

POST-PROCEEDINGS CONTACT

By particular reference to:

- (1) CARE ORDERS
- (2) ADOPTION

1. In many cases, children adopted; placed under special guardianship orders or subject to final care orders have been, for some time (whether prior to or simply in the course of care proceedings), in the care of a local authority. Accordingly, it is appropriate to start with the obligations placed on local authorities in respect of the promotion and maintenance of contact between the child and his family.
2. For this reason, this paper will begin with the issues arising in relation to contact with children in long term care. The greater part of the talk, however, will address issues relating to contact around adoption, particularly post-adoption contact.

(1) Final Care orders

Local authority duties regarding contact generally:

3. If a child is being looked after by an English local authority, then Sch 2, para 15(1) of the CA 1989 places the authority under a duty to '*endeavour to promote contact*' between the child and his parents (irrespective of whether or not they have parental responsibility) [save where either (a) a local authority is authorised to place the child for adoption under the ACA 2002, or (b) the child who has been placed for adoption by a local authority is less than six weeks old, see Adoption Agencies Regulations 2005, SI 2005/389, reg 45].
4. The overall amount of contact between children and their families has increased significantly since implementation of the Children Act 1989 ["CA 1989"] and is a major factor associated with a child returning home.
5. The prominence afforded to sibling contact is clear. In England, the statutory guidance emphasises the importance of sibling contact [*The Children Act 1989 Guidance and Regulations, Volume 2: Care Planning, Placement and Case Review* (DfE, 2015), paras 2.78–2.101, and 3.21–3.25]

Contact orders: children in care

6. Whether on the making of an interim or final care order, the primary piece of legislation governing contact to children in care is s.34 CA 1989, the most prominent part of which is as follows:

(1) Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section [and their duty under section 22(3)(a)] [or, where the local authority is in Wales, under section 78(1)(a) of the Social Services and Well-being (Wales) Act 2014) allow the child reasonable contact with—

(a) his parents;

(b) any guardian [or special guardian] of his;

[(ba) any person who by virtue of section 4A has parental responsibility for him;]

(c) where there was a [child arrangements] order in force with respect to the child immediately before the care order was made, [any person named in the child arrangements order as a person with whom the child was to live]; and

(d) where, immediately before the care order was made a person had care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person.

(2) On an application made by the authority or the child, the court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and any named person.

(3) On an application made by —

(a) any person mentioned in paragraph (a) to (d) of subsection (1); or

(b) any person who has obtained the leave of the court to make the application,

the court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and that person.

(4) On an application made by the authority or the child, the court may make an order authorising the authority to refuse to allow contact between the child and any person who is mentioned in paragraphs (a) to (d) of subsection (1) and named in the order.

....

(11) Before making, varying or discharging an order under this section or making a care order with respect to any child the court shall —

(a) consider the arrangements which the authority have made, or propose to make, for affording any person contact with a child to whom this section applies; and

(b) invite the parties to the proceedings to comment on those arrangements.

7. Because contact between a child and his family will be assumed to be beneficial by virtue of CA 1989, Sch 2, para 15, a local authority which considers that it is not reasonably practicable or consistent with the child's welfare to promote that contact will need to file evidence to justify its stance (Re M (Care: Contact: Grandmother's Application for Leave) [1995] 2 FLR 86, CA).
8. A local authority can be held to be in contempt of court if a foster parent thwarts a defined s 34 contact order [P-B (children) (contact: committal) [2009] EWCA Civ 143 [2010] 1 WLR 419, [2009] 2 FLR 66].
9. A s 34(4) order should not be made merely against the possibility that circumstances might change to justify the termination of contact (Re S (Care: Parental Contact) [2005] 1 FLR 469, CA).
10. The fact that ongoing direct contact will require long-term supervision is not, in itself, a reason to refuse to direct that such contact takes place (Re S (A Child) (Child Arrangements Order: Effect of Long-Term Supervised Contact on Welfare) [2016] 2 FLR 217, CA and see NA (Applicant) v ZA and ors [2015] EWHC 2188 (Fam)).

