B4/2016/3837

Neutral Citation Number: [2017] EWCA Civ 250
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM BARNET CIVIL AND FAMILY COURT
(RECORDER DIGNEY)

Royal Courts of Justice
Strand
London, WC2A 2LL

Tuesday, 28 February 2017

B E F O R E:

LORD JUSTICE McFARLANE

LORD JUSTICE McCOMBE

LORD JUSTICE DAVID RICHARDS

- - - - - - -

IN THE MATTER OF:

W - C (CHILDREN)

(DAR Transcript of
WordWave International Limited
Trading as DTI
8th Floor, 165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

Ms L Briggs (instructed by Lawrence & Co Solicitors) appeared on behalf of the **Applicant**
Ms M Hyde (instructed by London Borough of Barnet) appeared on behalf of the **Respondent**

J U D G M E N T
(Approved)

1. LORD JUSTICE MCFARLANE: This is an appeal from a decision of Recorder Digney sitting at the Family Court in Barnet taken on 29 July 2016. The judge had a number of issues to determine with respect to children born to the mother and, in relation to one of the children, one of the fathers.

2. The case had a substantial history and the concern of the social services, which was found to be established by the judge, focused upon the mother's ability to provide consistent and safe care for the children. Behind that was a diagnosis that she, unfortunately, suffered from an emotionally unstable personality disorder. Relationships she had had in the past were characterised at times by episodes of domestic violence, and on her own admission she consumed cannabis on a regular basis. So, the core concern about the impact of all of that on any children in her care was that their welfare was neglected, and neglected to a degree that caused them significant harm in various aspects of their development.

3. By the time the case came on for hearing before the judge the issues in the case had crystallised. An older child born to the mother, a boy "B" who was by then aged 15, had been adopted effectively from birth and, the mother tells us this morning, with her consent or at least without her opposition. An older boy than the younger two who were the subject of the proceedings, "C", who was aged 12 was at an earlier hearing by agreement accepted to be a young person who now should reside in a residential home, and he was made the subject of a care order in March 2016. There had been earlier proceedings under the Children Act in 2009 when that boy, C, and the younger child, also "C", who was the subject of the proceedings, had been made the subject of a supervision order for 12 months. C was born in October 2008 and was therefore aged around eight at the time of the hearing.

4. By the time the case came on before the judge there was a fourth child, another girl, "D", who was born on 17 June 2014 and therefore was just about two years of age at the time of the hearing before the judge, and two and a half years of age now.

5. So, the judge's focus was on these two younger children, C and D. So far as C was concerned, at the start of the proceedings the local authority and the children's guardian favoured placement of C with a maternal aunt under a special guardianship order. The mother, who throughout the proceedings had had the care of C and D and they remained living with her during the course of the various hearings, argued strenuously for both of these children to remain in her care.

6. As the Recorder describes in his judgment, the hearing had effectively been completed in the spring of 2016 and adjourned for judgment, but during that interim period the local authority had cause to change its recommendation from special guardianship with the maternal aunt for C to one of adoption in a joint placement with young D, to whom I will turn. So it was therefore necessary for the Recorder to open up the hearing once again and hear further debate as to whether a special guardianship order should or should not be made.

7. At the conclusion of the whole process, the Recorder did not agree with the local authority with respect to C's welfare, and he made a special guardianship order to the maternal aunt for C. There is no appeal against that decision.

8. So far as young D is concerned, the local authority case was that she should now move to adoption, and they applied for a placement for adoption order with respect to her, but they acknowledged that having lived in the family all her life as she had done, and having a close relationship with C, with whom she lived, and some knowledge of the older boy, C, who was going to a residential home, it was in D's interests - even if adopted - to have direct contact with her siblings for the future. D's father did not feature in the proceedings with respect to her.

