



JUDICIARY OF  
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**Keynote Address**

**Lord Justice McFarlane**

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***'Nothing Else Will Do'***

Over the past 3 years family lawyers, social workers, judges and magistrates have got themselves into a fair old spin over four short words. The words are 'Nothing else will do' and they appeared, for the first time, in three of the judgments of the five Supreme Court Justices who presided over the case of *Re B* in 2013.

Attempts made by myself and other judges in the Court of Appeal since that time, which were aimed at clarifying the situation, are said, at least by some, to have only made matters less clear. Each time a new judgment appears, it seems to be interpreted by some as yet a further 'change' in the law and, I understand, that some social workers, and even some local authorities, have read these cases as indicating that the Family courts are in some way anti adoption or, worse, that it is now unlikely that any adoption application will be successful.

My purpose during the next 30 minutes is simple. It is, firstly, to go back through the recent cases to demonstrate that there has been no change in the law at any point within them. It is, secondly, to explain the context within which the phrase 'nothing

else will do' falls to be understood. And it is, thirdly, to make plain the stage in the process when the 'nothing else will do' evaluation is to be undertaken.

Before turning to the cases, it may be helpful to describe how things were prior to the Supreme Court decision in *Re B*. I hope that you will forgive the rather contrived illustration that I am going to use to do so.

Picture the scene: there are three ships who regularly sail the public family law seas. Two of them are massive well-known vessels: The Good Ship Welfare and The Good Ship Proportionality. The third is a smaller craft that should travel in their wake, The Ship of Least Intervention.

Although all three ships will normally sail in the same direction, depending on the tide of the evidence, it is the Good Ship Welfare that is seen by all those involved as the flagship of this small fleet. Whilst on some, if not many voyages, there would often be a friendly wave [no pun intended] from Welfare towards Proportionality, it was the course of Welfare that really mattered and, where the voyage ended at the Port of Adoption, the Navy were normally content provided Welfare got there and was tied up alongside the quay. It did not matter, at least to some, so much whether The Good Ship Proportionality actually made it into the harbour as well.

On some voyages, the Ship of Least Intervention would cut across the bows of the others and possibly divert the convoy. This was because those at the helm of Least Intervention were wont to plot an entirely 'linear' course!

I will leave that nautical scene for a moment to translate the picture that I have painted into basic legal material.

It is a given that the test for determining whether a child should move on to adoption turns upon her welfare throughout her life, which is to be the paramount consideration for the court and/or the adoption agency [ACA 2002, s 1(2)].

But it is, and has long been, also a given that the outcome chosen by a court to best meet the requirements of a child's welfare must also be proportionate to all of the circumstances of the case.

‘There shall be no interference by a public authority with the exercise of [the right to family life] except such as is in accordance with the law and *is necessary* in a democratic society ...[among other things]... for the protection of health or morals, or for the protection of the rights and freedoms of others.’

So says Art 8(2) of the ECHR to which the UK has been signed up since its inception and which is to be read into our law under the terms of the Human Rights Act 1998, which has been on the statute book now for nearly 20 years.

The outcome for the child, as well as being that which meets her welfare requirements must also be ‘necessary’ for, in short terms, her ‘protection’. In other words it must be ‘proportionate’ to the need to protect her. A sledge hammer is not needed to crack a nut, but is necessary, and therefore proportionate, to the task of smashing concrete.

Both the CA 1989 and the ACA 2002 were drawn up expressly to be compatible with the need for proportionality under Art 8(2). A court ‘shall not make the order or any orders unless it considers that doing so would be better for the child than making no order at all’ are the familiar words of CA 1989, s 1(5). The need for proportionality is also prominent in the early case law under the 1989 Act, for example those dealing with the choice between making a care or a supervision order as *Re O (Care or Supervision Order)* [1996] 2 FLR 755 and later decisions.

In terms of adoption, ACA 2002, s 52(1)(b) is explicit that ‘the court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that the welfare of the child *requires* the consent to be dispensed with’.

In *P (A Child)* [2008] EWCA Civ 535; [2008] 2 FLR 625 Wall LJ said:

‘This is the context in which the critical word “requires” is used in section 52(1)(b). It is a word which was plainly chosen as best conveying, as in our judgment it does, the essence of the Strasbourg jurisprudence. And viewed from that perspective “requires” does indeed have the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable.

