

## PUBLIC LAW CHILDREN

November 2024

**R and C (Adoption or Fostering), Re [2024] EWCA Civ 1302**

**30 October 2024**

**Full judgment can be found [here](#).**

**Before:**

**LADY JUSTICE ASPLIN**

**LORD JUSTICE BAKER**

**LADY JUSTICE ELISABETH LAING**

### Overview

This is an appeal brought by a Local Authority (“LA”) against a judge’s refusal to make placement orders in respect of two young children.

The principal reason given by HHJ Wicks for refusing placement orders was that adoption was inconsistent with the children’s need for continuing contact with members of their birth family, in particular their two elder half-siblings.

The appeal re-iterates that at the stage of making an order under section 21 of the Adoption and Children Act 2002, it is the court, rather than the LA or any other person, who has the responsibility for determining whether there should be ongoing contact between the child and the birth family.

This is a welcome judgment in light of the recent Public Law Working Group report: ‘Recommendations for best practice in respect of adoption’ published on 7 November 2024.

### Judgment of Lord Justice Baker

**Developments in the law (at [3] – [40]):**

Legal adoption was first introduced in England and Wales in 1926. At the time, it was considered to be in the best interests of the child to have no contact at all with their birth family. However, there has been a notable shift in attitudes over recent years, which the Court considered at length at [8] – [40].

The number of adoptions has continued to decline over the last 30 years – and a significant number of children are now being adopted beyond infancy. When children are adopted beyond infancy, they may have memories of living within their birth families. This means they will benefit from different contact options being explored. The need for a continuing relationship with their birth family has resulted in the concept of open adoption coming to the fore in recent years.

The statutes passed between 1926 and 1976 were consistent with the notion of a closed adoption. However, the courts still retained the power to impose a condition that there should be ongoing contact with the birth family.

The Adoption and Children Act 2002 (the ‘2002 Act’) now governs the law regarding adoption. This case concerns the making of Placement Orders under Part IV of the CA 1989. The Court considered at length the legislative provisions and developments in the case law, alongside other recent developments in adoption policy. However, the Court felt that the developments in adoption policy did not call for a detailed analysis on this appeal.

The Court noted the President of the Family Division’s two recent lectures – “Adapting Adoption to the Modern World” (the Mayflower lecture in Plymouth, 9 November 2023, <https://www.judiciary.uk/speech-by-sir-andrew-mcfarlane-adapting-adoption-to-the-modern-world/>) and “Adapting Adoption to the Modern World – Part Two” (the POTATO conference lecture, 17 May 2024, reported at July [2024] Fam Law 797). The President reiterated the approach to section 26, which is mandated by case law.

## Factual background

This appeal centred around long-running care proceedings involving four children - N (a boy, now aged 6), Y (a boy, 5), R (a girl, aged 3 years 9 months) and C (a boy, 2 years 9 months). The first respondent is the mother of all four children ('M'). There are three fathers. Only the father of Y has been involved in the proceedings.

Care proceedings involving this family were started in September 2021. Interim care orders were made in respect of the three children on 10 September 2021 and in respect of C shortly after he was born in January 2022. At a final hearing in April 2023, supervision orders were made for all four children with a transition plan for the children to be returned to the mother's care over a period of twelve weeks.

The transition plan was unsuccessful, and further care proceedings were started in September 2023. Interim care orders were made and all four children were placed in foster care. M continued to have problems with drug use and incidents of domestic abuse. A parenting assessment recommended that none of the children be returned to her care.

A sibling assessment was carried out in December 2023 by the allocated social worker who found that:

*"... each child has a clear sense of being part of a sibling group of four and, except for C they have shared experiences of living within a home in which they have been subjected to their parents' unhealthy relationships with each other (and their peers) and the associated harmful effects of this".*

The assessor concluded that Y, R and C should be placed together for adoption, whilst N remained with his current foster-carer long-term. The assessment noted:

*"It is important to consider that sibling relationships are likely to last the longest in a person's lifetime and if they can be maintained this can help and support a child who lives away from their parents to retain a sense of identity. Should the children be placed in any dynamic outside of a quad the local authority will seek families that support continuing in person relationships*

*between the siblings at least 6 times per year with surrounding letter box contacts on special occasions such as birthdays and Christmases. Additional benefits of this arrangement would allow the two families to offer support to one and other”.*

The LA initially accepted the proposal that the three younger children be placed for adoption, but subsequently concluded that Y should be placed in long-term foster care with N.

## Final Hearing

The final hearing for these proceedings took place before HHJ Wicks over three days in May 2024.

### **Local Authority and Guardians position:**

- Y and N should remain together in long-term foster care ('eldest siblings'). R and C should be placed together for adoption ('younger siblings').
- The care plan for younger siblings provided for continued direct contact between the four siblings at a minimum of six visits a year, and direct contact with M to cease once they were placed for adoption.
- The care plan for the elder siblings was, for the sibling contact and for them to have direct contact with their mother eight times a year.

**Mother and Y's Fathers position:** Return of all four children to M's care.

Sibling contact was described as “paramount” for all four children. In her final statement, the local authority advance practitioner (who had previously been the children's social worker) said:

*“the local authority will not defer from finding families who are aware of, and are fully prepared to, support the children in maintaining their sibling links. Without this, the local authority are of the firm standpoint that they would not be the right families for the children.”*

HHJ Wicks in his judgment noted that a foster care placement “would preserve each child's links with the natural family, particularly the parents, and each child's siblings”. The evidence satisfied

him that all four children “clearly benefit from the contact they have with the mother”. He continued:

*“Of equal, if not greater importance, all four have a close bond with each other, and all benefit from their relationship with each other .... The sibling relationship in this case is likely to outlast relationships with the parents, and the closeness in age of the sibling group means that these relationships are likely to endure for the rest of their lives. In long-term foster care the maintenance of those relationships can be guaranteed.”*

HHJ Wicks weighed the advantages of the permanence of adoption against the cost of “*the complete and irrevocable severance of all ties with the natural family*”. He expressed concerns that adopters may not continue to promote contact after the making of an adoption order.

