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IN THE FAMILY COURT
(Sitting at Cardiff)

No. SA106/19 &
SA19P00873

2 Park Street
Cardiff
CF10 1ET

Thursday, 27 June 2019

Before:

THE HONOURABLE MR JUSTICE FRANCIS

(In Private)

B E T W E E N :

FOSTER CARERS

Applicant

- and -

(1) MOTHER

(2) FATHER

(3) A WELSH LOCAL AUTHORITY

(4) THE CHILD (by her Children's Guardian)

Respondents

MR S. MOMTAZ QC (instructed by Graham Evans & Partners, Solicitors) appeared on behalf of the Applicant

MR J. TILLYARD QC (instructed by Hutchinson Thomas, Solicitors) appeared on behalf of the First Respondent

MR J. LOCK (solicitor, of T Llewellyn, Solicitors) appeared on behalf of the Second Respondent

MR D. BOOTHROYD appeared on behalf of the Third Respondent Local Authority

MR R. JONES (instructed by Cameron Jones Hussell & Howe, Solicitors) appeared on behalf of the Guardian

J U D G M E N T

THE JUDGE:

- 1 For reasons of confidentiality, which are obvious to all of us, I refer to the applicants in this case simply as the carers. They bring two applications with which I have been concerned for the past three days. Both applications concern A, who was born on 4 July 2018 and who will therefore celebrate her first birthday next week. The first application is the issuing of wardship proceedings on 11 June 2019. The second is an application for permission to make an adoption application in respect of A
- 2 The carers have been represented by Mr Sam Momtaz, QC. In circumstances which I shall relate during the course of this judgment, their solicitor has graciously acted for them *pro bono*. The court expresses its immense gratitude to that firm of solicitors for this act of human kindness.
- 3 The respondents to this application are the mother and the father who are A's biological parents. The mother has been represented in these proceedings by Mr Jim Tillyard, QC, and the father has been represented by his solicitor Mr Lock. The mother and father have been in a settled relationship for more than ten years and are the birth parents of A. Between them the mother and father have four children; of whom the mother is mother of all and the father is the father of the younger three.
- 4 A has been represented by her guardian, Cate Riggott, who has instructed Mr Rhys Jones of counsel. The local authority has remained involved although these are no longer public law proceedings, in circumstances which I shall relate shortly. The local authority has been represented by Mr Boothroyd of counsel.
- 5 It is important that I record from the outset that Mr Boothroyd, on behalf of the local authority, has made a complete, fulsome and obviously well-meant apology for the failings of the local authority in this case. I hope that in due course the carers and the parents will be able to accept that apology, for without the failings of the local authority these proceedings would not, in my judgment, have been necessitated. Whether, and if so, to what extent proceedings are later taken against the local authority is not a matter for me - or certainly not a matter for me at the moment. I do tentatively suggest, however, that if any proceedings against the local authority are taken at a time when I am still a judicial office holder, it would be appropriate for such applications to be heard by me.
- 6 I said at the outset of these proceedings, and it is worth me repeating now, that the human misery in this court is palpable. From everything that I have read and heard, although I have heard no oral evidence, it seems obvious to me that the applicants and the parents are all thoroughly decent people who all wish the very best for A, with whom this court is concerned.
- 7 In circumstances which I shall shortly relate, these two decent couples have found themselves pitted against each other in litigation which none of them could have wished for in their worst nightmares. In short, the position can be described as follows, although I shall

relate it in more detail shortly. Because the birth parents already had four children between them, and because at the time when it was anticipated that A would be born they had personal difficulties and had briefly separated, they formed the conclusion, at least for a time, that it would be better for them, their children, and most particularly for A, if they were to relinquish her for adoption. It is hard to think of a decision, as a parent, that is more difficult to make, but I am completely persuaded from everything that I have seen and heard that they decided to relinquish A out of love for her and the desire to do the best for her.

