

Public Law Case Law Update

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This appeal, brought by the Local Authority, concerned the refusal of HHJ Tolson KC ('the Judge') to grant a placement order for S, instead preferring long-term foster care. The Court of Appeal dismissed the appeal, holding that although the Judge did not include a "balance-sheet" analysis of the options, his analysis was sufficiently thorough and reasoned when considering the judgment holistically. The appeal illustrates that when considering adoption and long-term foster care, courts should undertake a child-specific analysis. Long-term fostering remains a realistic and sometimes preferable permanence option for children, depending on their specific circumstances.

[Re S \(Foster Care or Placement for Adoption\) \[2026\] EWCA Civ 47](#)

Background

S is 4 years old and became the subject of care proceedings following concerns of neglect in the care of her mother. The mother suffered from numerous mental health difficulties including anxiety and depression, alongside clinically significant traits of autism and ADHD. The local authority became involved after a bruise was found on S's arm which was initially believed to be non-accidental, although no findings of physical abuse were ultimately pursued.

Over the course of 16 months, S experienced multiple placements. A residential assessment of the mother was unsuccessful, as was a subsequent placement with extended family. The mother was assessed further within the community, but this was also negative. S was therefore placed in foster care. By the final hearing, taking place in the 70th week of proceedings, S was emotionally secure and thriving with her foster carers.

Two working days prior to the final hearing, the Local Authority filed an application for a placement order. The initial proposal was one of closed adoption with letterbox contact only. During the final hearing, the proposal changed to open adoption with annual direct contact with the mother. The Local Authority intended to search for adopters for 6–9 months, failing which they would then consider long-term foster care potentially with her current carers. However, no active steps had been taken to assess them.

Both parents opposed adoption and supported S remaining in her current foster home if she could not return to her mother's care. The Children's Guardian supported adoption but highlighted the impact instability had on S. If S were not to be placed for adoption, the Children's Guardian believed that S's current carers should be explored for long-term foster care. The Guardian raised that the current foster carers told would wish to be considered as long-term carers and would facilitate ongoing contact between S and her mother.

The Decision at First Instance

At the final hearing in September 2025, the Judge granted the application for a care order in respect of S but refused the application for a placement order.

In reaching this decision, the Judge made two principal findings. Firstly, that S's interests were best served by her remaining with her current foster carers on a long-term basis. Secondly, that S should continue to have direct contact on a regular basis with her mother given the strength of the ties to both her mother and her present carers.

The Judge found that the Local Authority failed to give proper consideration to long-term fostering, instead presuming that adoption would be the only option due to S's age and no viable wider family placements. The Judge described the Local Authority's investigations as "perfunctory". Further, the Judge noted the lack of evidence as to the availability of adoptive placements for S, especially considering difficulties that might arise when considering S's age or the availability of open adopters.

The Judge stressed that when considering the merits of long-term foster care and adoption, the court should look at all of the available evidence and evaluate S's particular circumstances rather than drawing a comparison in principle.

Ultimately, the judge concluded that adoption was not necessary or proportionate in S's case. He placed weight on:

- a) the stability of S with her current foster carers
- b) the importance of preserving S's relationship with her mother
- c) the risks further disruption might cause
- d) the uncertainty surrounding the feasibility of an open adoptive placement capable of supporting ongoing contact with S's mother.

Therefore, the Judge determined that S should remain with her current carers in long-term foster care.

Grounds of appeal

The Local Authority appealed the refusal of the placement order on five grounds:

Ground 1: Failure to conduct any or any adequate comparative analysis of long-term foster care and adoption.

The local authority argued that the judge had erred by failing to carry out an adequate analysis of the positives and negatives of both long-term foster care and adoption. A particular criticism was the lack of a 'balance-sheet' analysis.

The Court of Appeal accepted that the judge did not conduct a formal balance sheet and observed that it would have been preferable to do so, referring to *Re G (Care Proceedings: Welfare Evaluation) [2014] EWCA Civ 965 at [54]*. However, it reiterated that a balance sheet is not mandatory and it was made clear that "a failure to set out the options in a side-by-side balance sheet analysis... will not pave the route towards certain success on appeal" [42].

The Court of Appeal highlighted that a judgment must be considered as a whole, in line with *Piglowska v Piglowski [1999] UKHL 27*. It also relied on more recent authority (*Re N (Refusal of Placement Order) [2023] EWCA Civ 1348 at [33]*) affirming that a balance sheet is a 'route to judgment but not a substitution for the judgment itself'.

It was also acknowledged that the Judge used the framework that adoption should only be chosen when 'nothing else will do'. It was stressed (relying on *Re W (Adoption: Approach to Long-Term Welfare)* [2017] 2 FLR 3) that 'nothing else will do' must not be used as a shortcut to avoid a full and comprehensive evaluation of all pros and cons. In this context, the Court of Appeal was satisfied that: *'It is possible to identify... the Judge's consideration of the competing factors relevant to each of the options, and this legitimately enabled him to express the view that placement for adoption should be preferred only when 'nothing else will do'.*

It was concluded that the Judge adequately covered the positives and negatives of the options before him.

