



Neutral Citation Number: [2020] EWCA Civ 1598

Case No: B4/2020/1724

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT LIVERPOOL
HH Judge Sharpe
LV593/19, LV599/19, LV600/19

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 November 2020

Before :

LORD JUSTICE UNDERHILL
(Vice President of the Court of Appeal, Civil Division)
LORD JUSTICE BAKER
and
LORD JUSTICE PHILLIPS

IN THE MATTER OF THE ADOPTION AND CHILDREN ACT 2002
AND IN THE MATTER OF C (CHILDREN) (REVOCATION OF PLACEMENT
ORDERS)

Between :

A MOTHER	<u>Appellant</u>
- and -	
A LOCAL AUTHORITY (1)	<u>Respondents</u>
A FATHER (2)	
SC, LC AND TC (3) TO (5)	
(by their children's guardian)	
-and-	
JA	<u>Intervener</u>

Deirdre Fottrell QC and Celestine Greenwood (instructed by **RMNJ Solicitors**) for the
Appellant
Lorraine Cavanagh QC and Matthew Carey (instructed by **Local Authority Solicitor**) for
the **First Respondent**
Edward Devereux QC and Alexandra Hewitt (instructed by **BDH Solicitors**) for the **Second**
Respondent
Karl Rowley QC and Mark Senior (instructed by **Berkson Globe**) for the **Third to Fifth**
Respondents
Frank Feehan QC and Liz Brennan (instructed by **Morecrofts**) for the **Intervener**

Hearing date: 12 November 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand down is deemed to be 10.30am on Friday 27 November 2020.

LORD JUSTICE BAKER :

1. This is an appeal against the decision of HH Judge Sharpe in which he dismissed an application by the appellant mother for revocation of placement orders made in respect of her three older children, S, now aged seven, L, aged four and T, now just two.
2. Applications to revoke a placement order may only be made by a parent with the leave of the court. Applications for leave to bring such an application are frequently made but rarely successful. In this case, however, for reasons that will emerge below, the mother was granted leave to apply by consent so that her substantive application for revocation continued to a fully-contested hearing. This is a very unusual event – so unusual, in fact, that neither counsel nor I have been able to discover any previous reported case in which a substantive revocation application has been considered by the court.

Background

3. For several years before the start of care proceedings, the local authority children's services department was involved with the family because of concerns about domestic abuse, substance misuse and poor home conditions. On 12 April 2018, the local authority started proceedings under s.31 of the Children Act 1989. At that point, S was aged four and L 18 months. The mother was then in the early stages of a further pregnancy. Following T's birth in October 2018, the local authority started further proceedings in respect of him.
4. The final hearing of the care proceedings took place in November 2018 before Recorder Davies. She concluded that the threshold criteria under s.31 were satisfied on the basis of a series of findings of fact including (a) that the children had been exposed to a number of physical assaults and numerous verbal altercations between parents and family members; (b) that both parents had a history of domestic violence as victims and perpetrators; (c) that the children continued to be at risk of exposure to domestic violence because the parents, who had separated during the proceedings, had recently resumed their relationship; (d) that the mother had been observed by professionals handling the children roughly, swearing and shouting in their faces; (e) that home conditions were reported to be poor and dirty on a number of occasions; (f) that both parents had a history of drug and alcohol abuse, and (g) that the engagement of both parents had been inconsistent and superficial and as a result they had struggled to meet the children's basic care or provide routine, stability or consistency. At the conclusion of the hearing, the recorder made care and placement orders in respect of all three children. Following the hearing, the children were placed together in a short-term bridging foster placement while the local authority embarked upon the search for an adoptive placement.
5. Shortly after the conclusion of the proceedings, the mother, who had by that point separated permanently from the father, started a new relationship with another man, JA. All parties to the present proceedings agree, and the judge found, that thereafter she underwent a remarkable transformation in her life. Although there were some reports of difficulties between the couple, the relationship has prospered and the mother's lifestyle has settled down. JA has three children by a previous relationship. After the breakdown of that relationship, the children remained with their mother but

following concerns about their care they were made the subject of child protection plans. Over the past 18 months, however, the children have spent significant periods of time with JA and the appellant mother, including one period lasting eight weeks. They are now living with their mother and staying overnight twice a week, on Tuesdays and Saturdays, with JA and the appellant.