- 8 The applicants have no children together, although the female applicant carer has a 19-year-old from a separate relationship before she met the male applicant carer. The applicant carers, for reasons completely unimportant for the purposes of this judgment, were unable to conceive children together. There is little more that they could have wanted in life than to adopt a baby, and when the prospect came and they were offered A as a prospective adoptive child they seized this opportunity, as any couple in their situation would have done.
- 9 With the mother's consent, at least in the first place, A was given to the carers when she was some three-hours-old and she has remained with them from that time until now. As I have said, A is about to celebrate her first birthday. In circumstances which I cannot and do not criticise, the birth parents changed their minds, and in particular the mother changed her mind. After a catalogue of failures by the local authority, which I find it my sad duty to have to recount, care proceedings were eventually launched by the local authority who sought an order from the family court in Swansea that threshold had been reached and that there were reasons to take baby A into care. The judge in Swansea, again in circumstances which I shall have to relate, did not agree and threshold was not established. It was in these circumstances that the carers sought legal advice and issued wardship proceedings, and now seek to bring an application for adoption.
- 10 It is important for the parties, and I believe, in due course for A, who may one day come to read this judgment, that I record at the outset of this judgment that in spite of all that they have faced these two couples have remained dignified, decent and have acted with complete humility. This court has no criticism of any of them. It my sad and difficult task to untangle the events which have occurred and to decide what the future holds, not only for these two couples but, emphatically more importantly, what the future holds for A.
- 11 I wish to record my thanks to all of the advocates in this case, and the teams that sit with them, for the dignified way in which they have presented this case. I have been provided with three Lever Arch files of documents and a fourth Lever Arch file with statutory and case references.
- 12 It is imperative that I give my decision, and the reasons for it, to the parties as soon as possible, not least because delay is the enemy of A's future. If I fail in the course of this *ex tempore* judgment to mention every submission that has been made to me, it is not because I have not taken it into account but it is because I wish to communicate my decision as a matter of urgency to the parties. Moreover, as I have heard the case, and as I have read it since the case finished not that many hours ago, I have become certain in mind as to the proper outcome.
- 13 My job, of course, is to apply the law. I have heard this case on submissions and have not heard any oral evidence. No-one has suggested that I should hear oral evidence because this is not a case where, mercifully, I have to make a decision between the competing rights or wrongs of these apparently decent people. There isn't really any disagreement about the facts in this case.

- 14 I have to tiptoe carefully through legal principles and then come to a decision. I also have to balance the competing jurisdictions in which I am presently engaged: one being the tail end of public law care proceedings, another being private law adoption proceedings, and the third being the entirely well-principled attempt by the carers to invoke the inherent jurisdiction of the High Court through wardship proceedings. In particular, I have been engaged in a debate as to the extent to which, if at all, the inherent jurisdiction of the High Court can trump the statutory framework created by the many statutory and regulatory enactments which guide our courts in relation to private and public law children disputes.
- 15 The local authority in this case is in Wales, and made an application for a care order on 26 April 2019. In any published version of this judgment I have agreed that the council be simply referred to as a local authority. It will be evident from this judgment that we are dealing with a Welsh local authority, because I refer to various Welsh regulations, and so if everybody agrees I suggest that the local authority be referred to as a Welsh local authority. They made an application for a care order on 26 April 2019. Prior to that, on 17 January 2019, the same local authority had applied for a placement order in respect of A.
- 16 As I have said, prior to A's birth, and for a time thereafter, both the mother and the father indicated that they did not consider that they were able to care for A and they took active steps to ensure that she was placed for adoption by the local authority. The parents reposed considerable trust in the local authority, and the outcome was that A was placed with the carers some three- to three-and-a-half-hours after her birth. The placement was pursuant to s.76 of the Social Services and Well-being (Wales) Act 2014. This is relatively new legislation as its name implies, being applicable to Wales only, which nobly and enthusiastically sets out many new principles.
- 17 The birth parents' concerns were that they already had four children and were worried that the stress of a fifth child would be too much for them as a family. There had been local authority involvement with this family previously, and the older four children had been placed on the child protection register in December 2016 under the category of neglect. Their names were removed from the register in October 2017. The parents had continued to work with the various care agencies and, as Judge Garland-Thomas found in the recently despatched care proceedings, they were able to sustain the positive changes that they had made. By May 2018, the local authority concluded that there were no safeguarding issues regarding the children, and the case was closed.
- 18 On 10 May 2018, a referral was made from midwifery indicating that the mother felt unable to care for a fifth child, and that she and the father had separated. It was indicated that the mother requested that the baby was to be put up for adoption immediately upon birth. Accordingly, the parents worked with the local authority to plan for placement of the baby following birth. A note, which forms part of the CYPS assessment and which is dated 2 May 2018, reads as follows:

“Should the plan to relinquish the pregnancy proceed, the mother and father are aware they will have a six-week period before a guardian will meet them, whereby they will be asked to sign a declaration to withdraw from all parental responsibilities of the child. The parents continue to conceal the pregnancy from extended family and report that they could not cope with watching another family member raise their child. Mother reports she would find it too difficult not to interfere in regard to how the child is parented. Mother is worried that this would cause arguments amongst the family, and not only would they lose their support network but they would

jeopardise any relationship they may have built with the baby. Therefore, mother and father are of the view that they do not wish for any friend or family member to care for the baby when born.”

