Re B-S and the Perils of the 'Balance Sheet' Approach

Michael Jones, barrister, 15 Winckley Square Chambers, considers the response of local authorities to the requirements imposed by Re B-S and later cases.

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It has become apparent since the judgment of the Supreme Court in the case of ***Re B (A Child)*** [2013] UKSC 33 and thereafter, in the case of ***Re B-S (Children)*** [2013] EWCA Civ 1146, that local authorities now have to carry out an increasingly detailed and holistic welfare analysis within their evidence in order to provide the court with sufficient information upon which it can legitimately base its decision whether to make care and placement orders. An adoptive care plan has always been viewed as the most draconian option possible, given that it entails placement outside of the birth family, however the *Re B-S* line of authorities has reinforced the need for the court to leave no stone unturned in considering the alternative options available to it. This has consequently placed further pressure on local authorities to ensure that their assessment base and public law proceedings are of sufficient detail and depth to comply with those recent dition to considering the welfare issues in the case, local authorities, and children's guardians, d consideration to the various placement options that are realistically open to the court in e a care order is sought.

post-*Re B-S*

The recent judgment of the Court of Appeal in the case of ***Re B (A Child) [***2014] EWCA Civ 565, acts as a further reminder to local authorities, and indeed to the courts, of the need to ensure that sufficient evidence in support of any application for a care and placement order is available in order to allow the court to carry out a proportionate evaluation and balancing exercise. This case originally involved an appeal to the county court in respect of care and placement orders made by the family proceedings court. The appeal judge in the county court held that the FPC was wrong in law due to the fact that it had adopted a linear approach to its decision making, failed to carry out a welfare analysis of the realistic options available for the child's long term care, and failed to conduct a proportionate evaluation of the proposed interference in the family life of the child and his parents. The county court judge hearing the appeal concluded that the lay justices had failed to carry out an appropriate and Convention-compliant balancing exercise but also that there was sufficient information before the court for the appellate judge to carry out the exercise. The court accordingly carried out its own welfare analysis and dismissed the appeal. This decision was then appealed.

The Court of Appeal undertook a detailed examination of the case at hand, focusing in particular on the issue of the lack of welfare analysis both within the reasoning of the FPC and within the social work evidence placed before it. Ryder LJ restated in light of the decision in *Re B-S*:

> "Where there is no welfare analysis of the realistic options before the court and/or no balance of the realistic options and no evaluation of the proportionality of the interference proposed, then following the decision of this court in *Re B-S* above at [30] to [46], the decision making is flawed on the basis that the interference with article 8 of the Convention has not been justified. In a placement order case the reason for dispensing with a parent's consent would also be missing. As this court said in ***Re W (A Child), Re H (Children)*** [2013] EWCA Civ 1177 at [16] and [18], there are cases (particularly those decided before *Re B-S*) where it can be argued that on a fair and sensible reading of the judgment as a whole, the essence of what is required can be found. The court is concerned with substance not form. Care must be taken on an appeal to identify cases where the substance of the reasoning exists and where that is sufficient." (Para 21)

It is of course, open to the appellate court, having identified an error in law within the original reasoning of the lower court, either to re-make the decision complained of or to remit the proceedings for a re-hearing. The appeal judge does have the power to fill gaps in the reasoning of the first court and give additional reasons; however, Ryder LJ confirmed that in a case where the appellate court is faced with a lack of reasoning, it is "unlikely" that this process will be possible.

> "If the question to be decided is a key question upon which the decision ultimately rests and that question has not been answered and in particular if evidence is missing or the credibility and reliability of witnesses already heard by the first court but not the appeal court is in issue, then it is likely that the proceedings will need to be remitted to be re-heard. If that re-hearing can be before the judge who has undertaken the appeal hearing, that judge needs to acknowledge that a full re-hearing is a separate process from the appeal and that the power to embark on the same is contingent upon the appeal being allowed, the orders of the first court being set aside and a direction being made for the re-hearing. In any event, the re-hearing may require further case management." (para 31)

The court concluded that, in the case in hand, the judge hearing the appeal simply did not have sufficient evidence available in order to carry out the appropriate welfare analysis and "fill in the gaps" in the analysis and evaluation of the lower court. The appeal was therefore allowed, with the care and placement order being set aside and the case being remitted for rehearing.

