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This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Neutral citation: [2024] EWFC 155 (B)

IN THE FAMILY COURT SITTING AT LEICESTER **LE23C50031**
IN THE MATTER OF THE CHILDREN ACT 1989
AND IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 2002

Date: 23 May 2024

Before:

HIS HONOUR JUDGE REDMOND

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Re A (Care Planning)

BETWEEN:

LEICESTER CITY COUNCIL — Applicant

-AND-

MOTHER
FATHER
THE CHILD — Respondents

-AND-

FOSTER CARERS — Intervenors

- -

Counsel for the Local Authority: Nick Brown
Counsel for the Mother: Jane O'Reilly
Counsel for the Father: Anita Thind
Counsel for the Guardian: Samantha Dunn

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JUDGMENT

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1. I am concerned with A. She is now just over 1 year old and has been within court proceedings for 66 weeks now; all of her short life. The statutory maximum for care proceedings is 26. This court is tasked with making decisions as to her welfare and she is at the centre of all we do.

2. The matter was listed for a final hearing to commence on Tuesday 21 May 2024 before a district judge. It is the third time that it has been listed for final hearing. It should have been ready to proceed but, as will become clear from this judgment, the working day before the hearing it became apparent to the court that significant legal argument was being raised in a dispute primarily between the local authority and the guardian. That argument ought to have been grappled with at a much earlier stage in proceedings. It has caused the court, the working day before the final hearing, to have to reallocate the matter to circuit judge level and find time in the diary to accommodate this. I have had to hear legal argument on Tuesday 21 May 2024, giving an indication of my decision that afternoon and write these fuller reasons amidst my other matters the next day. The reasons were sent in draft to the advocates on the afternoon of Wednesday 22 May 2024 and formally handed down the next day Thursday 23 May 2024. I have been acutely conscious of the previous delay in this case and the need to have a decision quickly and progress made.

3. I will set out the background as briefly as I can and it will not cover all areas. A has two older half-sisters, B and C. They are subject to care orders granted in 2020 and reside with foster carers under the enhanced parental responsibility of the local authority. Originally that included placement orders, but such were later revoked following a change of care plan. Their foster carers are enhanced foster carers working hard to provide a loving home to them.

4. Allegations were made as to sexual harm from the mother towards the older child. Such was the subject of a section 34(4) application and determined in November 2023. I have

the judgment. On any view, the court determined that the child was experiencing trauma due to her previous upbringing.

5. Care proceedings were commenced in February 2023. There was a PAMS parenting assessment by an independent social worker. Such was filed in June 2023, with an addendum as to the mother in September 2023. The matter should have proceeded directly to a final hearing. All options for care should have been looked at from week 1.

6. A final hearing was listed in November 2023, but I am told was unable to take place and re-listed in February 2024. The local authority had concluded that adoption ought to be the care plan and made an application for a placement order. That came to be considered by the learned district judge in February 2024. There was argument presented, again at the door of the court mirroring today's position, that the matter had to adjourn because the foster carers for the older children had now put themselves forward such that the court could not undertake the required analysis of all of the competing options deriving from **Re B-S [2013] EWCA Civ 1146**. It is not fully clear to me the extent of the enquiries that had taken place prior to this. When considering a placement order, the court must conduct a thorough analysis with the child's welfare throughout their life being the court's paramount consideration and with reference to the 'enhanced' welfare checklist in **s.1(4)** of the **Adoption and Children Act 2002**.

7. Evidence was directed looking at this and the matter was relisted directly for a final hearing on Monday 21 May for 3 days. No further hearing was listed, such as an issues resolution hearing or pre-trial review. There were directions for witnesses to be present, using the court's powers under **r.22.1 FPR 2010** for the final hearing. None of those directions were appealed or requested to be reconsidered.

8. In early May 2024, in an application I do not have, the foster carers applied to intervene in the case to challenge the conclusion of the authority that A ought not be placed with them. On 10 May 2024, all parties attended and argument was heard by the learned district judge. The foster carers were joined as intervenors. I should note that all parties (other than the foster carers) were properly legally represented on this occasion and could

have placed the arguments that now arise before the court so that they could have been resolved. It is suggested to me that no party raised the appropriate test for joinder under the Children Act 1989 with the court nor provided the court with caselaw as to the propriety of foster carers intervening in care proceedings.

9. The matter was listed to start on Tuesday 21 May 2024 before the learned district judge for the final hearing set up in the unchallenged February order.

