Neutral Citation Number: [2024] EWCA Civ 265

Case No: CA-2023-002287

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LUTON

HH Judge Kushner

LU23C0085

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 22 March 2024

Before :

LORD JUSTICE LEWISON

LORD JUSTICE BAKER

and

LADY JUSTICE ANDREWS

- -

J (CARE PLAN FOR ADOPTION)

- -

- -

Jonathan Sampson KC and Vicky Reynolds (instructed by **Duncan Lewis**) for the **Appellant**

Sam Wallace (instructed by **Local Authority solicitor**) for the **First Respondent**

Nick Goodwin KC and Daniel Sheridan (instructed by **Woodfines**) for the **Third Respondent by his children's guardian**

The Second Respondent was neither present nor represented

Hearing date : 29 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 22 March 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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LORD JUSTICE BAKER :

1.
This is an appeal by a mother against a care order made in respect of her son, J, now aged 9 months.

Background

2.
J has four older siblings. Children's services have been involved with the family for over a decade because of allegations of child neglect, physical abuse, and the adults' drug abuse. In January 2023,

when the mother was pregnant with J, the local authority started care proceedings in respect of her four older children after an allegation that the mother had assaulted one of the children in the street. A psychologist's assessment and a parenting assessment by the local authority each concluded that the parents could not safely care for any of the children.

3.
Immediately after J's birth in July 2023, the local authority initiated proceedings and the baby was made subject to an interim care order and, on discharge from hospital, placed in foster care. The initial social work statement in the proceedings proposed that there should be a further parenting assessment to consider whether the parents could care for J on his own. In the event, however, no further assessment was carried out. We were told that, at a case management hearing before HH Judge Kushner in August 2023, the judge indicated that no further assessment was necessary. In the following weeks, hair strand toxicology tests were carried out on the parents which in the mother's case detected opiates and cocaine but not other drugs. According to the local authority, the parents' attendance at contact visits with J was erratic.

4.
The proceedings in respect of J were listed for final hearing alongside those relating to the older children. At a case management hearing on 5 October, the judge abridged the time estimate for the final hearing to one day. The local authority filed final care plans in accordance with its obligations under section 31A of the Children Act 1989. In the case of the four older children, the plan was for long-term foster placements but, in the case of J, "for him to achieve permanency through adoption".

5.
The local authority's intention was for an application for a placement order in respect of J to be considered at the final hearing of the care proceedings. An application for a placement order was prepared but at the date of the final hearing it had not been filed, apparently because the local authority did not have a copy of J's birth certificate and without it was unable to upload the application onto the online portal.

6.
At the conclusion of the final hearing on 2 and 3 November 2023, the judge made care orders in respect of all five children and gave directions for the listing of the placement order application in respect of J later that month. An application on behalf of the mother for permission to appeal in respect of the order relating to J was refused by the judge.

The hearing before the judge

7.
In the light of the complaint made in the fourth and fifth grounds (which relate in part to the judge's conduct of the hearing), a transcript of the hearing on 2 November was obtained for our consideration. In the event, for reasons set out below, I conclude that it is unnecessary to cite lengthy passages from the transcript in this judgment. A summary of what occurred will suffice.

8.
The judge had a very heavy list of cases with a total time estimate of twelve hours. During the day, the final hearing in these proceedings was adjourned on several occasions. At the outset, the judge was informed that the placement order application had not been filed. She expressed the view, however, that the parents were expecting that application to be canvassed at the hearing so she would proceed to consider the local authority's application for a care order on the basis of the care plan, leaving the

placement order, and the question of dispensing with the parents' consent, to a later occasion. The mother's counsel, Ms Reynolds, said that she wished to challenge the local authority's evidence and the decision not to proceed with a further parenting assessment, and observed that it was unlikely that the hearing would be finished within the day. The judge responded that the scope of the hearing had been determined at the case management hearing, that the issues were relatively simple, and that, if necessary, she would curtail cross-examination. It is plain from the transcript that there was a measure of disagreement between the judge and counsel about this approach. After an adjournment, an application by the police for disclosure of documents from the proceedings was considered by the court, and there was further discussion between the judge and counsel as to the ambit of the oral evidence.

9.