- 19 For some time after A was born, the mother and the father declined to disclose the pregnancy or the birth to their other children and, indeed, to most family members. The guardian has provided a most helpful chronology of events, only part of which it is possible for me to reproduce for the purposes of this judgment. The chronology records that in May 2018 the birth mother indicated that she was worried about making the decision to place her unborn child for adoption, but she did not want it to reflect negatively on her older children. The mother apparently explained that she and the children are in, what she called, a good place now and they had all of her attention. She believed that another child would be just too much pressure and she would be unable to give them the attention she is giving them now and she does not want this to change for them.
- 20 The chronology records that the local authority explained that they would support her and that she would have six weeks from the birth to give her time to reflect upon the decision. The chronology shows that a social worker spoke with the mother on numerous occasions during June 2018, shortly before A was born, with it being explained to the mother that she could change her mind within the first six weeks after birth. The chronology records that on 4 July, the date of A’s birth, the mother named the baby. It carried on; “Mother struggled to leave baby, she wanted to stay with her a little longer than she initially planned. Mother went to kiss the baby’s head but withdrew and stopped herself. Mother was observed as upset, although not showing much emotion and did not cry. The mother asked if she could stay with the baby a bit longer, she gave the baby a last kiss and cuddle before saying goodbye and leaving”.
- 21 A note, two days later, records that the social worker expressed concern about the mother’s mental health. Only a week later, on 11 July, the mother requested another contact with A as she did not feel saying goodbye was enough for her to have closure. The birth parents, it is recorded, both requested to meet the carers for reassurance that A was well-cared for. The mother asked if she could have A’s umbilical cord when it falls off.
- 22 When the mother informed the local authority social worker of her decision to relinquish her unborn child, it was immediately accepted by that social worker as being for the best, and the local authority put in place proposed adopters from birth. In my judgment, they had a duty to discuss this with the mother, in fact with both parents, in detail, before accepting the position rather than actively encouraging them to go through with the adoption. The Adoption Agencies Regulations 2005, and the Welsh equivalent, pursuant to s.53 of the Adoption and Children Act 2002 mandate the local authority to provide pre-birth counselling to the mother, which would include whether the mother could care for the child with support or whether there were members of the family who could care for her in the short or long term. Following the birth, the social worker must counsel the mother to see if she still wanted to the child to be adopted. At the first statutory review, consideration should be given to whether there still remains a chance that the child will return home. The local authority must do whatever it can to ensure that the child is brought up within her birth family if at all possible. Prospective adopters, who are selected to accept a relinquished baby from hospital, should be informed they will need to be robust because of the possibility that the parents may change their minds.
- 23 The birth parents proceeded to have contact with A, and a note dated 16 August 2018 indicates that the mother was enjoying contact, and it records, “...and wants to have it for as long as she can.” A note dated 6 September 2018 records that the carers had expressed

concern that contact needed to be supervised, and that the birth parents should not be emotional in front of A. The mother agreed, and it was agreed that a photograph could be sent each year by the carers to the birth parents.

- 24 On 25 September 2018, the mother met with the guardian to sign the relevant consents to relinquish A, but due to the mother's reservations the guardian advised the mother not to sign the consents. In my judgment, this event on 25 September 2018 is a critical event. The following day the guardian sent an email, in which she recorded that she was unable to have the consent form signed as it was, and I quote, "Clear that the parents want A to be returned to their care. They feel circumstances have changed since relinquishing." The guardian wisely advised the parents to seek legal advice. I repeat that this was 25 September 2018, about nine months ago.
- 25 A contact recording on 5 October 2018 notes, and I quote, "Whilst the mother was cuddling A she whispered to her, 'I'm going to get you back', before repeating, 'Mummy is going to get you back.'" On 8 October 2018, the social worker recorded that the mother said that she felt that giving A away was a mistake and that she was due to see her solicitor on Thursday. There is a great deal more in the guardian's chronology, but what is abundantly clear is that it was only a short time after the birth that the mother, and then, in due course, supported by the father, showed increased anxiety about her decision and increased reluctance to let A go.
- 26 It is evident, and Judge Garland-Thomas so found in the care proceedings to which I will shortly refer again, that in October 2018 the mother was informed by a local authority social worker that if she changed her mind an assessment would need to be carried out which would involve the other children. This was as devastating for the mother as it was incorrect. It was devastating because it terrified the mother and, I dare say, the father when she relayed it to him that further local authority involvement with their family would now ensue, with all the risk to the other children that they had been through already, as I've recounted above.
- 27 It is completely evident to me that the birth parents became frightened that an inquiry would now follow into their capacity to care for the four children already at home with them -- certainly three of them, one of them I dare say being above the relevant age. The mother was understandably concerned about previous local authority involvement.
- 28 Judge Garland-Thomas found that by March 2019 both parents had indicated, reluctantly, that they agreed that A should be placed for adoption. Judge Garland-Thomas found, however, that on the way back from court on 3 April 2019, the mother disclosed that she did not agree with the plan and that she wanted A back in her care. It was this comment of the mother's that persuaded the local authority that they should issue care proceedings. Judge Garland-Thomas found, and it is obvious to me that she was correct in this finding, that the placement of A shortly after her birth as a foster to adopt placement was not one which had any legal foundation. It is accepted that the parents agreed accommodation under s.76 of the 2014 Act, but there was no compliance with other legislative requirements.
- 29 Mr Momtaz on behalf of the carers, has sensibly conceded that A could not properly have been placed as a foster to adopt placement, but that she was placed into foster care with the carers being simply, and I use the term simply with no disrespect at all, but to imply that this was nothing else but foster care.
- 30 As Judge Garland-Thomas found, the provisions for concurrent planning in Wales require that the carers are dual approved under both the Adoption and Fostering Regulations, that the child is placed with these carers as a foster placement at the start of care proceedings, that care proceedings are commenced and that there should be a placement decision. There

