Case No: CM133/15

IN THE FAMILY COURT
SITTING AT CHELMSFORD

IN THE MATTER OF THE CHILDREN ACT 1989
AND THE ADOPTION AND CHILDREN ACT 2002
AND IN THE MATTER OF: X (A CHILD)

Priory Place
New London Road
Chelmsford
CM2 0PP

Friday, 11th March 2016

Before:

THE HONOURABLE MRS JUSTICE PARKER DBE

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Re: X (A Child)

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Counsel for the Local Authority: Mr Archer
The Mother appeared In Person
Counsel for the Father: Mr Aherne
Counsel for the Prospective Adoptive Parents: Mr Chaloner

Hearing date: 11th March 2016

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JUDGMENT

APPROVED JUDGMENT

THE HONOURABLE MRS JUSTICE PARKER DBE:

The proceedings

1. The mother applies for leave to oppose an adoption order in respect of her youngest child, 'X', born on 28th May 2012, therefore just under 3 years and 9 months of age. The application is supported by the father, although he does not seek to care for his child. He is presently serving a substantial term of imprisonment for a serious S. 18 Offences Against the Person Act assault on an unrelated victim. He will not be released on current estimates before 2019 and possibly as late as 2021.

2. X is the subject of care and placement orders obtained by Essex County Council 'Essex', represented by Mr Archer, the father is represented by Mr Aherne, and the mother is in person. Her solicitors came off the record on 7 March 2016, the middle of last week. The proposed adoptive parents, Mr and Mrs A, with whom X was placed on 3rd September last year, just over six months ago, are represented by Mr Chaloner.

3. The mother has two other children, a 19-year-old daughter who is living with her, and a younger son. X was made the subject of care proceedings at birth due to the mother's relationship with the father and his unpredictable and violent behaviour. There had also been significant violence in her relationship with the father of her son. Those concerns had led to local authority involvement sometime prior to X's birth. Later in the proceedings it became apparent that she had longstanding problems with drugs, principally cannabis and amphetamines. Her elder daughter was never in fact removed from her care. The local authority says that she was made the subject of a child protection plan. The mother says that it was a child in need plan. The mother says

that her son, now 16, lives with her. Essex says that he was living with his father from before X's birth during the time of their intervention but are not aware of the current position. I need not make any findings.

4. I am grateful to Mr Archer for his chronology, not essentially disputed, which also provides some explanation as to why, proceedings having been commenced so very long ago, the care and placement order in respect of X made on 21st August 2013, and the last goodbye visit having taken place between her and her mother in November 2013, they have taken such a long time to get to this stage. By section 1(5) of the Children Act 1989, delay is presumed to be inimical to the welfare of a child. From all I know about X and the circumstances in which she now finds herself, this case is a paradigm example of the harm caused by delay.

5. X was placed in foster care from birth, initially under police powers and then under interim care orders. The mother spent a period of residential assessment at a well-known facility and on 16 October 2012 X was placed with her mother, even though the local authority already had significant concerns about the mother's continued use of amphetamines and cannabis and whether she was being honest with them about this. At a contested care application in March 2013, by which time X was already 10 months of age, the local authority's application for care and placement orders was adjourned to give the mother an opportunity to demonstrate that she was in fact abstinent from illicit drug use, as she claimed. That of course was already in breach of the 26-week limit which was certainly contemplated if not already in place by that time, but, as the President has made clear in a recent decision, substance abuse cases may fall into a different category and the prospect of rehabilitation is extremely important in decision making for a child.

6. The final hearing of the care proceedings commenced in July 2013. On 28th August Judge Staite, who at this court, Chelmsford County Court, has principally been the judge in charge of X's future, gave a reserved judgment and made care and placement orders. Her findings were that the mother's drug use had not been properly admitted to the court, that it continued, and that the court had not been told the truth about that and other important matters including the true state of the mother's relationships. Judge Staite stayed the order pending the mother's appeal.

7. An oral permission hearing was granted on 3 September 2013 and the stays continued. Permission was eventually refused on 17 September 2013, and the stays accordingly discharged or lapsed. X was removed from her mother's care, and placed in a foster placement with her former foster carer. She then remained there for a two further years as litigation continued.

8. The mother is supported by a family and friends network who are close and whose views do not in any way differ from her perception of what is in X's interests. Her maternal uncle and aunt Mr and Mrs B then made an application on 4 October 2013 for leave to apply for a residence order. Their application was refused by Judge Staite. At a hearing on 25 October 2013, she found that she could not identify any change of circumstances to merit the revocation of the placement order.

9. On 12 November 2013 the mother made an application for leave to apply to revoke the placement order. Judge Staite refused it in January 2014, finding on evidence that the mother had again used amphetamine and cannabis, although she did not admit this. No change in circumstances was identified and the judge did not consider that the application to revoke would be successful.

10. A goodbye visit between X and the mother, her elder daughter and Mrs B took place on 19 November 2013. The father had last seen X in July 2013. Due to the deterioration in his mental health, arrangements for a goodbye visit were shelved and it never in fact took place. X has not seen any family member since these visits.

11. The mother did not seek to appeal against Judge Staite's decision of 6th January 2014 but issued her second application for leave to apply to revoke the placement order on 10 February 2014. X had been matched with prospective adopters and Essex made a cross-application for leave to place X with the identified adopters. I need not consider that, although it does not immediately strike me that there was any necessity for such leave to be sought as a matter of law since Essex had their care order and placement orders and had parental responsibility which overrode the mother's. I suspect that the application was made out of abundance of caution.

12. In April 2014, His Honour Judge Newton, as he then was, Designated Family Judge at this court, granted the mother's application for permission and made no order on the local authority's application to place. He was concerned about the proper interpretation of the hair strand and urine analysis before the court, upon which the finding of continued drug use had been made. The reliability of the medical evidence then assumed a central importance in the court's determinative process. It still remains a feature of the case which is presented to me today.

