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What's wrong with linear judgments?

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Introduction

In a series of cases over the last 12 months, judges have condemned social work evidence and lower court decisions in care proceedings because they were based on 'linear judgements'. This paper questions the basis of the criticism by examining how the term 'linear judgment' is used in the courts, the potential defects of such judgments and how else the term may be understood. It makes the case for acknowledging a hierarchy of placements or care plans and challenges attempts to denote quality with labels. Assessments, and evidence of social work witnesses, should include analysis which provides a clear chain of reasoning linking the child's needs and carers' capacity to meet these with the proposed plan, order or placement. So far as possible, this should be written in a way that service users can understand.

Re G [2013] EWCA Civ 965

The case concerned an 8 year old boy with autistic spectrum disorder, epilepsy, learning difficulties and hyperactive behaviour. When he was 3 years old, his mother, a lone parent refugee had requested that he be looked after by children's services in Dublin where they were living. He remained looked after for around a year, care proceedings were brought but ultimately no order was made. He returned to his mother's care but she disengaged from services, moved the boy from school to school and then came to London. For a year she cared for her son, receiving a little support from the local authority. In December 2010, she asked the local authority to accommodate her son for 2 weeks but failed to keep contact or to collect him. After 3 weeks, the local authority started care proceedings. Initial assessments of the mother were positive but the information received from Ireland led the social worker to reconsider, and to recommend a care plan of long term fostering. This was supported by the children's guardian. A care order was made by a district judge in April 2012, and upheld on appeal by the circuit judge. In April 2013, the mother was given leave to appeal by the Court of Appeal, the appeal was allowed and the case remitted for rehearing. This pre-PLO case had taken 27 *months* in proceedings and now required a new final hearing,

The Court of Appeal plays two distinct roles according to the way the appeal is argued. If the appeal concerns the way the judge at first instance evaluated the case, for example applying the threshold test or conducting the proportionality analysis, the Court of Appeal considers whether the original decision was 'wrong' (*Re B [2013] UKSC 33*); if the issue is the exercise of discretion, for example the arrangements for the child's residence or contact, it considers whether the decision was 'plainly wrong' (*G v G (custody appeal) [1985] 1 FLR 984 HL*), in either case the appeal necessarily involves examining 'the merits' of the case. However, if the appeal concerns the conduct of the hearing or the reasons the judge gave for the decision, the Court of Appeal's role is only to examine the application of law and the

legal process; it is not concerned with 'the merits' - whether the facts should have resulted in a different decision. If the appeal is granted, the case will usually be remitted so that the judge (or sometimes a different one) can apply the law to the facts properly, using the explanation of the law and any guidance the Court of Appeal has provided. For these reasons, arguments and reasoning in the Court of Appeal can be rather esoteric, driven by effective legal points, not the realities of the child's situation.

In *Re G*, argument in the Court of Appeal focused on the initial judgment and the first appeal (to the circuit judge), analysing the approach by reference to the recent explanations of the law by the Supreme Court in *Re B* [2013] UKSC 33. Similarly, Lord Justice McFarlane focused his judgment on the processes the two judges followed in constructing or explaining their decisions (para 42). He was critical of the initial judgment: the district judge had failed to provide a '*holistic*' analysis but followed a '*linear*' model, rejecting the possibility of no order or a supervision order and focusing on the reasons for making a care order. He explained:

In most child care cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option. The linear approach, 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. (paras 49-50)

McFarlane LJ had three main objections to judges using what he termed 'a linear process': 1) the relative merits in welfare terms of the options were not balanced against each other; 2) the outcome depended on the order in which the alternatives were considered; and 3) the most draconian option (adoption) became the default because the alternatives were eliminated. Although a linear structure was acceptable for whole judgments, when it came to considering the child's welfare, what was required was 'a balancing exercise' where '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.' (para 54)

It is, in short, a linear analysis in which the mother is ruled out and therefore the only remaining option, and the one therefore endorsed by the court without further consideration, is long term fostering under a care order. The two options are never considered side by side as part of an holistic balancing exercise in which the pros and cons for each are weighed up and a express choice is made between the two by applying J's welfare as the paramount consideration. (para 59).