9. The mother, as I have indicated, primarily wanted D to remain in her care, but D's children's guardian put forward an alternative recommendation which was that adoption was not best fitted to meet D's needs, and that what was the best outcome for D was to be placed in long-term foster care under a care order so that she could continue to have more regular contact with her siblings and so that she would not be additionally confused by being adopted and grafted into an entirely new family, whilst knowing that the other siblings and half-siblings in her family were not adopted and were to some degree or another in touch with each other and with their mother in a way that D did not have.

10. At the end of the proceedings, the Recorder favoured the local authority's case and made an order dispensing with the parents' consent and authorising the local authority to place D for adoption. It is against that outcome that D's children's guardian now appeals, permission to appeal having been granted on paper by King LJ in December.

11. It is regrettable that we are hearing this appeal now at the very end of February 2017, almost exactly a year after the first hearing before the Recorder commenced. We have been into the timetable to try to understand why that is so. At each stage, there is some either acceptable or unacceptable explanation for a modest degree of delay, but the cumulative effect is depressing because young D moved to an interim foster placement soon after the Recorder's decision and remains there now, and if the appeal is successful it is, as I understand it, reluctantly accepted by the local authority that the matter will have to be reheard by a fresh tribunal as soon as possible.

12. The appeal, which is brought on behalf of the guardian by Miss Briggs, who has focused her arguments with a conspicuously clear and helpful skeleton argument, is not so much to challenge the decision actually chosen by the Recorder but to question - and question firmly - whether the Recorder conducted an adequate analysis of the issues before the court.

13. In order to understand the way the appeal is put, it is necessary to look at two or three aspects of the judgment. But the first matter that I draw attention to is not in fact a central ground of appeal raised by the guardian. It is important, because in my view it is symptomatic of a confused approach that, unfortunately, the Recorder had to the law, and the point of concern in my mind is the use of the word "realistic" that appears at various stages in the Recorder's judgment.

By way of recollection, any reference to "realistic" in this area of the law which, unfortunately, has become bedevilled with headline catchphrases, arises in the decision of Re R, a decision of this court, [2014] EWCA Civ 1625, to which both I and, more importantly, Sir James Munby, the President of the Family Division, contributed. Insofar as the word "realistic" is concerned, Sir James dealt with this at paragraphs 58 to 62 of his judgment:

> "58. The nature of that exercise has been helpfully illuminated by Ryder LJ in CM, para 33. Put more shortly, by Ryder LJ himself, in Re Y, para 24:
>
> 'The process of deductive reasoning involves the identification of whether there are realistic options to be compared. If there are, a welfare evaluation is required. That is an exercise which compares the benefits and detriments of each realistic option, one against the other, by reference to the section 1(3) welfare factors. The court identifies the option that is in the best interests of the children and then undertakes a proportionality evaluation to ask itself the question whether the interference in family life involved by that best interests option is justified.'.
>
> I respectfully agree with that, so long as it is always remembered that, in the final analysis, adoption is only to be ordered if the circumstances meet the demanding requirements identified by Baroness Hale in Re B, paras 198, 215.
>
> 59. I emphasise the words 'realistically' (as used in Re B-S in the phrase 'options which are realistically possible') and 'realistic" (as used by Ryder LJ in the phrase 'realistic options'). This is fundamental. Re B-S does not require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage in the proceedings, can legitimately be discarded as not being realistic. Re B-S does not require that every conceivable option on the spectrum that runs between 'no order' and 'adoption' has to be canvassed and bottomed out with reasons in the evidence and judgment in every single case. Full consideration is required only with respect to those options which are 'realistically possible'.
>
> 60. As Pauffley J said in Re LRP (A Child) (Care Proceedings: Placement Order) [2013 EWHC 3974 (Fam), para 40, 'the focus should be upon the sensible and practical possibilities rather than every potential outcome, however far-fetched.' And, to the same effect, Baker J in Re HA (A Child) [2013 EWHC 3634 (Fam), para 28:
>
> 'rigorous analysis and comparison of the realistic options for the child's future ... does not require a court in every case to set out in tabular format the arguments for and against every conceivable option. Such a course would tend to obscure, rather than enlighten, the reasoning process.'.
>
> 'nothing else will do' does not mean that 'everything else' has to be

considered.

