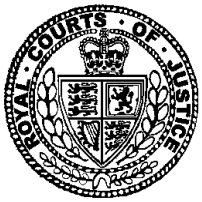

Neutral Citation Number: [2022] EWCA Civ 299

Case No: CA-2022-000140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT BARNET
Recorder Goodrum
ZW21C00465

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2022

Before :

LORD JUSTICE MOYLAN
LORD JUSTICE BAKER
and
LADY JUSTICE WHIPPLE

- -

D (LEAVE TO APPLY TO REVOKE PLACEMENT ORDERS)
Between :

A MOTHER	**Appellant**
- and -	
(1) A LONDON BOROUGH	**Respondents**
(2) and (3) AD and BD (by their children's guardian)	

- -
- -

Ranjit Singh (instructed by **Eskinazi and Co, part of GT Stewarts**) for the **Appellant**
Caitlin Ferris (instructed by **Local Authority Solicitor**) for the **First Respondent**
The Children's Guardian was not present nor represented.

Hearing date : 3 March 2022

- -

Approved Judgment

Remote hand-down: This judgment was handed down remotely at 10:30am on Thursday 10 March 2022 by circulation to the parties or their representatives by email and by release to BAILII and the National Archives.

LORD JUSTICE BAKER :

1. On 3 March 2022, this Court heard an appeal against an order dated 10 January 2022 refusing a mother leave under s.24(2)(a) of the Adoption and Children Act 2002 to apply to revoke the placement orders made on 12 February 2021 authorising the local authority to place her two children for adoption. Permission to appeal had been granted by King LJ and the appeal listed as a matter of urgency because an adoptive placement had been identified for the children and their case was due to be considered by the adoption panel imminently.

2. At the conclusion of the hearing, we announced that we would allow the appeal and grant the mother leave to apply to revoke the placement orders. We indicated that we would hand down our reasons at a later date. This judgment sets out my reasons for that decision.

3. So far as relevant to this case, s.24 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 in circumstances since the order was made."

4. The key principles established in the case law can be summarised as follows.

   (1) There is a two-stage process. Has there been a change in circumstances? If so, should leave to apply be given?

   (2) The change in circumstances does not have to be "significant" but needs to be of a nature and degree sufficient to open the door to a consideration of whether leave to apply should be given. That principle, identified by this Court in *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, [2007] 2 FLR 1069 in relation to an application under s.47 of the 2002 Act for leave to oppose an adoption order, has been held to apply also in relation to applications under s.24: *Re B-S* [2013] EWCA Civ 1146, [2014] 1 FLR 1035.

   (3) At the second stage, the child's welfare is relevant but not paramount: *M v Warwickshire County Council* [2007] EWCA Civ 1084, [2008] 1 FLR 1093.

   (4) The question for the court at the second stage is, at [27], "whether in all the circumstances, including the mother's *prospect of success* in securing revocation of the placement order and [the child's] interests, leave should be given": *NS-H v*

Kingston upon Hull City Council and MC [2008] EWCA Civ 493, [2008] 2 FLR 918.

(5) If leave is granted, the substantive application to revoke the placement order must be determined by applying s.1 of the 2002 Act. The child's welfare is the paramount consideration, any delay in coming to a decision is likely to prejudice the child's welfare, and the court must have regard to the factors in the checklist in s.1(4). Furthermore, as this Court stated in *Re C (Revocation of Placement Order)* [2020] EWCA Civ 1598, on a substantive application to revoke a placement order, the court must abide by the principles established in the case law on adoption generally, in particular the decision of the Supreme Court in *Re B* [2013] UKSC 33, so that 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" (per Baroness Hale of Richmond at [198]).

Summary of background and proceedings

5. The relevant facts are as follows. The two children are a girl, A, now aged 6 ½, and a boy, B, now 4 ½. B has a number of difficulties, including developmental delay, speech and communication problems, and has recently been diagnosed as meeting the criteria for autistic spectrum disorder.

6. The children's mother is Lithuanian. The man said to be their father is from Kosovo. He is not named as the father on the children's birth certificates, does not have parental responsibility, and has played no part in these proceedings.

