

RE G (ADOPTION: FREEING ORDER)

House of Lords

Lord Browne-Wilkinson, Lord Lloyd of Berwick, Lord Nicholls of
Birkenhead, Lord Steyn and Lord Hoffmann

1 May 1997

Adoption – Revocation of freeing order – Former parent not able properly to resume sole parental responsibility – Mother applying for revocation of freeing order after 12 months – Whether child’s welfare could be protected by making revocation conditional on obtaining care order – Whether conditional revocation possible

The child was freed for adoption in 1993. He became a boarder at a special school dealing with disturbed children. No adoption order was made within 12 months of the freeing order. The mother applied to revoke the freeing order, accepting that the child should stay at the special school. The judge refused to revoke the freeing order but granted her limited contact. The mother appealed. The mother subsequently agreed that if the freeing order was revoked the local authority should obtain a care order. The Court of Appeal held that revocation could not be made conditional on the obtaining of a care order and operated only so as to give the former parent sole and unfettered parental responsibility. The mother appealed.

Held – allowing the appeal – a care order gave the local authority power to determine the extent to which a parent could meet the parental responsibility which was shared with the local authority. The effect of the freeing order was that sole responsibility vested in the local authority as the adoption agency and the care order was discharged. The effect of revocation was to vest sole responsibility in the parent, whether or not she were suitable to have this, although the care order was not automatically revived. If the proposed adoption failed to materialise and there was no other proposed adoption pending, it was hard to accept that Parliament could have intended that the parent should continue to be deprived of all her rights, leaving the child in an indefinite adoptive limbo. The Adoption Act 1976 operated as part of the general legislation regulating powers over children. Its powers could be used in conjunction with the powers under the Children Act 1989. The court had jurisdiction to make the revocation order, provided that the welfare of the child could be protected, by making the revocation conditional upon such consequential orders under the Children Act or under its inherent jurisdiction or in some other way (see p 210B–C below). There was no justification for keeping the freeing order in force at a time when it was accepted that no adoption might ever take place. Since the local authority was prepared to apply for a care order and the mother was ready to consent to such an order the revocation of the freeing order would be ordered. The revocation would take effect upon the making of a care order under the Children Act.

Appeal from the decision of the Court of Appeal in *Re G (Adoption: Freeing Order)* [1996] 2 FLR 398 allowed.

Statutory provisions considered

Adoption Act 1976, ss 12, 16(2), 18, 19(2), 20, 72

Children Act 1989, ss 2, 3, 22, 26, 31, 33

Placement of Children with Parents etc Regulations 1991 (SI 1991/893), reg 8

Representations Procedure (Children) Regulations 1991 (SI 1991/894)

Review of Children’s Cases Regulations 1991 (SI 1991/895), reg 7

Case referred to in judgment

C (Minors) (Adoption: Residence Order), Re [1994] Fam 1, [1993] 3 WLR 249, *sub nom M v C and Calderdale Metropolitan Borough Council* [1993] 1 FLR 505, *sub nom C and Another (Minors) (Parent: Residence Order), Re* [1993] 3 All ER 313, CA

Charles Bloom QC and *Sarah Forster* for the mother
Michael Horowitz QC and *Hayley Griffiths* for the local authority
James Munby QC and *Kay Firth-Butterfield* for the guardian ad litem

LORD BROWNE-WILKINSON:

My Lords, this appeal relates to the power of the court, under s 20 of the Adoption Act 1976 ('the 1976 Act'), to revoke an order made under s 18 of that Act freeing a child for adoption. It is a precondition to the making of an adoption order that the parent has either agreed to the adoption or the court has dispensed with such agreement on one of the statutory grounds mentioned in s 16(2) of the 1976 Act. One of those grounds is that the parent is unreasonably withholding his or her agreement to the adoption. This requirement of agreement or dispensing with such agreement can be dealt with by applying, in advance of the adoption hearing itself, for a freeing order. A freeing order can only be made if the child has been placed with prospective adopters or adoption is likely. If, within a year after the freeing order is made, an adoption has neither taken place nor is pending, the parent can apply under s 20 of the 1976 Act to revoke the freeing order on the ground that he or she 'wishes to resume parental responsibility'.