Reviewing contact

11. The greatest tension probably arises when the court comes to sign off on a case, in particular, when it reviews the arrangements for contact, as it must [s.31(3A) and s.34(11)]. The issue arises as to whether, and if so how, the court might retain jurisdiction in order to oversee the issue of contact between a child in care and a relevant person. This issue can be a vexed one if the theoretical obligations placed on local authorities are not put into practice.
12. It is not open to the court to retain control over the issue of contact with a child in care by providing for a general review of the progress of the care plan and of contact arrangements at some date after the making of a care order (Re B (A Minor) (Care Order: Review) [1993] 1 FLR 421, FD).

13. Further, in *Kent County Council v C* [1993] 1 FLR 308, FD, Ewbank J held that the court cannot fetter the local authority's plans by adding a direction to a care order that the children's guardian remain involved with the child.
14. *Re B* (above), however, does envisage the court making an interim contact order with a specific provision for a further hearing with a view to making more enduring provision for contact at the subsequent hearing. That power has to be exercised cautiously.
15. In *Re S (A Minor) (Care: Contact Order)* [1994] 2 FLR 222, CA the Court of Appeal there held that, where the nature and extent of the contact was an integral part of the local authority's care plan, it was not for the court to decide precisely what contact was reasonable. The judge had made a care order but adjourned the issue of contact for further directions and this was, in effect, providing for a review of the implementation of the care plan which would lead the judge into the forbidden territory of supervising the administration of the local authority's arrangements for rehabilitation.
16. Thus, it was that Butler-Sloss LJ in *Re L (Sexual Abuse: Standard of Proof)* [1996] 1 FLR 116, 124 said:
- 'The effect of the Children Act is to set aside the former powers of the court in wardship and to remove from the court any continuing control over children after the making of a care order unless or until a further application was made to the court. ...*
- If the care order remains in place, other than by control over contact by virtue of the provisions of s 34, the court has no further part to play in the future welfare of the child: see Re B (Minors) (Care: Contact: Local Authority's Plans) [1993] 1 FLR 543 at p 548. This interchange between the judicial control of children, the subject of applications, and the local authority responsibility for children placed in care under the Children Act, is a difficult and sensitive area. **The point at which the court withdraws from further control over the child and passes the responsibility to the local authority is a matter of the exercise of discretion by the court and will vary with each set of circumstances. But at some point, if a care order is made by the court, it must hand over the future arrangements for the child to the local authority.'***
17. There are, however, a number of difficulties in this approach and it may be that the court would need to enquire in to the level of adherence by the relevant local authorities with the duties owed to other children in its care before handing over the reins of control to a local authority in a given case.

Local Authorities duties post-proceedings

18. As s.34 CA 1989 is not helpful in relation to inter-sibling contact, this issue will depend to a high degree on the contents of the care plan and the commitment of the local authority to keeping the care plan updated and under regular review in order to reflect the changing needs as they relate to contact. Accordingly, it is appropriate that inter-sibling contact is given prominence in the regulations.
19. The child's care plan should cover the arrangements for contact with family and friends. The Care Planning, Placement and Case Review (England) Regulations 2010, SI 2010/959, reg 5

Preparation and content of the care plan

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[(1)] The care plan must include a record of the following information—

- (a) the long term plan for C's upbringing ("the plan for permanence"),*
- (b) the arrangements made by the responsible authority to meet C's needs in relation to—...*
- (v) family and social relationships and in particular the information set out in paragraph 3 of Schedule 1.*

20. Paragraph 3 of Schedule 1 reads as follows:

Family and social relationships

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- (1) If C has a sibling for whom the responsible authority or another authority are providing accommodation, and the children have not been placed together, the arrangements made to promote contact between them, so far as is consistent with C's welfare....*
- (3) If C is in the care of the responsible authority, details of any order relating to C made under section 34 (parental contact etc with children in care).*
- (4) Any other arrangements made to promote and maintain contact in accordance with paragraph 15 of Schedule 2 of the 1989 Act, so far as is reasonably practicable and consistent with C's welfare, between C and—*
- (a) any parent of C's and any person who is not C's parent but who has parental responsibility for C, and*
- (b) any other connected person.*