7. In January 2019, the local authority instigated care proceedings in respect of the children. The matters on which it was alleged that the threshold conditions under s.31 of the Children Act 1989 were satisfied included domestic abuse in the parents' relationship and the mother's excessive consumption of alcohol, as a result of which the children had suffered, and were likely to suffer, neglect and emotional harm. In the course of the proceedings, the mother underwent a psychiatric assessment by Dr Christopher Mayer and a parenting assessment by Ms Vivien Kenley. The proceedings concluded with the making of supervision orders. The children, who had been removed under interim care orders during the proceedings, were returned to their mother's care.

8. Unfortunately, the mother, who had assured professionals and the court that she was abstinent, resumed drinking. In October 2019, she tested positive for chronic alcohol use for the period June to September 2019. Then on 24 January 2020, she was found heavily intoxicated sitting on a park bench. The children were next to her, strapped in a pushchair, in a state of considerable distress and neglect. It was evident that they had been there for some time. The mother was arrested for being drunk in charge of minors and the police took the children into care under a police protection order.

9. On 6 February 2020, the local authority made a second application for a care order. Further reports were obtained from Dr Mayer and Ms Kenley. In his report dated 7 May 2020, Dr Mayer expressed the opinion that, whereas he had previously found the mother to have a diagnosis of harmful use of alcohol, he was "now more inclined to make a diagnosis of alcohol dependence syndrome." He recommended that she take

antidepressants and that she would benefit from psychological treatment such as cognitive behavioural therapy. He concluded with this observation:

> "Notwithstanding these further concerns and [the mother's] lack of transparency, I still believe that she has the ability to maintain stable mental health and abstain from alcohol, in order to provide an effective standard of care for her children. This can only be achieved if she is prepared to work openly and honestly with professionals and accept the validity of their concerns, with full engagement with the help available for her. Much will also depend upon her ability to sort out her financial difficulties, avoid entering into another unstable or abusive relationship, and distance herself from those who have problems with alcohol. This obviously needs to be demonstrated in practice, I suggest over the next six to 12 months."

10. In a supplemental report, he observed:

> "If she is to make progress, in order to sustain changes and reduce the risk of relapse, she will need to make an important change in her thinking, whereby she takes ownership of her difficulties and not seek to blame others. In other words, her locus of control needs to shift from external to internal."

In response to a question about the extent of CBT required, he said that a typical duration would be twelve sessions at weekly intervals, possibly with further therapeutic input depending on engagement and progress. In response to a further question inquiring whether abstinence for six to twelve months would be sufficient, given that she had previously been dry for seven months before relapsing, he said:

> "A period of six to 12 months is a reasonable timeframe to have some idea of whether sustained progress can be made. This is not only demonstrated by abstinence from alcohol, but also continuing satisfactory mental health, a willingness to work openly and honestly with professionals, acceptance of the validity of the concerns that have been raised, full engagement, and effective day to day functioning, including the nature and quality of relationships with others …. 12 months is a more reliable measurement than six months, and three years would be better, but relapse is possible at any stage. If it was routinely determined that the risks are too great within a timescale compatible with a child's needs, there is little point in considering reunification for anyone with a history of alcoholism."

11. In her report, Ms Kenley noted that there was nothing to indicate that the mother was in contact with the father, or in any other relationship, so concerns about her longstanding domestic abuse were "currently not relevant". She concluded:

> "In my opinion [the mother] will need a minimum period of a year to provide some comfort of her ability to sustain any

> progress that has been made. This would involve her total sobriety alongside the professional help she is currently receiving for her anxiety and depression."

She added:

> "My views are similar to Dr Mayer 'I still believe she has the ability to maintain stable mental health and abstain from alcohol in order to provide an effective standard of care for her children'. Unfortunately I am of the opinion that the timescales to make and demonstrate sustained changes are out with the timescales for the children's needs for stability and security."

