OPEN ACCESS

University of BRISTOL

Masson, J. (2017). Disruptive Judgments. *Child and Family Law Quarterly*, *29*(4), 401-422.

Peer reviewed version

License (if available):
CC BY-NC

Link to publication record in Explore Bristol Research
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available via Jordan Publishing. Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research
General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available:
http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/

Disruptive judgments

Judith Masson*

Keywords: Care proceedings, adoption, guidance, judges, rule of law

Abstract

Disruptive judgments are exercises of judicial power intended to impact on practice. This paper discusses the concept of the disruptive case, the practice of making disruptive judgments and the processes though which judgments are made disruptive. It uses the Court of Appeal's decision in *Re B-S* as a case study showing how it has disrupted care proceedings and adoption practice. These disruptive effects of *Re B-S* are illustrated through an examination of case law, reviews, articles, published statistics and research findings. It It also considers how difficult it has been to restore clarity subsequently. It concludes by discussing how to prevent judgments from being disruptive: improving knowledge of the operation and effects of the family justice system through data; the need for interdisciplinary collaboration in developing guidance for practice beyond the court room; and the importance for the rule of law of judicial restraint in promulgating guidance.

Introduction

This article introduces the concept of the disruptive judgment, which it seeks to define and explore. In doing so it examines what makes a judgment disruptive, and how judgments operate to disrupt practice in and beyond the legal sphere. At its heart is a case study[1] of the Court of Appeal's decision in *Re B-S*[2] to reject a parent's appeal against the refusal of her application for leave to oppose the adoption of her children.[3] Such decisions are usually unremarkable but as is evidenced below, *Re B-S* has been a disruptive case. It has had (and continues to have) a marked impact on adoption practice, decision-making in local authority children's departments, the work of the courts and the futures of some children subject to care proceedings.

There is a rich vein of legal scholarship examining 'landmark cases' in various areas of law; typically, cases are selected by authors, not the editors, from their personal perspective. Whilst the editors of the collection on Family Law do attempt to explain why the selected cases are 'landmarks', this is the exception rather than the rule.[4] Cases are recognised as landmarks and selected because they standout by marking the 'beginning or end of a chain of legal development'[5] or its boundaries.[6] They are the foundations of legal doctrine or have shaped the law, are usually precedents, and their position is well-recognised by legal scholars.[7] This assessment is made in retrospect, sometimes at a considerable distance, for example the most recent case in the volume on restitution is from 1950.[8]

---

*Professor of Socio-legal Studies, University of Bristol. I would like to thank Professors Ann Barlow, Gillian Douglas and Liz Trinder, and the anonymous reviewers for their helpful comments on an earlier draft of this article. Also, the University of Bristol, School of Law, which funded the research interviewing local authority solicitors which sparked my interest in the immediate effects of *Re B-S*, and the ESRC Grant ES/M008541/1, which has funded my research into Outcomes for Children before and after care proceedings reforms.

[1] L. Mabry (2008) *The case study is social research,* Thousand Oaks, Sage; R. Yin (2012) *Applications of case study research*, *Thousand Oaks,* Sage.

[2] [2013] EWCA Civ 1146.

[3] Adoption and Children Act 2002, s.47(5).

[4] S Gilmore, J Herring and R Probert (eds), *Landmark cases in Family Law*, (Hart, 2016).

[5] Catherine Macmillan in C Mitchell and P Mitchell, (eds) *Landmark cases in the law of contract*, (Hart, 2016), p.

[6] John Mee writing about *Burns v Burns* [1984] Ch 317 in Gilmore *et al*, (n 4 above).

[7] For example authors in the volume on *Contract*, (n 5 above) refer to Professor Treitel's views.

[8] C Mitchell and P Mitchell, (eds*) Landmark cases in the law of Restitution*, (Hart, 2016).

Landmark cases stand the test of time, either because they continue to be cited as the foundation of legal principle or because they hold the key to subsequent developments. In contrast, disruptive judgments have immediate impact, and are not firmly grounded in law.

Many judgments identified as 'landmarks' have had little impact initially. This reflects the way much of the law operates. Despite past concerns about decisions opening 'floodgates' there are numerous steps between the creation of a new cause of action and successful claims based on it. Particularly, individuals must recognise that law might give redress, seek to do something about it[9] and find a lawyer who recognises the potential of the original case. According to Williams, *Street v Mountford*[10] (a landmark land law case on the distinction between leases and licences) remained largely unknown, and consequently failed to impact on letting practices.[11] Even where a landmark case might be expected to have immediate effect its application may proceed more cautiously. Herring notes that cases of marital rape were still being prosecuted as assaults after the decision of *R v R*,[12] and later were marked with lighter sentences because they were considered less serious.[13]

Disruptive judgments are 'game-changing'; they interrupt existing expectations and practice, disorient practitioners and result in decisions or outcomes which are not predicted. Nevertheless, they may be welcomed - the decision is *Re B-S* has the support of practitioners and academics who favour the restriction of adoption.[14] 'Disruptive' is a contemporary not an historic assessment, based on the effect of a decision on day to day practice, even though this may be short-lived.[15] Disruptive judgments may become landmarks but lack a foundation in law. They have disruptive impact in the real world not just the justice system changing many future actions and decisions. Disruption is a matter of scale. The breadth of the area effected, the frequency with which the issue arises or the sheer volume of work impacted defines such decisions. By contrast, even widely known legal landmarks may have only limited impact in practice. *J v C*[16] provides a good example. The issue in the case, a dispute between parents and carers, remains a relatively uncommon in the courts. The decision passed largely unnoticed at the time.[17] Whilst judges deciding landmark cases may be unaware of this,[18] those giving disruptive judgments cannot be. The judge wants to change the way things are done and constructs the judgment to maximise the chances that this will happen. Indeed, it is argued below that delivering a disruptive judgment is an intentional act.

Landmark cases generally are (or have been) precedents, in contrast status in law is not crucial for achieving disruptive effect. Indeed, judges may seek to give disruptive judgments because they are cannot make precedent to interpret or re-interpret law as they wish, legitimately. Disruptive judgments reveal the judiciary's assumed power to intervene in policy whilst purportedly working

---

[9] W Felsteiner, R Abel and A Sarat (1980-81) 'The emergence and transformation of disputes; naming, blaming and claiming' *Law and Society Review* 15(3-4) 632-66, H Genn and S Beinart, *Paths to justice* (Hart, 1999).
[10] [1985] AC 809.
[11] P Williams, 'Exclusively yours - a look back at *Street v Mountfor*d' (2014) *L. & T. Review*, 18(3), 92-95.
[12] [1992] 1 AC 599.
[13] J Herring in Gilmore *et al* above n 4, 241, citing P Rumney (1999) 19 *OLS* 243.
[14] For example, A Bainham and H Markham [2014] *Fam Law* 991–1002; A Gupta and E Lloyd-Jones [2016] *Child and Family Social Work* 539–547; B Sloan [2015] *JSWFL* 37(4), 437-457.
[15] The case may be overruled e.g. *Re W and B* [2001] EWCA Civ 757 (the starred care plan case) or overturned by statute.
[16] [1970] AC 668.
[17] N Lowe, in Gilmore *et al*, (n 4 above), 27 notes that the case was not recognised as important, 33.
[18] This is not always the case, for example Lord Denning was obviously intent on changing the approach to ancillary relief in *Wachtel v Wachtel* [1973] Fam 72, and see above G Douglas in Gilmore, Herring and Probert (n 4 above), 135, 142.

within the limits of interpreting and applying the law.[19] Disruptive judges are not constrained by the doctrine of precedent and can create change even where existing decisions appear to preclude this. Even a powerful dissent may be disruptive if it gains traction and effects practice.[20] Similarly, the facts of the case being decided may be relatively unimportant because the impact is intended to, and is presented as, applying more generally. Rather than relying on reasoning, the traditional tool of law-making, judges focus on *dicta*, soundbites, to set a course for change. The language used, the tone and mode of judgment are key tools in the construction of a judgment with disruptive potential. Labelling a judgment 'disruptive' recognises its immediate success in achieving intended change[21] and questions its legitimacy in strict legal terms.

Judging and judgments

First and foremost a disruptive judgment is a judgment with the power to effect a change of law. Other forms of judicial communication, even Practice Directions,[22] cannot interpret the law or state how it should be applied. The exercise of judicial power in giving judgment is constrained by the rule of law;[23] in selecting to deliver a message through a judgment rather than a speech or journal article judges both increase its strength and limit its scope. Traditionally, Judges' powers to develop or create law are limited by the requirements of the case they are deciding and the doctrine of precedent. However, Munday identified a more *dirigiste* approach with decisions approximating to a 'dilute form of legislation'.[24] Guidance judgments are an obvious example. In *Piglowska v Piglowski*[25] Lord Hoffman explained and endorsed the Court of Appeal's role in providing general guidance on the exercise of discretion, derived from the court's understanding of family life.[26] This mode of judgment has becomes a common practice in family law, extending beyond the weighing of factors in discretionary decisions to guiding (or directing) decisions more generally.[27] Nor has the practice been limited to appellate judges.[28] The practice of issuing guidance in judgments or 'guidance judgments' provides opportunities for policy-making, which can blur the boundary between law and policy, and questions what are (or should be) the limits to judicial policy-making.

Giving judgment is a deliberative act. Judges act strategically in choosing the structure, language and content of their judgment for deliberate effect. Duncan Kennedy has demonstrated how a judge can shape not just an individual decision but the law itself through the focus and construction of their judgments, even when another outcome of the case appears certain.[29] Judges can and do research areas not raised by the parties and base their judgment on the aspects they select to achieve desired effects. They have individual responsibility and, even in the Court of Appeal, do much of their work

---

[19] W. Twining and B Miers, *How to do things with rules* (5th ed 2010) 354.

