Final Care Order: Legal Summary

JACQUI GILLIATT
4 BRICK COURT
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Introduction: care by the birth family

1) In considering any care application where the local authority suggests that a parent is not able to manage the care of a child, the court will no doubt wish to analyse the case with reference to what Hedley J had to say in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 :-

> "Basically it is the tradition of the UK, recognised in law, that children are best brought up within natural families. Lord Templeman, in *Re KD (A Minor Ward) (Termination of Access)* [1988] 1 AC 806, [1988] 2 FLR 139, at 812 and 141 respectively, said this:
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> > 'The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not in danger. Public authorities cannot improve on nature.'
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> There are those who may regard that last sentence as controversial but undoubtedly it represents the present state of the law in determining the starting point. It follows inexorably from that, that the current legal starting point was that children were best brought up within natural families: it followed that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent, and that some children would experience disadvantage and harm, while others would flourish in atmospheres of loving security and motional stability. It was not the provenance of the state to spare children all the consequences of defective parenting; the compulsive powers of the state could only be exercised when the significant harm criteria in s31(2) of the Children Act 1989 (the 1989 Act) had been made out ."

2) In a similar vein Baroness Hale said this in *Re B* [2013] UKSC 33 at para 143:

> "We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, suffer from physical or mental illnesses or disabilities, or who espouse anti-social political or religious beliefs."

3) In *Re A (A Child)* [2015] EWFC 11 **,** the President expressly approved the words of Hedley J referred to above and these words from the judgement of His Honour Judge Jack in *North East Lincolnshire Council v G & L* [2014] EWCC B77 (Fam) where he said:

> "The courts are not in the business of providing children with perfect homes. If we took into care and placed for adoption every child whose parents had had a domestic spat and every child whose parents on occasion had drunk too much then the care system would be overwhelmed and there would not be enough adoptive

parents. So we have to have a degree of realism about prospective carers who come before the courts."

Welfare checklist: Children Act 1989

4) The relevant welfare checklist under the Children Act 1989 is found in s 1:

"1) When a court determines any question with respect to—
(a) the upbringing of a child; or
(b) the administration of a child's property or the application of any income arising from it,
the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.

(2B) In subsection (2A) 'involvement' means involvement of some kind, either direct or indirect, but not any particular division of a child's time.

(3) In the circumstances mentioned in subsection (4), a court shall have regard in particular to—
(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
(b) his physical, emotional and educational needs;
(c) the likely effect on him of any change in his circumstances;
(d) his age, sex, background and any characteristics of his which the court considers relevant;
(e) any harm which he has suffered or is at risk of suffering;
(f) how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
(g) the range of powers available to the court under this Act in the proceedings in question.

(4) The circumstances are that—
(a) the court is considering whether to make, vary or discharge a section 8 order, and the making, variation or discharge of the order is opposed by any party to the proceedings; or
(b) the court is considering whether to make, vary or discharge a special guardianship order or an order under Part IV.

(5) Where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all.

(6) In subsection (2A) 'parent' means parent of the child concerned; and, for the purposes of that subsection, a parent of the child concerned-

(a) Is within this paragraph if that parent can be involved in the child's life in a way that does not put the child at risk of suffering significant harm; and
(b) Is to be treated as being within paragraph (a) unless there is some evidence before the court in the particular proceedings to suggest that involvement of that parent in the child's life would put the child at risk of suffering harm whatever the form of the involvement.

(7) The circumstances referred to are that the court is considering whether to make an order under section 4(1)(c) or (2A) or 4ZA(1) (c) or (5) (parental responsibility of parent other than mother).

Welfare checklist: Adoption & Children Act 2002

5) The relevant checklist applicable to adoption and placement is set out in s 1 of the Adoption & Children Act 2002:

(1) This section applies whenever a court or adoption agency is coming to a decision relating to the adoption of a child.

(2) The paramount consideration of the court or adoption agency must be the child's welfare, throughout his life.

(3) The court or adoption agency must at all times bear in mind that, in general, any delay in coming to the decision is likely to prejudice the child's welfare.

(4) The court or adoption agency must have regard to the following matters (among others)—

(a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),

(b) the child's particular needs,

(c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,

(d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,

(e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,

(f) the relationship which the child has with relatives, with any person who is a prospective adopter with

whom the child is placed, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—

(i) the likelihood of any such relationship continuing and the value to the child of its doing so,

(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

(5) In placing the child for adoption, the adoption agency must give due consideration to the child's religious persuasion, racial origin and cultural and linguistic background.

