Adoption and Contact: A Judicial Perspective

In March 2017, in the course of the first Bridget Lindley Memorial Lecture, I made a number of observations concerning post-adoption contact. In short terms the points that I made in that lecture were:

- Following the introduction of the ACA 2002, there was some expectation that the previous approach to contact, which had been heavily reliant upon 'letterbox contact' might change.
- This prospect of change was alluded to by Wall LJ in *Re P (A Child)* [2008] EWCA Civ 535.
- A decade later, notwithstanding the further introduction of bespoke post-adoption contact provisions by the introduction of ACA 2002, ss 51A and 51B by the Children and Families Act 2014, there did not seem to be any significant change.
- I commended the published research of Dr Beth Neil and others at UEA as required reading and noted that that research indicated that there was a need to think laterally about other individuals in the family, other than just parents, who might be a means for supporting or building on contact as the child moved forward to adolescence and beyond.
- I identified that there had been a change in the growing understanding of the importance of sibling contact.
- I wondered whether the old case law [for example *Re T (Adoption: Contact)* [2010] EWCA Civ 1527] can now stand and whether it was right that the views of adopters should continue to hold such sway.
- Finally, I floated the suggestion of the new powers under s 51A being used to set down the issue of contact for review in a year or more after adoption to see if further arrangements might then be more clearly identified to give the adopted person, the soon to be adult, with some bridge back to her roots.

In the succeeding two years, further research has been published, and we have the inestimable benefit of hearing from Dr Beth Neil later this morning. In addition I would

commend a soon to be published book to you. It is “Supporting Birth Parents whose children have been Adopted” and it is edited by Joanne Alper. The book identifies the benefit to birth parents AND to the adopted child, of providing support and counselling to parents after the adoption process has concluded. In the context of contact, such support may well bring the parent to a more appropriate position and mindset from which they may be able to engage in contact to a greater degree than had been the case when the adoption order (and any contact arrangements) were made. Joanne Alper and her colleagues suggest that the right arrangement for contact may change over time. The book is rich with other detail and insight, but one specific observation that has stuck in my mind since reading the proofs is evidence that ‘letterbox contact’ often proves short-lived and difficult to maintain for a number of reasons.

In terms of the ‘judicial perspective’, the Court of Appeal has recently considered the legal context within which post-adoption contact decisions fall to be made in the case of *Re B (A Child) (Post-adoption Contact)* [2019] EWCA Civ 29. The headline point from that case is that the court [Sir Andrew McFarlane P, King and Coulson LJJ] reaffirmed the previous long-established approach that “the imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual” and that this was the case despite the introduction of ss 51A and 51B.

It may be helpful if I describe the approach that the court took in *Re B* to get to that conclusion.

The caselaw on this point goes back at least to a House of Lords decision in the late 1980s: *Re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1 in which their lordships stated in terms that ‘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.’

Of course, the law at that time did not contain any express facility to order contact and any requirement for future ‘access’ could only be achieved by attaching a term or a condition to the adoption order. Although our statute law has now moved on to provide for post-adoption contact, our decision in *Re B* confirms that the approach of the House of Lords in *Re C* still essentially applies.

It may be helpful to sketch out the journey through the caselaw and see how the courts have responded to the various legislative changes on post-adoption contact in the 30 or more years since *Re C*.

In *Re R (Adoption: Contact)* [2005] EWCA Civ 1128, some 4 months prior to the implementation of the ACA 2002, Wall LJ looked back at the House of Lords decision in *Re C*, given some 17 years earlier, with an eye to the new adoption legislation which was about to come into force:

> "[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."

In *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, which was a case about making contact orders at the time of making a placement for adoption order, and therefore before the child had been placed and before the views of adopters were known, the judgment of a court with considerable experience in these matters (Thorpe LJ, Wall LJ and Munby J), returned to the issue of post-adoption contact and, following a full review of the earlier case-law which concluded with the judgment in *Re R*, went on to state:

> "[147] All this, in our judgment, now falls to be revisited under ss 26 and 27 of the 2002 Act, given in particular the terms of ss 1(4)(f), 1(6) and (7) and 46(6). In our judgment, the judge in the instant case was plainly right to make a contact order under s 26 of the 2002 Act, and in our judgment the question of contact between D and S, and between the children and their parents, should henceforth be a matter for the court, not for the local authority, or the local authority in agreement with prospective adopters."

On the facts of that case the court held that the relationship between the two siblings was so important that the question of any contact between them should they eventually be placed in different adopted homes was too important to leave to the local authority's discretion and it should remain in the control of the court.

> "[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 over all. 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 [and] 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 powers are in the interests of the child concern."

Re P was and is an important decision, but it must be seen as being to a degree driven by (a) it particular facts with the imperative that was attached to maintaining the inter-sibling relationship and (b) that it was a 'placement order' case rather than a determination made at the time of an adoption application when the views of the adopters are clearly an important, or even determinative, factor.

On reviewing the relevant authorities, *Re P* can also be seen as the current high-water mark of the potential for any sea-change in the approach of the court (if one can have a high-water mark for a sea-change!).

Subsequently in *Oxfordshire County Council v X, Y and J* [2010] EWCA Civ 581; [2011] 1 FLR 272, the judgment of the court (Lord Neuberger MR, Moses and Munby LJJ) concluded (at paragraph 9) that paragraphs 147 to 154 of *Re P* were not intended to affect the application of the conclusion in the earlier case of *Re R* that "the imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual."

