

Speech by Lord Justice McFarlane

NAGALRO Annual Conference 2018

Keynote Address

Contact: a point of view

Introduction

In opening today's conference, which is focused upon the topic of 'contact', I have been invited to express a point of view and I wish to do so by highlighting three separate topics: adoption, contact in adoption and intractable private law disputes. It might be thought that the third of these topics is unrelated to the first two but, as I will suggest, in terms of its impact upon the child and any family members she no longer sees, there is a need for us to recognise that these cases have much in common with cases of adoption.

Adoption

It is almost exactly one year since I delivered the inaugural Bridget Lindley OBE Memorial Lecture in which, amongst other topics, I focussed upon adoption raising a number of questions about the assumptions that have hitherto underpinned our practice over the past 40 or more years. This is not the place to rehearse the entire content of that lecture again¹.

Having stressed that there is much that we should be pleased about and proud of in the law that has developed relating to children, I expressed a need for some hesitation, or 'buts' as I called them; the first 'but' related to adoption and was in these terms:

'But, is adoption still the best option? A system which has adoption against the wishes of the natural family as an outcome, which is regularly chosen as best meeting the lifelong welfare needs of young individuals, must have some confidence that that model of adoption is indeed normally in the best interests of those individuals who cannot safely be returned to their parents during their childhood.... If adoption was once the best outcome for children in these cases, does that continue to be the case today?'

Such an observation, going to the heart of our whole approach to adoption, was always going to be a slow-burner, if, indeed, it was to gain any traction at all. Whilst my words were favourably received by sections of the social care press and by a good number of

¹ <https://www.judiciary.gov.uk/wp-content/uploads/2017/03/lecture-by-lj-mcfarlane-20160309.pdf>

judges and lawyers, it was not, as far as I know, taken up as a topic of interest to any greater extent.

What has happened, however, during the past 12 months is that two separate projects broadcast by BBC Radio 4 have picked up similar themes in relation to adoption. The first was 'The Adoption' a series of 18 short episodes which a talented reporter, Jon Manel, built up to create a multi-layered account of an adoption case seen from the separate angles of each of the key participants.

The second project was an edition of 'File on 4' in September 2017 in which the reporter, Alys Hart, focussed on adoption and, in particular, how adoption cases sometimes play themselves out unhappily during the adopted child's teenage years.

For those who may have missed these programmes, I would strongly recommend catching up with them. Happily, the BBC has ensured that both programmes remain available on the iPlayer².

Finally in this regard, I would note that a further theme in my Bridget Lindley Lecture was echoed in the File on Four programme. It related to the apparent mis-match between the low level of support that is available to adopted families who are experiencing problems with teenagers who have behavioural and, possibly, mental health difficulties, compared to the comparatively high level of support once those same young people are removed from their adopted homes and accommodated under CA 1989, s 20 or under an interim care order.

Adoption and Contact

Focussing more particularly on the topic of today's conference, the second and final element within my Bridget Lindley Lecture to which I would draw attention related to adoption and contact. The section is short and as it may have resonance for some of the sessions today I will, if I may, repeat it in full at this point:

'Post Adoption Contact

My second short point relates to post-adoption contact. When the Adoption and Children Act 2002 came into force there was some expectation that the previous approach to post-adoption contact, which heavily relied upon a 'closed' adoption model with, at most, modest 'letterbox' contact, might change. In *Re P (A Child)* [2008] EWCA Civ 535, relying upon the earlier priority placed on

² <https://www.bbc.co.uk/programmes/p05k3wsq/episodes/downloads> [The Adoption] and <http://www.bbc.co.uk/programmes/b095rs05> [File on Four].

post-adoption contact by Baroness Hale in *Down Lisburn Health and Social Services Trust v H* [2006] UKHL 36, Wall LJ contemplated a possible sea change under the 2002 Act. Now, a decade later, the answer is that there has been no sea change. Even the introduction by the Children and Families Act 2014 of bespoke provisions for contact in adoptions following a placement order [ACA 2002, ss 51A + 51B] do not seem to have moved matters on.