(6) The court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so.

(7) In this section, "coming to a decision relating to the adoption of a child", in relation to a court, includes—

(a) coming to a decision in any proceedings where the orders that might be made by the court include an adoption order (or the revocation of such an order), a placement order (or the revocation of such an order) or an order under section 26 or 51A (or the revocation or variation of such an order),

(b) coming to a decision about granting leave in respect of any action (other than the initiation of proceedings in any court) which may be taken by an adoption agency or individual under this Act, but does not include coming to a decision about granting leave in any other circumstances.

(8) For the purposes of this section—

(a) references to relationships are not confined to legal relationships,
(b) references to a relative, in relation to a child, include the child's mother and father.

6) In addition the court will need to consider whether or not to dispense with parental consent as set out in s 21(2) & s 52(1) of the Adoption & Children Act 2002:

"The court may not make a placement order in respect of a child unless—

(a) the child is subject to a care order,

(b) the court is satisfied that the conditions in section 31(2) of the 1989 Act (conditions for making a care order) are met, or

(c) the child has no parent or guardian.

(3) The court may only make a placement order if, in the case of each parent or guardian of the child, the court is satisfied—

(a) that the parent or guardian has consented to the child being placed for adoption with any prospective adopters who may be chosen by the local authority and has not withdrawn the consent, or
(b) that the parent's or guardian's consent should be dispensed with."

"s52(1)
The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that—

(a) the parent or guardian cannot be found or is incapable of giving consent, or

(b) the welfare of the child requires the consent to be dispensed with."

Human Rights considerations

7) In carrying out its analysis, the court must have regard to the provisions of ECHR and in particular Article 8, the right to respect the family and private life: "T here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

8) In *Johansen v Norway* 23 EHRR 33 the European Commission of Human Rights observed, at para 83, that "the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportional to the legitimate aim pursued".

Burden of Proof

9) In *Re B* [2008] UKHL 35 Baroness Hale set out clearly what the burden of proof is:

"70. My Lords, for that reason I would go further and announce loud and clear that the standard of proof in finding the facts necessary to establish the threshold under section 31(2) or the welfare considerations in section 1 of the 1989 Act is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

... As to the seriousness of the allegation, there is no logical or necessary connection between seriousness and probability. Some seriously harmful behaviour, such as murder, is sufficiently rare to be inherently

improbable in most circumstances. Even then there are circumstances, such as a body with its throat cut and no weapon to hand, where it is not at all improbable. Other seriously harmful behaviour, such as alcohol or drug abuse, is regrettably all too common and not at all improbable. Nor are serious allegations made in a vacuum. Consider the famous example of the animal seen in Regent's Park. If it is seen outside the zoo on a stretch of greensward regularly used for walking dogs, then of course it is more likely to be a dog than a lion. If it is seen in the zoo next to the lions' enclosure when the door is open, then it may well be more likely to be a lion than a dog.

In the context of care proceedings, this point applies with particular force to the identification of the perpetrator. It may be unlikely that any person looking after a baby would take him by the wrist and swing him against the wall, causing multiple fractures and other injuries. But once the evidence is clear that that is indeed what has happened to the child, it ceases to be improbable. Some-one looking after the child at the relevant time must have done it. The inherent improbability of the event has no relevance to deciding who that was. The simple balance of probabilities test should be applied."

Evaluating the evidence

10) The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, humiliation, misplaced loyalty, panic, fear and distress, confusion and emotional pressure and the fact that a witness has lied about some matters does not mean that he or she has lied about everything else (*R v Lucas* [1981] QB 720, Baker J in *Re JS* [2012] EWHC 1370).

11) When a judge considers the evidence, he must take all of it into account and consider each piece of evidence in the context of all the other evidence, and, to use a metaphor, examine the canvas overall (*Re J (a child)* [2015] EWCA Civ 222).

Threshold criteria: Children Act

12) The threshold criteria test is set out in s 31(2) & (9) of the Children Act 1989

"2. A court may only make a care order or supervision order if it is satisfied—
(a) that the child concerned is suffering, or is likely to suffer, significant harm; and
(b) that the harm, or likelihood of harm, is attributable to—
(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
(ii) the child's being beyond parental control.