Ground 2: Consideration of the current foster placement as long-term foster carers

The local authority contended that the Judge was wrong to have concluded that the present foster carers had 'expressed a settled desire to care for her during her minority' ([38i] original judgment). Given the foster cares had only been approved as short-term carers, the appellants argued that this view assumed that they would continue to meet S's needs throughout her minority.

The Court of Appeal determined that this ground was defused given that more recent enquiries revealed that the foster carers are prepared to care for S on a long-term basis. Whilst the parents had not yet been approved as long-term carers, all the other circumstances indicated that they would be willing.

Ground 3: Failure to properly recognise or analyse the advantages of open adoption

The local authority proposed open adoption during the final hearing. They contended on appeal that the Judge did not sufficiently consider the advantages of this proposal. At the final hearing, all parties accepted that the contact between S and her mother was "positive". The Judge's reasoning placed significant weight on the importance of preserving their relationship. The Judge had determined that the optimal contact between S and her mother should be regular (every fortnight) and highlighted that it would be difficult to identify adopters willing to accept such frequent contact. This was notwithstanding the shift in the law towards an increase in post-adoption contact. The court detailed the modern authorities on post-adoption contact including *Re S (Placement Order; Contact)* 2025 EWCA Civ 823 and *Re R and C (Adoption or Fostering)* [2024] EWCA Civ 1302 which recognised a shift towards open arrangements where possible.

The Court of Appeal drew a distinction between contact which is desirable and that which is necessary for S and determined the Judge "*was entitled (indeed, it may be thought, bound) to conclude that finding an adoptive home for S which would accept this level of contact would – even in the "modern world" of increased post-adoption contact... be too formidable a task*" [71].

Ground 4

Ground 4 advances two challenges to the Judges conclusions, namely that he was incorrect in concluding:

- a) that the local authority/adoption agency was unlikely to find a suitable placement for S; and
- b) that they were not committed to finding an open adoptive placement for S.

As to (a), The Court of Appeal affirmed with reference to the comments of Hughes LJ in *Re T (Placement Order) [2008] 1 FLR 172* that uncertainty as to the availability of an adoptive placement will not in itself bar the making of a placement order. However, the court recognised that there are cases in which the practical realities of finding adopters are relevant. The Court of Appeal referenced *Re D-S (A Child: Adoption or Fostering) [2024] EWCA Civ 948* in which it was determined by Peter Jackson LJ at [32] that “there may be cases at the margins where specific evidence will be necessary, examples being where the plan is for the adoption of a much older child”.

It was decided that the Judge did consider the guidance offered by *Re T* and was entitled to doubt the ability of the local authority to find a placement that would accept S given her age and the amount of direct contact proposed by the Guardian.

As to (b), the Court of Appeal held that the Judge was justified in taking a view as to the Local Authority's commitment to find an open adoptive placement. The Court of Appeal made three observations. Firstly, that the Local Authority had only shifted to a proposal of open adoption on the second day of the final hearing. Secondly, that the Local authority had not 'seriously considered' long-term fostering as a realistic option. Thirdly, there had not been a sufficient investigation into the circumstances in which the present foster carers had adopted their children which demonstrated that “careful thinking on the relative merits of adoption against long-term foster care has been lacking” (original judgment, [18]).

Ground 5: Failure to give adequate reasons for departing from professional recommendations

The Local Authority argued that the judge had failed to give adequate reasons to depart from the professional recommendations which supported adoption. The Court of Appeal rejected this. It held that the Judge did consider all professional views in his judgment and was entitled to depart from them. In particular, the Judge had analysed and scrutinised the Local Authority's research, finding that it had not adequately considered long-term foster care. Further, by the time of the appeal, the Guardian's position had changed to support long-term foster care. This demonstrated how finely balanced the matter was. In those circumstances, the Judge was entitled to evaluate the circumstances and depart from professional recommendations to promote S's welfare.

Outcome and conclusion

Drawing these matters together, the Court of Appeal concluded that the Judge conducted a sufficiently reasoned and clear welfare evaluation. This was notwithstanding the omission of a 'balance sheet' exercise. The judge had been entitled to conclude that S's interests would be best met with long-term foster care. Therefore, the appeal was dismissed.

This decision reinforces several key principles for practitioners. Firstly, the approach that should be taken when making permanence decisions in care proceedings, particularly where the choice lies between adoption and long-term fostering. Adoption should remain a 'last resort', but relying on the phrase 'nothing else will do' does not negate the need for thorough and child-specific analysis of the available options. A 'balance sheet analysis', while desirable, is not essential when the court has weighed the competing options within the judgment as a whole.

Also highlighted are the practical realities of family-finding, including the availability of adopters willing to support regular ongoing contact. Difficulties such as this may properly be considered during a welfare analysis.

Adoption is often associated with providing children with a stronger sense of 'belonging' and a long-term identity. However, the facts and decision within this case show that where a child is already settled and thriving in foster care, and where maintaining a meaningful relationship with birth parents is central to their welfare, long-term fostering may be the option that best meets their individual needs.



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