10. The positions of the parties were to be as follows:

    a) The local authority seek care and placement orders with a plan of adoption.

    b) The mother and father seek return to their care, noting that their assessment is now almost a year out of date. Their fallback position is long-term foster care.

    c) The guardian seeks for a care order to be made and for the LA to reconsider their plan of placement with the foster carers for the older children. She seeks for the court to dismiss the placement order application on the basis that it cannot be satisfied as to the necessity and proportionality of the order.

11. However, at an advocates meeting on Friday 17 May 2024, significant concerns were raised by the authority as to the court's ability to explore the option of placement with the foster carers for the older children as a realistic option. The parties sent the minutes of the advocates meeting to the court and they were considered by the allocated judge on Monday 20 May 2024. Due to the legal argument, I reallocated the case and attempted to provide the parties with a forum to hear the legal arguments.

12. Counsel who are today instructed in the matter have worked extremely hard in a short space of time and they have the court's thanks; they did not appear at previous hearings. Given the delay potential, the court has attempted to grapple with the complexities of the issue and deliver a reasoned judgment at short notice. I am clear that this issue ought to have been determined much earlier and that the parties all had a continuing duty under the overriding objective in that regard.

13. The local authority originally sought that the matter proceed to final hearing but for the court to use a range of its case management powers to cut off from its consideration a competing option within the **Re B-S** analysis, that of placement with the half-siblings in foster care. They suggested that this, including excluding witnesses previously listed from giving evidence, could be achieved by use of **4.1(3)(l); (o); 4.1(6); 12.3(3)(b); 22.1(1)(a)** and **22.1(4)** within the **Family Procedure Rule 2010** and/or **s.31F(6)** of the **Matrimonial and Family Proceedings Act 1984**. They suggested were that route not taken that they wanted a written judgment on the matter.

14. The authority say that their care planning in relation to the older two siblings is sovereign and that to investigate it in these proceedings amounts to an impermissible interference with that planning and therefore the court must exclude the possibility from consideration as a preliminary issue. They seek for the court to discharge the foster carers as intervenors observing that order ought not to have been made.

15. Having taken instructions on the morning of the hearing, the authority propose an alternative, which is that a short period of time is given to the foster carers to bring an application for judicial review of their decision not to alter the care planning for the older children and thereafter bring the matter for a further hearing. They would offer to fund legal advice in that regard. It was further discovered in the hearing that it was not entirely known whether the IRO and ADM had knowledge of the recent developments and whether the ratification of the plan of adoption stood.

16. Alternatively, the guardian argues that this court cannot be prevented from conducting a holistic **Re B-S** analysis of all of the realistic options and that includes potential placement under a care order with the foster carers. Such does not stray into care planning for the older children and is a requirement of this court to examine. She now says additionally that there is a gap in the evidence and raises, on the morning of the hearing, a Part 25 application for assessment by an ISW. There is also the further matter of how long ago the parenting assessment was of the mother and father, now approaching a year.

17. The mother, having reflected throughout this process, falls behind the submissions of the guardian. The father makes his own submissions supporting those of the guardian and saying that this matter must be explored.

18. This is a paradigm example of a case that should have been tightly managed and brought for hearing swiftly. The adjournment in one area has a knock-on effect in the others. Further, no one appears to have appropriately grappled with the issues in February or since until the 11th hour. Such means the decisions for this little girl cannot be made even in week 66 of her proceedings.

19. Mr Brown eloquently argues for the authority, drawing a line between the roles of the Family Court and the local authority in care planning. He refers me to **Re T [2018] EWCA Civ 650**, which I observe is the culmination of a chain of authorities encompassing those such as **W v Neath Port Talbot [2013] EWCA Civ 1227** cited within it. He argues that it was right that information was provided by the authority from the February order, and potentially that further questions could be asked, but he resists as being on the wrong side of the impermissible line the local authority's evidence being tested in that regard. He accepts that we are in the very difficult territory described by the former President in **Re H [2018] EWFC 61** as to where one draws the line between explanation and justification when looking at 3rd party decision-making and the Family Court's powers but also responsibilities. Ultimately, he seeks to persuade the court that because a care order has been made for B and C and the case closed to the Family Court, that the care planning of the local authority is not only sovereign to them but cannot be the subject of probing within these proceedings beyond having the authority potentially consider some further questions.