Dr Elsbeth Neil and others at UEA have recently concluded a long term research project on the effects of post-adoption contact³; it should be required reading for us all. Recognising, whilst planning an adoptive placement for life, that the adopted individual will have other ongoing support needs, particularly in adolescence, is very important. 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. It goes without saying, and here I do think that there has been a change, that the need for continuing contact between siblings should be prioritised.

I wonder if, in this regard, the old case law based [reaffirmed in *Re T (Adoption: Contact)* [2010] EWCA Civ 1527] can stand. 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? 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.’

I also made the point, as Dame Eleanor King had done before me in her Hershman/Levy Memorial Lecture in June 2013, that, in a world where Facebook, Snapchat, email and Google are second nature to all youngsters, the ability of adopted families to prevent or even monitor any contact between their child and her natural family is very limited indeed.

If my words on the topic of adoption and contact have had any impact on individual cases, that impact has, to my eyes, been unnoticeable. What has occurred, however, is the coincidental publication by the British Association of Social Workers [BASW] of a major 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*’⁴ is an important and interesting document.

³ <https://www.uea.ac.uk/contact-after-adoption>

⁴ <https://www.basw.co.uk/resource/?id=7209>

I wish to draw attention to several of Featherstone and Gupta's conclusions which may have a particular resonance for our discussions today.

A key message appears in the 'Introduction' to the report:

"It was considered that in England, in recent decades, policy makers had tended to promote adoption as risk free in a 'happy ever after' narrative. The Enquiry heard from a range of respondents across the UK that this is unhelpful. It can lead to the silencing of adopted children and adults who may have to manage contradictory emotions such as grief and loss, joy and happiness. It can lead to birth families being unable to articulate their losses and feelings of shame and sadness. It can also leave adoptive families silenced and unable to access the help they need."

The Enquiry considered the culture, promoted by high ranking politicians, that adoption is 'a public good' and the 'right decision' to be inhibiting important ethical debates about adoption and its merits when compared to other permanence options.

"A significant rethink of approaches to 'contact' and connection between adopted children and their families is needed."

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.

"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 important to improve the benefit of the letterbox approach and to improve long term outcomes for all affected by adoption."

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.

The current model of contact fails to adequately recognise multiple attachments and complex identities.

While the law is clear on children's legal status post adoption, the emotional realities are complex and centrally linked to identity issues. An overwhelming message from adopted people was that identity development is a life-long process and it is vital that identity issues and dual/multiple connections are recognised and discussed.

A key message from adopted young people was that adoptive parents need to be prepared for the reality that many young people will want to search for their birth families when they reach 18.”

Against that background, it is no surprise that 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.’

The BASW Enquiry report is an important and rich resource on the topic of contact. Although being of an entirely separate origin, it is very much in line with the train of thought that I expressed on this topic last year.

40 years or more ago, the normal model for adoption was entirely closed, to the extent that, in some cases, the child may not even have been told that she was adopted. Two or more decades ago the concepts of ‘life-story work’ and ‘letter box contact’ replaced the wholly closed model and became the norm, but those concepts were developed in what can now be seen as a different age. The world has moved on, yet we, that is the courts and social work practice, still hold to life-story work and letter-box contact as setting the ‘right’ level of post-adoption contact in most cases. The BASW Enquiry, coupled with the range of anecdotal evidence that led me to say what I did last year, strongly suggests that a higher level of ongoing contact, or a level of direct contact that develops slowly during childhood once the dust from the adoption order being made has settled, may well be better for these young people in the longer term.

I would encourage all those involved in adoption planning and decision making to focus more on the issue of contact and to ask, in each case, whether the model of life-story work and letterbox contact is in fact the best for the individual child in the years that lie ahead for her, or whether a more flexible and open arrangement, developed with confidence and over time, may provide more beneficial support as the young person moves on towards adolescence and then adulthood.