21. The first issue concerns the provision and record keeping in relation to care plans. Does the local authority have a good, clear record, post-proceedings, in maintaining an accurate and updated record of contact and other plans relevant to the child's welfare? If not, does this provide support for the view that the court should adjourn the issue of contact before finally signing off on the care order? Further, there is, potentially now, a move for issues relating to post-adoption contact to be postponed to "allow the dust to settle" in which case, why shouldn't the same or a similar approach be permitted in relation to contact post the making of final care orders?
22. The second issue concerns the local authority's commitment to promoting inter-sibling contact between separated siblings. Why shouldn't the local authority be pressed for this type of information just as it is (when a court is looking at a plan for adoption) for its record in relation to past family finding?
23. The importance of good, accurate record keeping is as important as the need for proper reviews of contact.
24. In England, amendments to the Children Act 1989 by the Children and Young Persons Act 2008 extended the functions of the independent reviewing officer (IRO) from monitoring the local authority's performance in relation to the periodic reviews 'to monitoring the performance by the local authority of their functions in relation to a child's **case**', so that the IRO has 'an effective independent oversight of the child's **case** and ensures that the child's interests are protected throughout the care planning process [*IRO Handbook: statutory guidance for independent reviewing officers and local authorities on their functions in relation to case management and review for looked after children (DCSF, 2010)*, para 1.18].
25. Proper consideration must be given by the responsible authority to the issue of his rehabilitation with his family or, if that is not in his interests, the possibility of finding a permanent substitute for his family.
26. In England, ss 25A-25C CA 1989 and the Care Planning, Placement and Case Review (England) Regulations 2010 make enhanced provision for such reviews and a local authority '*must not make any significant change to [the child's] care plan unless the proposed change*

has first been considered at a review of [the child's] case, unless this is not reasonably practicable' [reg 32(2)].

27. As with record keeping, the child's welfare needs in relation to contact may depend on the vicissitudes of the IRO overseeing the care plan or the effectiveness of a particular local authority's reviewing procedure.

(2) Adoption

28. The issue of post-adoption contact seems set for some significant development if the signals from the new President of the Family Division are to be heeded. Delivering the Bridget Lindley OBE Memorial Lecture in 2017 and, in March 2018, the *Keynote Address to the NAGALRO Annual Conference*, the President addressed the issue of adoption and, in particular, post-adoption contact. It is hard to review these talks without gaining a sense that change is on the horizon.
29. In anticipating where and how such changes might arise, this paper will address the following, in turn:
- (a) An historic analysis of the issue of adoption and contact;
 - (b) Statutory developments;
 - (c) The impact of research;
 - (d) The impact of social media;
 - (e) Good practice and red lines.

The history of adoption and contact

30. The starting point in analysing the modern approach to post-adoption contact is the decision of the House of Lords in *Re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1, [1988] 2 WLR 474, [1988] 2 FLR 159. In this case, decided prior to the CA 1989, the child, C, who was 13, had a strong relationship with her brother, M, who was 19. C's mother refused to give her consent to C's adoption on the ground that adoption might harm C's relationship with M. Both the trial judge and this court upheld her refusal to consent, notwithstanding the prospective adopters' acknowledgement of the relationship and their assurance that no impediment would be placed by them on its continuance. The House of Lords reversed this court's decision, and made an adoption order,

attaching to it a condition under s 8(7) of the Children Act 1975 as to contact between C and M.

31. The leading speech was given by Lord Ackner. He reviewed the authorities prior to 1988, saying the following: – [167–168] –

“It seems to me essential that, in order to safeguard and promote the welfare of the child throughout his childhood, the court should retain the maximum flexibility given to it by the Act and that unnecessary fetters should not be placed upon the exercise of the discretion entrusted to it by Parliament. The cases to which I have referred illustrate circumstances in which it was clearly in the best interests of the child to allow access to a member of the child's natural family. The cases rightly stress that in normal circumstances it is desirable that there should be a complete break, but that each case has to be considered on its own particular facts. No doubt the court will not, except in the most exceptional case, impose terms or conditions as to access to members of the child's natural family to which the adopting parents do not agree. To do so would be to create a potentially frictional situation which would be hardly likely to safeguard or promote the welfare of the child. Where no agreement is forthcoming the court will, with very rare exceptions, have to choose between making an adoption order without terms or conditions as to access, or to refuse to make such an order and seek to safeguard access through some other machinery, such as wardship. To do otherwise would be merely inviting future and almost immediate litigation.”

