

## Chapter 13 updates: September 2021

These are linked to the main text as follows:

- **13.2 What is Adoption?**
- **13.5.1 Placing the Child for Adoption**

### 13.2 WHAT IS ADOPTION?

One of the key characteristics of adoption is its irreversibility: adoption is for life. However, as we note on pp 920-21 of the main text, the circumstances under which an adoption order can be challenged are very limited, and the court claims that applications will only succeed exceptionally. However, there have been a number of recent cases where orders revoking an adoption have been made, the most recent first instance decisions being *ZH v HS (Application to Revoke Adoption Order)*,<sup>1</sup> *HX v A Local Authority (Application to Revoke Adoption Order)*,<sup>2</sup> and *AX v BX (Revocation of Adoption Order)*.<sup>3</sup> The legal principles emerging from these cases have been summarised by MacDonal J.<sup>4</sup>

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*HX v A Local Authority (Application to Revoke Adoption Order)* [2020] EWHC 1287

#### MACDONALD J:

38. In summary, in determining ... [the] application to revoke the placement order the following legal principles fall to be considered and applied to the facts of this case:

i) An adoption order effects a change that is, and is intended to be legally permanent. The effect of an adoption order is to extinguish any parental responsibility of the natural parents. Once an adoption order has been made, the adoptive parents stand to one another and the child in precisely the same relationship as if they were his legitimate parents, and the child stands in the same relationship to them as to legitimate parents. Once an adoption order has been made the adopted child ceases to be the child of his previous parent and becomes the child for all purposes of the adopters as though he were their legitimate child.

ii) There are strong public policy reasons for not permitting the revocation of adoption orders once made, grounded in the nature and intended effect of an adoption

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<sup>1</sup> [2019] EWHC 2190.

<sup>2</sup> [2020] EWHC 1287.

<sup>3</sup> [2021] EWHC 1121.

<sup>4</sup> This summary was approved by the Court of Appeal in *Re I-A (Revocation of Adoption Order)* [2021] EWCA Civ 1222, [15].

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order but also in the grave damage that would be done to the lifelong commitment of adopters to their adoptive children if there was a possibility of the child, or indeed the parents, subsequently challenging the validity of the order and in the dramatic adverse effect on the number of prospective adopters available if prospective adopters thought that the natural parents could, even in limited circumstances, secure the return of the child after the adoption order was made.

iii) Within this context, the courts discretion under the inherent jurisdiction to revoke a lawfully made adoption order is severely curtailed and can only be exercised in highly exceptional and very particular circumstances.

iv) Those highly exceptional circumstances must comprise more than mistake or misrepresentation or serious injustice and amount to a *fundamental* breach of natural justice.

As Polly Morgan comments, ‘while there are commonalities among many of the cases ..., there is no single unifying thread other than exceptionality – and exceptionality as an argument can only go so far when the cases start to stack up’.<sup>5</sup> Despite the summary that MacDonald J offers, it is difficult to identify a terribly principled approach to the court’s decisions, which seem to turn on a rather unpredictable assessment of by individual judges. It is also an interesting insight into the court’s use of its inherent jurisdiction to undo the effects of orders made under a statutory scheme.<sup>6</sup>

### 13.5.1 PLACING THE CHILD FOR ADOPTION

#### **Placing the child with the birth parent’s consent**

From pp 937-942 of the main text, we discuss children placed for adoption with parental consent, and give particular attention to the question of whether the father of a child needs to be notified of (i) the existence of his child and (ii) the mother’s intention to adopt, if he does not otherwise know that information. We included in passing a reference to the major review of this question undertaken by Cobb J in *Re H (Care and Adoption: Assessment of Wider Family)*,<sup>7</sup> but the issue has subsequently been considered by the Court of Appeal.

