RE O (ADOPTION: WITHHOLDING AGREEMENT)

Court of Appeal

Swinton Thomas, Mantell and Buxton LJJ

21 August 1998

Adoption – Agreement – Natural father unaware of child's existence until informed of adoption proceedings – Child placed with prospective adopters as baby – Whether father withholding agreement unreasonably

The mother and father separated after a relationship lasting about 3 years. The mother had not informed the father that she was pregnant, having decided to give the baby up for adoption. From the age of 2 months, the child lived with the prospective adopters, who had already adopted one child successfully and were considered by the experts to be ideal adoptive parents. The father only became aware of the child's existence when, on the court's instructions, he was informed of the proposed adoption proceedings. He was in a stable relationship, had a secure job, and wished to care for the child himself with the help of his fiancée. He refused to consent to the adoption, and sought a residence order in respect of the child. It was accepted that he was an impeccable father, whose lack of contact with the child was through no fault of his own. Some of the experts considered that, in recognition of the father's commitment to the child, a residence order to the prospective adopters would be more appropriate than an adoption order. The judge found that the father was withholding his consent unreasonably and made the adoption order, but also granted the father a parental responsibility order and made provision for the father to have direct contact with the child at least twice a year. The father appealed, arguing that as the natural father he was the best person to care for the child, and that his resistance to adoption could not be considered unreasonable. The adoptive parents cross-appealed the parental responsibility order.

Held – dismissing the appeal and the cross-appeal – the judge, having considered all the relevant facts and the relevant law, including the importance of blood ties, had been firmly of the opinion that the child ought to reside with the adoptive family, to avoid the distress and trauma which would be caused by taking him away from the only family he had ever known,. He had decided that an adoption order was in the child's best interests, being more likely than a residence order to facilitate easy contact between the child and his natural father, and providing the child with greater stability. He had concluded that the father was withholding his consent unreasonably, on the basis that the reasonable parent would put the child's welfare at the forefront and would recognise that permanence and security were essential for the child's welfare. The judge had been entitled to reach those conclusions, within his wide discretion, and the court could not possibly interfere. In a case where the child's permanent home was in issue, it was logical and correct to take the issues in sequence and for the judge to arrive at a conclusion as to where the child's permanent home should be, and then, in the light of that conclusion, arrive at the further conclusion as to whether the parent's consent to adoption had been unreasonably withheld.

Statutory provision considered
Adoption Act 1976, s 6

Cases referred to in judgment
C (A Minor) (Adoption: Parental Agreement: Contact), Re [1993] 2 FLR 260, CA
E (A Minor) (Adoption), Re [1989] 1 FLR 126, CA
K, Re [1953] 1 QB 117, [1952] 2 All ER 877, CA

K (A Minor) (Custody), Re [1990] 2 FLR 64, sub nom *K (A Minor) (Ward: Care and Control), Re* [1990] 1 WLR 431, [1990] 3 All ER 795, CA
KD (A Minor) (Ward: Termination of Access), Re [1988] AC 806, [1988] 2 WLR 398, [1988] 1 All ER 577, sub nom *KD (A Minor) (Access: Principles), Re* [1988] 2 FLR 139, HL
Keegan v Ireland (No 16969/90) (1994) 18 EHRR 342, ECHR
L (An Infant), Re [1968] P 119, [1968] 1 All ER 20, CA
M (Adoption or Residence Order), Re [1998] 1 FLR 570, CA
M (Child's Upbringing), Re [1996] 2 FLR 441, CA
O'Connor and Another v A and B [1971] 1 WLR 1227, [1971] 2 All ER 1230, HL
W (An Infant), Re [1971] AC 682, [1971] 2 WLR 1011, [1971] 2 All ER 49, HL

Mark Everall QC and *Vera Mayer* for the father
Andrew McFarlane QC and *Frances Judd* for the local authority
Barbara Slomnicka for the guardian ad litem

SWINTON THOMAS LJ: This is an appeal from an order made by his Honour Judge Paul Clark in the Oxford County Court on 16 July 1998. The subject matter of the dispute and the order is a small boy, S, who was born on 2 January 1997 and is now 19 months old, 18 months old as at the date of the judge's order. Bearing in mind his age, we will make an order that this case should be reported under initials only.

The relevant part of the judge's order is:

'(1) The [father], GP, do have parental responsibility for the child, SCO.
(2) The court is satisfied that:

(i) The mother, AO, agrees to the making of the adoption order.
(ii) The agreement of the father should be dispensed with on the ground that he is withholding his agreement unreasonably.
(iii) The adopters will allow the father and [Miss N] to have direct contact with the child, not less than twice a year, any further contact to be agreed between the adopters and the father and Miss N.'

