



Neutral Citation Number: [2024] EWCA Civ 948

Case No: CA-2024-001094

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT READING
HHJ Tolson KC
RG23C50072

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 August 2024

Before:

LORD JUSTICE PETER JACKSON
LORD JUSTICE WILLIAM DAVIS
and
LORD JUSTICE SNOWDEN

D-S (A Child: Adoption or Fostering)

Deirdre Fottrell KC and Clarissa Wigoder (instructed by **the Joint Legal Team on behalf of Slough Borough Council**) for the **Appellant Local Authority**
Simon Miller (instructed by **Fort Solicitors**) and **Adam Kayani** (acting pro bono) for the **Respondent Mother**
Janet Bazley KC and Stephen Crispin (instructed by **Griffiths Robertson Solicitors**) for the **Respondent Father**
Nairn Purss (instructed by **THP Solicitors**) for the **Respondent Child**
by their Children's Guardian

Hearing date: 30 July 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 7 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Peter Jackson:

What the appeal is about

1. The question on this appeal is whether a judge was wrong to refuse to make an order allowing an 11-month-old child to be placed for adoption. If he was wrong, the other question is what steps this court should take.
2. The little girl is C. Her parents have learning difficulties, and I give this judgment with them in mind. They wanted C to come home, but the judge did not agree, and they don't challenge that decision. Still, they do not want C to be adopted and they say that the judge was right to decide that she should grow up in foster care.
3. C's mother has two other children. They are K, a girl aged 10, and J, a boy aged 5. They do not have the same father as each other or as C but, since J was born, he and K have always been together and they are very close. Sadly, they were neglected at home and there was an earlier court case about them. In August 2022, a supervision order was made, but it made no difference. The mother immediately became pregnant with C, but she and the father did not tell social services, who only found out a few weeks before the birth.
4. These proceedings began when C was born in May 2023. She went home from hospital for a few days. Then she and her mother spent two weeks in a foster placement before going to a residential assessment centre. A week later, the father and the other children joined them. It didn't work out. The father left after a month. The mother and children stayed on, but the assessment was negative. No one has ever suggested that the parents would deliberately harm the children, but they simply couldn't give any of them the care they need.
5. So, in November 2023 the court approved the older children going to one foster home and C, who was then just six months old, going to another. The parents did not agree, but that is where the children are now. The children have been having contact with the parents and with each other.
6. In December 2023, the local authority issued an application for an order allowing it to place C for adoption. It filed a statement from the social worker, Ms R, in the same month. The plan was for meetings to carry on with the parents and with the other children: twice a year after adoption, more until then. At the end of January 2024, the Children's Guardian, Mr B, filed his final report. He supported the making of a placement order for C.
7. This appeal is not about K and J. The plan is that they will stay together in foster care and have contact with their parents. They cannot stay where they are, so a long-term placement needs to be found for them.
8. C cannot stay where she is either. The local authority's plan was for her to move to carers who could adopt her later on.
9. The final hearing took place before HHJ Tolson KC over three days ending on 25 April 2024. It was his first contact with the case. He heard evidence from Ms R and two other social workers, from the parents, and from Mr B. He was making important

decisions that are not part of this appeal, mainly whether any of the children could go home.

10. At the hearing, parents were asking for C and the other children to come home. The professionals were asking for C to be adopted. The parents were only arguing for C to stay in foster care if she could not come home.
11. At the end of the hearing, the judge gave a judgment in court. He found that the parents could not look after the children well enough now or in future, and he made three care orders. He agreed with the plan for K and J to stay in foster care, but he refused the application for a placement order for C, and he refused permission to appeal.
12. The local authority appealed to this court, supported by the Guardian, and I gave permission to appeal on 24 June. This hearing has been held urgently because the plans for C's future hang on our decision.
13. Later in this judgment, I will give a summary of the judge's decision. Then I will set out the main arguments and give my view about them. But before I do that, I will explain this court's approach to appeals and say what I believe should happen, if my colleagues agree.

What is this court's approach?

14. The main question for us is whether the decision about C was one that a judge could properly take. In many cases about children there are a number of possible plans. One judge might choose one, another judge might choose another. So long as the judge takes the correct legal approach, explains his or her thinking, and makes a decision that will work for the child, that is fine. We will not allow an appeal just because we might think that another possible plan would have been better. We can only step in if we have been shown that the judge did not approach the decision correctly or explain it properly, or if the judge's chosen plan will not work.
15. Even when we allow an appeal, there will be many cases where the only fair thing to do is to order another hearing in the trial court. Where there is more than one possible answer, that court will usually be in the best position to decide between them, particularly if there is a gap in the evidence or where hearing the witnesses is going to matter. On the other hand, there are some cases where the evidence is complete and there is really only one answer. Then it is best for this court to say so, and to make its own decision.

My view about the appeal

16. I would allow the appeal and set aside the judge's decision for a number of reasons. He did not take the correct legal approach. He was wrong to say that the professional assessments had fallen short. He needed to make an all-round assessment of C's welfare, but he gave little or no weight to matters that were clearly important and he was influenced by matters that were not. His explanation of why he reached his decision is hard to follow.