The specific question raised in this appeal is whether, under s 20 of the 1976 Act, the court can revoke the freeing order in circumstances where the parent applying for revocation cannot properly be allowed to have the actual care of the child but accepts that, upon revocation of the freeing order, a care order should be made in favour of the local authority under the Children Act 1989 ('the 1989 Act').

The child in question, M, is now 7 years old. His mother was 15 when he was born and was too young and immature properly to care for M. M failed to thrive. He was placed by the local authority on the 'at risk register' and was admitted to hospital in November 1991. The local authority having been granted an interim care order under the 1989 Act, in December 1991 M went to his first placement with foster-parents. He was returned in August 1992 to his mother's care but, after numerous changes of care arrangements, the local authority obtained an emergency protection order on 30 October 1992 and a full care order was made under s 31 of the 1989 Act on 19 January 1993.

After the failure to rehabilitate M with his mother the local authority applied for an order under s 18 of the 1976 Act freeing him for adoption. M was placed with prospective adopters. The application came before his Honour Judge Willcock QC on 11 November 1993. At that time it was confidently expected that the adoption application would be made almost immediately by the adopters with whom M had been placed. In the light of the then known circumstances, the judge held that the mother's agreement to such adoption was being unreasonably withheld and made a freeing order under s 18. Contact between M and the mother continued until ended by the judge in August 1994.

In the event, the prospective adopters decided not to proceed with the

adoption. M was moved again to an experienced foster-mother but she was unable to manage him as was his school. Since August 1995 M has attended a special school experienced in dealing with severely emotionally disturbed children. He is now a boarder there and, although there is now some discussion as to whether he should live there throughout the year or split his time between the school and another residential establishment, he will be in one or other place throughout the year.

In December 1994 the mother was notified in accordance with the requirements of s 19(2) of the 1976 Act that no adoption order had been made although 12 months had elapsed since the making of the freeing order. The mother then applied under s 20 of the 1976 Act to revoke the freeing order and for contact with M. During 1995 the mother resumed contact with M by order of Judge Willcock. The mother has now a stable relationship and has two other sons.

The mother's application to revoke the freeing order came before Judge Willcock in October 1995. The evidence then before the judge demonstrated that M had been severely damaged in the course of his short life. The report of a clinical psychologist (obtained after the hearing before the judge but confirming the evidence which was before him) states that M was a child who:

'... presents with a complex constellation of difficulties ... [he] displays many of the psychological stigmata of significant harm to his social, emotional and behaviour development ... [he] is a boy with very special educational needs which are likely to endure and call for structured and reliable input integrated across both the domestic and more directly educational aspects of his day.'

The psychologist considered that the rehabilitation of M with his mother was not advisable since the risk of breakdown would be unacceptably high, having possible adverse consequences for the two younger children of the mother. He was also of the view that the effect of such breakdown on M would be psychologically destructive and felt that permanency through adoption ought to be the long-term plan. However, in the psychologist's view it was clear that M could not psychologically afford another permanency breakdown: 'his needs are too numerous and diverse and ingrained to move to a family soon though this should be the long-term aim'. It is accepted by the local authority that there is no immediate prospect of placing M with prospective adopters and indeed that adoption may never, in fact, take place.

At the hearing before the judge, the mother, whilst accepting that M should stay at the special school, did not suggest that M should be subject to a care order under the 1989 Act. In these circumstances, the judge refused to revoke the freeing order. He held that M could not safely return to the care of the mother. Since the effect of revocation of the freeing order would be to vest the sole parental responsibility for M in the mother, revocation would only lead to the local authority having to bring fresh care proceedings under the 1989 Act. Such proceedings would be detrimental to M and could only result in a further care order being made. Whilst refusing to revoke the freeing order, the judge made an order providing for the mother to have limited contact with M.

