ADOPTION IN THE NEW DECADE

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1. In this paper I will be looking at four issues relating to Adoption:
(1) What are the current debates within the field of adoption?
(2) How is adoption viewed outside of England and Wales?
(3) Contact to adopted children in the digital age.
(4) Are there any pointers from the recent case law?

Background

2. Adoption is a modern concept. It did not exist, as we know it now, until after WW1. Statutory adoption was introduced by The Adoption of Children Act 1926. Until then ad hoc arrangements were made for children whose parents would not or could not look after them. The Act replaced this unregulated system with a formal legal route for the permanent transfer of orphans and illegitimate children to new parents.

3. The use of adoption hit a peak in the 1960s with nearly 25,000 children adopted in 1968 of which 92% were illegitimate. There was, then, a considerable stigma to having a child outside marriage. 51% were babies handed over by their mothers when a few weeks old never to be seen again and often with the children never to be told that they had been adopted.

4. Gradually societal attitudes changed. Attitudes towards contraception, abortion and single parent families changed radically. So, in 2011-12 only 70 babies under 12 months old were adopted. Adoption law evolved, particularly with the introduction of the Adoption Act 1976 and the two-part test for dispensing with parental consent. More recently the Adoption and Children Act 2002 brought adoption into line with the Children Act 1989, making the child's welfare the paramount consideration rather than the first consideration.

5. The use of adoption in child protection achieved further impetus following the publication in the late 1970s of "The children who wait", a ground breaking piece of work by Rowe and Lambert which identified the need to make better and more effective long term provision for children who simply "waited" in long term foster care

or children's homes for years without ever achieving a stable family base during childhood.

6. As Eleanor King J (as she then was) recounted in her 2013 Hershman / Levy memorial lecture[1] *"So it was that gradually, the profile of the child placed for adoption changed to that which we now see; no longer placed as a consequence of the tragedy, to both mother and child, of separation forced upon them by social stigma but now, almost inevitably, those children who are adopted have been in local authority care having been removed from their parents due to concerns as to abuse and / or neglect."*

7. This change in the profile of adopted children has had, she said, 3 significant consequences:
a) These children will have memories of their birth families and these memories are unlikely to be good;
b) They may well have ongoing relationships with siblings or other family members;
c) The proceedings will, in all likelihood, have been contested – a far cry from *"those sad young women in grim mother and baby homes who accepted the inevitability of giving up their babies in the 1940s and 1950s."*

8. Societal attitudes continue to change and develop. In 1996 J Barton wrote of the 'deep suspicion' within English law of the concept of a same-sex couple raising children[2]. It was only in December 2005 that The Adoption Children Act 2002 came into force, widening the categories of those eligible to apply for adoption orders to include same-sex couples. However, numbers remain low and the proportion of hard-to-place children placed with same-sex adopters is disproportionately high[3]. None of the five local authorities in the Midlands who provided data to the authors had a specific policy concerning the recruitment and placement of children with same-sex adopters, which suggests there is more work to be done to encourage and develop same-sex adoption.

9. Even more recently there is the developing impact of IVF treatment and, potentially, surrogacy, on the availability of adoptive placements for children. In October 2018 Coram-i commented that *"the fall in approvals coupled with the*

[1] 'May I be your Facebook friend?' Life stories and social media. Family Law November 2013, [2013] Fam Law 1399
[2] J Barton, 'The Homosexual in the Family' 26 Family Law [1996] 626
[3] 'Adoption by same-sex couples – reaffirming evidence: could more children be placed?' Dr Tasker and HHJ Clifford Bellamy Family Law February 2019, [2019] Fam Law 171

increase in [placement orders] strongly suggested that there would not be enough adopters available for the number of children we need to find families for"[4].

The Current Debates

10. The 'happy ever after' narrative of adoption is under increasing challenge[5]. In September 2017 a survey conducted by the BBC and Adoption UK asserted, *"More than a quarter of adoptive families are in crisis… More than half of those surveyed reported living with a child who was violent, including being punched, kicked or threatened with knives"*[6].

11. The fostering network responded to say:
"The children who are being talked about in the report are the children who thousands of foster carers are looking after every day, and we recognise the difficulties and challenges being described. Foster carers are finding that the children coming into their care are increasingly traumatised and demonstrating challenging behaviour, and it is therefore inevitable that adopters are experiencing the same thing.[7]*"*

12. In his Bridget Lindley OBE Memorial Lecture in 2017[8]. McFarlane LJ (as he then was) sought to initiate a debate about adoption and (as below) about post-adoption contact. He questioned, *"But is adoption still the best option?"*

"A system which has adoption against the wishes of the natural family as an outcome, which is regularly chosen as best meeting the lifelong welfare needs of young individuals, must have confidence that that model of adoption does indeed normally best meet the lifelong needs of individuals who cannot safely be returned to their families during their childhood."

"If adoption was once the best outcome for children in these cases, does that continue to be the case today?"