is then a matching panel recommendation followed by a decision. Judge Garland-Thomas found, and no-one has sought to appeal this finding, that none of these legal requirements was met. She found that the application for a placement order was misconceived as there was no unequivocal consent from the parents. At the time of the application, the carers were not prospective adopters in that there had been no placement decision, no matching panel and no DM decision. Judge Garland-Thomas correctly, in my judgment, found that the placement was never a foster to adopt placement.

- 31 What triggered the issuing of care proceedings by the local authority was the withdrawal of consent by the birth parents. Judge Garland-Thomas said, and I also agree with this, that it is instructive to note that both s.19 and 20 of the Adoption and Children Act 2002 do allow for the withdrawal of consent.
- 32 At the first directions hearing within the now issued care proceedings, it was evident that threshold was disputed. The local authority sought to rely on the likelihood of emotional harm and neglect arising from the fact that A was relinquished at birth and there had been no contact between the parents and A since October 2018. Judge Garland-Thomas found herself having to grapple with the relevant date for threshold. It transpired that the local authority had pleaded three different relevant dates. Their initial threshold document pleaded the relevant date was 4 July 2018, being A's birth date. On behalf of the local authority, this was abandoned by Mr Boothroyd at the hearing before Judge Garland-Thomas and the second threshold document dated 24 May 2019 pleaded the relevant date as 3 April 2019, the date on which the mother requested that A be returned to her care. Later, in submissions, Mr Boothroyd on behalf of the local authority suggested that the only feasible relevant date could be the date on which the mother originally changed her mind, namely about 25 September 2018.
- 33 Judge Garland-Thomas found that it is clear to her that the only date which could possibly be the relevant date is A's date of birth, 4 July 2018. She found that the submission that the relevant date is either 3 April 2019 or possibly 25 September 2018 is not sustainable. On each of those dates A remained in local authority care, where she had been since 4 July. The judge found that any date other than 4 July 2018 is therefore an artifice seeking to place some blame on the parents for their change of stance.
- 34 By the time this case started in front of me, I was in receipt of the draft judgment of Judge Garland-Thomas. Although she had told the parties of her decision that threshold had not been met, she had not circulated her draft judgment. I believe that she did this for a number of good reasons, not least that it was important to keep the public law proceedings alive since it was imperative that the parties continued to be represented. Prior to hearing any submissions, I circulated to the parties, with Judge Garland-Thomas's express consent, a draft of her judgment. The judgment itself has been formally handed down by me today, although her decision, as I have indicated, was communicated to the parties some two weeks ago or so ago.
- 35 The only party who could possibly seek to appeal Judge Garland-Thomas's decision would be the local authority. As has been made clear to me by Mr Boothroyd in completely unequivocal terms, the local authority, with the benefit of comprehensive advice, does not seek to appeal her judgment and will not do so. This is significant because it means that I am now able to rely on the findings made by the judge. For what it is worth, and I can say this now only in the knowledge that no appeal is being pursued, I can see nothing in the judge's judgment which could conceivably give rise to an appeal. Indeed, it seems to me that her judgment is the model of clarity.