The mother appealed to the Court of Appeal (Butler-Sloss and Saville LJ and Douglas Brown J) whose decision is reported at [1996] 2 FLR 398. At the time of the hearing in the Court of Appeal, M's circumstances had not changed materially. However, the submissions of the mother were different. She accepted that, if the freeing order were to be revoked, the local authority should apply for and obtain a care order the making of which she would not oppose. The position adopted by the local authority both in the Court of Appeal and before your Lordships was that they would prefer the freeing order to remain in force but, if the court thought it appropriate to revoke the freeing order, the local authority would apply for a care order as the mother proposed. In those circumstances, the reasons for the judge's decision no longer applied since the welfare of M could be protected by an uncontested care order. The judgment of the Court of Appeal shows that they were unhappy that an order freeing M for adoption should continue to remain in force at a time when there was no immediate prospect of his adoption and indeed in circumstances where he might never be adopted at all. However, the Court of Appeal felt bound to hold on the construction of s 20 of the 1976 Act that on an application for revocation of a freeing order the court had only two choices, to revoke or not to revoke, and in the event of revocation the inevitable result would be that the mother assumed sole and unfettered parental responsibility for M. They therefore refused to make an order for revocation. The mother appeals to your Lordships' House.

Before considering the statutory provisions directly in point, it is convenient to say a word about the concept of 'parental responsibility' introduced by the 1989 Act. The concept has the same meaning both in the 1976 Act and the 1989 Act: see the 1976 Act, s 72(1). Section 3(1) of the 1989 Act defines parental responsibility as meaning:

'... all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.'

Under s 2(2), where (as in the present case) the child's parents were not married at the time of the child's birth, the mother has parental responsibility. Under s 2(5) more than one person can have parental responsibility for the same child at the same time. In particular, on the making of a care order under s 31 of the 1989 Act, the parent does not lose all parental responsibility but shares it with the local authority: see s 33(3). However, the parental responsibility of the parent is fettered since the local authority has power to determine the extent to which 'a parent ... may meet his parental responsibility': s 33(3)(b).

I turn then to consider the 1976 Act as amended by the 1989 Act. An adoption order cannot be made unless the child is free for adoption by virtue of an order made under s 18 or the parent unconditionally agrees to the making of an adoption order or his agreement is dispensed with on the grounds mentioned in s 16(2). Therefore, if a freeing order under s 18 has been made the proposed adoption can proceed in the certainty that the necessary agreement of the parent has either been obtained or dispensed with: the rights of the parent have been considered and determined at the earlier stage when a freeing order was considered. The provisions as to a freeing order are contained in s 18. Unless the parent agrees to the application, only a local authority, acting as an adoption agency, can make

the application for a freeing order and the child must be in its care: s 18(1) and (2A). Under s 18, the court is bound to make a freeing order if the parent agrees to the making of the adoption order or the court is satisfied that the parent's agreement should be dispensed with on one of the grounds specified in s 16(2). The grounds for dispensing with the agreement of the parent include the parent 'withholding his agreement unreasonably': s 16(2)(b). But it is to be particularly noted that the courts cannot dispense with the agreement of the parent under s 18 'unless the child is already placed for adoption or the court is satisfied that it is likely that the child will be placed for adoption': s 18(3).