13. The application was listed before Judge Lochrane. He heard the mother's second application for revocation over four days, refused it, and declined permission to appeal.

14. The mother sought permission to appeal to the Court of Appeal, asserting for the first time that she had a possible thyroid condition, arguing that it might have affected the reliability of the drug testing. Permission to appeal was granted by McFarlane LJ.

15. The almost inevitable result was that adopters under consideration as carers for X withdrew, citing as their only reason ongoing uncertainty caused by the litigation.

16. The appeal was heard by Laws, Patten and Macur LJJ on 27 October 2014 but not finally determined. Three questions were remitted to Judge Lochrane for his consideration: namely whether the mother suffered from a thyroid condition, which was not clear; was there any link between any such condition and the positive testing since the summer of 2013; and if so, was there any impact upon the judge's findings.

17. A further hearing therefore took place before Judge Lochrane in November 2014, for which further expert evidence was commissioned and evaluated by three experts. Judge Lochrane held that the mother had subclinical hypothyroidism. It was impossible to say if there was a link between that and the positive test result but the expert evidence did not invalidate the concerns; any change in the expert evidence was likely to increase the magnitude of the concerns rather than their character or their extent. Judge Lochrane did not consider that his conclusions had been invalidated. He took the view, hardly unsurprisingly in light of the history, that this was not a single issue case.

18. Within a fortnight of Judge Lochrane's judgment the mother was sentenced to two years' imprisonment in the Crown Court for an offence of money laundering. This came to light only incidentally. She had not previously disclosed to anyone in the Family proceedings that she faced criminal proceedings. The offence dated back to 2011 and she was tried under a different name. The mother explained to me today and

has explained to me on paper that she much regrets having not disclosed the information about the criminal charges but that she never thought that she would go to prison. An obvious explanation as to why she did not disclose this information to this court was because she appreciated, and as I say she is an intelligent lady, that it would be bound to have an effect on her applications in respect of her daughter.

19. The mother's appeal, adjourned on the remission to Judge Lochrane in October 2014, came again before Patten and Macur LJJ on 1 December 2014 and was dismissed, and the guardian's Respondent's notice withdrawn. The Appeal Court did not consider the issues arising out of the dispute with regard to medical evidence. The mother's appeal was obviously of no practical effect since she was not available to care for the child. The local authority was asked to undertake not to place X for adoption until 12th December as the mother's elder daughter, then just 18, was considering her position.

20. The elder daughter issued an application for leave to apply for revocation of the placement order, discharge of the care order and for a child arrangements order in her favour, on 10 December 2014. A viability assessment was negative, primarily because the social worker concluded that the elder daughter saw herself only as a temporary carer pending her mother's release from custody. I do not know whether it was at this time or earlier in X's life that that elder daughter, as the mother told me today, sought from the local authority a placement whereby she could join her younger sister, well over 15 years younger than her, and her mother in either a mother and baby home or some kind of supportive foster placement. This points to the strength of united family feeling, but much responsibility and potential burden was assumed by a young girl still in her teens.

21. In February 2015, by then more than a year and a half after the making of the care and placement application, Judge Staite dismissed the elder daughter's application which she found was a sufficient change in circumstances, but that the extended family still lacked insight into the mother's problems and would be likely to return X to the mother's care upon her release. She also refused permission on the basis that the substantive application would be unlikely to be successful. She refused permission to appeal.

22. The elder daughter issued an appellant's notice on 6 March 2015 and on 11 June 2015 Black LJ refused her permission to appeal.

23. The mother issued a third application for permission to apply to revoke the placement order on 4 June 2015. On 2 July 2015 Judge Lochrane refused her application on the basis that she had not been able to demonstrate a sufficient change in circumstances and even if she had, that the prospects of success of revocation were extraordinarily small, particularly because of the mother's dishonesty.

24. Also on 2 July X was finally matched with new, current prospective adopters, Mr and Mrs A, with whom she is now living.

25. The mother applied for permission to appeal against Judge Lochrane's refusal of permission on 3 July 2015.

26. On 7 July 2015 the local authority issued another application for permission to place X with the identified adopters. On 28 July 2015 Lady Justice King dismissed the application for permission to appeal against the refusal to permit her to apply to revoke the placement order.

27. On 3 September 2015 (six weeks later) X was placed with the prospective adopters.

28. In October 2015, the mother emailed Essex notifying them of an online petition she had begun seeking the return of the child. Essex received notification very shortly thereafter that further information about X including a photograph had been posted on the website. Mr Archer tells me that the information given on line about the case and why X has been removed from her care was grossly untrue and misleading.

29. The mother, it is believed, then issued an application for judicial review in respect of the placement for adoption but this did not progress. Ex parte orders were made on Essex's application restraining publicity on 5 November and continued inter partes on a slightly varied basis by Hayden J on 29 January 2016. In the meantime, on 15th December, Mr and Mrs A applied to adopt X and a directions hearing took place in front of Judge Staite on 18th February 2016.

30. Judge Staite listed the hearing before me as Family Division Liaison Judge for this part of the circuit sitting here in Chelmsford, but also because she thought it might be helpful for there to be a fresh eye on the proceedings, now of sufficient complexity and difficulty to warrant High Court attention.

Preliminary issue about disclosure and injunctions

31. Further events have happened over the last few days. I was notified of them last night through Judge Staite and I have heard some evidence about what happened today.

32. Yesterday morning, the mother, and she is to be commended for this, notified the local authority that she had received from Essex an unredacted bundle by email with full details of the applicants' names, whereabouts, and other material which was supposed to be excised from the bundle served upon her. She had requested the paper electronically from Essex over the telephone since she was now representing herself.