20. Ms Dunn for the guardian resists the argument of Mr Brown, arguing that to cut off a legitimate line of enquiry cannot withstand scrutiny when looking at the available options for this child when one of those is the draconian care plan of adoption. She urges me to follow the route in **Re T**, to make those enquiries and to examine and probe the evidence. She accepts that there are two distinct roles: care planning is the domain of the authority and the Family Court cannot force a local authority to change its care plan and ought not

to. However, it may make a request and to do so after appropriate consideration of the issues. She argues that the court must focus on the proper welfare decisions for A and such includes an evaluation of the risk, or otherwise, of placement with these foster carers. She comments that it is highly unfortunate that the local authority do not appear open in any way to even considering, within their sovereign care planning, any alternative view to which the Family Court may come.

21. While originally being neutral on the point, Ms O'Reilly for mother supports the arguments advanced by the children's guardian. Ms Thind for father comes to a similar conclusion to the guardian although independently of her reasoning.

22. I am grateful to all advocates for marshalling those arguments at short notice and each has been assiduously conscientious in their task, even working over the weekend. However, I must record that it is highly unfortunate that the question has come before the court in this manner and with this urgency, requiring the court to assimilate the complex arguments quickly and give a decision. It required the change of list between a circuit and district judge the day before a final hearing was to commence, with the result that clear days were not available nor the amount of days originally envisaged. That is following the insistence by the authority in its position statement for a written judgment on the preliminary issues and time to consider were they not to fall in their favour. It is inappropriate to put before the court a reason for the late notification is that counsel was only just instructed. In the context of these long-running public law proceedings that argument must carry little weight and fall back on the shoulders of the party themselves. I note that all parties have been represented throughout this long-running litigation and each has a duty to the court in furthering the overriding objective. Arguments concerning joinder and how the case should be put ought really to have been made on 10 May at the hearing listed for such a purpose. However, arguments about the legitimacy of the court to undertake the exercise it directed in February ought to have been brought to the court at that time. I do not accept Mr Brown's submission that the authority were content with the evidence directed in February because the order goes further than that directing a final hearing where it was envisaged that evidence would be called which he now asserts cannot be subject to challenge. Therefore, I have to deprecate the manner in which the authority has

approached this part of the litigation and such has unnecessarily extended the timetable for this little girl.

23. The court is guided in case management decisions by the interests of justice, of which the child's welfare is a relevant although not paramount consideration. Within this decision, however, there is also case law that falls to be considered as to the distinct roles between the court and the local authority.

24. Within the submissions described above, I have been referred to:

    a) **Re T [2018] EWCA Civ 650**
    b) **Re H [2018] EWFC 61**
    c) **Re T-S [2019] EWCA Civ 742**
    d) **Re R [2021] EWCA Civ 873**

25. For the most part, the oral arguments I have heard have concentrated on (a) and (b) above.

26. I accept wholeheartedly, as a starting proposition that the roles of the Family Court and the local authority are distinct. The Family Court is responsible for an evaluation of risk and welfare, making orders to underpin those. The local authority is responsible for care planning. However, there is an interplay between those roles which requires a mutual respect and cooperation. It is what we ought to expect from two arms of the state entrusted with the safeguarding and welfare of children. This argument is about that interplay.

27. The local authority approach the matter with the solid stance that the court cannot ask them to revisit their care planning for the older children as such is sovereign once the care order has been made and, as such, cut off from consideration that avenue for this child's welfare analysis. They have made clear to me that their mind is made up. Mr Brown asserts that this court cannot directly or indirectly interfere with that decision-making and

that such trespasses into the impermissible territory in **Re H** of requiring a 3rd party decision-maker to both justify its decision-making and argue its case. I am concerned as to how that folds into the mutual respect and cooperation that has to exist between our two roles, or the task that we must all undertake within these proceedings for this subject child and with due deference to her and her family's article 8 rights. The authority argue that the remedy for the foster carers is judicial review and a short adjournment could allow that to occur. Following case law, and as a last resort, they may be correct about that, although none of us are aware of an instance where it has ever come to that option of last resort due to the mutual respect and cooperation path highlighted above. However, the submissions of the authority appear to cut off the ability of this court to examine the reasoning, probe appropriately and to have the authority at least reflect upon and consider that position prior to that option of last resort being invoked. It also involves a range of decision-makers, including those for the older children but also the IRO and ADM for the subject child.

