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Briefing Note

Making of s.26 Orders in relation to sibling contact/staying in touch plans

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Introduction

This Briefing Note looks at recent court rulings covering contact/staying in touch plans for children with a plan of adoption. CoramBAAF was an intervenor in a recent case in which Sir Andrew McFarlane, President of the Family Division, used his judgement to add to his previous speeches on the modernisation of adoption agenda. This is considered here, along with the practice implications.

Information about s.26 orders is included. What s.26 orders are and who can apply for them is often misunderstood and confused with post-adoption orders.

Several previous court cases from the last 18 months have included useful citations that may be helpful for practitioners balancing permanence options for children who are unable to remain in the care of their families, including applications for placement orders. Below, we set out the details of these cases and what they may mean for practice.

Re S [2025] EWCA Civ 823 McFarlane P. King & Singh LJJ.

Summary

This was an appeal finding on a s.26 contact order where the court decided not to uphold the appeal regarding an order being made for sibling contact. The judgement further outlines the approach to be taken to sibling contact at placement order stage. CoramBAAF was an intervenor in this case.



Background to the Case

- The case involved two brothers, R and S (aged 8 and 2 years).
- In January 2023, S suffered a head injury and rib fracture when he was a few months old.
- November 2023 findings reported non-accidental injury and the boys' father was found responsible for the injuries. The boy's mother was found to be aware and to have failed to protect the children. There was a failure to seek medical attention.
- The parents claimed to have separated after the initial hearing, but there was extensive phone evidence that this was not the case, including many exchanges of texts. In addition, there was evidence that the parents had reset their phones before examination, described as 'sustained dishonesty'.
- S has long-term effects from his head injury.
- S is subject to care and placement orders, R to a care order only.

Father was found to have caused S's injuries and beaten R, derogatory text messages and regular beatings. There was also a significant finding of failure to seek medical attention for S. The boys' father was found to have caused S's injuries and also to have beaten R and sent derogatory text messages about the boys to their mother. There was also a significant finding of failure to seek medical attention for S by both parents, extending from mid-November 2022 to mid-January 2023.

The Court of Appeal was told that although S's profile had been on LinkMaker for six months, his developmental delay and the uncertainty about the long-term effects of his head injury meant that no prospective adopters had come forward so far.

The President of the Family Division has previously given two speeches on contact/staying in touch and the approach to be taken to sibling contact at placement order stage (Mayflower Lecture, 'Adapting Adoption to the Modern World', November 2023; and Part Two, May 2024). See the references section for more details.

Outcome and implications for practice

The making of a s.26 order for R and S was refused by the Court of Appeal, on the basis that doing so would limit the pool of prospective adopters.

The case is significant in that the President made a number of important statements adding to the modernisation of adoption agenda.

‘In all cases it will be necessary to take account of the impact on family finding of a care plan that includes ongoing contact or proposals for a s.26 order’. There is a difference between cases where a child’s contact is considered necessary for their future welfare, and cases where ‘achievement of an adoptive home is the overarching goal’. There should be a holistic analysis of all the factors in each individual case.

Indeed, the need for individuality and flexibility of staying in touch plans cannot be overstated. This is highlighted in research (Neil et al, 2013), emphasised by adopted people and their families, and reiterated again here. ‘The need for a bespoke analysis of the future contact arrangements in each case for each child, as required by the statute, cannot be too firmly stressed’ (para.79), and there should be no assumption that six times per year is an appropriate level of contact, simply because that was the rate endorsed by the Court of Appeal in *Re R*. Decisions around the level of contact are a welfare decision and need to take into consideration all the individual circumstances of each case. ‘Just as the decision whether an order is necessary will turn on the particular facts of each case, so too will the detailed contact arrangements.’

The President suggests that there is a role for the staying in touch plan to be proposed at the placement order stage: ‘It may be helpful for professional evidence to be set out in a way that offers the court and parties a “road map”’ (para.77). This should cover plans for the initial family-finding phase, any changes once an adoptive family has been identified, and then longer-term post-adoption order. This should take into consideration the lifelong impacts on the child and take into account all their important relationships. The risks, benefits and challenges of supporting ongoing contact, especially direct face-to-face contact, should be balanced with the long-term risks of not doing so. These include the impacts on the child’s identity and development, their ability to identify and trace people through social media or DNA tracing, etc.