33. When they learned of this, Essex was extremely anxious, in light of the mother's firm and resolute opposition to the adoption and wish to reclaim her daughter, that something might happen, perhaps an approach to the foster parents, publication of their identity and whereabouts, or perhaps worse. Judge Staite made holding orders. She sent me an email whilst I was delivering a judgment in London to tell me what had happened and asking whether I needed to make any form of inherent jurisdiction order. I emailed back that I was available over the telephone if the local authority wanted to apply and gave her a mobile number. I do not think she received that email that evening.

34. The local authority, in the event, made an application to the out-of-hours judge, Mr Justice Keehan, who made an order to prevent the removal of X from the care and control of the named prospective adopters, a prohibited steps order and a protection from harassment order not to use or threaten violence against the prospective adopters; from intimidating, harassing or pestering them or from going within 100 metres of their address, which she now knew; and also made anti-publicity orders. He left it to me to decide whether the orders should continue at the hearing. He made orders that the copies of the adoption proceedings were to be destroyed and the mother was prohibited from disseminating them any further.

35. Judge Staite had asked that the person responsible should be here at 9.45 am, so the matter could be addressed in the absence of the parents before commencing the mother's application itself. I was delayed by train problems, and the father was also brought late to court. I took the view, once I had established that the mother indeed did know these details, that it would be better to conduct this enquiry in as transparent a manner as possible rather than leaving the mother or father worrying about what was

being said in their absence and being excluded from the process. So this was dealt with as part of the main application.

36. I heard Miss Gundova, the legally qualified person responsible for the conduct of this case. The paralegal who sent the bundle had simply not asked her whether this was the right one. Earlier that week I had asked for an electronic bundle to be created and sent to me, unredacted, to ease preparation, since I was sitting both in London and Chelmsford. There is a strong suggestion that the paralegal felt that there was time pressure, since the mother was concerned to replace the statement filed on her behalf with a further statement, and may have been out of time. He may have assumed that this was the bundle to be sent out, and he did so. An enquiry is being put in hand by Essex. I am satisfied it has taken this matter extremely seriously, appropriately seriously, and will conduct an enquiry. I raised with Mr Archer whether there might be some impact on costs and I will return to that at the end of the hearing. The mother recognises that she might be treated with considerable suspicion in respect of her potential actions as a result of this disclosure.

37. I accept that the mother has behaved responsibly in regard to this wholly unwarranted disclosure. On the other hand, the mother's seeking of publicity and disclosure of information in relation to X, however desperate she is, may not bode well for the future. I appreciate that there is no actual evidence of an attempt to seek to remove X from the prospective adopters' care but I can understand why alarm was felt about this prospect. It is inevitable that any judge, and I am sure I would have taken exactly the same view, would have felt it was better to be safe than to be sorry.

38. The matter which most concerned me arising out of these events was whether the breach of confidentiality might lead to some reconsideration by the prospective

adopters as to whether they would seek not to adopt X. I raised this matter this morning whilst reviewing the question of how far I needed to hear from Essex, from their Legal Department or any other person responsible for what has caused the data breach.

Conduct of the substantive hearing

39. I suggested that the mother should cross- examine and present her case last, so that she can deal with all the applications and submissions which were addressed to me. She welcomed that proposal.

40. The mother has been courteous, is intelligent, articulate, and has passionate feeling for her daughter but expresses it in court in a measured way. I agree with the other court assessments which have also referred to her dignity, appropriate behaviour and sensible communication with the court. With her intelligence and articulate presentation, she has helped me very significantly as to her case and the reasons why she seeks to oppose the adoption order.

41. Mr Aherne, for the father, has, utterly appropriately in my view, from time to time assisted the mother with the way that she should put her questions and I am most grateful to him. The mother and the father are presenting a common case and it is not in any way in breach of his duty to his client, so far as I can see, for Mr Aherne to give this assistance to the mother as a litigant in person which is consistent with the best traditions of the Bar and his duties to the court.

The present position of the prospective adopters

42. At the outset I told the parties that I wanted to know about the present stance of the adoptive parents in response to the 'data breach'. Mr Archer told me on instructions

that Mr Barron, the service manager, had spoken to them both and that they had told her that this had not caused them to waver in their wish to adopt X.

43. I stated that I thought that instructions would not be sufficient. I needed to hear evidence, albeit that it would be hearsay, on which there could be cross-examination. Mr Archer offered to call Ms Muncey. She had also previously provided the adoption report and made a statement. Both the mother and Mr Aherne confirmed that they wanted to cross-examine Ms Muncey, potentially on this point as well as generally.

44. Essex had arranged for Mr and Mrs A to be represented and Mr Challenor was instructed at some point yesterday. He told the court that he had clear instructions through his solicitors who had spoken both to Mrs A whilst Mr A was travelling within the UK and then to Mr A. The disclosure did not in any way shake their firm desire to become adoptive parents to X.

45. Ms Muncey told me that Mr and Mrs A have a solid, loving, established and consistent commitment to X. When she spoke to them they made it clear that they understand the implications and possible consequences of what has happened. They wish to make her a full part of the family. There is no doubt about their attachment to her and their commitment to her both now and in the future.

46. Ms Muncey told me, and Mr Chaloner confirmed, that the As wish court orders to be made to restrain further dissemination of information and to protect them and X against possible harassment or other disturbance of her home with them.

47. Ms Muncey was not cross-examined on her evidence about the commitment and intentions of Mr and Mrs A to X. The mother does not submit to me and neither does Mr Aherne that I should reject it. I am wholly satisfied with what Ms Muncey told me.