6. Meanwhile on 29 May 2019, the mother filed an application under s.24 of the Adoption and Children Act 2002 for leave to apply to revoke the placement orders. A few weeks later in June 2019, final contact visits took place between the mother and the children. Thereafter, contact has been confined to letterbox contact only. On 4 July 2019, prospective adopters for all three children were approved by the adoption panel and on 4 September 2019, the children were formally “matched” with those adopters.
7. The hearing of the mother’s application for leave to apply to revoke the placement orders was adjourned on several occasions, in part because of difficulties over public funding but also because the local authority proposed that the hearing should include a further fact-finding element arising out of concerns relating to the mother’s behaviour and relationship with JA. In November 2019, the mother disclosed she was expecting her fourth child of whom JA was the father. As a result, the local authority started a further investigation to determine whether proceedings should be started in respect of the new baby immediately after birth. In the event, however, the pre-birth assessment filed by the local authority on 11 February 2020 reported positive change in the mother’s life, as a result of which the local authority concluded that the new baby should remain in her care. Thereafter, after negotiations between the parties, the issues of fact which the local authority and guardian wished to be determined by the court were reduced. Furthermore, in the light of the positive pre-birth assessment, the guardian reversed her position on the mother’s application and supported the grant of leave to apply to revoke the placement order, albeit on the basis that she reserved her position in relation to the substantive application. Subsequently, the local authority also conceded that leave should be granted. On 13 February 2020, the court approved an agreed order granting the mother leave to apply to revoke the order and authorising an assessment of the mother’s application by an independent social worker.
8. On 27 March 2020, the mother gave birth to her fourth child, N. She remains in the care of the mother and JA under a child in need plan. There have been no court proceedings in respect of N.
9. On 12 May, a drug test analysis report was filed reporting that JA had tested positive for a metabolite of cocaine in the medium range.
10. On 29 May, the independent social worker, having investigated the circumstances of the mother’s life with JA and those of the three children, S, L and T, filed her report in which she concluded:

“I have considered extensively whether it would be possible for the children to return to their mother’s care and, if so, what support would mitigate the risks identified in this assessment. Unfortunately, I am not convinced there is any realistic level of support which would guarantee the safety and security of the children moving to live with their mother, at this juncture. S’s emotional needs present serious risk of her regressing, enduring further trauma through being

reminded of her adverse experiences, confusion and placement breakdown. Furthermore, there is no realistic level of consistent support from the same caregiver, or any person who is familiar with all children, which would alleviate pressures on [the mother] who will be expected to meet the needs of four to seven children at any one time – a very demanding and pressurised task, one which is untested.”

11. The final hearing of the mother’s revocation application took place over five days in September 2020, 17 months after her application had been filed. Her application was supported by JA and the children’s father, but opposed by the local authority and guardian. On 25 September, HHJ Sharpe handed down judgment dismissing the mother’s application. On 14 October, the mother’s lawyers submitted a request for clarification of the judgment, to which the judge responded the following day. On that day, the mother filed an application for permission to appeal, which was refused by the judge.
12. On 19 October, the mother filed notice of appeal to this Court. On 20 October, I granted permission to appeal on all grounds and stayed the order of 25 September until the appeal had been determined. The children had been introduced to the prospective adopters a few days earlier, but thereafter, the process of placement was paused pending this appeal.

The Law

13. S.24 of the Adoption and Children Act 2002, headed “Revoking placement orders” provides:
 - “(1) The court may revoke a placement order on the application of any person.
 - (2) But an application may not be made by a person other than the child or the local authority authorised by the order to place the child for adoption unless
 - (a) the court has given leave to apply, and
 - (b) the child is not placed for adoption by the authority.
 - (3) The court cannot give leave under subsection (2)(a) unless satisfied that there has been a change of circumstances since the order was made.
 - (4) If the court determines, on an application for an adoption order, not to make the order, it may revoke any placement order in respect of the child.
 - (5) Where
 - (a) an application for the revocation of a placement order has been made and has not been disposed of, and
 - (b) the child is not placed for adoption by the authority,the child may not without the court’s leave be placed for adoption under the order.”

14. Case law has established that, before granting leave to apply for the revocation of a placement order, a court must be satisfied, first, that there has been a change of circumstances and, secondly, that leave should be granted having regard to the prospects of the application succeeding and the welfare of the child which, although a relevant consideration, is not in this instance paramount: *M v Warwickshire County Council* [2007] EWCA Civ 1084. Applications for leave to apply to revoke a placement order are not infrequently made, but rarely succeed, no doubt because in most cases the child will be placed for adoption within a few months of the placement order being made and it will be very difficult for a birth parent in such a short period of time to demonstrate sufficient change of circumstances to open the door to revocation. As a result, substantive applications for revocation of a placement order rarely come before the court and, as stated above, counsel have been unable to find any reported case in which such an application has been determined. It follows that there is no case law providing guidance on how a court should approach an application to revoke a placement order once leave has been granted.
15. This does not give rise to any difficulty, however, because the law is relatively straightforward and uncontroversial. Before the judge, and before this Court, there has been consensus amongst the legal representatives as to the applicable principles. In his judgment, the judge began by adopting a “note on the applicable legal framework” drafted by Ms Celestine Greenwood and approved by all parties. He appended that document to his judgment and included in the body of the judgment a passage which he described as a “short summation” of the law.
16. The starting point is s.1 of the 2002 Act which provides (so far as relevant to this appeal):
 - “(1) Subsections (2) to (4) apply 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 (amongst 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) 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 it 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.

...

(6) In coming to a decision relating to the adoption of a child, a 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 certain 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.

....”

17. Under Article 8 of ECHR, any interference with the exercise of the right to respect for family life should be proportionate to its legitimate aim. There can be no greater interference than the permanent removal of a child. A court making a decision relating to the adoption of a child must therefore consider whether that outcome is proportionate to the aim of securing the child's welfare. In *YC v United Kingdom* (2012) 55 EHRR 967, the ECtHR said (at paragraph 134):

“The Court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests

that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family."