9. Harm" means ill- treatment or the impairment of health and development including, for example, impairment suffered from seeing or hearing the ill-treatment of another "

13) In *Re A (A Child)* [2015] EWFC 11 the President emphasized the need for a local authority to adduce proper evidence to establish what it seeks to prove. He commented: "Much material to be found in local authority case records or social work chronologies is hearsay, often second- or third-hand hearsay. Hearsay evidence is, of course, admissible in family proceedings. But, and as the present case so vividly demonstrates, a local authority

which is unwilling or unable to produce the witnesses who can speak of such matters first-hand, may find itself in great, or indeed insuperable, difficulties if a parent not merely puts the matter in issue but goes into the witness-box to deny it." He went on to underline the need to formulate the threshold so that it is clear what is asserted (not X reports or it appears that but Y happened) and the need to demonstrate the link between the facts asserted and the harm this is said to establish, particularly with respect to parental attitudes and behaviours which do not directly impact the child such as dishonesty or failing to engage with professionals.

The meaning of "significant harm"

14) In *Re MA (Care Threshold)* [2009] EWCA Civ 853 Ward LJ considered the meaning of 'significant' in 'significant harm':

> "Given the underlying philosophy of the Act, the harm must, in my judgment, be significant enough to justify the intervention of the State and disturb the autonomy of the parents to bring up their children by themselves in the way they choose. It must be significant enough to enable the court to make a care order or a supervision order if the welfare of the child demands it" [para 54].

15) However in *Re B (Care Proceedings: Appeal)* [2013] UKSC 33 Lord Wilson warned of the dangers of over-defining 'significant':

> "In my view this court should avoid attempting to explain the word 'significant'. It would be a gloss; attention might then turn to the meaning of the gloss and, albeit with the best of intentions, the courts might find in due course that they had travelled far from the word itself. Nevertheless it might be worthwhile to note that in the White Paper which preceded the Children Act 1989, namely *The Law on Child Care and Family Services* , Cm 62, January 1987, the government stated, at para 60:
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> 'It is intended that 'likely harm' should cover all cases of unacceptable risk in which it may be necessary to balance the chance of the harm occurring against the magnitude of that harm if it does occur'" [para 26].

Threshold and timing

16) In *Re G (Care Proceedings: Threshold Conditions)* [2001] 2 FLR 1111 Hale LJ (as she then was) considered the point in time in care proceedings at which threshold must be met and the question of whether future evidence can be relied upon to establish threshold retrospectively.

> "it is common ground that the date at which the threshold has to be crossed is when the local authority first intervened to protect the child: that is, either the date of the application or, if child protection measures (police protection or an emergency protection order) have been continuously in place since before then, the date when those began" [para 10]

"... It is a commonplace in legal proceedings that evidence gathering continues after the proceedings are begun and there is usually nothing to prevent its being used in accordance with the rules. It would be absurd if evidence coming to light during the proceedings, such as further medical evidence on the interpretation of X-rays and scans, further complaints by the children, or confessions by the parents, could not be taken into account to show what the situation was at the relevant time" [para 22]

"... later events cannot be relied upon unless they are capable of showing what the position was at the relevant time. But if they are capable of proving this, then in my view they should be admitted for that purpose. It will then be a matter for the judge to consider how much weight they should be given" [para 23].

Adoption Orders

17) Adoption is a draconian sanction and its imposition should only be considered as a case of last resort. If a possible viable parent / family carer is available then the child should be placed with that carer so long as that placement is safe.

18) It is not enough to show that a child could be placed in a more beneficial environment for his upbringing (*K and T. v. Finland* [GC], no. 25702/94, 36 EHRR 18, ECHR 2001-VII).

19) Article 8 HRA says:-

a. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

b. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

20) The impact of this in domestic jurisprudence is particularly clearly expressed in the case of *Re B (A Child)* [2013] UKSC 33 in which each of the five justices made it clear that an adoption order is an order of last resort. Lord Wilson said the making of such an order required a "high degree of justification" [para 34], Lord Neuberger, Lady Hale and Lord Kerr preferred the phrase "nothing else will do" [paras 76-78, 130, 145 and 198 respectively]. Lord Clarke said "only in case of necessity will an adoption order be proportionate "[para 135]. The case stressed the need for the court to evaluate proportionality actively in every case.