32. It is important to note, however, that this dicta was delivered in a speech which led to the making of, in effect, a contact order. Thus, this guidance was, strictly, all obiter. Given its provenance it has been, unsurprisingly, followed to this day, not least as the thinking on the issues has remained consistent post the CA 1989.

33. The 1989 Act permitted for contact orders post adoption to be made under s.8, though 'leave' or permission from the court was required before a birth parent could apply for contact once an adoption order was made. In accordance with *Re C*, however, such orders were perceived to be highly unusual. In *Re T (Adopted Children: Contact)* [1995] 2 FLR 251, the adopters had agreed to contact once a year. The child's birth mother wanted contact two or three times a year and sought an order to that effect so that her contact with the child would be secure. The judge made an order for contact once a year. The adopters appealed, and Butler-Sloss LJ said at 256:-

'It seems to me that that degree of security that she seeks has to be found in the trust that she must have in these adopters. That is a trust which is undoubtedly held by the local authority and the guardian ad litem, because those experts in this field all believe that at this stage of this child's life it is right for her sake that she should continue to see her mother once a year. They have chosen this family on the basis that they also would recognise it was in the interests of this child that she should continue, certainly for the time being, to see her natural mother. These adopters themselves accept that this is right. This is all in the interests of the child, and, of course, an order under s 8 for contact is made with the welfare of the child of the primary consideration. Nobody is suggesting that if this order is not made then the welfare of this child would not continue to be the primary consideration of these adopters in relation to her continuing contact with her natural mother.'

34. The value of contact post adoption has been identified in a number of the cases:
- (a) By Ward LJ in *Re G (Adoption: Contact)* [2002] EWCA 761, [2003] 1 FLR 270;
 - (b) In the dissenting speech of Baroness Hale in the Northern Ireland case of *Down Lisburn Health and Social Services Trust v H* [2006] UKHL 36 [2007] 1 FLR 121, (neither of which was decided by specific reference to the 2002 Act).
35. Notwithstanding this, in *Re R (Adoption: Contact)* [2005] EWCA Civ 1128; [2006] 1 FLR 373 at [49], it was held that whilst contact post adoption was 'more common' the jurisprudence was clear, and that *'the imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely unusual.'*
36. The introduction of the 2002 Act was not foreseen to be a game-changer in relation to the Lord Ackner line of thinking, see Wall LJ in **RE R (ADOPTION: CONTACT) - [2006] 1 FLR 373**
- [48]** *We were shown s 1 of the new Adoption and Children Act 2002, which is due in force later this year, which demonstrates the clear change of thinking there has been since 1976, when the Adoption Act was initially enacted, and which demonstrates that the court now will need to take into account and consider the relationship the child had with members of the natural family, and the likelihood of that relationship continuing and the value of the relationship to the child.*
- [49]** *So contact is more common, but nonetheless the jurisprudence I think is clear. The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual."*
37. Interestingly, Wall LJ considered that, had the adopters resiled completely from their prior agreement (for contact thrice yearly) the appeal would have been allowed. The balance then would have fallen against the adopters.
38. The next case of note is *Re P (Placement Orders: Parental Consent)* - [2008] 2 FLR 625. As in *Re R*, the appeal concerned inter-sibling contact but by now the 2002 Act was in force. Wall LJ said:
- [151]** *"On the facts of this case, there is a universal recognition that the relationship between D and S needs to be preserved. It is on this basis that the local authority/adoption agency is seeking the placement of the children. In our judgment, this means that the question of contact between the two children is not a matter for agreement between the local authority/adoption agency and the adopters: it is a matter which, ultimately, is for the court. It is the court which will have to make adoption orders or orders revoking the placement orders, and in our judgment it is the court which has the responsibility to make orders for contact if they are required in the interests of the two children.*
- [152]** *In our judgment, the making of placement orders in the instant case requires additional safeguards for the two children over and above the fact that the court has made contact orders under s 26*

of the 2002 Act. We accordingly direct that all further applications in the case, including any application for either child to be adopted, should be listed before the same judge, and that all further applications in the case be reserved to him. Whilst we cannot, of course, fetter the future exercise of his discretion, which he must exercise as he thinks fit on the facts of the case, we are satisfied that he must retain control of the case, and that no final step should be taken in relation to either child without his imprimatur.