61. What is meant by 'realistic'? I agree with what Ryder LJ said in Re Y, para 28:

'Realistic is an ordinary English word. It needs no definition or analysis to be applied to the identification of options in a case.'.

62. In many, indeed probably in most, cases there will be only a relatively small number of realistic options. Occasionally, though probably only in comparatively rare cases, there will be only one realistic option. In that event, of course, there will be no need for the more elaborate processes demanded by Re B-S and CM: see Re S (A Child) [2013] EWCA Civ 1835, paras 45-46, and Re Y, paras 23, 25. The task for the court in such a case will simply be to satisfy itself that the one realistic option is indeed in the child's best interests and that the parent's consent can properly be dispensed with in accordance with section 52(1)(b) of the 2002 Act, as explained in Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008 2 FLR 625."

I would stress two aspects of what is said there. Firstly, at paragraph 59 Sir James identifies that the issue of what is or what is not a "realistic" option should have been "properly evaluated, typically at an early stage in the proceedings". Secondly, at paragraph 62 where he advises that it will only be occasionally that the court is left with just one "realistic" option to consider, and this will arise in "comparatively rare cases".

14. Here, the judge in my view unfortunately fell into error. I have described the background to the case and the allegations of neglect that were laid against the mother. Entirely correctly, and with admirable descent to detail, the judge at paragraph 11 of his judgment sets out the key passages from Lady Hale's judgment in Re B [2013] UKSC 33, dealing with the choice that has to be made in cases such as this, relying in part upon the well-known words of Lord Templeman in Re KD [1998] AC 806, and Hedley J in Re L [2007] 1 FLR 2050. The judge correctly at the end of that paragraph identifies the test:

> "I have to decide on which side of Mr Justice Hedley's divide the case falls and I have to decide if the balance is tipped here. I would also refer to a later passage in that case, where Lady Hale says what a judge must do in a case of this sort is to spell out what the feared harm was; whether it was significant, and how likely it was to happen."

15. The judge then goes on to consider the evidence. Although he does not say so, the background was that these children were still living at home with their mother, and so at earlier stages in these proceedings various courts and the local authority had determined that it was safe enough, if I can use that phrase, for them to remain there during that interim period. In addition, there had been a parenting assessment conducted of the mother which initially had concluded in her favour in terms of

providing future care for the children; the assessor and the local authority only changing their case about the mother in the last few weeks before the hearing.

16. Despite that background, and despite having taken time to set up the law as I have described and then rehearse the evidence in some considerable detail, the Recorder turns to his decision on this aspect of the case at paragraph 38 in these terms:

> "The first thing I have to do is to conclude whether leaving the children with the mother is a realistic option, because what I have to do is weigh up the realistic options."

and he then goes on to rehearse various matters. Sadly for the mother, these are well established by the judge on the evidence and led to him ruling her out, but he rules her out at paragraph 42 in these terms:

> "It is clear from the evidence that remaining with the mother is not an option."

and at paragraph 43:

> "Even if [C] were removed, and just looking after [D] were all that was to happen, that would not be an option".

Well, for my part I would flag up that the approach taken by the judge to this issue was not in line with the authorities. The question of whether or not an option was realistic, for example placement with one of the fathers in this case, should have been considered at an early directions hearing and taken off the court's agenda if it was not a "realistic option". Once the final hearing started and the judge immersed himself in the detail of the issue of whether or not one or both of these children could stay with their mother or go to another placement - either special guardianship, long-term fostering or adoption - the question of whether one option or another was "realistic" was irrelevant. There was a need at that stage for an ordinary full welfare evaluation of the options that were before the court.