Evidence and conclusions relevant to the substantive issue

48. The mother's presentation of her case through her solicitors in her first statement in this application states, as she has reiterated to me in oral submissions, that she has remained drug-free since December 2013. She has become a mentor through Open Road, a drugs support centre with which she has engaged. She has a stable life with her elder daughter. She was discharged from her two-year custodial sentence in November 2015, having served a year, and is on licence until 2017. She took courses to increase her educational level in prison. She has engaged with her probation officer and she is otherwise seeking professional help. She has undertaken the 'Freedom' programme for victims of domestic violence. She is not in any relationship, let alone a violent one.

49. The second statement, which came to me last night together with its exhibits, focuses on a different aspect of the case, centred on what happened in late 2014, at the time of the hearing before the Court of Appeal, and the extent to which the Court of Appeal was itself concerned on the basis of the information before it as to the reliability of the drug testing evidence. She says that the Court of Appeal never made a finding as to the reliability of the drug testing evidence because it was overtaken by her incarceration in the middle of that appellate process. The second statement does not deal with the asserted changes. The mother describes this as a 'replacement statement' but she addressed me on the basis of her first statement also, so I take both into account, even though she did not have permission for the second.

50. The mother's second statement, and its exhibits, communications from the Court of Appeal, orders and other material in October 2014 which led to the retrial of the remitted issues in November 2014, provide a very limited part of the overall picture.

This does not support the case that medical issues still require to be decided against this extensive background. The decision of Judge Lochrane of November 2014 has not been appealed. No reopening of issues is appropriate or justified at this stage in the process. This is raised at the last possible moment, after the mother had presented her case with legal advice. I cannot ignore that the timetable for the child has been harmfully extended already because of repeat applications and challenge to medical evidence. In any event none of this is a change in circumstances within the meaning of section 47(5) of the Adoption Act 2002.

51. The history and the overall findings by Judge Staite and by Judge Lochrane with regard to drug use, domestic instability and violence, and pervasive and continuing dishonesty, are consistent, and provide overwhelming evidence of a pattern of behaviour. They bind me. I could not as a matter of law, or in practice, disagree with them. I record for the purpose of this judgment that I see no conceivable basis upon which to suggest that the very careful and concurring analyses, in the various lengthy and encompassing judicial investigations which have taken place, are in any way unreliable. In fact, they strike me as models of their kind, conscientious and detailed analyses of the evidence before them. No reinvestigation is appropriate or justified almost 18 months later.

52. I look at what is said about X and her present circumstances. I have read a statement from the adoptive parents, the contents of which have been confirmed by Ms Muncey in her oral evidence, upon which she was cross-examined, as to X's reaction on being moved in autumn of last year from the foster mother with whom she had been for such a very long time, to their care. That statement does not come across as in any way overstated, hysterical or self-serving. It paints a stark but wholly believable picture.

53. X must barely have remembered her mother, whom she had not seen for the best part of two years, at the time when she was moved. She was prepared in so far as a little girl of 3¼ can be prepared. Nonetheless Mr and Mrs A describe how painful she found the move to them and what its effect was on her both physically and psychologically. She had disturbed sleep through nightmares; found difficulty in seeking comfort from Mr and Mrs A; she has marked speech and language delay, likely to be the consequence of her disrupted upbringing as she is a bright child, and her speech deteriorated upon her move; she found the visits by social workers inordinately distressing, so much so that it was necessary to ask them to remove all signs of their profession when they visited, such as lanyards which carried their ID cards. X has had frequent day-time urinary incontinence which increased after visits from professionals. She has made very significant progress at settling with Mr and Mrs A with the assistance of a consultant paediatrician, therapy from Barnardos, and by themselves coming to know her better. She has started preschool. She remains a vulnerable, fragile and unsettled child.

54. Ms Muncey's evidence overall was that this little girl has reacted very badly to the move she has had so far, inevitably in the circumstances. I comment that nothing that has happened is in the slightest bit surprising. The mother accepts that all the moves have been distressing.

55. Mr Aherne on behalf of both parents asked Ms Muncey to consider what supports the local authority could put into place in order to facilitate a move back to the mother. She said that there would be a support plan and she was able to describe, as is common knowledge, that the way to move a child is by initial introductions, sensitively handled,

and then a move as swift as is consistent with the child's pace to make the transition and reattachment work.

56. Ms Muncey could not, in spite of many attempts to ask her to assist the court, put forward anything other than the practical ways in which the transition might be effective. I am quite satisfied that this was not due to a lack of professional skill, imagination or willingness to help either X or the court. She could not suggest any professional support or assistance that could actually be given to X to alleviate her distress, particularly since she is so fragile, which would help her make sense of what was happening to her. There is no way to explain to her, accustom her or make bearable the loss of parent figures to whom she has already made a very considerable attachment even if not yet entirely secure.

57. A further move, particularly if it was unable to be fully supported by parent figures who have come to love her and invest their future in her, would be destructive of her psychological wellbeing and of the progress that she has already, hesitantly, been able to make. X found it difficult enough to move from her foster mother who had no aspiration to keep her and whose heart and her head were in unison in supporting and facilitating X's transfer to her long-term family. However hard Mr and Mrs A may try, it is impossible to imagine that they could consistently conceal their distress. Furthermore, since X has made such a strong investment in that relationship already, she would be bound to perceive any future attempts, or encouragement by Mr and Mrs A or support of her leaving them to go to another family, as a profound rejection, the effects of which would be likely to be lifelong.

58. Although this is entirely understandable to me, the mother cannot truly take on board what a move will mean to X. She sees the benefits of family to X as outweighing all

other considerations. Although she did not actually say this (and she did not give evidence) it was obvious from her cross-examination that she does not envisage that X might find it difficult to settle with her, or might never settle with her. Nor can she imagine that X will face difficulties and could behave in a rejecting and distressed manner, with behaviour of all kinds which would be very destructive to the mother's relationship with her.