12. On 20 November 2020, after a contested hearing, DJ Jabbitt found that the threshold conditions under s.31 of the Children Act 1989 were satisfied in that the children had suffered neglect and emotional harm and had been at risk of suffering physical harm due to the mother's alcohol abuse. He then considered whether a return of the children to the mother was a realistic option. He identified positive and negative factors:

> "Positive factors in favour of [the mother] not being ruled out as a potential carer for the children
>
> a. [The mother] loves her children dearly.
>
> b. She has warm and loving interactions with them, and regularly attends contact.
>
> c. On a practical level, she is able to care for them.
>
> d. [She] is generally cooperative with professionals.
>
> e. There were stress factors in her life, in January 2020.
>
> f. The support from the LA initially, was not as comprehensive as it could have been.
>
> g. [The mother] bitterly regrets her actions on 24 January 2020, and acknowledges that she put her children at risk of harm.
>
> f. She has now had counselling, and asserts that she is more able to deal with stressful issues, and will take responsibility for herself and her actions. She asserts that she will not let problems overwhelm her.
>
> g. Her financial position is now stable.
>
> Negative factors in respect of the children returning to the care of [the mother], and thus not being a realistic option
>
> a. [She] has a long-standing alcohol dependency, the seriousness of which, she is unable to fully recognise.

> b. She continued a relationship with [the putative father] until 2018, in which she was subject to persistent domestic violence.
>
> c. The children, particularly, A, witnessed some of this abuse.
>
> d. [The mother] will only admit use of alcohol, when she is confronted with evidence, otherwise she will persistently lie to professionals about her drinking.
>
> e. She promised that she would be abstinent at the conclusion of the first set of proceedings in August 2019. It was a condition of the return of the children to her care, but she immediately began drinking again.
>
> f. [She] put the children at considerable risk of harm on 24 January, when she drank to the extent that she blacked out.
>
> g. She has continued to use alcohol after 24 January 2020.
>
> h. She can refrain from such use for sustained periods of time, but the weight of evidence is that she will return to using alcohol, particularly when not under scrutiny, and when subject to stress.
>
> i. The weight of professional opinion that she cannot provide safe care for her children"

He concluded:

> "I am firmly of the view that the risks of emotional, and indeed physical harm, to the children would be so significant, that I am unable to consider [the mother] as a realistic option, to care for the children."

13. Having concluded that the children could not safely be returned to the mother's care, the district judge then adjourned a final decision as to the orders to be made to a further hearing which took place over two days in February 2021. At that hearing, the mother no longer put herself forward as a carer for the children, and the realistic options for their future care were long-term fostering or adoption. In his further judgment, the district judge set out the evidence, including that provided by the local authority family finder, social worker and guardian. He considered the factors in the statutory welfare checklist, including the wishes and feelings of the children, noting that A in particular wished to return to her mother's care. He observed that it was plainly a finely balanced decision, and the judge, having reminded himself of the law including the decisions of this Court in *Re G* [2013] EWCA Civ 965 and *Re B-S* [2013] EWCA Civ 1146, set out the advantages and disadvantages of each option. He concluded:

> "I do accept that placing A and B for adoption will not be straightforward, but after balancing all the factors, I am firmly of the view that these children should have the opportunity to develop over time a significant and deep attachment with adoptive parents, free from the label of cared for children. There is a risk of foster care placement or adoptive placement

> breakdown, but I acknowledge that adoptive parents, fully appraised of B, are likely to make more of an emotional investment in the children. A and B should have the prospect of a permanent secure and stable home.
>
> Of course, if no successful matching takes place, the children will remain in long-term foster care. [The mother] will continue to have contact with the children. [The social worker] made clear in his evidence that, although not a prerequisite, the local authority would look for an open adoption, so mother can still see the children. I anticipate this would depend, not just on the views of the adopters, but whether such contact impeded the children from emotionally attaching to their adoptive carers."

14. The district judge therefore approved the local authority's plan for adoption, dispensed with the mother's consent to adoption, and made care and placement orders.

15. Initially thereafter, the children remained in the interim foster placement where they had settled and were thriving. In July 2021, for reasons arising from the foster carers' personal circumstances, they moved to another foster placement where they continue to thrive. According to the local authority social worker, A observed that their next move needs to be to a more permanent placement. The children have remained at the same schools where they are said to be settled. B is said to have made considerable developmental progress during the course of the past year, in particular in speech and language. The local authority pursued a search for adoptive parents able and willing to take both children. In October 2021, a prospective adopter was identified.