17. Having made that observation, I move on to the central points that are made with respect to young D. The case in favour of long-term fostering, if I can take that first, was established by the children's guardian and the judge summarises it at paragraph 25 of his judgment in the following words:

> "It is very difficult to settle into adoption when there is contact with siblings. It is difficult to find adopters who are happy with sibling contact and, even if adopters say they will agree to that in advance, it is difficult to know how they will feel when it comes to it. He sees problems when the child gets older, as to identity, and particularly at puberty. He sees a real confusion as to who they are and a real dysfunction. There will be more problems with this solution (that is adoption) than with foster care."

Earlier, the judge at paragraph 15 had summarised the social worker's response to that in these terms:

> "She was asked about the Guardian's views that long-term fostering was more appropriate for [D], and she said it is something that they would not consider for a child of [D]'s age. She would be a looked after child for 17 years and she needs a legally secured placement. They would seek adopters who would accept sibling contact but not direct contact with the mother".

18. Before turning to the judge's conclusion on this aspect, it is right to point out and very much in my mind in the Recorder's favour, that much of his judgment is taken up with the important issue of whether C should also move to adoption or be placed with a special guardian, namely her maternal aunt. No criticism is made of the judge's decision there or his analysis of the law and the relevant evidence, and I am conscious of the fact that I am now focusing on that part of his judgment which deals with the other issue, despite him having undertaken substantial judicial evaluation which is not challenged on the other main topic of the case.

19. Be that as it may, it is necessary to look at what he said as to the choice between long-term fostering and adoption for D. There are some five paragraphs, and I propose to take each in turn.

20. First of all, paragraph 54:

> "Here we come to the area where there is dispute between the Guardian and the local authority as to what should happen to [D]. The local authority think that she should be adopted. The Guardian thinks that there should be long-term fostering. This disagreement in a sense turns on almost a matter of principle. The local authority's view is based on the fact that there should be certainty and permanency at the earliest possible stage, whereas the Guardian's view is that sibling contact overrides the need for certainty and permanency. It may be that in ten years' time the question will be answered differently. It is clear that even over the last few years far more weight is given to sibling contact than it was a not very long time ago. But it seems to me the weight of judicial thinking, as at the moment, is that permanency and certainty outweigh the need for sibling contact, but it does seem to me that sibling contact is particularly important."

A number of points need to be made about this paragraph. First of all, the judge at no stage in his judgment makes any reference to any law which may or may not help him on this issue. He had been referred to the case of LRP [2013] EWHC 3974, a decision of Pauffley J, dealing with a ten-week old child where that judge in round terms held that such a long-term foster placement would not be appropriate. He had not, unfortunately in my view, been referred to the decision of this court in Re V (Long-term fostering or adoption) [2013] EWCA Civ 913, where Black LJ at paragraph 96 sets out a list of some of the factors, one way or the other, which mark the distinction between long-term fostering and adoption.

21. Secondly, at no stage has the judge in the course of his review of the evidence done more than make the short references to which I have already myself referred to the evidence of the children's guardian and the social worker. He does not identify the particular factors in this case for or against long-term fostering, or for and against adoption. He does not identify the factors in this case about this child which lead this experienced children's guardian to put forward the somewhat atypical recommendation of long-term fostering for a two-year-old child. One asks rhetorically, unless the judge had a proper grasp of the precise details of the welfare factors in relation to this child relevant to the distinction that has to be drawn, it was difficult for the court to move forward. Insofar as the judge in the centre of that paragraph, the bottom of the quotation that I have made, refers to "the weight of judicial thinking", it is not clear to what he may be referring, unless it is obliquely to the case of LRP.