18. Following this and other decisions of the European Court, the Supreme Court addressed the question of the proportionality of an adoption order in *Re B (Care Proceedings: Appeal)* [2013] UKSC 13 [2013] 2 FLR 1075. In the Supreme Court's judgment, Lord Neuberger, at paragraph 104 endorsed

"the principle that adoption of the child against her parents' wishes should only be contemplated as a last resort – when all else fails. Although the child's interests in an adoption case are "paramount"...the court must never lose sight of the fact that those interests include being brought up by her natural family, ideally her natural parents or at least one of them."

At paragraph 198, Baroness Hale of Richmond, having reviewed the case law of the European Court, concluded:

"It is quite clear that the test for severing the relationship between parent and children is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short where nothing else will do."

19. Following the decision of the Supreme Court in *Re B*, the Court of Appeal addressed the approach to proportionality in adoption cases in a series of reported decisions, notably *Re G* [2013] EWCA Civ 965 and *Re B-S* [2013] EWCA Civ 1146. In *Re G*, McFarlane LJ (as he then was) observed:

"49. In most child care cases a choice will fall to be made between two or more options. 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.

50. The linear approach, in my view, is not apt where the judicial task is to undertake a global, holistic evaluation of each of the options available for the child's future upbringing before deciding which of those options best meets the duty to afford paramount consideration to the child's welfare.

....

54. In mounting this critique of the linear model, I am alive to the fact that, of course, a judgment is, by its very nature, a linear structure; in common with every other linear structure, it has a beginning, a middle and an end. My focus is not upon the structure of a judge's judgment but upon that part of the judgment,

indeed that part of the judicial analysis before the written or spoken judgment is in fact compiled, where the choice between options actually takes place. What is required is 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.”

20. In *Re B-S*, the Court identified the fact that non-consensual adoption is unusual in the European context, that under ECtHR law family ties are only to be severed in very exceptional circumstances and that, as a result, everything must be done where possible to rebuild a family. The Court stressed that it is incumbent on (a) the local authority that applies for care and placement orders, (b) the children’s guardian entrusted with representing the children in the proceedings, and (c) the court to carry out a robust and rigorous analysis of the advantages and the disadvantages of all realistic options for the child and, in the case of the court, set out that analysis and its ultimate decisions in a reasoned judgment.
21. In *Re F (A Child) (Placement Order: Proportionality)* [2018] EWCA Civ 2761, Peter Jackson LJ (at paragraph 2) identified the following factors to be considered when analysing the risks likely to arise if a child is, on the one hand, rehabilitated with the birth family or, on the other hand, placed for adoption:
 - “(1) The type of harm that might arise.
 - (2) The likelihood of it arising.
 - ...
 - (3) The consequences: what would be the likely severity of the harm to [the child] if it did come to pass?
 - (4) Risk reduction/mitigation: would the chances of harm happening be reduced or mitigated by the support services that are or could be made available?
 - (5) The comparative evaluation: in the light of the above, how do the welfare advantages and disadvantages of [the child] growing up with his mother compare with those of adoption?
 - (6) Proportionality: ultimately, is adoption necessary and proportionate in this case?”
22. Although these statements of principle have been expressed in judgments concerning the making of care and placement orders, they plainly have a bearing on applications to revoke a placement order.
23. In the “short summation” of the law included in his judgment in this case, HHJ Sharpe summarised the principles in these terms. Having summarised s.1 of the 2002 Act, and set out in full the welfare checklist in s.1(4), he continued:
 - “16. In addition to those specific legislative matters the following principles can be drawn from the extensive case law which has developed, but in particular from the landmark decision of *Re B (A Child)* [2013] UKSC 33:

- (a) the paramount consideration for a court when considering an outcome for a child is that child's welfare;
- (b) it is a principle of the law that the welfare of a child is best met by maintaining the connection with birth parents to as full an extent as possible;
- (c) that principle is underpinned by application of the least interventionist principle enshrined in s.1(6);
- (d) adherence to those principles reflects and respects both the importance of the right to family life set out in Article 8(1) of ECHR and the limited scope for interference with that right as set out in the exceptions in Article 8(2);
- (e) interference in the right to family life, which is the right both of the parent and of the child, is parametered by necessity, proportionality and legality.
- (f) As a consequence, the permanent severing of ties between a child and her birth parents is an outcome only to be ordered in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare.
- (g) To arrive at that conclusion the possibility of parental care or, in the alternative, care by members of the wider birth family must be shown to be options which are not realistic either by reason of unavailability (i.e. they do not exist) or because such care cannot meet the welfare needs of the child.
- (h) That option of parental or family care should not be rejected if identified deficits could be remedied through appropriate and proportionate support provided by the Local Authority, even if such support would be necessary for an extended period of time.
- (i) In order to arrive at a valid conclusion that a child's welfare requires their permanent removal from parental/family care it is necessary to consider individually all of the competing options for care, to assess their respective strengths and weaknesses and then to look at those options against each other to ensure that every option is fully considered against every other option.
- (j) Having done so and identified the outcome most able to meet the welfare needs of the child it is necessary to consider whether that outcome is itself a proportionate interference in the rights of the child."

24. It seems to me that this distillation of the principles is clear and comprehensive. I am happy to endorse it.

The reasons for the judge's decision

25. Before summarising the judgment, it is instructive to consider the case advanced on behalf the mother by Ms Greenwood, who represented her at first instance. In her

closing submissions, counsel set out the mother's position in the following paragraphs:

"9. The mother now accepts that as at the conclusion of the care proceedings in November 2018 adoption was 'the only thing that would do' for each of her children given that neither she, the father nor any family member or other connected person was in a position to provide good enough care for them and that, given their ages at the time (almost 5, just over 2 and 8 weeks), therefore the 'last resort' of adoption was the only plan that met their best interests.