A form of s.26 order which recognised the importance of continuing contact, but allowed for a significant degree of flexibility, might be the most appropriate means of meeting a child's needs in some cases. An express order for finite contact arrangements, specifying the number and circumstances in which it is to take place, may not be apt in some cases. Given the number of uncertainties in play at the time that a placement order is being made, a more flexible statement of the road map for future contact that the court has determined for the child may well be more appropriate. In such cases, rather than having an order for contact in concrete terms, the court might record its views, and its endorsement of the future contact plans, in a recital to the placement order. (para.80)

The President endorsed the use of recitals to the placement order, to allow the court to record its views of future contact and individual plans, whilst retaining flexibility by not suggesting specifics such as number or forms of contact. This may be more appropriate than the making of a s.26 order.



Information about s.26 orders – not to be confused with post-adoption orders

The Adoption and Children Act (ACA) 2002 s.26 makes provision in respect of contact for a child who is subject to a placement order:

A s.26 order can be made on an agency being authorised to place for adoption (placement order or a child less than 6 weeks of age).

On making of a s.26 order

- *S.8 child arrangements order ceases*
- *S.34 orders (parents' contact with child in care) ceases*
- *Any activity direction made in proceedings for the making, variation or discharge of a child arrangements order with respect to the child, or made in other proceedings that relate to such an order, is discharged*

An application for an order under this section may be made by—

- (a) the child or the agency,*
- (b) any parent, guardian or relative,*
- (c) any person in whose favour there was provision ... which ceased to have effect by virtue of subsection (1)(a) or an order which ceased to have effect by virtue of subsection (1)(b),*
- (d) if a child arrangements order was in force immediately before the adoption agency was authorised to place the child for adoption or (as the case may be) placed the child for adoption at a time when he was less than six weeks old, any person named in the order as a person with whom the child was to live,*
- (e) if a person had care of the child immediately before that time by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person,*
- (f) any person who has obtained the court's leave to make the application.*

When making a placement order, the court may on its own initiative make an order under this section.

Importantly, a s.26 order ceases to have effect once an adoption order is made, a fact often confused or unknown to practitioners. It can be varied or revoked by the court on application by the child, agency or person named in the order.

Additional recent cases referencing contact/staying in touch

Re D-S (A Child: Adoption or Fostering)[2024] EWCA Civ 948 (07 August 2024)

This case contains extensive analysis of the balancing of long-term fostering and adoption as permanence plans.

Summary

- C was a female child aged 11 months, with siblings aged 10 and 5 years. A residential assessment had been unsuccessful. The local authority care plan was for fostering for the older two children, and adoption for C – ideally with contact.
- The Judge refused a placement order, ordering that C should be in long-term fostering, even if not the same placement as her siblings, and should have fortnightly direct contact with her parents.
- Possible hearing loss and C's parents' learning difficulties affected the likelihood of adoption. The judge stated that this was 'not an abuse case' so 'contact was not a risk'. C's parents were committed to contact and the Judge suggested that it should continue fortnightly.

Nothing else will do is not a substitute for a proper welfare evaluation.' In this case, the Court of Appeal allowed the appeal and substituted a placement order, on the basis that 'Instead of making a rounded welfare assessment, the judge elevated fostering into something that in his view "would do" and therefore ruled out adoption. That was another error of principle.'

In making the order, the judge asserted that C 'needs a lifelong family where she can feel that she belongs. I agree with the professional assessment ... that this can only happen through adoption'. The advantages of adoption were 'overwhelming', and even if contact could not be arranged, the welfare outcome favouring adoption 'is the same' (para.55).

The 'powerful advantages' of adoption for a child of C's age should be considered, along with the 'manifest disadvantages' of long-term fostering.