28. When I have been looking at the case law, I bear in mind the different set of facts upon which each was decided.

29. I am mindful that **Re T** was about the enquiries that could be done within one single set of care proceedings, where a grandmother was seeking care and where the court's view of risk and welfare was sovereign within proceedings. This involves a care order that has already been made and the court appreciates that difference. Of course, here the foster carers are not completely unconnected with the family, but the long-term carers of the two older children who are half-siblings to a little girl for whom the authority's plan is adoption. There exists a hybrid situation for which we have been unable to find an exact parallel in caselaw. I have considered whether it would, for hypothetical example only and noting the limits of such, prevent a grandmother who was looking after an older sibling as a foster carer seeking further assessment for a newborn sibling were the authority to take the view that she ought not due to the care plan for the older child. I am unpersuaded as to that being appropriate. However, as I have said above, I note the limits of hypothetical examples.

30. While Mr Brown argues that for the court to undertake this task would fall on the wrong side of that line which is impermissible in **Re H**, there is not in my view sufficient weight from the authority to the former President's observations within the same case as to the court's ability (and responsibility) to "*probe the proffered explanation, if need be by asking searching questions*". **Re H** was about enquiring into the approach of a separate public body. I do not accept that the authority's very limited, and in my view reluctant, suggestion that further questions could be considered by them would amount to this court being effectively able to discharge its responsibilities to this subject child. It does not amount to the searching and probing that was envisaged.

31. Taking all of that into account, my evaluation is that the step the authority are inviting this court to take as a preliminary issue is akin to that warned against within **Re T** in that it achieves a boxing-in of the process highlighted at paragraphs 56 and 58(3):

"faced with this unfortunate situation, the judge did not press the local authority further. She treated its stance as being beyond the power of the family court to amend and she removed placement with the grandmother from the list of realistic options."

And

"Even if the point arrived where a decision had to be taken in circumstances where the local authority maintained a refusal to approve the grandmother as a foster carer, it was necessary for the judge to re-evaluate the remaining options for Alan's future. By not doing this, she effectively boxed herself in. Had she looked at matters afresh, she would inevitably have confronted the fact that this was a child who was being sent for adoption as a direct result of a decision of a non-court body, an outcome unprecedented in modern times so far as I am aware. She would then have been able to weigh that prospect against a range of lesser legal orders (interim care order, private law order, supervision order, injunctions, special guardianship, wardship) in order to arrive at a valid welfare outcome."

32. The emphasis above is mine. The authority effectively wish me to remove the issue from consideration on a preliminary basis. By doing so it is removing an option from the holistic analysis based upon its sovereign and unassailable decision in relation to the older children. The court must look through a wide lens at all realistic options for this child.

When I look at that issue, I am aware that such is not on all fours with **Re T**, but provides a hybrid situation involving care planning for other children. Any further assessment may not recommend placement; I simply do not know. I remain mindful of the nuanced issues within this case, including the trauma suffered already by the two older children and how A would fit into that picture. However, that does not to my mind abrogate the duty of this court to examine, and probe where necessary, decision-making for this child when faced with an application for a placement order at which the authority asserts that 'nothing else will do' and therefore the order is both necessary and proportionate.

33. I have come to the conclusion that the authority are asking the court to look at this through the wrong end of the telescope. It is not about removing the question of foster care from consideration at the start relying on care planning of older children. The question for the court on the local authority's own application is, for this child, what is the best long-term welfare option for A and which order must underpin it. To do so the court must undertake a **Re B-S** analysis of the realistic options. Care planning is a matter for the authority, but the court must be satisfied that the order requested is appropriate and not because the authority have simply cut off all other avenues to make it so. There must exist mutual cooperation and that extends to probing decision-making asking those searching questions and expecting consideration.

34. I decline to make the various case management directions suggested by the local authority or to remove the possibility of the foster carers as a realistic option which may fall to be considered. By the nature of the assessment ordered below, it falls to be considered as a potential option subject to further consideration by each party. I would suggest if that decision were subject to challenge, given the delay occasioned in this case already, it ought to be very swiftly actioned.

<u>Part 25 & Case Management</u>

35. I am acutely mindful that this application is now in week 66 and an application has been made by the guardian for expert evidence under Part 25 FPR 2010, being:

a) An independent social worker assessment of the foster carers for the older two children as to their ability to be special guardians and/or foster carers;
b) An addendum assessment of the parents.

36. The application would see the ISW who completed the original assessment of the parents take on the additional roles, limiting the number of experts within the case but also having someone already familiar with the family dynamics such that the time taken to report is reduced.