10. Following this hearing the mother seeks:

- (1) Revocation of the placement orders made on 27 November 2018 in respect of each child (and thereafter the local authority be invited to formulate plans for the careful and measured rehabilitation of the children to her care, together with JA, under the existing final care orders failing which, an application to discharge the care orders will be made).

OR, given that the revocation of the placement orders would effectively eliminate any prospect of the children being placed for permanence via adoption,

- (2) adjournment of the Court's decision on this application pending the completion (estimated by the children's guardian to take 6 to 8 weeks) and review by the Court, of a dual-structured piece of work with S and the mother.

As explored in evidence with the guardian, such a piece of work would have the dual aims of ascertaining the feasibility of rehabilitating S to the care of the mother and, in the event that was negative, effecting emotional closure for the child in respect of aspirations to return to the mother.

11. In the event that the Court determines that rehabilitation to the care of the mother cannot be achieved she wants the children to be happy, which in itself can only be achieved by permanence and a sense of belonging.

However, she urges the Court to consider commenting positively in its judgment on the following:

- (a) Her willingness to meet the adoptive carers and her intention to make that beneficial for them especially in terms of providing honest information;
- (b) Her willingness to be available to provide support to the adoptive carers on an ongoing basis;
- (c) The imperative for the adoptive carers to honour the children's needs for contact (indirect and direct) with the mother (the father, others) and not to abrogate the fulfilment of that need by reason of their own fear(s) and misgiving;

- (d) How creative ‘contact’ can be without the need for direct, in-person contact and the potential benefits of alternative forms of ‘contact’ for the children;
- (e) Her love for the children, her acceptance of responsibility for causing them harm, her deep sorrow and regret for that and her wish for them to be happy.

12. In the event that the Court determines that rehabilitation to the care of the mother cannot be achieved she urges the Court to give close and thoughtful consideration to whether adoption remains in the best interests of S.”

26. The judge began his judgment by considering the law. Having referred to the agreed note of the legal framework (which he appended to the judgment), he set out the “short summation” of the law which I have cited above, and then added (at paragraph 17):

“Finally, in respect of the law I make it clear that there is no ‘status quo’, by which I mean no argument that because a decision was made in 2018 that placement orders should be made that that is now a default position which will determine this application absent some significant or exceptional situation. That was the position until the point where leave was granted. The granting of leave effectively levelled the field. Put simply the question in my view is not ‘why shouldn’t the placement orders remain?’ but ‘what does the welfare of these children *now* require?’”

27. The judge then identified the issues as follows (at paragraph 18):

- “(a) What now are the possible outcomes for these children?
- (b) Which of them best meets their welfare needs?
- (c) If that outcome does not result in a return to the mother, is that undoubted interference in their right to family life both necessary and proportionate?”

He then (at paragraph 19) identified three possible outcomes, namely (a) immediate revocation of the placement orders coupled with the commencement of a transitioned return to the care of the mother under the care orders; (b) the adjournment of the revocation applications to enable a time-limited piece of work to be undertaken focusing on the likelihood of S being rehabilitated to her mother, or (c) the dismissal of the applications, with the result that the children would be introduced to and then placed with the prospective adopters. Although the mother apparently said in evidence that she favoured the continuation of foster care over adoption, no party advanced long-term foster care as an option. The foster carers with whom the children have lived since November 2018 are not able to look after the children on a permanent basis. The judge indicated that he did not regard long-term foster care as a prospect he should entertain.

28. The judge then considered the significant changes that have occurred in the mother’s life since the placement orders were made in November 2018. At paragraph 22 he observed:

“There is no doubt that [the mother] has effected a transformational change in herself, her life and in her significant relationships. During the course of the hearing witness upon witness, even those who do not support her overall aim, paid tribute to the difference [she] has made in her own life. I do not normally spend time in a judgment dealing with matters which are not in dispute but I think the following needs to be set out simply to record just what this mother has achieved.”

He proceeded to set out in detail the transformation of the mother’s life. Having summarised the background leading to the making of the care and placement orders he continued:

“24. That was then. In my experience that sort of record combined with the outcome which followed leaves most parents despondent, possibly even depressed and certainly defeated. They rarely come back from such a setback and invariably any progress which follows is limited.

25. [The mother] chose a different route.

26. Before me last week I watched a confident, capable and engaged woman. Despite her previous experience of the Family Court she engaged with the hearing with patience, courtesy and commitment, just as she has with the whole of the proceedings.

27. But [the mother] now has much to be confident about. In 2018 she met JA and started what has slowly developed and matured into an established, mutually supportive and committed relationship. That relationship has been thoroughly stress-tested not only by [her] participation in this litigation and all the pressure but by the envelopment of JA himself into these proceedings as an intervener”

Noting how the mother and JA had coped with caring for his children and then the arrival of the baby N, the judge continued (at paragraph 30):

“What shone out from the mother during her evidence was not how testing, tiring and troubling all of this was but how much she had felt engaged and committed to the children whose care had become her responsibility.”