- 36 The judge found, in paragraph 28 of her judgment, that it would be necessary for the local authority to show, on any of the dates proposed, that there is a lack of care being provided by a parent which gives rise to threshold. The judge said that she was satisfied, and she so found, that the local authority cannot establish that A has suffered, or that she is at risk of suffering, significant harm attributable to the parents as at any relevant date. The judgment of Judge Garland-Thomas, therefore, brings the public law care proceedings to an end. The application for a care order has been dismissed and the care proceedings now will formally end today with the handing down of her judgment.
- 37 Entirely properly, Mr Montaz on behalf of the carers, now accepts that when A was placed with the carers it was on the basis that they were foster parents and not prospective adopters. Judge Garland-Thomas, correctly in my judgment, concluded that when the local authority proceeded on the basis of a foster to adopt placement they did not have in place the legal framework to enable them to do so, and care proceedings should have been issued earlier than they were. It was completely clear by at least 25 September 2018 that the parents were equivocating about their consent to adoption. There is a duty on this local authority to support and assist parents in the position that these parents were in, and I have already set out the relevant Adoption Agencies Regulations that apply here in Wales.
- 38 Instead of providing that support and counselling, the local authority actively encouraged the parents to proceed along the adoption route, and even, albeit implicitly rather than explicitly, allowed the parents to feel that failure to continue to relinquish A for adoption could give rise to an inquiry in relation to the other children.
- 39 Mr Boothroyd on behalf of the local authority, has referred me to a famous but now somewhat old lecture given by Lord Mackay of Clashfern in 1989, when he delivered the Joseph Jackson memorial lecture. It is to be remembered that 1989 is the year of the Children Act, albeit it that did not come into force in 1990 or maybe even 1991. During the course of that lecture, Lord Mackay said this,
- “The integrity and independence of the family is the basic building block of a free and democratic society and the need to defend it should be clearly perceivable in the law. Accordingly, unless there is evidence that a child is being or is likely to be positively harmed because of a failure in the family, the state, whether in the guise of a local authority or a court, should not interfere.”
- 40 The lecture is to be found reported in New Law Journal vol 139 at p.505. The quoted paragraph being at p.507.
- 41 Mr Tillyard in sensitively but, if I may say so, in characteristically bold fashion, criticises the local authority. He lists *inter alia* the following failings:
- 42 1. When the mother informed the local authority social worker of her decision to relinquish her unborn child, it was immediately accepted by that local authority to be for the best, and the local authority put in place the proposed adopters from birth.
- 43 I agree with Mr Tillyard’s submission and so find that they had a duty to discuss this the parents in detail before accepting the position, rather than actively encouraging them to go through with the adoption.

- 44 2. The local authority should have permitted the mother time to reflect on her decision to relinquish A following the birth, rather than asking her to leave hospital within three hours of A being born.
- 45 3. The applicants, that is the carers, had not been approved as foster carers, and so A should not have been placed with them from birth.
- 46 I wish to make it completely clear that in saying this I do not criticise the carers at all. I criticise the local authority.
- 47 4. Once A was placed with the carers, the local authority took far less interest in the mother's welfare than they should have done. It took them some three weeks before they even organised contact.
- 48 5. The local authority was placed on notice by the guardian in September 2018 that the parents' consent was likely to be in issue.
- 49 In my judgment, the local authority should have fully investigated this as soon as it became evident to them. That was their clear duty. The local authority told the mother that once she signed the papers for adoption in September or October there would be a final contact session. The mother was not aware, because nobody told her, that she could have requested ongoing contact.
- 50 It is clear that, had the local authority carried out its statutory duties pursuant to statute and regulation, from at least 26 September 2018, these proceedings would not be happening. It is overwhelmingly likely that had that action been taken last September, as I have said just over nine months ago, the parents would have been rehabilitated with A and the carers, however sadly, tragically and reluctantly, would have conceded this. It is almost beyond belief that we are now some nine months later. Who can possibly blame the carers now for bringing the applications that they do, both within wardship proceedings and for seeking leave to bring the adoption application?
- 51 The mother and the father have each been separately represented in these proceedings before me. I questioned the need for this; not out of any sense of criticism, but because it seems to me that they stand together shoulder to shoulder in this application. Of course, as I have recounted above, there was a time when they were separated and that separation appears to have been a significant part, although not the only reason, for the decision to relinquish the baby. I can well understand that that led people to think that they should be separately represented, however, when questioned about this the best answer that I was given as to the reason for separate representation is that this is what normally happens in public law care proceedings.
- 52 As I have said, I do not intend to and do not criticise either of the birth parents nor any of the legal representatives for the decision for separate representation. I do, however, tentatively suggest that if it is obvious to advocates that two parties to proceedings have identical cases, ambitions and evidence, attention should be given to the possibility of single representation. In any event, I have been greatly helped in this case not only by Mr Tillyard for the mother, but by Mr Lock for the father. Mr Lock's written submissions are extremely helpful, but his oral submissions have been necessarily short because Mr Tillyard before him had said most, if not all, of what needed to be said.
- 53 Mr Lock tells me, and I accept, that the parents were not consenting to placement and that the consent to placement by a parent under s.19 and 20 of the 2002 Act has to be given in

the required statutory notice form and witnessed by the guardian. As Mr Lock correctly observed, this clearly did not happen.