After another break, the court resumed with the intention of hearing the oral evidence of the social worker. By this point, however, the mother had left court and Ms Reynolds asked the court to put the matter back until after the short adjournment. The judge agreed but made it clear that she would not adjourn the hearing to a later date. It is clear from the transcript that the judge expressed herself in forthright terms about this. We were told that in the course of the hearing she banged the desk (although we did not have an opportunity to hear a recording of the hearing).

10.

After a further break, the hearing resumed. Ms Reynolds told the judge that the mother did not wish to return to court, and that in the circumstances she accepted that there would be no oral evidence. After further discussions, the judge allowed Ms Reynolds a further short opportunity to check her instructions, after which the parties proceeded with their submissions in respect of the older children. After yet another break, the judge heard submissions in respect of J. By this point in the day, the children's guardian had left court. Ms Reynolds applied for an adjournment of the application relating to J on the grounds that the guardian was not present and the application for a placement order was not before the court. Amongst Ms Reynolds' concerns was the possibility that, if a care order was made, the mother's legal aid would be withdrawn so that she would be unrepresented at the hearing of the placement order application. (In fact, this latter concern was misplaced because, by virtue of an amendment to the Civil Legal Aid (Merits Criteria) Regulations 2013 recently introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid: Family and Domestic Abuse) (Miscellaneous Amendments) Order 2023, non-means tested public funding is now available to a parent seeking to oppose a placement order in these circumstances where a care order had already been made.) The judge responded that she would "deal with threshold" (meaning determine whether the threshold criteria for making a care order were proved) adding "and then we will see where we get to". She continued:

> "Because I have been thinking about the way it is. I cannot dispense with the consent of the parents, or even deal with that issue, because there is no placement application before me. But I do have a care application in front of me, with a care plan. Now, it can be that I deal with that and then the matter of the placement application is adjourned ...."

11.

The exchanges between the judge and counsel continued. Ms Reynolds persisted with her application for an adjournment, arguing that the local authority could not establish on the evidence before the court that nothing else but adoption would meet J's welfare needs. The judge replied, "Right, and we are not dealing with 'nothing else will do' today". She added:

> “She can reserve her position in respect of the placement application but there is a care plan, and your opportunity to cross-examine is now because what I am not going to do is allow all the issues in respect of a placement application to go over because there is a care application. And what you are suggesting-- And the whole thrust of her case is she wants the matter to go off long-term.”

After further argument, the judge delivered a short judgment refusing the adjournment application.

12.
Counsel then delivered submissions on the care order application. Ms Reynolds submitted that, in the absence of a placement order application, the local authority’s care plan was inchoate. She continued:

> “In terms of the position with the proportionality evaluation, I would also submit that the court cannot consider in the round whether a care order is necessary and proportionate balanced against other realistic options, less draconian in nature to the care order proposed, without being seised of the placement order application. And in particular on that point, that the court essentially-- is the proportionality evaluation happening under s.1 of the Children Act, is it happening under s.1(4) of the Adoption and Children Act?”

The judge immediately replied:

> “Section 1 of the Children Act.”

Ms Reynolds proceeded (with limited interruption from the judge) to develop her argument that, having embarked on the process of a further parenting assessment which was then abandoned, the local authority was unable to establish an adequate welfare basis for a care order. At the conclusion of submissions, the judge reserved judgment until the following afternoon.

The judgment

13.
In her judgment, which considered the applications relating to all five children, the judge started by summarising the background and the legal principles. She set out the issue concerning J in these terms:

> “26.
> In determining the welfare stage which follows, the central issue I must decide in relation to the child’s future is whether I should approve the local authority’s care plan or whether there is any realistic route by which he or she may be safely placed back into the care of one or both of the parents and, if not, whether I should direct further assessment of either or both parents or other family members to explore whether the child might be placed in his or her care, and in regard to this I must be satisfied that further assessment is necessary in order fairly to determine the case.
>
> 27.
> I am not considering the matter in respect of a placement order, so I am not considering the child’s welfare throughout his life, being the paramount consideration, but of course I am alive to the fact that the local authority has put forward a care plan, one of permanence outside the family, for want of a better phrase, that is simply putting it under the widest umbrella that I can, and I also note and acknowledge that their plan for J is one of adoption in that regard. But, in any event, whilst it has been put before me

that a placement application is a draconian step, and that was put forward on grounds of proportionality whether I should separate the two applications, I take the view that, in any event, placement outside the family on a medium to long-term basis is a draconian step in its own right, whatever the basis, whether it is foster care under a care order or going beyond that. So I want everyone to know that I have well in mind that it is a draconian step, with all the difficulties that flow from that."