21) Lord Neuberger outlined the approach to be taken as follows:

a) A care order on a care plan for adoption is a “very extreme thing, a last resort” [para 74];

b) A judge cannot properly decide that a care order should be made unless the order is proportionate bearing in mind the requirements of article 8 [para 75];

c) If found that threshold has been crossed, a care order should only be made if the court is satisfied that it is necessary to do so in order to protect the interests of the child [para 76];

d) As required by section 1(3)(g) of the 1989 Act and section 1(6) of the 2002 Act, the court "must" consider all the options before coming to a decision [para 77];

e) a care order should be a last resort, because the interests of the child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests" [para 77] ;

f) Although the child's interests are paramount, the court must never lose sight of the fact that those interests include being brought up by the natural family, ideally by the natural parents, or at least one of them, unless the overriding requirements of the child's welfare ma ke that not possible" [para 104];

g) The court's assessment of the parents' ability to discharge their responsibilities towards the child must take into account the assistance and support which the authorities would offer. So "before making an adoption order … the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support" [para 105].

22) The significance of *Re B* was emphasised in two subsequent judgments. In *Re G (A Child)* [2013] EWCA Civ 965 Mcfarlane LJ stressed the need for "a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options" [para 54]. He also warned of the danger of phrases such as 'draconian' and 'proportionality' becoming "formulaic window dressing" that need to be " backed up with a substantive consideration of what lies behind them" [para 53]. In *Re P (A Child)* [2013] EWCA Civ 963 Black LJ similarly stresses the need for a proper balancing exercise to be undertaken when considering the making of a care order with a plan for adoption.

23) The fundamental principles to be applied in applications relating to adoption and concerns about the current approach adopted by professionals and the courts in such cases were further addressed by the Court of Appeal in *Re B-S (Children)* [2013] EWCA Civ 1146 . The President, giving the judgment of the court, built on the case of *Re B (A Child)* [2013] UKSC 33, emphasising the following points:

a) The court should adopt the 'least interventionist' approach [para 23];

b) The local authority cannot press for a more drastic form of order because it is unable or unwilling to support a less interventionist form of order and Judges must be alert where there is any reason to suspect that resource issues may be affecting the local authority's thinking [para 29];

c) An adoption order was only to be made "where nothing else will do" [para 22];

d) There must be proper evidence both from the local authority and from the guardian. The evidence must address all the options which are realistically possible and must contain an analysis of the arguments for and against each option [34];

e) The court must produce an adequately reasoned judgment [41]; and

f) The judicial exercise should not be a linear process; it must be a "global holistic evaluation". The judicial task must be to evaluate all the options, undertaking a global, holistic and multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option. [44].

g) Where a parent does not consent to the child being placed for adoption or the making of an adoption order, his consent may only be dispensed with if the child's welfare 'requires' this: s52 (1) (b) of the 2002 Act.

h) 'Require' has the Strasbourg meaning of necessary, "the connotation of the imperative. What is demanded rather than what is merely optional or reasonable or desirable" (*Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, [2008] 2 FLR 625, at paragraphs 120,125).

i) In line with European jurisprudence, cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child. Family ties may only be severed in very exceptional circumstances and everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. [para 18].

24) The judgment of Ryder LJ in *Re B (A Child)* [2014] EWCA Civ 565 further considers the interrelation between domestic and European law in adoption proceedings. He identified a "continuum" between the court's analysis of welfare and the proportionality evaluation required under Article 8 HRA, and considered that an error in the former inevitably affects the latter. Therefore if no or an insufficient welfare analysis as to the realistic options for the child's long term care is undertaken it follows that the proportionality evaluation as to the local authority's proposed interference with Article 8 HRA will also have been inadequate. The case stressed the need to ensure that sufficient evidence in support of any application for a care and placement order is available in order to allow the court to carry out a proportionate evaluation and balancing exercise.

25) In *W (A Child) v Neath Port Talbot County Borough Council & Ors* [2013] EWCA Civ 1227 Ryder LJ also encouraged the court to adopt a balance sheet approach first used by Thorpe LJ in medical cases, setting out the positives and negatives of each placement option by reference to the welfare checklist factors. Ryder LJ considered that this "is an illuminating and essential intellectual and forensic exercise that will highlight the evidential conclusions and their implications and how they are to be weighed in the evaluative balance that is the value judgment of the court". He stressed that this exercise is different in substance and form from a mechanical recitation of the welfare checklist "with stereotypical commentary that is neither case specific nor helpful" [para 78].

