Neutral Citation Number: [2023] EWCA Civ 404

Case No: CA-2022-002202

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LEICESTER
Recorder Pemberton
LE48/22

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 April 2023

Before :

LADY JUSTICE MACUR
LORD JUSTICE HOLROYDE
and
LORD JUSTICE PETER JACKSON

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M (A Child: Leave to Oppose Adoption)

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Sarah Beasley (instructed by **Leicestershire County Council**) for the **Appellant**
Rebecca Foulkes and **Frankie Shama** (instructed by **Dawson Cornwell**) for the **Respondent Mother**

Hearing date : 28 March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 18 April 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

Overview

1. Section 47(5) of the Adoption and Children Act 2002 ('the Act') provides that where a child has been placed with prospective adopters under a placement order a parent or guardian may not oppose the making of an adoption order without the court's leave. Section 47(7) states that the court cannot give leave unless it is satisfied that there has been a change in circumstances since the placement order was made.

2. This restriction on parental opposition, alongside the court's power to permit it where there has been a change of circumstances, forms a part of the balanced structure created by the Act to ensure a fair and timely process for making a decision about adoption. Before the Act came into effect, the decision would be taken at the hearing of the adoption application itself, a process that unhelpfully pitted parents and prospective adopters against each other. The Act instead allows the adoption decision to be taken together with the care proceedings, with the full participation of the parents. If a placement order is made, the expectation is that the local authority will find suitable adopters and that the adoption application will not then face renewed opposition. However, there remains the possibility that during the passage of time between the placement order and the adoption hearing the situation has changed in such a way that adoption is no longer the appropriate outcome. The court's power to grant leave to a parent to oppose the making of an adoption order exists so that these cases are not missed.

3. I would therefore state the essential questions for the court when it decides an application for leave to oppose the making of an adoption order in this way:

    1. Has there been a change in circumstances since the placement order was made?

    2. If so, taking account of all the circumstances and giving paramount consideration to this child's lifelong welfare, should the court revisit the plan for adoption that it approved when making the placement order?

4. I will discuss the correct approach to each of these questions below, and then address the appeal in the present case. But before that, a point of practice arises in this case, and has arisen before.

Transcripts of judgment in placement order proceedings

5. A decision to approve adoption as a child's care plan is of huge importance to the child, to the birth family and to the adoptive family. The reasons for the decision will appear in a judgment or in justices' reasons and are likely to be of interest or importance to anyone concerned with the child. They may also be important to the child in later life. There is therefore a duty on the court and on the local authority to ensure that the record is preserved. Considering the amount of care and expense that will have been invested in the proceedings, that seems elementary.

6. A further reason for creating a record of the reasons for a placement order is that the order may not be the end of the litigation about the child. The court may have to consider an application for permission to apply to revoke the order or an application for permission to oppose the making of an adoption order. In this situation, it may be difficult to deal with the application fairly without sight of the judgment that was made at the time of the placement order. In particular, as my Lady, Lady Justice Macur noted in *Re S (A Child)* [2021] EWCA Civ 605 at [32] a transcript provides the baseline against which to assess whether there has been a change in circumstances.

7. Accordingly in my view, when giving reasons for making a placement order, the court should always order the local authority to obtain a transcript of its judgment, unless it has handed down a written version or made arrangements for there to be an agreed and approved note. The same applies in cases where a final care order is made, though that is not the focus of this appeal.

Section 47(5)

8. In *Re W (A Child: Leave to Oppose Adoption*) [2020] EWCA Civ 16, [2020] 1 FLR 1125 at [3-14] I gave a full account of the legal context surrounding applications under s. 47(5), noting that the proper approach to the exercise of the power had been settled by this court in *Re P (A Child)(Adoption Proceedings)* [2007] EWCA Civ 616, [2007] 1 WLR 2556, [2007] 2 FLR 1069 and *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146, [2014] 1 WLR 563, [2014] 1 FLR 1035. Those decisions make clear that the provision is intended to provide a real and meaningful remedy and that it should not be too narrowly applied: *Re B-S* at [70-72]. A parent who obtains leave to oppose is entitled to have the question of whether parental consent should be dispensed with considered afresh and, crucially, considered in the light of current circumstances: *Re B-S* at [13]. It nevertheless remains the fact that it is for the parent to show that the court should revisit its decision and contemplate the wholesale reversal of the programme for the child that it had felt driven to endorse when making the placement order (to borrow words from Wilson LJ in *Warwickshire County Council v M* [2007] EWCA Civ 1084, a case under s.24(3) of the Act).

9. *Re P* established that an application for leave to oppose an adoption application involves a two-stage process. The first – has there been a change of circumstances? – is a threshold test, while the second – should leave be granted? – is a broad evaluation. At the first stage, the court is typically asked to consider what has occurred in the parents' lives since the placement order was made, though change of any kind can be taken into account. By contrast, the focus at the second stage is firmly on the welfare of the child and, as was said in *Re P* at [33], this stage is far more important.