13. Having charted the development of adoption from that introduced for very young babies given up, with consent, by their mothers, to a process for older children

[4] https://coram-i.org.uk/adoption-under-pressure
[5] Sarah Phillimore, Family Law April 2018, [2018] Fam Law 424
[6] http://www.bbc.co.uk/news/uk-41379424
[7] https://www.familylaw.co.uk/news_and_comments/the-fostering-network-responds-to-report-that-a-quarter-of-adoptive-families-are-in-crisis
[8] 'Holding the risk: The balance between child protection and the right to family life'

and with a power for the court to dispense with consent, McFarlane LJ observed that the situation for the adoptive parents may be very different from the one initially envisaged:

"The older a child is when he or she moves on to an adopted home, the more knowledge and understanding they will have about their life to date and the individuals that make up their natural family. Where that family has been dysfunctional, abusive or dangerous, the more that young individual will have suffered and the more likely it is that some deep-seated long-term harm will have been caused to their psychological makeup and personality. No matter how strong, skilled and loving the placement in their adoptive home may become, it must remain likely that the consequences of their earlier experience will be played out as they come to terms with the sense of their own identity whilst traversing the choppy waters of adolescence in the adoptive home."

14. The primary justification for adoption has always been (and rightly so, McFarlane LJ adds) that the lifelong commitment made by adopters is likely to provide a child with the most secure and stable base for their development throughout their childhood and beyond. However, he points to *"a radical change in a number of the fundamental elements of our model of adoption in recent years":*

- the characteristics of the young people seen as candidates for adoption;
- the lack of support given to adopters once placement has been achieved;
- the erosion of the 'seal' around adoption caused by social media.

15. Thus, the current President poses the question *"whether our model of adoption continues to be as valuable to each of the individuals concerned as we have hitherto held that it is".* A question, as he acknowledges that can only be answered by research conducted by suitably qualified experts.

16. He adds that judges making the decisions in these difficult cases receive almost no feedback on the outcome of the decisions they have made. Any such feedback is likely to be irregular and anecdotal e.g. because the case happens to come back to court for some reason at a later date. Even when an adoptive placement formally breaks down, the judge is not informed. He suggests that a short report of the outcome of any placement breakdown review should be sent to the judge. He compared the situation *"to one where an individual who is learning to become a proficient darts player is instructed to throw the darts behind him, over his shoulder, without any sight of the dart board and without anyone telling him whether he had even hit the wall, let alone the board or the bulls eye".*

17. The President is not the only Judge of the Division to have questioned our current model of adoption. In his article 'Reflections of a Judge of the Family Division'[9] Keehan J says that there are very many cases where non-consensual adoption is the only option in the welfare best interests of the child or children concerned. However, in others there may be available the option of *"enhanced long-term foster care"*. Greater thought could be given, he suggests, to the identification and availability of a pool of 'gold standard' foster carers with the ability to provide *"a demonstrably better long-term alternative for the child or children to a placement for adoption"*:

"From time to time I have heard evidence from or read about foster carers who are 'the jewels in the crown' of foster carers. One recently had been a foster carer for over thirty years, three of her children had become foster carers and a number of children who had remained with her for many years and into early adulthood, had got married from her home. Of course, there are always the issues of finances and resources. If we could innovatively improve foster care placements, and the rules and regulations around them, we could better serve the children and young people who come into the care system and the judiciary may, more often than at present, have a realistic option to adoption which, of course, includes the consequential severing of all ties with the birth parents and birth family".

18. Alongside these questions is a developing concern about the absence of any proper recognition of the importance of sibling relationships. This was an issue raised by Professor Monk and Dr Macvarish in their article 'Siblings, contact and the law: an overlooked relationship'[10] In their research about siblings, the authors examined the role of the law in the context of public law proceedings which often results in siblings being separated with little or no provision for direct contact. They assert that the value of the sibling relationship is often undervalued, particularly in the context of adoption. They note that the advice of Lord and Borthwick in their influential guide 'Together or Apart? Assessing siblings for permanent placement. 2008' is often not applied: *"The decision to separate permanently siblings who have lived or are currently living together should, in our view, be treated with the same seriousness as the decision to separate children permanently from their parents".*

Comparative Views

19. Many jurisdictions simply do not recognise adoption in the form available in the UK. For example, adoption is incompatible with Islamic Law and so do not take place in these jurisdictions. Instead the system of 'Kafala' ensures that children in

[9] December 2018 Family Law, [2018] Fam Law 1514
[10] February 2019 Family Law, [2019] Fam Law 180.

need of a permanent home can have that home with the security and stability that goes with it.

20. Many European countries have two kinds of adoption, 'adoption pleniere' which severs all links between the child and his birth parents and 'adoption simple', the more common version, which allows the child to have a new permanent home while sometimes being allowed to retain links with their birth parent. Those arrangements are more akin to special guardianship in the UK[11].