In *Re A, B and C (Adoption: Notification of Fathers and Relatives)*,<sup>8</sup> Peter Jackson LJ (with whom Sir Andrew McFarlane P and Nicola Davis LJ agreed) gave a characteristically detailed judgment, which set out the legal framework from paragraphs 27 to 80, followed by his analysis

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<sup>5</sup> Morgan (2020).

<sup>6</sup> On the inherent jurisdiction, see 8.7.

<sup>7</sup> [2019] EWFC 10; see p 942, fn 104.

<sup>8</sup> [2020] EWCA Civ 41.

from paragraphs 81 to 88, and a lengthy summary at paragraph 89, before turning to the facts of the particular cases before the court. Having assessed all the previous case law, including that which is set out in the main text of our book, Jackson LJ concluded that ‘the balance that has been struck between the competing interests in these difficult cases is a sound one and there is no need for any significant change of approach’.<sup>9</sup>

From there, the court went on to consider three core issues:

**1. Whether the welfare of the child is paramount in the decision of whether to inform the father or other relatives about the proceedings:**

Jackson LJ noted that there was some uncertainty about whether the welfare principle applies to this issue or not, and there were observations in *C v XYZ County Council* and later cases that seemed to suggest that it does.<sup>10</sup> However, in *Re A, B and C* the court took the view that welfare was not paramount in such a decision: ‘while child welfare, prompt decision-making and a comprehensive review of every relevant factor, including those mentioned in the checklists, are all central to the notification decision, the decision is not one that is formally governed by the provisions of s.1 of the CA 1989 or of the ACA 2002 and the welfare of the child is not the paramount consideration of the local authority and the court in this context’.<sup>11</sup>

**2. Consistency:**

The court noted that decisions about adoption are made by both courts and by social workers, and that the decisions about notification might apply both to putative fathers and to other family members. The court held that there should be consistency of approach where possible, but ‘[t]he factors that govern the outcome will depend on the facts of the case, not on the identity of the relative or of the decision-maker’.<sup>12</sup>

**3. Urgency and thoroughness of procedure:**

While suggesting that it was not for the court to tell social workers how to manage their procedures in cases such as this, Jackson LJ went on to set out some detailed guidance which was designed to assist social workers<sup>13</sup> and courts.<sup>14</sup> Most of these matters are procedural rather than being focused on the substantive law.

From there, Jackson LJ offered a lengthy summary of his conclusions.

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*Re A, B and C (Adoption: Notification of Fathers and Relatives)* [2020] EWCA Civ 41

**PETER JACKSON LJ:**

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<sup>9</sup> Ibid, [80].

<sup>10</sup> [2007] EWCA Civ 1206; see pp 938-40 of the main text for relevant extracts.

<sup>11</sup> [2020] EWCA Civ 41, [84].

<sup>12</sup> Ibid, [85].

<sup>13</sup> Ibid, [87].

<sup>14</sup> Ibid, [88].

**89.** The principles governing decisions (by local authorities as adoption agencies or by the court) as to whether a putative father or a relative should be informed of the existence of a child who might be adopted can be summarised in this way.

1. The law allows for 'fast-track' adoption with the consent of all those with parental responsibility, so in some cases the mother alone. Where she opposes notification being given to the child's father or relatives her right to respect for her private life is engaged and can only be infringed where it is necessary to do so to protect the interests of others.

2. The profound importance of the adoption decision for the child and potentially for other family members is clearly capable of supplying a justification for overriding the mother's request. Whether it does so will depend upon the individual circumstances of the case.

3. The decision should be prioritised and the process characterised by urgency and thoroughness.

4. The decision-maker's first task is to establish the facts as clearly as possible, mindful of the often limited and one-sided nature of the information available. The confidential relinquishment of a child for adoption is an unusual event and the reasons for it must be respectfully scrutinised so that the interests of others are protected. In fairness to those other individuals, the account that is given by the person seeking confidentiality cannot be taken at face value. All information that can be discovered without compromising confidentiality should therefore be gathered and a first-hand account from the person seeking confidentiality will normally be sought. The investigation should enable broad conclusions to be drawn about the relative weight to be given to the factors that must inform the decision.