16. On 26 October 2021, the mother filed an application to discharge the care order. On 23 November, she filed an application for leave to apply to revoke the placement order. In her statement in support of her applications, the mother said she believed that there had been significant change in her circumstances since the conclusion of the care proceedings in February 2021. She produced evidence of hair strand testing and alcohol testing to demonstrate that she had remained abstinent since October 2020. She also produced evidence that she had attended cognitive behaviour therapy as recommended by Dr Mayer and also counselling to help her manage stress. She had also undergone several courses about autism with a view to understanding more about the condition so as to help her look after B should he be returned to her care. She had attended all contact visits with the children allowed by the local authority, although recently the frequency of contact had been reduced. She acknowledged that she had made mistakes in the past which had led to the children being in care. She said that, if the children were returned to her, they would remain living in the family home they knew. She added that she was slowly increasing her hours of work so would be able to provide for them. She concluded: "I am not the person I was at the beginning of the last set of care proceedings. I have focused on looking after myself and making sure that I am [the] best version of myself for my children."

17. On 9 December 2021, the children's guardian filed an application under Part 25 of the Family Procedure Rules for permission to instruct Dr Mayer and Ms Kenley to provide updating psychiatric and parental assessments. In the application, the guardian said: "It is considered that updating assessments are essential in order to assess whether the … mother is able to care for the children and have them returned to her sole care". In a

position statement filed before the directions hearing on 10 December 2021, the solicitor for the children on behalf of the children's guardian informed the court that "purely from reading the documentation submitted by the mother the guardian is inclined to the view that mother should be reassessed to consider her current ability to meet the children's needs", although he emphasised the guardian had "reached no view yet". At the case management hearing on 10 December, a district judge listed the application for leave to apply to revoke the placement order before a recorder on 22 January 2022, and made various case management directions. The order included recitals (1) that the local authority had informed the court that it was seeking "to progress matters to panel in January 2022 and placement with the prospective adopters [sic] in February 2022" and (2) "that the guardian having issued Part 25 applications …and stated to the court that the mother had made significant changes since the last hearing however, she supported the local authority's application for adjournment of today's hearing to enable further evidence to be provided in respect of the progress of family finding."

18. In a statement filed on behalf of the local authority, the children's social worker applauded the mother for the changes she had made, but noted that, whilst she had managed to abstain from alcohol and engage with therapy and counselling following the first care proceedings, she had been unable to sustain this progress after the children were returned to her care in August 2019. The social worker observed that she struggled to maintain abstinence and engage with interventions and support over the long term. In those circumstances, the local authority remained concerned that the children would be at risk of future harm if returned to her care.

19. In a further statement, the local authority's family finder described the challenges faced trying to identify an adoptive placement for these children. She reported that there are fewer approved adoptive families willing to consider children over the age of five, or able to meet the long term emotional, social and behavioural needs of sibling groups. There are also fewer approved adoptive families able to consider a child with problems of the sort displayed by B as a result of autistic spectrum disorder or unexplained developmental delay. Fewer approved adoptive families are able to consider children where there is little information about a parent and his or her family health history. The family finder described the efforts she and colleagues had made to identify a suitable placement for these children over several months in the course of 2021. Eventually, one prospective adopter has been identified. She is White British and assessed by her agency as being able to care for two children up to the age of seven. She seems to be well supported by her own adoption agency. After assessing information about this prospective adopter, and a series of preliminary meetings, the local authority is hopeful that she may be approved to adopt the children.

20. In the light of the children's ages and needs, it was the local authority's view that this represented the one opportunity for the children to achieve an adoptive placement. The authority was therefore concerned that, if the mother's application to revoke the placement order was allowed to proceed, there was a significant risk that the children would not be placed for adoption.

21. For those reasons, the local authority contended that neither limb of the test for granting leave to apply to revoke the placement order was satisfied.

22. As noted above, the guardian's initial position on being reappointed had been to apply for updating psychiatric and parenting assessments of the mother. In a detailed analysis for the contested hearing, however, the children's guardian adopted the same position of the local authority. She observed that, even if the placement orders were revoked and the mother assessed positively, there was a risk that she would relapse as she had done in the past when the children were returned to her care. The guardian considered this to be a risk which was highly likely to continue. She expressed the view that, if a prospective adopter had not been found so that the children faced the prospect of further changes in foster care placements, it may have been reasonable to look at the option of returning the children to the mother's care "where both sides of this equation could be further considered and balanced". There was, however, now "a very good prospect for adoption for the children" and in the guardian's view this provided an opportunity to give the children the very best option for security, stability and good nurturing care which should not be missed.