59. The mother is wholly unprepared, in my assessment, for what the reality of X's return would bring. She does not truly understand, for reasons again which I am sure stem from her own problems in managing her life and her own feelings about that, the effect of the past on the child or what the past means to the child. Coupled with the mother's problems in managing her own life, it is quite impossible now, whatever the strength of the mother's own personality, and whatever qualities she has, to envisage that the past could be written out of X's life.

60. If X remains with the As, further delay in the adoptive process is highly likely to cause harm as X will not be able to be told that her future is now assured and if she asks a positive answer cannot be given. The A's anxiety about the future is likely to be transmitted to her.

61. Mr Archer points out that the mother has previously asserted that she has been drug free, for instance in March 2013, when Judge Staite was persuaded to adjourn the proceedings, but her assertion was later found to be untrue. Furthermore her use of drugs on 26 December 2013 which she now asserts to have been the last 'blip', was withheld from the court at the time. Scientific testing was positive for April 2013 to April 2014, showing increased use at the end of the period. Throughout her acceptance has been limited and her usage minimised. She has challenged evidence of test results.

In fact her drug use was embedded for at least a decade, possibly a decade and a half, before X was born but this was only established by enquiry in earlier proceedings and its full extent never volunteered.

62. There is much circumstantial evidence, particularly relating to X's behaviour, and observations of the mother's behaviour at the time, to lead to the conclusion that her drug abuse had a direct impact upon the wellbeing of her children, particularly this young and vulnerable child.

The law

63. I turn now to consider the law and again I am most grateful to Mr Archer for his analysis with which no party disagrees in any respect. Mr Archer sets out in its entirety in his skeleton argument section 47 of the 2002 Act. I need not repeat it. The statutory criteria are of course considered in *Re: B-S (Children) [2013] EWCA Civ 1146,* following the Supreme Court's decision in *Re: B [2013] UKSC 33. Re: B* states the importance of the way that the court approaches adoption decisions and contains the now familiar phrase, "Nothing else will do", adoption is a "last resort", and it must be proportionate taking into account ECHR Article 8 rights.

64. Previous decisions particularly of Lord Justice Thorpe suggested that only in "exceptionally rare circumstances" would it be appropriate to permit an application to oppose an adoption order under section 47(5). In *Re: B-S* at first instance I held that exceptionally rare circumstances are not required. I have no hesitation in accepting the President's formulation.

65. The test has two stages. Firstly, whether there has been a change in circumstances of a nature and degree sufficient on the facts of the particular case to open the door to

permitting the parents to defend the adoption application. Secondly, if so, should leave be given?

66. I remind myself of the lengthy passage from *Re: B-S,* (set out in paragraph 11 of Mr Archer's skeleton argument):

"In relation to the second question… the Court will need to consider all the circumstances. The Court will in particular have to consider two inter-related questions: one, the parent's ultimate prospect of success if given leave to oppose; the other, the impact on the child if the parent is, or is not, given leave to oppose…

i) Prospect of success here relates to the prospect of resisting the making of an adoption order, not, we emphasise, the prospect of ultimately having the child restored to the parent's care.

ii) For purposes of exposition and analysis we treat as two separate issues the questions of whether there has been a change in circumstances and whether the parent has solid grounds for seeking leave. Almost invariably, however, they will be intertwined; in many cases the one may very well follow from the other.

iii) Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave. The judge must keep at the forefront of his mind the teaching of Re B, in particular that adoption is the "last

resort" and only permissible if "nothing else will do" and that, as Lord Neuberger emphasised, the child's interests include being brought up by the parents or wider family unless the overriding requirements of the child's welfare make that not possible. That said, the child's welfare is paramount.

iv) *At this, as at all other stages in the adoption process, the judicial evaluation of the child's welfare must take into account all the negatives and the positives, all the pros and cons, of each of the two options, that is, either giving or refusing the parent leave to oppose. Here again, as elsewhere, the use of Thorpe LJ's 'balance sheet' is to be encouraged.*

v) *This close focus on the circumstances requires that the court has proper evidence. But this does not mean that judges will always need to hear oral evidence and cross-examination before coming to a conclusion. Sometimes, though we suspect not very often, the judge will be assisted by oral evidence. Typically, however, an application for leave under section 47(5) can fairly and should appropriately be dealt with on the basis of written evidence and submissions: see Re P paras 53-54.*

vi) *As a general proposition, the greater the change in circumstances (assuming, of course, that the change is positive) and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments based on the child's welfare must be if leave to oppose is to be refused.*

vii) *The mere fact that the child has been placed with prospective adopters cannot be determinative, nor can the mere passage of time. On the other hand, the older the child and the longer the child has been placed the greater the adverse impacts of disturbing the arrangements are likely to be.*

viii) *The judge must always bear in mind that what is paramount in every adoption case is the welfare of the child "throughout his life". Given modern expectation of life, this means that, with a young child, one is looking far ahead into a very distant future – upwards of eighty or even ninety years. Against this perspective, judges must be careful not to attach undue weight to the short term consequences for the child if leave to oppose is given. In this as in other contexts, judges should be guided by what Sir Thomas Bingham MR said in Re O (Contact: Imposition of Conditions) [1995] 2 FLR 124, 129, that "the court should take a medium-term and long-term view of the child's development and not accord excessive weight to what appear likely to be short-term or transient problems." That was said in the context of contact but it has a much wider resonance: Re G (Education: Religious Upbringing) [2012] EWCA Civ 1233, [2013] 1 FLR 677, para 26.*

ix) *Almost invariably the judge will be pressed with the argument that leave to oppose should be refused, amongst other reasons, because of the adverse impact on the prospective adopters, and thus on the child, of their having to pursue a contested adoption*