Counsel's note in *Re D-S*

When faced with a choice between adoption and fostering, the court's primary task is to take a decision as to whether one or the other is right for the child as a matter of principle. In order to do that, the court will not usually have to have evidence about the availability of placements

(*Re T (Placement Order)* (CA) [\[2008\] EWCA Civ 248](#), [2008] 1 FLR at [17]). There may be cases at the margins where specific evidence will be necessary; examples being where the plan is for the adoption of a much older child, or the placement of a child with severe health or behavioural problems, or of a large sibling group.

Re LRP [2013] EWHC 3974 (Fam)

Long-term foster care is an extraordinarily precarious legal framework for any child, [...] a long-term foster child does not have the same and enduring sense of belonging within a family as does a child who has been adopted. There is no way in which a long-term foster child can count on the permanency, predictability and enduring quality of his placement as can a child who has been adopted. Fostering would not give the stability and consistency of care that they require growing up.

F-S (A Child: Placement Order) [2021] EWCA Civ 1212

Nowadays it is well recognised that the traditional model of closed adoption without contact is not the only arrangement that meets the needs of certain adopted children.

Re T (Placement Order) [2008] EWCA Civ 248

This judgement held that uncertainty about the prospects of finding an adoptive placement does not in itself rule out the making of a placement order.



Ways of staying in touch

Traditionally, the majority of post-adoption contact has taken the form of the exchange of letters through the adoption agency one or twice per year, known as “letterbox contact”. This has become increasingly unsuitable in a world where letter writing is minimal, and families are likely to have little or no experience of social letter-writing. Writing letters to a parent or child whom they do not know in person is extremely challenging. Letterbox contact is generally felt to be unsatisfactory by both adoptive and birth families and is frequently not sustained [Neil et al, 2015]. Pilots of digital alternatives to letterbox contact (e.g. LetterSwap and ArcBox) have been developed and piloted, and others are in development. Whilst some of these have potential, they will be substitutes for letterbox contact rather than alternatives to direct contact.

Satisfaction with contact is linked to good outcomes for adoption placements, but no one form of contact is identified as the best option for every child. Contact with grandparents is almost universally a positive experience, while sibling relationships tend to be the most enduring and to extend into adulthood. Grandparents and siblings are not usually parties to placement order applications and there is a risk that discussions about s.26 orders will be focused on ongoing contact for parents.

Young peoples’ satisfaction with contact is based more on quality and stability than on type or frequency. They feel contact should be a choice for them, not something imposed. The Australian experience of compulsory contact up to the age of 12 has in some cases retraumatised children and destabilised their adoptive placements (Collings et al, 2019). ‘Contact sometimes needs to take a back seat when young people are struggling’ (Neil et al, 2013).

Direct face-to-face meetings potentially have a significant resource implication for agencies. We are aware that contact is most successful when all the adults involved are agreed on the purpose of contact, support the arrangements, and are well supported themselves. Identifying the purpose of contact after care and placement orders have been made is critical, and birth parents’ understanding and acceptance of the changes in their contact arrangements is crucial to the success of ongoing contact for the benefit of the child. There is a significant shortfall in resources and workforce available, particularly to support birth families. Local authorities have delegated their adoption functions to Regional Adoption Agencies which are increasingly being asked to find resources to support in-person contact arrangements that were not in contemplation when their original contracts were agreed.

Sibling relationships

Most children want to keep in touch with their siblings and may experience deep loss when contact is severed, compounded if they have assumed a parental role in the past (Research in Practice, 2015). It remains the case that apart from the decision to remove children from their parents, 'decisions about placing siblings "together or apart" ...will be some of the most emotionally demanding and challenging ones that social workers make' (Beckett, 2021, p.3).

The importance of sibling relationships is emphasised as part of adopter preparation training, and prospective adopters are often more receptive to ongoing face-to-face sibling contact than they may be to contact with birth parents. One-third of Adoption UK's respondents maintained direct contact with a birth relative, usually a sibling. (Adoption UK, 2024).