21. The widely held belief that adoption is unique, or almost unique, to the UK is, to an extent, misplaced. All European countries provide a legal mechanism to terminate parental rights and place children for adoption without their parents' consent[12]. In all such countries adoption decisions are taken by the judiciary but decisions can be taken by a specialist court (such as the Family Court in England and Wales), a general court or by a court-like or administrative body. However, it is right to say that there is significant variation across countries as to the practice of adoption from care. In England approximately 4 children per 10,000 are adopted from care each year. In Finland, for example, it is 1 per 10,000. In many countries, although it is possible to dispense with parental consent to adoption, it is rare for this to occur (e.g. in Germany and in Ireland). In Norway only foster parents can adopt a child from care.[13]

22. There has, however, been considerable controversy over the perceived differences in approach between jurisdictions and, in particular, the eventual adoption of children in England and Wales who were born in, or are nationals of, other European Member States. The permitted free movement of persons within the EU may occur for many reasons. The UK, in particular, has become a destination state for economic migration, particularly from the more recent accession states. Ease of movement has encouraged parents to migrate to another State to evade the child protection systems of their home state. Equally, migration itself may place pressures on family relationships such that an environment may be created where abuse can occur (e.g. alcohol or drug abuse or financial pressures). This can all lead to a situation where a non-national child is taken into care or is the subject of proceedings. Difficult decisions as to jurisdiction can then arise under Brussels IIa including where the child is habitually resident under Article 8 and whether proceedings should be transferred to another Member State under Article 15. If the

[11] 'Separated children in children proceedings: thinking outside the box', June 2018 Family Law, [2018] Fam Law 646

[12] 'The Hidden Proceedings – An Analysis of Accountability of Child Protection Adoption Proceedings in Eight European Jurisdictions', European Journal of Comparative Law and Governance 6 (2019) 339-371

[13] See 'The Hidden Proceedings' above

court assumes jurisdiction under Brussels IIa, it will then apply its own domestic law on child protection and adoption. As set out above, domestic law on these issues varies across the Member States and the legal frameworks remain 'legitimately diverse'.

23. Such diversity is an important aspect of understanding the consequences of migration for the individual. Free movement inevitably encourages a situation whereby individuals find themselves regulated by a system of law that is not their own. Although, as Munby P said in *Re J and S (Children)* [2014] EWFC 4 *"The parents have made their life in this country and cannot impose their own views either on the local authority or the court"*, nonetheless there are risks to a child's cultural and religious heritage if he or she is placed with a family without similar tradition. As Parker J said in *London Borough of Barking and Dagenham v C* [2014] EWHC 2472 such a placement could represent a *"profound dislocation"* for the child.

24. There is no doubt that far more adoptions take place in England each year than in any other European jurisdiction.[14] There has been a growing protest against these 'forced adoptions' of children with ties to other Member States, with parents claiming their parental rights have been breached by their consent to adoption being dispensed with in a way that they allege could not occur in their own country[15]. This concern is shared by foreign governments with Slovakia and Latvia in particular objecting to English practice in this area.

25. As a result of this pressure the Petitions Committee of the European Parliament commissioned a report on the adoption system in England and its comparison with laws in place in other jurisdictions[16]. The report showed emphatically that England is not unique in Europe in permitting adoption without parental consent. In some jurisdictions consent is not necessary because of parental misconduct (e.g. Germany, France and The Netherlands) and in some consent can be dispensed with in the child's best interests (e.g. Denmark, Finland and Poland). As the report noted the English adoption system has been examined in detail in two European Court of Human Rights cases (*YC v United Kingdom* and *R and H and the United Kingdom*) and found to be in conformity with the requirements of the European Convention. Nonetheless, the controversy continues particularly in

[14] Fenton-Glynn C (2015). Study for the petitions committee of the European Parliament 'adoption without consent'.
[15] 'Cross-border public care and adoption proceedings in the European Union, Lamont & Fenton-Glynn, Journal of Social Welfare and Family Law, 2016, Vol 38, No.1, 94-102
[16] Fenton-Glynn C (2015). Study for the petitions committee of the European Parliament 'adoption without consent'.

individual cases where objection is made to the adoption of a child who is a national of a European state outside of the UK.

Contact In the Digital Age

26. The question of contact between an adopted child and his or her birth family is one of the most vexed in sociological analysis and law. Noel Arnold, Director of Legal Practice at Coram Children's Legal Centre has appositely summarised the acute dilemma as follows[17]:

"In most societies, when people construct their families (through whatever method), they typically think of the child as being 'their child' and that they will determine all relevant matters for that child, including decisions and actions that facilitate the child's knowledge about, connections with and experience of a range of other people adults and children. Where an adult has a birth child, it would be highly unusual for that person to expect that their child will have contact (direct or otherwise) with a person who is not particularly known to that adult or who is not within that adult's own friends and family network."

27. It is, he says, reasonable to expect that those seeking a child through adoption will come to think about matters the same way, that they will make the decisions about which adult a child forms relationships with, particularly in their early years. It is hardly surprising, therefore, that potential adopters may be resistant to facilitating contact between the child and their natural family, especially direct contact. There may also be concerns about the safety of any such contact and the potential anxiety and confusion it may cause to the child.