- 54 Nevertheless, instead of accepting the facts, the local authority proceeded, as I have said, as if consent was still forthcoming. I am the first to recognise that local authorities work under intense pressure of work and in circumstances where funding has been persistently and repeatedly reduced. The pressure on local authority social workers and lawyers is often intolerable. However, the local authority should not, and cannot, make the mistakes of the kind that have been made by this local authority in this case. I have already used the words “human misery” above, and I repeat those words now in the sense that the human misery caused by the failings of this local authority are almost too much to bear.
- 55 Moreover, and in any event, the cost in pure monetary terms of these proceedings, and of any likely proceedings that may in due course be brought against the local authority, will far outweigh any possible savings that could have been made by the inadequate attention that was given to this case. It is not my task in the course of this judgment, least of all when I have heard no oral evidence, to blame individuals. Whether this is the failure of one or two individuals in the local authority, or a systemic failure is not something that I can or should comment on in this judgment. I can only hope, however, that there will be a thorough review by those at the top of the legal department of this local authority to consider what failings were made, and how steps can be put in place to make sure that they can never be repeated.
- 56 It is clear to me that the carers of A are thoroughly decent people, who have thought of her arrival into their lives as the fulfilment of a dream. To have that dream taken away from them, as these proceedings invite, is to heap upon decent people misery of a kind that is completely unacceptable.
- 57 For the birth parents who have pleaded for the return of their child for many months, they have had to endure many months of misery, litigation, and what can probably only be described as hell. It is, if I may say so, a tribute to the birth parents and to the carers that they have sat in court in close proximity and they continue to offer each other support. I can only express the hope that one day A will realise that she has not two, but four, wonderful adults in her life.
- 58 The unarguable position at the moment is that A is in short-term local authority foster care. No consent to placement for adoption nor adoption order has ever been given, and no matching panel has taken place. Mr Momtaz has correctly identified that he seeks, on behalf of the carers, permission to make an application for an adoption order. Pursuant to s.42(6) of the 2002 Adoption Act, leave is required because A has not lived with the foster carers for a period of one year and she has not been placed with them by the local authority. This is a non-agency application. Mr Momtaz seeks to persuade me that I should take into account the fact that A has been with her carers for almost a year, and it is in some way relevant to my determination. I agree that in the overall circumstances of the case, the fact that we are nearly at that twelve-month point is potentially relevant. However, the statute provides for a period of one year, and in this case that period of one year has not been fulfilled. The statute is quite clear therefore that permission, or leave, is required.
- 59 It is common ground that the test for determining whether permission should be granted is the likely prospect of success. In this regard I have been referred to *Re: A (Coventry County Council)* [2008] 1 FLR 959. In that case, the Court of Appeal made clear that the principles identified in *Re: M v Warwickshire County Council* are relevant to the grant of leave to apply for revocation of a placement order under s.24 be applied to the grant of leave to

apply for an adoption order under s.42(6). Thus the welfare of the child was a relevant but not the paramount consideration. The application's prospect of success was relevant, and the delay that the grant of leave would cause to a finalisation of the programme for the child's adoption was relevant.