‘What is also important to appreciate is the statutory context in which the word “requires” is here being used, for, like all words, it will take its colour from the particular context. Section 52(1) is concerned with adoption – the making of either a placement order or an adoption order – and what therefore has to be shown is that the child's welfare “requires” adoption as opposed to something short of adoption. A child's circumstances may “require” statutory intervention, perhaps may even “require” the indefinite or long-term removal of the child from the family and his or her placement with strangers, but that is not to say that the same circumstances will necessarily “require” that the child be adopted. They may or they may not. The question, at the end of the day, is whether what is “required” is adoption.

‘In our judgment, however, this does not mean that there is some enhanced welfare test to be applied in cases of adoption, in contrast to what [counsel] called a simple welfare test. The difference, and it is an important, indeed vital, difference, is simply that between section 1 of the 1989 Act and section 1 of the 2002 Act.

‘In the first place, section 1(2) of the 2002 Act, in contrast to section 1(1) of the 1989 Act, requires a judge considering dispensing

with parental consent in accordance with section 52(1)(b) to focus on the child's welfare "throughout his life". This emphasises that adoption, unlike other forms of order made under the 1989 Act, is something with lifelong implications. In other words, a judge exercising his powers under section 52(1)(b) has to be satisfied that the child's welfare now, throughout the rest of his childhood, into adulthood and indeed throughout his life, requires that he or she be adopted. Secondly, and reinforcing this point, it is important to bear in mind the more extensive "welfare checklist" to be found in section 1(4) of the 2002 Act as compared with the "welfare checklist" in section 1(3) of the 1989 Act; in particular, the provisions of section 1(4)(c) – which specifically directs attention to the consequences for the child "throughout his life" – and section 1(4)(f). This all feeds into the ultimate question under section 52(1)(b): does the child's welfare throughout his life require adoption as opposed to something short of adoption?'

I make no apology for setting that passage out in full. To my mind it cannot be bettered as a description of the test for deciding whether or not a child should move on towards adoption, despite the fact that her parents do not consent to that course. The description given by Wall LJ rightly, indeed inevitably, combines regard both to the need to afford paramount consideration to the child's welfare throughout her life AND to the need for the outcome to be proportionate: 'does the child's welfare throughout his life require adoption as opposed to something short of adoption?'

So, the need for there to be an evaluation both of Welfare and of Proportionality has for many years been, or should have been, at the centre of each and every adoption decision made about a child under our law. That this is so should not be surprising. Welfare and Proportionality are not two distinct or incompatible concepts; they are in reality two sides of the same coin. If it is not necessary to protect a child by removing her permanently in fact and in law from her birth family and grafting her into another family by adoption, it is highly unlikely that it will otherwise be in her best interests to do so.

Having set the scene and described the legal landscape as it was for many years prior to 2013, it is now time to turn to *Re B* [2013] UKSC 13 and in doing so it is my intention to establish that all that the Justices of the Supreme Court were doing was stating the law as it was, namely that the option of adoption should only be chosen for a child where adoption is in her best interests and is necessary and proportionate to the facts of the case.

*Re B* focussed on an application for a care order with a care plan for adoption in circumstances where the CA 1989, s 31 threshold criteria was crossed, but not to an extreme degree. Although the Court of Appeal dismissed the parents' appeal, deep disquiet was expressed by Rix and Lewison LJ over the proportionality of the outcome where this child had not suffered harm and had a loving relationship with both parents.

The following extracts, which are the points in the case where the 'Nothing' phrase is used, should suffice to demonstrate that this is so.

Lord Neuberger:

'77. It seems to me to be inherent in section 1(1) that a care order should be a last resort, because the interests of a child would self-evidently require her relationship with her natural parents to be maintained unless no other course was possible in her interests. That is reinforced by the requirement in section 1 (3)(g) that the court must consider all options, which carries with it the clear implication that the most extreme option should only be adopted if others would not be in her interests. As to article 8, the Strasbourg court decisions cited by Lady Hale in paras 195-198 make it clear that such an order can only be made in "exceptional circumstances", and that it could only be justified by "overriding requirements pertaining to the child's welfare", or, putting the same point in slightly different words, "by the overriding necessity of the interests of the child". I consider that this is the same as the domestic test (as is evidenced by the remarks of Hale LJ in *Re C and B* [2001] 1 FLR 611, para 34 quoted by Lady Hale in para 198 above), but it is unnecessary to explore that point further.