[20] For example, Lady Hale's dissenting judgment in *Re B* [2013] UKSC 33, a case concerning the threshold test in care proceedings and the proportionality of orders made. Although whether the phrase 'nothing else will do' would have had such an impact without *Re B-S* [2013] EWCA 1146 can only be a matter of conjecture.

[21] Whether the outcome is viewed positively or negatively depends on the view taken of the impact but the method of reform remains questionable.

[22] Constitutional Reform Act 2006, Sched, 3(2)(a).

[23] Tom Bingham, *The Rule of Law* (2010), 45.

[24] R Munday, 'Judicial configurations' (2002) 61 C.L.J. 612-656, 612.

[25] [1999] 2 FLR 763 HL.

[26] At 784H 785D but such guidance could not involve value judgments on which judges could reasonably differ.

[27] For example, Munby J gave guidance on the contact regime for a new born baby in *Re M* [2003] 2 FLR 171, and on the use of Children Act 1989, s.20 in *Re N* [2015] EWCA Civ 1112, in both these cases the guidance was not limited to court practice but extended to social work practice.

[28] R McCarthy, 'Family Division judgments: what are they for?' [2012] *Family Law* 1211, 1214.

[29] Duncan Kennedy, 'Freedom and constraint in adjudication' 36 *J. Legal Educ. 518* (1986); J Smith and E Tiller (2002) 'The strategy of judging: evidence from administrative law' *J. Legal Studies* 31,1 61-82.

individually.[30] Darbyshire observed the burdens on Court of Appeal judges, constrained by the volume of work and the 'moral pressure' to get judgments written.[31] Draft judgments were frequently prepared in advance of oral hearings so they could be delivered at the end with little discussion with other members of the panel.[32] Single judgments are now common in appeal cases, either produced by a single judge or as a composite from those who heard the case.[33] The judge who gives judgment determines how the decision is explained and the language used. This system of individual rather than collective judicial responsibility provides no filter mechanism to deter or question the potential for disruption. Such practices weaken the internal checks which may constrain judgments, effectively giving powers formally held by the Court of Appeal to individual judges.[34]

Creating a disruptive judgment starts with the selection of a case as a suitable vehicle. Most appeals to the Court of Appeal require leave;[35] applications are reviewed on paper by a single judge and those refused can be taken to a hearing. Judges can identify possible cases in advance and control which cases enter the appellate system.[36] The supervising Lord (or Lady) Justice for each type of specialist appeal decides who judges important cases.[37] This system means that that the judiciary, individually and sometimes collectively control the cases heard by the Court of Appeal, who hears those cases and who writes the judgment. In some cases, for example *Re R*,[38] they also exert substantial influence over the selection of cases where leave to appeal is sought. Through this process Lord Justice Wall gathered a group of contact cases, *Re L, M, V, H (contact: Domestic Violence)*,[39] so that the Court of Appeal could issue a judgment enshrining guidance based on the advice of a committee he had chaired.[40] Despite careful preparation, which included obtaining expert evidence, this decision has had little effect,[41] underlining the crucial role of context for making a disruptive judgment. A study of disruptive judgments is therefore a study of judgments in context, analysing the judgment itself, the circumstances in which it was given and its effect.

Case Study: *Re B-S*[42]

The case of *Re B-S* provides a signal example of the disruption a judgment can cause and the mechanisms through which this occurs. Indeed, studying the way the case was used and referred to

[30] Sitting together to hear cases is the exception, P Darbyshire, *Sitting in Judgment Hart* (2011), chap 14.
[31] Darbyshire, (n 30 above), 354.
[32] Darbyshire, (n 30 above), chap 14.
[33] R Munday, '"All for one and one for all" the rise to prominence of the composite judgment within the civil division of the Court of Appeal' (2002) 61 C.L.J 321-50.
[34] McCarthy's concerns about guidance judgments from individual High Court judges, see, (n 28 above), 1214 are apposite.
[35] Civil Procedure Rules, r.52.3. Leave can be granted by the lower court but the practice is for this decision to be left to the Court of Appeal.
[36] This routinely occurs where the leave application and substantive appeal are heard together, see *Re D* [2015] EWCA Civ 703 para 40.
[37] Darbyshire, (n 30 above), 345. This process allows the President of the Family Division to select the cases which he hears.
[38] *Re R* [2014] EWCA Civ 1625, n 147 below and accompanying text.
[39] [2001] Fam 260
[40] I am indebted to Professor Liz Trinder for these details.
[41] R Hunter and A Barnett (2013) *Fact-Finding Hearings and the Implementation of the President's Practice Direction: Residence and Contact Cases: Domestic Violence and Harm Family Justice Council*.
[42] [2013] EWCA Civ 1146.

by practitioners first alerted me to the power of judgments to have an immediate and disruptive effect.[43]

The case involved an unsuccessful appeal by a mother against a decision to refuse her leave to oppose the adoption of her child. However, the judgment went beyond the decision on the case; the President of the Family Division, Sir James Munby, giving the judgment of the court set out detailed requirements for social work evidence and court judgments in care proceedings. Practice in adoption is well-documented, the numbers of children entering and leaving care by adoption are routinely published, making possible the examination of impact not only through legal literature, (unrepresentative) reported cases but also statistically, in terms of the change in applications and orders. Alternative cases might have been selected;[44] *Re N*[45] similarly employed the tone and mode of the judgment to make a point unconnected to the decision. Others familiar with practice beyond family law will no doubt identify other examples, and further mechanisms for making judgments disruptive.

The judgment in *Re B-S*

Everything about the judgment in *Re B-S* gave the impression of its importance. It was a composite judgment by the Master of the Rolls, the President of the Family Division and the Head of International Family Justice. Leave to appeal had been given by the next most senior family judge in the Court of Appeal, explicitly in response to a decision of the Supreme Court, *Re B.*[46] The problem it sought to address appeared serious, current and portrayed as widespread, raising issues of human rights. It was of the utmost importance for the mother and child concerned, with the potential to change the course of their lives.[47] The language used in the judgment was trenchant and the direction it gave uncompromising, not simply guidance but 'principles' for 'the proper approach.'[48] In this context, it seems that the judgment was intended to produce change – to swing the family justice pendulum in favour of parents at a point when the impending restriction on expert assessments and case duration was seen as disadvantaging them.[49]

However, *Re B-S* was not a very suitable vehicle:[50] the points made so strongly in the judgment were not reflected in the decision being appealed. The court could not therefore provide examples of what was wrong; indeed, the judgment declared that the judge at first instance had been 'right' to refuse leave to oppose the adoption and the appeal was dismissed. The general points on social work evidence and the structure of judgments were all obiter; the specific points on the test for leave had been decided by the Court of Appeal in 2008 in a judgment that *Re B-S* did not (and could not) overrule.[51] The decision and reasoning were very short, covering just three and a half pages of

[43] Interviews with local authority lawyers in the three months after the decision see: J Masson, 'Third (or fourth) time lucky for care proceedings reform?' [2015] CFLQ 3.
[44] *P v Cheshire West and Chester Council and another* [2012] UKSC 68 was suggested; deprivation of liberty is the subject of a recent Law Commission Report, Law Com No 372 (2017). Munby P's *dicta* in *Re N* [2015] EWCA Civ 1112 appears to have contributed to the substantial increase in care proceedings but *Hackney LBC v Williams* [2017] EWCA Civ 26 has made it clear that these do not re-interpret Children Act 1989, s.20.
[45] [2015] EWCA Civ 1112.
[46] [2013] UKSC 33, see *Re B-S* [2013] EWCA Civ 813, paras 9, 18-24, *per* McFarlane LJ, granting leave to appeal.
[47] See, for example what could have happened had the decision favoured the mother: *A and B v Rotherham MBC* [2014] EWFC 47 (Fam).
[48] Paras 74 and 75.
[49] The Children and Families Act 2014 reforms were being piloted in advance of Royal Assent.
[50] This was also the case in the 'corrective' judgment in *Re R* [2014] EWCA Civ 1625, see n 148 below and accompanying text.
[51] *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ 616, a well-known and widely cited decision.

the judgment. Each of the appeal grounds was summarily rejected and Parker J's decision, though not without minor errors, was upheld. Put another way, despite a Supreme Court decision, which had justified the *Re B-S* appeal and its assertion of a less restrictive approach to applications for revocation, a decision made before *Re B* to reject such an application was upheld in short order. That being so, the need for another judgment was questionable. *Re B* had not required a new approach to *these* cases. Stating this would have neutralised the judgment's potential to disrupt. As it was, the disjunction between the case and the judgment, between ratio and dicta created confusion,[52] and this was magnified by the way the decision was disseminated and revisited. What was subsequently agreed to be only 'practice guidance' was treated by judges and practitioners as *law* to justify appeals where decisions had not met the desired standard.[53]

Had the judgment in *Re B-S* simply reminded local authority applicants and the judiciary of the importance of explaining, with evidence, the selection and rejection of placement options for the child and providing a fully reasoned judgment it would not have had a disruptive effect. However, it went much further, condemning past practice as 'sloppy',[54] giving a clear message that previous practice was not good enough, 'time to call a halt'[55], and consequently suggesting that earlier decisions may have been wrong. It set out how social workers and judges should approach their tasks in terms of content, process and format; there had to be 'a holistic' not 'linear'[56] evaluation of 'all realistic placement options'[57], comparing each with the others. Judges were directed on the importance of considering all the pros and all the cons of allowing or refusing the parents leave to oppose the adoption, and reminded 'not to attach undue weight to the short-term consequences for the child if leave is given'.[58] The adverse effect of a contested adoption on the adopters could be dealt with by 'firm judicial case management' before the leave hearing.[59] This was not a judgment that simply reminded judges to apply the statutory tests conscientiously, it added further layers and a specific approach.[60] Effectively, it set out a checklist of possible appeal points for challenging refusal to revoke a placement order[61] or give leave to oppose adoption.