The judge made his order in the context of the finding that an adoption order in favour of the prospective adopters, Mr and Mrs A, was in the best interest of S. S's father, Mr P, appeals against this order, submitting that the judge was wrong not to make a residence order in his favour and was wrong to say that an adoption order was in S's best interests and wrong in finding that the father was withholding his agreement to an adoption order unreasonably.

This was, and is, undoubtedly an anxious and difficult case for the judge and for this court. The judge was faced with, on one side, an impeccable father who, for reasons for which he has no responsibility, has had no contact with his child, and his fiancée who propose to get married in October 1998 and, on the other side, impeccable and loving proposed adopters with whom S has lived since 7 March 1997. They clearly love him deeply and he is now securely bonded with them. Furthermore, the judge was faced, as we are, with conflicting evidence given by experts as to where S's best interests lie.

S's parents were both born in Scotland. The father is one of a close-knit and happy family living in Scotland. The parents had a relationship lasting about 3 years leading to the birth of S. They separated in the spring of 1996.

The mother, Miss O, was resolved from an early stage of her pregnancy that the expected child should be adopted. She had, of course, already separated from the father and she did not tell him that she was pregnant. He knew nothing of the subsequent birth until, by an order of the Oxford County Court, he was informed of the proposed adoption proceedings. The mother has a job as a nanny and the father has a good job with an airline. His girlfriend is also employed. Mr A, the proposed adoptive father, also has an excellent job and he and his wife already have an adopted child, K, who is aged 7. She is devoted to S and regards him as her little brother. All the experts who have reported in this case, and there is a reasonably substantial number, were in agreement that Mr and Mrs A were ideal adoptive parents, possibly as ideal as one could find and are devoted to S.

It is a crucial fact in this case that S has lived with Mr and Mrs A since he was 2 months old and has formed very strong bonds with them. The judge had to resolve, with the assistance of the expert evidence and the lay evidence, the primary issues as to whether removing S now from the only carers that he has known and placing him in the care of his father and the father's fiancée, whom he does not know but are his blood family, was the right course to take in the best interests of the child.

The father's case, put at its simplest, is that he is the child's blood father, the mother does not wish to care for him and that he and his future wife are the natural and the best people to care for S. He is, most naturally, deeply affronted that he was not told about the existence of his son and that the failure to tell him, by reason of the time that elapsed, has prejudiced his claim to look after his child. Although he is undoubtedly committed to looking after S, it is a fact that has to be faced that he and his fiancée are, again through no fault of their own, untried as parents and would be faced with caring for a small boy who, on any basis, does not know them and would be deeply upset at the concept of being removed from the only family that he knows, however carefully such a move was planned.

I turn to the judge's judgment. The judge set out the issues he had to resolve in this way:

> 'In the event it was agreed that I must decide:
>
> (a) where S should live;
> (b) whether the father should have parental responsibility;
> (c) whether S should be adopted,
>
> There is no issue in this case that the A's are impeccable prospective adopters. Similarly I am satisfied that if an order is made, they will be responsible about keeping S informed of his real parentage as he grows up, and also in facilitating indirect contact with his father, and direct contact twice a year. All in all, and their evidence to me firmly supported this, they are ideal adopters, in whose care one might expect S to flourish. Similarly, although this can be of little direct relevance to my decision, they will be devastated if S were removed from them, and their adopted daughter K might well have uncertainties about her own future in the general distress that would follow. I also accept the sincerity of their evidence that in the event of their application failing they could not lessen the consequent damage to S in a handover by taking all the best steps to reduce the damage; in the event I think they are a couple of such quality

that they would probably do more than at present they can consider possible.'

The judge then continued by making trenchant criticisms of the local authority's failure to inform the father of the proceedings and it is not necessary for me to make any further reference to those factors in the judgment.

The judge then turned to the issue as to residence and the evidence that he had heard. He summarised the evidence which he considered relevant on pp 6–10 of his judgment. It is not necessary for me to recite them. He then said:

'In this very unusual case I have reserved judgment, pondered and reconsidered the evidence and submissions and come to the firm conclusion that S should continue to reside with the A's. I bear in mind Lord Templeman's much quoted words in *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806, 812 sub nom *Re KD (A Minor) (Access: Principles)* [1988] 2 FLR 139, 141 – I have also to decide to what extent the welfare of the child requires that he should be protected from "harm caused by the resumption of parental care after separation has broken the parental tie". I have to be aware also of the dangers of slipping into social engineering, and to ask myself "does the welfare of the child positively demand the displacement of the parental right?" I must also have at the forefront of my mind the s 1 criteria of the Children Act.'

The judge then turned to the issue as to whether the father should be granted a parental responsibility order which would make enable him to participate in the proceedings. The judge said that he was satisfied that the father should be granted parental responsibility and gave his reasons for reaching that conclusion. The respondents to this appeal cross-appeal against that part of the judge's order.