28. In his 2017 Bridget Lindley OBE memorial lecture, McFarlane LJ questioned whether there might, in the future, be a sea-change in attitudes towards post adoption contact. When the Adoption and Children Act 2002 came into force, it was with some expectation that the previous 'closed' approach to post adoption contact with, at most, modest 'letterbox' contact might change. The answer, he said, *"is that there has been no sea change"*. Even the introduction by the Children and Families Act 2014 of bespoke provisions for contact in adoptions following a placement order did not *"seem to have moved matters on".*

29. He drew attention to the long-term research project on the effects of post-adoption contact conducted by Dr Elsbeth Neil and others at UEA. She noted that

[17] 'Reimagining Adoption', January 2019 Family Law, [2019] Fam Law 3

contact arrangements with adopted children tended to decrease over time, across the 16 years of the study over half of the contact arrangements had reduced in intensity or stopped all together. Indirect contact appeared to pose particular challenges in relation to maintaining arrangements over time. In only a small minority of indirect contact cases had there actually been reciprocal exchanges over an extended period. Adoptive parents struggle with knowing what to say and understanding and interpreting what the parent or other person is saying. Sustaining the contact requires literacy skills and a willingness and ability to stay in touch with the adoption agency. Support is needed to ensure that beneficial contact is sustained. Contact needs to be purposeful, individualised and dynamic across time. She suggested that a standardised formula should be resisted in favour of more individualised planning *"which takes account of the desired goals and the strengths and vulnerabilities of all parties".*

30. The initial contact plan should be considered to be 'just that' – *"a starting point for thinking about contact in the longer term. A plan to review the arrangements should be built in"*. Support is likely to be needed to make contact a success. Contact is more than just a letter or a meeting, it is a 'relational process' taking place between the adoptive parents, the adoptive children and birth relatives. Managing the process requires effort from all involved but can yield rewards for the child, particularly in enabling the child to achieve a *"cohesive sense of identity".*

31. The study found that whilst in the early years contact was maintained for the child by the adults, in teenage years many young people became more active participants in the process. This could present challenges, particularly when contact developed in an unexpected and unplanned way, e.g. through social media, and the adoptive parents were unaware of what was happening.

32. This was a theme explored by Eleanor King J (as she then was) in her 2013 Hershman / Levy memorial lecture.[18] Referring to Facebook as 'The Trojan horse in the bedroom' she viewed rather wistfully the situation faced by the adoptive parents in *Re O (Contempt: Committal)* [1995] 2 FLR 767 where the natural parents had parked their camper van outside the adoptive home and rang the doorbell asking to see the children, *"I suspect many adopters would say that such an intrusion is infinitely preferable to Facebook, at least you can see what you are dealing with when it is hateful letters and camper vans parked outside your door."*

[18] 'May I be your Facebook friend?' Life stories and social media. Family Law November 2013, [2013] Fam Law 1399

33. Within days of the first social media contact being made with a child, the challenges the family will face (from the research and her own experience) include:

- The child being bombarded with messages demonising the social workers who had removed the adoptive and undermining the adoptive parents.
- The natural family attempting to rewrite history and denying any responsibility for what happened.
- The natural family dumping their own problems on to the child.

34. The 'Trojan Horse' of Facebook has now been joined by multiple social media platforms including Instagram, TikTok and many others. The debate is not so much how can the identities of adopted children be kept secret (because this is impossible) but how will adoption evolve to manage these challenges. Does this all spell the beginning of the end for adoption and are closed adoptions sustainable?

35. Eleanor King J suggested that the way life story work was being undertaken would need to be changed. All too often such work is simplistic, amounting to little more than *"your parents loved you very much but were unable to care for you".* The eminent Child Psychiatrist Eia Asen had suggested to her that these 'sanitised' versions and the implicit lies and omissions which children know, sooner or later, are not the truth operate to undermine their trust in their adoptive carer. Giving the child crucial, and truthful, information about their past as the child grows older will not only create trust but also provide the child with a measure of self-protection where unplanned contact takes place. In other words, *"Empower the child rather than fiddle around with privacy settings".*

36. Like many others who have written in this area, Eleanor King J emphasises the importance of post contact support. Without this there is a risk of contact retraumatising the child so that she is *"plunged back into a world she cannot understand or rationalise and at appalling personal cost".* Such cost is not only to the child but to the adoptive parents who provide a vital social function in caring for vulnerable and damaged children. Those parents find their life in tatters, not of their own making, *"Imagine for a moment the joy of adopting a 3 year old and then reflect on how you would feel, as one mother records it, on going onto your daughter's Facebook profile, say 12 years later, to see that the birth mother's name has replaced yours as 'mother' on the front page."*

37. In March 2018, a year or so after his Bridget Lindley OBE memorial lecture, the President came to reflect upon the impact of his words (and those of Eleanor

King LJ) in his Keynote Address to the NAGALRO Annual Conference[19]. He suggested that if his views on adoption and contact had had any impact on individual cases, that impact has been unnoticeable. However, in the time that had passed a major enquiry into adoption from a social work perspective had been undertaken, 'The Role of the Social Worker in Adoption – Ethics and Human Rights: An Enquiry'.