17. We will not order another hearing. The facts are not disputed and the arguments are all known to this court. This is a case where there is only one plan that will work for C. There would be no point in another hearing, and it would cause months of delay at a crucial stage in C's development when she needs to be bonding with new carers. We will make a placement order on the basis of the local authority's plan, which aims for there to be some contact before and after adoption. We will not make a contact order, because that might complicate the search for adopters, which must be the priority.
18. I fully recognise the huge benefits that many children get from good foster homes, but fostering is just not right for C.
19. I know that this outcome will be painful for the parents, who have done their best, and I am sorry that their hopes will have been raised. Our decision will also be sad for K and J. But C's needs must come first. The parents have done their best but they cannot give her a family life. The arguments in favour of keeping her in foster care throughout her childhood are weak. C needs a family of her own and the only way she can have that is by being adopted.
20. I now set out the reasons for our decision in legal terms.

The local authority's note

21. The judge had the benefit of a note on the law regarding long term fostering and adoption from Ms Sian Cox, counsel then acting for the local authority. It also distilled the local authority's submission on that part of the case. The note is a model of its kind, because it focused on the key legal issue that the judge had to decide. Unusually, I am going to set it out in full, because it deals with so many of the points that he should have addressed and which now arise on appeal.

“Local Authority’s note on the law on long term foster care versus adoption

1. Wherever possible, consistent with their welfare needs, children deserve an upbringing within their natural families (*Re KD* [1988] AC 806; *Re W* [1993] 2 FLR 625). Care plans for adoption are “very extreme” only made when “necessary” for the protection of the children’s interests, which means “when nothing else will do”, “when all else fails.” Adoption “should only be contemplated as a last resort” (*Re B* [2013] UKSC 33; *Re P* (a child) [2013] EWCA Civ 963; *Re G* (a child) [2013] EWCA Civ 965).
2. The Local Authority relies on the judgement of Pauffley J in *Re LRP* [2013] EWHC 3974 (Fam) when she said the following in respect of a guardian’s recommendation for long term foster care in respect of a 10 week old baby:

39. Ms Gorbutt’s report suggests that long term foster care would be a “means by which permanency can be achieved”; and that “a long term foster home can offer ... commitment,

security and stability within a new family...” I profoundly disagree with those contentions. Long term foster care is an extraordinarily precarious legal framework for any child, particularly one as young as LRP. Foster placements, long or short term, do not provide legal security. They can and often do come to an end. Children in long term care may find themselves moved from one home to another sometimes for seemingly inexplicable reasons. Long term foster parents are not expected to be fully committed to a child in the same way as adoptive parents. Most importantly of all in the current context, a long term foster child does not have the same and enduring sense of belonging within a family as does a child who has been adopted. There is no way in which a long term foster child can count on the permanency, predictability and enduring quality of his placement as can a child who has been adopted.

40. The realistic, as opposed to the fanciful, options are (i) a return to her parents or (ii) a placement for adoption. So whilst I am sympathetic to Ms Gorbitt, as I would be to any practitioner who is endeavouring to fulfil the requirements of the law in the way assessments are conducted and reports written, it is worth reiterating that the focus should be upon the sensible and practical possibilities rather than every potential outcome, however far-fetched.

43. The advantages of a placement order are many and obvious. Prospective adopters are required to submit themselves to a rigorous and very thorough assessment process over many months. Those who satisfy the selection criteria are ordinarily of the highest calibre. They may be confidently expected to provide extremely good parenting to any child who is matched with them in all areas of his / her development. They will protect LRP from harm of whatever kind. The overwhelming probability is that they will be able to provide her with the priceless gift of a happy, secure and stable childhood from which she will derive life-long advantages.

3. In *F-S (A child: Placement Order)* [2021] EWCA Civ 1212 Peter Jackson LJ endorsed the weight placed on a child’s sense of belonging by Pauffley J in *Re LRP*:

That sense of belonging is not 'transactional' but arises from the mutual commitment between adoptive parents and children in those cases where adoption is appropriate. Here, the Judge was absolutely entitled to regard it as a factor of critical importance. [25]

4. The judgment goes on to say the following in respect of the argument in respect of the importance of ongoing sibling and parental contact:

It is also significant that an open adoption is hoped for. Nowadays it is well recognised that the traditional model of closed adoption without contact is not the only arrangement that meets the needs of certain adopted children. If the argument made against this placement order were sound, it is difficult to envisage a case in which open adoption could occur without parental consent. [25].

5. The Court of Appeal has given further guidance about the different considerations that apply to long term fostering and adoption in *V (Children)* [2013] EWCA Civ 913. In this case, the appeal was allowed and final care and placement orders substituted for children aged 9 and 5. The guidance at paragraph 96 is as follows:

- i) *Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely therefore to “feel” different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.*
- ii) *Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is made, it is made for all time.*
- iii) *Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) Children Act 1989). The contact position can, of course, be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions, where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the adoption order has been made, the natural parents normally need leave before they can apply for contact.*
- iv) *Routine life is different for the adopted child in that once he or she is adopted, the local authority have no further*

role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example).

6. *Re T (placement order)* [2008] EWCA Civ 248, [2008] 1 FLR 1721 held that uncertainty about the prospects of finding an adoptive placement does not in itself rule out the making of a placement order.