Applying those provisions to the present case, there is no doubt that the requirements of s 18 were satisfied on 11 November 1993 when the freeing order was made. M was in the care of the local authority which made the application. He had been placed for adoption with the then proposed adopters. The judge held that, in the light of the then circumstances, the mother's agreement was being unreasonably withheld. The effect of the freeing order was as follows. Under s 18(5) parental responsibility was given to the local authority as the adoption agency and s 12(2)–(4) were made applicable as though the freeing order was an adoption order and the local authority were the adopters. Under s 12(3)(a) the parental responsibility which the mother enjoyed immediately before the freeing order was extinguished. In consequence, sole parental responsibility was vested in the local authority as adoption agency. Moreover, as a result of the extinguishment of the parental responsibility of the mother, she ceased to be a 'parent' within the meaning of that word in the 1989 Act: she became a 'former parent': see the 1976 Act, ss 19–20; *Re C (Minors) (Adoption: Residence Order)* [1994] Fam 1, sub nom *M v C and Calderdale Metropolitan Borough Council* [1993] 1 FLR 505. Pending the making of an adoption order, M had and has no human being as a parent: the mother is not a parent and there is no adoptive parent. M is in what the Court of Appeal described as an 'adoption limbo': a statutory orphan. It should also be noted that the freeing order discharged the existing care order: s 12(3)(aa).

After the expiry of one year from the date of the freeing order, the local authority is bound to inform the 'former parent' whether an adoption order has been made and (if not) whether the child is currently placed for adoption: s 19. The right of the 'former parent' to apply for a revocation order under s 20 is linked to the same factors. So far as relevant, s 20 provides as follows:

'(1) The former parent, at any time more than 12 months after the making of the order under section 18 when—

- (a) no adoption order has been made in respect of the child, and
- (b) the child does not have his home with a person with whom he has been placed for adoption,

may apply to the court which made the order for a further order revoking it on the ground that he wishes to resume parental responsibility.

(2) While the application is pending the adoption agency having parental responsibility shall not place the child for adoption without the leave of the court.

(3) The revocation of an order under section 18 (“a section 18 order”) operates—

- (a) to extinguish the parental responsibility given to the adoption agency under the section 18 order;
- (b) to give parental responsibility for the child to—
 - (i) the child’s mother; and
 - (ii) where the child’s father and mother were married to each other at the time of his birth, the father; and

(c) ...

(3A) Subject to subsection (3)(c), the revocation does not—

- (a) operate to revive—
 - (i) any order under the Children Act 1989, or
 - (ii) any duty referred to in section 12(3)(b),

extinguished by the making of the section 18 order; or ...

(4) Subject to subsection (5), if the application is dismissed on the ground that to allow it would contravene the principle embodied in section 6—

- (a) the former parent who made the application shall not be entitled to make any further application under subsection (1) in respect of the child, and
- (b) the adoption agency is released from the duty of complying further with section 19(3) as respects that parent.

(5) Subsection (4)(a) shall not apply where the court which dismissed the application gives leave to the former parent to make a further application under subsection (1), but such leave shall not be given unless it appears to the court that because of a change in circumstances or for any other reason it is proper to allow the application to be made.’

There are a number of points to be noted about s 20. First, it is discretionary. The court is not bound to revoke a freeing order just because (as in the present case) the conditions required for the making of the original freeing order no longer obtain. In particular, in deciding whether or not to revoke the freeing order, the court is entitled and bound to have regard to the need to safeguard and promote the welfare of the child: s 6 of the 1976 Act and s 20(4). Secondly, the effect of revocation is to vest sole parental responsibility in the parent who wishes to resume parental responsibility: s 20(3). Thirdly, the care order in force before the freeing order was made (and extinguished by the freeing order) is not automatically revived: s 20(3A). In consequence, the effect of a revocation order (if made) will be that the full and unfettered parental responsibility will vest in the parent whether or not he or she is a suitable person to have such sole responsibility. If she is not a suitable person, it cannot be for the welfare of the child to make an order vesting sole responsibility in her.

These were the factors which led the Court of Appeal to the conclusion that there was a lacuna in the 1976 Act in dealing with a child, subject to a freeing order, who subsequently becomes unlikely to become adopted but whose parent cannot properly be permitted to resume sole and unfettered responsibility. The Court of Appeal, although initially attracted to the

proposal that the position could be covered by a care order under the 1989 Act, felt bound to reject that course because it 'runs counter to the express purpose of the section'. They held that 'the philosophy behind s 20 remains a rejection of public law intervention and the intention to return the child to the control of the parent'.