The judge then turned to consider the issue as to whether the right course was that there should be an adoption order in favour of Mr and Mrs A or whether there should be a residence order in their favour. He judge said:

'In the witness-box Dr Cameron volunteered that he would "come down in favour of residence rather than an adoption – to show a proper recognition of the father's commitment".

There is little issue in this case that if S continues to live with the A's, there should be indirect contact, plus direct contact twice a year (the A's have come round to that), maybe increasing in the distant future. Dr Cameron agreed that he was not absolutely sure, and perhaps he was just trying to show some kindness to the father because of his decision against the child residing with [the father]. "To show proper recognition of the father's commitment" does not seem to me to be an important matter in my decision, however otherwise laudable a concept.

In effect there would be little difference between the two orders as far as contact is concerned, but one must not overlook the need for confidence in the A's to secure S's stability, and the greater risk of the mother, AO, seeking contact or even residence. If S is to live with the A's, I have come to the conclusion that his welfare would be better

safeguarded and promoted by an adoption order than by a residence order. I bear in mind the essential differences between residence and adoption orders, in particular as set out recently by the Court of Appeal in *Re M (Adoption or Residence Order)* [1998] 1 FLR 570.

I consider the duty of the court under s 6 of the Adoption Act 1976. I have the mother's consent, but not the father's and I have to decide whether, now the father has parental responsibility, he is withholding his consent unreasonably. I have to apply in this regard the classic *Re W (An Infant)* [1971] AC 682 principles and decide is [the father] being unreasonable, as a parent, in refusing his agreement. I must ask myself what the reasonable parent would have done in all the circumstances, remembering that the reasonable parent would put the child's welfare at the forefront. I remember that, although the reasonable parent will give great weight to the welfare of the child, there are other interests of himself and his family which he may legitimately take into account. I further can ask myself whether, having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views and interests of the objecting parent (*Re C (A Minor) (Adoption: Parental Agreement: Contact)* [1993] 2 FLR 260, 272).

What would the reasonable father do in the light of all the evidence and submissions in this case? He would take into account that he has been unfairly treated by being excluded from his child's life for more than its first year, mainly due to the actions of its mother and the inactions of the local authority. He would take into account his own commitment and that of the woman he proposes to marry in October, and the support of both their families, who, I was told, attended court throughout the hearing. He would take into account that Dr Cameron, although otherwise against him, seemed to prefer a residence order to the A's rather than adoption by them.

On the other side he would take into account the risk of the mother, A, reappearing and perhaps seeking to rock the boat in some way (she had earlier said she would want contact if S resided with the father), that under a residence order S would have a different status from K, the A's adopted daughter, (he might also take into account the distress and potential damage to K if S were removed from the A's, but that would be very much on the periphery, if relevant at all). He would realise that permanence and security are essential for S's well-being, and override all other considerations, and that the A's, with the added confidence coming from an adoption order, are more likely to facilitate successful contact, and that direct and indirect contact is indeed offered by the A's and that they will at the appropriate time tell S the true story of his early years.'

The judge then quoted from the case of *Re W* and continued:

'Having regard to all the circumstances of the case, after considering the evidence and the parties' submissions, particularly of those made on the A's and the father's behalf, I have come to the view that the father's veto is not a reasonable decision. As Lord Denning said "His anguish of mind is quite understandable, but it still may be unreasonable for him to withhold consent".'

It is submitted, as I have said, that the judge was wrong to make the orders that he did. In the amended notice of appeal the grounds of appeal are set out as follows:

'(1) The decision of the judge to dismiss the appellant's application for a residence order was plainly wrong in that:

(i) the judge failed to give any or any proper weight to:

(a) the advantage of S being brought up by his natural father;
(b) the evidence of Dr Banks and the guardian ad litem on the risk to S of not moving to live with his father;

(ii) the judge gave too much weight to the risk to S in the event of a move to the father's care;
(iii) the judge gave too much weight to the evidence of Dr Cameron despite its inconsistency on the issue of risk with his evidence in an earlier case.

(2) The decision of the judge that an adoption order should be made rather than a residence order in favour of the respondents was plainly wrong in that:

(i) he gave no weight to the advantage which a residence order would bring to S as identified by Dr Cameron (the judge misunderstanding Dr Cameron's evidence on this point);
(ii) he gave no weight to the recommendation of the guardian ad litem;
(iii) he gave too much weight to the need to give the respondents' confidence.