14.
Next the judge considered the matters relied on by the local authority to establish the threshold criteria under s.31(2) and concluded that the threshold was crossed. She then considered the evidence about the welfare of the four older children, analysed the issues by reference to the checklist in section 1 of the 1989 Act, and made care orders on the basis of the plans for long-term fostering. Finally, she expressed her conclusions about J in these terms:

"97.
Now, J is in a different category because there is, or should have been, a placement application. Nevertheless, the local authority want me to say that, first of all, it should be a permanent placement outside the family, and that he cannot return to the parents, a so-called North Yorkshire. The care plan is one of adoption, but, nevertheless, that subsumes, it has to be said, permanence outside of the family, and it has to be said that, to that extent, I endorse the care plan, that it is one of placement outside the family. I dislike, it has to be said, a North Yorkshire finding, not least because things happen within court proceedings and although I have marked the date in November for this matter to be reconsidered, there is frequently many a slip between cup and lip, and I have, it has to be said, been caught before, so I do not wish to make the North Yorkshire finding as such, but the care plan under the care order is one of permanence outside the family, which I do endorse at this particular stage, at this particular date, if I can put it like that.

98.
The care plans are not set in stone, they are always subject to review, and will be reviewed, it has to be said, when the placement application is made and heard, with, it has to be said, the considerations of the checklist, both under the Children Act and indeed under the Adoption and Children Act, where there are differences to note, not least, under the Adoption Act, in respect of looking throughout the child's life and not simply throughout the child's minority.

99.
I have, therefore, had to consider whether it is best, in the circumstances, having endorsed the care plan, in respect of J, to have it under an interim care order or under a care order, and I am noting, it has to be said, the point about legal representation. For my part, I will be flexible on legal representation. My concern is whether they would be represented and whether there would be a delay, and I am anxious that there should not be any further delay and that there will be a hearing of the placement application in November. So I am inclined to take a pragmatic view. It may well be that an ICO would be easier in the circumstances, but the findings as they stand at the moment are likely to inform any judgment that I make in the future.

100.

> An ICO might be regarded as, it has to be said, a part-heard order. For my part, I note that the parents are not seeking any further evidence, they are not seeking to give evidence-in-chief or to cross-examine, or indeed to be cross-examined at the next hearing. I appreciate, as I have said, that the ICO might be regarded as part-heard but, for my part, I would regard this hearing as a discrete hearing, if I can put it like this. I intend to release counsel across the board. It is likely that a note of my judgment will be required. It is too late for a transcript, but nevertheless a note of judgment in my view would suffice, and essentially what I am saying is that representation at the next hearing will be a matter between legal representative and client but, for my part, I intend to be as flexible and as accommodating as I can. I will await to hear any submissions or any observations that can be made, whether it is better for an interim care order to continue to be made, but, on the basis of the findings that I have made, both in respect of threshold and in respect of welfare, the next hearing in November would of course be subject to the parents being able to say, and submissions to be made on what they would say, might well be, for example, in terms of their ability to change within the timescales of J, and I merely put that forward as an example."

15.
The judge then heard further submissions on the order. The local authority, supported by the guardian, asked for a final care order. After further discussion, the judge gave her decision in these terms:

> "I think I have got to bite the bullet, frankly. It is not something-- if I am wrong, then I am wrong, and somebody else will tell me. I am going to make the care order and I stand by what I say in terms of, essentially, the care plan which I approve is one of a permanent placement outside the family, I will hear the placement application and it is at 24 that point that I will consider all the matters under both the Children Act checklist and indeed the Adoption Act checklist and consider the issue of consent. So there is further opportunity for the parents to make submissions at that particular point, or to argue that there should be--you know, all the arguments that you can make in that respect. I am not going to go through what they can and cannot do, it is the full spectrum, and I will consider it at that particular point. But, of course, I have given a judgment in the care proceedings, and that stands and is available for appeal if that is what is wanted, but will also inform various decisions going forward whatever they are."

16.
Ms Reynolds then applied for permission to appeal. Her grounds included that the order was unjust because of a serious procedural irregularity, namely the judge's conduct of the proceedings. She referred to the judge raising her voice and banging her fist on the table. The judge delivered a further judgment giving her reasons for refusing permission.