Private Law Contact

There is not time to offer a comprehensive overview on this important topic. What follows therefore are two ‘headline’ thoughts on aspects of private law contact:

1. the need to recognise and address potentially intractable cases at a very early stage;
2. Should the judiciary publicly describe ‘what normal looks like’ in a contact case?

Before turning to those topics, I accept that, of all the reforms put forward by the Family Justice Review [‘FJR’], under Sir David Norgrove, of which I was the legal member, the least successful has been that relating to private law disputes concerning children. This is so despite the great efforts that have been made by Sir Stephen Cobb

and many others to develop the Private Law Programme, which does work for many cases and is a vast improvement on what went before, and despite the case-by-case concern that is diligently applied, in most cases by lay justices and district judges, in conducting the MIAMs and FHDR appointments which are at the heart of the current system.

The great hope of the FJR was that mediation would take off and divert a large number of cases towards settlement and away from the court. Unfortunately, the removal of legal aid for most cases at the very moment that the reforms were coming in meant that there was an increase, rather than a decrease, in the cases coming directly to court and a reduction in self-referral (often guided and encouraged by lawyers) to mediation.

There is I fear a need to look at this area again to see if yet more radical reform may be required.

Turning to my first headline point, however, there is more that can be done under the present regime to avoid the disaster of a contact case becoming wholly intractable with the result that a child is cut off from contact with the absent parent and, often, grandparents and other important family members.

No fewer than four recent court decisions have provided a timely reminder of what can go wrong when the court puts off early intervention and fails to undertake a fact-finding process when it is clearly necessary to do so.

They are:

Re CB (International Relocation: Domestic Abuse: Child Arrangements) – Cobb J: 30 June 2017 - [2017] EWFC 39; [2017] 3 FCR 273;

Re D (Appeal: Failure of Case Management) – Peter Jackson J: 24 July 2017 - [2017] EWHC 1907 (Fam); [2017] 3 FCR 451.

Re M (Children) [2017] EWCA Civ 2164.

Re J (Children) [2018] EWCA Civ 115,

Similar failures by the court to follow the very clear requirements of FPR 2010, PD12J occurred in each case as a result of which the court process went badly astray and failed to deliver an effective outcome for the children or the parties.

The facts of *Re J* are sufficient to set the scene for today's purposes. After a marriage lasting 19 years, the father moved from the family home in September 2014 leaving his wife and their three children aged 15, 13 and 8 years. The father was denied contact by the mother, who was granted a without notice non-molestation injunction. The father

promptly applied for s 8 orders and made it clear that he totally denied the factual allegations that were made against him. Despite the fact that the Family Court was seized of these issues on an inter-party basis by the beginning of January 2015, no fact-finding hearing was ever conducted and the father has not seen any of his children since the day he left the house over three years ago.

In July 2015, nearly a year after the separation, rather than conduct (even at that late stage) a fact-finding hearing, the court directed that a report on the children's welfare should be prepared by their NYAS guardian. When that was supplied, it demonstrated that the children had very deeply entrenched negative views about their father and that they were wholly against any contact with him. The judge proceeded on the basis that, because of the strength of the children's views, a fact-finding determination was no longer necessary and he ultimately made 'no contact' orders at the conclusion of the case.

On appeal, whilst being highly critical of the failure to conduct a fact-finding hearing in the early part of 2015 and then determining interim contact in the light of any findings, the Court of Appeal [McFarlane and King LJ] accepted that it was now simply too late to reverse the effect of what had occurred and consider directing contact.

At the start of this address I indicated that I consider that there is much more of a link between these high-end private law disputes and adoption than might otherwise be appreciated. The link concerns the impact upon the relationship between the child and the absent parent.

The relationship that the father in the case of *Re J* had with his three children was, effectively, totally severed in September 2014 with, now, little hope that it may be resurrected in any way during the remainder of their childhood or beyond. On a scale, the impact of that state of affairs is not, in my view, un-akin to the impact generated by the making of an adoption order. Adoption orders are, rightly, regarded as the most Draconian orders that a family court, or indeed any court, can make. The adoption decision in every case is therefore afforded corresponding respect in terms of time, resources and judicial concern. Based on the evidence provided from the four recent cases that I have cited, I fear that the same cannot be said of potentially intractable contact cases.