[154] *We do not know if our views on contact on the facts of this particular case presage a more general sea change in post adoption contact overall. It seems to us, however, that the stakes in the present case are sufficiently high to make it appropriate for the court to retain control over the question of the children's welfare throughout their respective lives under ss 1, 26, 27 and 46(6) of the 2002 Act; and, if necessary, to make orders for contact post adoption in accordance with s 26 of the 2002 Act, under s 8 of the 1989 Act. This is what Parliament has enacted. In s 46(6) of the 2002 Act Parliament has specifically directed the court to consider post adoption contact, and in s 26(5) Parliament has specifically envisaged an application for contact being heard at the same time as an adoption order is applied for. All this leads us to the view that the 2002 Act envisages the court exercising its powers to make contact orders post adoption, where such orders are in the interests of the child concerned”.*

39. In his more recent lecture, the President highlighted this reference to a potential sea change and lack of anything of that nature following.

40. Indeed, in *Oxfordshire County Council v X, Y and J* - [2011] 1 FLR 272, Lord Neuberger returned to Lord Ackner theme when allowing an appeal against a judge’s direction that a photograph should be provided by adopters to birth parents:

“[26] *Of course, as a matter of law, the adoptive parents' wishes cannot be determinative or dispositive, but the fact that it is 'extremely unusual' to make an order with which the adoptive parents are not in agreement, is simply not to be found stated or acknowledged anywhere in the judgment. And if that is what Judge Corrie had in mind, we cannot believe that he would have expressed himself, even in an ex tempore judgment, as in fact he did. To say, as the judge did, that the adoptive parents' wishes and concerns must be given 'appropriate', even 'considerable', weight is one thing. It is a significantly different thing to say that it would be 'extremely unusual' not to give effect to the adoptive parents' refusal to agree.*

[36] *It is a strong thing to impose on adoptive parents, it is 'extremely unusual' to impose on adoptive parents, some obligation which they are unwilling voluntarily to assume, certainly where, as here, the adoption order has already been made. Was there a proper basis for taking that extremely unusual step? In our judgment, there was not. The judge found that the adoptive parents were genuine when they expressed their concerns, so what was the justification for imposing on them something they conscientiously and reasonably objected to, particularly when, as we have seen, they say that they have not ruled out the possibility of letting the natural parents have photographs in the future? As we have said, they are not to be saddled with an order merely because a judge takes a different view. The adoptive parents are J's parents; the natural parents are not. The adoptive parents are the only people with parental responsibility for J. Why, unless the circumstances are unusual, indeed extremely unusual – and here, in our judgment, they are neither – should that responsibility be usurped by the court? We can see no good reason either on the facts or in law. On the contrary, there is much force in the point they make, that they wish their status as J's parents to be respected and seen to be inviolable – not for themselves but in order, as they see it, to give J the very best chance for the adoption to be successful.”*

Statutory developments

41. The Adoption and Children Act [ACA 2002] introduced the following points at which contact falls to be considered:
- (a) The broadly drafted “Coming to a decision relating to the adoption of a child” [s.1 ACA 2002];
 - (b) Specifically, the making of an order authorising the adoption agency to place the child for adoption [s.26 ACA 2002];
 - (c) Before making any adoption order [s.46 ACA 2002]; and
 - (d) Making or at any time after making an adoption order (following placement by an adoption agency)[ss 51A and 51B ACA 2002].
42. The latter most provisions came into force in April 2014. Section 51A only applies where a court is making, or has made, an adoption order following placement for adoption by an adoption agency; in all other cases, provision for post-adoption contact will be made under a ChA 1989, s 8 child arrangements order. It remains to be seen whether these changes, taken together with the other provisions might bring about a sea or any change, in particular, whether the Lord Ackner approach survives.
43. The President said this, in his later speech:

“I wonder if, in this regard, the old case law can stand. Is it right that the views of the adopters should hold such sway?”