At paragraph 31, he added:

“the couple are a team and that team has stepped up at a very difficult time for three children and provided them with a sense of security and stability which has served them well and which will have made a real difference to them this year.”

29. Observing that “no picture is ever perfect”, the judge then considered some of the issues about which the local authority had raised concerns, including JA’s failed drug test and reports of an altercation between the mother and JA in May 2019. He concluded that he did not regard the drug issue as material to his decision and continued (at paragraph 36):

“when weighed against all that has gone on since and all that this couple has achieved, in my view it would be wholly disproportionate to attach a significance to one night in 2019 which then sounded in my decision-making now. [The

mother] and JA are not perfect and they can make mistakes like all of us. I move on.”

30. The judge then summarised the mother’s progress in the last two years in these terms (at paragraph 37):

“The position therefore in terms of her own development is that [this] mother has demonstrated a level and scope of change which on any basis justified the granting of leave because it raised her from a failed parent to a good one and therefore has opened the door to the reassessment which this hearing now requires. As change goes it is very significant, it is successful and, most importantly, it has been sustained when tested. It is difficult to see what else this mother could have done to turn around her own life and that needs to be set out here for her to know.”

31. The judge then considered the particular needs of the three children. He noted that, given the different ages and the extent of time they had spent with their parents, the level of exposure to their parents’ problems varied. T plainly had no memory of his parents and the judge concluded that he would have no difficulty in adapting to a change of carers, whoever they may be. Although L had some recollection of her mother, the judge concluded there was nothing to indicate that she would have difficulty forming new attachments. He noted the view of the social worker that adoption remained the right option for T and L. With regard to S, the position was plainly more complex. At paragraph 44, he said:

“Of the children an uncertainty lies in respect of S and what is best for her. S is nearly 7 years old, by any margin that is an age when even finding adoptive placement becomes less and less likely. In this case there is a placement available for S, but the question remains as to whether it can be a successful placement.”

He noted that S had at one stage accepted that she would not be returning to her mother but subsequently, on learning about the mother’s application, her expressed views had changed. She now said she wanted to return to the care of her parents, that is to say both parents, not simply her mother. The judge noted that S retained an awareness of the domestic violence between her parents and was visibly unhappy when voices were raised. He concluded that, notwithstanding the significant progress made by S and L since they were removed from their parents’ care, the fact that S continued to display unease in such circumstances indicated the depth of the damage she had sustained over an extended period of time.

32. The judge then identified two other factors of relevance to his decision, described by the social worker as being “potentially catastrophic”. The first was the unity of the children. He described them as “a united sibship” and “an exemplar of the importance of ensuring that wherever possible siblings remain together”. He accepted the social worker’s evidence that any outcome which resulted in the enforced separation of any one of the children would have a profound impact on all of them. He summarised the second factor as follows:

“51. The other potential catastrophe and linked to the first would be for S to endure a failed attempt at rehabilitation to her mother, to have her hopes of such a future raised up only for them to be dashed if the children had to be removed.

52. The effect of such a failure would be threefold. It would cause significant emotional harm to S if that failure was despite her own efforts and contrary to her wishes as opposed to her needs. It would almost certainly remove any prospect of a successful transition through to a permanent stable future for her. Finally, it would probably require separate consideration of the outcomes for the children with the likelihood that adoptive placements could be secured for only the younger two as they could still move on but S would be unable to form such permanent attachments to entirely new parents.

53. For S this would be a loss of huge proportions: an emotionally damaged little girl condemned to the care system, facing the loss of a settled future and enduring a permanent separation from her siblings to an adoptive placement to which she could not go.”

33. The judge then discussed the options and expressed his conclusion at an early stage in his analysis:

“55. I start therefore from the position that [the mother] and JA want to offer home to the children and to do so would enable the reintegration of a family and so uphold the rights of those involved. The only reason why that should not happen is, if in doing so, it is unlikely to work and will not therefore give these children what they need and to which they are entitled. Children are not simply the products of their parents but have their own entitlements, needs and rights.

56. In my judgment these children need and are entitled to the following:

- (a) a settled, stable and permanent future;
- (b) delivered with immediacy given their ages, particularly S’s;
- (c) which enables them to live together on a long-term basis and to enjoy the benefits of their sibling relationships throughout their lives;
- (d) where their immediate, medium-term and long-term needs can be met on a daily basis and with a degree of certainty, insofar as life ever carries a guarantee about anything, that that will continue.

57. In my judgment that outcome cannot be delivered by [the mother] and JA, despite all the positives recorded in this judgement, and that if the welfare of the children is to be the paramount consideration I must dismiss the application for revocation.”

34. In the following paragraph the judge set out the reasons for his conclusion. He noted S’s clear wishes but observed that they could not be achieved because the mother was now living with a man whom S did not know and who had his own children. The judge noted that in each sibship – that is to say, the three children in the proceedings and JA’s own three children – there were children with specific needs. In addition, N’s position had to be considered. The judge expressed concern about the consequences of moving S, L and T into a household where they would have to share the adults’ attention with other children. At paragraph 66, he observed:

“It is no answer to say that the pressure points arise only at weekends when it is currently anticipated that most children will be sharing the same space. A permanent household of four children is itself a significant change for the children with whom I am concerned and the regular and frequent enlargement to seven brings with it an exponential increase in stresses, care requirements and emotional pressure points. It is not a household which lends itself to calmness, to stability or to individualised care time for children who need it.”