No doubt judicial hearts may sink at the thought of a contested fact-finding – I know that mine has done so on more than one occasion – but the guidance in *PD12J* is both clear and correct in stating that, where such a hearing is necessary, it must be undertaken and undertaken very promptly in the early stages of proceedings. Not to do so simply stores up problems which become more and more difficult to unpick as the months, and years, go by. The interests of the children are not served and those who may be called upon to advise the court as to the children's welfare, whether as CAFCASS officers or guardians, have no factual bedrock from which to work.

It is, in my view, unhelpful to look in every such case to see if it is possible to identify a formal label of “Parental Alienation Syndrome”. In such cases, that there has been ‘alienation’, with a small ‘A’, will normally be a given; it is that factor which will often render the case ‘intractable’. The existence of alienation of itself can only be damaging to a child. It must be grim to grow up having a profoundly negative view of one of your parents. In some cases such a negative view may be justified by the actions of that parent, but often life is not so black and white and a more nuanced, ordinary and tolerable view of both parents will have been justified had an imbalanced status quo as to contact not become established.

The idea of allowing an unjustified and damaging status quo to become established leads me to my second and final ‘headline point’.

At a recent conference, more than one delegate from a parent organisation asked whether the courts, ie the judges, could identify ‘what normal looks like’ in a private law case.

Traditionally, the family judges have not published templates or paradigm examples of the typical outcome to be expected in the bulk of private law children cases. I should be plain that I am speaking only about those cases where there are no unresolved allegations of domestic abuse or other safeguarding concerns.

In the Midlands in 2009 the judges did publish a short document that went out to every parent who was coming to court, setting out what the court would expect them to have considered before the first hearing and stressing that it was primarily their responsibility as parents to make arrangements for their child. From time to time similar messages have been transmitted by the higher courts. But we have pulled back from issuing guidance as to the range of outcomes that are regularly considered to be the ‘norm’ in the majority of cases. The justification for this reticent is strong and arises from the court’s statutory duty to afford paramount consideration to the welfare of each individual child before the court on the specific facts of his or her case. No two cases are the same and it is neither legally justified nor possible for the court to announce its final welfare determination before the case has been heard, or, in terms of announcing ‘norms’, before the proceedings have even been issued.

I understand that position, but, in my view, the publication of a statement of general norms by the judges represents a different level of judicial activity than the determination of the outcome of any particular case that may go on to be contested before the court where, of course, there will be no rubber-stamp application of a template norm, and a bespoke outcome for the individual child must be determined.

For a long time, going back to conferences chaired by Dame Margaret Booth and Dame Joyanne Bracewell 15 years ago, I have been interested in and supportive of the ‘Early

Intervention Project' ['EI'] promoted by Dr Hamish Cameron and others. At the core of the EI approach is the need to manage the expectations of parents as to the post-separation arrangements for their child from the earliest point. Key to this approach is the issuing of general guidance on what a court would regard a reasonable amount or pattern of contact to be (in cases where there is no safeguarding risk to the child); to be of weight, such guidance can only come from the judiciary.

In addition to a statement of norms being of benefit as a thing in itself, other jurisdictions have linked this approach with other steps, some of which are now familiar here, including:

- The early agreement to, or imposition of, a 'standing temporary order' based on the norms for the age of the child in order to maintain some contact in the interim stages;
- Parenting Education Classes (similar to the PIPs that are currently available);
- A Parenting Conciliation Session (similar to the current FHDRA appointment);
- The making of a consent order.

Whether or not this is an idea that is taken forward and developed must be entirely a matter for the Family judiciary. For it to be authoritative, it would need to be developed and 'owned' by all levels of the judiciary, particularly the lay justices and district judges who hear the majority of these cases. The process of development would take time, but it is, in my view, a proposal that should now be given serious consideration by Family judges.

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