10. More than that, where the court is satisfied that there has been change, the two stages are intertwined, and it will carry forward its assessment of the nature and degree of the change into the welfare evaluation. Self-evidently, the baseline from which change is measured will vary from case to case. In some cases, the difficulties that led to the making of the placement order will be so profound that, even though there has been sufficient change to satisfy the statute, it will be quite inadequate to cause the court to revisit the plan for adoption. In other cases, the combination of a more favourable starting position and a marked degree of change may amount to a strong argument in favour of granting leave: cf. *Re B-S* at [74(vi)]. Either way, the court will

take account of the nature of its assessment at the first stage in any case where it is able to move to the second stage.

Change of circumstances

11. Section 47(7) reads:

> "(7) The court cannot give leave under subsection (3) or (5) unless satisfied that there has been a change in circumstances since the consent of the parent or guardian was given or, as the case may be, the placement order was made."

The aim of this provision is clearly to prevent the adoption proceedings from becoming a rerun of the placement order proceedings for no other reason than that the parents continue to oppose adoption. It is a filter to ensure that the structure put in place by the Act is not defeated.

12. In *Re P* at [30-32], this court held that the asserted change of circumstances must be relevant to the grant of leave and "of a nature and degree sufficient, on the facts of the particular case, to open the door to the exercise of the judicial discretion to permit the parents to defend the adoption proceedings". It rejected reading words into the statute, so as to require change to be 'significant' and said that the test should not be set so high so as to be unachievable. Whether or not there has been a relevant change of circumstances is a matter of fact to be decided by the good sense and sound judgement of the decision-maker. *Re B-S* endorsed this approach, while preferring to describe the process at the second stage as an evaluation rather than the exercise of a discretion.

13. It of course follows that the parent is not expected to show that there has been a complete change of circumstances. The court will look at the situation overall and the fact that some things have not changed will not prevent the test from being satisfied if there has been a sufficient change of circumstances in other respects.

14. I also reject the suggestion that the change must be unexpected or unforeseen. This proposition was advanced in obiter dicta in the decisions in *Prospective Adopters v SA* [2015] EWHC 327 (Fam) at [16-19] and in *Prospective Adopters v London Borough of Tower Hamlets* [2020] EWFC 26 at [5]. In the earlier case, Mostyn J stated:

> "Obviously the words "a change in circumstances" are not intended to be read literally. As soon as the placement order is made circumstances will change if only by the effluxion of time. What Parliament clearly contemplated was proof of an unexpected change in the basic facts and expectations on which the court relied when it made the placement order."

While in the later case he added:

> "Obviously, changes that were clearly either foreseen or which were foreseeable at the time of the original order cannot qualify. Otherwise, the provision would be just another variation power."

15. This approach finds no support in *Re P*, something that Mostyn J addressed in *Re SA* at [28]:

> "*Re P* did not however address the question which I have identified namely whether the change in circumstances should be unexpected. In my judgment, in the absence of a specific reference by Parliament to actually foreseen changes (in contrast to section 14(2)(a) of the Matrimonial Proceedings and Property Act 1970) the changes in question must be unexpected and must exclusively attach to the basic facts and expectations which underpinned the initial order."

16. There are several reasons for rejecting this approach:

(1) The language of the sub-section is simple and there is no reason to gloss it.

(2) In *Re SA* at [14] Mostyn J said that he intended to look at the provisions from first principles, but there was no occasion for him to do that. The issue of whether change must be unexpected, unforeseen or unforeseeable (and the concepts are not the same) did not arise in *Re SA* or in *Tower Hamlets*. The law had been recently and authoritatively stated in this court's decisions in *Re P* and in *Re B-S*.

(3) The proposition was inspired by an analysis of statutory provisions relating to the court's power to vary maintenance agreements: *Re SA* at [17-19]. Those provisions are irrelevant to legislation about the adoption of children. They concern changes of circumstance that occur following bargains made between the parties. The Act concerns placement orders imposed by the court for reasons of child welfare. The proper approach to construction will in each case be conditioned by the very different statutory purposes of these unrelated pieces of legislation.

(4) In the absence of a relevant contrary indication, the only conclusion that can reliably be drawn from the fact that a statute does not say whether a change of circumstances is foreseen or unforeseen is that it can be either. There is also a false logic to the argument that, because Parliament has amended one statute to provide that a change of circumstances may include a foreseen change of circumstances, every statute that does not do the same must mean the opposite.

(5) In the context of the Act, there is no reason whatever to raise the bar by burdening parents with the additional obligation of showing that the changes they rely upon were unexpected or, put another way, to deprive them of the opportunity to rely on changes that were foreseen or foreseeable. As Lord Justice Holroyde observed during argument, that would be very unfair. Expectations are not binary, foresight cannot be calibrated, and there may be a number of future possibilities of varying degrees of likelihood. For example, a parent may say at the placement order hearing that he will achieve sobriety or become drug-free, but the court may not be convinced. If, by the time of the adoption proceedings, he is sober, that cannot sensibly be regarded either as unexpected, unforeseen or unforeseeable simply because it was

uncertain or because the alternative was more likely. Why should he be worse off for having achieved something the court foresaw as possible but did not consider probable?