I am unable to agree with this conclusion. Before considering the construction of s 20 itself, I must emphasise the background against which it falls to be construed. Apart from proceedings under the Adoption Act, the parent of a child enjoys parental responsibility of some kind, even in cases where there is intervention under the 1989 Act. Moreover, as a 'parent' within the meaning of the 1989 Act, he or she has certain statutory rights whether or not there is a care order in force:

- (a) the local authority is required to ascertain the wishes and feelings of the parent in relation to decisions affecting the child (the 1989 Act, s 22(4));
- (b) in conducting any review of the child the parents' views have to be sought and the parents have to be given the result of the review (the 1989 Act, s 26(2) and Review of Children's Cases Regulations 1991, reg 7);
- (c) the parent has to be notified of any placement (Placement of Children with Parents etc Regulations 1991, reg 8);
- (d) the parent has the right to use the representation and complaints procedures established by the Representations Procedure (Children) Regulations 1991.

By dispensing with the agreement of the parent and making a freeing order under s 18 all the ordinary rights of a parent and these statutory rights of a parent are extinguished and remain extinguished so long as the freeing order remains in force. It is true that, as to the statutory rights under the 1989 Act, the former parent may be consulted by the local authority as being, for example, a person 'whose wishes and feelings the authority consider to be relevant': see the 1989 Act, s 22(4)(d). But this discretionary right of the local authority to deal with the former parent is no substitute for the absolute statutory rights she previously enjoyed. The extinguishment of all parental rights, parental responsibility and the statutory rights under the 1989 Act is a Draconian step. It is a necessary corollary to enable an adoption to take place. But if the proposed adoption giving rise to the freeing order fails to materialise and there is no other proposed adoption pending, it is hard to accept that Parliament can have intended that the parent should continue to be deprived of all these rights leaving the child in an indefinite adoptive limbo.

Moreover, the inability to revoke the freeing order when the circumstances have changed, may give rise to an injustice to the parent and possible harm to the interests of the child. A decision whether or not to dispense with the agreement of a parent has to be taken on the basis of all the circumstances as they exist at the date of the application. Thereafter circumstances may change. For example, if there has been continuing contact between the parent and the child notwithstanding the freeing order, a bond may have developed between them. The situation may have developed in which some third party is prepared to provide satisfactory day-to-day care for the child whilst retaining beneficial contact between the child and the

parent. If it is impossible, in cases where the parent cannot be trusted with full parental responsibility, to revoke the freeing order, then many years later notwithstanding such change of circumstances an adoption could take place without the consent of the parent, reliance being placed on the existing freeing order. But in the changed circumstances, it may not be in any way unreasonable for the parent at that later date to withhold his agreement to the adoption. In my judgment this would run counter to the whole structure of the Adoption Act which shows that parental agreement is only to be dispensed with, whether on the making of an adoption order or on the making of a freeing order, in the light of the reasonableness of the parent's conduct as at that date. Sections 18 and 19 indicate that a freeing order is to be made only where an adoption is likely to take place within 12 months or shortly thereafter. For these reasons, it would to my mind be very strange if, a freeing order having been correctly made to facilitate a pending adoption, it was incapable of being revoked when adoption ceases to be an immediate prospect save in cases where the parent whose rights have been dispensed with under the freeing order is capable of looking after the child and having unfettered control.

Does s 20 of the 1976 Act require that conclusion? It certainly does not do so expressly. The requirement in s 20(1) that the parent can apply for revocation 'on the ground that [the former parent] wishes to resume parental responsibility' does not postulate that the former parent must wish for sole and unfettered parental responsibility. Parental responsibility can be shared. Where a care order has been made under the 1989 Act that parental responsibility is fettered, but even so the former parent may still wish to resume parental responsibility, shared or fettered though it may be.