Judgments need support and application to become disruptive. All judgments become stronger and more noteworthy when they are supported by other judgments, and particularly where they become the foundation for a new way of thinking about an issue or provision.[62] A single case, even from the Court of Appeal, may always be side-lined as limited to its facts. W *v Neath Port Talbot*

---

[52] 'Such was the level of misunderstanding … that a year later the Court of Appeal gave further guidance' *Re N (ICO interim removal)* [2015] EWFC 40, para 75. Interviews with local authority lawyers in the weeks after *Re B-S* revealed considerable difference of opinion about its effect, see n 43, and below n 102, and accompanying text.

[53] See, The impact of *Re B-S*, below.

[54] Para 40.

[55] Para 30.

[56] Para 43, quoting from McFarlane LJ's judgment in *Re G* [2013] EWCA Civ 913.

[57] Paras 34 and 35 (but note in para 27 the phrase 'all options' was used). The difficulty with focusing on 'realistic options' unless these are agreed, failure to consider *any* option may ground an appeal.

[58] This is a puzzling point. Only where granting leave makes no difference to outcome can its effects be short-term, see Masson [2014] JSWFL 82-84. In making this statement, Munby P quoted from *Re O* [1995] 2 FLR 124, a private law case about indirect contact, where refusal would not prevent a future application.

[59] Para 74(ix).

[60] This is in marked contrast to the law of relocation where the Court of Appeal has urged a return to the welfare test, removing judicial accretions, *Re F* [2015] EWCA Civ 882.

[61] Adoption and Children Act s. 24(2), see para 84.

[62] This was the approach taken by Lord Denning in his development of the Common Law see A Denning, *The Discipline of Law* (1979).

County Borough Council,[63] an appeal by a local authority against a care order, which it considered unnecessary and disproportionate, provided the opportunity for a supporting judgment from a differently constituted court in a different factual context. The *Neath and Port Talbot* case had been heard shortly before *Re B-S* but the judgment was given weeks later, in October 2013. It served to buttress and expand the scope of *Re B-S*. Ryder LJ, who delivered the main judgment, took the opportunity to explain how his judgment meshed with the reasoning in *Re B-S,* and set out the expansive powers of the courts in care proceedings together with the local authority's obligation to satisfy them. Munby P gave a short, concurring judgment, '[Ryder LJ's] judgment explains and elucidates the respective functions of the court and the local authority in care cases. It complements the recent judgment in *Re B-S*…'[64]

Three of the specialist family judges in the Court of Appeal had now put their names to the *Re B-S* approach,[65] which was extended beyond the niche area of adoption to care proceedings more generally. They had also approved the decision of a fourth, McFarlane LJ in *Re G*[66] requiring a 'holistic' approach to analysing options for the child's care. The list of appeal points had grown; options for placement at home or with relatives now had to indicate the services the local authority would provide, and why these were (or were not) sufficient for the child's welfare. The courts had not previously claimed successfully that the family jurisdiction extended to determining the provision of local authority services.[67]

Making judgments disruptive

Disruptive judgments must have impact, 'a marked effect or influence'[68] on everyday practice, including on legal advice, claims and decisions in areas of law with substantial numbers of cases. The first requirement therefore is that they become widely known. Munby P sought to achieve this both with the language of the judgment and through dissemination. He later commented, that the language was 'deliberately strong…we did not mince our words.'[69] In the words of a local authority senior manager it was 'a massive edict.'[70] The President's Office immediately emailed the judgment to all Designated Family Judges *for onward circulation*[71] - this was unprecedented. It ensured that local authority lawyers, lawyers in private practice, solicitors and barristers in each family court area knew of the case. The President referred to it in the next edition of *View from the President's Chambers* in case anyone had missed it,

> 'Finally, before departing from the recent case-law may I emphasise the importance for all family practitioners, whatever their professional discipline, of the decision in *Re B-S (Children)* [2013] EWCA Civ 1146. The Court of Appeal voiced serious concerns and

[63] [2013] EWCA Civ 1228.
[64] *W v Neath Port Talbot County Borough Council* [2013] EWCA Civ 1228 at para 115.
[65] By the end of October 2013 all the family judges in the Court of Appeal except Gloster LJ had delivered substantive judgments applying *Re B-S*.
[66] [2013] EWCA Civ 965.
[67] *Re S* [2002] UKHL 10; Pack, A '*W v Neath Port Talbot* – courts local authorities and a Mexican standoff' *Family Law Week* 17th November 2013 available at http://www.familylawweek.co.uk/site.aspx?i=ed120970 (31st July 2017).
[68] Oxford English Dictionary definition.
[69] J. Munby, Keynote speech to Families Need Fathers AGM, 14th November 2014.
[70] Research in Practice, (2016) *The impact of the Family Justice Reforms: Phase 3 – exploring variation across 21 local authorities,* Department for Education RR 546, 84.
[71] This has been done with a few subsequent cases, notably *Re N* [2015] EWCA Civ 1112 (see above n 44); the corrective *Hackney* case [2017] EWCA Civ 26 was circulated only by the Local Government Care Lawyers Group.

> misgivings about how courts are approaching cases where a placement order or adoption order is made without parental consent …. And that practice, to speak plainly, has not been satisfactory.'[72]

Within days of being published the judgment became the subject of comment in the legal press and blogs, raising the possibility of new appeals.[73] A torrent of cases[74] followed, which attracted further publicity; there were more applications to revoke placement orders and to appeal cases decided previously. The *Re B-S* standard was applied to appeals of decisions made months earlier, reinforcing the impression that it was law (with retrospective effect) not simply new guidance for the future.[75]

Timing matters; judgments are more likely to have impact if they are published at a point where the legal community is receptive to change and seeking to develop the law. *Re B-S* was expertly timed; leave to appeal was give two days after the Supreme Court's decision in *Re B* and the case was heard only five weeks later, a very short wait even allowing for the priority given to cases involving children. The judgment too was well-timed, delivered promptly,[76] at the start of the legal term, rather than shortly before the vacation when the case was heard. This timing emphasised the case's potential importance: it was a considered response to *Re B*, delivered without delay to prepare the lower courts for this latest development.

The context in which a judgment is issued can increase or diminish interest in it, and thus the potential to disrupt. The decision in *Re B-S* appeared at a time of heightened concern amongst family lawyers about justice for families and the future for lawyers who relied on legal aid funding. This may go some way to explain the alacrity with which lawyers explored the opportunities the case provided. The imposition of the 26 week timetable for care procee dings, recommended by the Family Justice Review, and the government's promotion of adoption for children in care raised questions about how parents' rights could be secured procedurally and substantively. The shortening of care proceedings by more than half would reduce parents' opportunities to demonstrate change once care proceedings had started; the restriction of expert appointments also limited the parents' lawyers' options in challenging the local authority's case.[77] Reforms introduced by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 were limiting access to justice, reducing legal work and cutting fees.[78] In excess of £170 million of public funding for legal advice and representation in family cases had been removed by taking most areas of family law out of the scope of legal aid. Parents and children in care proceedings still had the right to non-means, non-merits legal aid but legal representation in other areas of family law depended on privately paying clients. Lawyers reliant on public funding faced cuts to their fees and needed to develop new areas of

---

[72] *View from the President's Chambers*, No. 7 (October 2013) available at https://www.judiciary.gov.uk/publications/view-from-presidents-chambers/ (last viewed 24th March 2017).

[73] New Law Journal 20th September 2013; http://www.magdalenchambers.co.uk/court-appeal-case-re-b-s-children-2013-ewca-civ-1146/ (8th October 2013); http://www.wwwparentsagainstinjusticeorguk.com/2013/10/re-b-s-children-2013-ewca-civ-1146.html (21st October 2013); http://www.parentsaccused.co.uk/time-to-call-a-halt-to-sloppy-practice-in-adoption-cases/ (16th October 2013).

[74] A Verdan and P Harries in a paper published on 26th September 2013 commented, '*Re B-S* has huge and wide-ranging implications and is already being referred to in family courts up and down the country.' http://www.familylawweek.co.uk/site.aspx?i=ed117472 (24th March 2017).

[75] *Re H; Re W* [2013] EWCA Civ 1177.

[76] In contrast, Munby P issued his decision and judgment in *Re N* [2015] EWCA Civ 1112 seven months after the case was heard.

[77] Pearce *et al* (2012) *Just following Instructions*? School of Law, University of Bristol.

[78] Legal Aid, Sentencing and Punishment of Offenders Act 2012, had been implemented on 1st April 2013.

work.[79] Lawyers were critical of Review's proposals because they saw them as weakening the position of parents and children. In evidence to the House of Commons Justice Committee, The Family Law Bar Association stated, 'the forthcoming reduction in the scope of legal aid for children work heightens our concern that justice is being compromised by the imposition of an arbitrary time limit.'[80] Opportunities to develop practice by challenging decisions for parents *after* the end of care proceedings were welcome. They could help to redress the system in favour of (birth) families and offer the possibility of work, which could still be funded on a means and merits-tested basis.

Spring and summer of 2013 were a period of great activity as agencies and professionals prepared for the implementation of the care proceedings reforms.[81] In early 2013, local authorities and Cafcass had jointly issued a good practice guide for court work stating, 'social work reports should always be focused, analytical and evidence based.'[82] New templates for social work evidence and children's guardian's case analyses were developed for the Public Law Outline (PLO)[83] but after *Re B-S* it was unclear whether these would be considered adequate. They contained no reference to 'a balance sheet approach' for setting out the pros and cons of options for the child's care.[84] Whilst the guidance, forms and training on them had been designed to ensure work of a sufficient standard, social workers had not been trained in the closely-defined structure which *Re B-S* now required. Over the next few months local authority lawyers reviewed the case law, many issued supplementary guidance and evidence templates were revised. The timing of *Re B-S* was disruptive, particularly for local authorities which had already undertaken substantial staff training for the PLO. Whilst preparation was not entirely wasted, more work was required to meet the court's new demands; authorities that had prepared in advance for the PLO were penalised for good planning.