26) In *Re M (A child : Long-Term Foster Care)* [2014] EWCA Civ 1406 the proper application of the "nothing else will do" test was again considered. Black LJ stressed that "what has to be determined is not simply whether any other course is possible but whether there is another course which is possible *and in the child's interests (* my emphasis). This will inevitably be a much more sophisticated question and entirely dependent on the facts of the particular case. Certain options will be readily discarded as not realistically possible, others may be just about

possible but not in the child's interests..." [para 32].

27) In *CM v Blackburn with Darwin Council* [2014] EWCA Civ 1479 Ryder LJ concluded the following:

> *"33. a* court making a placement order decision must conduct a five part exercise. It must undertake a welfare analysis of each of the realistic options for the child having regard among any other relevant issues to the matters set out in section 1(4) of the 2002 Act (the 'welfare checklist'). That involves looking at a balance sheet of benefits and detriments in relation to each option. It must then compare the analysis of each option against the others. It must decide whether an option and if so which option safeguards the child's welfare throughout her life: that is the court's welfare evaluation or value judgment that is mandated by section 1(2) of the Act. It will usually be a choice between one or more long-term placement options. That decision then feeds into the statutory test in sections 21(3)(b) and 52 of the 2002 Act, namely whether in the context of what is in the best interests of the child throughout his life the consent of the parent or guardian should be dispensed with. The statutory test as set out above has to be based in the court's welfare analysis which leads to its value judgment. In considering whether the welfare of the child requires consent to be dispensed with, the court must look at its welfare evaluation and ask itself the question whether that is a proportionate interference in the family life of the child. That is the proportionality evaluation that is an inherent component of the domestic statutory test and a requirement of Strasbourg jurisprudence.
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> 34. That is what 'nothing else will do' means. It involves a process of deductive reasoning. It does not require there to be no other realistic option on the table, even less so no other option or that there is only one possible course for the child. It is not a standard of proof. It is a description of the conclusion of a process of deductive reasoning within which there has been a careful consideration of each of the realistic options that are available on the facts so that there is no other comparable option that will meet the best interests of the child."

28) Further authorities including *Re G (A Child)* [2013] EWCA Civ 965 stipulate that a linear approach to evaluating competing options should be avoided, meaning that the judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option. Instead the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing.

29) However it is obvious from *Re R (A Child)* [2014] EWCA Civ 1625 that where there are only two realistic options (mother or placement outside the family) before the court, there is nothing wrong with the court considering whether the parent could care, and if concluding against that option going on to look at the issue of placement outside the family.

30) In this case the President also took the opportunity to stress emphatically that *Re B* and *Re B-S* had not changed the law in relation to care orders with a plan for adoption, voicing concern that the phrases " 'adoption is a last resort' and 'nothing else will do' "have become slogans too often taken to extremes " [para 41]. He stressed that "where adoption is in the child's best interests, local authorities must not shy away from seeking,

nor courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family at all costs" [para 44].

31) The President noted this comment in *Re B, para 215* : orders are to be made "only in exceptional circumstances and where motivated by the overriding requirements pertaining to the child's best interests." At para 32 he expanded: I emphasise the last phrase of that passage ("in her interests") because it is an important reminder that what has to be determined is not simply whether any other course is possible but whether there is another course which is possible and in the child's interests. This will inevitably be a much more sophisticated question and entirely dependent on the facts of the particular case. Certain options will be readily discarded as not realistically possible, others may be just about possible but not in the child's interests, for instance because the chances of them working out are far too remote, others may in fact be possible but it may be contrary to the interests of the child to pursue them."

32) This is clearly accepted within European jurisprudence: where the maintenance of family ties would harm the child's health and development, a parent is not entitled under Article 8 to insist that such ties be maintained (see *Neulinger and Shuruk v. Switzerland* [GC], no. 41615/07, 6 July 2010; § 136; *R. and H. v. the United Kingdom* , no. 35348/06, 31 May 2011 § 73).

Final Care Orders

33) In respect of the making of care orders with a plan for long term removal from a family, recent authorities such as *W (A Child) v Neath Port Talbot County Borough Council & Ors* [2013] EWCA Civ 1227 (11 October 2013), Ryder LJ, McCombe LJ and Sir James Munby P, confirm that this is also a case of 'last resort.'