(6) To introduce a requirement relating to expectations would be unworkable and add needless complication to what is no more than a threshold test. When it makes a placement order, the court reaches a conclusion about the need for adoption. It cannot state every expectation it may have for the future, and it cannot know when the adoption application will be made. Trying to decide what was or was not expected, foreseen or foreseeable could only distract from the simple question of whether there has been a change between the facts that existed then and the facts that exist now.

17. For these reasons, the proposition in *Re SA* is wrong and should not be followed.

The welfare evaluation

18. In reaching its decision at the second stage the court applies the welfare principle, the delay assumption, and the checklist in ss.1(1), (3) and (4) of the Act to take account of all the circumstances that are relevant to the child's lifelong welfare.

19. An important element in the welfare evaluation is the prospect of success in opposing adoption if leave is granted. In *Re B-S* it was observed at [59] that

> "… In deciding how discretion is to be exercised at the second stage the court must have regard to the parent's ultimate prospects of success if leave to oppose is given. In deciding how discretion is to be exercised the child's welfare is paramount; that being so one can well see why the parent's prospects must be more than just fanciful and must be solid – for how otherwise can it be consistent with the child's welfare to allow matters to be reopened?"

20. Other enduring guidance appears at [74]:

> "74. In relation to the second question – If there has been a change in circumstances, should leave to oppose be given? – the court will, of course, need to consider all the circumstances. The court will in particular have to consider two inter-related questions: one, the parent's ultimate prospect of success if given leave to oppose; the other, the impact on the child if the parent is, or is not, given leave to oppose, always remembering, of course, that at this stage the child's welfare is paramount. In relation to the evaluation, the weighing and balancing, of these factors we make the following points.
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> (i) Prospect of success here relates to the prospect of resisting the making of an adoption order, *not*, we emphasise, the prospect of ultimately having the child restored to the parent's care.

(ii) For purposes of exposition and analysis we treat as two separate issues the questions of whether there has been a change in circumstances and whether the parent has solid grounds for seeking leave. Almost invariably, however, they will be intertwined; in many cases the one may very well follow from the other.

iii) Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave. The judge must keep at the forefront of his mind the teaching of *Re B*, in particular that adoption is the "last resort" and only permissible if "nothing else will do" and that, as Lord Neuberger emphasised, the child's interests include being brought up by the parents or wider family unless the overriding requirements of the child's welfare make that not possible. That said, the child's welfare is paramount.

iv) At this, as at all other stages in the adoption process, the judicial evaluation of the child's welfare must take into account *all* the negatives and the positives, *all* the pros and cons, of *each* of the two options, that is, either giving or refusing the parent leave to oppose. Here again, as elsewhere, the use of Thorpe LJ's 'balance sheet' is to be encouraged.

v) This close focus on the circumstances requires that the court has proper evidence. But this does not mean that judges will always need to hear oral evidence and cross-examination before coming to a conclusion. Sometimes, though we suspect not very often, the judge will be assisted by oral evidence. Typically, however, an application for leave under section 47(5) can fairly and should appropriately be dealt with on the basis of written evidence and submissions: see *Re P* paras 53-54.

vi) As a general proposition, the greater the change in circumstances (assuming, of course, that the change is positive) and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments based on the child's welfare must be if leave to oppose is to be refused.

vii) The mere fact that the child has been placed with prospective adopters cannot be determinative, nor can the mere passage of time. On the other hand, the older the child and the longer the child has been placed the greater the adverse impacts of disturbing the arrangements are likely to be.

viii) The judge must always bear in mind that what is paramount in every adoption case is the welfare of the child "throughout his life". Given modern expectation of life, this means that, with a young child, one is looking far ahead into a very distant future –

> upwards of eighty or even ninety years. Against this perspective, judges must be careful not to attach undue weight to the short term consequences for the child if leave to oppose is given. In this as in other contexts, judges should be guided by what Sir Thomas Bingham MR said in *Re O (Contact: Imposition of Conditions)* [1995] 2 FLR 124, 129, that "the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems." That was said in the context of contact but it has a much wider resonance: *Re G (Education: Religious Upbringing)* [2012] EWCA Civ 1233, [2013] 1 FLR 677, para 26.
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> ix) Almost invariably the judge will be pressed with the argument that leave to oppose should be refused, amongst other reasons, because of the adverse impact on the prospective adopters, and thus on the child, of their having to pursue a contested adoption application. We do not seek to trivialise an argument which may in some cases have considerable force, particularly perhaps in a case where the child is old enough to have some awareness of what is going on. But judges must be careful not to attach undue weight to the argument. After all, what from the perspective of the proposed adopters was the smoothness of the process which they no doubt anticipated when issuing their application with the assurance of a placement order, will already have been disturbed by the unwelcome making of the application for leave to oppose. And the disruptive effects of an order giving a parent leave to oppose can be minimised by firm judicial case management *before* the hearing of the application for leave. If appropriate directions are given, in particular in relation to the expert and other evidence to be adduced on behalf of the parent, *as soon as* the application for leave is issued and *before* the question of leave has been determined, it ought to be possible to direct either that the application for leave is to be listed with the substantive adoption application to follow immediately, whether or not leave is given, or, if that is not feasible, to direct that the substantive application is to be listed, whether or not leave has been given, very shortly after the leave hearing.
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> x) We urge judges always to bear in mind the wise and humane words of Wall LJ in *Re P*, para 32. We have already quoted them but they bear repetition: "the test should not be set too high, because … parents … should not be discouraged either from bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable.""