Judges were also concerned about the reform of care proceedings, and to make these reforms work. Before *Re B-S* the standards of judicial decision-making had not been seen as problematic; indeed, senior judges had given evidence to the Adoption Committee to this effect.[85] Concerns centred on weak case management leading the over-use of experts and excessive case length; Judicial College training on the new approach to care proceedings in the spring of 2013 focussed on these.[86] Judges were given an 'uncompromising' direction by the President of the Family Division on what was expected of them in terms of completing cases in 26 weeks. 'This deadline can be met, it must be met, it will be met.'[87] The quality and format of judgments was not seen as an issue and did not form part of the training; judgments could continue to be given orally at the end of the case, rather than

[79] Ministry of Justice. Consultations on Legal Aid, Sentencing and Punishment of Offenders Bill - Annex A: Scope. London, UK: Ministry of Justice, 2011; 39% of family barristers at the self-employed bar reported a decline in income: Bar Standards Board, *Barrister's Working Lives* (2013).

[80] House of Commons Justice Committee, *Pre-legislative scrutiny of the Children and Families Bill* (2012-13 HC 739), Written evidence from the Family Law Bar Association (CFB 34).

[81] Masson (2015) (n 43 above).

[82] Cafcass and ADCS (the Association for Directors of Children's Services, *Good practice guidance for social work in the family court*s (April 2013), 3.2.

[83] The court process for completing care proceedings within 26 weeks.

[84] Re *B-S* para 74 (iv).

[85] House of Lords Select Committee on Adoption, Second Report 2012-13, *Post-legislative Scrutiny of the Adoption* (2012-13 HL 127), McFarlane and Ryder LJJ, (nn 112, 121 below).

[86] For an outline of the training see Ryder LJ, oral evidence to House of Commons Justice Committee, *Pre-Legislative Scrutiny of the Children and Families Bill* (2012-13 HC 739) 20th November 2012, Q62.

[87] Munby P, *The View from the President's Chambers* No 1, April 2013.

in writing, later.[88] To ensure the 26 week timetable operated effectively, the President established a national pilot commencing between July and October 2013 in each Family Justice Area.

It was only *after* the decisions in *Re B-S* and *Re W; Re H*,[89] (where *Re B-S* was applied), that the exacting standard required for judgments was made clear. These cases challenged the existing perception, reinforced in training, that implementing the PLO was only about working more efficiently and avoiding delay. The tone of these judgments made it clear that past practice had been inadequate and higher standards of judging were required, particularly if the plan in care proceedings was adoption. Indeed, the Court of Appeal indicated that the 26 week rule did not apply where the court is 'not properly equipped to decide these issues.'[90] Whilst the training had been designed to convince judges that the 26 week timetable was achievable and fair to parents, these cases challenged judicial confidence in past decisions and judge's ability to do justice.[91] It became clear that decisions adverse to parents in care proceedings would be subject to increased scrutiny.

The impact of *Re B-S*

The impact of *Re B-S* was immediate: appeals were allowed, cases sent for rehearing, applications for care and placement orders were refused; there was a marked decline in care plans for these orders and an increase in other types of orders, with and without local authority support. The case was applied in five cases in the Court of Appeal in October 2013 alone, and cited in another. In three, care and placement orders were over-turned and the cases remitted for rehearing; appeals were granted in two other cases where leave to oppose adoption had been refused. Only one appeal was refused.[92] This pace was maintained: Westlaw lists 18 cases in 2013, 12 in the Court of Appeal and six in the High Court, where the case was mentioned in the judgment or applied. In addition, there were appeals from magistrates or district judges to Circuit Judges - these are rarely reported[93] and not recorded in the published court statistics. New judgments from the Court of Appeal, given or supported by Munby P, glossed and extended the original decision;[94] he acknowledged that allowance could be made for judgments delivered before *Re B-S,* but the Court must be satisfied the 'judge's approach as it appears from the judgment engage[d] with the essence [of *Re B-S*].'[95] This narrow concession did not re-orient appeals towards substance rather than structure; appeals were

[88] Oral judgments did prove problematic for the appeals process, see below. Munby P subsequently made clear that more judgments should be published on Bailii, Practice Guidance, *Transparency in the Family Courts* 16th January 2014.

[89] *Re W; Re H* [2013] EWCA Civ 1177.

[90] A Verdan and N. Harries, 'Time to call a halt New Court of Appeal Guidance in Adoption Cases: *Re B-S* [2013] EWCA Civ 813' (sic) *Family Law Week* 26/9/2013, citing the judgment para 49.

[91] In *Re W*, HHJ Bond's careful and detailed judgment had failed to explain exactly why the application was refused, para 44; in *Re H*, HHJ Barclay's judgment was described as 'thin, very thin' and he did not appear to have used the correct formula in setting out the test for leave, para 40. Both these judges had contributed to judicial training, HHJ Bond as a course director and HHJ Barclay as a tutor judge.

[92] *Re W; Re H* [2013] EWCA Civ 1177; *W (A Child) v Neath Port Talbot County Borough Council* [2013] EWCA Civ 1227; *Re Y* [2013] EWCA Civ 1337; *Re E* [2013] EWCA Civ 1614; *Re C* [2013] EWCA Civ 1259 (appeal refused).

[93] See: J Doughty, A Twaite and P Magrath, (2017) *Transparency the publication of family court judgments*, Cardiff University. There is a second appeal to the Court of Appeal, this path was taken in *BP v Herts CC* [2014] EWCA Civ 1524 (leave to appeal was refused by the Court of Appeal) and in *Re B; MB v Staffordshire CC* [2014] EWCA Civ 565, where the circuit judge had attempted unsuccessfully to ensure sufficient reasons.

[94] *Re W; Re H* [2013] EWCA Civ 1177; *W (A Child) v Neath Port Talbot County Borough Council* [2013] EWCA Civ 1227 (n 64 and accompanying text).

[95] *Re W; Re H* [2013] EWCA Civ 1177.

allowed because the judge had taken the 'traditional' linear approach,[96] considering proposals sequentially, starting with re-unification, reaching adoption having ruled out everything else,[97] and on the basis that a short judgment, referring simply to the judge's acceptance of the Cafcass guardian's reasons, could not be adequate.[98] The Court of Appeal did not seek to limit the flow of cases by requiring appellants first to seek clarification from the judge at first instance, which is the expected approach in family cases.[99] Appeals generated more appeals as the court found fault with lower court judgments and appeared willing to grant leave.

The published court statistics show an increase in family appeals to the Court of Appeal from 135 in 2012 to 179 in 2014, declining to 155 in 2015. Details are not provided of the subject of these appeals but analysis of the judgments on Bailii, which account for at least two-thirds of family appeals at this level found public child law made up half of reported appeals in 2013, compared with 45% in 2012 and 41% in 2014. Although not conclusive, these data suggest that *Re B-S* was contributed to the increase in family appeals. In 2013 and 2014, the Court of Appeal Court received more applications than it could hear. The subsequent decline decisions illustrates the difficulty judges had, coping with the workload and publishing judgments in a timely way.

The difficulties experienced in the Court of Appeal were highlighted in the judgment of Black LJ in the case of *Re R* [100] an appeal against care and placement orders on the basis that the judgment was inadequately reasoned.

> 'This case is illustrative of an increasing problem faced by this court. More and more litigants appear in front of us in person. Where, as here, the appellant is unrepresented, this requires all those involved in the appeal process to take on burdens that they would not normally have to bear. The court office finds itself having to attempt to make sure that the parties to the litigation are notified of the appeal... The bundles that the court requires in order to determine the appeal are often not provided by the litigant, or are incomplete, and proper papers have to be assembled by the court, not infrequently at the request of the judges …The grounds of appeal that can properly be advanced have to be identified by the judge … and the arguments in support of them may have to be pinpointed by the court hearing the appeal. The court has no extra resources to respond to these added challenges.'[101]

Black LJ's proposed solution that local authority respondents should take on responsibility for preparing hearing bundles was oblivious to the pressure demands arising from *Re B-S* (including appeals) were having on them.

---

[96] In *Re C* [2013] EWCA Civ 1259, McFarlane LJ refused a disappointed relative's appeal despite the original judge's linear approach but maintained his view of the importance of holistic reasoning.

[97] A. Pack, 'Judicial Window Dressing and Balance Sheets – Where is adoption post-*Re B-S*?' *Family Law Week* 11/10/13 pointed out that this reflected the Supreme Court's exhortation (in Hale B's dissenting judgment) to treat adoption as a last resort. McFarlane L J subsequently deplored the use of the 'last resort' dictum as a 'hyperlink' to a decision: Re W [2016] EWCA Civ 793 at para 68.

[98] *Re N-D* [2014] EWCA Civ 1226 Ryder LJ contrasted the length of the hearing (6 days with the brevity of the judgment, which was inadequate as a basis for care and placement orders. The parents had been convicted of extreme physical abuse of their eldest child. The judge did not detail the evidence but merely said which she accepted it.

[99] *Re M (Children)* [2008] EWCA Civ 1261; Family Procedure Rules, Practice Direction 30A provides for parties or the Court of Appeal to seek clarification from the lower court.

[100] *Re R* [2014] EWCA Civ 597.

[101] *Re R per* Black LJ at paras 6-7, emphasis in original.