38. That work had challenged the 'happy ever after' narrative frequently attached to adoption by politicians as not only not reflecting reality but inhibiting important ethical debates about adoption and its merits when compared to other permanence options. There also needed to be *"A significant rethink of approaches to contact and connection between adopted children and their families".* The report again identified how frequently 'letterbox' contact is poorly supported and breaks down. The lack of contact with the natural family can 'store up trouble' with children seeking reunification in later life. There was *"a need to move away from standardisation and formulas to individualised contact planning, pointing out that children of different ages have different contact needs".* He notes that one of the Enquiry's five recommendations was that *"the current model of adoption should be reviewed, and the potential for a more open approach considered".*

39. The President reaches the following conclusion in his 2018 Address:

"40 years or more ago, the normal model for adoption was entirely closed, to the extent that, in some cases, the child may not even have been told that she was adopted. Two or more decades ago the concepts of 'life-story work' and 'letter box contact' replaced the wholly closed model and became the norm, but those concepts were developed in what can now be seen as a different age. The world has moved on, yet we, that is the courts and social work practice, still hold to life-story work and letterbox contact as setting the 'right' level of post-adoption contact in most cases. The BASW Enquiry, coupled with the range of anecdotal evidence that led me to say what I did last year, ***strongly suggests that a higher level of ongoing contact, or a level of direct contact that develops slowly during childhood once the dust from the adoption order being made has settled, may well be better for these young people in the longer term****.*

I would encourage all those involved in adoption planning and decision making to focus more on the issue of contact and to ask, in each case, whether the model of life-story work and letterbox contact is in fact the best for the individual child in the years that lie ahead for her, or ***whether a more flexible and open arrangement, developed with confidence and over time, may provide more beneficial***

[19] Contact: a point of view June 2018 Family Law, [2018] Fam Law 687

support as the young person moves on towards adolescence and then adulthood*."*

40. Professor Neil responded to the President's comments in her article 'Rethinking adoption and birth family contact: is there a role for the law?'[20] She too questioned whether letterbox contact provided a meaningful and sustained exchange of information; her 18 year longitudinal study (1996-2014) following adopted children having established that such arrangements were inactive by middle childhood in the majority of cases. Only a small proportion of adopted children were having face to face contact with their birth relatives: 17% had a plan for face to face contact with a birth parent and / or grandparent and about one third with a sibling. In a later study in Yorkshire and Humber (2016-18) only 6% of plans included a plan for direct contact with a parent or extended family member and 25% with a sibling, suggesting that over the years there has been a move even further away from considering direct contact.

41. In relation to social media she said that *"Re-unions via social media could be successful or quite damaging, the involvement and support of adoptive parents being a crucial factor."* Searches for 'lost' relatives via social media generally happened where there was no ongoing contact, suggesting that in these circumstances adopted children and their birth families can feel compelled to 'take contact into their own hands'.

42. Professor Neil emphasised again the need for arrangements to be decided 'on a case by case basis'; "This is a basic and obvious message, yet the uniformity of current practice suggests that case sensitivity is not sufficiently embedded. She has developed a practice model for planning and supporting contact based upon the research undertaken[21]. A key consideration should be whether the child will benefit from maintaining an important relationship or building such a relationship. Where relationships are the goal, face to face contact should be considered as *"it is hard to achieve any meaningful sense of relationship from infrequent mediated letter exchanges"*. Equally important, self evidently, is the need to protect children from potentially damaging relationships i.e. where the parent presents a risk to the child or might actively seek to undermine the placement. Overall, she suggested there is *"scope for considering face to face contact in a greater number of cases*". In those cases the court may need to 'set the tone for contact' by using its power to make orders at placement stage under s.26 ACA. Inevitably such orders would influence the search for adopters and focus the minds of all on establishing a working contact

[20] September 2018 Family Law, [2018] Fam Law 1178

[21] https://www.uea.ac.uk/contact-after-adoption/resources

plan. This would avoid the child's need for contact "being 'side-lined in order to make him or more 'adoptable', an outcome that is incompatible with the notion of adoption as a service for children".

43. She recognised, however, that considering contact at the time when court proceedings are in train may not be the best time to make firm and lasting contact plans. Birth parents at that stage are often still fighting to keep their child and adoptive parents may feel in an insecure position. The capacity of all the adults involved to consider and construct contact plans may be much higher once 'the dust as settled'. This suggests that *"An expectation of the need for flexibility and to keep arrangements under review should be established from the start".*

44. Professor Monk and Dr Macvarish have similarly sought to open up the debate in the area of sibling contact[22]. They explain the current lack of orders providing for contact 'by the existence of deep seated attitudes and assumptions' such as that the making of a contact order would reduce the pool of potential adopters, that it is only appropriate with the agreement of adopters and might undermine the placement. At present the need for a sibling relationship, while acknowledged, is routinely outweighed by these other factors. However, listening to young people suggests that this can overlook what they themselves consider as important:

"… obviously a parent and a sibling's different but they should have kind of like near enough similar rights if you get me. Because no matter what, a sibling will have that special connection that a parent doesn't have.