17.
The order drawn after the hearing provided that J be placed in the care of the local authority and gave directions for the hearing of the placement order application. The recitals to the order included the following:

> "AND UPON the Court concluding proceedings in respect of the child by endorsing the Local Authority's care plan for J to be placed outside of his family and making a final

Care Order in favour of the Local Authority and listing the matter for a placement order hearing."

The appeal

18.
On 17 November, an appeal notice was filed in this Court. On 30 November, permission to appeal was granted and the application for a placement order stayed pending determination of the appeal.

19.
Five grounds of appeal were advanced.

(1)
The judge was wrong to make a final care order in circumstances where the court did not have a complete care plan before it to underpin the final care order that it made.

(2)
The judge erred in her welfare and proportionality evaluation which was flawed and unfair because the judge adopted a linear, as opposed to holistic, approach, whereby the mother's case and the other options available were argued, considered and evaluated under the Children Act only, and not on the basis of the heightened test for adoption (that 'nothing else will do') as summarised by Baroness Hale in Re B (A Child) (Care Proceedings: Threshold Criteria) UKSC 33.

(3)
The judge failed properly to consider the mother's case that (a) it was wrong to proceed in the absence of a placement order application and (b) there was not sufficient evidence for a final care order to be made where there had been no assessment of the parents' capacity to care for J alone.

(4)
The manner in which the judge expressed herself in her judgment was unfair to the parents.

(5)
The judge's decision was unjust because of serious procedural or other irregularities in the proceedings. Her conduct of the case and behaviour towards the parties and counsel was unreasonable and bordered on the oppressive.

20.
The appeal was opposed by the children's guardian. Unusually, although the local authority opposed the appeal on grounds 3 to 5, it did not oppose it being allowed on grounds 1 and 2. The father took no part in the appeal.

21.
At the hearing of the appeal, the principal focus of the argument was on grounds 1 and 2. Mr Jonathan Sampson KC, leading Ms Reynolds on the appeal, described these grounds as two sides of the same coin. In short, he submitted that, as the care order had been made on the basis of a care plan for adoption, the judge erred in failing to apply the legal principles applicable when a court is making a decision relating to adoption and in making the order without considering (a) the permanency provisions in the care plan and (b) all the information needed before a plan for adoption could be approved. On behalf of the local authority, Mr Sam Wallace, who did not appear before the judge, accepted that the appeal was "very likely to succeed" on those grounds. On behalf of the guardian, Mr Nick Goodwin KC and Mr Daniel Sheridan, neither of whom appeared at first instance, accepted that

the judge had not applied the correct legal principles but argued that it was nonetheless open to this Court to uphold the order.

22.
The care order was made under Part IV of the Children Act 1989. Under section 1(1)(a) of that Act, when a court determines any question with respect to the upbringing of a child, the child's welfare "shall be the court's paramount consideration". Section 1(1) and (2) of the Adoption and Children Act 2002 contain a similar provision, but with an important distinction. They provide that, "whenever a court or adoption agency is coming to a decision relating to the adoption of a child … the paramount consideration of the court or adoption agency must be the child's welfare throughout his life" (my emphasis).

23.
Both the 1989 Act and the 2002 Act contain checklists of factors which the court must take into account when making the welfare evaluation. The checklist in section 1(3) of the 1989 Act identifies factors to which the court "must have regard" when making certain orders listed in section 1(4), including a care order under Part IV. The checklist in section 1(4) of the 2002 Act identifies the factors to which the court must have regard under section 1(1) when "coming to a decision relating to the adoption of a child". Most of the factors in the 1989 Act checklist are repeated in the 2002 Act checklist. But the 2002 Act checklist contains two additional factors which reflect the requirement under section 1(2) that the court's paramount consideration is the child's welfare throughout his life. Under section 1(4)(c), it includes the requirement to have regard to:

> "the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adoptive person".

It also includes, under section 1(4)(f):

> "the relationship which the child has with relatives, with any person who is a prospective adopter with whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including –
>
> (i)
> the likelihood of any such relationship continuing and the value to the child of doing so,
>
> (ii)
> the ability and willingness, of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
>
> (iii)
> the wishes and feelings of any of the child's relatives, or of any such person, regarding the child."

