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## **The quality of care proceedings reform**

### **Judith Masson**

In *Re B-S* [2013] EWCA Civ 1146, giving the judgment of the Court of Appeal on an adoption matter, Munby P. issued trenchant criticism of 'sloppy' practice in social work evidence and inadequately reasoned judgments from the courts. Neither of these factors appeared to have infected the case itself, rather *Re B-S* provided the opportunity for judicial guidance following the Supreme Court's decision in *Re B (A Child)(Care Proceedings)*[2013] UKSC 33 and a series of recent cases where woeful practice had occurred.

The mother in *Re B-S* was appealing against a decision by Parker J to refuse leave to oppose the adoption application relating to her two children. Care and placement orders had been made in October 2011 because the mother 'was completely unable to provide safe or good enough parenting.' She, separated from her abusive partner, turned her life around and applied for leave to oppose the adoptions under Adoption and Children Act 2002, s.47(5). Parker J refused the application: there had been a significant change in the mother's circumstances and there must be compelling reasons for adoption but the paramountcy of the child's welfare meant the application had to be refused. MacFarlane LJ heard the mother's application for leave to appeal (*Re B-S* [2013] EWCA Civ 813) two days after the Supreme Court's decision in *Re B* [2013] UKSC 33. He granted leave in order to clarify the correct approach to s.47(5) applications (paras 18-19) and appeals about them (paras 20-22) in the light of *Re B*. The Court of Appeal guidance extends far beyond these points; challenges based on *Re B-S* risk unravelling the care proceedings reforms introduced following the Family Justice Review.

Leave requirements control would-be litigants' access to the court; their interpretation has to be sufficiently wide not to restrict good claims but still check those that cannot succeed. The Court of Appeal hinted that the door to oppose adoption should be widened. Whilst accepting that the test for leave to oppose adoption had been correctly set by Wall L.J. in *Re P. (Adoption: Leave Provisions)* [2007] EWCA Civ 1084, it might sometimes have been applied too harshly. *Re P* established a three-part test. Once the court had accepted there was a change in circumstances it had to consider the parent's ultimate prospect of success if given leave, and the impact on the child of the grant or refusal, keeping in mind that adoption is permissible only 'if nothing else will do' (*per* Lord Neuberger in *Re B* at para 76).

The suggestion that the previous application may have been too harsh lay in the language used in earlier cases, the focus on short term negative impacts on the child and the emphasis given to the disruptive effect on prospective adopters. It was misleading to say the test was 'stringent' or that leave would be granted in 'exceptionally rare circumstances' (para 68). Rather, the court suggested an approach where, 'the greater the [positive] change in circumstances and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments on the child's welfare must be if leave is to be refused.'

The notion that change in the parent necessarily re-weights arguments about the child's welfare is novel and unreasoned. It links these separate issues and moves parental change from a condition for the leave application to a role in its evaluation, quite different from the terms of the Act or their interpretation in *Re P*. Is a parent who has changed more – given up drugs *and* won the lottery – really to have a stronger case because of their fortune? The call not to focus too much on short term consequences for children (*Re B-S* para 74(viii)) is disingenuous; only if leave is refused will the consequences be short in a child's timescale. Where leave is granted, the child and adopters will face the uncertainty of contested adoption and, if the adoption is refused, further applications for residence or contact. Nor can it realistically be thought that 'firm case management before the hearing' will allow the adoption case to be heard directly after the leave application (para 74(ix)). The possibility of an appeal (now recognised in *Re W; Re H* [2013] EWCA Civ 1177) and the lack of public funding cannot be ignored. Nor can it be assumed that any necessary expert evidence can be arranged in advance to allow a swift final hearing: such evidence is only 'necessary' (Family Proceedings Rules 2010, r.25.1) if leave is granted; it would be profligate to commission it just in case it were required. The family justice system cannot be made to work effectively by such wishful thinking.

In *Re B*, the Supreme Court effectively opened the appeals door wider by holding that decisions about granting care and placement orders were 'evaluative' not discretionary, and so they could be appealed if 'wrong' rather than 'plainly wrong'. The Court of Appeal, whilst declining to set limits for the Supreme Court's decision, held this applied to applications for leave to revoke placement orders or oppose adoption (Adoption and Children Act 2002, s. 24, s.47(3)(5)) because of 'the nature of the issues and their potential gravity for both parent and child' (para 84). This new width prolonged the mother's hopes but the Court of Appeal found no merit in any of her grounds for appeal. Although Parker J had conflated the review of welfare with the mother's prospects of success (para 90), her decision was right (para 103). The Court of Appeal's approach will allow more fruitless applications for leave to oppose: a case of being kind to be cruel.

Much of the Court of Appeal's judgment is taken up with broader guidance on the requirements for analytical evidence from social workers and reasoned judgments from the court. These ideas have been widely disseminated extra judicially (Munby 2013). Making them part of an appellate court decision allows them be enforced through adversarial challenge to local authority and Cafcass evidence, and appeals. This is already occurring.

To meet the standard required, social work evidence must analyse the pros and cons to give a 'fully reasoned recommendation' for the child ; a 'balance sheet' approach is recommended (paras 36). The judge must undertake a 'global, holistic evaluation' (para 43) considering the positives and negatives of each option, individually and in comparison with all the others. Where the court does not have the evidence required, it will have to adjourn. The Court of Appeal acknowledged that its demands could place 'an onerous burden on practitioners and judges' (para 49) and prevent compliance with the 26 week time limit for care proceedings (Children and Families Bill 2013, cl. 14). It was not prepared to compromise justice for timeliness.

If this judgment were merely intended as a reminder of what the required standards are, it would be unquestionable. However, it carries a suggestion that *more* is now required to justify any outcome that does not allow a child to grow up with a birth parent. On the basis of a few cases (of which *Re B-S* does not appear to be one) it sets standards for local authority evidence, which will encourage return to past practice, reliance on external experts and delay (Family Justice Review 2011).

The Family Justice Review recognised that improving practice required ‘Everyone in the system, including the judiciary, should share lessons’ (Interim Report 2011, Para 44). Guidance judgments are not a suitable way of doing this. Developing practice standards should be a matter for discussion from those within the relevant professions, not dictated from judges, and be based on a review of all the issues and their implications for all concerned, not developed through an adversarial analysis, focusing on one case (or even a handful). Practice standards are not independent of resources but constrained by what can be afforded. Once standards have been agreed, time must be allowed for implementation; practitioners need training and support to integrate new expectations into their thinking. The need for improved practice has been recognised (Munro 2011) and work is underway to achieve this (Lewis and Erlen 2013). *Re B-S* shows that the courts want immediate action even if this undermines change.

Disseminating positive examples provides a better way of encouraging good practice, showing practitioners what is necessary and how it can be achieved. Pauffley J’s decision in *Re AW (A Child: Application to Revoke Placement Order: Leave to Oppose Adoption)* [2013] EWHC 2967 (Fam) provides a good example of both social work practice and judicial reasoning, where adoption plans are challenged at a late stage.

Improving confidence in family justice is not only about raising standards. It is also about managing expectations and creating enough certainty to allow for realistic advice. Social worker confidence will not be improved through returning to a system which routinely turns to external experts. Nor will parents’ confidence be raised by a system that allows them to appeal but not legal aid and holds that the original decision was right, or was flawed and requires another hearing.

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