23. In a well-structured judgment, the recorder summarised the background and the parties' respective positions. He correctly set out the legal test to be applied when considering an application for permission to apply to revoke a placement order. He summarised the evidence, noting in particular the mother's description of the factors which she asserted amounted to a change of circumstances, and the evidence of the social worker and guardian, and the parties' submissions. In his discussion and concluding analysis, he started by recalling the findings made by the district judge in February 2021. He recited some of the positive and negative factors identified by the district judge in his first judgment in November 2020. He reminded himself that, when considering whether there had been a change of circumstances, the bar must not be set too high. He summarised again the changes that the mother claimed had taken place and indicated that he was prepared to accept that the evidence showed that she had been abstinent for over a year.

24. He then considered the first issue, whether there had been a sufficient change of circumstances.

> "It is highly commendable that [the mother] has taken the steps as described in her witness statement. I also recognise that this is a finely balanced case. Having carefully considered all of the evidence, however, in my judgment to the extent that there has been a change, it is not a change of circumstances of a nature and degree sufficient to reopen consideration of the issue. As found by DJ Jabbitt, [the mother] has previously been abstinent from alcohol for a sustained period of time. Previously it was between January and September 2019 when the children were being cared for by the local authority under an ICO. Albeit for a slightly longer period of time, but once again (and to her credit) [the mother] has been able to sustain a period of abstinence while the children have not been in her care. DJ Jabbitt also recorded that [she] had attended counselling and asserted that she was more able to deal with stressful situations. Again, whilst to her credit, [the mother] has now attended eight CBT sessions, mere attendance does not amount to a change which is of a degree sufficient to reopen consideration of the case. What I see in the

> evidence is largely a repetition of what has happened previously, not a change which is of a nature and degree sufficient to reopen consideration of the case. Further, in relation to whether the abstinence is sustainable (whether the children are returned to her care or not), the evidence before the court today in my judgment does not allow me to conclude that there has been a change from DJ Jabbitt's finding that 'the weight of evidence is that she will return to using alcohol, particularly when not under scrutiny and when subject to stress'. The evidence before the Court regarding the mother's attending CBT and counselling unfortunately does not assist on this issue. It does not address [her] 'long standing alcohol dependency' or her ability to abstain from alcohol. I agree with [the guardian's advocate] that there is no evidence either way before the Court in relation to this issue."

25. Although the recorder therefore concluded that there had not been a sufficient change of circumstances, he proceeded to consider the second stage of the legal test, namely whether in all the circumstances leave should be given.

> "In relation to prospects of success, they need to be more than just fanciful. There needs to be a real prospect of success. The history of this case and the court's previous findings are crucial. With regard to the mother, I agree with the Local Authority that the position has largely remained static. Whilst commendable, it is largely a repeat of what has happened previously. There is no evidence before the court which could lead the court to safely conclude that there has been a change in the position regarding risk of relapse from that set out by DJ Jabbitt. In my judgment, the evidence placed before the Court does not suggest that the *Re B* and *Re B-S* analysis would be any different from that carried out very carefully by DJ Jabbitt in his judgments of 20th November 2020 and 12th March 2021. The Court has previously undertaken a comprehensive holistic balancing exercise ultimately concluding that adoption was necessary and proportionate. I agree with the Local Authority that the risks 'have by and large remained static'. As such, I do not consider the application has a real prospect of success."

26. He continued:

> "In relation to the children's welfare, I take into account a number of matters. These children have already been through two sets of public law proceedings. They are in the care of the local authority for the second time. On both occasions it has been due, in large part, to the mother's relationship with alcohol. As the guardian points out, they have experienced great instability with significant neglect and emotional harm being featured in their lives in the care of their mother. Both A and B need long-term security and stability. This is needed now and throughout their lives. That is what the court has previously concluded and

> that is my conclusion too. I take into account that it has taken a long time for the local authority to find a prospective adopter but I also accept the reasons as to why it has taken so long. In my judgment it is important that the opportunity is not lost. If it is lost, the prospects of obtaining another suitable adoptive placement, I accept, may be much less."