(3) The decision of the judge that the appellant father was unreasonably withholding his agreement to adoption was plainly wrong in that:

(i) the judge failed to have regard to the factors to which the reasonable parent was entitled to have regard, namely the views of Dr Banks and the guardian ad litem as to where S should live; the view of the guardian ad litem that if S was to remain with the respondents, Mr and Mrs A, it should be under a residence order rather than an adoption order; the importance of maintaining S's legal link with his natural family;
(ii) the judge was wrong to hold that the possible attitude of the mother, the difference in status between S and K, the need for permanence and security, the facilitating of contact were factors which inevitably outweighed the other factors in the case in the decision of the reasonable parent;
(iii) he substituted his own view for that of the appellant father;
(iv) he found the decision of the father was not a decision within the band of possible reasonable decisions open to the father.'

In the context of the notice of appeal I turn to consider as shortly as I can the evidence given in the case. Although I will make comparatively few references to the evidence, we have read in detail all the statements made by the witnesses and the transcripts of the evidence given by the various experts. We have all those matters in the forefront of our minds. There is a

Sch 2 report prepared by the adoption team manager. In that report there is extensive reference to S's relationship with the prospective adopters and with K. On p 49 of that report this appears:

> 'S is a very happy child, He smiles readily and is generally a very contented child. S is wary of strangers and readily seeks the comfort of his parents when new people enter the room. His attachment to the prospective adoptive parents is very apparent. He enjoys physical contact with them and will only be consoled by them after any trauma such as a fall.
>
> S is also very bonded to K the adoptive parents' first child. When he was first place[d] K experienced very minor jealousies. She however adores her "new brother", loves helping to look after him, feeding him and playing endless games with him.'

There is also a report from the Sch 2 report in relation to S's parents. Doctor Banks is the consultant clinical psychologist who gave evidence on behalf of the father. In the final recommendations of his very full report he states:

> 'I will not consider whether or not S should be removed from the prospective adopters to the care of [the father and his fiancée]. I believe this is an issue which must be determined by the court. I will say that if S is removed one would expect some separation protest and anxiety going through the phases I have previously outlined. This may exist for a period of several weeks until S reaches the detachment phase and that this may continue for a period until he eventually develops an amnesia of his past history beginning to reattach himself to his birth father and S. Eventually this attachment will become complete. I would expect that at approximately 4 to 6 that there will be no memory of being placed with the prospective adopters and in fact given S's young age, where he has no language to encode his experience, it is very likely that this amnesia will come about at a much earlier age. Of course S has emotions to encode his experience. The effect of these emotions will give rise to the phases as earlier described. As has been indicated, if the court decide that S should be removed then the distress he would be likely to face could be reduced considerably by prior planning and agreement of the two couples to work together. This agreement would be most necessary to both reduce stress (in the short and medium term) in S and in the prospective adopters' adopted daughter (in the short medium and possibly long term). The agreement could mean that S could be phased in and direct contact could continue with S by the prospective adopters' daughter. By the co-operation and working together of the adults involved one could reduce the loss that both children would experience to a considerable degree.'

Doctor Banks gave evidence to the judge. On p 89 he was asked:

> Q: 'I think you say yourself you are looking at them and you have seen no problem with their motivation and their sincerity in putting forward their… I think in your evidence you said the blood tie formed an important part of the attachment. I think you said it was the attachment.
> A: I said it was the bond.'

Then on p 95:

'Q: No, but that is what will happen if S goes to them. The adults in his life who he depended on and trusted will suddenly completely and utterly let him down.
A: It need not be that way. It might not be that way.
Q: It might well be that way, might it not?
A: As I say, I think the fact that he has established a positive attachment is protective.
Q: The idea of seeing an 18-month-old child going through the various stages that have been suggested, panic, bewilderment, despair: it is a truly horrible thing to contemplate for a small child, is it not?
A: I wouldn't wish it on him for no reason at all.
Q: Presumably it is an occasion of enormous trauma, at best about 6 weeks of really pretty trauma.
A: Trauma and confusion.'

The point Dr Banks was stressing was that, in his judgment, any serious trauma that might be occasioned to S by a move would be of a very limited duration.

The mother did not give evidence, but the judge had two statements from her. At one stage she made certain criticisms of the father which she subsequently withdrew. However, in the statements which she made which were not tested in evidence, she maintained her stance that, in her view, the best course for S lay in adoption.

Miss Adcock is an experienced social worker who, amongst other qualifications, has worked in the Department of Psychological Medicine at Great Ormond Street Hospital for Children. Her report is at p 104 of the bundle and her evidence commences at p 1 of the transcript bundle. At p 4 she is asked whether she has read Dr Cameron's report and she said she had. She is then asked:

'Q: Obviously he has made certain recommendations and observations about the question of S's attachment and the risk of disturbing it. Can I ask you for your comments on what Dr Cameron has said?
A: I would agree with him and I think it is a sound mental health principle that many clinicians follow that wherever possible you preserve a good placement and a secure attachment.'