35. The judge noted that the capacity of the mother and JA to meet the needs of all the children was untested. Although there were family members who will be able to give practical assistance, he concluded that “multiplying the hands” did not ensure that the emotional needs of the children would be met. As a result (at paragraph 67) he found he was

“unable to conclude that what would result would be anything which would be more than coping and that such a low level of care would undoubtedly impact upon these children on an ongoing basis.”

He continued (at paragraph 68):

“A coping household would be sufficient for children who have known no different and who have become emotionally and psychologically resilient as they became resigned to the fact that their parents’ time had to be split across several siblings. This is not the evidence of what these children need. By reason of their damaged experience in early life the children need more than merely coping parenting and in my view would be unable to develop a mindset which allow them to flourish in regular and relative chaos.”

As a result, he concluded:

“the risks for the children of attempting a migration to the care of [the mother] present too many risks which collectively cause me to conclude that the outcome would be a near certainty of placement breakdown and an inevitable separation of the children into different futures.”

36. At paragraph 71, the judge summarised those risks in these terms:

- “(a) The risk of a failed reunification between the children and their mother;
- (b) The risk of a difficult introduction and acceptance of JA as the mother’s partner;
- (c) The uncertainty over the introduction of N to the children;
- (d) The inevitable re-introduction of their father to the children in the context of their adjusting to their mother’s new arrangements;
- (e) The introduction and attempted merger of the two sibships;
- (f) The potential for difficulty for two sibships ‘sharing’ N;

- (g) The possibility, which I acknowledge is not a current reality, of the two sibships having to fully merge due to situational change for JA's children, as has occurred in the past, and seven children attempting not only to get along at weekends but to integrate into a single household."

He continued (at paragraph 72):

"All of these risks are evidentially possible and some of them are probable. I do not need to be satisfied that they all will happen. I am however satisfied that they are all likely in one form or another and that to ignore them would be wrong."

37. The judge then considered but rejected the mother's alternative proposal, observing (at paragraph 75):

"The immediate outcome of an adjournment would be delay, no clear outcome, an extension of the proceedings, a confusing picture for the children, a possibility of invoking the very catastrophic outcome to be avoided at all costs and, possibly, the potential complete loss of a placement for all three children which could maintain the sibship and so open up the possibility that a divided sibship would end as a wholly separated one."

The judge further concluded that the proposed assessment was flawed because it contained so many uncertainties.

38. He then set out his final conclusion:

"79. In my judgment it is clear from the evidence of what the children need that there is only one outcome which will meet their welfare needs both now and in the future and that outcome is for them to move forward towards a permanent non-family placement rather than to return to the care of their mother or even to test out that possibility by trying it out.

80. There are many downsides to an adoptive placement and some are inevitable. There is a real risk that S may not settle or do so over such a time as to destabilise matters for all three children. There is the high likelihood that even a successful transition will, at some point, cause an eruption for a child who suffers in later years a real sense of dislocation and loss, a possibility made all the greater for a child who remembers their parents and can access social media. There is the inevitable loss of the possibility of a continuing relationship with a birth family and the severance of [ties] which will undoubtedly cause a sense of dislocation, even if it does not result in a breakdown of the adoptive placement.

81. In arriving at the conclusion that I do I have to both acknowledge that the mother could literally have done no more than she has to achieve her aim but to equally acknowledge that for these children their needs now and in the future must be given greater precedence than even this mother's achievements. The problem for these children is not what their mother can offer them now but what they need now as a result of what they endured in the past."

39. In response to the request for clarification of his reasons, the judge added these observations:

“The support required to enable the children to achieve rehabilitation at home without incurring the risks of separation or re-removal would have to be sufficient to effectively remove from the parents nearly all other burdens and distractions to enable them to focus upon the needs of the children. That would amount to care by the local authority in the presence of the adults rather than care by the adults.

The obvious benefits of being brought up within the birth family are, in my judgment, significantly outweighed by the real risk of a failed attempt at rehabilitation which resulted in long-term damage to at least S and the possibility of a separation of the sibship. An outcome for even one child that left all three of them suffering the loss of a sibling or was causative of an inability to secure future permanence is a detriment which, in my view, outweighs the benefits of maternal care.”