This criticism was endorsed by the President of the Family Division in the case of *Re B-S* [2013] EWCA Civ 1146, who quoted extensively from McFarlane LJ's judgment and called his description of the potential danger of the linear approach as 'compelling' (para 43):

We emphasise the words "global, holistic evaluation". This point is crucial. The judicial task is to evaluate *all* the options, undertaking a global, holistic and (see *Re G* para 51) multi-faceted evaluation of the child's welfare which takes into account *all* the negatives and the positives, *all* the pros and cons, of *each* option. (para 44) (emphasis in original).

Although the demand to consider all options was subsequently tempered - only 'realistic' options had to be considered. This form of analysis was not only required only of judges; social workers and children's guardians presenting evidence to the court also had to take this approach. Social work evidence had explicitly to consider the negatives as well as the positives of options; a balance sheet approach was encouraged. (para 74)

The decisions in *Re G* and *Re B-S* set standards for social workers presenting assessments to courts and for judges giving reasons for their final orders. On one view these standards were merely a re-statement of what was always required. This view was endorsed by the Andrew Webb, then Chair of the Association of Directors of Children's Services and Anthony Douglas, CEO of Cafcass in a letter to social workers, which was also sent to the President:

'Recent Appeal Court judgments in the B, B-S, W, H and V cases have caused concern that a new standard and bar for a social work analysis is now being set by judges We are advising social workers and guardians that no change to the revised PLO or the current framework for a case analysis is necessary as a result of the recent caselaw. What is needed in every court application under s31 of the Children Act 1989 is a robust social work analysis with a strong evidence base, both from the local authority and from the guardian. We see this as existing good practice rather than as constituting a higher test.'

The alternative view was that the Court of Appeal was requiring more or better analysis than had previously been necessary. Whichever view was correct, the Court of Appeal had provided handy labels, 'linear' and 'holistic' which could be applied to further a case for appeal, or justify overturning a decision. There has been a torrent of appeals, constructed on the basis that lower court practice was inadequate using these arguments, and other cases have been delayed in the lower courts for further social work analysis. Webb and Douglas expressed concern that, 'some high quality analyses appear to be being passed back for more work purely because they do not set out methodically and formulaically the pros and cons of every single placement option for a child.'

A focus is on form rather than substance makes it more likely that the quality of assessment practice will be wrongly evaluated. It is easier for lawyers to challenge the presentation and the process than to attempt to get to grips with a substantive examination of the quality of social work evidence and show that this decision was wrong. Indeed, the care proceedings process has been designed to accommodate

this; it is the role of the children's guardian to advise the court about social work issues in part because neither the judge nor the lawyers have the knowledge and skill base to assess this.

Placement hierarchies

An approach whereby potential placements are considered sequentially (McFarlane LJ's linear approach) has been long established practice in placement planning. It reflects the rights of children and parents to proportionate intervention under the European Convention of Human Rights, and is now required by the Children Act 1989, s. 22C.

In *Making Care Orders Work* (2003), Harwin and colleagues examined the preparation and implementation of care plans in care proceedings. The researchers developed a framework for the process that they found social workers to use implicitly in their work. First, social workers considered whether rehabilitation was possible examining the risks to the child and the ways these could be controlled or mitigated. Secondly, where risks of return home were considered too high, the focus moved to kinship care. Thirdly, if there was no suitable relative willing and able to provide adequate care, they considered alternative forms of substitute care depending on the child's age, difficulties, contact needs and other factors. Finally, primarily for older children, they considered whether a foster or residential placement should be sought focusing on children's wishes and the available resources (chapter 4 and figure 4.1).