Application to this case

7. It is submitted that C falls squarely within the considerations set out by Pauffley J. All the advantages of adoption and disadvantages of long term foster care are applicable and there are no distinguishing factors in her case.
8. The following particular considerations particularly support adoption as opposed to long term foster care:
 - a. C is only 11 months old and her case is analogous to *Re LRP*. It would be highly unusual for a child of her age to remain in long term foster care, especially when she is not living as part of a sibling group;
 - b. C has spent only 5 months of her life placed with her mother and siblings. She does not have a significant lived experience as part of a sibling group and is already placed separately to them;
 - c. At 10 and 5 years old, K and J are aware of who their parent(s) are and have memories of being parented by them. C will not have these. She will also lose the opportunity of forming those parental relationships with a ‘mummy’ and/or ‘daddy’ and thus the sense of belonging that is so vital to her long term emotional wellbeing;
 - d. C will experience continued local intervention throughout her childhood, which is unnecessary and disproportionate when a care plan of adoption is open to her;
 - e. There is no guarantee that a foster placement for all three children together could be found or maintained throughout her childhood;
 - f. Adoption will provide C with a life-long family, whereas long term foster care will end when she turns 18, subject to transitional provisions.
9. It is submitted that the following factors are not relevant considerations for the court in determining the application:

- a. The fact that threshold relies on neglect and lack of parenting capacity compounded by learning disabilities rather than abuse should not bear on the decision. If the parents cannot meet C's needs, then adoption should be considered in light of whether it meets C's needs rather than the parents' culpability or lack thereof. Adoption is not punishment for parents; it is a means of providing permanence for a child. The court may take judicial notice of the fact that a substantial proportion of placement applications are in respect of parents who did not deliberately harm their children or place them at risk.
 - b. The parents' commitment to contact is reflected in the Local Authority's care plan for direct contact to continue post adoption and for the search to concentrate only on placements that can facilitate this for the first three months of the search. It cannot justify keeping a child in long term foster care for another 17 years;
 - c. Concerns about family findings. No party sought a family finding statement or sought to argue that there would be any serious difficulty in obtaining an adoptive placement for C, an 11 month old White British girl, even if she is found to have some hearing loss and/or other minor medical issues. The court can be confident that adoption is a realistic prospect for C."
22. I have only two comments at this stage. At paragraph 2, it is said that the Guardian in *LRP* recommended long-term foster care for the child, who was 10 weeks old and had two siblings under the age of two. In fact she recommended adoption, but in her analysis she had mentioned foster care as one of the realistic alternatives, and Pauffley J's remarks were addressed to that proposition. Paragraph 5 cites *Re V (Long-term Fostering or Adoption)* (CA) [2013] EWCA Civ 913, [2014] 1 FLR 1009. The observations of Black LJ about contact at paragraph 96(iii) were made in July 2013. In April 2014, section 51A was added to the Adoption and Children Act 2002 ('ACA 2002'), giving the court the power to make a contact order in respect of an adopted child, and the modern position must be viewed in that light.

The judge's decision

23. The judge set out the background and the positions of the parties. Having directed himself on the law in relation to care orders, he continued in this manner:
- "13. ... In C's case, however, because there is an application for a placement order and the care plan is for adoption, I would at all stages, have to bear in mind the provisions of the Adoption and Children Act 2002 directly in terms of the placement order but also indirectly as a result of C's care plan. I must look at both the different Welfare Checklists, emphasising welfare throughout life rather than simply during the child's minority

and with its subtly different considerations about ongoing relationships with family and others and so forth.

14. Sections 47 and 52 of the 2002 Act are also firmly in play for C. Compulsory State-sponsored adoption is an exception. It is not usually available without the consent of the parents. I am able to dispense with that consent only if I am satisfied that the child's welfare "requires" that I do so. The Higher Courts have ruled that the word "requires" carries the connotation of an imperative, in the phrase that is always used on these occasions that "nothing else will do".

15. Ms Cox for the Local Authority has supplied me with a helpful note of the law and I gratefully adopt her wording within paragraph one of that note:

"Care plans for adoption are 'very extreme', only made when 'necessary' for the protection of the children's interests which means 'when nothing else will do', 'when all else fails'. Adoption 'should only be contemplated as a last resort'".

16. Then she makes reference to the well-known authorities of *Re B* [2013] UKSC 33, *Re P* (A Child) [2013] EWCA Civ 963 and *Re G* (A Child) [2013] EWCA Civ 965. She also reminds me of the observations of Pauffley J within the case of *Re LRP* (A Child) (Care Proceedings: Placement Order) [2013] EWHC 3974 as to the difficulties that can arise for children within long-term foster placements. Overall, however, I take as my guiding light the authorities referred to within paragraph one of Ms Cox's note. Article 8 of the European Convention is in play. Adoption is about as radical an interference in the right to respect for private and family life as there is, perhaps within life generally, never mind within the family justice system. It can only be justified if it is both necessary and proportionate. I also have to be careful to consider all the options put before me holistically, that is to say without ruling out first one and then another so as to leave myself, in effect, with Hobson's choice."

24. The judge then addressed the question of whether the children could go home. He found that it was clear that the parents could not meet their need for full time care, largely because of their leaning difficulties, and that all options to help them had been tried. Despite K and J's wishes to go home, that was not in their best interests. In C's case, he approached the matter on the basis that "her inner feelings would be to be with the mother to whom she is bonded" but it was not possible for her to go home either.