On p 10, when cross-examined, she was asked:

'Do you think the psychological distress to S as he grow up from not living with his natural family justifies moving S from where he is now?
A: No, I do not think it does. I think also that if he is moved he will need to be told later on about the move and he may equally feel very angry that he was moved, so I think it can be a difficulty either way.'
Q: In terms of adoptive placements how good is this one?
A: I think it is an excellent adoptive placement. In terms of outcomes, as I have already said, this is a child who was placed before 6 months; placed with the mother's blessing with a couple who were confident at that time that this was going to be a permanent placement. I was impressed with Mr

A and Mrs A's attitudes to adoption and their thoughtfulness, because I think they have made a big shift in attitudes since this case started because they've been trying to look at what would be best for S as well as what would be best for their own daughter and I think they have now come to see that contact might be helpful for S.'

On p 16 she said:

B

'I think he would get the most security by the making of an adoption order. I think that if there is a residence order either that S stays with Mr and Mrs A or if goes to Mr P the way is then open for her to make applications and I think it would be very harmful to S if he felt that he was in a conflictual situation, because it is going to be important that he is helped to come to terms with his mother giving him up as well as whether he is given from the adopters or has to give up the idea or the possibility of living with Mr P.'

C

On p 20:

'Q: What is it that suggests to you that he and Miss L are not going to be good enough caring for S?

D

A: Because taking on a distressed 18-month-old with a formed character is very different from beginning to bond to a new baby, and he is not what the R's would – sorry, they are not what the R's would call "experienced foster-parents". I know that Miss L has got some child care experience but we are talking about a situation that taxes even the most experienced parents. What we are also talking about I think is S being in a period while as they feel their way they will not be able to anticipate and respond to his needs, and, if he is in a very distressed state, the messages that he will be giving as to what he wants will be very mixed.'

E

Page 30:

F 'Q: We also do not know, and it may be that Dr Banks is right on this, whether he is going to have some problems, or serious problems, and Dr Banks will say up to 50% possibility, problems with his identity when he reaches a cognitive age where he can understand the concept of adoption.

A: I think what the research shows is that that is a stage in adoption which the early placed children do better in coming through than the late-placed children, but that many, many adoptive children do come through this very well, and if S is moved now he will be the equivalent of a late-placed child.'

G

At p 39 she said:

'All I can say, because I have not met the mother, is that there would be more security within an adoption order than within a residence order where she retains her parental responsibility.'

H

Those questions and answers, and the evidence generally given by Miss Adcock, are important in the context of the judge's findings as to adoption.

That very experienced witness was of the opinion that an adoption order was clearly the right course to take in this case. That was evidence which the judge was entitled to accept if it accorded with his views on the case overall.

Finally, on p 54, Miss Adcock said:

> 'But we are not starting with an equal situation. We are not starting with a new-born baby and saying, "Which of these two sets of parents would be better?" What we are starting with is a well-attached child who has had 18 months of his life and who would have to suffer what I think all of us agree would be pretty intense short-term distress in the hope that what he would go to would eventually turn out to be equivalent of what he is getting already in his adoptive home, plus that little extra bit of the immediate access to his genetic inheritance.'

Doctor Cameron is an extremely experienced child psychiatrist who has given evidence in many difficult cases concerning children. Because he was instructed late in the day, Dr Cameron had not seen any of the people involved. However that was not, in reality, any grave disadvantage to him because there are, in this case, in truth no factual issues to be resolved between the parties and there is no great difference of view in the assessment of the characters of the father and his fiancée and the prospective adopters. Doctor Cameron's report commences at p 149 of our bundle. At p 161 he said:

> 'It is accepted that permanence is the young child's first requirement. Knowledge of their family roots and acquiring a sense of identity come second. Although for the child in an ordinary family, "permanence" and "identity" coincide, permanence remains the first requirement for a child in a substitute family placement.'

The doctor was asked questions about research on this topic. On p 167 he said:

> 'The view of this report is that the potential benefit, from being transferred to the care of his father in Edinburgh, is significantly outweighed by the risk of short-term and middle-term harm, and possibly even long-term ill effects which will persist into adulthood.'

On p 173:

> 'The two infant separations are something S will learn about and come to terms with as he grows up. He has suffered no other harm in the past. He is at risk of suffering the emotional harm of separation which will emerge as the protest, despair, detachment reaction, if he is taken away from the only family and home he has known since he was 9 weeks old.'

His summary and conclusions are to be found on p 174. He describes S as a healthy, happy toddler, developing well. He says that:

> 'The likely benefit (exclusively in terms of identity) of a move is slight, whereas the risk of him being significantly emotionally bereaved by

A separation/loss is real, even though the extent of that harm is unquantifiable.'