The authors noted (p. 73) that 'this model is not foolproof' and that 'every item requires interpretation' but in the cases studied it was 'helpful and effective' to structure social work planning. The model worked well where it was accompanied by 'rigorous professional thinking about the value of specific options to individual children.' They also saw disadvantages. The sequential model did not encourage twin-track planning and worked by a process of elimination, which lacked 'subtlety when used on its own'. Specifically, most considerations were seen as relevant at particular stages and given little attention later even though they remained relevant. Also, stages were sometimes omitted; for example, one children's guardian complained that the social worker had left considering possible extended family placements to her.

Starting by considering the possibility of a child remaining at home/being rehabilitated, respects the child's and parents' rights to family life, particularly the obligation to intervene proportionately (ECHR art. 8). Only where parental care poses too greater risk for the child's well-being, for their rights under arts, 2, 3 and 8, are alternative placements considered. Considering adoption only after return home, kinship care and fostering have been ruled out treats adoption as 'a last resort' to be used only where there is no alternative placement that can satisfy the child's safety and welfare rights. This approach fits with the Supreme Court's decision in *Re B* 2013.

The Children Act 1989 originally gave local authorities wide discretion over the placement of children subject to care orders (or in s. 20 accommodation) although the court controlled the making of orders. Amendments introduced in the Children and Young Persons Act 2008 brought a statutory hierarchy for placements, prioritizing placements with parents, others with parental responsibility and those who had

a residence order before a care order was made unless this is not practicable or not in the child's welfare (s.22C(3) and (4)). Where such a placement is not available, the local authority must give preference to placement with a relative, friend or connected person, who is a local authority foster carer, over any unrelated carer (s.22C(6)(7)). Whilst this does not require a family or friends placement where no such relative is approved, it strongly suggests that members of the child's wider family should be considered before stranger placements. Another step has been added by the Children and Families Act 2014, s.2, to accommodate fostering for adoption. Where the local authority is considering a plan of adoption, it must consider a placement with a relative, friend or connected person who is an approved foster carer (s.22C(9A)). However, if it considers that this is *not* the most appropriate placement for the child, it must consider a fostering for adoption placement (subs 9B) even though it has not obtained a placement order, but not where a placement order has been refused (subs 9C).

Although the 2008 Act put giving priority to family placements in statute, it is clear from the earlier research both that this was already established practice and a legal requirement on local authorities under ECHR art 8. There was, of course, no absolute obligation to place children with parents or relatives; the European Court of Human Rights has long recognized that parents do not have any right to decisions which are contrary to their children's welfare, *Johansen v Norway* (1997). More recently the Court's approach has been encapsulated in this quotation from *YC v UK* (2012) 55 EHRR 967:

[F]irst, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and second, it is in the child's best interests to ensure his development in a safe and secure environment. ...family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. (para 134)

Placement hierarchies are not unique to England and Wales. They are well established in other jurisdictions, notably in North America where they were introduced to support placement of children from Native American or Inuit communities within their cultural group. Under the Indian Child Welfare Act 1978 (USA) priority must be given to placement with the extended family, then in the child's tribe, with an Indian family not from the child's tribe and only with a non-Indian family where none of these is available. In this way, the legal framework serves to preserve the child's cultural links and to counter a long history of forced assimilation.

In the search for an outcome that serves the child's best interests, a hierarchy ensures that specific types of outcomes are considered first, and positively dismissed before other types are considered. Effectively, hierarchies operate like weak, rebuttable presumptions, indicating an objective view about what might be best but allowing this to be overridden with reasons. The hierarchy sets the priority in which placements must be considered. The order is a matter of deliberate policy; it is simply not lawful for the local authority to start with adoption as McFarlane LJ speculated. A legal argument not based on groundless speculation can hardly be considered as 'compelling'.

What is a realistic option?

In some cases evidence and assessments may provide obvious reasons for rejecting placements. The acceptance that only *realistic* options need be considered acknowledges this. However, this raises the difficulty of agreeing what is realistic, and dealing with disagreement. On the reported facts in *Re G*, it is not difficult to see why returning the child to his mother might have been considered unrealistic. Research evidence on re-unification (see example Farmer *et al*'s study of reunification (2006) <http://www.bristol.ac.uk/sps/research/projects/completed/2006/rk6174/> and Farmer and Lutman's five year follow up study of neglected children returned to their parents (DCSF RB 214, 2010) has established both the high failure rate of re-unification plans for children on care orders (85%) and factors associated with reunification failure, including previous failed reunification, lack/ non use of support, child's age and behaviour difficulties, all of which were present in that case.

