term foster care was an option which should have been considered and evaluated alongside the other options in accordance with case law, as part of "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." For the reasons set out above, however, the judge's analysis of the realistic options for C's future care was flawed. She failed to deal clearly with the option of long-term foster care with the Ds, to the extent that at the appeal hearing the parties were unable to agree whether it had been treated as a realistic option or not.

41. The appellant's argument in the first two grounds of appeal that the judge did not have sufficient evidence that long term foster care with the current carers was not a realistic option and that there was further information which should have been obtained before the decision was made has been strongly reinforced by the recent emails. It seems clear that Mr and Mrs D are no longer saying that they cannot continue to care for C unless they receive support at the current level. Even if the option of long-term foster care with the Ds was not a realistic option at the time of the hearing, it has unquestionably become so now.

42. For these reasons, I would allow the appeal on grounds 1 and 2 and set aside the placement order. In the circumstances it is unnecessary to consider the remaining grounds. I am unpersuaded that there is any need for further guidance as suggested by the appellant, and I would certainly not be prepared to give such guidance after a hearing in which the range of arguments was limited.

43. If my Lady and my Lord agree with my conclusion, the application for a placement order must be reheard. At that hearing, the court will have to consider all the realistic options for C's future. Although I have expressed the view on the basis of the evidence now available that long-term foster care with Mr and Mrs D is a realistic option, I am expressing no view as to which option should ultimately preferred. There were other options before the judge and further realistic options may emerge. For example, as anticipated in the recent emails, Mr and Mrs D may decide to proceed with their own adoption application. Although we were not addressed on this at the hearing, it seems to me that they could initiate this process by serving notice on the local authority under s.44(3) of the 2002 Act. There will be arguments for and against the various options which the judge conducting the rehearing will have to evaluate.

44. Although I have expressed some criticism of the analysis in the judgment, it is clear from the judgment and the agreed note of evidence that the judge approached this difficult task conscientiously. She is an experienced family court judge with a deep understanding of the case. Nevertheless, on balance I have reached the conclusion that the rehearing should be conducted by a different judge who will have the opportunity

to conduct a completely fresh evaluation of the realistic options. I therefore propose that the matter be remitted to Newton J, as Family Division Liaison Judge for the South Eastern Circuit, to allocate the rehearing to another circuit judge.

LADY JUSTICE CARR

45. I agree.

LORD JUSTICE WARBY

46. I also agree.