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Is a balanced holistic evaluation really that difficult?

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September 2024

Almost 11 years on from the judgment of Sir James Munby in Re B-S, those two letters are referenced in almost every final hearing within public law proceedings. So often is the term "Re B-S analysis" quoted its prevalence may appear to have lost its substantive meaning. What it often means, in the bluntest of terms, is that the analysis undertaken is not good enough. It has come to mean that the analysis undertaken does not appropriately look at all the various options and complete the holistic analysis required by the court. In many cases the phrase might be being used in the absence of any other coherent argument, however in many cases there is a great deal of substance to the point being sought to be made by an advocate for a parent.

As pressures on public bodies continue to rise, and the pressures on social workers show no signs of reducing, the risks of generic and simplistic analysis being put forward in the most serious of cases continues to increase. The absence of a true detailed analysis in many cases is acutely obvious, but why does this remain the case after so many Courts of Appeal cases emphasising the importance of the analysis?

A fellow barrister the other week even asked me 'what really is a holistic analysis' after I had been making the point in closing submissions. It seemed a useful point to write a short article on.

Re B-S

Despite how regularly it is quoted it is always worth practitioners reading the sage words of Sir James Munby in Re B-S[1]. The relevant section on the provision of 'proper evidence' begins at paragraph 34. Sir James Munby emphasises the dicta in many previous decisions that make very similar points, including:

'evidence of the lack of alternative options for the children and an analysis of the evidence that is accepted by the court sufficient to drive it to the conclusion that nothing short of adoption is appropriate for the children' – Ryder LJ in Re R Children [2013] EWCA Civ 1018

'An assessment of the benefits and detriments of each option for placement and in particular the nature and extent of the risk of harm involved in each of the options' – Ryder LJ in Re S, K v The London Borough of Brent [2013] EWCA Civ 926

'the need to take into account the negatives, as well as the positives, of any plan to place a child away from her natural family' – McFarlane LJ in Re G [2013] EWCA Civ 965

'*However, the court requires not only a list of the factors that are relevant to the central decision but also a narrative account of how they fit together, including an analysis of the pros and cons of the*

various orders that might realistically be under consideration given the circumstances of the children, and a fully reasoned recommendation' – Black LJ in Plymouth CC v G [2010] EWCA Civ 1271

He quotes further from Ryder LJ's judgment in Re S, K v The London Borough of Brent where the social worker's analysis of the various options was limited to:

"a permanent placement where her on-going needs will be met in a safe, stable and nurturing environment. [S]'s permanent carers will need to demonstrate that they are committed to [S], her safety, welfare and wellbeing and that they ensure that she receives a high standard of care until she reaches adulthood

Adoption will give [S] the security and permanency that she requires. The identified carers are experienced carers and have good knowledge about children and the specific needs of children that have been removed from their families …"

Sir James Munby and Ryder LJ make the point that:

'*fairness dictates that whatever the local authority's final position, their evidence should address the negatives and the positives relating to each of the options available.'*

The judgment then goes on from paragraph 41 to make several points about the need for adequately reasoned judgments, for which further very similar decisions have been given over the last 10 years by the Court of Appeal. Sir James Munby emphasises the need for judges to balance the various options, and as Black LJ had said give *'proper focussed attention to the specifics.'*

Emphasis is placed on the need for judges to undertake a *'global, holistic evaluation'.* This is said to mean:

'A multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons, of each option.'

Judges are specifically warned against undertaking a linear analysis. McFarlane LJ in Re G[2] says the following on a linear analysis:

In most childcare cases a choice will fall to be made between two or more options. The judicial exercise should not be a linear process whereby each option, other than the most draconian, is looked at in isolation and then rejected because of internal deficits that may be identified, with the result that, at the end of the line, the only option left standing is the most draconian and that is therefore chosen without any particular consideration of whether there are internal deficits within that option.

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

[1] [2013] EWCA Civ 1146 and **https://www.bailii.org/ew/case...**

[2] [2013] EWCA Civ 965

Global, holistic evaluation

The simple answer to the question of my colleague at court, about what is a 'global analysis' are the words of Sir James Munby in Re B-S which I have quoted above. The fact that this question however is asked appears to underline the point that the Court of Appeal so regularly appears to make.