The required standard of evidence

This judgment is of particular relevance in respect of the evidence which must be produced by both the local authority and the children's guardian within care proceedings. The court commented, in particular, upon the lack of depth within the final evidence of both the social worker and the children's guardian in that case. It was identified by the court that the local authority's final evidence did not include any welfare analysis or balance and that it failed to deal sufficiently with why the child's adoption outside of the birth family was necessary or required. Ryder LJ was particularly critical of the absence of such a welfare analysis within the local authority's Annex B report, noting that such a document ought to be one of the materials in which a full comparative analysis and balance of the realistic options are available:

> "I need say no more than that both reports are poor and demonstrate a defective exercise in identifying the benefits and detriments for the child of the realistic long term options for the care of B. That was necessary not just for the court's purposes but also for the local authority's (adoption) agency decision maker whose decision is a pre-requisite to a placement application being made. The revised care plans and statements of evidence filed after the local authority changed its mind contained statements relating to their concerns about whether the parents had the capability to work openly and honestly with them. Beyond that they are devoid of any welfare analysis of the alleged change of circumstances or of the options for the long term care of B. There is no evidence relating to the proportionality of the plan proposed." (para 34)

These comments, whilst reinforcing the need for both local authorities and children's guardians to ensure that their evidence contains the appropriate balancing exercise, also bring into question the adequacy of the decisions made by agency decision makers. In this case, it appears that the agency decision maker clearly did not have a sufficiently balanced, analytical evidence base in order to make the decision, which they clearly went on to make. In any case where a practitioner representing a parent, or indeed, a child, suspects that there is any deficiency within the analysis of the local authority's central assessment (or within the Annex B report or child permanence report) and the agency decision maker has been satisfied that the child can be suitably placed for adoption, it is important to ensure that the minutes of the relevant meeting of that agency decision maker are requested and made available to the parties prior to any final hearing. This particular direction for the filing and serving of these minutes is, from the writer's experience, becoming increasingly common practice.

Many practitioners will have noted that, following on from the decision in *Re B-S*, a large number of local authorities have begun to structure the conclusions to their assessments and their final evidence around a pro-forma, "checklist" model, where there is a heading for each placement for the child that can be realistically considered (for example, residence order, special guardianship order) and an analysis of whether each option is or is not appropriate. Whilst many such documents are often of an acceptable standard and allow the court to conduct the necessary welfare evaluation, there are also cases where they lack sufficient detail. Whilst the President, within the judgment in *Re B-S*, did of course endorse the use of "balance sheets", it is important that social workers do not lose sight of the fact that simply employing a "checklist" or "balance sheet" style approach is not necessarily adequate; the actual analytical content needs to be detailed and to evidence careful thought and regard to the balancing exercise that the court must conduct. In this respect, it is perhaps useful to consider the comments from Ryder LJ in *Re B*:

> "Although the children's guardian's analysis makes reference to both exercises and supports the local authority's plan for adoption, it likewise does not descend to an analysis of the welfare of B throughout his life except for just one opinion in one of 36 paragraphs where she says: "My own

> view until very recently was that this is a finely balanced case; although I had significant concerns about the parents' ability to work in partnership with professionals. I balanced against that the potential loss to [B] of the opportunity to live in the care of his birth family if such an outcome could be achieved. I was particularly mindful of his right to family life and the loss to him of a relationship with his siblings." So far as it goes, that is a relevant opinion, but in my judgment not a sufficient analysis for the purposes of the ACA 2002 or the authorities. There is no evidence directed specifically to why it is necessary to dispense with the consent of the parents to adoption." (para 35)

Childcare professionals, both social workers and children's guardians, need to evidence careful analysis and not simply express what is referred to by the Court of Appeal as "an opinion". No doubt many practitioners who have observed the use of a standard "checklist" document considering the alternative placements for a child have also on some occasions noted an absence of any deep analysis within that model. What is clear from *Re B* is that, without the necessary evidence to allow the court to conduct a holistic welfare analysis, the court cannot conduct that analysis legitimately and cannot compensate for the deficiencies within the evidence if they are so extensive. Local authorities simply cannot expect the court to approve a care plan of adoption based on inadequate social work evidence and, in the absence of adequate evidence, any such decision is highly likely to be the subject of appeal.