37. The parents support both applications made by the children's guardian. The local authority resists the applications, asserting its primary position as above regarding realistic options and if not then further arguments about necessity at this late stage in proceedings, noting that we are week 66 and that the matter requires resolution.

38. The application is one for expert evidence and is governed by **Part 25 FPR 2010**. Such is a case management decision to which section 1 of the **Children Act 1989** does not apply. Permission for expert evidence can only be granted if it is necessary to justly resolve the proceedings. The test of necessity has the connotation of the imperative: that which is required rather than that which is desirable. In order to assess that test, I should consider all the circumstances and in particular look to the factors contained in **section 13(7) Children and Families Act 2014**.

39. It is effectively an assessment of the capability of the foster carers to welcome A into their care alongside their standing commitments and whether that is possible. While it was envisaged at the hearing that could be done by this ISW (including all on a single Form C), it was later suggested by the authority that she would need to update the Form F only in relation to foster carer ability. Upon the provision of the draft order it has now been clarified that the authority would provide the Form F part. In any event, the support services that could underpin that must be provided by the authority. The assessment could be achieved by the ISW in 6 weeks for the foster carers and an addendum for the parents in 8 weeks. The identification of this particular ISW would have the advantage of a professional already known to the case and familiar with the family dynamics.

40. There is other evidence from the local authority, such ordered in February, although the authority have suggested that it is not subject to challenge. They also appear to take the stance that they have firmly made up their mind in respect of the foster carers' ability to welcome A into their care alongside their other commitments and therefore such ought not to be explored. That argument has been explored above and rejected. They cannot undertake the substantive assessment, and do not offer to do so. Their role would be limited to completing the form F described above following receipt of the assessment. It would be my plea to the authority to retain an open mind. I offer a similar plea to the other parties. I simply wish to place the court in a position where it has all of the available evidence to make informed decisions and undertake the life-altering task entrusted to it.

41. I am acutely mindful of delay and it is a matter on which the authority rely in resisting the application. Unfortunately, it interplays with my comments above in relation to what ought to have been undertaken at the February hearing projecting forward and was not done. The delay to this child is unconscionable, although I have in mind in addition the comments of Baker LJ in **Re E**:

"if there is an evidential gap which has to be filled before a decision can be taken about a child's future, it is very unlikely that the fact that it might take a few months to fill the gap would by itself warrant refusing an adjournment, bearing in mind the lifelong consequences of the decision reflected in the statutory principle in s.1(1) and (2) of the Adoption and Children Act 2002 that, when coming to a decision relating to the adoption of a child, the paramount consideration must be the child's welfare throughout their life".

42. This particular consideration of placement and its feasibility ought to have been in the minds of the parties, and particularly the authority, from week 1 of the application. While we are in week 66, we are presently unable to resolve the impasse upon proper evidence that can be reasonably challenged. That is a factor to be weighed in the balance with the others at 13(7) as described above. It is a gap in my judgment that requires to be filled and cannot be by the evidence of the authority that they say is unassailable. Any adjournment period should be as short as it could be, but I agree with the guardian that there is presently a gap in the evidence.

43. On balance, having reflected on the factors within 13(7) expressed above, and on all the circumstances, I am satisfied that the requested evidence is necessary to justly resolve the proceedings. There is a gap in the evidence that comes from this court's suggested inability to explore the roles of the foster carers as possible carers when balancing that against the other available options and for the court to conduct a robust **Re B-S** analysis. I have preliminary dates and times from the parties by email and will confirm timetabling at the handing down of this judgment, having also liaised with the Designated Family Judge regarding a hearing that has been proceeding for this length of time.

Joinder

44. The learned district judge did not have the arguments available to me as to joinder. I have to comment that is despite all parties, other than the foster carers, being represented at the hearing. The decision was not challenged, presumably because those arguments were not advanced at the time. Reconsideration has effectively been invited by the back door. When hearings are listed and parties are represented that should be the final word on the matter absent proper appeal. It follows that they must give the court the assistance it requires in determining the matter.

45. I am acutely aware that the foster carers having come unrepresented throws them into the middle of a very difficult issue amidst a sea of professionals involving several layers of local authority management. They have been in court during those arguments and heard us talk about them. I have no doubt how difficult it has been for them to do that. The guardian at present is advancing the position appropriately and robustly. Having heard from everyone and considering the case law, I do not consider that the time has come as yet (and may not) for the foster carers to be intervened in proceedings. I discharge them. That may be reconsidered at the appropriate time.

HIS HONOUR JUDGE REDMOND