The Court of Appeal was clearly not prepared for the volume of appeals. There were very substantial delays in hearing them and giving judgment. Most successful appeals against care and placement orders resulted in cases being remitted for rehearing, incurring further delay in the implementation of any plan for the child. For cases decided before the PLO, these delays generally came after long proceedings, compounding the period of limbo for the child. In later cases, the gains achieved through the PLO were more than cancelled out by the time taken simply waiting for a decision from the Court of Appeal.[102]

The impact was not limited to family matters. The volume of children cases contributed to the need for wider changes in the Court of Appeal. The 'hear by dates' were extended. Children cases still have the shortest waiting times but most appellants can expect to wait longer, with substantial increases for appeals against final orders in all other civil and family cases.[103] Access to the Court of Appeal has been restricted for some family cases but appeals in care and adoption matters.[104]

At Family Court level, local authority lawyers reported immediate difficulties getting care plans approved and obtaining placement orders. They applied various strategies to ensure cases were '*Re B-S* compliant': submitting additional social work statements containing a balance sheet; using oral evidence to highlight the pros and cons of the different options; and asking social workers to amend care plans if they could not evidence that adoption was the only solution in the child's welfare, the child would be difficult to place or a relative was offering care. There were more, and more vigorous, contestations of care plans by parents and children's guardians.[105] Social workers and managers were thought to be shying away from adoption plans because of the difficulties posed by satisfying the court.[106] The assessment of relative carers was problematic because of the staff time taken by multiple assessments and delays caused by assessments, ordered late in proceedings. Social workers reported that they felt they had to explore *every* option and complete in-depth assessments, even on relatives who appeared unsuitable at the outset, to prevent difficulties in court.[107] Courts were requiring additional assessments in proceedings.[108] All this had to be done to exacting standards in limited time. *Re B-S* made the court process even more daunting for social workers. [109]

Thorough preparation did not ensure that applications for placement orders were successful. Following the decision in *Re B-S*, the number of children for whom plans changed away from adoption more than doubled, from 690 in 2012 to 1470 in 2014. Change in children's needs and inability to find adopters have always led local authorities to abandon adoption plans. However after *Re B-S,* these cases were almost equalled by changes as a result of the court's refusal to make, or

---

[102] *Re R* [2014] EWCA Civ 597 had taken 11 months at first instance and took another 9 months for the appeal (case remitted). In *Re K, KT* [2014] EWCA Civ 1211 12 months passed before the Court of Appeal held there was no substance in any point. It is not possible to produce statistics on appeal delays because the relevant dates (the order and application for leave etc) are not routinely included in judgments.

[103] Practice Guidance, Court of Appeal (Civil Division) Hear-by dates, 3 July 2015.

[104] Appeals from circuit judges or recorders now go to a High Court judge from the Family Division: Access to Justice Act 1999 (Destination of Appeals) (Family Proceedings) (Amendment) Order 2016 (2016 SI 891) art 2. A 200% increase in family appeals to the Court of Appeal between 2008 and 2015 is given as one reason for the change, *Explanatory Memorandum*, para 7.

[105] Research in Practice (2016), (n 70 above), pp 74-75; Masson, (n 43 above), pp 20-21.

[106] P Bentley, 'Continuing conflicts in adoption law and policy' 24 (2014) *Seen and Heard* 26, 32.

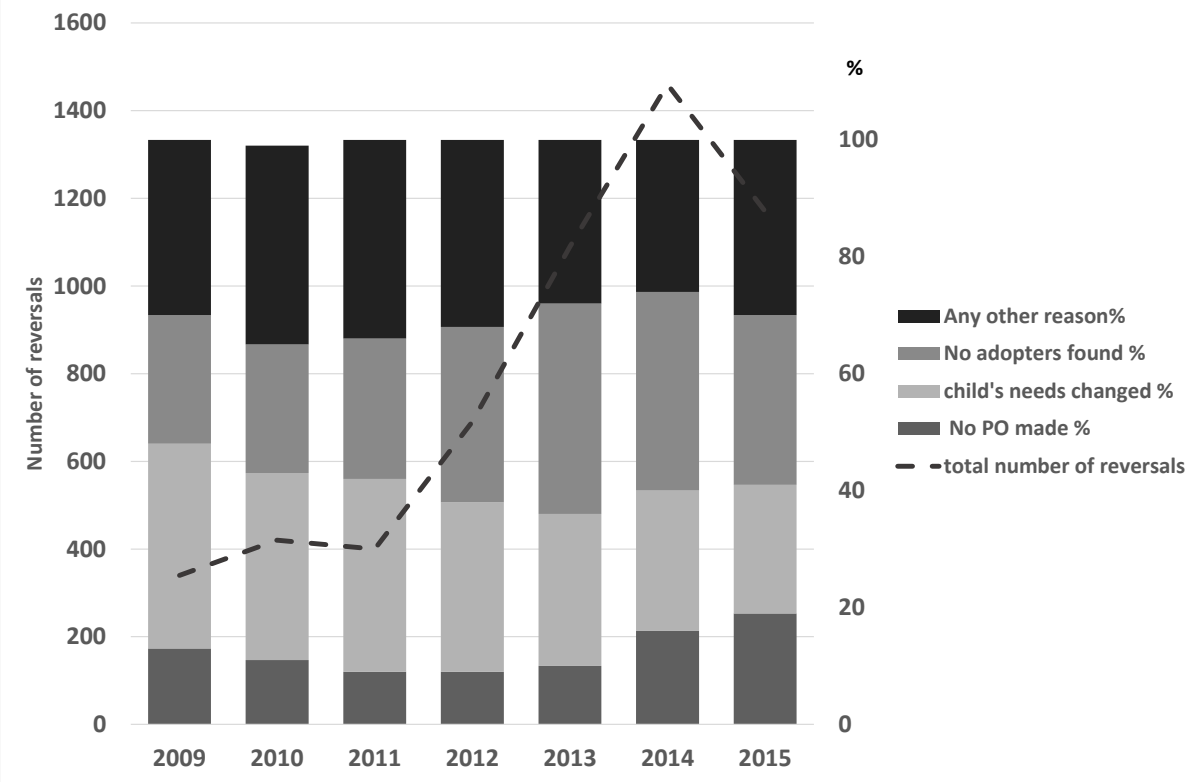
[107] Ipsos Mori (2014), *Action research to explore the implementation and early impacts of the revised Public Law Outline* (PLO), Ministry of Justice, p.18.

[108] Research in Practice (2016), (n 70 above), pp 47 and 75.

[109] Research in Practice (2015), *The impact of family justice reforms on front line practice Phase 1: The Public Law Outline*, Department for Education RR 478A.

revocation of, placement orders.[110] Local authorities could no longer predict accurately the court's response to placement applications.[111] Contrary to Ryder LJ's evidence to the Select Committee in November 2012, refusal of placement orders was no longer a 'very rare event.'[112] Refusals increased more than fourfold, from an average of 50 per year from 2009 to 2012 to an average of 240 per year in 2014 and 2016, see Figure 1.[113] This increase occurred despite a reduction in the number of applications.

Figure 1: Change of children's plans away from adoption 2009-2015



The impact of *Re B-S* on the overall numbers of placement orders was very pronounced, see Figure 2. The number of placement orders declined sharply, almost halving in the 12 months following the decision in *Re B-S.*[114] As is clear from Figure 1, this was not simply due to an increase in refusals by the courts, local authorities also made fewer applications. In a study by Masson and colleagues, adoption plans were only accepted for the youngest children, excluding adoption for almost all children aged over two years when care proceedings concluded.[115]

[110] Revocations are included in 'any other reason' in the Adoption Statistics and not separately identified in the court statistics.

[111] Variation between areas increased, with some local authorities continuing to obtain placement orders whilst others did not, for further details see the *Report of the Outcomes for Children Study* ES/M008541/1 (forthcoming, 2018).

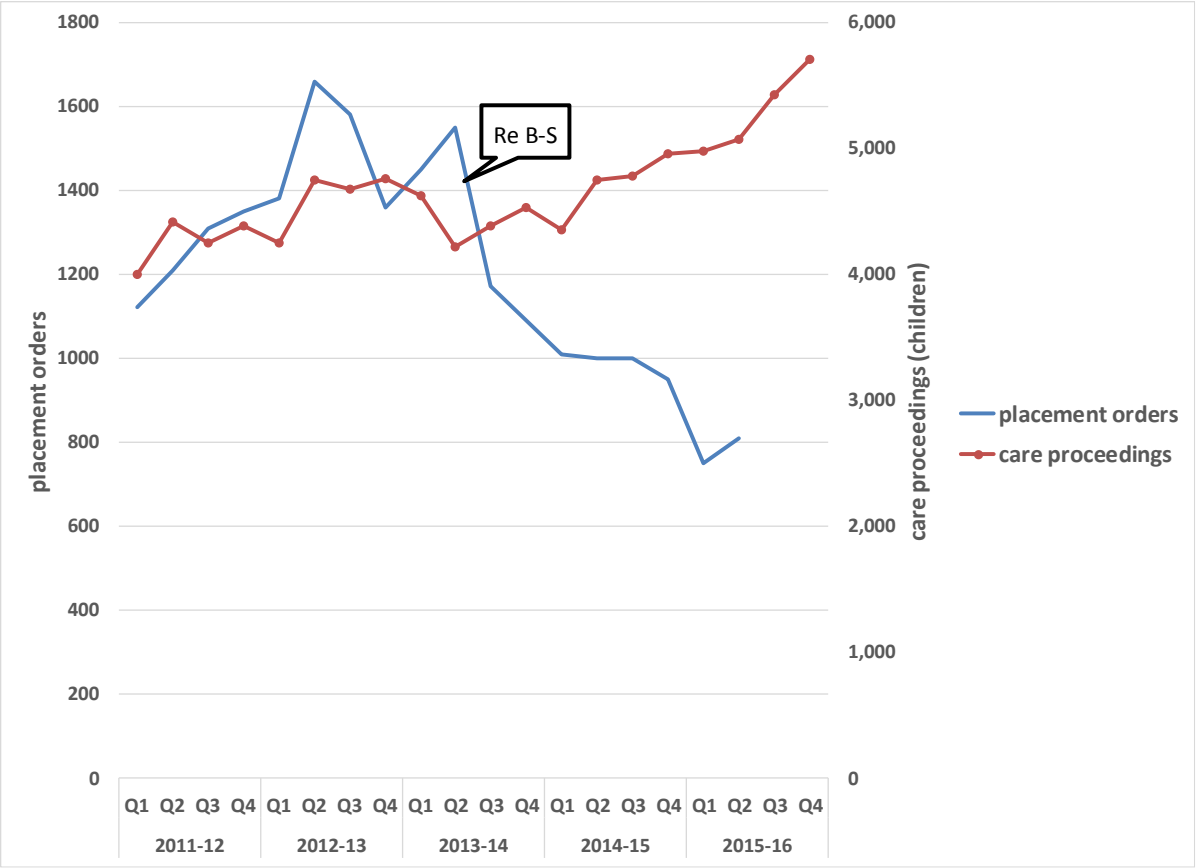
[112] Ryder LJ, evidence to the House of Lords Select Committee on Adoption Legislation, (2012-13 HL 127), Q790.