25. Turning to the plan for adoption, the judge made some general remarks:

"31. I turn now to C. As I understand the law, in every case, regardless of the age of the child, it is necessary to conduct a full analysis of the pros and cons of the rival orders proposed. It

cannot, as I understand it, be sufficient to proceed simply to an adoption care plan from a point at which family placements have been dismissed without considering other options and, in particular, long-term fostering along the way. If that were the case, I do not see how one could ever satisfy the “nothing else will do” test. Yet, and I understand this and I make no criticism of the individuals involved because in truth, it is what I encounter in most cases, the approach for Local Authorities seems to be that for children below a certain age then if there is no family placement available, then adoption it will have to be.

32. Nevertheless, I act of course on the evidence in this case rather than bringing experiences of past cases to bear. In this case, Ms R in her fair and professional evidence was perfectly open with me that that is indeed the approach that had been taken in this case. Mr B in supporting the Local Authority was to tell me much the same thing. The result is that there is, in my judgment, no sufficient professional analysis such as the law requires. There is no evidence as to the availability of placements. It is as if, for C, at less than one, adoption it will have to be. Speaking for myself, whilst I recognise that C is yet reach her first birthday, I feel it necessary to conduct my own analysis. As with every case, there is a unique combination of many factors which are in play in looking at the right future for C against the test laid out in the 2002 Act – namely that welfare throughout life is a paramount consideration – and the application of the subtly different checklist.”

26. The judge went on between paragraphs 33 and 38 to set out what he described as “the major factors”:
- (1) He said that he gave significant weight to C’s age. The need for bonding with a parent throughout life is particularly important for a very young child who still has the ability to form primary attachments. Her position is different to that of K and J, who know their mother well.
 - (2) He described certain other factors as important. The first was C’s health. She might have some hearing loss, which was being investigated and was due to lead to an operation (for grommets). The proposed fostering-to-adopt placement had put matters on hold until C’s condition was clarified. The judge thought that the point affected the availability of a placement more generally.
 - (3) He said it was important that the parents have learning difficulties, so C might too. Adopters would have to be told about that. On the other hand, she might be attractive to adopters as a young white girl. He said that these things had to be considered, but the professionals hadn’t advised him about how they might “play out”.
 - (4) He thought it was “highly significant” when considering welfare and proportionality that this was not “not an abuse case” and that the parents would not hurt C physically if they spent time with her.

- (5) He considered C as part of a sibling group. If she was adopted, she would be parted from that group. Though there was a plan for contact after adoption, it would be much easier for the children to see each other if they were all in foster care.
- (6) He referred to the parents' commitment to contact. He noted that there was no suggestion that they would seek to disrupt any placement.

27. The judge then came to his decision between paragraphs 39 and 43, which I must quote in full:

“39. In any event, those are some of the considerations. I have indicated that in my judgment, I lack a detailed analysis from the Local Authority or, indeed, the Guardian. However, to say there is no analysis may be unfair in the sense that they do see subtleties and nuances in the case. The Local Authority care plan for C unusually specifies that there should be post-adoption contact “facilitated by the adopters”. I am bound to say whether because of the lack of a social worker currently actively in post or otherwise, I am not sure the Local Authority have thought through the consequences. Why? Because when Mr B did so and came up with the recommendation that there had to be a search only for adopters who would contemplate post-adoption contact not just with siblings but with parents at least for a period of three months, the Local Authority, I believe, saw that as an extension of their care plan rather than a restriction upon it. I doubt the local authority would have conducted any such search. This emphasis on open adoption is, I think, a measure of the difficulties in this case. One cannot say simply ‘adoption for C’. On any view, even the view of both the Local Authority and the Guardian, the position must be more nuanced than that or the care plan could not exist in its current form.

40. How then, against the checklist do I weigh these factors? My first difficulty is a lack of professional assistance on the point. However, if I look forward, it seems to me, at the very least entirely possible that an appropriate long-term foster placement could be found, I am going to say ideally for all three children together but if not, then for K and J on the one hand and C on the other. [Counsel] effectively conceded that the Local Authority would have to find a placement if its application for a placement order were refused and there were to be no successful appeal.

41. I then look to how C's needs would be met in that environment. She would have the ability to know her parents; to know her origins in a way which could not be achieved simply through life story work. It is, of course, entirely possible, perhaps highly likely that there would be a significant difference between the intellectual functioning of any carer or adoptive parents and C herself. I can easily foresee that it would be of some assistance to her to know why that was and to know about

her roots. Nor is there any indication in this case that a relationship with her parents will be somehow difficult for her. There is no evidence that they would disrupt the placement. There is every indication that they would be committed and it seems to me, therefore, that that relationship would be a positive thing for C. Nor can I somehow assume that it would disrupt the necessarily close relationship between foster parents and C. Foster parents are trained to deal with that kind of thing. There is, of course, no indication that such a relationship with her parents would expose her to harm of any kind. She would lack the arguably additional benefit of a close parental relationship that was not divided between foster carer and birth parents. However, I am not sure in this case that it could be put higher than that.

42. Accordingly, all those same considerations: needs and harm and capabilities and the nature of C's existing relationships, the views of wider members of her family and so forth are in play in this case in that way. They apply with additional force because she is part of a sibling group whom she would know. She might be in a foster placement with them full time which would surely be of an additional benefit to her.