application. We do not seek to trivialise an argument which may in some cases have considerable force, particularly perhaps in a case where the child is old enough to have some awareness of what is going on. But judges must be careful not to attach undue weight to the argument. After all, what from the perspective of the proposed adopters was the smoothness of the process which they no doubt anticipated when issuing their application with the assurance of a placement order, will already have been disturbed by the unwelcome making of the application for leave to oppose. And the disruptive effects of an order giving a parent leave to oppose can be minimised by firm judicial case management before the hearing of the application for leave. If appropriate directions are given, in particular in relation to the expert and other evidence to be adduced on behalf of the parent, as soon as the application for leave is issued and before the question of leave has been determined, it ought to be possible to direct either that the application for leave is to be listed with the substantive adoption application to follow immediately, whether or not leave is given, or, if that is not feasible, to direct that the substantive application is to be listed, whether or not leave has been given, very shortly after the leave hearing.

x) *We urge judges always to bear in mind the wise and humane words of Wall LJ in Re P, para 32. We have already quoted them but they bear repetition: "the test should not be set too high, because ... parents ... should not be discouraged either from*

bettering themselves or from seeking to prevent the adoption of their child by the imposition of a test which is unachievable."

Conclusions

67. So, I ask myself firstly whether there has been a change in circumstances. I accept that the judge should not set too high a bar in the face of a parent who seeks to better their conditions.

68. The mother's dishonesty with the court and with social services encompassed not only drugs but her relationships with the children's fathers and her own criminal activity. Her online petition either seeks to mislead the public or else she does not accept or understand the past and its impact on X.

69. I have no evidence apart from the mother's assertion, found to be wholly unreliable in the past, that she is abstinent from drugs. Explanations for not providing that evidence to the court are neither convincing nor strong. She says that she went to her GP recently, told him about the history and that the GP wanted to have instructions from the local authority, bearing in mind the queries raised about the previous drug testing, as to precisely what form of scientific investigation would be acceptable to them; she now wanted guidance from the court to the same effect.

70. I do not see any evidence that she sought any direction about drug testing or monitoring from the court at the directions hearing in February when she was represented. She has not sought to introduce into this court process any form of such evidence whatsoever, whether sanctioned by the court in advance or not. In previous proceedings she has been able to obtain testing and place results before the court when in person.

71. She says that she has engaged with the Open Road project. I know so little about them that I cannot say whether they offer drug testing programmes and reports, as many such organisations which I have encountered up and down the country do. I have no evidence whether she has asked them to provide such information and testing. I have no evidence as to her role as a mentor with that organisation or any counselling that she receives or any other monitoring of her behaviour and presentation. It is for the mother to demonstrate change and she has not demonstrated to me that she is drug free.

72. I have no evidence with regards to her engagement with the domestic violence programme or any other programme of counselling, support or behaviour management which might address the social problems which she has met in her own life and the instability of the home which she provided for her children.

73. It is submitted to me by Mr Aherne, and supported by the mother, that the father's incarceration at least for three years is a significant change in circumstances. In my assessment this incarceration, even assuming that he will not be granted earlier parole, does not reduce the risk of this or another violent relationship in the future impacting on X whilst she is still a child, which she will remain for the next 14 years.

74. I have no evidence of any development of insight by the mother into the harmful effects of the delays and X's psychological state now which have arisen by reason of her frequent appeals against orders. Nor do I see any substantive overall recognition that the problems in her own life, which she only partially acknowledges, are the fundamental reason for the court having to intervene in the first place and then not being able to rely on her care of her own child.

75. Her dishonesty has led to an essential lack of cooperation with Essex's intervention to protect X, and has compounded the delays in resolving X's future. She has not in any way explained or given any acceptable explanation for her dishonesty or indicated how she intends to address it. Apologies are insufficient in the circumstances if they are, as they seem to me to be, lacking in depth and true explanation. Furthermore, I see much evidence that the mother's passionate feelings for her own child, which are entirely understandable, and in themselves of course highly to be admired, are inconsistent with her child's needs. Those feelings may be the foundation of her inability to take an objective view, or to see her child's needs anything other than through the focus of her own feelings.

76. The mother has not passed the first hurdle to permit her to defend the adoption proceedings. There are no solid grounds for her to do so. The mother has shown herself unable to meet X's needs and I do not find in her presentation any change in circumstances that is, "…of a nature and degree sufficient on the facts of this particular case to open the door to permit her to defend the adoption application".

77. The father's support of her adds nothing to the case which she advances. He does not seek to defend the proceedings himself. If he did so, I would take the view that his circumstances are such to make any defence wholly unrealistic.

78. If I am wrong on the first question I need to look at the second question, should leave be given, focused on all the circumstances relevant to whether or not the adoption order should be made, not the prospect of ultimately having the child restored to the parent's care[1]. This does not in my view mean that I must not look at the future

[1] In post-judgment submissions the mother stated to me in connection with her application for permission to appeal that she intends to present medical evidence that she is drug free and in respect of the other changes which she asserts.

options, or what the problems may be in reunification, which impact on the child's welfare. I am specifically asked by the parents to consider how reunification can be achieved and to conclude that it is entirely possible and in X's interests. I have to look at all the circumstances and the realistic options for the child. It is part of the question of what is the impact on the child if the parent is or is not given leave to oppose. But I must not focus solely on the prospect of reunification.

79. As Mrs Justice Pauffley pointed out in *Re: LRP (A Child) (Care Proceedings - Placement Order) [2013] EWHC 3974* (*Fam*) the court needs to look at realistic options. If X is not to be adopted by Mr and Mrs A, what does the future hold for her?

80. I accept that the greater the change in circumstances, assuming that there has been a change, and the more solid the parent's grounds for seeking leave to oppose, the more cogent and compelling the arguments based on the child's welfare must be to refuse leave to oppose. For the purposes of the second question, I shall assume that the mother is found to have made the necessary changes.