[113] Source of data: Department for Education, *Children looked after by local authorities including adoption*, table E4 (published annually).

[114] Sources of data: Adoption Leadership Board statistics, published quarterly http://bit.ly/1P7gcuN ; Cafcass care demand statistics http://bit.ly/1FZsM5R (29th March 2017).

[115] Findings from the ESRC funded *Outcomes for Children Study* (n 111 above).

Figure 2: Care proceedings (children) and placement orders 2011-12 to 2015-16



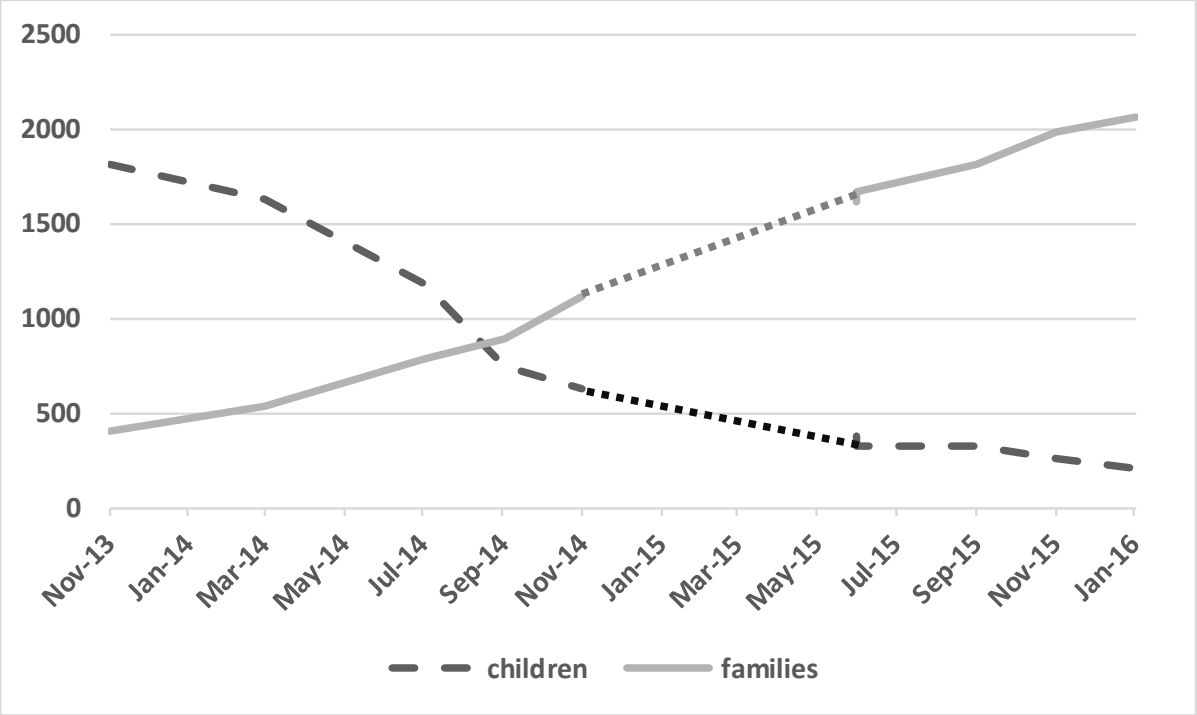
Applications for leave to oppose adoptions also increased.[116] One designated Family Judge reported to their local family justice board that 20 per cent of his sitting time was committed to hearing these cases, which were often 'hopeless' and 'caused misery' for all concerned. He proposed that this work should be allocated to magistrates.[117] If these figures were replicated elsewhere, *Re B-S* had imposed substantial demands on judicial time. In a small number of cases, courts were faced with competing applications for adoption and placement with family members.[118] Such cases are 'harrowing…and cause intense grief'[119] because the judge faces the choice between removing a child from the prospective adopter's care and denying him or her a childhood being raised in the 'natural family'.[120] The emotional toll of such proceedings disrupts the lives of those involved whatever the outcome. Placement orders, one of the 'real boons of the system',[121] had been designed to achieve a fair assessment of adoption plans without pitting birth families against adopters. Allowing adoption

[116] These are not separately reported in the court statistics.
[117] DFJ Wildblood, Bristol Family Court, 18th June 2015.
[118] Only reported cases can be identified: *A and B v Rotherham MBC* [2014] EWFC 47 (Fam); *Re SR* [2014] EWHC 1777 (birth parents from *Re W* [2013] EWCA Civ 1177 unsuccessful in opposing adoption); *Re LG (A Child)* [2015] EWFC 52; *Re M'P-P* [2015] EWCA Civ 584, reheard as *Re B and E* [2015] EWFC B203 children to remain with foster carer/adopter; *Re W* [2015] EWHC 2039 (Fam), reversed on appeal: *Re H* [2015] EWCA Civ 1284 and finally resulting in an adoption order *Re W* [2017] EWHC 829; *Re W* [2016] EWCA Civ 793 appeal allowed, adoption granted: *Re W* [2016] EWHC 3118 (Fam); *London Borough of X v KD* [2016] EWFC B54 special guardianship to grandparent granted; *Re RA* [2016] EWFC 47 adoption granted.
[119] *A and B v Rotherham MBC* [2014] EWFC 47 (Fam), *per* Holman J at para 1.
[120] *Re W* [2016] EWCA Civ 793 McFarlane LJ repeatedly used this phrase in relation to placement with relatives.
[121] McFarlane LJ, evidence to the House of Lords Select Committee on Adoption Legislation (2012-13 HL 127), Q787.

placements to be overturned at a late stage, undermined the process in the Adoption and Children Act 2002 and 'constitute[d] a sea change' in approach.[122] As a consequence, some children in care might lose the chance of a 'forever family' if potential adopters were discouraged by the possibility of such conflicts.[123] The government responded by including a clause in the Children and Social Work Bill to recognise the relationship between children and their prospective adopters.[124]

There was no immediate decline in the number of adoptions because of the time lag between granting placement orders and adoption. However, reduction in numbers of placement orders impacted on the Adoption Register, which helps to identify potential placements. Whereas the register had always held details of more children requiring adoptive placements than prospective adopters, by August 2014 the position was reversed. There was a sharp decline in children referred because local authorities needed to find fewer adoptive homes; at the same time, a recruitment drive for adopters, under the Government's Adoption strategy increased the pool of potential adopters. The imbalance which had resulted in children waiting for placements was reversed; now prospective adopters were the ones waiting, see Figure 3.

Figure 3: Children and adopters on the Adoption Register November 2013- June 2016



Alongside the decline in placement orders there was an increase in other orders, particularly special guardianship and supervision.[125] The number of children leaving care through special guardianship orders increased by 22 per cent between 2012-13 and 2013-14 and a further five per cent the

[122] J Tughan (2015) 'Public law update' http://www.familylawweek.co.uk/site.aspx?i=ed146825 (29 March 2017).
[123] Research in Practice (2016) (n 70 above), p. 74, mentioned by 2 of 21 local authorities.
[124] Cl. 9, now s.9. Before the Bill was enacted the decision in *Re W* [2016] EWCA Civ 793 recognised that prospective adopters had rights under ECHR, art 8.
[125] Special Guardianship Orders (CA 1989, s. 14A-F) gives parental responsibility (PR) to someone other than their parents and severely curtails parents' PR; these are intended to be permanent. Supervision orders (CA 1989, s. 35) place a child under the supervision of the local authority, initially for a maximum of 12 months and are the most limited form of state intervention.

following year.[126] The proportion of special guardianship orders with supervision orders increased from 11 per cent in 2010-11 to 29 per cent in 2014-15.[127] A greater number of children finding a permanent home in their extended family is to be welcomed but anecdotal evidence suggests that 'more fragile special guardianships were being sanctioned by the courts following *Re B-S'*.[128] Relatives with no previous relationship with, or even knowledge of, the child were preferred[129] with supervision orders added for risky arrangements. In response, the Department for Education commissioned further research on the use of special guardianship and consulted on whether changes were needed in assessments of potential special guardians.[130] Some local authority and Cafcass staff commented that standards had been lowered following *Re B-S* and there were no clear criteria for making special guardianship orders.[131] Also, that the courts allowed insufficient time for assessments in order to complete cases within 26 weeks and were 'over-focused' on keeping children within their families.[132] Regulations were enacted to strengthen special guardianship assessments and similar provisions for other assessments were included in the Children and Social Work Act 2017.[133]

Local authority lawyers and managers responded to the decision in *Re B-S* by asking social workers to rewrite care plans and advising against applications for care or placement orders where evidence was not thought sufficient to support such an intervention. In doing so they were making their own assessment of what the courts required. Mnookin and Kornauser coined the phrase 'bargaining in the shadow of the law' for the practice of lawyers negotiating from the perspective of what they expected the courts to decide.[134] The 'bargaining' was not simply limited to interaction with lawyers for the other party to a dispute, it impacted on the advice lawyers gave to clients and their own litigation strategies. Lawyers' actions were shaped by local court practice and by their clients' willingness to accept risk, at least as much as the by facts of a case.[135] These observations are equally relevant to lawyers acting for parents in care proceedings and children's services department lawyers, whose client is not simply the social worker or manager giving instructions but the local

---

[126] Department for Education (2015) *Children looked after in England (including adoption and care leavers) year ending 31 March 2015*, SFR 34. This figure under-estimates the number of SGOs in care proceedings because it only includes children subject to an ICO or a s.20 agreement when the SGO is made. Those are with an interim supervision or child arrangements order during proceedings are excluded.