His evidence is at p 105 of the transcript bundle. At p 120 Dr Cameron said:

B 'The long-term disadvantage that children have in adoptive and foster-placements when they grow up is small, and that the follow-up of infant adoptions, which was carried out particularly by someone called Mia Kelmer Pringle some years ago, is that the actual child outcome when they reached adulthood was that they were virtually indistinguishable from children who had been brought up in birth families: These were infant placements. The outcome of infant placements indistinguishable
C from …'

And the witness was interrupted by the judge.

On p 129 Dr Cameron said:

'The difficulty I found myself faced with in this case are [sic] that Mr and Mrs A are not interim carers. They are not foster-parents working for the
D local authority. They are adopters, and their commitment to S was absolute, has been and still is, and S's commitment to them has therefore been that emotional attachment or bonding which is more profound and in my view almost identical to that which you get in birth families.'

Page 156 in answer to a question from the judge, Dr Cameron said:

E 'As far as I am concerned, your Honour, the first and most important decision is which home he is going to be brought up in, and that's obviously as a child's … my principal concern, but the issue which is really for the court and the lawyers to decide is whether he should be adopted or whether there should be some other order like a residence order.

F Miss Mayer: What do you think, Dr Cameron, you have been giving evidence in adoption cases for many years?

A: Well, there's a balance to be struck between the finality and the security that an adoption order would give to the child, on the one hand, against the benefits to the child of knowing that there was a birth father who really was determined to find him and did his best, and who he still sees, and the respect that that would be recognised by the making of a
G residence order, and in my view this is the sort of case which I agonise over myself but I would come down more in favour of a residence order with contact rather than making an adoption order at this time, and I know that that's hard for those who are caring for S at the moment to hear, but I actually think it's a proper recognition which I would be able to say to S if ever I had to: "Everybody met your first daddy and S and they thought
H they were marvellous people and we wanted you to keep in contact with them and therefore a residence order was made and your position in terms of relating to them was sustained".'

Over the page at p 158:

'Q: That is another problem because if there is a residence order then the birth mother might start nibbling away as well.
A: Well, the latest statement she put in this morning seemed to imply that she was going to leave well enough alone.
Q: Yes, but she has given that more than once so I would not have too much confidence in that.
A: I know.'

At p 167 Dr Cameron said:

'My advice in this case is that there is a risk, it is a significant and a serious risk to disturb a child who is well settled without other very powerful causes one would be needlessly interfering with the welfare of that particular child.'

Page 174:

'Miss Judd: I think you said at the beginning of your evidence that there were two very important things for a child in growing up, one was permanence and the other one was identity.
A: Yes.
Q: So it follows from what you say that permanence is extremely important for S?
A: Permanence, as I have said in my report, as generally accepted, is the central basis for a child's well-being as they grow up, and for their future in adult life.
Q: If S was to stay with A and A, the best thing for him would be to know that he was there permanently?
A: Yes, definitely.
Q: They want an adoption order, that is what they would prefer. Can you see that for them, and in law as well, there is more permanence about an adoption order than about a residence order?
A: Yes, I do see that, and residence orders finish at 18, too, there is not the continuity into adulthood.'

Over the page the witness said in the centre of a long answer:

'I do see the attraction of the finality of changing S's status and making him subject to an adoption order, but I just have a suspicion that for S's life story the fact that he has been the subject of a residence order before his father came forward, etc, etc, and his father's position was therefore acknowledged by the authorities by the making of that order, that would be good for S to feel that his father, you know, genuinely wanted him; the court approved of him as a father, they therefore didn't override him and exclude him, but nevertheless they decide (if that is the decision of the court) that he, S, would stay with his potential adopters under a residence order and that would respect his two families, and certainly to my mind that would be a balance which would be clearly explainable to both families. It would also allow [the father] to feel that he's still got the approval of the court in giving a generous in-put to his son. I am reluctant to have too many parents, you know …'

A On p 182:

> 'Q: If any adoption succeeds this one has as good a chance as any?
> A: This is the optimum adoptive placement you could ever imagine. But I was meaning that, your Honour, in terms of the age of the child at placement, the fact that the child was the result of a normal birth and delivery, the fact that the perinatal events were all right, etc, etc. Everything was positive about S. The fact that the adoptive parents met the birth mother, albeit after the placement. They have had face-to-face contact, and all these ideas about permission giving, entitlement and claiming all come into that and it makes you feel all right to have the child under those circumstances.'

C On p 197 Dr Cameron said:

> 'My recommendation is based on the principle that I do not do harm to a child by displacing him from a secure and settled home where he is doing well without very good reason indeed. Now, a good reason that has been advanced has been identity. In my view that can be answered satisfactorily by the things we have gone into already, and I think that the other reasons that have been advanced are apprehension about the future, a bad time in adolescence and that sort of thing, in my view if the child has got a very positive adoptive home, as S has (I am using that term advisedly) then the chances of him having a bad time in adolescence really are very small.'