The point which seems to have weighed with the Court of Appeal is that, if the 1976 Act is looked at in isolation, revocation of a freeing order can only operate so as to vest sole and unfettered parental responsibility in the former parent: revocation vests parental responsibility in the parent, extinguishes the parental responsibility vested by the freeing order in the local authority and does not revive the care order which was in force before the freeing order was made: s 20(3)(b), (3)(a) and (3A)(i). But the 1976 Act does not exist in isolation. It is a code regulating adoption which takes effect in the context of the wider legislation regulating children, viz, formerly the Children Act 1975 and now the 1989 Act. Section 20 of the 1976 Act, in regulating adoption, provides for the undoing of the steps which have been taken towards the pending adoption which has subsequently failed to materialise. It restores the status quo ante, save that the care order in force at the date of the freeing order is not revived. The failure to revive the care order is explicable since, in the changed circumstances giving rise to the revocation of the freeing order, it may well not be right for the child to revert automatically to the care of the local authority: the parent obtaining the revocation order may be fully competent to have sole parental responsibility. The fact that the pre-existing care order does not automatically revive does not, as the Court of Appeal thought, indicate that 'the philosophy behind s 20 remains a rejection of public law intervention'. The 1976 Act does not purport to limit in any way the powers under the 1989 Act. If, as a result or as a condition of revocation, it is appropriate that the powers under the 1989 Act should be exercised there is nothing in the 1976 Act to exclude them. In my judgment there is no lacuna in the 1976

Act: it operates alongside and as part of the general legislation regulating powers over children. I can see no reason why the provisions of the 1976 Act have to be read as a self-sufficient code for all purposes: the powers conferred in relation to adoption by the 1976 Act can, if necessary, be used in conjunction with and supplemented by the powers of the 1989 Act.

In my judgment, therefore, the position is as follows. Where a freeing order has been made under s 18 of the 1976 Act but at the end of one year thereafter it is clear that no adoption is likely to take place within a short period, the freeing order may be revoked so as to restore the parent to his or her normal rights and to ensure that the child does not remain in an adoption limbo. Even if the former parent is not, at the date of revocation, fit to have sole and unfettered responsibility, the court has jurisdiction to make the order provided that the welfare of the child can be protected whether by making the revocation of the freeing order conditional upon such consequential orders as are appropriate under the 1989 Act or under its inherent jurisdiction or in some other way.

That being so, the question is whether such jurisdiction can be exercised in the present case, bearing in mind the welfare of M. As I have said, the mother is prepared to consent to a care order. The local authority (which has been to great lengths to help M) is prepared to make the necessary application under s 31 of the 1989 Act. I would expect in a case in which the court indicates that the revocation order would be appropriate local authorities will be prepared to make such application for a care order. If such care order is made, there is no justification for keeping the freeing order in force at a time when no adoption may ever take place and at best adoption is only a long-term hope or plan. In my judgment the freeing order should be revoked and the adoptive limbo terminated since M's welfare will be fully protected by the care order. It is plain that the Court of Appeal, if it had thought itself free to do so, would have made such an order.

For these reasons, I would allow the appeal and order the revocation of the freeing order made by Judge Willcock QC on 11 November 1993, such revocation to take effect only upon the making of a care order relating to M under s 31 of the 1989 Act. There will be no order as to costs.

LORD LLOYD OF BERWICK:

My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Browne-Wilkinson. For the reasons he gives, and with which I agree, I too would make an order in the terms proposed by him.

LORD NICHOLLS OF BIRKENHEAD:

My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Browne-Wilkinson. For the reasons he gives, and with which I agree, I too would make an order in the terms proposed by him.

LORD STEYN:

My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. For the reasons he gives I would make the same order as he proposes.

LORD HOFFMANN:

My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. For the reasons he gives I would also make the same order as he proposes.

Appeal allowed. Revocation of freeing order to take effect upon making of care order.

Solicitors: *Charlesworth Nicholl & Co* for the mother
Sharpe Pritchard, agents for *K. Barry Morgan* for the local authority
Slee Blackwell for the guardian ad litem

DEBORAH DINAN-HAYWARD
Barrister