81. Although the mere fact in itself that X has been placed with prospective adopters cannot be determinative and nor can the passage of time, X's experiences to date, and her emotional fragility, and the fact that she has now found some real prospect of certainty and stability, are of high importance. Return to the mother cannot take place, or is very difficult to envisage, in any way consistent with her short-term, medium-term and long-term welfare.

82. The welfare of the child throughout his or her life, (which means what it says, and is part of the section 1 checklist), is also relevant in the evaluation of whether to grant leave to oppose. The mother has focused on what X's feelings are likely to be in 15 years' time if she is brought up in a family other than her family of origin. Under

section 1, the court must always balance the effect of adoption, which is never a neutral event; and always has losses as well as gains, against the self-evident gain of being able to be brought up by a parent.

83. I take the point that the mother makes that at 18 or perhaps earlier X may question why she could not be cared for by her own family. In fact, she is highly likely to do so. At 18, of course, she will be able to find her mother. She may wish to do so. It is possible she may not. But the long-term damage to her development including speech and language, psychological health, capacity to trust and love and to put down roots, will be profoundly compromised by a move now.

84. I accept that I should not take into account or at least place too much emphasis on the adverse impact of a contested adoption application on the prospective adopters. The President in *Re: B-S* did not say that this was a point which could never be considered. In this case my focus is not on them but on the inescapable and harmful impact of the adopters' inevitable anxiety being transmitted to X, particularly in the event of a move, but also if she stays with them and there is continuing uncertainty.

85. Even if the As were prepared to keep her as a foster child that is not in her interest at her age and particularly in this case. She is already suffering intense anxiety about future moves caused by social services oversight. The future, if she is not to return to her mother, and not to be adopted, is likely to include repeat court proceedings at least, and a high likelihood of greater disturbance.

86. I put into the balancing exercise the fact of the mother's parenthood and the family environment she has around her, and that the mother cared for X for important early months of her life. But that is far from enough to outweigh X's pressing need for her future to be secured by this option for a continued stable upbringing. There is too

much danger to X from all the problems which historically have occurred and which have not been shown to be overcome. Even if there has been a change and the mother is presently drug free and has undergone or does undergo the interventions she describes, the combination of that history and the risk of removal, particularly to the mother's environment where no-one fully understands and will be able to combat the impact of that move, comes down firmly in favour of adoption as in X's best interests for her childhood, adolescent and adult life.

87. The mother makes some criticism of Mr A. The As have been carefully assessed individually and as a couple. This issue does not give ground to oppose the adoption order in the light of the other factors identified to make this placement a very strong one for X and to support adoption by them, and when other prospects will not be in her interests.

88. I conclude that there is no prospect of success if the mother is given leave to oppose, and the consequences for the child would be harmful if she is.

89. I do not blame the mother. Like many others, I regard substance abuse as an illness. The mother has other problems too.

Appeal

90. If the mother wishes to seek permission to appeal that is her right. I hope it is not inappropriate for me simply to point out in that context how pressing is the need for a speedy resolution of X's future now. I have to adjourn this application now for another 21 days. The mother knows that this is the time limit for appeal because she has been through this process before. I shall, however, record in the order, as is my usual practice, that I have advised the mother that the time limit for appeal is 21 days.

Although there is power to extend time, really very strong reasons have to be given in the absence of a compelling reason for delay. She is entitled to ask me for permission now and I will deal with that application. I am willing to be persuaded that there is an error in my judgment but I need her to tell me what it is. She will need to seek permission from the Court of Appeal if I refuse that permission.

91. In any event, if the mother is to go down the appellate path she must do absolutely everything necessary to progress that process as quickly as possible. In those circumstances I normally insert into my order a requirement that the mother should keep the local authority informed (not the adopters), so the local authority will convey this information to the adopters, of every relevant step in the appellate process including the date of the application for permission, any relevant correspondence with the Court of Appeal office, any date of permission applications which the parties are not necessarily entitled to attend but in respect of which they are permitted to lodge written representations, so that the local authority can plan for this little girl with proper knowledge of any legal process.

Publicity

92. I shall deal with the question of publicity injunctions separately. I have already told counsel that I was informed by email last week by the Court of Appeal office that the mother's application for permission to appeal against Mr Justice Hayden's publicity order is being considered on paper at the moment. I did not consider that that process in any way required me to adjourn today's application. The mother has not sought an adjournment of this hearing on that account. I am grateful to her for that. I am satisfied that that appellate process does not impact upon this hearing.

93. I bear in mind that the order of Mr Justice Hayden is being appealed. I will hear submissions now as to the appropriateness of the continuation of the order of Mr Justice Keehan, made in these new circumstances, and in particular whether an undertaking is offered by the mother, and if so I should accept that in preference to an order.

Postscript

94. In *Vince v Wyatt* [2015] UKSC 14 Lord Wilson gives examples justifying strike-out under Rule 4.4 Family Proceedings Rules 2010. These include repeat applications where a similar application on the same facts has already been dismissed. Rule 4.4 does not apply to adoption proceedings. Neither does the power to restrict applications pursuant to s 91 (14) Children Act 1989, which applies in private law proceedings and also has a place in care proceedings. Nevertheless there is no doubt that the court has power to dispose of applications which do not disclose reasonable grounds at an early, abbreviated hearing without full enquiry, assessments, or hearing evidence, as the President makes clear in paragraph (v) of his outline of "all the circumstances" in *Re B-S.* This must apply especially to repeat applications relying on grounds already rejected, and those made by others, where the court has already given due weight to the statutory requirements and Article 6 and 8 ECHR considerations and their judicial interpretation. The court has general case management powers under Rule 4.1 FPR 2010 governed by the overriding objective set out in Rule 1 FPR 2010. In retrospect it may have been possible to adopt such an approach here earlier.