Sibling networks spread across multiple types of placement, including kinship, foster care, adoption and residential placements, present the most challenges for planning and supporting contact plans and relationships. This is particularly the case where birth parents may not have an ongoing relationship with all of their children. Staying in touch plans for these children are likely to need even more flexibility and potentially support for all parties if they are to be successful and sustainable.



Social media and contact

The world in which contact plans are made has changed radically over the last fifty years, from a time when adoption was seen as a “clean break” for relinquished babies to one in which the internet allows unprecedented opportunities for social networking.

(Research in Practice, 2015)

The ease with which any person can be traced by internet search engines or social media means that it is highly likely that an adopted young person will be able to trace and contact a member of their birth family, and vice versa. In addition, the growth of consumer DNA testing allows for easy identification of blood relatives. It is therefore unrealistic to expect adoptions to remain “closed”. Prospective adopters are alerted to this as part of their preparation training, and throughout the assessment process will be supported to consider the importance of supporting a child’s knowledge about their birth family. A total of 22 per cent of adopted children aged 13–18 had unplanned/unsolicited contact with birth family (Adoption Barometer, 2024) This figure has remained reasonably steady over the last five years. The impact of unplanned or unsupported contact ranged from unsettling to ‘sometimes disastrous’. For some children, there will be significant risks to unsupported contact with birth family members.

There are consistent findings that adopted children have higher self-esteem and a more cohesive sense of identity when placed with carers who have high levels of communicative openness (Brodzinsky, 2006; Beckett et al, 2008; Thomas and Simmonds, 2024). Adopters who display communicative openness are more likely to be receptive to an ongoing relationship with birth family. Children in these families are likely to be less vulnerable to disruption through unplanned contact in their teenage years.



Conclusion

Adoption remains an important permanence option for those children who are unable to remain in the care of their families, and one that provides a high level of security, stability and consistency of care throughout childhood. In order to develop a secure and balanced identity, it is crucial that adopted children are aware of their history and life story and are supported to know as much as possible about those who are important to them. Modernisation of adoption no longer assumes that there will be no ongoing contact with a child's birth family, as in the past, unless the child's safety precludes it. In order to consider the best outcome for a child, courts require staying in touch plans to be set out in a way that considers the risks of all the different ways of staying in touch (direct and indirect), alongside the risks of not supporting a plan for the child to stay in touch with those important to them.

For all children, it is critical that any staying in touch plan retains flexibility over time (potentially 18 years), along with consideration of individual factors for this child and their family, including their adoptive family.

References

Adoption UK (2024) *The Adoption Barometer*, available at: [Download.ashx](#)

Beckett S (2021) *Beyond Together or Apart: Planning for, assessing and placing sibling groups* (2nd edn), London: CoramBAAF

Beckett C, Castle J, Groothues C and Hawkins A (2008) '[The experience of adoption \(2\): the association between communicative openness and self-esteem in adoption](#)', *Adoption & Fostering*, 32:1, pp.29-39

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Collings S, Wright AC and Spencer M (2019) *Family Connections and Contact Study: Final report*, Sydney: Institute of Open Adoption Studies, Faculty of Arts and Social Science, University of Sydney

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Research in Practice (2015) *Contact: Making good decisions for children in public law. What the research tells us about planning contact in assessment, fostering, adoption and kinship care*, Dartington: Research in Practice

Thomas C and Simmonds J (2024) *Assessing Children and Families for Adoption Support in England*, London: CoramBAAF.

Other resources

Speech by the President of the Family Division: Adapting Adoption to the Modern World, Parts One and Two:

[Speech by Sir Andrew McFarlane: Adapting Adoption to the Modern World - Courts and Tribunals Judiciary](#)

[Speech by the President of the Family Division: Adapting Adoption to the Modern World, Part Two - Courts and Tribunals Judiciary](#)

Research in Practice: the website contains resources for practitioners writing staying in touch plans: [Maintaining relationships after adoption | Research in Practice](#)

University of East Anglia: Maintaining Relationships website gives details of research: Interview with Professor Beth Neil, UEA, [Contact in Adoption: Interview with Professor Beth Neil | CoramBAAF](#)

CoramBAAF runs a training course on '[Making plans for staying in touch](#)'.

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