22. Moving on, at paragraph 55 the judge says this:

> "I turn to the welfare checklists. With regard to the ascertainable wishes and feelings of the child concerned, [D] probably does not have any stated views as at the moment, but [C] certainly does and [C] would certainly wish to remain with her mother. I have made it clear where my views are with regard to physical, emotional and educational needs. As I say, I bear in mind that I am now thinking about the realistic options. As regards [D], as I say, my preferred, although hesitant, option is adoption with contact. [D]'s physical, emiotional and educational needs can be properly looked after in an adoption placement and [C]'s can be looked after under a special guardianship. I turn to the likely effect of any change of circumstances. The children are still with their mother and I do not doubt that in the short term there will be upset. With regard to age, sex, background and any other relevant characteristics, I think that [D]'s age means that adoption is something that is likely to work very well. I do not think that adoption at her age would be a very good thing as far as [C] is concerned. As I say, that is still the local authority's view, that they should be adopted together. I think adoption for her at this stage, she is at an age where the success rate is going down, and the same argument applies to any harm which she has suffered or is at risk of suffering. I think that adoption for [C] at this stage would be harmful. Cutting her off completely from her family would be harmful. With regard to how capable each of the parents and any other person in relation to whom the court considers the question to be relevant, is of meeting the relevant needs, obviously the potential adopter is as far as [D] is concerned. The special guardian is as far as [C] is concerned. In this case the range of powers available to the court is significant because I have already said that I have been told that I can certainly make a sibling contact order as at the moment, and the judge who deals with the adoption of [D] when that happens can do that as far as that is concerned."

Again, I am afraid the Recorder's approach is one which calls for criticism. First of all, the Recorder refers to "welfare checklists" in the plural, and plainly in this paragraph is focusing on the welfare checklist in the Children Act 1989, section 1(3). I have in the

judgment as it happens that I gave in Re R to which I have already referred, at paragraph 20, in the past made the observation that in a case such as this where the issue is a choice between adoption and some other form of long-term care a child is to have, the 1989 Act checklist is not relevant:

> "Although it does not affect the substance of his evaluation in the present case, I would, however, question the judge's decision to analyse the issues in the case first under the welfare checklist in CA 1989, prior to making a care order endorsing the care plan for adoption, and before moving on to conduct a second analysis using the welfare checklist in ACA 2002. There was one issue in this case: should the child be returned to the mother or go forward for adoption. That is an adoption question to which the factors in the 2002 Act directly apply. In the circumstances it was necessary, and necessary only, to analyse which outcome was to be chosen, by giving the child's welfare paramount consideration throughout her lifetime through the lens of the welfare checklist in ACA 2002, s 1(4). There was no need to conduct a preliminary, lower level, analysis using the CA 1989 checklist or to make a care order in the middle of the judgment; if the adoption plan was ultimately chosen then a care order would readily be justified and made at the conclusion of the hearing."

Not only does the judge use the 1989 Act checklist as his entry into the case, he has in my view not assisted his analysis by using the welfare checklist structure to make points about each of these two very different children in the course of single sentences. Consequently, so far as ascertainable wishes and feelings are concerned, he simply says, "D probably does not have any stated views at the moment". That no doubt is right, but to hold that that deals with the entirety of that topic in the welfare checklist is certainly questionable. Whether or not D can say anything about her wishes at the moment does not mean that she lacks "feelings" about the choices that have to be made. There was a necessity in my view to look at what attachments D had at that stage to her mother, but also to her sibling, in order to form a view as to what her ascertainable "feelings" might be. Given her age they may or may not hold sway, but they needed to be part of the picture in the case.

23. Moving on, the judge says this: "I have made it clear where my views are with regard to physical, emotional and educational needs". Rhetorically, unfortunately, one can ask, "Where?", insofar as that relates to the emotional needs of D and the impact on her of growing up either in a long-term fostering placement or in adoption. The judge then in the third or fourth sentence of the paragraph actually announces his decision on the adoption issue. He says, "As regards D, as I say, my preferred, although hesitant, option is adoption with contact". Irrespective of the fact that the judge has announced his conclusion at that comparatively premature stage of his analysis, the reader of the judgement is given no hint as to what the judge's hesitation was as to the choice. What were the factors that tipped the decision in favour of adoption as opposed to long-term fostering?