- 60 However, were a judge to consider whether there was a real prospect that, in adoption proceedings, a court were to find that it would serve the welfare of a child throughout her life to be adopted by the foster mother if there was no-one else, it would rarely be a proper exercise of his discretion for questions of delay to precipitate a refusal to allow the foster mother's application to be made.
- 61 My task is, as everyone agrees, to decide whether there is a real prospect of success of the adoption application succeeding. Mr Lock on behalf of the father contends, as well as supporting Mr Tillyard, as follows:
- 62 1. Whatever may have been expressed to be the intention of the parties at A's birth, it was apparent by September 2018 that consent to adoption was not forthcoming. I agree.
- 63 2. The carers have at all times been foster carers. For the adoption application to succeed, the court would have to be satisfied that parental consent should be dispensed with on the basis that nothing short of adoption would be appropriate for the child. This is a critical submission which of course has also been made by Mr Tillyard on behalf of the mother. As the former President of the Family Division, Munby, LJ said, "In the case of a private adoption, as in the case of a public adoption, the court cannot make an adoption order in the absence of parental consent except as a last resort, and only if nothing else will do."
- 64 This drives Mr Lock to submit that in this case it is acknowledged that the threshold criteria are not made out, and that it is simply not possible to assert that, no public law order being possible, adoption is still possible. Further, Mr Lock submits that the effect of the application made by the carers is to enter into some form of comparative welfare analysis.
- 65 I have already quoted from Lord Mackay's lecture shortly after the introduction of the Children Act and it is trite law to state, but nevertheless it is important to state, that the court cannot, and does not, play any role in any form of social engineering. I am absolutely proscribed from lining up parents to decide which of them is, or might be, the better parent.
- 66 During the course of this hearing I engaged with Mr Momtaz in a debate about the burden of proof. Mr Momtaz sought to persuade me that the burden of proof is not the relevant test. However, it is clear that adoption is to be regarded as the exception. This is evident, not least from the fact that in order to make an adoption order in a case such as this I have to have either the consent of the parents or, if I do not have that consent, I have to dispense with their consent.
- 67 What evidence is there to enable me to dispense with their consent? What I have is public law care proceedings which have been dismissed by an experienced judge, whose judgment is not under appeal. There is accordingly nothing on which I can base any suggestion that the parents' consent is likely to be dispensed with, or even that it might be dispensed with. I am driven to agree with the submissions made by both Mr Tillyard and Mr Lock that what is effectively going on here is a fishing expedition, during the course of which the carers - and I repeat that I make absolutely no criticism of them - hope to find something adverse to the parents' capacity which will enable them to start to construct a case. I do not like to use the words "against" or "construct" because, as I have already repeatedly observed, these two

couples appear to me only to be able to want to help each other and not to criticise each other.

68 However, it is foolish for any of us to think that the next stage of the proceedings, were there to be one, would be anything other than parents pitted against prospective adopters in some form of who is the better parent type of contest. This has never been, and is not the basis on which children law and adoption law in this jurisdiction operates. I have helpfully been referred to the decision of Ms Justice Russell in *Re: W* in 2015, where she said, “The fact that W has been with the applicants for some time, sixteen months, and is settled with them, may militate against a move in the short-term but it cannot form the reason for W to remain in adoptive placement when balanced against her welfare for the rest of her life.”

69 I keep in mind the words of Lord Neuberger at para.103 of *Re B* referred to above:

“The effect on Mr and Mrs A of W moving away from them to be reunited with the family of origin will be distressing and difficult to bear, hence their inability to contemplate playing an active role in any transition. But their welfare is not my paramount consideration, this is with W’s lifelong welfare. With balancing the effects of reunification against those of remaining in adoptive placement, principles are set out in *Re: B* in the Court of Appeal decision to which I have referred, and they are binding on me, and even if there were not a presumption that children are best brought up with their natural families, I would still conclude that it is in the interests of W’s welfare throughout her life that she should be reunited with her father and siblings and her mother to live with in her family as she grows up, and take her place among them for the rest of her life. If she remains where she is, all those ties with the family of origin will be lost and the advantages of being brought up within a family, and seeing her mother, will be denied her.”

70 I have also been referred to the decision of Sir James Munby as President of the Family Division in the Court of Appeal decision of *Re: T* in 2015. At para.53 of his judgment the President said:

“Moreover, there is, as Miss Anning pointed out, a very real risk that if, in a case such as this, the forensic process is allowed to become in effect a dispute between the prospective adopters and the birth family, the court will be diverted into an illegitimate inquiry as to which placement will be better for the child. That, it cannot be emphasised too much, is not the question before the court. I repeat, because the point is important, what the Strasbourg court said in *YC v United Kingdom*: ‘family ties may only be severed in very exceptional circumstances ... It is not enough to show that a child could be placed in a more beneficial environment for his upbringing.’”

71 In answer to all of this, Mr Momtaz put up a strenuous battle on behalf of the carers. If I may say so, he has effectively, forcefully and constructively put every point that could possibly be put on their behalf. I have already acknowledged the abominable position in which the carers find themselves. However, sympathy for their position cannot guide my decision. What guides me is the law, both statute and precedent, to which I have endeavoured to refer.

72 Mr Momtaz has, on behalf of the carers, made every concession that he sensibly could have made and made every point that he could properly have done. Mr Momtaz asserts that the

court will need to determine whether the mother or the father gave valid consent to placement and/or adoption at any time. What is clear, is that even if they did give consent that consent was plainly in question by 25 or 26 September 2018. Mr Momtaz properly accepts that there must be significant doubt whether either parent gave full and informed consent to adoption at any time after signing the s.76 consents.