24.
As stated above, under section 1(1) of the 2002 Act, the provisions of subsections (2) to (4) "apply whenever a court or adoption agency is coming to a decision relating to the adoption of a child". Plainly that encompasses making a decision whether to make a placement order under section 21 authorising a local authority to place a child for adoption. Very frequently, however, the application for a placement order is made during the currency of care proceedings. Under section 22(2) of the 2002 Act, if an application has been made (and not disposed of) on which a care order might be made, the

local authority must apply for a placement order if they are satisfied that the child ought to be placed for adoption. At the final hearing, the court will then be faced with applications for a care order and a placement order. Earlier decisions of this Court have established that in those circumstances the court must apply section 1 of the 2002 Act: see Re C (A Child) (Placement for Adoption: Judicial Approach), Practice Note [2013] EWCA Civ 1257, [2014] 1 WLR 2247, Re R (A Child) [2014] EWCA Civ 1625, and Re B (A Child) (Adequacy of Reasons) [2022] EWCA Civ 407.

25.
Allowing an appeal in the last-named case, Sir Andrew McFarlane P said at paragraphs 37 to 39:

> “37.
> It is plain that the statute requires courts and adoption agencies to apply the test in ACA 2002, s 1 whenever they are 'coming to a decision relating to the adoption of a child' (s 1(1)). The choice facing the court in the present case was a straight one between placing E in the care of his parents or pursuing the local authority plan by placing him for adoption. That choice plainly involved coming to a decision relating to adoption and the court was required to apply the ACA 2002, s 1 provisions when making its decision.
>
> 38.
> In the present case the judge unfortunately fell into error, as a matter of law, in conducting his entire evaluation of the proposal that E should be placed with his parents within the context of CA 1989, s 1. The judge reached his conclusion on this point before making any reference to the requirements of ACA 2002, s 1, or adoption and 'nothing else will do'. The decision in the case involved determining whether E was to be placed with his parents or adopted (or as the judge added, placed in long-term foster care). The presence of adoption in the range of realistic options dictated that ACA 2002, s 1 was the relevant provision, and the judge was in error in making any reference to CA 1989, s 1 in that context.”

26.
In that case, an application for a placement order had been filed and was before the court for determination at the final hearing of the care order application. But the same approach applies where there is no placement order application for the court but the local authority care plan is for adoption. In Re R, supra, Sir James Munby P said (at paragraph 51):

> “Where, in an application for a care order, the plan is for adoption, the court must have regard not merely to the 'welfare checklist' in section 1(3) of the 1989 Act but also, and even if there is no application for a placement order, to the 'welfare checklist' in section 1(4) of the 2002 Act.”

In the light of Sir Andrew McFarlane P’s clear statement in Re B quoted above, I would respectfully rephrase Sir James’s words as follows. Where, in an application for a care order, the plan is for adoption, the presence of adoption in the range of realistic options determines that section 1 of the 2002 Act is the relevant provision, even if no application for a placement order is before the court.

27.
Unfortunately, that was not the course followed by the judge in the present case, even though she was being asked to make a care order on the basis of a local authority care plan for adoption. She could not have been clearer that she was applying section 1 of the 1989 Act, not section 1 of the 2002 Act. She said so expressly to Ms Reynolds in the course of submissions. And at paragraph 27 of her

judgment, she said that she was not considering the child's welfare throughout his life as the paramount consideration.

28.
In addition to the requirement to apply the "enhanced" welfare provision in section 1(2) and (4) of the 2002 Act, a judge asked to make a care order on the basis of a plan for adoption – and thus "coming to a decision relating to adoption" – is required to comply with the principles established in case law when evaluating the proportionality of the plan for adoption. The leading case is, of course, Re B (Care Proceedings: Appeal) [2013] UKSC 33 and the principle most often cited is in the observation of Baroness Hale of Richmond at paragraph 198:

> "It is quite clear that the test for severing the relationship between parent and children is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short where nothing else will do."

29.
This in turn led to the series of cases in this Court in which guidance was given as to how this proportionality exercise should be carried out in practice. In short, it is incumbent on the court to carry out the balancing exercise prescribed in Re G (A Child) [2013] EWCA Civ 965 and Re B-S (Children) [2013] EWCA Civ 1146, in which, per McFarlane LJ in Re G at paragraph 54;

> "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."

30.
Again, the judge could not have been clearer that she was not carrying out this proportionality exercise. She expressly told Ms Reynolds in the course of submissions that "we are not dealing with 'nothing else will do' today".