Local authority evidence: the essential components

The judgment in *Re B* is another in a line of authorities reinforcing the principles set down by *Re B-S*. When questioning what the essential content of local authority evidence should be, the one thing that is clear from the line of "*Re B-S* authorities" is that there is no simplistic "balance sheet" or "checklist" format which can compensate for detailed analysis of alternative placement options; each case is fact specific and simply listing the alternative permanent placements available to a child and briefly stating whether they are or are not, in the opinion of the local authority, suitable is clearly not going to be adequate. In order to consider the approach that social work evidence should take, the starting point is perhaps to go back to *Re B (A Child)* [2013] UKSC 33. When looking at the proportionality of making care and placement orders, the Supreme Court reiterated the following principles:

1. It is not enough to state that it would be better for the child to be adopted than to live with his natural family;
2. A care order is a very extreme thing and "a last resort"; and
3. The making of a care order has to be proportionate within a human rights context.

Accordingly, in any case where the local authority seeks a care order, it should clearly justify the necessity for the court to make such an order on the basis that it is "a last resort". Social work evidence should acknowledge the gravity of a care order and clearly analyse why no less interventionist an order (for example a supervision order) would be in the child's welfare interests. It must also address each realistic placement option and assess why each option is or is not appropriate in light of the facts of that specific case.

The judgment in the case of *Re B-S* followed on from that in *Re B* and practitioners are well familiar with the principles both cases have set out. The first essential that the court in *Re B-S* noted as being required before a care plan of adoption can be approved is "proper evidence" which would allow for the second essential, an adequately reasoned judgment. A point to note within *Re B-S* is at paragraph 35 where the President refers to the judgment in ***Plymouth CC v G (children)*** [2010] EWCA Civ 1271 where Black LJ commented in respect of the social work evidence in that case, that there was surprisingly little detail about the central issue

of the type of placement that would best meet the child's needs; the judge noted that this could well be an "unfortunate by-product" of the entirely proper use of the welfare checklist. Local authorities, and for that matter, Children's Guardians, have often structured their evidence around the template of the welfare checklist and, while it is of course, quite proper to refer to the checklist elements, this should not be done to the exclusion of a detailed consideration as to appropriate placement. In the Plymouth case, Black LJ actually noted that the lack of details as to appropriate placement options could well have been, in the case of the social worker's placement report, at least partially attributed to the pro-forma used. What can be taken from this is that, whilst a pro-forma or a template, used for the purposes of completing reports, may assist social workers, any such document should clearly go through the realistic placement options and analyse them in depth, weighing up the advantages and disadvantages of each type of placement, rather than simply stating whether or not they are appropriate.

In the event that the local authority is pursuing a care plan of adoption, it must clearly evidence that nothing, bar adoption, will be appropriate in the case of the subject child and will have to do so via the analysis of all available placement options. The President in *Re B-S*, further referred to Ryder LJ's judgment in *Re S*, ***K v The London Borough of Brent*** [2013] EWCA Civ 926, where the Court of Appeal concluded that the judgment of the lower court was wrong because the necessary evidence had not been provided, thus not enabling the judge legitimately to choose between one placement option over another (a similar situation to that in the recent case of *Re B*).

The essential points which can be taken from the Re B-S line of authorities in relation to the contents and structure of local authority evidence is as follows:

- The use of a pro-forma or "balancing sheet" in respect of the available placement options is advisable
- The contents of any such document must, however, be detailed in its analysis of the alternative options available and must carefully reason why each option is or is not suitable for the subject child
- In the event that a care plan of adoption is sought, then the local authority should evidence that no other placement option available would be sustainable in the long-term and that it is necessary to dispense with parental consent to adoption
- The local authority should detail any support services which could be provided to the family and, if appropriate, why the provision of such services would not be sufficient to sustain any placement within the family
- The local authority should be able clearly to evidence that it has had regard to concurrent care planning in each case
- The evidence should acknowledge the gravity and the draconian nature of not just an adoptive care plan, but also of the making of a care order and why this is necessary in the circumstances.

As a final point of note, it is perhaps appropriate to refer to the comments of the President at paragraph 39-40 of the judgment in *Re B-S* when referring to the judgment of Ryder LJ in *Re S*:

> "Most experienced family judges will unhappily have had too much exposure to material as anodyne and inadequate as that described here by Ryder LJ. 40. This sloppy practice must stop. It is simply unacceptable in a forensic context where the issues are so grave and the stakes, for both child and parent, so high."

Simply utilising a pro-forma, "balance sheet" is not in itself, sufficient; it is the content of any such document which is required in order to comply with the authorities; it is in this regard that local authorities need to ensure that social work professionals are aware of the evidential necessities clearly referred to in *Re B-S* and are aware of the consequences of failing to produce sufficiently detailed analysis of all placement options.

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