21. From this, it can be seen that the prospect of success in opposing adoption if leave is granted is an important element to which the court must have regard, but it is not a test in itself, still less an exclusive one. It is helpful as a reminder that the question to

be answered is whether or not there should be an opposed adoption hearing. However, the expressions 'more than just fanciful' and 'solid' are not true opposites, in that something that is not fanciful may fall short of being solid. This may lead to the court being pressed with different formulations and can cause inconsistency if the court treats prospects of success as the only benchmark.

22. I also note that there will be cases, of which the present one is an example, where the distinction between opposition to an adoption order and rehabilitation to a parent collapses. That situation will arise, and not uncommonly, where adoption and rehabilitation are the only possible outcomes.

23. Drawing matters together, I suggest that the essential question for the court at the second stage is this: Taking account of all the circumstances and giving paramount consideration to this child's lifelong welfare, should the court revisit the plan for adoption that it approved when making the placement order? By asking this question, the court ensures that it focuses firmly on the individual child's welfare in the short, medium and long term with reference to every relevant factor, including the nature and degree of the change that it has found, the parent's prospects of success, and the impact on the child of contested proceedings.

24. In framing the essential question in this way, I do not overlook the fact the parent is seeking leave to oppose the making of this specific adoption order. However, in the great majority of cases, the basis of the proposed opposition is that the child should not be adopted at all. Much less frequently, the opposition may involve an objection to the specific identified adopters, and in those cases, the factors to be taken into account when answering the question will need to be adapted accordingly.

25. Finally, the application for leave to oppose must be decided on proper evidence but experience confirms that oral evidence is not usually necessary. The court will want to take a broad view of the evidence before it, as befits a decision at the leave stage. There has been a very recent and welcome change to the availability of legal aid for parents making applications to oppose adoption: see Regulation 5 of The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Legal Aid: Family and Domestic Abuse) (Miscellaneous Amendments) Order 2023. This should enhance the fairness of the process and assist the parties and the court to focus on the issues, but at the same time the court must ensure that hearings and timetables are not unduly lengthened.

The present appeal

26. This is an appeal by the local authority from an order granting permission to a mother to oppose the making of an adoption order. The Children's Guardian supports the appeal, while the mother opposes it. The child's father plays no part in the appeal.

27. The child concerned is W, who will soon be three years old. At the time of her birth, her mother was 17 and her father was 15. Both parents had experienced difficult childhoods. The mother was sexually abused by her stepbrother. She has suffered from long-standing mental ill-health, with diagnoses of anxiety, depression, panic attacks and post-traumatic stress disorder. She had self-harmed and attempted suicide. The father, who was adopted at the age of two, had also self-harmed and attempted suicide.

28. The local authority issued proceedings on the day W was born. On discharge from hospital she was placed in a mother and baby foster placement with her mother. Whilst in the placement, concerns were raised in respect of a lack of stimulation and communication from the mother towards W and a lack of insight in respect of her basic needs. In June 2020, the mother was discharged from CAMHS due to an improvement in her mental health. However, later that month she reported being sexually assaulted by a stranger at a railway station, though video footage did not support her account. From that point on, her mental health declined again. In early October 2020, she chose to leave the mother and baby foster placement in order to concentrate on her own mental health and returned to live with her mother. W remained in foster care.

29. During the care proceedings, assessments were undertaken by a forensic psychologist, who concluded that the mother suffered from marked depression and anxiety and required counselling and cognitive behavioural therapy to promote greater psychological robustness. A parenting assessment was carried out by an independent social worker ('ISW'), who stated that she would be very concerned were W to be placed in the care of her parents while their mental health was unstable. She also recommended therapy and counselling.

30. On 24 February and 12 March 2021, a two-day final hearing took place before Her Honour Judge George. The court heard oral evidence from the psychologist and the allocated social worker. The parents attended and were represented but did not give evidence.