31.
A further plank of Mr Sampson's submissions was that the judge failed to give proper consideration to the care plan. Where an application is made on which a care order might be made, section 31A of the 1989 Act requires a local authority to prepare a care plan for the future care of the child. Following amendments to the 1989 Act introduced by the Children and Families Act 2014, the degree to which the court is required to scrutinise the care plan is limited. Section 31(3A) and (3B) provide as follows (so far as relevant to this appeal):

> "(3A) A court deciding whether to make a care order
>
> (a)
> is required to consider the permanence provisions of the section 31 plan for the child concerned …
>
> (3B) For the purposes of subsection (3A), the permanence provisions of a section 31A plan are
>
> (a)
> such of the plan's provisions setting out the long-term plan for the upbringing of the child concerned as provide for any of the following:
>
> (i)

the child to live with any parent of the child’s or with any member of, of any friend of, the child’s family;

(ii)
adoption;

(iii)
long-term care not within sub-paragraph (i) or (ii);

(b)
such of the plan’s provisions as set out any of the following:

(i)
the impact on the child concerned of any harm that he or she suffered or was likely to suffer;

(ii)
the current and future needs of the child (including needs arising out of that impact);

(iii)
the way in which the long-term plan for the upbringing of the child would meet those current and future needs.”

32.
In the present case, the permanency provisions of the care plan included the following. Under Section 1, headed “The Overall Aim”, the plan contained the following provisions:

“1.1
The aim of the final care plan is to ensure that J’s safety, emotional and physical needs are met in a permanent, secure, and stable environment to ensure that he is not at risk of significant harm. It will make it possible for J to thrive and grow safely in an environment in which he feels that he belongs and is nurtured, is loved unconditionally and where he can learn and develop to reach his full potential.

1.2
The Local Authority’s final care plan for J is for him to achieve permanency through adoption.

1.3
It is the proposal of the Local Authority that a Care Order and Placement Order in respect of J are granted, to enable the Local Authority to proceed with its preferred plan to place him for adoption.

1.4
An adoptive placement would afford J’s adoptive parents Parental Responsibility for J and enable them to safeguard him from significant harm. They will be able to make appropriate plans for J’s long-term future and ensure his health needs are met.

1.5
J is subject to an Interim Care Order granted on 28.07.2023. J has been placed in foster care since he was discharged from hospital, following his birth on 18.07.2023.

1.6

The Local Authority does not support J being placed in the care of his parents, either together or separately. It is assessed that neither parent would be able to provide safe, consistent care for J nor is either of them able to prioritise their safety and therefore mitigate risks exposed to J through substance misuse, neglect, physical abuse, emotional abuse, and criminality."

33.
Under Section 4, headed "Placement Details and Timescales", subsection 4.1, headed "Proposed placement – type and details (or details of alternative placement)" contained the following provisions:

"4.1.1
The Local Authority proposes that Care and Placement Orders are granted for J so that he can be placed in an adoptive family. This will allow him to reside within a family and enjoy a private and family life whilst being protected from harm.

4.1.2
The Agency Decision Maker have ratified its decision that J's care plan is adoption.

4.1.3
J would receive careful preparation for placement for adoption.

4.1.4.
The Local Authority is mindful of the requirement to avoid delay in these proceedings and is mindful that any delay may prejudice J's ability to form the optimum attachments with his permanent carers. The Local Authority plans to act responsibly to ensure that J's needs are met and that he is placed with permanent carers as soon as possible.

4.1.5
Once a suitable match has been made, and subject to a Placement Order being made, prospective adopters would be presented at the next available Adoption Matching Panel.

4.1.6.
In the event that the Court agrees with the plan for J to be adopted, he will remain in his current foster placement, minimising the disruption to him. His foster carer will assist J to make a planned and positive move to his permanent placement.

4.1.7
The Child Permanence Report and other associated reports will assist in the family finding process and ensure that J is matched appropriately. J's individual needs will be taken into consideration."

34.
Mr Sampson submitted that it was incumbent on a judge being asked to make a care order on the basis of this plan to scrutinise these permanency provisions. Here, the judge expressly elected not to do so.