Having reviewed the factual context and concluded that the application for contact in the *Oxfordshire* case should be dismissed, the judgment of the court continues [at paragraph 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. [The adoptive parents] 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 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 best chance for the adoption to be successful."

The question of whether or not the judgment of the court in *Re P* moved away from the firm statement of principle that Wall LJ had made in *Re R*, which might have been thought to have been settled in the *Oxfordshire* case where Munby LJ, as he then was, was a contributor to the judgment of court as he had also been in *Re P*, must finally have been determined by the decision a few months later in *Re T (Adoption: Contact)* [2010] EWCA Civ 1527; [2011] 1 FLR 1805 where the constitution of the Court of Appeal included Sir Nicholas Wall himself, by then President of the Family Division.

The judgment of Wilson LJ, with whom Sir Nicholas Wall and Arden LJ agreed, dealt with the point in plain terms (at paragraph 22):

> "In my view the judge might also briefly have referred to the established principles applicable to a contested claim for contact following adoption by a member of the biological family. In *Re R (Adoption: Contact)* [2005] EWCA Civ 1128, my Lord, then Wall LJ, stated:
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> > 'The imposition on prospective adopters of orders for contact with which they are not in agreement is extremely, and remains extremely, unusual'

> In her energetic submissions [counsel] suggests that that statement may now not in such absolute terms represent the law; and she cites to us the judgment of this court in *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535, in particular at [147]. The judgment certainly heralds somewhat greater flexibility in the attitude of the court to contact following adoption in certain cases. But the problem for Ms. Evans is that my Lord's statement in *Re R* was cited with approval in the very recent decision of this court in *Oxfordshire County Council v X, Y and J* [2010] EWCA Civ 581, at [8] and still reflects the general approach."

The central question raised by the recent appeal of *Re B* was whether the introduction into law of ACA 2002, s 51A had altered the test from that stated in *Re R* and subsequently endorsed in 2010 by the *Oxfordshire* case and *Re T*. We concluded that the advent of s 51A had not altered the underlying position and we came to that conclusion for the following reasons:

The starting point must be the established position under the previous caselaw, which I have just described, and which had been so firmly restated in two decision as recently as 2010.

Although s 51A has introduced a bespoke statutory regime for the regulation of post-adoption contact (in cases where placement has been made by an adoption agency), there is nothing to be found in the wording of s 51A or s 51B which indicates any variation in the approach to be taken to the imposition of contact on unwilling adopters.

The Explanatory Note to the Adoption and Children Act 2014 on this point reads:

"The Act includes provisions which are intended to… Make changes to the arrangements for contact between children in care and their birth parents, guardians and certain others and adopted children and their birth parents, former guardians and certain others *with the aim of reducing the disruption that inappropriate contact can cause to adoptive placements*." [emphasis added]

In addition, it is of note that under s 51A, which allows various people to apply for, or to apply for leave to apply for, a post-adoption contact order, the court is only empowered to make an order of its own motion if that order is to *prohibit* contact.

The Court of Appeal therefore concluded that Parliament's intention in enacting s 51A was aimed at enhancing the position of adopters rather than the contrary.

There was, in short, nothing in the new provision to indicate that the previous case law had been changed by the introduction of s 51A, there was no other basis for holding that the approach of the existing caselaw should be amended and it therefore continued to apply unchanged. The judge's approach, which had been to uphold the adopter's flexible approach to contact, could not be challenged as a matter of law or on the facts and so the appeal failed.

As a matter of law, that concluded the appeal, but I added a number of 'obiter' observations, with which the other two members of the court agreed.

In short, they were:

- The development in understanding through research of the importance of post-adoption contact and the introduction of s 51A are not linked;
- The impact of the research and any ensuing debate are, however, likely to be reflected in evidence adduced in court in particular cases and/or in advice to prospective adopters;
- 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'.
- Any social worker or children's guardian will be expected to be fully aware of any current research on post-adoption contact and to advise the court accordingly on its impact to each individual case.
- Post-adoption contact must be considered in every case [ACA 2002, 46(6)].

- There is now a joined-up regime of orders under ACA 2002, s 26 and s 51A.
- In contrast to the previous provision where adoption contact orders were made under CA 1989, post-adoption contact is now to be determined by applying the welfare provisions in ACA 2002, s 1 and there is therefore a life-long perspective and the bespoke welfare checklist to be considered.
- Orders for contact made at the placement for adoption stage may well set the scene for future contact, but courts should be careful not to say anything which may cause delay in the overall process or suggest that the position of adopters, as stated in *Re R,* has changed or that, on adoption, an order would be made to compel adopters to accept contact with which they do not agree, unless there are extremely unusual circumstances.

Drawing matters together, the occasion of the appeal in *Re B* has clarified the legal position with the result that any move towards greater openness and flexibility in post-adoption contact arrangements must come organically, on a case by case basis, in a manner that brings prospective adopters along on a consensual basis. At each stage the court must give full consideration to the issue of long-term contact and the court is entitled to expect that advice from social workers and guardians will be well informed by research into the benefits, or otherwise, of contact. At the placement order stage, the court has an opportunity to set the tone for contact in the future, but must be clear that, if doing so, no order would eventually be made unless the prospective adopters were in agreement with it or the circumstances were extremely unusual.

Sir Andrew McFarlane

President of the Family Division

10th May 2019