34) Ryder LJ: [94] "It is necessary, however, to recollect that only recently the Supreme Court in In the matter of *Re B (a Child)* [2013] UKSC 33 emphasised that care orders are a last resort. Whether the context is an adoptive care plan or not, Lord Neuberger's conclusion on the correct legal test for the making of an order are unambiguous:

> "75. As already mentioned, it is clear that a judge cannot properly decide that a care order should be made in such circumstances, unless the order is proportionate bearing in mind the requirements of article 8.
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> 77. It seems to me inherent in section 1(1) that a care order should be a last resort, because the interests of a child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests. This is reinforced in section 1(3)(g) that the court must consider all options, which carries with it the clear implication that the most extreme option should only be adopted if others would not be in her interests. As to article 8, the Strasbourg court decisions cited by Lady Hale in paras 195-198 make it clear that such an order can only be made in "exceptional circumstances", and that it could only be justified by "overriding requirements pertaining to the child's welfare", or putting the same point in slightly different words, "by the overriding necessity of the interests of the child". I consider that this

is the same domestic test (as is evidenced by the remarks of Hale LJ in Re C and B [2001] 1 FLR 611, para 34 quoted by Lady Hale in para 198 above), but it is unnecessary to explore the point further."

30. However, in Re DAM (Children) [2018] EWCA Civ 386 (Peter Jackson LJ, in a judgment with which Asplin LJ and Moylan LJ agreed), the Court of Appeal held that 'nothing else will do' is not applicable where the plan is long-term foster care:

> "(5) I reject the argument that a court considering whether to make a care order has to be satisfied that "nothing else will do". A care order is a serious order that can only be made where the facts justify it, where it is in the child's interests, and where it is necessary and proportionate. But the aphorism "nothing else will do" (which, as has been said, is not a substitute for a proper welfare evaluation and proportionality check) applies only to cases involving a plan for adoption. That is clear from the case in which it originated, In re M (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33, which concerned an application for a care order with a care plan for adoption. It is clear, where it is not explicit, that all the justices were addressing a situation involving the severance of the parental relationship altogether, and not one involving physical separation under a care order, where the parent retains parental responsibility. That is confirmed by the summary given by the President in Re B-S:
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> "22. The language used in Re M is striking. Different words and phrases are used, but the message is clear. Orders contemplating non-consensual adoption – *care orders with a plan for adoption, placement orders and adoption orders* – are "a very extreme thing, a last resort", only to be made where "nothing else will do", where "no other course [is] possible in [the child's] interests", they are "the most extreme option", a "last resort – when all else fails", to be made "only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do": see Re M paras 74, 76, 77, 82, 104, 130, 135, 145, 198, 215." "

Particular considerations relevant to parents with a learning disability

31. In Re T (A Child) [2018] EWCA Civ 650 giving the lead judgement Jackson LJ addresses the roles of the local authority and the court in adoption. He notes as follows:

- An application for a placement order fundamentally engages the State's obligation under Article 8 ECHR, which applies to local authorities and the court as public bodies.
- This common purpose means that 'in the great majority of cases the local authority will acknowledge the court's welfare decision and, if necessary, amend its care plan to accommodate it.' Where that does not happen, the remedy of judicial review is available: *Re C (Religious Observance)* [2002] 1 FLR 1119.
- The court cannot dictate to the local authority what its care plan should be: *Re S and D (Children: Powers of Court)* [1995] 2 FLR 456. Nor can it maintain supervision or control after a final order has been made: *Re S (Minors)(Care Order: Implementation of Care Plan)* [2002] UKHL 10.
- It is not open to a local authority within proceedings to decline to accept the court's assessment and evaluation of risk, which is sovereign within proceedings, and it cannot refuse to provide lawful and reasonable services that would be necessary to support the court's decision if by doing so it would unlawfully

breach the rights of the family concerned or if its decision-making process is unlawful on public law grounds: *Re W (A Child)(Care Proceedings: Court's Function)* [2013] EWCA Civ 1227 and *Re CH (Care or Interim Care Order)* [1998] 1 FLR 402.

- Although the Family Court cannot dictate the LA's care plan, the court can expect a high level of respect for its assessments of risk and welfare, leading in almost every case to those assessments being put into effect. The process of mutual respect spoken of by Thorpe LJ in *Re CH* will almost inevitably lead to an acceptable outcome.
- The court has both a power and a duty to assert its view of risk and welfare by whatever is the most effective means.

JACQUI GILLIATT
4 BRICK COURT
25.9.18