35.
In any event, Mr Sampson and Ms Reynolds submitted (under ground 1) that the judge was in no position to approve the plan because she did not have before her all the information required before she could approve the care plan for adoption. They rely in particular on the observations of Ryder LJ in Surrey County Council v S [2014] EWCA Civ 601 at paragraphs 28 to 29:

> “28.
>
> …. A concurrent hearing of care and placement order applications also helps to prevent the error of linear decision making because the court has all of the evidence about the welfare options before it. Indeed, I would go further: in order for the agency decision maker to make a lawful decision that the children be placed for adoption, the Adoption Agencies Regulations 2005 (as amended) must be complied with. For that purpose, the agency decision maker has a detailed 'permanence report' which describes the realistic placement options for the child including extended family and friends. The report describes the local authority's assessment of those options. When a decision is then made by the agency decision maker it is based on a holistic non-linear evaluation of those options. That decision leads to evidence being filed in placement order proceedings. It is good practice for that evidence to include the permanence report used by the agency decision maker, the record or minute of the decision made and a report known as an 'annex A' report which is a statutory construct which summarises the options and gives information to the court on the suitability of the adoptive applicants. All of this permits the court to properly evaluate the adoption placement proposal by comparison with the other welfare options.
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> 29.
>
> In care proceedings where the local authority are proposing a care plan with a view to an adoptive placement, the court is likely to be missing important evidence and analysis if the placement order proceedings are considered separately. Furthermore, without the agency decision maker's decision, any care plan based on an adoptive proposal cannot be carried into effect. It is likely to be inchoate or at least conditional on a decision not yet made and the outcome of which cannot be assumed. I make no criticism of the key social worker or the children's guardian in this case. Their materials were of high quality but necessarily, without the agency decision maker's decision, they could not present a full analysis of the factors in section1(4) of the 2002 Act and could do no more than pay lip service to the proposed adoption plan of the local authority and the interference with family life that it would have entailed.”

36.

This practice has been followed at first instance in several cases, including London Borough of Redbridge v A, B and E (Failure to Comply with Directions) [2016] EWHC 2627 (Fam), in which MacDonald J observed (at paragraph 24):

> “it would be inappropriate to proceed to a final hearing absent the decision of the ADM, a placement application and the associated evidence in circumstances where the court is being asked to approve a care plan that will permanently remove E from her mother's care and place her for adoption.”

37.

As noted above, Mr Nick Goodwin KC and Mr Daniel Sheridan acknowledged on behalf of the children’s guardian that the judge erred in applying the checklist under section 1 of the Children Act 1989 rather than the “enhanced” checklist under section 1 of the Adoption and Children Act 2002. They argued, however, that she deliberately sought to steer a course between (a) the technical difficulty generated by the absence of a formally issued placement order application and (b) the delay that a wholesale adjournment of the case would cause. She did not, therefore, approve a care plan for adoption but merely a plan for permanency. That is clear both from the terms of the recital to the

order made after the hearing and from her reference to the “North Yorkshire” case – the decision of Black J in North Yorkshire County Council v B [2008] 1 FLR 1645 which endorsed the practice, in appropriate cases, of the court ruling out a parent as a potential carer for the child before the court had presented its final care plan. They submitted that, in those circumstances, the judge’s failure to apply the 2002 Act checklist or to conduct the proportionality exercise prescribed by case law or to scrutinise the permanency provisions of the plan did not invalidate her decision to make a care order.

38.
The flaw in this argument is that the court was not considering a general plan for permanency but a specific plan for adoption. Under section 31(3A), the court was required to consider the permanence provisions of the section 31 plan for the child concerned (my emphasis). Under section 31(3B), the provisions of the plan which the court had to consider included such provisions as provided for adoption, the current and future needs of the child, and the way in which the long-term plan would meet those needs. The evaluation of those provisions, and the way in which it was said they would meet the child’s current and future needs, was manifestly a “decision relating to adoption” falling within section 1 of the 2002 Act. Such evaluation required the court to consider, inter alia, the likely effect on the child (throughout his life) of having ceased to be a member of the original family, the relationship which the child has with relatives, and the value to the child of that relationship continuing. That is part of the proportionality assessment which a judge is required to undertake.

39.
In the alternative, Mr Goodwin and Mr Sheridan submitted that it was in any event safe for this Court to uphold the care order. The judge had ample material on which to determine that J could not be placed with his parents, in particular the assessments carried out in the course of the older children’s proceedings. Although there had been a plan to carry out a further assessment, that had been abandoned at an early stage and no application made under Part 25 of the Rules. Testing had confirmed that the parents were still using drugs. Their attendance at contact with J had been erratic. But for the technical hitch which had prevented the filing of the placement order application, it would have been considered on 2 November. All parties, including the parents and the guardian, were fully prepared for that and had submitted evidence. The agency decision maker had approved the plan. Although it is sensible wherever possible for the placement order application to be determined during the currency of the care proceedings, it is not obligatory. The judge had been careful not to prejudge the placement order application. In the circumstances, there was no fundamental unfairness to the parents in the course taken by the judge.