24. Thereafter, the points that the judge makes using the rest of the 1989 Act checklist are, as Miss Briggs submits, simply points in favour of adoption to reinforce the decision

that he has announced. There is no evaluation of the option of long-term fostering, indeed long-term fostering is not mentioned at all in paragraph 55.

25. In her skeleton, Miss Briggs submits at paragraph 26:

> "It is submitted that the Recorder's analysis was beyond linear, the exercise was performed in reverse: He posited his preferred option and then justified it with reference to selected parts of the welfare checklist rather than performing anything close to a full analysis of each option".

Sadly, I agree that Miss Briggs is entirely right in that submission.

26. Miss Briggs also, at paragraph 28 of her skeleton, says this:

> "By failing to address the welfare checklists and failing to balance all the relevant considerations, the Recorder fell into error by characterising the case as one of 'permanency vs sibling contact' and attempting to find his own resolution to the conundrum by making a contact order, which does not in fact resolve the problem."

Again, unfortunately, I believe that Miss Briggs has correctly identified a central fault in the Recorder's analysis.

27. Moving on to paragraph 56 of the judgment, it is in these terms:

> "I also have to consider s.1 of the Adoption and Children Act. The paramount consideration of the court must be the child's welfare throughout his life. I think that [C], given her age, is likely to be a much happier person if she remains with the special guardian and I think happiness leads towards wellbeing. With regard to [D], on the other hand, given her age, her welfare is likely to be better if she is adopted. That brings me to see the likely effect on the child of having ceased to be a member of the original family and become an adopted person. Of course that will not apply to [C], but as far as [D] is concerned, she will have become an adopted person but I hope that the sibling contact that she will have will mean that the harm of ceasing to be a member of the original family is mitigated to a considerable extent. 'The relationship which the child has with relatives and with any other person in relation to whom the court or agency considers the relationship to be relevant'. That again will be covered, as far as [D] is concerned, by sibling contact and the same applies to the likelihood of such relationship continuing and the value. Sibling contact, as I say, seems to me particularly valuable."

The fact that the Recorder indicates that he "also" has to consider section 1 of the Adoption and Children Act is a matter to which I have already made reference. To do so after he has announced his decision with respect to adoption is clearly of concern.

28. It is impossible for a court as a matter of law to make a decision that a child should move towards adoption unless it has conducted its analysis under section 1 of the

Adoption and Children Act 2002 and made a decision which affords paramount consideration to the young person's welfare "throughout their lifetime". Again, in this paragraph the judge has mixed in considerations about both of the children, often in the same sentence. Again, unfortunately, the topic of long-term foster care is simply not mentioned and again, Miss Briggs' criticism that the judge has simply listed shortly a number of factors which support adoption is well made.

29. I am afraid I regard this analysis by the judge as wholly unsatisfactory on any basis, and certainly when considering a decision as important as this. Matters, unfortunately, do not improve when one turns to paragraph 57, which is in these terms:

> "Looking at all these matters and weighing up the two realistic alternatives, namely that [D] is adopted and [C] is placed under a special guardianship order with Ms.[H], or that [D] and [C] are adopted together, it seems to me that the better of those two options and, as I have pointed out, the local authority thought it was the better option when they thought the special guardianship was a proper course, is special guardianship for [C] and adoption for [D]. I would add that that was, when special guardianship was thought appropriate, that was the preferred view of all the professionals in this case."

Here, the judge purports to look at "the two realistic alternatives". But in relation to both of the alternatives that he considers, D is adopted. Long-term fostering for D is again simply not mentioned. The only oscillating element of the alternatives is whether C is with D in the adoptive placement or placed with her aunt.