104. .... However, [a cited article and two cases] give added weight to the importance of emphasising the principle that adoption of a child against her parents' wishes should only be contemplated as a last resort – when all else fails. Although the child's interests in an adoption case are "paramount" (in the UK legislation and under article 21 of UNCRC), a court must never lose sight of the fact that those interests include being brought up by her natural family, ideally her natural parents, or at least one of them.'

Lord Kerr:

'130. Whether or not article 8 has any part to play in the threshold decision, it certainly comes into full flower at the disposal stage. Lady Hale and Lord Wilson have both referred to emphatic statements by ECtHR in such cases as *Johansen v Norway* (1996) 23 EHRR 33, K and *T v Finland* (2001) 36 EHRR 255, *R and H v United Kingdom* (2011) 54 EHRR 28, [2011] 2 FLR 1236 and *YC v United Kingdom* (2012) 55 EHRR 967 concerning the stringent requirements of the proportionality doctrine where family ties must be broken in order to allow adoption to take place. I agree with Lady Hale's statement (in para 198 of her judgment) that the test for severing the relationship between parent and child is very strict and that the test will be found to be satisfied only in exceptional circumstances and "where nothing else will do". I also agree with what Lord Wilson has said in para 34 of his judgment, that "a high degree of justification" is required before an order can properly be made.'

Baroness Hale:

### **'Proportionality**

194. Once the threshold is crossed, section 1(1) of the Children Act requires that the welfare of the child be the court's paramount consideration. In deciding what will best promote that welfare, the court is required to have regard to the "checklist" of factors in section 1(3). These include, at (g), the range of powers available to the court in the proceedings in question. By section 1(5), the court must not make any order unless it considers that doing so would be better for the child than making no order at all. The Act itself makes no mention of proportionality, but it was framed

with the developing jurisprudence under article 8 of the European Convention on Human Rights very much in mind. Once the Human Rights Act 1998 came into force, not only the local authority, but also the courts as public authorities, came under a duty to act compatibly with the Convention rights.

....

197. [Thus] it is not surprising that Lewison LJ was troubled by the proportionality of planning the most drastic interference possible, which is a closed adoption, in a case where the threshold had not been crossed in the most extreme way (see para 174 above). However, I would not see proportionality in such a linear fashion, as if the level of interference should be in direct proportion to the level of harm to the child. There are cases where the harm suffered or feared is very severe, but it would be disproportionate to sever or curtail the family ties because the authorities can protect the child in other ways. ... Conversely, there may be cases where the level of harm is not so great, but there is no other way in which the child can be properly protected from it.

198. Nevertheless, it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do. In many cases, and particularly where the feared harm has not yet materialised and may never do so, it will be necessary to explore and attempt alternative solutions.

...

215. ... We all agree that an order compulsorily severing the ties between a child and her parents can only be made if "justified by an overriding requirement pertaining to the child's best interests". In other words, the test is one of necessity. Nothing else will do.

....



## **Conclusion**

223. In all the circumstances, I take the view that it has not been sufficiently demonstrated that it is necessary to bring the relationship between Amelia and her parents to an end. In the circumstances of this case, it cannot be said that "nothing else will do" when nothing else has been tried. The harm that is feared is subtle and long term. It may never happen. There are numerous possible protective factors in addition to the work of social services. There is a need for some protective work, but precisely what that might entail, and how the parents might engage with it, has not yet been properly examined.'

There is, I suggest, with respect, nothing 'new' in those important passages in *Re B*. It was nothing more, nor nothing less, than a clear, and in my view most timely, restatement of the law as it had been for a decade and more. It is not only a re-statement of the case law but, in view of the words of ACA 2002, s 52 regarding dispensing with parental consent, it was also a re-statement of the law as established by Parliament.

I have suggested that the re-statement of the law in *Re B* was 'timely' because in my view, and from my perspective, we who are involved in delivering justice in family cases may have, from time to time, and in some cases, slipped into the position painted by my earlier verbal sea-scape whereby Proportionality was given the odd wave or acknowledgment during the course of a case, but was not always seen as an essential factor to be determined before an adoption order was made as it should have been.