E The report of Mrs Alway, the guardian ad litem, commences at p 120 of our bundle. At p 145 she reports:

> 'For the reasons outlined throughout this report I do not consider … a natural relationship with them.'

F Mrs Alway sets out her conclusions at p 147 of the bundle. At para 107 of the report she says:

> 'I believe that S would be better placed within his natural family. I am impressed by the caring attitude of [the father and his fiancée]; they appear to have a strong and loving relationship. Both the extensive P and L families have a strong sense of the importance of the family. They are committed to supporting the couple in any way they can.'

G Paragraph 108:

> 'I am therefore of the view that notwithstanding the trauma S may suffer in the short term the benefits he will gain by being a member of his father's family for the remainder of his childhood must outweigh the option of being adopted and all the problems that will occur when he questions the reasons for his adoption. If he is told the truth he may well be very resentful and angry with his mother and with his adopters for preventing him from living with his father.'

Her evidence starts at p 203 of the transcript bundle. At p 205 she was asked:

'Q: Dr Cameron said there is a real risk to S and that risk should not be taken. Why do you feel that risk should be taken?
A: I do feel that risk should be taken, yes.
Q: Why?
A: If we accept the fact that there would be short-term trauma. I'm not so sure about after that. I accept that it will probably be 3 months, although I have experienced it might be considerably less …'

On p 222:

'Q: We have heard a lot of research in this case and percentages and predictions: are you saying that this child should go back because of this family in Scotland, this particular family?
A: Yes.
Q: This case you are talking about, you are not talking about research or about extrapolation, you are saying it is because it is your gut feeling from your experience as a guardian and social worker?
Judge Clark: She is using her brain as well.
Miss Mayer: Not that feeling but …
A: No, experience, yes, experience and having assessed the situation the best I could in the three times I saw them, I looked at the family very carefully.
Q: The gut feeling (I am sorry about the expression) really comes into the question of optimism, I am right in saying that you are much more optimistic about the likely placement of S with [the father and his fiancée] than Dr Cameron is.
A: Yes, I am, I am, yes.'

On p 237 Mrs Alway said:

'I am far, far more optimistic than he is and I have seen – I think it's very – a lot of it [is] dependent upon the care that he will receive, and I've seen [the father] and I've seen [his fiancée] a great deal and I'm quite confident that they will give him the love and understanding that he – to help him through this.'

Page 239:

'Q: Are you saying that that is what Mr and Mrs A could not have for S, an innate love and tolerance?
A: They're not family, they're a substitute family.'

Page 247:

'Q: You feel very strongly about the rights of this other family, do you not?
A: Yes, I think every child should be brought up in their own family unless that family is unwilling or unable to look after him.

A Q: Regardless of whether it is in the interest of the child …
A: I think it is in the interest of the child.'

Page 254:

'Q: Can I put it to you that the evidence you have just given that S would be in no different position than any other divorce situation shows that you
B simply do not pay any regard to the trauma and the effects of a move to S?
A: Yes, I do, I think there will be short-term trauma, but I don't think there will be long-term trauma, and I think the gains that he will receive by being with his natural family, and seeing part of his maternal family, both sides, and maybe his mother later on, will be of immense benefit to him.'

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The judge also heard very important evidence from the father, from the father's fiancée, Miss L, and the proposed adopters, Mr and Mrs A.

I turn in the context of that resume of the evidence to consider the issues that arise on this appeal.

(1) With which family should S live?

D The first and important issue that arises is whether the judge was right to come to the conclusion that S should live with the A's rather than with his father and his family. This was undoubtedly the most important issue in the case and the one to which the bulk of the evidence was directed. Perhaps for that reason, I find it the easiest to resolve in the context of an appellate jurisdiction. The judge had a body of evidence. As I have indicated, he heard
E evidence not only from the experts but also from the proposed adopters, the father and Miss L. The experts were divided. Doctor Cameron and Mrs Adcock were of the firm opinion that S's best interests were with him remaining in the care of Mr and Mrs A, whereas Dr Banks and Mrs Alway took the opposite view.

Mr Mark Everall QC, on behalf of the father, submits that the judge was plainly wrong in the balancing exercise carried out by him. It is submitted
F the judge failed to make proper findings as to the extent of the harm that could be suffered by S if he were to remain in the care of the applicants, or the advantages to be gained by S which would arise if he lived with his father and natural family. Mr Everall relies on the evidence of Dr Banks and Mrs Adcock and invited our attention to a number of passages in the reports and the transcripts, to some of which I have referred. He submits that the judge failed to give proper weight to that evidence. He submits that
G Dr Cameron failed to give proper weight to the care and commitment of the father and Miss L. In particular Mr Everall submits that the judge did not give proper weight to the advantage of S being brought up by his father and the father's family.