73 Mr Momtaz properly recognises that if A was placed with the carers as foster carers rather than prospective adopters, as I find to be the case and he has properly conceded, then he must apply for leave for them to make an adoption application. He contends that they should be given leave. In para.30 of his first skeleton argument he identifies the correct principles as follows:

1. The welfare of the child was a relevant, but not the paramount, consideration.
2. Another relevant consideration is whether the proposed application has a real prospect of success.
3. He refers me to the judgment of Wilson, LJ, as he was, who indicated his view that the requisite analysis of prospects of success will almost always included the requisite analysis of the welfare of the child.

74 However, I am clear that this does not permit me, and still less does it encourage me, to draw up some sort of balance sheet between the competing debits and credits of these two decent couples.

75 It is of course the case that A has bonded with her carers, who, as I have repeatedly said, have provided her with an unquestionably good level of love and care. Within the context of her own young world, I have no doubt that A regards the carers as her parents. Mr Tillyard submits, and I accept, that I have to weigh this against the rest of A's life.

76 What is the right of this court to terminate A's right to family life with her family - by which I mean her birth parents and siblings? The right of the state to interfere in A's young life does not, in my judgment, exist. Judge Garland-Thomas has dismissed the care proceedings and there are no longer any public law proceedings on foot. The carers, as I have said, are temporary foster parents. So to describe them will appear to them, I know, to be the deepest of insults. I do not describe them in this way in any pejorative or critical sense, I am merely using the language of the statute to define the legal position: they are foster carers, and the birth parents are the birth parents.

77 Mr Momtaz concluded his excellent written submissions with a short but, I am certain, correct proposition that the applicants, the carers, only want what is best for A. He then says that they want the court to be able to make an informed and balanced decision as to her welfare. The fatal flaw with Mr Momtaz's submissions, in my judgment, is that I do not get to that welfare stage.

78 Mr Momtaz asks why A should be introduced to the care of her biological parents. In my judgment this is the wrong question. The correct question is why A should be prevented from being in the care of her biological parents, when this is precisely what her biological parents want. I do not for a second question the proposition that what the carers want is what is best for A. The phrase "what is best for" is emotive and implies all sorts of subjective tests. I am driven to make my conclusions based on the law. The law is that adoption is a process of last resort unless consent from the parents is forthcoming. Everyone in this case recognises that the consent of the parents is not forthcoming now, if it ever was. There is no material evidence on which I could base a finding that the consent of

the parents should be dispensed with. My task is to find whether the carers have a reasonable prospect of success in their adoption application.

- 79 With the care proceedings having been dismissed, there is no basis on which I could find that the birth parents are other than, to use the language of family lawyers, good enough parents.
- 80 An application for leave to apply for an adoption order prevents the removal of a child from the child's home, but, once determined then the provisions of s.38(4) and (5) fall into place. Even if leave were granted, the parents would be entitled to remove the child from the foster carers. How could an application for an adoption order be seriously contemplated in circumstances where the child has been removed from the prospective adopters, as would inevitably be the position in this case?
- 81 I am driven to the conclusion that the carers have no reasonable prospect of success in their adoption application. Indeed, I am driven to the conclusion that it is bound to fail. Accordingly, there is no basis on which I can give them permission to make the application.
- 82 This leads me to the most painful and difficult debate as to how now to reintegrate A into her birth family. With exceptional kindness, love and understanding, the carers have offered, even in the face of the prospect of losing their application, to do all that they can to help to integrate A into her birth family should they lose this application, as it is evident to them that they now have. Should they change their mind in relation to this, nobody, least of all me, would criticise them. If, however, after a period of contemplation following this judgment, they feel able to continue in this offer, then I know that the birth parents and this court would be grateful to them.
- 83 It may even be, and I express this very sincere hope, that they can play a part in A's life as she grows from the toddler that she now is into the girl, and the woman, that she will become. That is, of course, not a matter for this court but a matter for the four individuals who have patiently listened to this case for some three days.
- 84 In my experience as a judge in the Family Division I have rarely, if ever, seen such decent accommodation by individuals, of the horrible circumstances in which they all find themselves, and I end where I started by thanking all four of them, and express the hope that the goodwill seen by me in this court will continue, not just in the days and weeks to come, but in the years and decades to come.
- 85 Accordingly, I therefore dismiss the application for leave to bring an adoption application, and I will dismiss the wardship proceedings.

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

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**** This transcript has been approved by the Judge ****