How should a decision to reject an option be seen? Necessarily wrong, or a justifiable approach where the merits of the case indicate? Clearly, if every option (even unrealistic ones) has to be considered any omission must be fatal. However, this is not the law: only realistic options need be considered. A social worker can be cross examined as to why an option was not considered, and these views tested against those of the children's guardian. Judges can, and do provide, alternative ways of reaching their decisions, in case they are held to have been wrong in part of their reasoning. A decision should not be considered as wrong without considering the merits, merely because it is possible to criticize the reasoning for it.

Appeals and timely remedies

The importance of speed of decision-making in the lower courts has been recognized in 26 week time limit in the Children and Families Act 2014, and in the time limits for applications to appeal, but any sense of urgency sometimes seems lacking in the Court of Appeal. Delays in hearing cases, or in issuing judgment, for example in *Re B* [2014] EWCA Civ 565, where 5 months elapsed between hearing the second appeal and the judgment that the case should be remitted for rehearing. The Court of Appeal can no more claim it lacks resources or has too much work than any social worker required to file a *Re B-S* compliant assessment. Just as the local authority has started proceedings and must commit its resources to timely decision-making, so too must the Court of Appeal when it grants leave to appeal.

If, as in *Re G*, the parent's complaint is that the plan is long-term fostering rather than return home, the local authority's review duty may well provide a more realistic remedy and a better outcome than an appeal followed by a rehearing. Working with the social worker to build the parents relationship with the child will provide a stronger foundation for successful reunification than yet another hearing. Of course, these need not be alternatives but, realistically, the time the parent and the social worker both expend preparing for the proceedings is time they are not spending working together for the child. Appeals can provide remedies but frequently only diversion and delays.

Clarity and meaning

The language used in *Re G* to describe the approach to explaining care plans and judgments confuses rather than clarifies. In decision-making studies, the term 'linear judgment' is used to describe a form of

reasoning where all the factors considered, the cues for the decision, are identified by the decision-maker. Studies from the 1970s identified cues and modelled decision-making, using linear regression, to identify checklist items and improve consistency. 'Linear decision-making' is a process whereby all matters considered are identified. In contrast, an 'holistic approach' merely uses general terms to explain a decision, for example, that it is in the child's best interests. This is clearly not what the Court of Appeal expects, either from social workers or from judges

The welfare checklist in Children Act 1989, s. 1 follows the linear approach to determining welfare but leaves the much of the identification and interpretation of the relevant aspects to those applying it. As Lord McDermott explained in *J v C* (1970), the various (competing) factors have to be weighed up. As reminders, checklists or balance sheets can help this process but a tick box approach undermines rather than supports professional decision-making, as Eileen Munro made clear (*The Munro Review of Child Protection* 2011).

Social work assessments, for the courts, or other purposes, require knowledge, evidence, analysis through which knowledge is applied to the evidence about the child and family, and judgment. Skilled practice is needed to work with families to understand their circumstances, gain their trust, and to establish their needs, their capacities and how best to help them and their children. Assessments have to be completed with limited resources, particularly within short timescales, not least so that decisions can be made in a timely way for children. Decisions must be clearly explained but demands for 'holistic' judgments or balance sheets and the rejection of a sequential approach are unlikely to support better professional decision-making.

Conclusion

Better decision-making for vulnerable children is important – the question is how to achieve it. Speed is important, and appears to be being achieved in the lower courts but how this fits with avoiding delay before and after proceedings currently remains unknown. Court judgments imposing standards or procedures on the basis of a single case and from a legal perspective do not appear to be a good way to achieve good decisions about policy and practice. Rather, there needs to be better interdisciplinary communication so the social work profession assists lawyers to understand what good assessments look like and the professions work together to promote better practice.