At the risk of stretching my metaphor too far, the law is, and this should always have been clear, that for there to have been a successful voyage to the Port of Adoption both vessels, Welfare and Proportionality, must have reached the port and be firmly tied up alongside.

After *Re B*, the later cases, all in the Court of Appeal, have sought to do no more than correct the approach of some judges in some cases where it was seen that the welfare

and proportionality evaluation had fallen into error. These cases are to do with process, in particular the process of evaluation and judicial analysis: they do not purport to change the law.

Again, before descending to the cases, it is helpful to remind ourselves what the law and practice has always been.

For as long as I have been practising in family law, and that is now getting on for 40 years, the idea of the overall welfare balancing exercise has been at the heart of decision making for children. The court is required to take note of all of the relevant factors in the case, attribute appropriate weight to each and, where they point in different directions, weigh one against another so as to arrive at an overall final decision. It is not rocket science. It is not new. It is a simple description of the process of fairly and wisely arriving at a final decision which seeks to afford paramount consideration to the child's welfare.

Parliament and the architects of the CA 1989 sought to assist the courts in undertaking the overall balancing exercise by adumbrating a list of likely relevant factors in the s 1(3) welfare checklist, and this was replicated in 1(4) of the ACA 2002. These checklists were welcome additions to assist in this often difficult task, but the character of, and need for, the old-fashioned welfare balancing exercise did not change.

What did change, in some cases, and what in the Court of Appeal we saw was changing in some cases, was a tendency for judges to miss out the overall welfare balancing exercise by following a different route to their final decisions. That these judges were drawn into error, as we have seen it to be, can be readily understood by reference to the *Good Ship of Least Intervention*. Properly the requirements of CA 1989, s 1(5) and ACA 2002, s 1(6) should be considered as part of the statutory welfare requirement and of proportionality; they are not, and cannot be, a substitute for them. The danger of looking at each progressively more interventionist option for

a child in turn, starting with the least, is that, if that is the only analysis undertaken by a social worker or a judge, in a case that ends in adoption, you have looked at and rejected each of the lesser options in turn without ever, at any stage, asking yourself the central 'adoption question' posed by Wall LJ in *Re P*, namely, in my words, whether the other lesser options are so bad that the child's welfare 'requires' adoption as opposed to any one of those other options.

I came to describe that process of thinking as 'linear'; one where each skittle in the line is knocked down, separately, one by one so that only the adoption skittle is left standing and that is chosen simply because it is the only one there. The process is wrong because it does not involve the court undertaking the old fashioned overall welfare balance that has always been required. Although the words that I used may have been new in this context, and if by choosing them I inadvertently caused confusion I apologise, by stating that what was required was a 'global holistic evaluation' I was doing no more than saying that in every case there was a need for the court to undertake the old-fashioned overall welfare evaluation. This was not, emphatically not, new law.

In terms of my metaphor, the Ship of Least Intervention should travel in the wake of the Good Ships Proportionality and Welfare; it is part of their flotilla; it should never be, on its own, the leader or, on its own, set the course.

The Court of Appeal cases are well known. My purpose in referring to them is to demonstrate how they do no more than address the analytical process and do so in a manner which simply seeks to nail down the extant law, with welfare and proportionality running in tandem – albeit that the nailing down may have been undertaken through deliberately robust, clear and uncompromising language!

The key Court of Appeal decision following *Re B* was, of course, *Re B-S* [2013] EWCA Civ 1146 which, in turn, drew on a clutch of Court of Appeal judgments handed down

(independently and, I have to record, without any significant collaboration between the different LJ's) at the end of July 2013.