The lack of a coherent or detailed welfare analysis is often the most fertile ground for productive cross examination of social workers and guardians. This is because the analysis continues to regularly be so limited or miss the most basic of points. It regularly appears that this global, holistic evaluation has never been carried out prior to having the analysis challenged in cross examination.

It shouldn't realistically be a complicated or difficult concept for social workers, lawyers or even judges to grasp. However there appears to continue to be widespread generic analysis written in final SWETs, even in cases which advocate for adoption. Indeed, in the most extreme examples social work professionals limit the positives about a return to a parent as being 'the parents love the child' or that 'the parents have been able to care in supervised contact.' There often appears in the written material a lack of any attempt to grapple with what the actual positives are of a parent's case, or the widespread advantages that there may be about remaining within a family unit.

Much of the difficulty comes from the use of the standardised SWET document. This document produces under several different headings sections that can be completed by professionals. The focus inevitably should be on the heading titled *'the proposed care plan – the realistic options analysis'* which usually includes a tabular section. Often very little focus is had on this section of the document, despite it being at the heart of the issue that the court must address.

There is often no reference within the tabular analysis to the benefits of being able to remain within the family unit, including the ability to have ongoing contact or communication with extended family or even siblings. It is a regular and alarming contradiction that siblings are frequently described as the 'most enduring relationship in any child's life' until the plan is long term separation of sibling groups, and then that argument appears not to exist.

Another regular omission is any attempt to consider the support that could be provided to a parent if the child returned to their care. In my experience this occurs in almost every case that I have dealt with at a final hearing. In some cases, there is at least some vague reference to a supervision order, but in many the concept of a supervision order has even failed to be written, let alone analysed by way of an alternative to the plan of adoption.

In some cases, the social work professionals even attempt to say that a return to the parents' care is not even realistic, and thus the 'global, holistic evaluation' doesn't need to include that as an option. Regularly the tabular section includes the description of 'discounted option' which seeks to include a return to the care of the parents in any form.

Whilst this might be a viable argument in some cases, it really is a question for the court to determine what is realistic or not. For social care professionals to unilaterally refuse to undertake an analysis of often one of the two available options to the court (return or not return) often underlines a real lack of analysis regarding the options before the court. This use of the 'discounted option' also must be used cautiously given what Sir James Munby said in Re R[1]:

'I emphasise the words "realistically" (as used in Re B-S in the phrase "options which are realistically possible") and "realistic" (as used by Ryder LJ in the phrase "realistic options"). This is fundamental. Re B-S does not require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage in the proceedings, can legitimately be discarded as not being realistic. Re B-S does not require that every conceivable option on the spectrum that runs between 'no order' and 'adoption' has to be canvassed and bottomed out with reasons in the evidence and judgment in every single case. Full consideration is required only with respect to those options which are "realistically possible.'

This part of the judgment makes it clear that there are limits to what the 'Re B-S analysis' is meant to include, however importantly it is for the court to properly discard options as being unrealistic at the early stage of the proceedings. Where there are but two options, a return to a parent and adoption, it is a bold step (an arguably erroneous step) for a social worker to say in their final evidence that they won't even evaluate the option of a return to a parents' care because it is not realistic.

Thus, for all these reasons, whilst the term 'global holistic evaluation' should be readily understandable, it continues to be far too often lost in the written material put before the court.

[1] [2014] EWCA Civ 1625

Linear analysis

My theory as to why the global holistic evaluation is so often missing is because there is an ongoing tendency from social care professionals to undertake a linear analysis within these cases. Indeed, regularly in cross examination professionals will accept that this is what they have done and do not think that there is anything wrong with that as an approach.

Indeed, the reason why a linear analysis is often undertaken is that is what the court process could appear to encourage. Local authorities are ordered to undertake parenting assessments as to a parent's ability to care for a child. These assessments then regularly get described as either a 'positive' or 'negative' assessment by the professionals undertaking them. In many areas different social work teams undertake the assessments to the social worker who is writing the final analysis. It is therefore of no surprise that when a social worker has what they have described as a 'negative assessment' that they then feel able to say that the parent being able to care is not 'realistic' or doesn't need to be comprehensively analysed.