5. Once the facts have been investigated the task is to strike a fair balance between the various interests involved. The welfare of the child is an important factor but it is not the paramount consideration.

6. There is no single test for distinguishing between cases in which notification should and should not be given but the case law shows that these factors will be relevant when reaching a decision:

(1) *Parental responsibility*. The fact that a father has parental responsibility by marriage or otherwise entitles him to give or withhold consent to adoption and gives him automatic party status in any proceedings that might lead to adoption. Compelling reasons are therefore required before the withholding of notification can be justified.

(2) *Article 8 rights*. Whether the father, married or unmarried, or the relative have an established or potential family life with the mother or the child, the right to a fair hearing is engaged and strong reasons are required before the withholding of notification can be justified.

(3) *The substance of the relationships*. Aside from the presence or absence of parental responsibility and of family life rights, an assessment must be made of the substance of

the relationship between the parents, the circumstances of the conception, and the significance of relatives. The purpose is to ensure that those who are necessarily silent are given a notional voice so as to identify the possible strengths and weaknesses of any argument that they might make. Put another way, with what degree of objective justification might such a person complain if they later discovered they had been excluded from the decision? The answer will differ as between a father with whom the mother has had a fleeting encounter and one with whom she has had a substantial relationship, and as between members of the extended family who are close to the parents and those who are more distant.

(4) *The likelihood of a family placement being a realistic alternative to adoption.* This is of particular importance to the child's lifelong welfare as it may determine whether or not adoption is necessary. An objective view, going beyond the say-so of the person seeking confidentiality, should be taken about whether a family member may or may not be a potential carer. Where a family placement is unlikely to be worth investigating or where notification may cause significant harm to those notified, this factor will speak in favour of maintaining confidentiality; anything less than that and it will point the other way.

(5) *The physical, psychological or social impact on the mother or on others of notification being given.* Where this would be severe, for example because of fear arising from rape or violence, or because of possible consequences such as ostracism or family breakdown, or because of significant mental health vulnerability, these must weigh heavily in the balancing exercise. On the other hand, excessive weight should not be given to short term difficulties and to less serious situations involving embarrassment or social unpleasantness, otherwise the mother's wish would always prevail at the expense of other interests.

(6) *Cultural and religious factors.* The conception and concealed pregnancy may give rise to particular difficulties in some cultural and religious contexts. These may enhance the risks of notification, but they may also mean that the possibility of maintaining the birth tie through a family placement is of particular importance for the child.

(7) *The availability and durability of the confidential information.* Notification can only take place if there is someone to notify. In cases where a mother declines to identify a father she may face persuasion, if that is thought appropriate, but she cannot be coerced. In some cases, the available information may mean that the father is identifiable, and maternal relatives may also be identifiable. The extent to which identifying information is pursued is a matter of judgement. Conversely, there will be cases where it is necessary to consider whether any confidentiality is likely to endure. In the modern world secrets are increasingly difficult to keep and the consequences, particularly for the child and any prospective adopters, of the child's existence being concealed but becoming known to family members later on, sometimes as a result of disclosure by the person seeking confidentiality, should be borne in mind.

(8) *The impact of delay.* A decision to apply to court and thereafter any decision to notify

will inevitably postpone to some extent the time when the child's permanent placement can be confirmed. In most cases, the importance of the issues means that the delay cannot be a predominant factor. There may however be circumstances where delay would have particularly damaging consequences for the mother or for the child; for example, it would undoubtedly need to be taken into account if it would lead to the withdrawal of the child's established carers or to the loss of an especially suitable adoptive placement.

(9) *Any other relevant matters.* The list of relevant factors is not closed. Mothers may have many reasons for wishing to maintain confidentiality and there may be a wide range of implications for the child, the father and for other relatives. All relevant matters must be considered.