43. For all these reasons, applying the Welfare Checklist within section 1 of the 2002 Act, it seems to me that it would be in C's best interests to search for a long-term foster placement. Certainly, I am not in a position, whether as a result of professional evidence or my own analysis to say, as I would have to do, that nothing else will do in this case. Consequently, I refuse the application for a placement order. I have considered whether I should simply adjourn it to allow, for example, for evidence of long-term foster placements and so forth because there is no evidence of placement availability before me. However, it seems to me that that would not be desirable. It would, of course, remain open to the Local Authority in the future to apply again for a placement order or potentially, depending on circumstances, to back an application for an adoption order but I say nothing about that."

28. Finally, the judge turned to contact. Again, he departed from the professional recommendation, which was for contact to reduce progressively to six times a year:

"44. I turn to the question of contact. In my judgment, there is an overly restrictive approach taken by the professionals. We perhaps exist in an environment where increasingly, levels of contact are reduced, whether for perceived welfare interests or resource issues or both. Contact appears to be ever more tightly supervised and so forth. However, in this case, I believe a more generous and flexible attitude towards contact than normal could be taken for the reasons which I have already set out in this

judgment concerning the parents' commitment and attitude which I will not now repeat.

45. I also acknowledge that none of the children will be able to stay where they are at present as far as I am aware. It will be difficult to judge precisely how they will react, in K's case the knowledge that she is not returning to her mother. Perhaps also for J. Also, to the balance which C will have to hold between both parents and foster carers. Accordingly, there will have to be an element of discretion to the Local Authority. I, therefore, propose to say that for the present, the level of contact should be at least once a fortnight. In my judgment, it should take place beyond the contact centre and in the community. I am not going to order it but I am directing the Local Authority must consider the question of whether all of it has to be supervised. I have, for example, evidence of a successful trip to [a theme park] while the parents were caring for the children and the father was working for that organisation.

46. However, the order will also rehearse that there is a discretion for the Local Authority to reduce contact to once a month should it reach the decision as time goes by that it is in the children's welfare interest to do so. Below that level, the Local Authority would have to return the matter to court seeking permission."

29. It appears that the judge envisaged the three children going to contact with the parents together even if they did not live together. Although he implied that he was making a contact order under section 34 of the Children Act 1989, no such provision appears in his order. The parties could not explain this.

The issues on appeal

30. I will address these questions, and in doing so will take account of the submissions that we have received about them:
- (1) Was there a gap in the evidence and professional analysis? If there was, what was the appropriate response?
 - (2) Did the judge carry out an appropriate all-round assessment of C's welfare?
 - (3) Was the judge's legal analysis sound?
 - (4) Does new evidence alter the position?
 - (5) If the appeal is allowed, can this court substitute its own decision?
 - (6) If so, what decision should we make, and why?

A gap in the evidence or analysis?

31. At paragraph 32 the judge said that there was “no sufficient professional analysis such as the law requires. There is no evidence as to the availability of placements.” He repeated this at paragraphs 39 and 40.
32. I start with the judge’s remark about the lack of evidence about the availability of placements. It may have been directed to the availability of foster placements, but he was clearly equally concerned about the availability of adoptive placements. However, no party had argued that further evidence was necessary in either respect. The application for a placement order had been on foot for several months and there had been an Issues Resolution Hearing in February. The perception that there was a gap in the evidence was felt by the judge alone. In my view, it was a misperception. When faced with a choice between adoption and fostering, the court’s primary task is to take a decision as to whether one or the other is right for the child as a matter of principle. In order to do that, it will not usually have to have evidence about the availability of placements: *Re T (Placement Order) (CA) [2008] EWCA Civ 248, [2008] 1 FLR at [17]*. There may be cases at the margins where specific evidence will be necessary, examples being where the plan is for the adoption of a much older child, or the placement of a child with severe health or behavioural problems, or of a large sibling group. In this case, there were no special features of that kind and no inadequacy in the local authority’s evidence. Specifically, it did not need to show what foster home or homes could be found for the three children. That search had to be made after the court had taken its decision in principle. Further, if there had been a gap in the evidence, the judge should have adjourned and given directions for it to be remedied. It was not open to him to go ahead regardless. He considered adjourning at paragraph 43, but did not explain why he was not doing that. His suggestion that the local authority might apply for a placement order at a later date was, as he recognised, undesirable. I would go further, and say that it was probably wrong in principle, bearing in mind the statutory presumption in relation to delay.
33. The judge’s other concern was about the quality of the professional assessments. He was troubled by the lack of attention that had been paid to long-term fostering for C. We were taken to these documents:
 - (1) Ms R’s statement of 17 October 2023, which cited three realistic options for C’s interim placement after the residential placement ended: foster placement or early permanency placement foster placement on her own; foster placement for the three children together; return home under an interim care order. The statement recommended the first option, and it was approved by the court on 3 November.
 - (2) Ms R’s ‘Together and Apart’ statement of 16 November 2023, in which she considered the children’s relationships with each other and their placement needs, and concluded:

“Although C is clearly a very cherished younger sister to J and K, she is only 6 months old and has not experienced the level of neglect that her older siblings have. Apart from the first few days of her life, C was in a mother and baby foster placement with her mother and then at [the residential placement]. This meant that other adults have assisted and often stepped in to parent her. Due to her young age and in the absence of any identified wider

paternal or maternal family member who has been positively assessed to care for her, the Local Authority’s care plan, should the Court decide it is not safe for her to return to her parent’s care, is one of Adoption.