It's like siblings don't actually have rights to see each other, but they should have… Again, it's about our rights as a young person, our sibling rights."

As the authors conclude, *"This call to rights is compelling."*

Recent case law

45. My thanks go to The Honourable Mrs Justice Judd DBE who kindly gave me access to her case law update prepared in June 2020 for the Judicial College.

46. There is, I suggest, a growing willingness to permit parental challenges to adoption even where proceedings appear to be heading firmly in that direction.

[22] February 2019 Family Law, [2019] Fam Law 180.

47. Many cases where natural parents seek permission to oppose adoption orders are desperately sad, the parents having previously lost the battle to prevent care and placement orders being made. A rare example of permission having been granted to oppose adoption is *Re W (A Child) (Leave to Oppose Adoption)* [2020] EWCA 10.

48. This case concerned a two year old boy who had been removed from his family at birth, placed with foster carers until the age of 17 months during which time a placement order was made, and then placed with the prospective adopters. There were older siblings in the family who had been removed from the parents because of poor emotional parenting, significant physical abuse, mental health problems on the part of the mother, and the very limited insight of the parents. Since the making of the placement application the parents had worked hard to turn things around. The mother had undergone cognitive behaviour therapy and her mental health had improved. The parents had undergone a parenting course and showed insight and remorse. The professionals were impressed with the warmth of the family relationships and the situation now was described as hugely different. Adoption proceedings were issued with respect to the boy in April 2019, and the parents sought leave to oppose. This was refused by the judge at first instance.

49. The Court of Appeal held that there was no question but that the first limb of the two stage test had been met – namely that there had been a change in circumstances since the placement order was made. The issue surrounded the second stage of the test – namely whether permission to oppose should be granted. In considering the principles to be applied on the second stage, Peter Jackson LJ recited the guidance in paragraphs 72 to 74 in *Re B-S (Adoption: Application of s 47(5))* [2013] EWCA Civ 1146 in full. In this case the local authority and guardian disagreed as to whether or not permission should be given to oppose. The local authority argument, accepted by the first instance judge, was that the child had been very affected by a move from his foster carers, and that he would not cope with yet another move. He had never lived with his birth parents and contact with them had stopped some time before. The guardian had suggested permission should be granted so that all options for the child could be considered with the assistance of an expert assessment as to the emotional and psychological effect upon the child of another move.

50. The Court of Appeal overturned the judge's decision on the basis that he had made a decision about the child's ability to move and form another attachment prematurely and without having sufficient evidence. The court was thus prevented

from evaluating all the factors that would be relevant in a decision about his life long welfare. The negative effects of a contested adoption must always be taken into account, but they could not be given much weight in the light of other factors.

51. The Court of Appeal noted that it would not expect either oral or expert evidence to be required for a decision as to whether or not to grant leave to oppose, Peter Jackson LJ stated *"indeed if the court is thinking that either might be necessary, it may be an indication that leave should be granted".*

52. *Re Y (A Child) (Leave to Oppose Adoption)* [2020] EWCA Civ 1287 is another example of a successful permission application. The child had sustained 10 fractures to his ribs, to both femurs and to both tibias when only a few weeks old. During subsequent care proceedings the parents accepted that the father had caused the injuries (although he later sought to retract his admission). The father was also found to have been violent to the mother and that the mother had failed to protect the child and two older half siblings from his volatile behaviour. The half siblings were placed with relatives and the child was placed in foster care. Care and Placement Orders were made with respect to the child. Subsequently the foster carer applied to adopt the child and the parents sought permission to oppose.

53. The judge at first instance noted from the mother's witness statement that the parents had relocated, were happier and had improved their relationship. They had both sought help for depression and the father had undergone anger management. The judge thought this was a particularly important step as the father's inability to control his anger had been a key factor in the care proceedings. He therefore granted permission to oppose and the LA appealed.

54. The Court of Appeal held that the judge had applied the correct legal principles as reiterated in *Re W (a child).* He was not entitled simply to accept the parents' assertions of change at face value but had to evaluate them in light of all the circumstances. Here the judge plainly had his earlier findings in mind when considering the application and took them into account. He also took into account the fact that the parents' assertions were challenged by the LA and, at that point, untested and would require further investigation. However, he had concluded that the evidence of change was sufficient to open the door to the exercise of discretion whether to grant leave to oppose. Given his experience of the case and his deep understanding of the issues, it could not be said that he was wrong to have reached that conclusion.

