Impact of Court Judgments on Adoption

What the judgments do and do not say

Addendum, December 2014

1. The National Adoption Leadership Board published guidance in November which clarified the meaning of a number of high profile court judgments on care and adoption order cases, notably *Re B* and *Re B-S*.

2. Since the guidance was published, a further judgment – *Re R* – has been issued by the Court of Appeal. This further clarifies the legal position, along with *Re M, Re M-H* and *CM v Blackburn with Darwen Borough Council* which were handed down in October and November.

3. In particular, in *Re R* the President of the Family Division takes the opportunity to address what he describes as the "widespread uncertainty, misunderstanding and confusion" that has arisen in the "post *Re B-S* landscape".

4. In *Re R*, the President affirms that, as stated in the November guidance, the law has not changed. He states that:

   "There appears to be an impression in some quarters that an adoption application now has to surmount 'a much higher hurdle', or even that 'adoption is over', that 'adoption is a thing of the past.' There is a feeling that 'adoption is a last resort' and 'nothing else will do' have become slogans too often taken to extremes, so that there is now "a shying away from permanency if at all possible" and a 'bending over backwards' to keep the child in the family if at all possible….There is concern that *Re B-S* is being used as an opportunity to criticise local authorities and social workers inappropriately – there is a feeling that "arguments have become somewhat pedantic over '*B-S* compliance'" – and as an argument in favour of ordering additional and unnecessary evidence and assessments. … It is said that when social worker assessment of possible family carers are negative, further assessments are increasingly being directed …There is a sense that the threshold for consideration of family and friends as possible carers has been downgraded and is now "worryingly low"…

   "(Such concerns) plainly need to be addressed, for **they are all founded on myths and misconceptions which need to be run to ground and laid to rest.**" *[emphasis added]*

5. The latest Court of Appeal judgments confirm the messages set out in the November guidance. This addendum highlights the key points from these important judgments and, like the initial guidance, is designed to point local authorities, children's guardians and other professionals involved in the family justice system to the relevant statute and case law. Judges look to statute and case law in making decisions: this is why both the original guidance and the addendum refer to key Court of Appeal and Supreme Court judgments throughout.

The Court of Appeal has clarified and confirmed a number of key points

The legal test for adoption has not changed

6. In Re R, the President states that:

> "I wish to emphasise, with as much force as possible, that *Re B-S* was not intended to change and has not changed the law. Where adoption is in the child's *best* interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement orders and adoption orders."

7. This could not be clearer. The law has not changed, and where adoption is in the child's best interests, it must be pursued.

It is not necessary to consider *all* alternative options, or to re-assess options dismissed earlier in proceedings, in order to satisfy a court

8. In *Re R*, the President states that:

> *"Re B-S* does *not* require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage in the proceedings, can legitimately be discarded as not being realistic. *Re B-S* does *not* require that every conceivable option on the spectrum that runs between 'no order' and 'adoption' has to be canvassed and bottomed out with reasons in the evidence and judgment in every single case. Full consideration is required only with respect to those options which are "realistically possible"."

9. Again, this could not be clearer. As set out in the original guidance, the court does **not** need to see in-depth analysis of options which are not realistic for the child concerned, nor an assessment of every option that is put forward by a family.

10. *Re R* states that, "'nothing else will do' does not mean that "everything else" has to be considered" and goes on to set out that:

> "In determining whether an assessment is "necessary", the court must adopt a robust and realistic approach, guarding itself against being driven by what in *Re S* (A Child) [2014] EWCC B44 (Fam) I described as "sentiment or a hope that 'something may turn up'"."

"Nothing else will do" and "last resort" do not mean that foster care or special guardianship should be pursued instead, or that planning for adoption must wait

11. As set out in the November guidance, "nothing else will do" does not mean settling for an option which will not meet the child's physical and emotional needs. Nor does it mean that adoption should be dismissed because a child might otherwise be brought up in foster or residential care.

12. In *Re R*, the President affirms his agreement with the finding in *Re M-H* that, often, arguments in court have left out a significant element of the test set out in *Re B* and *Re B-S*, which qualify the literal interpretation of "nothing else will do". *Re R* also makes

reference to an earlier Court of Appeal judgment, *Re M*, agreeing with the statement that,

> "What has to be determined is not simply whether any other course is possible but whether there is another course which is possible *and* in the child's interests".

13. *Re R* reiterates that, "At the end of the day, the court's paramount consideration, now as before, is the child's welfare "throughout his life"'.

Unnecessary and multiple assessments are not required, and so the 26 week rule should not be a barrier to adoption

14. As set out in the November guidance, placement order applications are not subject to the statutory 26 week time limit. However, we are aware that applications for Placement Orders are often determined at the same time as applications for Care Orders and, consequently, not infrequently, Placement Order decisions are heard within the care proceedings timetable.

15. Local authorities have told us that the multiple friends and family assessments they have thought necessary since *Re B-S* are difficult to complete within the 26 week timescale, creating an additional pressure. *Re R* helps to alleviate this pressure, by emphasising that *Re B-S* does not require re-assessments of options that have already been legitimately ruled out, nor multiple assessments of any possible option.

16. *Re R* states:

> "The [Public Law Outline] stresses the vital importance of such potential carers being identified and assessed, at the latest, as soon as possible after the proceedings have begun. Not infrequently some of those putting themselves forward do not secure a sufficiently positive initial viability assessment to justify pursuing them further as potential carers."
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> "This process of identifying options which can properly be discarded at an early stage in the proceedings itself demands an appropriate degree of rigour, in particular if there is dispute as to whether or not a particular option is or is not realistic. But *Re B-S* does not require that every stone has to be uncovered and the ground exhaustively examined before coming to a conclusion that a particular option is not realistic. Nor is there any basis for assuming that more than one negative assessment is required before a potential carer can be eliminated"