30. Finally, and this is by no means an unimportant aspect of the case, so far as the parents' consent is concerned, the judge simply says this, at paragraph 58:

> "The only other thing I have to say is that I dispense with the parents' consent to adoption because I conclude that it is in [D]'s best interests".

As is well known, the test for dispensing with parental consent is not that which is stated by the judge in that paragraph. The test in the Adoption and Children Act 2002, section 52(1)(b) is that:

> "(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 -
>
> [...]
>
> (b) the welfare of the child requires the consent to be dispensed with."

The authority which is at least required reading, if not citation, on this point is the decision of this court in Re P [2008] EWCA Civ 355, in which in the course of a number of paragraphs, Wall LJ sets out the approach to be taken to applying the word "requires" to these difficult decisions. In short, the court has to decide whether the child's welfare requires adoption or something short of adoption.

31. In this case, where the issue was for an intermediate category of placement - namely long-term fostering - the structure described by Wall LJ would seem to be an essential prerequisite of any judicial analysis. Not only is that required by domestic law, but it is by the means of the wording of the statute and the analysis described in Re P that the necessary evaluation of proportionality required by Article 8 of the European Convention on Human Rights is brought to bear in determining the outcome for each individual child.

32. The judge, having given his judgment in these terms, was asked to elaborate on a number of points that were raised with him by counsel. The result is in the form of a page-and-a-half document promulgated by him on 3 September. It is not necessary for me to go through that in detail. The judge's observations are in very short terms. For example, in response to the question:

> "The court did not balance the benefits and detriments of LTF vs adoption for [D], nor was there any reference to the least draconian order principle or proportionality. If the court accepts that this is an omission can the judgment be amplified."

and below that:

> "Reply: It was made clear in the judgement that as adoption was being considered the Local Authority had to show that nothing else would do"

Well, it is correct that in the short paragraph on the law at the start of the judgment, the judge does indeed refer to the need for the local authority to establish that "nothing else will do".

33. Unfortunately, as is clear from what I have said, I agree with the appellant that the substance of the judgment shows a failure by the Recorder to deliver an analysis which comes close to what was required. I am therefore driven to conclude that this was a wholly inadequate judgment in terms of its analysis of the issue as between long-term fostering and adoption for D.

34. There is no appeal brought by the mother or by any other party to challenge his rejection of placement of either of these children with her, and there is no appeal with regard to the judge's analysis with respect to the special guardianship order. The judge's approach was at times not only confused as to the applicable law, but as I have indicated, wrong. He did not assist himself in the structure he adopted, in drawing together consideration of two very different children, one aged eight and one aged two, one going for special guardianship and one going for long-term placement elsewhere, when to keep them separate would have been of assistance not only to him, but also to those who may read this judgment in the future, not least young D when she is old enough to do so.

35. If my Lords agree, then in my view there is no option but for this case to be remitted for re-hearing. Miss Hyde, who represents the local authority this morning, has adopted the same realistic approach of Miss Lecointe, who was trial counsel and who prepared

the skeleton argument. The local authority accept that the judgment displays insufficient analysis by the Recorder and that the Recorder seems to have adopted a "linear" approach. It is accepted that the Recorder did not address the guardian's argument about long-term fostering.

36. Miss Hyde, understandably and rightly on behalf of the local authority, has tried to persuade this court to undertake its own reevaluation of these matters and to hold that despite the inadequacy of his analysis the judge came to the right conclusion for D. As we explained to her, and as I think she reluctantly accepted during submissions, it is simply not possible for this court to undertake that exercise ourselves. For one reason, we do not have any transcript of the oral evidence that was given by the guardian, the social worker and maybe others on this key matter. If my Lords agree, then the case will have to be re-heard by a fresh tribunal, and we will hear submissions from the parties at the close of these judgments on the way forward.

37. LORD JUSTICE MCCOMBE: I entirely agree, with nothing to add to my Lord's comprehensive judgment.

38. LORD JUSTICE DAVID RICHARDS: I also agree.