31. HHJ George made care and placement orders, having dispensed with the need for parental consent on the basis that W's welfare required it. She approved a threshold document that described the mother's mental health difficulties, which prevented her from giving safe care to W when under stress. It related two recent occasions when she had accessed a bridge with thoughts of self-harm and an occasion when she had assaulted her own mother. It described the conditions in the home of the grandmother as not being a safe environment for a baby due to aggressive outbursts from the mother's brother. The relationship between the parents was volatile, had ended before W's birth, was resumed afterwards, and had ended again in December 2020. In the father's case, he had cognitive difficulties, a history of cannabis use that would prevent safe care of a baby, and he had associated with risky persons. The judge gave an extempore judgment, but no transcript or note has been provided.

32. After the placement order was made, the parents each had a final meeting with W in July 2021. W was matched with prospective adopters, with whom she was placed in September 2021, aged 16 months. In April 2022, the adoption application was issued.

The present proceedings

33. Having been served with the adoption application, the mother wrote a letter to the court, which it treated as an application for leave to oppose. At a hearing on 24 August 2022, the father made an oral application for leave to oppose.

34. The hearing took place on 7 November 2022 before Recorder Pemberton. Both parents represented themselves. The mother had prepared a hand-written statement and produced supporting statements from her mother and from a friend. She also

provided a letter from her community psychiatric nurse ("CPN"). The local authority provided a statement from the senior social worker in the permanence team and the Guardian filed a final analysis. The local authority and the Guardian filed skeleton arguments opposing the parents' applications. I will summarise the evidence before the Recorder in a little detail so that this court's decision can be understood.

35. The mother's letter began with a complaint that she had been treated unfairly and had been set up to fail by being sent to a distant mother and baby placement, where she was controlled and the male carer was rude and horrible to her. This made her mental health worse. Social services were meant to keep families together, not split them up. She loves and could safely care for W, and she no longer associated with the father. She was now happy in a new relationship. Separation from W had caused her mental health to decline so that she required hospital treatment, but she was now stable and had not self-harmed in nearly a year. She had turned up, well-prepared, to nearly every contact with W. Her mother's house was not an unsafe environment, and her brother was not a danger to anyone. She was in regular touch with her CPN. She had done a 12-week life skills course at the Prince's Trust and was now able to get out of the house a lot more often than before. She had volunteered for an organisation that takes people with special needs on canal boat trips. She asked for an opportunity to prove she could look after W.

36. The mother's CPN for the past 8 months confirmed that her mental health was being monitored at 4-weekly appointments and appeared to be stable. She demonstrated good insight into her past mental health struggles. There had been no episodes of deliberate self-harm for 11 months. She was taking her medication and no longer experiencing panic attacks. Her mental health, confidence and self-esteem had significantly improved since the life skills programme. She could now go shopping without support and attend appointments independently. The letter ended:

> "[Mother] has identified that [W] is her protective factor and that she is the reason for recovery. At present no concerns have been identified regarding her ability to care for a child as her mental health is now stable. She has been able to make plans for the future and has aspirations to return to college."

37. The social worker's statement drew attention to the fluctuating history of the mother's mental health. She described a home visit to the mother and grandmother in December 2021, when they said that they were not planning to oppose W's adoption as they had to think about the disruption to her and the impact on the mother's mental health. She described the various difficulties that continued to exist in the grandmother's home. The mother had never lived on her own and had been reported to struggle with basic care tasks when living in the mother and baby placement. The identity of the mother's new partner, with whom she hoped to live, was unknown and any risks were unassessed.

38. As for W, the social worker expressed the opinion that she would be likely to experience regression, confusion and stress as a result of a further move, which would put increased demand upon the mother and her mental health. W was happy and settled in the care of her prospective adopters, who she now confidently identified as "Mummy" and "Daddy". They were committed to and attuned to meeting her needs. She sought them out for comfort and reassurance and was well integrated with her

wider adoptive family, regularly spending time with people she had come to know as her grandparents, auntie and older cousins. Because of the uniqueness of her birth name, she had been referred to by a new first name since her placement and had come to know herself by that name.

39. The social worker concluded that, while the parents had made some changes, there was insufficient evidence to suggest that either of them was in a position to be able to offer W safe, nurturing and consistent care. Rehabilitation could result in W being at risk of ongoing harm, with her needs being neglected and not prioritised above the parents' own needs. Any further disruption to her attachments would be detrimental to her emotional well-being both now and in the future.

40. The Guardian, who had the advantage of having acted in the care proceedings, reported that W was fully integrated in a stable and happy family home environment, with her carers' maternal and paternal family members playing an active role in her life and providing a strong support network. She attended nursery and participated in a range of activities. He commended the parents for making some moves away from the lifestyles they were previously living, reducing the harm to which W would be likely to be exposed. However, the mother had never lived independently and her plan to live with her partner was untested. While not doubting the parents' love for W, there remained uncertainty and instability around their futures. Their application would undermine W's current stability. Given her age and level of understanding she was unlikely to be able to verbalise her wishes and feelings, but she was emotionally invested in her new family, and change would cause her undue emotional distress. The Guardian accepted that there had been a change in circumstances, but it was relatively recent and did not amount to the sustained change that would be sufficient to support the parents' applications.