44. When one reviews some of these statutory provisions taken as a whole, the scope for a sea change is readily apparent.
45. Firstly, s.1 requires the court to have particular regard, whenever making a decision relating to adoption, to

(f) the relationship which the child has with relatives, [with any person who is a prospective adopter with whom the child is placed,] and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—

(i) the likelihood of any such relationship continuing and the value to the child of its doing so,

(ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,

(iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child.

46. Secondly, s.51A is especially widely drafted:

(1) This section applies 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 whose 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 an 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 section 26 in respect of the child (contact with children placed or to be placed for adoption) by virtue of subsection (3)(c), (d) or (e) of that section;*
- (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 child, 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.*

(6) *When making an adoption order, the court may on its own initiative make an order of the type mentioned in subsection (2)(b).*

(7) *The period of one year mentioned in subsection (3)(e) need not be continuous but must not have begun more than five years before the making of the application.*

(8) *Where this section applies, an order under section 8 of the 1989 Act may not make provision about contact between the child and any person who may be named in an order under this section.]*

Research

47. We have the benefit of some significant research. It is usefully summarised in last month's Family Law by Dr Elsbeth Neil at UEA [**Rethinking adoption and birth family contact: is there a role for the law? – [2018] Fam Law 1178**].
48. The research now dates back over 20 years and encompasses:
- (1) The 'Contact after adoption' study (1996 – 2014) – an 18-year longitudinal study following adopted children, and their birth relatives and adoptive parents. Findings are reported in *Contact after adoption: a longitudinal study of postadoption contact arrangements* by Elsbeth Neil, Mary Beek, and Emma Ward, (Corambaaf, 2015).
 - (2) The 'Supporting direct contact' study E Neil and others, 'Supporting direct contact after adoption' (BAAF, 2011). This project focused on face-to-face contact and how this can be supported. Data were collected from social workers, adopters and birth relatives.
 - (3) The 'Yorkshire and Humber' adoptive parent survey (2016–18). This was a cross-sectional in-depth survey completed by 319 adoptive parents (their children being mean age 7).
49. Among the key findings are the following:
- (1) Most importantly of all, arrangements should be decided on a case by case basis: a basic and obvious message, yet the uniformity of current practice suggests this case sensitivity is not sufficiently embedded.

- (2) The starting point of the model is to consider the goals of the contact, these being informed by the current and likely future needs of the adopted child as well as the needs of adoptive parents and birth relatives (unless there is some reward for adoptive parents or birth relatives, contact is likely to falter).
- (3) A key consideration is 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 (though indirect forms of contact could be a first step in working towards establishing a relationship in the future).
- (4) In the 'Supporting direct contact' study, contact was significantly more likely to be rated as 'working well' when meetings did not include a birth relative who had been involved in the abuse or neglect of the child.
- (5) Children who are younger at placement, who have had more benign experiences before adoption and who have fewer developmental problems, are those who are most able to manage the inevitable emotional complexities of contact; perversely, children placed very young are least likely to be considered suitable for face-to-face contact. For older children who have established relationships, contact may be wanted and needed. However, some children might find visits hard to manage and the benefits
- (6) The capacity of adults to consider and enact contact plans may be much higher once the 'the dust has settled'. An expectation of the need for flexibility and to keep arrangements under review should be established from the start.
- (7) The almost universal use of letterbox as a means for adopted children to stay in touch with their birth parents does need to be questioned. Where such contact is being proposed is important to negotiate the details of arrangements with the birth and adoptive family, to gauge commitment to sustaining the contact as long as it is in the child's best interests, and to consider what support will be needed in particular to get the contact off to a good start (ensuring that adopters, birth relatives and carers of siblings have the chance to meet at least once will be important here).
- (8) There is scope for considering face-to-face contact in a greater number of cases. Where there is a member of the birth family with something positive to offer a child

in terms of meeting their information needs, reassuring them that they are remembered and cared about, and/or offering a positive relationship that will not threaten but complement their relationships in their adoptive family, then courts should ask questions if face-to-face contact is *not* being considered.

- (9) During care and adoption proceedings may not be an optimal time to fully agree contact plans, but it is an important time in which to establish a clear focus on the child's needs and strong expectations that adoptive parents and birth relatives will commit to meeting these. It is also an important opportunity to check whether birth parents have been actively encouraged to use independent birth parent support services,
- (10) This may be a useful tool where children are considered to have a compelling need for ongoing contact, helping to avoid these needs being side-lined in order to make him or her more 'adoptable', an outcome that is incompatible with the notion of adoption as a service for children.