[127] J Harwin *et al,* (2016) *A national study of the usage of supervision orders and special guardianship over time (2007-2016) Briefing paper no 1: Special guardianship orders,* Brunel University and Lancaster University available at http://bit.ly/1RYBQlA (29th March 2017).

[128] Research in Practice, (2015) *Impact of the Family Justice Reforms on Front-line Practice Phase Two: Special Guardianship Orders* Research *report, Department for Education,* 9.

[129] Ibid 11. Reported judgments provide some examples: *Re M' P-P* [2015] EWCA Civ 584 and *Re W* [2016] EWCA Civ 793 (both overturned and remitted on appeal); *Re LG (A Child*) [2015] EWFC 52; *London Borough of X v KD* 2016 WL 04261451.

[130] Department for Education (2015) *Special guardianship review: report on findings Government consultation response* available at https://www.gov.uk/government/consultations/special-guardianship-review (30th March 2017.

[131] Research in Practice (2015), (n 128 above), 22. This view was rejected as misconceived by Munby P in *Re R* [2014] EWCA Civ 1625, 43.

[132] Research in Practice (2015), (n 128 above).

[133] Special Guardianship (Amendment) Regulations 2016 (2016 No 111); Children and Social Work Act 2017, s. 8.

[134] R Mnookin and M Kornhauser 'Bargaining in the shadow of the law: The case of divorce' [1979] *Current Legal Problems* 65.

[135] A Sarat and W Felstiner (1986) 'Law and Strategy in the Divorce Lawyer's Office', *Law and Society Review*, 20,1, 93-134; L Mather, C McEwan and R Maiman (2001) *Divorce lawyers at work* Oxford: OUP.

authority.[136] The sharp reduction in placement orders was due to the combination of fewer applications by local authorities and greater judicial reluctance to make orders. That the numbers continued to fall suggests that neither local authority professionals (lawyers and social workers) nor judges had a common understanding about the circumstances which make adoption appropriate now. This view is supported by variation between courts in the proportion of different orders granted in care cases.[137] The focus in *Re B-S* on structure, of social work evidence and judgments, appears to have left all decision-makers and advisers less clear about when adoption is the right plan, and the large number of appeals has done little to clarify this as each is limited to its specific facts. By allowing appeals where the child's *circumstances* appeared to necessitate adoption, the Court of Appeal made the issue of intervention less clear.[138]

Tackling the disruptive effects of *Re B-S*

In February 2014, a letter expressing concern at the consequences flowing from *Re B*-S was sent to the President of the Family Division, all Designated family judges, heads of local authority legal services, Cafcass managers and officials in the Department for Education, the Ministry of Justice and the Welsh Government. The authors, Andrew Webb, Chair of the Association of Directors of Children's Services and Anthony Douglas, Chief Executive of Cafcass were critical of the courts' rejection of 'high quality analyses' because of not 'every single option' for the child had been discussed, the priority being given to parents' right to oppose, and the delay this was causing for children. Webb and Douglas stated that they, like judges were 'committed to raising the standards of social work and … equally committed to re-building the confidence of social workers in their ability to deliver … to these exacting standards.' They noted that their current guidance on social work evidence[139] was compatible with *Re B-S*, and advised against a return to 'more defensive social work' because of the case. Such an intervention was unprecedented, extending beyond the social work and local authority communities to local judiciary, and setting out thinly veiled complaints about judges' inability to recognise the quality of social work assessments, a focus on form rather than content and the disruption of reforms to reduce delay in care proceedings. There was no direct public response to this letter from the judiciary but in his next *View*[140] Munby P noted that revisions had been made in the Cafcass and ADCS social work evidence templates to make them compatible with *Re B-S.*

The Adoption Leadership Board (ALB), which is appointed by Ministers and has responsibility for facilitating the implementation of government policy on adoption also sought to counter the damaging effect of *Re B-S*. Discussions between the Board, the Department for Education and the Family Justice Board concluded that the reduction placement order applications was due to 'a significant misinterpretation' of case law.[141] Therefore, in November 2014, the ALB issued guidance on the correct interpretation of *Re B-S.*[142] This document sought to correct misconceptions ('myths')

---

[136] J Pearce et al (2011) *Just following instructions?* Bristol, School of Law, Bristol University; J Dickens (2005) 'Being "the epitome of reason": the challenges for lawyers and social workers in child care proceedings', *International Journal of Law, Policy and the Family*, 19, 1, 73-101,

[137] J Masson, J Dickens, L Garside, K Bader and J Young, (2017) *How is the PLO working? What is its impact on court process and outcome?* http://www.familylawweek.co.uk/site.aspx?i=ed176043 (30th March 2017).

[138] For example, in *Re T* [2014] EWCA Civ 929 an appeal against a placement order was allowed where the parents were both serving long sentences for offences of violence, cf *Re N-S* [2017] EWCA Civ 1121.

[139] Cafcass and ADCS, 'Good practice for social work practised in the Family Courts', Issued in April 2013.

[140] Munby P, *View from the President's Chambers* No 10, February 2014.

[141] Letter from Sir Martin Narey circulated with the 'myth buster' document, November 2014.

[142] Adoption Leadership Board (2014) *The impact of court judgments on adoption what judgments do and do not say,* Department for Education.

about recent decisions and to re-establish a more positive approach to adoption whilst emphasising that the provision of 'expert, high quality, evidence-based analysis of all realistic options … and the arguments for and against each of these options.'[143] It was a myth that *Re B-S* had changed adoption law, required consideration of *all* alternatives to adoption, or fostering or special guardianship to be pursued instead; adoption planning did not have to be delayed because adoption was 'a last resort'; and the 26 week timetable did not apply to proceedings for placement orders.[144] The document also noted that opposing adoption had not been made easier, the test remained the welfare of the child throughout life.[145]

The Adoption Leadership Board's document, accompanied by a carefully worded letter which suggested but did not expressly claim judicial support, was publicised through adoption organisation websites and widely circulated, including to all local family justice boards.[146] The letter stated, 'Sir James Munby, President of the Family Division … has seen this document and is supportive of its aim of dispelling the myths that have arisen.'[147] On this occasion the President responded publicly, 'This document appears to be directed primarily at social workers and, appropriately, not to the judges. It has been the subject of some discussion in family justice circles. I need to make clear that its content has not been endorsed by the judiciary.'[148]

Rowing back from *Re B-S*

Despite the reluctance to climb down, the Court of Appeal (including Munby P) clearly felt it necessary to backtrack. The family judges in the Court of Appeal revisited *Re B-S* in *Re R*,[149] a case where the judge accepted that adoption was the only realistic option and made care and placement orders. In giving judgment for the court on the case, McFarlane LJ noted that concerns about *Re B-S* had been discussed by the judges and with counsel. He comprehensively rejected each of the counsel for the mother's points on the judge's supposed failure to apply the standards required by *Re B-S*. Whilst McFarlane LJ did not go as far as saying the appeal was totally without merit, the rejection of all grounds for appeal and the conclusion that the judge had no alternative but adoption[150] raises the question why leave to appeal had been given to such a clear-cut case. The Court of Appeal appears to have commandeered a passing case as the vehicle for its message on standards for care plans and judgments.[151]

In his judgment in *Re R*, the President focused on *Re B-S*, its meaning and effect. He noted the 'widespread uncertainty, misunderstanding and confusion' following *Re B-S* which required 'urgent' action.[152] He dismissed as 'myths' suggestions that adoption plans were subject to 'higher hurdles' or required more evidence 'emphasising, with as much force as possible, that *Re B-S* was not intended to change and has not changed the law….it was primarily directed at practice.'[153] Throughout his judgment, Munby P restated the points he had made in *Re B-S*, explaining them slightly more and

[143] ALB (2014), para 5.
[144] ALB (2014), paras 7-24.
[145] ALB (2014), para 34.
[146] It was sent to all designated family judges as the judgment in *Re B-S* had been.
[147] Narey, above n 136.
[148] *Re R* [2014] EWCA Civ 1625, para 70.
[149] [2014] EWCA Civ 1625.
[150] Given the mother's excessive drinking, continuing violent relationship, the child's fear of her and the any alternative family carers.
[151] The judge was criticised for including an unnecessary step in his decision, para 20.
[152] *Re R* [2014] EWCA Civ 1625, para 41. The judgment was published 9 months after Webb and Douglas' letter and 15 months after *Re B-S*.
[153] Paras 44 and 56.

linking them to subsequent decisions. He stressed that decision-making was about substance not structure or form, drawing back, as McFarlane LJ had done, from the view that a linear structure made a decision appealable.[154] Also, '"Nothing else will do"[155] did not mean that everything else had to be considered.'[156] Floyd LJ agreed with both judgments adding that judges had to explain why the selected option was best for the child in a way that 'was able easily to be respected by an appellate court.'[157] The overall message was that *Re B-S* was right; it had been misinterpreted but not by the judiciary.