Doesn't the use of the labels 'positive' and 'negative' undermine what the purpose of a parenting assessment is? Is a parenting assessment meant to create a binary conclusion that is either good or bad? Is the assessment itself meant to be the evidential basis upon which a case is decided? Do we as professionals ourselves fall into the trap of seeing the assessment process as binary?

Parenting assessments are to my mind meant to bring together all the information about a parents' ability to care for a child into a single document. They are meant to put before the court all the information that the other professionals (if written by a different team) and then the court needs to form an opinion to undertake a global holistic evaluation on. If they are to be used to form a positive or negative conclusion, then the assessor needs to be incorporating into their assessment all of the

support that could be provided to that parent through a supervision order, rather than just saying that they are unable to care.

PAM assessments (which I accept are now used less frequently) would not come to a specific conclusion on a parent's ability to care, rather they would set out the support that they needed to be able to improve their parenting or their ability to care. To my mind that is exactly what parenting assessments themselves should do, rather than seeking to come to the binary decision in that document.

This predominantly is because how can a parenting assessor say whether it is in a child's best interests to remain with a parent, when they do not know what they are balancing that decision against? Surely whether it is in a child's interest to remain with a parent depends entirely on what the alternative plan is. If the alternative plan is more harmful (i.e. placement for a closed adoption) then welfare arguments need to be stronger than if the plan is to be placed with the other biological parent. That is the very essence of the holistic evaluation or the very essence of a balancing of risk. A binary decision cannot be made if the alternative outcome is not known.

Far too often in the final analysis social work professionals (including guardians) will rely upon the fact that there has been a negative parenting assessment as a reason why a child cannot return to the care of a parent. In a recent case I did the concept of a return was 'discounted' on the following terms:

'A supervision order would only be considered necessary if the local authority considered to place the children in the care of their parents. Given a positive assessment of [parents] *has not been achieved then this order would not be sufficient to protect the children.'*

This clearly is woefully inadequate as an analysis in favour an adoptive order. However, it comes directly from the encouragement of describing parenting assessments as being positive or negative. The very description means that social workers and indeed guardians regularly undertake a linear analysis of the cases before them. They will readily accept ruling out the parents because of a negative assessment, then ruling out any family members because of 'negative' viability assessments or no alternate carers, then ruling out long term foster care given the inherent difficulties for young children and being left with adoption.

If a judge was to undertake this exercise, then the decision would be almost inevitably appealable. However, even if both professionals undertake this exercise, then reliance is still sought to be applied to their analysis. This (at least in my mind) is the exact opposite of the global, holistic evaluation that is meant to be undertaken. If this approach is taken (with a reliance on the parenting assessment) then there hasn't been an analysis of all of the positives of remaining with a parent, nor has there been an analysis of all of the support that might avoid the need for separation. There has been a binary decision made by a professional, often not considering the support available, which has then led another professional to write off that option without feeling the need to further evaluate that option against the other realistic options.

Concluding thoughts

This article is not written to seek to re-invent the wheel. Assessments will continue to be described as positive or negative as indeed parents will continue to be pigeon-holed into certain categories by legal and social care professionals. That is an inevitable consequence of dealing with multiple cases in a busy professional practice. However there needs to be a realisation that the consequence of doing this is that the written analysis of both social workers and guardians regularly does not include global holistic evaluations.

I regularly represent social workers and guardians. The reality often is that they have carefully considered all the options, and they know all too well (probably more than many lawyers) the consequences of pursuing an adoptive order for a child. However, the written analysis that they put forward regularly appears to fail to undertake that holistic evaluation. A key reason for this is the way that assessments are undertaken and described. The other reason that often leads to the linear analysis is the use of the phrase *'nothing else will do'*. This often encourages the need for a linear analysis to be undertaken, as it might appear to require that all other options have been *'ruled out'* before that can be the only remaining option.

In most cases the court can undertake its own analysis and get around when a guardian or social worker has fallen into the errors that I have identified above. However, for those more nuanced cases the ongoing need to focus on the balanced holistic analysis remains as crucial as ever.

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