The appeal

27. The grounds of appeal put forward on behalf the mother contended that the judge:

(1) failed to give sufficient weight to the evidence demonstrating the length of time that the mother had remained abstinent;

(2) failed to give sufficient weight to the evidence demonstrating her new learned skills from engaging with CBT, counselling and other services since the last proceedings;

(3) failed to give sufficient weight to the evidence demonstrating her further change of circumstances, including her personal relationship, stable home and stable mental health;

(4) failed to apply the correct legal test adequately and set the bar of "change of circumstances" too high;

(5) placed too much weight on the history of the previous proceedings;

(6) failed to conduct a balancing exercise and failed to take into account the issues of the nature of harm or risks and proportionality;

(7) failed to give any weight to the strength of relationship between the children and the mother, in particular A, and discounted that bond and B's special needs as factors that could prove difficult for the single prospective adopter to manage.

28. In his succinct and cogent oral submissions on behalf of the mother, Mr Ranjit Singh, who did not appear at first instance, crystallised his client's case into two propositions. (1) The recorder set the bar far too high when considering whether there had been a change of circumstances. (2) As the prospects of the mother achieving a revocation of the placement order were more than merely fanciful, it was in the children's interests for leave to be granted.

29. Mr Singh submitted that the recorder's conclusion that the mother's abstinence was "largely a repeat of what has happened previously" and that her position "remained largely static" failed to take account of Dr Mayer's opinion in 2020 and the other positive features of her progress since February 2021. It was accepted that she had remained abstinent for over a year. The factors which Dr Mayer had identified as being important for the mother's progress to be sustained were all present. There was no evidence to contradict Dr Mayer's opinion, shared by Ms Kenley, that the mother had the ability to abstain from alcohol to provide effective care for her children. Mr Singh submitted that it was notable that the immediate reaction of the guardian on receipt of the mother's applications was to propose follow-up assessments from Dr Mayer and Ms Kenley and to state through her advocate at the case management hearing on 10 December 2021 that the mother had made significant changes since the last hearing. In

the circumstances, the recorder's conclusion that there had not been a sufficient change in circumstances was simply wrong.

30. With regard to the second stage, whilst it may be right that the adoptive placement which had finally been identified might represent the last chance for the children to be adopted, the recorder had failed to acknowledge that the mother's progress represented the last chance for the children to be brought up by her. It is a fundamental principle that children should wherever possible be brought up within their natural families, and an adoption order was "a last resort", only to be made "where nothing else will do": *Re B* [2013] UKSC 33. Accordingly, the mother's prospects of success were real rather than fanciful and it was in the children's interests for the application to revoke the placement order to be allowed to proceed.

31. On behalf of the local authority, Ms Caitlin Ferris submitted that the recorder had identified and applied the correct legal principles. He had rightly taken DJ Jabbitt's judgments as his starting point, warned himself against setting the bar too high, and acknowledged that it was a finely balanced decision. He had been right to note that the mother had been abstinent for a period of months at an earlier stage but had not been able to maintain sobriety when the children were returned to her care. His conclusion that the change in circumstances was insufficient could not be said to be wrong in law. In addressing the second limb of the test, the recorder had paid due regard to both the mother's prospects of success and the children's welfare. His conclusion that the situation had remained static was supported by clear evidence.

32. The guardian, whose position was the same as the local authority's, was not granted public funding for representation at the hearing of the appeal. In a written note, the solicitor for the children submitted that the judge had identified and applied the correct legal principles, that the grounds of appeal overstated the change in the mother's circumstances, that the recorder had been perfectly entitled to conclude that the change was not sufficient to justify reopening issues, and that criticisms of the weight which he had applied to various factors should not lead to a successful appeal in this Court where it is recognised that issues of weight are a matter for the trial judge. It was acknowledged that the guardian had initially proposed updating psychiatric and parenting assessments but on receiving further information about the proposed adoptive placement had decided that this proposal would only be pursued if the mother was granted leave to apply to revoke.

Discussion and conclusion

33. This Court is always cautious about interfering with the discretionary decisions of judges at first instance. In this case, the recorder approached his task carefully and with the correct legal principles in mind. Nevertheless, I have come to the conclusion that his reasoning on both limbs of the test was flawed.