The appellant’s submissions

40. On behalf of the appellant, Ms Deirdre Fottrell QC, leading Ms Greenwood, put forward three grounds of appeal.
41. First, it was asserted that the judge had been wrong in his assessment of risk and the extent to which such risks may be adequately ameliorated or mitigated in accordance with the guidance given by this court in *Re F*, supra. His assessment of the needs of the children, and the mother’s capacity to meet their needs, had been flawed and unjustifiably exaggerated and was not supported by the evidence. He did not have the benefit of any expert psychological assessment in respect of the children to provide insight as to any emotional harm they had suffered, how they may be affected during their minority as a result of such harm, and in respect of their ability to establish a healthy relationship with their mother. The independent social worker, whilst noting that the mother had provided excellent care to N, had concluded that she was nonetheless at the limit of her capacity, but in reaching that conclusion had been unable to describe any features of the mother’s functioning to support it. It was submitted that the independent social worker and the judge had ignored or underestimated the fact that the mother and the intervener regularly care for four children, with the approval of the local authority. Ms Fottrell observed that it was unusual for a court to find itself contemplating a case where a mother was found to be capable of caring for one of her children and three other children who are not hers but deemed to be incapable of providing care for her three of her own children.
42. In the second ground of appeal, it was argued that the judge failed to undertake an adequate or fair assessment of the potential advantages of the children growing up with their mother. His assessment of the benefits of being brought up within the birth family had been inadequate and he had failed to take into account the fact that a return to the mother would enable the children to grow up with their younger half-sister, N, with JA and his children, and with the opportunity of a contact with their own father and wider birth family. In this context, it was argued that he failed to engage properly with the welfare checklist in s.1(4) of the 2002 Act, in particular with the factors identified in s.1(4)(f). Furthermore, having identified the obligation set out in case law to identify and compare the risks and benefits offered by placement with the mother

and JA on the one hand and placement with the proposed adopters on the other, he had failed to carry out such a comparative analysis, focusing instead on the disadvantages of a rehabilitation. The judge failed properly to identify the realistic options and to weigh them against each other as part of the welfare and proportionality exercise which was central to his decision. The fact that a prospective adoptive placement had been identified did not obviate the need to re-evaluate the advantages and disadvantages of adoption, including the risk of the adoption breaking down. Although at the end of paragraph 44 of the judgment he raised the question whether the adoptive placement could be a successful placement for S, he had failed to answer it. The brief observations in paragraph 80 of his judgment (quoted above) were insufficient.

43. In the third ground of appeal, it was contended that the judge was wrong to refuse the application for a short adjournment to allow a piece of work to be carried out with S. It was argued that the judge overlooked the fact that a short piece of work will now be required with S and L in any event to prepare them for adoption. In oral evidence, the guardian had conceded that the proposed piece of work with S would provide an opportunity to explore the prospect of reunification and, in any event, to bring about emotional closure for her. It was submitted that in dismissing the proposal the judge attached too much weight to the potential impact of delay, given that the interests of the children for the rest of their lives were in the balance.
44. The appeal was supported by the intervener JA and by the children's father. On behalf of JA, Mr Frank Feehan QC leading Ms Liz Brennan adopted the submissions made on behalf the mother. The judge had failed to give proper consideration to the question of proportionality. Although the child's welfare is the paramount consideration, it had to be seen in the context of the principle that family life should only be interfered with to the extent that it is necessary to do so. Mr Feehan cited the well-known dicta of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050, at para 50:

“society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.”
45. On behalf of the father, Mr Edward Devereux QC leading Ms Alexandra Hewitt adopted the arguments put forward on behalf the mother, in particular that the judge's analysis focused too greatly on the risks to the children rather than undertaking a careful assessment of the benefit and dis-benefits of the different options. It was submitted that there was no evidence identified to support the judge's description of the mother's household as being one of “regular and relative chaos” in which the mother would do little more than cope and his conclusion that as a result there was a near certainty that a placement of the children with the mother would break down. The limited opportunity which the independent social worker had to observe the mother's household did not provide sufficient evidence for this conclusion.

Discussion and conclusion

46. The judge’s “short summation” of the legal principles included the observation that, in order to arrive at a valid conclusion that a child’s welfare requires their permanent removal from parental/family care, it is necessary to consider individually all of the competing options for care, to assess their respective strengths and weaknesses and then to look at those options against each other to ensure that every option is fully considered against every other option. In the event, the judge did not carry out a “side-by-side” analysis of the advantages and disadvantages of rehabilitation with the mother and the advantages and disadvantages of adoption. In the circumstances of this case, however, it does not follow that the judgment was fatally flawed.
47. It is important to consider the way in which the case was argued before the judge, in particular on behalf of the mother. There are a number of striking features in the mother’s position in the court below as set out in Ms Greenwood’s closing submissions. First, it is plain that the mother accepted that, at the date when the placement orders were made in November 2018, adoption had been the right and only option for the children. Secondly, it is equally plain that the mother continued to accept that, if the children could not be returned to her care, adoption would be the best option – certainly for L and T and, subject to the court’s further scrutiny, for S. This is a highly unusual position for a parent in the mother’s circumstances to take. Although it seems that in the course of her evidence the mother may have stated that she considered long-term fostering to be a better option than adoption, this is not how her case was put in closing submissions. Thirdly, it demonstrated that, in the event that the children were not returned to her care, the mother wished to give positive support to them in their adoptive placement. All these factors provide further evidence of the mother’s growing maturity, insight and ability to focus on the needs of her children – yet further evidence of the transformation in the mother’s life over the past two years. They also had the effect of narrowing the scope of the issues to be determined at the hearing. In the light of the way in which the case was argued on behalf the mother, it is to my mind unsurprising that the focus of the judge’s inquiry was whether rehabilitation of the children with the mother was a viable proposition.
48. Although the judge did not spell out in detail the advantages of the children being placed with the mother, I am satisfied that he had those advantages firmly in mind. In his “short summation” of the legal principles, he reminded himself that the welfare of a child is best met by maintaining the connection with birth parents to as full an extent as possible, that this principle is underpinned by application of the least interventionist principle enshrined in s.1(6) and that adherence to those principles reflects and respects Article 8 of ECHR. He set out in considerable detail the remarkable progress the mother had achieved since the placement orders were made, concluding with the striking observation that she had transformed herself from a failed parent into a good parent. I accept that he could have identified more explicitly the advantages in this case of placing the children in her care but I have no doubt that he had those advantages firmly in mind.
49. It is correct that he focused in detail on the disadvantages of placing the children with the mother and JA. In doing so, however, it seems to me that he was fairly reflecting the evidence before him. I do not consider this surprising, since it was manifestly the key issue in the case to which the evidence had been largely directed. The extensive and detailed report from the independent social worker provided ample evidence