Giving the judgment of the court, The President, Sir James Munby, listed and explained the 'essential considerations that judges *must* always have in mind ... at every stage of the process' (emphasis in original). These considerations all arise from ECHR, Article 8. They include:

- the overarching principle under ECHR, Article 8 requires that the aim of any state intervention in a family 'should be to reunite the family when circumstances enable that, and the effort should be devoted towards that end' (Hale LJ in *Re C and B* [2001] 1 FLR 611 quoted by Sir James Munby P in *Re B-S*);
- Under Article 8 'cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child' (*Re C and B*);
- ACA 2002, s 52(1)(b) provides that consent can be dispensed with only if the welfare of the child 'requires' this, which carries with it the Strasbourg meaning of necessary as explained by Wall LJ in *Re P*;
- The Supreme Court decision in *Re B* spells out just how stringent and demanding the s 52 requirement is;
- 'behind all this there lies the well-established principle ... that the court should adopt the "least interventionist" approach' - again as described by Wall LJ in *Re P*;
- By CA 1989, s 1(3)(g) and ACA 2002, s 1(6) the court "must" consider all the options before coming to a decision;
- The court's assessment of the parents' ability to discharge their responsibilities towards the child must take account of the assistance and support which the authorities would offer. Per Lord Neuberger (para 105): 'before making an adoption order ... the court must be satisfied that there is no practical way of the authorities (or others) providing the requisite assistance and support';

- It is the obligation of the local authority to make the court's order work. Judges must be alert to, and stand up against, cases where resource issues may be affecting the local authority's thinking.

The court in *Re B-S* expressed real concern about the 'recurrent inadequacy of analysis and reasoning' put forward in support of adoption by local authorities, guardians and, on occasions, judges. Two 'essentials' for every adoption case were identified: 'proper evidence' and 'adequately reasoned judgments'. The point made in relation to each was effectively the same. What is required at every stage is '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) or '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 (A Child)* [2013] EWCA Civ 965).

From the judge what is required is 'a proper balancing exercise' or 'putting it another way ... a proportionality analysis'; there is a need for acknowledgment that adoption is a last resort and consideration of what it is that justifies adoption in a particular case (Black LJ in *Re P (A Child)* [2013] EWCA Civ 963).

The court endorsed what I had said in *Re G* concerning the application of a 'linear' approach, which is wrong, as opposed to the 'global, holistic evaluation' which is what is required. As Sir James Munby said:

'This point is crucial. The judicial task is to evaluate all the options, undertaking a global, holistic and 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.'

That statement is to be qualified as relating only to each of the 'realistic' options, rather than every intellectually conceivable option there may be (*Re B-S*, para 34 and *Re R* [2014] EWCA Civ 1625).

I hope that from this summary, and indeed from a full reading of *Re B-S*, that it is clear that what is required is just the same as that which has always been required: a thorough balancing exercise of each option against each of the other options to find the outcome that the child's welfare proportionally requires.

*Re H (A Child)* [2015] EWCA Civ 1284 rehearsed the point that, although the Strasbourg and domestic case law favours reunification with the family, this is an aspect of proportionality and there is no formal 'presumption', in the sense that a presumption is normally applied in domestic law. I would suggest that where the statute requires paramount consideration be given to the welfare of the child, there is no room, as a matter of law, for any formal 'presumption' that pre-loads the welfare evaluation so that one outcome is pre-ordained unless it is rebutted.

In *Re R* [2014] EWCA Civ 1625, The President stressed that *Re B-S* was primarily directed at practice and he emphasised,

'with as much force as possible, that *Re B-S* was not intended to change and has not changed the law. Where adoption is in the child's best interests, local authorities must not shy away from seeking, nor courts from making, care orders with a plan for adoption, placement orders and adoption orders. The fact is that there are occasions when nothing but adoption will do, and it is essential in such cases that a child's welfare should not be compromised by keeping them within their family at all costs.'

The President also emphasised the importance of the long-established welfare balance under s 1 of the 1989 Act or the ACA 2002.

At a number of points both in the judgment of The President in *Re R* and in my own judgment, it was stressed that 'nothing else will do' applies in the context of the overriding requirements of the child's welfare throughout her life.

In *Re F (A Child) (International Relocation Cases)* [2015] EWCA Civ 882 I revisited the word 'holistic' after hearing argument to the effect that there was a danger that this word may have become elevated into a free-standing term of art in a way which was entirely at odds with the original meaning that I had intended for it, which was only as a handy label for the old fashioned welfare balance. In my judgment I explained that:

'The overall balancing exercise is 'holistic' in that it requires the court to look at the factors relating to a child's welfare as a whole; as opposed to a 'linear' approach which only considers individual components in isolation.