55. The judge had given a careful and balanced analysis. He had emphasised that what he was evaluating was not the prospect of the child being returned to the parents' care, but the prospect of the parents successfully opposing the making of the adoption order. He had concluded that it was in the child's interests to have another look at the question whether the need to preserve family relationships, including sibling relationships, continued to be outweighed by the greater permanency of adoption. Given the potential for delay, not every judge would have given leave in such circumstances but this judge had not been wrong to reach his decision.

56. *Re JL (A Child) (Leave to Apply to revoke a Placement Order)* [2020] EWCA Civ 1253 is another example of a natural family member being given permission to challenge a potential adoption placement. The maternal grandmother, in this case, appealed against the judge's refusal to grant her permission to apply to revoke a placement order. J was under 2 and had 3 siblings. The elder of his siblings was placed with his paternal grandfather under an SGO and the younger two were placed with the maternal grandmother under care orders. At the time of the care proceedings with respect to J, the maternal grandmother was living in a 2 bedroom flat and was unable to accommodate J alongside his two brothers. The LA sought care and placement orders for J which were granted by the judge. The maternal grandmother then applied to revoke the placement order on the basis that her circumstances had changed in that she had recently rented a 3 bedroom house with a garden so could now accommodate J. Her application was supported by the guardian who said she should be granted "leave to appeal the placement order". However, the judge rejected the application on the basis that her circumstances had not changed, the application would involve further delay and the guardian had mistakenly conducted her analysis on the basis that the application was for leave to appeal rather than leave to apply to revoke.

57. The CA held that the guardian's analysis was perceptive and persuasive. It was unfortunate that she had wrongly referred to the application as one for leave to appeal, but the content of her report addressed the key issues and the judge had been wrong to disregard it. The case was a clear example of a change of circumstances of a degree sufficient to open the door to an application to revoke the placement order:

"18. The law requires children where possible to be brought up in their natural families. Adoption is a measure of last resort. Mrs B is by all accounts caring for the two boys very well… In those circumstances, it must be in J's interests to at least explore the possibility of being placed in her care." Per Baker LJ

58. *Re RP (A Child) (Foster Carer's Appeal)* [2019] EWCA Civ 525 was an appeal where a welfare option had not been properly evaluated before making a final decision.

It also demonstrates the acute difficulties than can arise when making placement decisions about a child of foreign nationals.

59. The case concerned a 2 year old daughter of Polish parents, who had been living with her current foster carer for 14 months, and had developed a strong bond with her. The judge at first instance determined that the child should be placed in foster care in Poland so as to be geographically close to her older siblings. At the time the judge had not been made properly aware that the foster carer had asked for R to remain with her permanently (and indeed that this was very much a realistic option). After she made her decision, the foster carer, who had not been a party to the proceedings, applied for permission to appeal. The Court of Appeal considered that, although she had not been a party below, she had a real interest in the outcome of the appeal and so she should be permitted to pursue her application.

60. The appeal was allowed on the basis that the judge, not being fully aware of that placement with the foster carer was a realistic option, had not taken this proposal into account when carrying out her evaluation of what outcome would be in Rs best interests. S.1(4)(f) of the Adoption and Children Act 2002 casts a wider shadow than that under s.1(3)(f) of the Children Act ("how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs"). It has widened the focus of capability and embraces consideration of (a) the value to the child of a continuing relationship with his relatives and/or with his prospective adopters (and any other person who is important to the child), and (b) the wishes and feelings of those relatives. Crucially, this includes sibling relationships. These provisions give significant emphasis to those issues which are especially important for the older child who has established identity links with his birth family. The statutory obligation to identify any relevant relationship and consider the likelihood of that relationship continuing and the value to the child of its doing so may extend to a relationship between a child and foster carers who have put themselves forward as prospective adopters.

61. The matter was remitted back for a rehearing. Ultimately, Theis J determined that R's welfare required the making of care and placement orders notwithstanding the potential for R to be placed under a SGO with her foster carer (*Re RP* [2019] EWFC 50). However, the LA had accepted that the foster carer would be considered as R's adopter if their application was successful and that the chances of such a placement were 'extremely high'.

62. *Re T (A child) (refusal of adoption order)* [2020] EWCA 797 was another case where adoption was used in a context very different from that which would likely to

be applicable in another European jurisdiction. The child was placed with his grandparents due to the mother's mental health difficulties. Care proceedings concluded with an SGO in favour of the grandparents. However, since then the mother had been convicted of breaching a restraining order imposed for threats to kill the grandmother and for having smashed windows in the family home and car. Since June 2018 the mother had spent time either as a serving prisoner or detained in a psychiatric hospital. The grandparents applied for an adoption order and this was opposed by the mother. The judge concluded that an adoption order was not necessary or proportionate because the SGO was working well and she was not satisfied that 'nothing else will do'.