41. The Recorder granted leave to the mother and refused leave to the father. The local authority applied to this court, and on 23 January 2023 I granted permission to appeal.

The Recorder's decision

42. In a notably well-organised ex tempore judgment, the Recorder rehearsed the procedural history and summarised the positions of the parties. She then addressed the question of change of circumstances:

> "43. Stage 1 of the test is a question of fact. I need to be satisfied that there is "*sufficient*" change, not necessarily "*significant*" change. I have to give proper weight to the fact that two experts' opinions in the previous proceedings, which were accepted by the Court as being reasonable and fair ones, have not been followed, albeit I am also asked by the Mother to take on board that the Mother's treating psychiatrist does not agree with the recommendation for CBT.
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> 44. In terms of assessing, as a fact, whether there has been a change in circumstances, I have to weigh up competing points, but I do not take into account the criticisms made by the Mother about the previous proceedings. I weigh in favour of finding a sufficient change in circumstances, the fact that:

- the Mother has gone almost 12 months without any self-harm. In my view, this level of improvement should not be underestimated;
- she is about to be discharged from the community mental health team;
- she has improved on her anxiety to such an extent that she feels more able to leave the house;
- she has started to live, or shortly will be living, independently; and
- she undertakes voluntary work and is trusted with vulnerable people.

45. In the Mother's representations to me she has presented as somebody who is clear and focused on her ambition as to what she wants and intends for W, if W was to return to her care.

46. Weighing against all the improvements made by the Mother is the plain fact that she has not followed the recommendations of the experts. I have to consider whether this failure, whether alone or along with any other matters, means that she has not demonstrated a sufficient change in circumstances.

47. Putting everything into the balance, as a fact I conclude that Mother has demonstrated a sufficient change so as to satisfy Stage 1. I do not ignore that the experts' recommendations have not been followed, but I have evidence that the Mother has not self-harmed for almost 12 months and that her mental health is sufficiently to enable her to be discharged from the community mental health team. In my judgement, this is a factor which tips the balance in the Mother's favour."

43. The Recorder then turned to consider welfare:

"49. At Stage 2, the Court's paramount concern is W's welfare in the long term. It is the extended Welfare Checklist at section 1(4) of the 2002 Act, which I apply to my decision.

50. The fact that W is already placed with prospective adopters is not, of itself, enough of a reason to refuse leave. I have to take the long-term view and must not be deterred by the prospect of short-term disruption, but I have to be satisfied that the Mother's ultimate prospects of success have solidarity [sic] i.e., they are more than fanciful. In making that assessment, I have to bear in mind all the circumstances – the past and the present state of affairs, and what will or may happen in the future.

51. I remind myself of the ten points which are set out by the Court of Appeal in *Re B-S*. Looking at all the circumstances, I have to be impressed by the improvement to the Mother's mental health over the last 12 months and that community psychiatric team are about to discharge her from their care. I have to balance this fact against the unknowns, and the fact that the Mother has not followed the

recommendations of two experts in previous proceedings, even though I acknowledge that the Mother's treating psychiatrist does not stand with the recommendation of the psychologist that the Mother should have CBT.

52. The evidence, or the viewpoint, of the treating psychiatrist is not before the Court. They are not an expert of the Court and the Court in the previous proceedings accepted the recommendations and accepted the therapeutic work needed, as advised by the psychologist, and as arising from the parenting assessment etc.

53. Further, there is a lack of testing as to how the Mother will cope in independent living away from her support network.

54. There is also the fact that the Mother's new relationship is unknown, it is untested, and no assessment had been undertaken of the relationship. The absence of the Mother's domestic abuse work leaves at large how she will cope and function if that relationship does not turn out to be which is positive for her.

55. In considering the Mother's prospects of success, not of obtaining the return of W to her care, but the prospects of the Mother resisting the Adoption Order, there is a real tension between what is a commendable change in circumstances and what looks to be a clean bill of health in terms of self-harm for a period of almost 12 months, on the one hand, and the fact that the recommended work has not been undertaken, on the other.

56. As to the impact that granting or refusing leave will have, I have to look at what granting leave will look like in real terms for W. The reality in that regard is that when it comes to the balance sheet approach as to what is best for W's welfare, the Court did have, or does have, only three realistic options – adoption, long-term foster care, or the return to one of her parents (there being no kinship carers).

57. It probably goes without saying that for a child of W's age, it would be unlikely that the Court would consider that long-term foster placement was in her best interests e.g., she would risk being stigmatised and here would be a real risk of instability if the placement broke down because her carer's retired or they moved on etc. So this Court, like the previous Court, is likely looking at a situation where there are two stark outcomes.

58. In summary then, the ultimate prospects of the Mother resisting the Adoption Order (i.e., the question as to whether there is a solidarity [sic] to those prospects) has to be looked at alongside the impact that the granting or refusing of leave would have on W.