Reference to 'a global, holistic evaluation' in *Re G* was absolutely not intended to introduce a new approach into the law. On the contrary, such an evaluation was put forward as the accepted conventional approach to conducting a welfare analysis, as opposed to a new and unacceptable approach of 'linear' evaluation which was seen to have been gaining ground.'

Finally, we come to the most recent in the current canon of cases, *Re W (A Child)* [2016] EWCA Civ 793 which was decided in July 2016. The case concerned a two-year-old girl, who had been placed with foster carers at the age of one day before moving to prospective adopters when she was 7 months old. Care and placement for adoption orders were made without a contest when she was 5 months old. By the time of the proceedings she had lived with the adopters for 17 months and had developed a firm and sound bond with them.

The child's paternal family had been unaware of her birth until they became involved in caring for first one, and then a second, younger sibling. When the adopters applied for an adoption order on the first child, the paternal grandparents, who by then had the long-term care of one of the younger siblings, applied for a special guardianship order. The High Court, after a full hearing, held that the child should move from the adopters to live with her grandparents; the adoption application was therefore dismissed.

On appeal focus was given to the approach adopted by the independent social worker and children's guardian which, it was held, was substantially in error because of a misuse or misunderstanding of the phrase 'nothing else will do'. The judgment contains full quotation of the relevant parts of the evidence, but in essence it was held that these two professionals had approached their evaluation on the basis that, because there was a viable family placement, the 'nothing else will do' approach required that that placement must be chosen. No account had been taken of the 'status quo' argument (see also *Re M' P-P* [2015] EWCA Civ 584) as there had been no regard to the fact that the child did not know of or have any relationship with her grandparents and had found a settled home with the adopters where she had been for over two-thirds of her life. By accepting and endorsing this professional evidence, which did not contain any overall welfare balance, the judge had, it was held, unfortunately fallen into error.

We held that, where an adoptive placement has been achieved and a significant time has passed, the welfare balance must inevitably reflect these changed circumstances. At the earlier stage of an application for placement for adoption, that element of the balance that now includes the new adoptive family simply did not exist. At that stage, the part of the scales weighing against any family placement is likely to be populated with factors such as risk of harm and the need for protection. But once the child has settled in a new adoptive home, that side of the balance must, in addition, take account of the real relationships and the bank of experiences that the child will by then have established in her new life.

In my judgment, having stressed that 'nothing else will do' must always be tied to the welfare of the child, I said (paragraphs 68 and 69):

'The phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase "nothing else will do" is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the ECHR and reflected in the need to afford paramount consideration to the welfare of



the child throughout her lifetime (ACA 2002 s 1). The phrase "nothing else will do" is not some sort of hyperlink providing a direct route to the outcome of a case so as to bypass the need to undertake a full, comprehensive welfare evaluation of all of the relevant pros and cons (see *Re B-S* [2013] EWCA Civ 1146, *Re R* [2014] EWCA Civ 715 and other cases).

Once the comprehensive, full welfare analysis has been undertaken of the pros and cons it is then, and only then, that the overall proportionality of any plan for adoption falls to be evaluated and the phrase "nothing else will do" can properly be deployed. If the ultimate outcome of the case is to favour placement for adoption or the making of an adoption order it is that outcome that falls to be evaluated against the yardstick of necessity, proportionality and "nothing else will do".

Put another way, if 'nothing else will do' means, as Baroness Hale described it, something that is 'justified by an overriding requirement pertaining to the child's best interests', that question cannot be evaluated unless and until there has been a thorough analysis of the child's welfare? How else could one evaluate it? Welfare is the paramount consideration. Once welfare is determined, where adoption is the chosen option that outcome must then be checked for proportionality and will only be justified in Art 8 terms if there is an overriding welfare 'requirement' (in line with s 52), that is that 'nothing else will do'.

With commendable speed both Professor Judith Masson, in an article '*Relationships v Relatedness in family justice*'<sup>1</sup>, and Sarah Phillimore (St John's Chambers, Bristol)<sup>2</sup> have offered commentary upon the Court of Appeal decision in *Re W*. The case is going to be re-tried in the High Court, therefore, other than drawing attention to these articles, I wish to quote from only two or three sections which are relevant to the theme of my address this morning.

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<sup>1</sup> Journal of Social Welfare and Family Law, DOI: 10.1080/09649069.2016.1239369 (published online 28 Sept 2016).