50. It is of note that the President highlighted the following points, based on the research findings:

- (a) Planning for, building on and supporting contact, possibly with relatives other than those in the immediate centre of the care proceedings, can be very helpful in the long term
- (b) Why, if face to face contact would benefit a child, not necessarily now but in some time after she has settled down, should the adopter have an effective veto?
- (c) The court may make a contact order at the time of adoption or “at any time afterwards”. In the right case, there may well be justification in this power being used for the issue of contact to be set down for review, may be in a year or more after adoption to see if, in some way, provision of contact may provide the adopted person, the soon to be adult, with some bridge back to her roots.

Impact of social media

51. The potential impact of social media for all adoptions cannot be overstated and, since Dame Eleanor King delivered her Hershman Levy Memorial Lecture in 2013 [May I be your Facebook friend? Life stories and social media – [2013] Fam Law 1399] should not be overlooked by practitioners.

52. In the year 2011 to March 2012, 3,450 children were adopted, the average age was 3 years and 8 months; 74% [71% in 2017] were between 1 and 4 and 21% [21% also in 2017] between 5–9.
53. She identified that this complete change in the profile of children being placed for adoption had three significant consequences:
- (1) These children will have memories of their birth families and they are unlikely to be good.
 - (2) They may well have on-going relationships with siblings or other family members.
 - (3) The proceedings were far more likely to have been contested, with parents fighting through the courts to keep their children. These children would have suffered instability and fractured attachments, often they will have been in an out of care whilst attempts were made safely to rehabilitate them home and each time the attempt failed they were moved to a different foster carer.
54. She highlighted the different views at the time:
- (1) Dame Elizabeth Butler-Sloss's view that adoption must not be sacrificed as a valuable solution for many children, so that ways should be sought to accommodate the changes brought about by social networking.
 - (2) The view of the eminent Child Psychiatrist Dr Eia Asen of the Anna Freud Centre that closed adoption, since the arrival of social media and un-boundaried TV shows such as Big Brother, Ophra Winfrey and Jeremy Kyle is no longer a sustainable concept.
55. King LJ went on to identify the advice then given by BAAF that the best and most effective preparation would be provided by reviewing and changing the way in which Life Story work is undertaken and in the recognition that post adoption support/therapy is not a luxury but an absolute necessity:
- 'The best internet security in the world is no substitute for talking to the child about her life story, adoption and birth family. Parents must do their best to ensure that their child is not struggling with unanswered questions.'*
56. She then drew attention to some of the conclusions arising out of the British Association of Social Workers (BASW) enquiry into adoption from a social work perspective

undertaken by Professor Brid Featherstone, Professor Anna Gupta and a research assistant, Sue Mills. Their report 'The Role of the Social Worker in Adoption – Ethics and Human Rights: An Enquiry:

- (1) 'A significant rethink of approaches to “contact” and connection between adopted children and their families is needed.'
- (2) Letterbox contact is seen as the norm, even where relatives may pose no risk to a child, yet the Enquiry heard that letterbox contact is poorly supported with resources so that it often breaks down.
- (3) 'The lack or cessation of direct contact can “store up trouble” especially for birth families and adopted people. Seeking reunification in later life was considered to be widespread. Better resourcing of earlier periodic contact may be
- (4) It is important to improve the benefit of the letterbox approach and to improve long term outcomes for all affected by adoption.'
- (5) The Enquiry concluded that:

A rethink of contact arrangements between those adopted and their birth families was considered essential by many. They felt a need to move away from standardisation and formulas to individualised contact planning, pointing out children of different ages have different contact needs.

- (6) 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'

Good practice and red lines

57. In the light of the above, the following suggestions are made as to good practice, partly because they appear to be supported by research and partly in answer to the President's challenge to the long-standing jurisprudence and the likelihood that this will be reviewed:

(1) Each case is different:

Talking of “Adoption” in isolation is unhelpful. For example, there is a significant difference between:

- (i) A child adopted as a baby and one aged 3-8;
- (ii) A child with siblings and a child without;

- (iii) A child cared for (and harmed) within her family for some time and a child removed at birth;
- (iv) Children with physical disabilities or mental health problems and those with none;
- (v) Children with 'safe' relatives and children without.