59. As to the prospects of success, in my judgement in this case it follows from the finding I have made as to sufficient change in

> circumstances, primarily based on the improvements to the Mother's mental health, that the prospects are more than merely fanciful.
>
> 60. As to the impact that the granting of leave would have of W, I take into account that W has been with her prospective adoptive parents for 14 months. While this is not, of itself, sufficient to refuse leave, it is a very real factor to take into account.
>
> 61. Further, granting leave will likely introduce further delay. It will be to introduce instability and, invariably, upset to her prospective adoptive parents, which in turn will likely, or could likely, have an impact on W. While W is too young to have an awareness of these proceedings, so far as she is concerned, the people with whom she lives are the only carers she has known and are her parents.
>
> 62. As to the impact of refusing leave, put shortly, this will mean that there is no prospect of a return of W to the Mother and W's birth family and contact with them will be limited as per the Local Authority's plan for letterbox contact.
>
> 63. I have considered all of the circumstances, the pros and cons of refusal, and the pros and cons of granting leave, and I am not satisfied that W's welfare demands the refusal of leave. In light of W's age, the delay which will be caused by holding a contested hearing will not unduly prejudice or risk the security of that placement.
>
> 64. In respect of Mother's application therefore, I do grant her leave to oppose the Adoption Order. What happens after that point may be something very different to that which Mother hopes for, but that is a matter for another day."

44. The Recorder then determined the father's application. She decided that the first stage of the test was satisfied but that the second stage was not. There is no appeal from that decision.

The local authority's appeal

45. The local authority was represented, as before, by Ms Sarah Beasley. As a result of the intervention of the Civil Appeals Office and Advocate, the mother was now represented by Ms Rebecca Foulkes and Mr Frankie Shama. They were due to appear pro bono, but the change in the legal aid regulations meant that the mother was fortunately able to obtain legal aid, with counsel being instructed by Ms Hilka Hollmann of Dawson Cornwell. We are grateful to all concerned for their assistance but, in circumstances where the mother was not previously represented, the exceptional quality of the written presentation of her case and Ms Foulkes' oral advocacy has been of particular value to the court.

46. Ms Beasley challenges both stages of the Recorder's decision. As to change of circumstances, she does not contest the five factors listed by the Recorder at para. 44 but argues that insufficient weight was given to the fact that the mother had not

undertaken the therapy and courses recommended by the experts in the previous proceedings.

47. We did not find this submission sufficiently persuasive to require a response. The Recorder's conclusion on this issue was a reasoned one that she was entitled to reach for the reasons she gave, and it had some support from the Guardian's report. This was a case where there had been change in some respects but not in others. The Recorder directed herself correctly, did not overlook the matters relied upon by the local authority, and was not obliged to give them more weight than she did. Her decision was not wrong in this respect.

48. The real issue arises at the welfare stage. As to that, the local authority argues in its grounds of appeal that the Recorder (1) was wrong about the mother's prospect of success, (2) was wrong to differentiate the prospects of the mother and the father, and (3) failed to give proper weight to the impact on the child. I would not engage with the second of these grounds. It is not helpful to compare the decision about one parent with that about the other, particularly where the father's position was considerably worse and his application much weaker than the mother's.

49. On the first ground, Ms Beasley challenges the Recorder's assessment of the mother's mental health. In a case where there were only two options, she had placed too much weight on recent improvements. The mother had made a transition from a period of crisis into a period of some stability, but still needed to take medication and had not completed the work recommended by the psychologist or the ISW. Any assessments carried out during contested adoption proceedings would be likely to be negative and the time required to complete the work to a point where the mother's mental health would be consistently stable was outside W's timescales. There was also a lack of insight about risk in the maternal family. On the third ground, Ms Beasley contended that the Recorder simply failed to give due weight to all the evidence about W's history and current situation and the impact on her of allowing the adoption proceedings to be contested.

50. Ms Foulkes responded that the Recorder, who directed herself correctly, was entitled to find that the mother's prospects of success were more than merely fanciful for the reasons she gave in her judgment. She had taken proper account of the impact on W of granting leave, which was no more than would be expected, and she was right to weigh the long-term consequences of ruling out a prospect of a return to the mother and birth family. The bar should not be set too high and the court should remember that limited evidence will be available at the leave stage. The CPN had said that there were no identified concerns about the mother's ability to care for a child. The grant of leave does not preclude the court from making an adoption order; it provides a legal framework within which relevant evidence can be produced and tested before the court makes a final decision that will govern a child's entire life. If leave is not granted, the parent is unable to oppose the redefinition of their child's legal status, identity and parental relationships across their whole life, a significant interference with the parent's Article 6 ECHR right and the parent and child's Article 8 ECHR rights. This was a preliminary decision and full and proper evaluation of the merits should be left until after leave is granted. Ms Foulkes also argued that, even if the mother's prospects were not solid, there could be benefit to W in later life in knowing that her birth mother had contested the proceedings to the end. Overall, she argues, the Recorder was clearly right to have granted leave.