34. In order to evaluate whether there has been a change of circumstances, the court must have sufficient information about the circumstances which led to the placement order being made. In *Re S (Leave to Oppose Adoption Order: Appeal)* [2021] EWCA Civ 605, the Court of Appeal allowed an appeal against the refusal of leave to oppose the adoption and ordered the rehearing of the application for leave on the grounds, inter alia, that the judge did not have a transcript of the judgment setting out the reasons why the placement order had been made. That case involved an application for leave to

oppose an adoption, but the same principle applies to applications for leave to apply to revoke a placement order. Sometimes a transcript of the earlier judgment will be sufficient, but in other cases it may be necessary to look beyond the judgment in order to elicit the relevant circumstances at the time the placement order was made.

35. The conclusion reached by DJ Jabbitt in February 2021 that the "weight of evidence is that she will return to using alcohol, particularly when not under scrutiny, and when subject to stress" was based on his assessment of the totality of the evidence at that stage. But the validity of that assessment did not necessarily continue indefinitely. On the contrary, the evidence of Dr Mayer, set out in his report but not cited in DJ Jabbitt's judgment, was that the longer the mother remained abstinent, the better her chances of staying so in future and that it would be reasonable to assess her prospects of sustained progress after six to twelve months of abstinence. Similarly, DJ Jabbitt's conclusion that "the weight of professional opinion that she cannot provide safe care for her children" was also based on the totality of the evidence then before him. Again, however, the validity of that assessment did not necessarily continue indefinitely. On the contrary, the jointly held view of Dr Mayer and Ms Kenley was that the mother had the ability to maintain stable mental health and abstain from alcohol in order to provide an effective standard of care for her children. It was Dr Mayer's evidence, set out in his report but again not cited in DJ Jabbitt's judgment, that her chances of sustained progress would be improved if she made an important change in her thinking, taking ownership of her difficulties and not blaming others, was prepared to work openly and honestly with professionals and accept the validity of their concerns, sorted out her financial difficulties, avoided entering into another unstable or abusive relationship, distanced herself from those who have problems with alcohol, demonstrated continuing satisfactory mental health and effective day to day functioning, and underwent CBT.

36. In order to evaluate the extent of the change in the mother's circumstances in January 2022, having accepted that the mother had remained abstinent for over twelve months, it was therefore necessary for the recorder to assess the significance of that continued abstinence in conjunction with the other factors identified by Dr Mayer. As I read his judgment, the recorder did not carry out that evaluation. Instead, he merely took DJ Jabbitt's conclusions as his starting point and found that the period of abstinence prior to the latest hearing was not significantly longer than the period prior to the making of the supervision order and that what he saw in the evidence was "largely a repetition of what has happened previously". In fact, the mother had remained abstinent for several months longer than she had prior to the making of the supervision order and had exceeded the period of six to twelve months after which Dr Mayer had considered it would be appropriate to reassess her capacity to sustain progress. Furthermore, there was some evidence that she had taken ownership of her difficulties, acknowledging her responsibility rather than blaming others, accepted the validity of professionals' concerns, sorted out her financial difficulties, avoided entering into another unstable or abusive relationship, distanced herself from those who have problems with alcohol, and demonstrated continuing satisfactory mental health and effective day to day functioning. In addition, she had undergone CBT and counselling, taken courses on autism to help her understand B's needs and problems, increased her working hours, and regularly attended contact with the children. With respect to the recorder, I do not agree that this can properly be described as "largely a repetition of what has happened previously".

37. I therefore accept Mr Singh's submission that, in considering whether there had been a change of circumstances sufficient to open the door to the exercise of the discretion to allow the mother to apply to revoke the placement order, the recorder set the bar too high. He failed to carry out a sufficiently thorough analysis of the mother's professed change of circumstances. Of course, the evidence about the mother's circumstances was limited. Apart from the evidence of abstinence, which the recorder accepted, the evidence was principally what was set out in her statement, in some respects corroborated by the social worker. But this was only an application for leave, not the substantive application to revoke. It is inevitable that the evidence at this point will be incomplete. That is one reason why it is important not to set the bar too high. To the extent that there was evidence about those factors, it was positive.

38. Had the recorder considered the mother's period of abstinence in the context of the markers identified by Dr Mayer, and the mother's evidence about them, he ought to have concluded that there had been a change of circumstances of a nature and degree sufficient to open the door to the exercise of discretion.