It is acknowledged that all three children would feel a sense of loss, especially J and K if they could not all be together, and it will be important that on-going contact is promoted between the siblings should the Court grant that it is not safe for them to return to the care of their mother.”

- (3) Ms R’s final statement of 15 December 2023, which considered two options for K and J in tabular form: long-term fostering and return to mother with the support of father under a care order. In C’s case she identified two realistic options: adoption and return home, and she set out the pros and cons of each option:

First Realistic Option: To be placed in an adoptive placement (assuming a Placement Order is granted)	
Factors in favour	Factors against
<p>Adoption would afford C the opportunity to belong to a new family. She would be given the opportunity to settle into a family with carers who are committed to caring for her for the remainder of her minority and beyond.</p> <p>C would not be exposed to the risk of significant harm that she would if she returned to the care of her parents.</p> <p>Adoption is the only enduring Order. Therefore, this not only provides C with legal permanence during her childhood but also a sense of permanence that endures for the remainder of her life.</p> <p>Research suggests that the younger a child is placed for adoption the greater the chance of this being a success. C is only 7 months old and will be afforded the opportunity to start developing positive attachments with her adopters from a young age.</p>	<p>Adoption legally severs a child’s ties to their birth family. This would mean that [the parents] would no longer hold parental responsibility for C.</p> <p>Whilst C will not understand this now, as she grows and develops, she is likely to experience feelings of grief, loss and rejection as she processes the information that she could not be cared for by her birth parents.</p> <p>C would be living outside of her parents’ care which is likely to cause her sadness and emotional distress.</p> <p>Any proposed post-order contact will fall to the adoptive carers to fulfil as they will hold parental responsibility. It is therefore not guaranteed.</p>

<p>C would remain in the care of the Local Authority up until the Adoption Order is granted, ensuring that her needs are met.</p> <p>However, C would not be in the care of the Local Authority until adulthood and therefore not have the stigma attached to this.</p>	
<p>Second Realistic Option: C, J & K return to the care of their mother with the support of [father] under a Care Order</p>	
<p>Factors in favour</p>	<p>Factors against</p>
<p>The children and their mother love one another.</p> <p>[The father] wishes to be able to parent his daughter C and support [Mother] with the parenting of J and K.</p> <p>J and K see [Father] as a father figure.</p> <p>[The parents] have been committed to attending all their contacts.</p> <p>A return to their mother and [the father]’s care would promote C, J and K’s sense of identity and belonging.</p> <p>C, J and K would be able to live with their mother and in C’s case both parents, in their family home and in their community. They would be able to see their wider maternal family.</p>	<p>There remain significant concerns in respect of [the parents’] ability to safely and consistently meet the needs of C, J and K.</p> <p>There have been negative parenting assessments of both [mother] and [father].</p> <p>[The parents’] support network is limited and those identified are not considered to offer an adequate level of consistent and safe support.</p> <p>If the children were to return to the family home, K would likely revert to be a young carer for her siblings. This would mean that K’s own needs would not be met, and C and J’s needs would not be being met by a safe adult.</p> <p>C, J and K would be at risk of significant harm even with the oversight of the Local Authority as was evidenced during their time in [residential care].</p> <p>A Care Order would not afford the level of protection needed as although the Local Authority would have overriding parental responsibility for the children, they would not be able to</p>

	monitor their welfare 24 hours a day.
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- (4) Mr B’s Final Analysis dated 31 January 2024 contained a permanence analysis, again in tabular form, in relation to these options: No Order, Safe reunification, Kinship care, Permanent (long-term) fostering, Adoption and Special guardianship.

In relation to fostering, he wrote:

“I support this final care plan for J and K and for them to be placed together. This would not be a viable care option for child of C’s age and circumstances. Whilst long term fostering would enable her to maintain relationships with their parents and birth family members via contact, it would not give her the stability and consistency of care that they require growing up.”

As to adoption, he wrote:

“I share the Local Authority view that the only viable care option for C is adoption. Whilst it would sever her ties with her birth family, adoption would offer her the best chance of being brought up within a safe, consistent, and secure family setting, where she would have the opportunity to develop lasting attachment relationships with her adoptive family.”

34. Ms R and Mr B were questioned during the hearing about their view of fostering, but their recommendations remained the same.
35. I cannot see that there was anything deficient in the professional analysis. C’s situation is sadly not an uncommon one, and, while each child has to be thought about individually, a number of generic considerations are bound to arise. The professional judgement of the social worker and the Guardian was that fostering was not a realistic way of meeting C’s needs for the reasons given by the Guardian in *LRP*. As Pauffley J said in that case, the focus should be upon the sensible and practical possibilities, not ones that are considered to be far-fetched. In this case I would accept that the professional reports could have spelled out in somewhat greater detail why the witnesses considered that long-term fostering was a non-starter for C, but their essential point was clear from the material above. As the Guardian put it:

“Whilst long term fostering would enable her to maintain relationships with their parents and birth family members via contact, it would not give her the stability and consistency of care that they require growing up.”

It is hard to see that chapter and verse was needed for this proposition, and the witnesses stood by it in oral evidence.