63. The Court of Appeal allowed the grandparents' appeal and made an adoption order. The judge had taken account of the detrimental consequences for the child and for the mother of terminating their legal relationship and of removing the mother's legal 'rights' in respect of the child. She had not, however, considered the potential benefits to the child and the grandparents of removing those 'rights'. She had clearly given weight to the fact that an adoption order would 'skew' the child's legal relationships but she had overplayed that and failed to balance it against the superior benefits of an adoption order which were that it would:

- reflect the reality of the child's life with his grandparents now and throughout the whole of his life;
- provide the child and grandparents with the security and reassurance that the child's future life was securely and permanently with them in fact and in law;
- sever the mother's legal relationship with the child, which would remove the mother's ability to interfere in his life whether by making court applications and/or requiring and demanding information about his life;
- remove the obligation on the grandparents to seek the mother's consent for certain steps to be taken in the child's life;
- enable the step-grandfather to be the child's legal father in circumstances where the identity of his biological father was unknown; and
- send the clear message to the wider world that the child was lawfully the grandparents' child.

64. In *Re B (A Child) (Post-Adoption Contact)* [2019] EWCA Civ 29, [2019] 2 FLR 117 the CA reaffirmed that s.51A ACA has not changed the legal position with respect to post adoption contact nor has the ongoing debate about the benefits of such contact.

65. S.51A of the Adoption and Children Act, as introduced by the Children and Families Act 2014 is headed "Post adoption contact":

"(1) This section applied where
(a) an adoption agency has placed or was authorised to place a child for adoption; and
(b) the court is making or has made an adoption order in respect of the child.

(2) When making the adoption order or at any time afterwards, the court may make an order under this section
(a) requiring the person in whosej favour the adoption order is or has been made to allow the child to visit or stay with the person named in the order under this section, or for the person named in that order and the child otherwise to have contact with each other, or
(b) prohibiting the person named in the order under this section from having contact with the child.

(3) The following people may be named in a order under this section:
(a) any person who (but for the child's adoption) would be related to the child by blood (including half-blood), marriage or civil partnership;
(b) any former guardian of the child;
(c) any person who had parental responsibility for the child immediately before the making of the adoption order;
(d) any person who was entitled to make an application for an order under s.26 in respect of the child ….
(e) any person with whom the child has lived for a period of at least one year.

(4) An application for an order under this section may be made by
(a) a person who has applied for the adoption order or in whose favour the adoption order is or has been made,
(b) the child, or
(c) any person who has obtained the court's leave to make the application.

(5) In deciding whether to grant leave under subsection 4(c), the court must consider
(a) any risk there might be of the proposed application disrupting the child's life to such an extent that he or she would be harmed by it (within the meaning of the 1989 Act),
(b) the applicant's connection with the chid, and
(c) any representations made to the court by
(i) the child, or
(ii) a person who has applied for the adoption order or in whose favour the adoption order is or has been made."

66. The court held that, although s.51A introduced a bespoke statutory regime for the regulation of post-adoption contact following placement for adoption by an

adoption agency, there was nothing in the section to indicate any variation in the previous approach settled by case law in *Re R* to the imposition of an order for contact on adopters who are unwilling to accept it. The President observed (at paragraph 54) that *"Parliament's intention in enacting s 51A was aimed at enhancing the position of adopters rather than the contrary".* He went on to give the following further guidance (at paragraph 59):

"ACA 2002, s 51A has been brought into force at a time when there is research and debate amongst social work and adoption professionals which may be moving towards the concept of greater 'openness' in terms of post-adoption contact arrangements, both between an adopted child and natural parents and, more particularly, between siblings. For the reasons that I have given, the juxtaposition in timing between the new provisions and the wider debate does not indicate that the two are linked. The impact of new research and the debate is likely to be reflected in evidence adduced in court in particular cases. It may also surface in terms of advice and counselling to prospective adopters and birth families when considering what arrangements for contact may be the best in any particular case. But any development or change from previous practice and expectations as to post-adoption contact that may arise from these current initiatives will be a matter that may be reflected in welfare decisions that are made by adopters, or by a court, on a case by case basis. These are matters of 'welfare' and not of 'law'. The law remains, as I have stated it, namely that it will only be in an extremely unusual case that a court will make an order stipulating contact arrangement to which the adopters do not agree."

67. Thus, for the time being at least, it appears the President is not signalling a change in the legal position on post adoption contact but is seeking to influence a wider change in welfare expectations and decision making in this area.

<u>Conclusions</u>

68. There are many ongoing debates about the merits of adoption and whether our current practices best meet the needs of children, their siblings, adoptive parents and birth parents and other family members. It is certainly right that adoption is more prevalent in the UK than in other European jurisdictions and this causes fierce debates when a child of a Member State is the subject of care proceedings here. Our present system involving a significant number of largely closed adoptions is somewhat out of sync with our European neighbours and questions have been asked both as to whether that system meets the needs of the children involved and is sustainable in the age of social media. At present, whilst there is a push to improve planning for contact and social work practice, the legal position, reflecting a reluctance to impose contact on prospective adopters, remains largely unaffected. However, it is right to say that judges continue to examine carefully in individual

cases whether adoption is best for the child concerned and whether other alternatives might better meet their needs.

Leslie Samuels QC

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