39. Turning to the second stage, the flaw in the recorder's evaluation was repeated. When considering whether the mother's prospects of success were more than merely fanciful, he accepted the local authority's submission that "the position has largely remained static" and found no evidence "which could lead the court to safely conclude that there has been a change in the position regarding risk of relapse from that set out by DJ Jabbitt". In my judgment however, he should have analysed the mother's evidence by reference to Dr Mayer's opinion. Had he done so, he would have concluded that the evidence before the court, inevitably limited at that stage, was more indicative of progress than of stasis.

40. When considering the children's welfare, which is, as already noted, a relevant factor but not paramount, the recorder was right to take into account the harm the children had suffered, their need for security and stability, and the fact that the local authority has now, after a long search, identified a possible adoptive placement, albeit one that has not yet been subject to the matching process. But as part of his evaluation of their interests he ought also to have considered the value to these children of retaining a relationship with the mother with whom they have a close bond, and perhaps of being returned to her care at some point in the future. In having regard to the child's welfare or interests, the court will have to consider a range of factors which are likely to include many of the factors in the checklist in s.1(4) in the 2002 Act. In ***M v Warwickshire***, supra, this Court held that s.1 does not apply to applications under s.24(2)(a) so that it is not obligatory under the statute to have regard to those factors in the s.1(4) checklist. But it does not follow that they should not be taken into consideration. On the contrary, in so far as they are relevant to an evaluation of the child's welfare or interests, they plainly must be taken into account. Thus the harm that the children have suffered, and are at risk of suffering, are relevant factors and the recorder was entitled to take them into account. But the relevant factors also include the relationship which the children have with the mother, the likelihood of any such relationship continuing and the value to the children of it doing so.

41. The recorder expressed the view that the evidence did not suggest that the ***Re B*** and ***Re B-S*** analysis would be any different from that carried out very carefully by DJ Jabbitt in his earlier judgments in which he had "undertaken a comprehensive holistic balancing exercise ultimately concluding that adoption was necessary and

proportionate". But the *Re B-S* analysis undertaken by the district judge in February 2021 had focused only on long-term fostering and adoption because at that stage they were said to be the only realistic options, return to mother having been ruled out at the earlier hearing in November 2020. There had never been a holistic balancing exercise comparing adoption with a return to the mother's care.

42. For those reasons, the recorder's exercise of his discretion as to whether to grant the mother leave to apply was flawed. Both Dr Mayer and Ms Kenley had concluded in 2020 that the mother had the ability to maintain stable mental health and abstain from alcohol in order to provide an effective standard of care for her children. Given the mother's progress, assessed in the context of Dr Mayer's report, her prospects of success are more than fanciful. On the limited evidence available at this stage, she has a real prospect of success. In all the circumstances, it is in my view in the children's interests for the court now to consider again the options for their future care.

43. Having found that, contrary to the recorder's view, the change in the mother's circumstances is sufficient to open the door to the exercise of the discretion, I conclude that she should be granted leave to apply to revoke the placement orders and that the appeal should therefore be allowed.

44. In reaching that conclusion, I stress that I am expressing no view as to whether the application should or should not ultimately succeed.

45. It is plainly important that the issue be determined without delay. At the conclusion of the hearing of the appeal, we made an order allowing the appeal, granting the mother leave to apply to revoke the placement orders, and remitting the case to HH Judge Rowe QC, Designated Family Judge for West London, to allocate the case to a circuit judge for (1) a case management hearing as soon as possible and if possible in the week of 7 March 2022 and (2) a full hearing to determine the mother's applications for revocation of the placement order and discharge of the care order. The order included a recital that the parties should endeavour to agree any proposed assessments and directions 48 hours in advance of the hearing and, in any event, file any applications under Part 25 of the Family Procedure Rules and attend the hearing in possession of the timescales for any proposed expert(s). We had in mind that the parties and the court may conclude that updating assessments should be obtained from Dr Mayer and Ms Kenley, as originally proposed by the guardian. The case management hearing has now been listed before HH Judge Oliver Jones on 10 March. I am very grateful to Judge Rowe and Judge Jones for arranging for it to be accommodated in what I know to be extremely busy lists at West London.

LADY JUSTICE WHIPPLE

46. I agree.

LORD JUSTICE MOYLAN

47. I also agree.