addressing the strengths and reservations about the mother's current lifestyle, parenting ability and capacity to care for these three children. The independent social worker also looked in detail at the needs of the children, speaking to them personally and to their current carer. As a result she was able to develop a good understanding of their individual and collective needs. In addition to her evidence, the judge had extensive evidence from the social workers and the overarching report of the guardian from which he was entitled to draw his conclusions.

50. Despite the best efforts of counsel, I am wholly unpersuaded that the judge's analysis of the risks of placement with the mother and JA was unsupported by the evidence. It seems to me that there was manifestly sufficient evidence to support his conclusions. The assessment of evidence is first and foremost a matter for the trial judge and I can see no basis on which this court could fairly conclude that his analysis was flawed. Although he did not refer expressly to the decision of this court in *Re F*, I consider that he did address the issues surrounding risk identified in Peter Jackson LJ's judgment in that case. The extent, likelihood and consequences of the risks of returning the children to the mother were considered in detail in the judgment. The question of mitigation was considered in admittedly shorter terms, but in my view sufficiently in all the circumstances in paragraph 67 of the judgment supplemented by the further observations in response to the request for clarification.
51. The judge's conclusion was stark – that the risks that would arise if the children were placed in the care of the mother and JA were on a scale that the outcome would be the “near certainty of placement breakdown” leading to the “inevitable” separation of the children, outcomes which the judge described as “potentially catastrophic”. As a result, he concluded that there was “only one outcome” which will meet the needs of the children. In other words, in this case the judge's conclusion was that rehabilitation with the mother was not a realistic option for these children.
52. In those circumstances, and bearing in mind the way in which the mother's case was advanced in closing submissions, I do not consider that the failure to re-evaluate in detail the advantages and disadvantages of adoption in a side-by-side analysis compared with rehabilitation with the mother undermined the reliability of the judge's conclusions. In paragraph 80, he recognised that there were “downsides” to an adoptive placement including the risk of placement breakdown and the substantial prospect of what he described as an “eruption”, meaning a crisis for S at some point in the future. But compared to his conclusion that it was nearly certain that a placement with the mother would not succeed and the potentially catastrophic consequences that would flow from a breakdown of such placement, he understandably concluded the risks and disadvantages of adoption were manifestly lower.
53. As noted above, McFarlane LJ in *Re G* noted that, in giving a judgment,

“What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary”

In my judgment, the evaluation carried out by the judge in this case contained the degree of detail necessary in the circumstances, having regard to the way in which the case was argued before him.

54. As for the third ground of appeal, his decision to dismiss the proposal for a further adjournment to allow a specific piece of work to be undertaken with S was plainly justified in all circumstances. The proposal was inchoate and the scope of the proposed piece of work unclear. The judge was entitled to conclude that the risks of further delay, including the possible loss of the adoptive placement, outweighed any conceivable benefit from such a piece of work. The judge was clear that he had sufficient evidence to reach a fully-informed conclusion. His decision on this issue cannot be said to be wrong.
55. When granting permission to appeal, I was concerned by the fact that no consideration had been given in the judgment to the option of long-term fostering of the children. Such an outcome might have enabled the children to build a relationship with the birth family. But it is clear from the documents now filed with this court that the option was not advocated by any party, save perhaps in passing by the mother in evidence. In closing submissions, as above, the mother's counsel made it clear that in the event that the children could not be returned to her care, she supported adoption with all the advantages that she identified in terms of permanence. In those circumstances, I do not consider that the judge can be criticised for failing to consider in detail the option of long-term foster care.
56. Hedley J's dictum cited by Mr Feehan has no bearing on the issues arising on this appeal. Of course society must tolerate diverse standards of parenting, including parenting that is no more than adequate. In this case, the judge was clear that the quality of parenting the mother is now providing to her youngest daughter, and to JA's children, is much more than adequate. But he concluded, after careful analysis of the evidence, that despite her qualities as a carer, she and JA would not be able to meet the needs of S, L and T in addition to those of N and JA's children and that a placement of the children in their care would be almost certain to break down, with potentially catastrophic consequences.
57. Accordingly, I would dismiss this appeal.
58. I recognise that this outcome is a tragedy for the mother who has achieved such a remarkable transformation in her life, on a scale which I have rarely seen in many years' experience of the family justice system. The submissions put forward so eloquently on her behalf give me confidence that she will indeed give active support to the adoptive placement in the hope that it will succeed. I am confident that the local authority will consider carefully the offer of support she has made as recorded in counsel's closing submissions to the judge.

LORD JUSTICE PHILLIPS

59. I agree.

LORD JUSTICE UNDERHILL

60. I also agree.