HHJ Wicks rejected M’s proposal. He also dismissed the LA application for placement orders of the younger siblings and directed that revised care plans for R and C be submitted on the basis that they be placed in long-term foster care. His judgment was clearly influenced by the “*critical importance*” of maintaining the sibling relationship between all four children.

## The Appeal

### Arguments on behalf of the Local Authority (‘LA’)

Two grounds of appeal were put forward:

- (1) The judge was wrong to conclude that the sibling relationship could not be preserved if he approved an adoptive care plan.
- (2) The judge was wrong to refuse placement orders on the basis that the mother “could not be completely ruled out”.

It was argued that the “*judge approached his task by assuming that there was no middle ground*”.

*“If he had properly considered the use to which orders under [s.26](#) of the [Adoption and Children Act 2002](#) (now) and [s.51A](#) of [the Act](#) (in the future) might be put, he would have*

*recognised that the court had the power to achieve the best of both worlds for the two children.”*

Counsel acknowledged that these provisions would only be used to compel adopter to accept contact they do not agree to in extremely unusual circumstances. However, they argued that if these orders were used at the placement order stage -

*“...the eventual adopter accepts the adoptive placement with their eyes wide open to the court-directed imperative for long-term sibling contact ... The use of [s.26](#) in such circumstances would not be for the purpose of overriding an adopter's fully formed views about sibling contact, but to shape those views before they are formed. In this case, the judge misconstrued the powers and flexibility afforded him by [s.26](#).” [at 57]*

Regarding ground 2, it was submitted that the judge's observation regarding M was inconsistent with his finding that she was simply unable to put into effect what she has learned from all the support work” and that “there are no other options available in terms of safeguards that could be put in place to minimise the risks of future harm to the children”.

The LA were supported in their appeal by the Children's Guardian.

### ***Arguments on behalf of the Parents***

Counsel for M submitted that the judge's decision fell within his broad welfare discretion after consideration of the evidence and submissions, and that he was best placed to carry out this evaluation. Excessive weight had not been attached to maintaining sibling contact, he was entitled to conclude that the mother “could not be completely ruled out”. As such, this was an example of a decision with which an appellate court ought not to interfere.

### **Judgment**

The judge's decision to refuse the placement order was wrong for the reasons set out in the appellant's submissions in support of ground 1.

Open adoption is now embraced and the judge was wrong in his assertion that “*permanence comes at a significant cost, namely the complete and irrevocable severance of all ties with the natural family*”.

*“[T]he judge overlooked the fact that it was his duty to “set the template for contact going forward”. This case seems to fall four square within the words used by Wall LJ in Re P at paragraph 151. As in that case, there is a “universal recognition” that the relationship between the siblings needs to be preserved. It is “on this basis that the local authority / adoption agency is seeking the placement of the children .... [T]his means that the question of contact between the two children is not a matter for agreement between the local authority / adoption agency and the adopters: it is a matter which, ultimately, is for the court”. In those circumstances, “it is the court which has the responsibility to make orders for contact if they are required in the interests of the two children”.” [at 66]*

Every case turns on its own facts. The judgment in *Re T and R* is not to be misconstrued as meaning that in every case where sibling contact is in the best interests of the children adoption should be ruled out.

*Re B* does not “*obviate the court’s responsibility to set the template for contact at the placement order stage*”. A possibility that ordering contact under section 26 may make the search for adopters unsuccessful is not a sufficient reason to refuse to make a placement order.

The Court was concerned by a number of the judge’s comments at [69] – [71] and accordingly allowed the appeal.

After considering the welfare checklist in section 1 of the 2002 Act, and carefully analysing the advantages and disadvantages of long-term fostering and adoption the Court also made placement orders in respect of the younger siblings. Not having family finding evidence does not preclude the appeal court from making such a decision.

Alongside this, the Court also made an order under section 26(2)(b) of the 2002 Act requiring the persons(s) with whom the younger siblings are to live while they remain the subjects of placement

orders, to allow them to attend visiting contact with their siblings N and Y six times per year, in accordance with arrangements made by the local authority.

The Court also proposed the following:

*“[I]n line with the suggestion made by the President in his second lecture “Adapting Adoption to the Modern World – Part Two” (quoted at paragraph 39 above), I would propose adding a recital that it is this Court’s view that after adoption R and C should continue to have direct contact with N and Y six times a year.” [at 93]*

LJ Laing and LJ Asplin agreed.

## Practical consequences

The Public Law Working Group published [‘Recommendations for best practice in respect of adoption’](#) on 7 November 2024. One of the reports key recommendations is that there needs to be a change in face-to-face contact between adopted children and birth families, with training, greater support and counselling for birth parents.

The President of the Family Division of England and Wales, Sir Andrew McFarlane, said:

*“The recommendations concerning contact with a child’s birth family are especially important, but the particular arrangements in each case much be determined by the needs of the individual child.”.*

There continues to be a growing movement towards open adoption. This appeal offers a welcome clarification on the law around section 26 and how it should be applied in cases where contact after the making of a placement order is in the best interests of the child(ren).





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