Conclusion

51. No one learning about the mother's childhood experiences and her acute difficulties as a young person could fail to admire the distance that she has travelled in the past year. However, the court's decision in respect of her application depended on a clear-eyed assessment of W's welfare. Although we are hearing an appeal, and not making an original decision, we have had the benefit of legal argument and factual submissions from both sides. The more I have heard, the more convinced I have become that a balanced assessment of the evidence was bound to lead to the dismissal of the mother's application. I pay tribute to the care with which the Recorder approached her task and the clarity with which she expressed her decision. I acknowledge that we must be slow to interfere with an evaluative decision that follows a correct statement of the law. However, I consider that the decision to grant leave was wrong for three reasons.

52. First, the Recorder erred in the way in which she carried forward her conclusion about change of circumstances in her welfare assessment. At para. 59 she said that it followed from her finding of a sufficient change of circumstances at the first stage that the prospects of success were more than merely fanciful. In fact, it did not follow. This was a case where the reasons for the placement order were overwhelming. Since then, fragile change had been achieved from that very low baseline. This had implications for the welfare decision, but that was not acknowledged, and the changes were instead treated as if they self-evidently offered support for the grant of leave.

53. Second, the Recorder did not confront the wall of evidence that established that rehabilitation was plainly not likely to be in W's interests. For example:

    (1) She listed a number of matters about the mother's circumstances, but did not then go on to give them the weight that they evidently deserved. She referred briefly to "the unknowns" about the mother's mental health but did not acknowledge that recent improvement had to be set in the context of a history of serious, long-standing and fluctuating conditions that, on the basis of clear professional advice, were not going to resolve without treatment and time. The description of "a clean bill of health in terms of self-harm for a period of almost 12 months" and the mother's own account of the first steps she had been able to take to lead a more independent life could only emphasise the scale of the challenges.

    (2) The Recorder noted that the mother's ability to cope in independent living was untested, but gave no apparent weight to that factor. She treated the new relationship and the lack of domestic abuse work, a parenting course or a cookery course in the same way. On the other hand, the life skills course appeared to have been of benefit to the mother as an individual. The inference from this evidence was that it would take time to see whether the mother could establish herself independently before any question could arise of her being capable of taking over the care of a distressed and confused child. At the same time, the Recorder referred to the mother's support network, but the evidence about that was at best mixed. An additional factor was the mother's own evidence, and that of the grandmother, which showed no indication that they understood why W had been removed, but rather tended to blame the local

authority. This was a poor prognostic factor, which the Guardian noted, but it was not addressed.

(3) The Recorder rightly identified that there were only two possible outcomes for W, rehabilitation or adoption. That meant that in this case there was no practical difference between opposing adoption and proposing rehabilitation. She was also right to caution herself to take a long-term view and (as I read para. 60) to describe the impact on W of leaving her present carers as a very real factor. She recognised that they are the only carers W has known and are now her parents. But once again, this received no analysis, and the decision swiftly followed. From W's point of view, the court was bound to face the fact that she had only lived with her mother for five very troubled months ending over two years ago, had not seen her for 16 months and had become securely attached to her new family over the course of a year. In that situation it was entirely improbable, to borrow a phrase from *Re B-S*, that it could ever be in W's interests to remove her from her new family unless she could be reliably moved to a home where she was likely to receive skilled and secure parenting. The evidence that this could be achieved by the mother within W's timescale was simply not there.

54. Third, the Recorder noted the professional evidence of the social worker and the Guardian, set out above, but she did not heed it or explain why she was departing from it. Their opinion was that it was (in the Recorder's words) "plainly and unequivocally" not in W's interests to disturb her position with her new family. They pointed to the uncertainty and instability on the mother's side in contrast to the stability and integration from which W now benefited. They advised that any further disruption to her attachments would be detrimental to her emotional well-being both now and in the future. Judges can of course depart from professional advice and are obliged to do so when they think it right, but in my view, there was no good basis for departing from this advice, and none was given.

55. Finally, I cannot accept Ms Foulkes' argument based on the opinion of the CPN that no concerns have been identified regarding the mother's ability to care for a child. That was not a matter on which the CPN was equipped to advise the court and the Recorder rightly did not rely upon it. Nor would I accept the argument that it might be right to allow the mother to oppose, even with poor chances, so that W can know in future that her mother tried everything. As these proceedings show, the mother has tried everything, and it is in nobody's interests for her to become involved in further proceedings which could only have one outcome.

56. For these reasons I would allow the appeal and discharge the order granting permission for the mother to oppose W's adoption.

Lord Justice Holroyde:

57. I too would allow this appeal. I respectfully agree with the reasons which Lord Justice Peter Jackson gives for reaching that conclusion, and cannot usefully add anything to them. I would endorse his observations at paragraph 7 above as to the necessity of obtaining a transcript in the circumstances he mentions.

58. I also wish to add my own tribute to the mother's achievements over the last year or so in seeking to overcome the difficulties which she has faced earlier in her life.

Lady Justice Macur:

59. I agree with both judgments.