95. The 'data breach' illustrates how important it is that unredacted material is not disseminated, especially since electronic bundles may be standard in the future.

[Judgment ends]

Post hand-down comments ruling on publication

96. This judgment was approved and sent to the transcribers on 21 March 2016 urgently because the mother wanted to appeal. The Press Association had emailed to say that there was an interest in publishing it. It was posted on Bailii . In my view it was sufficiently anonymised and amply justified publication.

97. During the vacation Essex had the judgment removed from Bailii. They did not send the judgment as circulated to the mother. The mother emailed that she had not received the judgment. My temporary clerk replied during vacation that the judgment had been sent to the transcribers. I assumed that it had been provided to the mother by the transcribers and she had in turn provided it to the Court of Appeal, and that Essex's suggestion that the mother should not receive the judgment until amendments were made (which I had not endorsed) had been overtaken by events.

98. Essex's initial explanation was that

    (i) There were errors of a type that the court would normally expect to have drawn to its attention before the judgment was handed down as approved.

    (ii) Additionally they were seeking an amendment to redact the judgment which would normally be done under the Practice Guidance before the publication of the judgment.

99. Essex now additionally says that

    (i) The parties were insufficiently anonymised thus leading to a potential risk of identification.

(ii) The only legitimate reason for publicising was in respect of the 'data breach' as Essex terms it.

(iii) The social worker should not have been named as this had been prohibited by Hayden J.

100. A number of emails have passed between me and Essex, and Mr Nicholas O'Brien, acting for Essex in Mr Archer's absence on leave.

101. On 11 April 2016 I learnt that neither the Court of Appeal nor Judge Roberts, now dealing with this case at Chelmsford, had a copy of the originally approved judgment, which was then immediately provided.

102. The mother's application for permission and a stay was dismissed as totally without merit by Eleanor King LJ within 24 hours of receiving the judgment. The adoption hearing has now been relisted.

103. Whether there were errors or not, or risks of identification, this did not justify the judgment not being released to the mother or the Court of Appeal being provided with the judgment.

104. It was not appropriate to redact the transcript of the judgment, orally delivered, before release of the judgment to the Court of Appeal or to the mother. Redaction was only relevant to publication, an entirely different issue.

105. The failure to provide the mother and the Court of Appeal with the transcript as approved has given rise to delay.

Errors

106. The errors are immaterial to the decision. I wrongly recorded that the mother had four children and not three and have corrected this passage. I also wrongly named the Crown Court where the mother was tried and sentenced. This reference has been removed. It is unnecessary to the decision. I have also corrected the name of the person who spoke to the As pre-trial about whether they continued to wish to adopt. I have redrafted paragraph 94 which is immaterial to the decision.

Further anonymisation

107. I have amended the initials of the relevant individuals at Essex's request although I do not regard this as strictly necessary.

Publication

108. Publication of this judgment is justified under a number of headings following the **Practice guidance as to publication of judgments of 16 January 2014.**

109. **Public interest (para 16):** this is satisfied by **(i)** the subject matter (ii) delays in the process and the harm caused to this child by delay (iii) terminating repeat applications (iv) the 'data breach'.

110. **Transcribed judgment (para 17):** Schedule 1 does not specifically refer to an application for permission to oppose an adoption order but this case engages the same issues as the making of an adoption order or its refusal which justifies publication under **Schedule 1 (iii).**

111. The press have asked for the judgment to be published (**Paragraph 18**). I still regard this as a paradigm case for (anonymised) publication. It does not compromise Article 8

rights of the parties or child or named individuals, and the public interest in reporting is important.

Redaction

112. I decline to redact the judgment by removal of most or indeed any of its contents. It is necessary for the background to be properly set out. The risk of 'jigsaw identification' of the child's identity or present whereabouts arising from such publication is remote, indeed I would say non-existent.

Naming the social worker

113. **Paragraph 20 (iii)** provides that anonymity should not normally extend beyond the privacy of the children or adults who are the subject of the proceedings unless there are compelling reasons to do so. Social worker anonymity is not specifically referred to. The mother has withdrawn her appeal against the order of Hayden J. It prohibits the "publishing or broadcasting … in such a way as to identify that the child (sic) as having ever been the subject of child protection proceedings… (a) the name and address of …(iv) any employee of the Applicant local authority".

114. The newspaper report of the hearing before him (there is no transcript) supports that interpretation- "the Judge said that that the press must not publish names and addresses of the little girl, her parents, carers and council staff only if publication led to the girl being identified as the child at the centre of proceedings".

115. This must mean identified by name, not that the judgment refers to an unnamed or identified child and proceedings. If so there would never be any publication of a child case at all.

116. The child is only referred to by her first name in the mother's petition. No reportage exists referring to the mother under the same surname as the child, even by initial. The photograph was an old one.

117. There is no more risk of identifying the child as the subject of proceedings as a result of the publication of this judgment than there was from the Press report of Hayden J's judgment on the publicity injunction.

118. I do not need to decide whether I am bound by Hayden's J's order, intended to deal with the on-line petition and not the publication of a later judgment in the public interest.

119. The order I made against the mother at the conclusion of the proceedings prohibits the mother from disseminating details of the adopters, X, or X's placement with them. There is no reason to think that this will be compromised by disclosure of the social worker's name, or anything in this judgment.

120. There is no good reason why the social worker should not be named, and good reason why she should. It will clarify that she is not the subject of the mother's complaint in cases where she is not involved, and in cases where she is involved that she has not been criticised in this enquiry.

121. Transparency, so long as there is no risk of harm, is to be encouraged and not stifled.