<sup>2</sup> *Contesting the making of an adoption order: Re W (A Child)* [2016] Fam Law 1068.

Under a heading '*Where do we go from here?*', Sarah Phillimore notes that the decision has caused some consternation with many family practitioners who may have approached the issue as the ISW and guardian had done. She, rightly, identifies the 'clear and dangerous potential' for "nothing else will do" to 'distract from the essential welfare analysis and asking what does this particular child need'.

In relation to the erroneous approach of the ISW, guardian and the judge, as it was held to be, Prof Masson observes:

'Such errors occur because individuals assume they know the right answers to complex problems or apply heuristics to find an answer quickly. An increase in cases places pressure on professionals and courts so they behave in this 'sloppy' way. The solution lies not in lists of guidance but interdisciplinary knowledge and professional challenge, and in reducing applications, for example by refusing leave.'

I had to look up 'heuristics' and I found it to be exactly the right word to describe the misuse of 'nothing else will do' as we had found it to be in *Re W*. Although the word may have other more technical meanings, it refers to mental shortcuts which ease the load of making a decision, examples might be 'a rule of thumb' or 'an educated guess'; 'heuristic' therefore completely captures the 'quick-fix' or 'hyperlink' approach that I was attempting to describe in *Re W*.

Pausing there, I believe that Professor Masson is entirely right in pointing to the pressures of time and resources which are the day to day reality of all those currently working in the Family Justice system. The President's recent 'View'<sup>3</sup> has described how those pressures are rapidly increasing in at an alarming rate. *Re B*, *Re B-S* and now *Re W* are, nevertheless, important decisions which send the clear message that, no matter what the pressures in the system may be, the decision for each child must be undertaken after a thorough evaluation of both welfare and proportionality.

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<sup>3</sup> *View from The President's Chambers (15)* [September 2016]

Professor Masson concludes her article in the following memorable manner:

'Family cases resolve (or not) individual claims, they also indicate the current climate in family justice. *Re W* demonstrates that the stormy period heralded by *Re B*, has not yet resolved into clear skies. The lightning flashes from the Supreme Court have obscured the value of adoption and fog and hailstones from the Court of Appeal have made it hard to find the way. The adults and children exposed to these storms have suffered most.'

The purpose of this address is an earnest attempt, in an extra-judicial setting, to settle the weather and to calm the storm. We meet in the autumn of the year. A time of mist and mellow fruitfulness, but also a time for crispness and clarity of view. My message is that the landscape that is to be seen now, in public family law in 2016, is the same as it had been for a decade and more prior to 2013 and prior to *Re B* and *Re B-S*, with welfare and proportionality needing to be alongside each other in any evaluation conducted by a social work professional or the court.

If we have ended up back where we always thought we were, 'what', you may ask, was the point of these cases and the controversy that they have undoubtedly caused within the system and beyond. The 'point' quite simply is that, to a degree, and by that I mean some professionals and judges in some cases, we had lost our way and there was a need for those of us in the system as a whole to be reconnected to the core principles. The facts of *Re B*, which I have briefly rehearsed, led two senior Lord Justices to express significant concern and unease at the proportionality at a care plan for adoption in the context of that case. That, in turn, led the Supreme Court to restate the principles but by a majority (Baroness Hale dissenting) to uphold the pro-adoption order. In doing so some of the Supreme Court Justices offered 'nothing else will do' as a firmly worded illustration of the impact of ECHR, Art 8 and the requirement that a highly interventionist order such as adoption will only be justified if it is necessary and proportionate.

It remains the case that there will always be children for whom adoption is the right option, indeed, as it must be, the only option. Courts and social workers should not be deflected from identifying such cases and moving forward with promptness to make orders aimed at securing an adoptive home for those children. The aim of the recent flurry of case law has not been to remove or devalue the option of adoption for such children; it has, as I have attempted to demonstrate, been to ensure that the all-important 'adoption decision is made, as it must be, by affording paramount consideration to the child welfare throughout her life, following a comprehensive balancing of the relevant welfare factors, and where adoption is seen to be both necessary and proportionate to the facts of the case. That is the exercise in social work and judicial analysis that is required; indeed, I would say, 'nothing else will do'!

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