7. It has rightly been said that the maintenance of confidentiality is exceptional, and highly exceptional where a father has parental responsibility or where there is family life under [ECHR] Article 8. However, exceptionality is not in itself a test or a short cut; rather it is a reflection of the fact that the profound significance of adoption for the child and considerations of fairness to others means that the balance will often fall in favour of notification. But the decision on whether confidentiality should be maintained can only be made by striking a fair balance between the factors that are present in the individual case.

One of the interesting elements of this judgment is that, as we noted in relation to *Re H*, there is no consideration amongst the lengthy analysis of how the UN Convention on the Rights of the Child may bear on the decisions in question. Again, it is worth emphasising the importance of this issue, and the potential for a UNCRC analysis to impact on the decision as demonstrated by Claire Fenton-Glynn in her alternative judgment for *C v XYZ County Council*.<sup>15</sup>

An identically-constituted court returned to this issue in *Re L (Adoption: Identification of Possible Father)*.<sup>16</sup> Here, the court considered two questions related to the issues decided in *Re A, B and C*—(i) does the same approach apply where the identity of the child's father is not certain, and (ii) should the court permit DNA testing on another child of the mother's in order to seek to determine paternity without reference to the possible father?

As to the first question, the Court of Appeal referred back to the list of relevant factors in *Re A, B and C*, saying that:

uncertainty about paternity is to be regarded as one of the other relevant matters referred to at sub-paragraph 6(9) of the summary at paragraph 89 in *A, B and C*. If the court, on all the available information, considers that there is a substantial possibility that a person may be the child's father, that will be a factor to be taken into account alongside other factors bearing on the decision concerning notification.

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<sup>15</sup> Fenton-Glynn (2017); see p 941 of the main text.

<sup>16</sup> [2020] EWCA Civ 577.

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The weaker the possibility, the less likely the court will be to direct an investigation of paternity that compromises the mother's wish for privacy.<sup>17</sup>

As to the second question, while Jackson LJ was clear that he was not undertaking a full analysis, he expressed concern about the risks of a breach of Art 8 ECHR rights if testing was undertaken without the knowledge of the father, where the purpose was to seek to establish his paternity.<sup>18</sup> As his Lordship went on:

Social workers will need to take account of these legal and ethical issues when making a judgement about the appropriateness of such testing. For its part, a court should in my view be extremely cautious before approving the testing of possible siblings as a means of clarifying the parentage of a child whose mother seeks adoption. It should reflect on the fact that in the presence of one secret (the birth of the child) it is, as a public body, being asked to endorse another secret (covert testing). It should think beyond the testing to the possible consequences. The inherent ethical objections to sibling testing are therefore only likely to be overcome in compelling circumstances where the clarification of parentage is necessary and where standard paternity testing is for some reason not an acceptable option. In any case, such a course should only be contemplated after a thorough analysis that takes full account of the interests of the possible siblings.<sup>19</sup>

The importance of the broad issues raised by these cases can also be seen from the number of significant High Court decisions addressing related questions in the last couple of years. For further judicial authority, see Cobb J in *Re F (Assessment of Birth Family)*<sup>20</sup> [whether to assess the original biological family, when the parent herself was adopted as a child] and Judd J in *Re H and T*<sup>21</sup> [whether to assess wider paternal family members when both parents oppose any involvement of their families and favour adoption].

#### REFERENCES:

Morgan, P. 2020. 'ZH v HS & Ors (*Application to Revoke Adoption Order*): three groups of revocation cases'. *Journal of Social Welfare and Family Law*, 42: 246.

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<sup>17</sup> Ibid, [21].

<sup>18</sup> Ibid, [24].

<sup>19</sup> Ibid, [24].

<sup>20</sup> [2021] EWFC 31.

<sup>21</sup> [2021] EWFC 35.

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