(2) Early planning is valuable:

- (i) Once proceedings end, a valuable opportunity to engage family members in planning for adoption may be lost;
- (ii) Identification of potentially safe(r) members of the birth family should be undertaken at an early stage as they may represent the child's only opportunity to connect to their roots;
- (iii) If a child may have a need for on-going contact to family members it is also important to identify these at an early stage to see if work can be undertaken with them;
- (iv) It is important to ensure that placements are able to meet the identified need for on-going contact.

(3) In the light of (a) and (b) it is important to develop an awareness of the many different circumstances/variables in adoption cases.

(4) Section 26 orders:

- (i) Advisers, children's guardians and courts should give active consideration to the use of orders made pursuant to s.26 at the point at which a child is placed for adoption.
- (ii) Rather being viewed as the introduction of a restrictive regime, such orders might be viewed as setting an agenda for the ultimate orders to be made once the child is adopted. The issue of contact is prominently placed on the agenda.

(5) Recognition of the statutory changes since the 1970s:

- (i) It is striking how the dicta of Lord Ackner have continued to run when they were issued in a case where post-adoption contact was directed.
- (ii) Little seems to have changed notwithstanding (a) the introduction of the ACA 2002 and (b) statutory changes made to the statute, including ss 51A and B. The time may now have come for a re-thinking of the old approach.

(6) Move away from presumptions

- (i) We have seen a move away from presumptions in other areas of children law [i.e. removal from the jurisdiction; the natural parent presumption] and a concentration on the relevant issue being addressed simply as a welfare issue;
- (ii) The President may have this in mind now for post-adoption contact:

*“Is it right that the views of the adopters should hold such sway? In all other respects, those before the court who hold a contrary view on any topic are told that **“what is best for the child” must prevail.** Why, if face to face contact would benefit a child, not necessarily now but in some time after she has settled down, should the adopter have an effective veto?”*
- (iii) He seems here to be promoting the idea that welfare decisions should not be restricted by the views of one party, however important to the child that party might be. The simple question remains: What is best for the child?
- (iv) Accordingly, practitioners should be looking closely at the particular circumstances of their case, identifying how these circumstances engage the s.1 ACA 2002 adoption checklist and whether recent statutory changes support the notion of post-adoption contact.

(7) Consider adjournment or later review of the contact issue

- (i) The President said this:

“The new powers under ACA 2002, s 51A are wide. The court may make a contact order at the time of adoption or “at any time afterwards”. In the right case, there may well be justification in this power being used for the issue of contact to be set down for review, may be in a year or more after adoption to see if, in some way, provision of contact may provide the adopted person, the soon to be adult, with some bridge back to her roots.”
- (ii) It may seem to run counter to usual practice but consideration should be given to seeking a review of contact once the dust has settled. The issues which arise in relation to the prohibition on courts supervising the local authority’s care plan do not directly apply (though it may be argued that similar reasons militate against delay and review). In the right case (whatever that may be), practitioners should stand ready to seek a review.

(8) Recognise the realities of social media:

- (i) The need for support for adopters in this area is clear;

- (ii) The need for creative Life Story work to withstand the challenges of social media are equally important.
- (iii) In court proceedings, the realities of social media may cut either way:
 - (a) The prevalence of social media and photo-recognition software might now inhibit the provision of photographs;
 - (b) The simplicity with which natural family members can be traced might require a court to permit controlled direct contact as a better outcome than unsupervised social media contact.

Conclusion

58. Wall LJ wondered about a potential sea change in post adoption contact. This may now be a reality. Adherence to the above guidelines might assist practitioners in facing such changes.
59. Finally, it may be worth having some thought about these issues as they impinge on special guardianship orders. Whilst identity issues may be mitigated by being brought up in one's natural family (if that is the arrangement under the SGO) they may well be aggravated by regular on-going direct contact with. Apparent whom the child is told they cannot live with.

Mark Twomey QC

Coram Chambers

2nd October 2018