40.
None of these points makes it “safe” or indeed lawful for this Court to uphold an order made applying the wrong statutory principles and without carrying out the proportionality assessment stipulated by case law. Whether or not there was any unfairness to the parents, it was in my view unfair to the child and wrong for a care order to be made on the basis of a care plan for adoption without subjecting the plan to the rigorous analysis required by statute and case law. To carry out that analysis, the court needed to scrutinise the permanency provisions of the care plan as required by sections 31(3A) and (3B) with reference to the information available to the agency decision-maker as stipulated by Ryder LJ in the Surrey case.

41.
In oral submissions, Mr Goodwin argued that, in the event that we concluded that the care order could not stand, it was open to this Court to substitute a “North Yorkshire” finding. There is clear authority that such a finding is still permitted, although following the decisions of the Supreme Court

in Re B and the subsequent Court of Appeal authorities, the circumstances in which it will be appropriate are likely to be less common. As Sir James Munby P observed in Re R, supra, at paragraph 67:

> "Re B-S requires focus on the realistic options and if, on the evidence, the parent(s) are not a realistic option, then the court can at an early hearing, if appropriate having heard oral evidence, come to that conclusion and rule them out. North Yorkshire County Council v B [2008] 1 FLR 1645 is still good law. So the possibility exists, though judges should be appropriately cautious, especially if invited to rule out both parents before the final hearing …."

In the present case, I am unpersuaded that it would be an appropriate course for this Court to take, in the light of the judge's fundamentally mistaken approach and the fact that she expressly said in her judgment that she did "not wish to make the North Yorkshire finding as such".

42.
In fairness to the judge, her instinct at the end of her judgment was to make an interim care order but in subsequent submissions she was persuaded to take a different course. She was understandably anxious to bring the proceedings to an end as soon as possible. She did not have the benefit of the legal analysis put before us by leading counsel, nor the time for reflection available to this Court but not to hard-pressed judges sitting at first instance. But the regrettable fact is that she made an order which was not open to her in law and which must therefore be set aside.

43.
If my Lord and my Lady agree, I would therefore allow the appeal on grounds one and two, set aside the care order, substitute an interim care order, and direct that the application for a care order and the application for a placement order be listed before another judge. I propose that we remit the case to the Designated Family Judge, HH Judge Hildyard KC, for an urgent case management hearing to determine the next steps.

44.
In those circumstances, it is neither necessary nor appropriate for this Court to address the remaining grounds of appeal. Under ground 3, it was asserted that the judge failed to consider the mother's case that there was not sufficient evidence before the judge on 2 November for a final care order to be made where there had been no assessment of the parents' capacity to care for J alone as opposed to the four older children. At the next case management hearing, it will be open to the mother to renew the application for an adjournment and a further assessment of the parents' capacity to care for J alone as opposed to the four older children. It will be for the next judge to determine whether such an assessment is necessary to assist the court to resolve the proceedings justly: Children and Families Act 2014, section 13(6). That determination will be made on the basis of the evidence at that stage, and the next judge is unlikely to be assisted by any comments I might make about the treatment of the issue at the hearing in November.

45.
I propose to say nothing about the other grounds of appeal, save for the following brief observations about ground five. Ms Reynolds was plainly in a difficult position. The judge was faced with an extremely heavy list and presented with submissions which she found unattractive. There were some robust exchanges in which the judge said things which, on reflection, she might conclude could have been expressed differently. We have not heard a recording of the hearing so have not heard the tone in which the judge addressed counsel nor confirmed counsel's assertion that the judge banged the

desk. It is difficult to envisage circumstances in which it is ever appropriate for a judge to bang the desk. But reading the transcript as a whole, I did not consider that the judge conducted the hearing unfairly or in a way which led to an unjust outcome, save for the errors identified in grounds one and two on the basis of which I would allow this appeal.

LADY JUSTICE ANDREWS

46.
I agree.

LORD JUSTICE LEWISON

47.
I also agree.