36. As a further argument, Ms Bazley KC submitted that the professional assessments were stale, being a few months old by the time of the hearing. This was not a point that appears to have troubled the judge and I do not think there is anything in it. The

evidence was ready for the IRH on 9 February and there was no direction for it to be updated after that. The passage of time (10 weeks) until the final hearing would have made little difference to the essential features of the case.

37. I therefore conclude that the judge was wrong to find that there was a gap in the evidence or a flaw in the professionals' approach to it. It was of course open to him to differ from their recommendation on its merits, and I will now consider whether he was on firm ground in doing so.

The judge's decision

38. The judge did not structure his judgment with reference to the welfare checklist. That is not mandatory, provided the court's thinking comes through clearly in some other way. Here, I do not think that it does. On my reading, the judge appears to have considered that the predominant welfare factor was the benefit to C of her parents and half-siblings being a regular presence in her life.

39. There are a number of fundamental problems with that assessment:

- (1) The judge referred to C as having a bond with her mother, but for a child of her age, past and present family relationships are of far less significance than potential future relationships. The importance of her birth family will always be limited by the inability of her parents to be her carers. Even if a single foster home could be found for the three children, that could only be a mitigation or, as the judge put it, "an additional benefit". If membership of the birth family, with its limited potential, is of such importance that it is going to deprive C of a new family of her own, with all that it would be likely to offer, the judge needed to explain why.
- (2) There is no rule that very young children who cannot live at home must always be adopted. However, the advantages of adoption for C, at her age, were obvious. They did not automatically predominate, but they were a powerful consideration that had to be recognised. Unfortunately, they did not feature in the judge's analysis. He said that C's age weighed heavily but it is not possible to see that he actually took it into account at all in his final evaluation at paragraphs 40-42. The only reference to the benefit of "a close parental relationship" is a reference to a relationship with foster carers. In my view, even taking account of the generous latitude due to a trial judge, the failure to consider the benefits of adoption for C was a fundamental error of principle.
- (3) The same can be said about the judge's treatment of long-term fostering. He referred to the advantages of maintaining family ties, but not to the manifest disadvantages of a life in foster care. He mentioned *LRP*, and had been referred to *Re V*, but he did not respond to the guidance they contain. In particular, he said nothing to justify "the balance which C will have to hold between both parents and foster carers" or explain why that was a reasonable demand to make of a child of this age. Nor did he consider the ever-present possibility that C would experience changes of foster carers between now and reaching her majority in 2041, and that she would then leave care as a member of a birth family with whom she had never been able to live.

- (4) The judge’s analysis also leans on matters that were irrelevant to C’s case. The evidence about her health was not of a kind that could affect her chances of being adopted, and nor was the possibility that she might share the parents’ learning difficulties. Even if one took a gloomy view of these uncertainties, that could only speak in favour of C having a family of her own as soon as possible, so that her adoptive parents could advocate for her and give her the best chance of achieving her full potential.
- (5) As noted, the court must reach its own conclusions on the evidence. It is not bound by the professional recommendation, but has to give good reasons for departing from it. Here, the judge did not do so. As he noted himself, he was faced with an orthodox recommendation. At a minimum, he should have asked himself whether he was on solid ground in departing from it, but instead he unjustifiably treated its orthodoxy as a weakness when it was in fact based on solid experience.
40. The parents submit that adoption is a most serious step and should only be approved in a very clear case. They contend that we should not pick our way through the judgment in search of errors. Overall, they submit that the judge was not wrong to find that the arguments for adoption were not strong enough. He was right to think that contact with the parents and with K and J is important for C. He thought C’s needs could be met by foster parents and that it would be good for her to have a relationship with parents who would not unsettle the placement.
41. I agree that we should read the extempore judgment benevolently and as a whole. But the errors I have identified are manifest. We cannot conclude that the welfare assessment had the necessary balance and thoroughness.

The judge’s legal analysis

42. In *Re W (Adoption: Approach to Long-Term Welfare)* [2016] EWCA Civ 793, [2017] 2 FLR 31 at [68-69], McFarlane LJ explained the dangers of using the slogan ‘nothing else will do’ as a substitute for a proper welfare evaluation. It only comes in as a proportionality cross-check.
43. Ms Fottrell KC submits that the judge fell into the trap warned against in *Re W* and elsewhere. Again, this submission is well-founded. Instead of making a rounded welfare assessment, the judge elevated fostering into something that in his view ‘would do’, and therefore ruled out adoption. That was another error of principle.

New evidence

44. On behalf of the father, there are two applications for us to admit documents not seen by the judge. The first is a review by C’s health visitor dated 26 February 2024, and the second a LAC review minute of 3 July 2024. These record the investigations that have been taking place to identify the cause of C’s apparent hearing loss, occasional seizures and possible developmental delay. It is unnecessary to give further details.
45. Ms Bazley argues that the information in the documents is relevant to the availability of potential adopters, and also to the issue of what would be the best placement for C. I can reassure the parents that we have studied the documents, but I do not consider

that they could have an important influence on the judge's decision or on ours. The information they contain is very much of a piece with information that was known to the judge. The uncertainties surrounding C's health have no real likelihood of making adoption unrealistic or of swaying the choice in favour of fostering. I would therefore not formally admit them into evidence.

What order should we make?

