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## HOW FAR CAN YOU PUSH THE COURT ON CONTACT, INCLUDING POST-PROCEEDINGS AND POST-ADOPTION CONTACT BETWEEN SIBLINGS AND EVEN BETWEEN PARENTS AND CHILDREN?

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### CRIB SHEET

#### The Research

1. Contact after Adoption. Research in Practice/University of East Anglia/Centre for Research on Children and Families. <https://contact.rip.org.uk>.
2. An essential tool for considering the practicalities of post-contact adoption and generally on contact issues for children placed away from their birth families.
3. A longer read – the two main studies by Prof Beth Neil and her team – “Contact after Adoption Study (stage 1, 2 and 3)” and “Supporting direct contact after adoption”.  
<http://corambaaf.org.uk/bookshop/contact-after-adoption>;  
<http://corambaaf.org.uk/bookshop/contact-after-adoption-summary>;  
<http://corambaaf.org.uk/bookshop/supporting-direct-contact-after-adoption>.
4. For cross-examination purposes the recommendations for social work practice arising from the research were :-
  - a) At the stage of planning post adoption contact, try to move away from standard practices or assumptions within your agency. Focus instead on the individual needs, risks, and resources present in any one case;
  - b) Consider birth relatives’ potential to accept adoption, recognising that this capacity can change and may be low at the time of contested proceedings;
  - c) Where needed, provide ongoing support for contact particularly when birth relatives have additional needs for example with literacy or mental health issues.
5. BASW – “The role of the social worker in adoption – ethics and human rights: An Enquiry. Published 12 June 2018. <https://www.basw.co.uk/resources/role-social-worker-BASWadoptionethics-and-human-rights-enquiry>. Carried out by Professors Brid Featherstone (University of Huddersfield) and Anna Gupta (Royal Holloway, University of London).

6. The definition of ethics and human rights agreed by the steering group were- *“In its broadest sense ethics is concerned with looking at what is the right thing to do and what ought to be done. Ethics help us consider the benefits of actions or decisions for individuals, groups or society in general and the importance of the values and principles behind our decisions. So, it moves us beyond questions such as “does this policy work?” and makes us consider questions such as “is this policy right?”*  
*Broadly speaking, we see human rights as emphasising our common humanity and the importance of social, economic, political and legal rights. In the context of this Enquiry a crucial question is whether all families can use the economic, social, legal and political rights they need to ensure their children’s safety and wellbeing.”*
  
7. On a practical level and again for cross-examination purposes the BASW Enquiry reached, inter alia, the following conclusions:-
  - a) Letterbox contact is often poorly supported with resources. A lack of resources can mean if either adoptive families or birth families stop letterbox contact unilaterally there is no follow up to ascertain why.
  - b) 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.
  - c) There is rarely a clean break or severance in real life; relationships endure in hearts and minds. The absence of physical presence may, indeed, mean they are more powerful.

### The Legal Framework

8. The decision of the Court of Appeal in *Re B (A Child) (Post-Adoption Contact)* [2019] EWCA Civ 29 was eagerly awaited as it was the first appellate decision following the implementation of Section 9 Children and Families Act 2014 which created Section 51 (A) and Section 51 (B) of the Adoption and Children Act 2002.
  
9. Section 51 (4) (c ) and Section 1 (4) (f) specifically set out the requirement to consider the extended meaning of the welfare provisions of a child not being with their birth family.
  
10. Did this herald a change in approach in the jurisprudence arising from the research, in that contact orders could be made even if opposed by the prospective adopters, or was it simply a necessary revision reflecting the introduction of Child Arrangement Orders?

11. The restricted view<sup>1</sup> existed before the Children Act 1989. See -Re C (A Minor) (Adoption:Access) [1989] AC 1 HL. The Children Act 1989 did not herald change. See -Re R (Adoption:Contact) [2005] EWCA Civ 1128. Neither did the Adoption and Children Act 2002. See – Re J (A Child) (Adopted Child:Contact) [2010] EWCA Civ 581.<sup>2</sup>
12. The restricted view remains.
13. The President of the Family Division, Sir Andrew McFarlane P declined the invitation of Nick Goodwin QC for the LA, who whilst opposing the appeal on its facts nevertheless sought to have a series of propositions endorsed by the Court of Appeal, namely
- a) adoption agencies to ensure that all prospective adopters and all adoption social workers fully understand the developing research when undergoing training and approval;
  - b) in every case where post adoptive contact is a realistic option, the local authority should file, during the placement proceedings, the best information available as to the pool of “open” adopters nationally and to ensure this is as specific to the subject children as possible;
  - c) the social work and children’s guardian to consider the significance of the research studies in every case;
  - d) the court to provide full reasons on any s26 contact application;
  - e) sibling contact to be considered as an entirely separate exercise to the parental contact;
  - f) an open and frank dialogue between social workers, prospective adopters and birth parents and, if sufficiently mature, siblings about the child’s needs, possibly with a face-to-face meeting as in this case.
14. The President described the factors as “.....very largely matters of social work practice, rather than law; I do not consider that it is appropriate for this court to raise any of the listed matters to the status of being something which the Court of Appeal has stated should now be required in every case. That said, it must be a given that any social worker, children’s guardian or expert who is required to advise the court on the issue of contact, will ensure that they are fully aware of any current research and its potential impact upon the welfare issues in each particular case. Equally, it is already a requirement that courts should give adequate and clear reasons for any orders that are made following contested proceedings”. [para 56]

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<sup>1</sup> Lord Ackner in Re C stated “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 fact. 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.”

<sup>2</sup> A notable exception can be found in MF v LB of Brent & Others [2013] EWHC 1838 (Fam).

## The way forward

15. What the President did say however was – *“Post-adoption contact is an important issue which should be given full consideration in every case [ACA 2002 s46(6)]. Whilst there may not have been a change in the law insofar as the imposition of a contact regime against the wishes of prospective adopters is concerned, there is now a joined up regime contained within the ACA 2002 for the consideration of contact both at the placement for adoption stage and later at the hearing for an adoption. Further, and in contrast to the situation prior to 2014 where the issue of contact on adoption was determined under s8 by applying the CA 1989, s 1 welfare provisions, issues under both s26 and s51A of the ACA 2002 will be determined by applying the bespoke adoption welfare provisions in ACA 2002 s1, where the focus is not just upon the welfare of the subject of the application during childhood but throughout their life”*. [para 61].
16. And for practitioners this route map – *“A placement for adoption hearing has the potential for having an important influence upon the development of any subsequent long-term contact arrangements. As required by ACA 2002, s 27(4), the court must consider the issue of contact and any plans for contact before making a placement for adoption order. The court’s order may well, therefore, set the tone for future contact, but the court must be plain that, as the law stands, whilst there may be justification in considering some form of direct contact, the ultimate decision as to what contact is to take place is for the adopters and that the court will be “extremely unusual” for the court to impose a contrary arrangement against the wishes of the adopters.....At the placement order stage courts should therefore be careful to stress that, if there is any future issue as to contact, the law, as stated in Re R, will apply and, save for there being extremely unusual circumstances, no order will be made to compel adopters to accept contact arrangements with which they do not agree”*. [para 62].
17. Know the research and use it.
18. Be prepared to test the thinking behind care plans for permanence away from the birth family whether long term foster care or adoption.
19. Be prepared to argue, unless a care plan is adjusted, for a s34 Order if the plan is long term foster care.
20. Be prepared to ask for a s26 Order on a placement application on behalf of a parent if there is merit and also on behalf of the child with its siblings if for the child, if the factual circumstances make the preservation of an enduring sibling relationship critical for the child’s welfare.

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