Re R focused on correcting misunderstandings in care proceedings decisions but did not reconsider leave to oppose adoption or making orders in favour of relatives in respect of children who were already in long-term placements.[158] The Court of Appeal had the opportunity to consider these issues in cases in 2015 and 2016; McFarlane LJ gave the main judgment in each of them.[159] Decisions to favour placement with a relative unknown to the child, over continuing care (and adoption) were overturned and cases remitted for rehearing. McFarlane LJ used his judgments to correct misconceptions, which had obviously diverted children's guardians, experts and judges from the required, balanced consideration of the child's welfare. Children had no 'right' to be brought up in their 'natural family'; a relative who was able to provide care had no right to do so; and there was no presumption in favour of care in the natural family which trumped an existing placement.[160] He went further in criticising use of the phrase 'nothing else will do.' It was 'meaningless and potentially dangerous' if taken alone.[161] This was the clearest acknowledgement that Lady Hale's dicta in *Re B* and the guidance in *Re B-S* had drawn attention away from the *status quo*, the child's attachments, which were fundamental in assessing welfare.[162]

This recent case law illustrates how tenacious disruptive judgments can be. Soundbites, dicta and guidelines acquire a status that they could not claim as law.[163] It is judicial reasoning that establishes precedent which amounts to law; lawyers and judges must engage in analysis and explain how and why law applies to other circumstances. Where provision have already been interpreted they cannot legitimately be given new meaning unless earlier decision can be shown to be wrong. These interpretive processes necessarily raise questions about similarity and difference, continuity or change. In contrast, dicta and guidelines shape behaviour in an altogether less thoughtful way, in the words of McFarlane LJ as if they are 'a hyperlink'[164] to the correct decision. In this way, *Re B-S* led

---

[154] Paras 18 and 69. McFarlane LJ repeated this point in *Re F* [2015] EWCA Civ 882, paras 45-50, where he acknowledged responsibility for its use to challenge decisions and reflected that the holistic approach was no more than 'the old-fashioned balancing exercise'. Appeals are still being allowed in placement order cases on the basis that the judge's reasoning was 'linear': *Re H* [2016] EWCA Civ 1131.

[155] *Re B* [2013] UKSC 33, *per* Lady Hale at para 198.

[156] *Re R* [2014] EWCA Civ 1625, *per* Munby P at para 60. The social worker in *Re R* had not dared to exclude *any* possibility, even residential care throughout childhood, for a child aged 2 years, a practice contrary to International standards!

[157] *Re R* [2014] EWCA Civ 1625 at para 38.

[158] Munby P's judgment touched on adoption, repeating incorrectly 'ours is one of the few countries in Europe which allows adoption without parental consent', para 41 and a truncated quotation from *Y v UK* (2012) ECtHR 4547/10, para 134.

[159] *Re M'P-P* [2015] EWCA Civ 584; *Re H* [2015] EWCA Civ 1284; *Re W* [2016] EWCA Civ 793.

[160] *Re H* at para 89; *Re W* at para 70-71.

[161] *Re W* at para 68.

[162] *Re M'P-P* at para 47-51; *Re W* at para 67.

[163] Even when correcting Munby P's misinterpretation of Children Act 1989, s.20 in *Re N* [2015] EWCA Civ 1112 Leveson LJ accepted that it could still be 'good practice': *London Borough of Hackney v Williams* [2017] EWCA Civ 26, para 68.

[164] *Re W* at para 68.

appellants to focus on the form of evidence and judgments (particularly linearity), which simplified the task of challenging decisions and took the focus away from the parent's parenting and the child's needs. Whilst this strategy might not ultimately succeed in achieving re-unification, it provided time for the parent to demonstrate their positive qualities, just as seeking further expert reports had done before the 26 week timetable. For the Court of Appeal, focusing on form avoided a need to consider the ultimate merits of a case, and thus making the momentous decisions required in care and adoption proceedings. Indeed, having concluded that the existing evidence was inadequate they could only remit the case. Soundbites also skewed views and practices in favour of family placements and against adoption, with limited attention to relationships, the quality of care and the durability of arrangements.

Whilst the response to *Re B-S* was immediate, and this added to its disruptive effect, it is taking far longer to reset the balance. In part, this is because the notions generated by cases have taken root in the minds of some professionals. The contested nature of adoption means that views that it is, or should be, more difficult have resonance with those who already view it negatively.[165] Loss of confidence about assessments and judgments is also a factor for local authorities, social workers, Cafcass officers and judges because of the highly critical tone of the original judgment and the repeated fault finding in subsequent cases. For those who were already critical of adoption or local authority practice, *Re B-S* and subsequent cases provided confirmation that the President of the Family Division agreed.

Conclusions

In his report for 2015, the Lord Chief Justice remarked on the decline in placement orders, noting that the judiciary would welcome 'reliable data' which would cast light on whether this was due to fewer applications by local authorities or a 'reduction in the number of cases where the Family Court allows adoption.'[166] The available evidence indicates both fewer applications and a decline in the proportion achieving orders. This was triggered by the Court of Appeal's decision is *Re B-S* and the cases that followed. Judicial decisions are never confined to the court room whether judges are applying the law or making policy. Judgments can have disruptive effect because of this. Rather than seek to allocate responsibility, more relevant questions are whether *Re B-S* has raised the standards of social work evidence, whether this could have been achieved without the attendant disruption[167] and whether decisions now achieve justice for all the parties involved, are in children's best interests.

The Family Justice Review remarked on the lack of management data on the system's operation; and the lack of trust amongst the various organisations and individuals in the Family Justice System.[168] Both these are relevant to the capacity of judgments to be disruptive. Better data on care proceedings could have provided a clearer picture of decision-making, providing a better understanding of problems before any attempts are made to address them. A case for reform, whether of law or practice, ought to be based on firmer foundations than a few recent cases that reached the Court of Appeal. It would also enable the effects of reforms, including through case law

[165] McFarlane LJ used the term 'forced adoption' in his Bridget Lindley Memorial Lecture to mean non-consensual adoption under the Children and Adoption Act 2002, although such orders comply with the European Convention on Human Rights, http://bit.ly/2nzsH8g (30th March 2017).
[166] *Lord Chief Justice's Report 2015*, (2016) Judiciary of England and Wales, 15.
[167] For example, by co-operative working called for by the Family Justice Review (2011) and the House of Lords Select Committee on Adoption (2012-13 HL 127).
[168] Family Justice Review (2011) *Interim Report* para 2.52.

to be tracked, allowing for early discussion about whether corrective action is required, rather than waiting until beliefs or misconceptions have become entrenched.

Lack of trust was at the root of the use of *Re B-S* as means of improving practice, and the actions of the Adoption Leadership Board and the President of the Family Division in seeking to correct the misconceptions it generated. The Court of Appeal was not prepared in September 2013 to trust local authorities or lower court judges to deliver work of a sufficient standard within shorter proceedings, whether this was because they were unhappy about the imposition of the timetable[169] or because they believed that standards were already too low[170] is unclear. However, both McFarlane LJ's and Ryder J's answers to the House of Lords Adoption Committee and Munby P's lecture the Judicial College PLO training both suggest that decision-making standards were not a concern at the end of 2012 and the beginning of 2013. It is also clear that when the Adoption Leadership Board published its corrective guidance it was not able to establish sufficient trust for any form of joint statement with the judiciary. Despite the strong resonance between the Guidance and *Re R*, including the language, Munby P publicly rejected it, undermining rather than developing trust.

Re B-S and the subsequent guidance provide a clear illustration of the continuing lack of a system for family justice. The President's statements in *Re B-S* and *Re N* were not about law but about practice and needed to be responded to by social workers, their managers, local authority lawyers, Cafcass and the judiciary. The leaders of all agencies and organisations needed to reach agreement about practice standards: what could realistically be required given the resources (staff and time) available, and a 'good enough' minimum; how to assess standards by reference to content not form; and the actions to be taken if these are not met. A systems approach[171] is required to ensure that demands on one part of the system do not undermine standards in another. The family justice system will not function if local authorities and Cafcass cannot meet the standards the judiciary demand, nor if courts make orders irrespective of the child's interests or in the hope that things will work out for the best. Establishing agreement about practice is challenging and time-consuming, interdisciplinary work, which is more difficult with formalistic views of judicial independence[172] and without a history of co-operative working. However, using readily understood language and planning implementation would make be more effective. Without trust and an effective system, which the judiciary accept does not compromise their independence, the judiciary will continue to resort to judgments to impose their views on practice. Where these are interpreted as imposing new demands they will be disruptive.

In his discussion of judicial guidance, Roger McCarthy comments that 'if prior judicial guidelines or general approaches are allowed to predetermine the outcome of individual discretionary cases, there is a real risk that the trial process which underpins … justice …[is] reduced to a procedural stage show.'[173] The examination of disruptive judgments through the example of *Re B-S* demonstrates that where guidance is presented as, or taken for, law and applied to an area which is frequently before the courts there is also a risk of wide scale disruption to professional practice, decision-making and the lives of those caught up in litigation.

---

[169] As the minister suggested, *Telegraph* 12 November 2014, coinciding with the publication of the Adoption Leadership Board guidance.

[170] The ostensible reason for giving guidance in *Re B-S* and for allowing the appeals in *Re H, Re W* [2013] EWCA Civ 1177.

[171] Munro Review of Child Protection, *Part 1 A Systems analysis* (2010) http://bit.ly/2l3kbjO (30th March 2017).

[172] For example, *President's Guidance Judicial Cooperation with Serious Case Reviews* (2017).

[173] McCarthy, (n 28, above), p 1216.

The idea of judicial restraint in law making remains strong despite the general acceptance that judges do more than merely state the law. It should apply equally to the development of practice guidance by judges. Predictable application is fundamental for the rule of law. Where judges use their position deliberately to force change through judgments where it is not open to them to develop the law they act disruptively and undermine the rule of law. Controlling disruptive judgments requires judicial self-control – avoiding the abuse of power – and using alternative means to address practice problems that judges or others identify. The Family Justice Council might have been expected to fulfil this role but developing interdisciplinary guidance requires a better balance between the relevant disciplines and a clearer relationship to the family justice system. Improving practice necessitates interdisciplinary and inter-agency discussion, which judges should be parties to but not seek to dominate. There must be consultation (as normally occurs with statutory guidance on child care practice) and preparation for its introduction.

Setting out the ways and means of using judgments to disruptive effect is intended to put these practices under the spotlight, not to encourage them but to highlight the damaging effects where judges operate outside the rule of law.