46. For the reasons given above, I consider that we must set aside the order refusing the local authority's application for a placement order. It remains to consider whether we should remit the proceedings to the family court for retrial or whether we should remake the decision ourselves. The local authority and the Guardian invite us to take the latter course.
47. Ms Bazley urges that we should remit. She places particular emphasis on the question of contact, and she points to the modern thinking on the benefits of contact alongside adoption. She argues that we do not have the information on which to decide that question. We would need evidence allowing us to evaluate the benefits of contact, weighed against the availability of adopters. She points out that some occasions of sibling contact have been missed since the judge's order, which might indicate that the care plan alone is not a sufficient guarantee and that there should be an order. Before taking a decision about contact, the court should also equip itself with more information about C's health and development. If we do make a contact order, she asks us to order that C's contact with parents and with siblings should each take place three times a year.
48. There is an obligation on the court, before it makes a placement order, to consider the arrangements for contact: ACA 2002 section 27(4). Section 26(2)(b) gives the court power to make a contact order while a placement order is in effect, either following an application under sub-section (3), or on its own initiative under sub-section (4) when making a placement order. The order will remain in effect before and after the child is placed for adoption: section 27(1). Once the child is adopted, the order will end, but it may be replaced by a post-adoption contact order under section 51A.
49. Taking everything into account, I am in no doubt that this is a case, such as *Re Y*, where this court is in a position to determine the application for a placement order, and that it is strongly in C's interests that we should do so. I have already noted that there are no disputed facts, and that the limited further evidence does not alter the picture. Once it is accepted that all the information is available, it has not been submitted to us that the family court would be in a better position than this court to make a welfare evaluation and proportionality assessment.
50. In considering the application for a placement order, we must direct ourselves with reference to sub-sections 1(2), (3), (4) and (6) of the ACA 2002. They make C's welfare throughout her life our paramount consideration. We must have regard to the presumption that delay in taking a decision is likely to prejudice her welfare. We must not make an order unless we consider it would be better for C to do so than not to do so. We must have regard to the matters in the extended welfare checklist, among others. Of these, I would identify the most significant factors as being:
 - (b) C's particular needs

- (c) The likely effect on C throughout her life of ceasing to be a member of her original family and becoming an adopted person.
- (d) C's age, sex, background and relevant characteristics.
- (e) Any harm that C is at risk of suffering.
- (f) The relationship C has with her parents and half-siblings and the value to her of it continuing; also, the ability of the parents to meet C's needs, and the wishes of the parents and of K and J.

I do not consider that any particular weight is due to C's wishes or her feelings. Such attachment as C presently has to her family is better considered under other heads.

51. Having made a welfare evaluation, we must give effect to Article 8 of the Convention on Human Rights by asking ourselves whether the best welfare outcome is a necessary and proportionate interference with the right to respect for the family life of all family members.
52. After all that has been said above, my welfare evaluation can be quite shortly stated. The dominant feature of C's present situation is, in my view, her particular needs at her very young age. At the heart of the matter, she needs a lifelong family where she can feel that she belongs. I agree with the professional assessment of Ms R and Mr B that this can only happen through adoption. Spending a whole childhood in foster care is absolutely not the same, even if good and permanent carers could be found. The reason why long-term fostering was not looked at more closely by the professionals was because it was obviously a very poor plan for C's future. Even if the parents and foster parents do their best, it is an insecure plan for C's childhood, and if she was to experience multiple placements, she would be at real risk of suffering irreparable harm.
53. As already remarked, the uncertainties about C's health and development are not of a kind that could tip the scales, and they certainly do not speak against adoption. The lifelong effect on C of leaving one family and joining another are similarly a neutral factor. There will surely be losses, but there will very likely be gains.
54. C has a relationship with her parents and half-siblings. They understandably want to keep her within the family. I respect their position but, seen objectively, C's family relationships are not of such importance that they can outweigh the predominant need for her to have a family of her own. This factor speaks in favour of contact taking place, if it can be arranged, after C is placed for adoption and later adopted.
55. From a welfare point of view, I therefore find that the advantages of adoption for C are overwhelming. I further consider that the interference with the Convention rights of the parents and of K and J is necessary and proportionate because adoption is the only way of meeting C's needs. Any interference may be mitigated if contact can be arranged, but even if it cannot, the outcome is the same. In fact, the interference with C's rights if she was placed in long-term foster care would be far greater, by depriving her of the opportunity to have a family of her own. She needs to commit to new parents, not to split herself between two or more families. Recognising that this is a

sad situation for the parents, I would nevertheless dispense with their consent to the making a placement order on the basis that C's welfare requires it.

56. As to contact, the local authority can be expected to honour its care plan for current contact, and for a 3-month search for adopters who will accommodate meetings with family members. It transpires that there were two missed occasions of sibling contact for health and logistical reasons: that will have been a pity for the children but it does not signal the need for the court to impose a regime on the local authority that could only be changed through litigation if it proved problematic. Overall, it would not be better for us to make a contact order, in fact it might be detrimental to the greater priority of finding an adoptive family for C.

Conclusion

57. I would therefore allow the appeal, set aside the judge's order, dispense with the parents' consent, and make a placement order in relation to C.

Lord Justice William Davis:

58. I agree.

Lord Justice Snowden:

59. I also agree.
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