In support of those submissions Mr Everall invited our attention to the relevant authorities. In his submissions on this aspect of the case Mr Everall
H was supported by Miss Slomnicka, counsel for the guardian ad litem. Miss Slomnicka submitted that the judge was plainly wrong in refusing to grant the father a residence order and in concluding that if S was to remain with Mr and Mrs A his welfare would be safeguarded and promoted by the making of an adoption order rather than a residence order. She strongly

submitted that the judge did not give proper weight to the importance of S being brought up by his father and his natural family. She submitted that there is a presumption that it is a child's right to be brought up by his natural family.

In support of her submissions she relied on a number of cases, including *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806, sub nom *Re KD (A Minor) (Access: Principles)* [1988] 2 FLR 139; *Re K (A Minor) (Custody)* [1990] 2 FLR 64; and *Re M (Child's Upbringing)* [1996] 2 FLR 441. She submits that the judge failed to give proper weight to the evidence and the recommendations of the guardian. I do not accept the submission that the judge did not have proper regard to the importance of the blood and family ties. Reading the judge's judgment, it is quite clear that he did have in the forefront of his mind the great importance of those factors.

Mr McFarlane QC, who also appears on behalf of the local authority, supported the judge's order and relied on the judge's findings. He stressed that there is no suggestion in this case that the judge failed to direct himself correctly as to the law applicable to it. He stressed that S has lived with the applicants since he was 2 months old and that the decision must be based on welfare considerations. He invited our attention to the relevant passages in the transcript in support of his submissions.

This was undoubtedly, as I have said, an anxious case for the judge. It is abundantly clear that he gave it anxious and full consideration. The judge made a reference in his judgment to all witnesses who gave evidence, in particular the expert witnesses. In the context of this case it is quite impossible, in my judgment, to say that he did not have firmly in mind the evidence given by those witnesses or that he failed to pay adequate regard to them. He plainly had firmly in mind the evidence of Dr Banks and Mrs Alway.

Section 1 of the Children Act 1989 provides that the child's welfare shall be the court's paramount consideration. Section 6 of the Adoption Act 1976 places a duty upon the court in reaching any decision relating to the adoption of a child to have regard to all the circumstances, first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood. It is abundantly clear that the judge had those principles very firmly in mind in his consideration of the various issues in this case.

The judge reviewed the evidence and then he said on p 10 of his judgment:

> 'In this very unusual case I have reserved judgment, pondered and re-considered the evidence and submissions and come to the firm conclusion that S should continue to reside with the A's.'

He took very much into account the fact that the order would substantially break the parental tie between S and his father. He accepted, as he was entitled to do, the evidence of Dr Cameron and Mrs Adcock. The effect of that evidence was that S had formed very close bonds with the A's and was secure with them and that, at 18 months of age, to remove him and break those bonds, was capable of having a very adverse effect on S's personality and security. In those circumstances the judge was entitled to take the view that there were 'compelling factors requiring him to override the prima facie right of the child to be brought up by its surviving natural parent' (*Re K (A*

Minor) (Custody) [1990] 2 FLR 64, 65H).

The task of the judge was to make up his mind in the light of the totality of the evidence and the principles contained in the Children Act 1989 and the decided cases whether the welfare of S required that he should order that S should live with his father, and the father's fiancée, or continue to live with the A's. Having considered the matter very carefully he concluded that S's welfare required that he should remain with the A's. Bearing in mind the length of time that he had lived with them and the strong bonds that had been formed, I have no doubt that the judge was right in coming to the conclusion that he did. However, much more important than that, it is abundantly clear, in my view, that the judge was entitled to reach the view that he did and this court could not possibly interfere with the wide discretion vested in the trial judge.

(2) An adoption order or a residence order?

The second issue that arises in the appeal is whether S should live with the A's under a residence order or an adoption order. The judge decided that there should be an adoption order coupled with limited contact with S and his father. In deciding this issue, the judge had to apply the provisions of s 6 of the Adoption Act. He concluded that the making of an adoption order as opposed to a residence order would give S greater stability. It would give the proposed adopters much greater confidence which would improve their relationship with S.

Although in recent years views in relation to adoption have, to an extent, altered, there can be no doubt that adoption gives the adoptive parents and the child greater security and confidence in the relationship. After all, if an adoption order is made, the adopters become the child's parents. If there is not an adoption order in place, the people with whom the child is living may always fear that there will be a change of status. There is a risk, unquantified in this case, that the mother might have a change of mind and reappear on the scene. Naturally enough, the father and his advisers place considerable reliance on the evidence of Dr Banks and the guardian and, most particularly, on Dr Cameron's view expressed in the witness-box that a residence order might be more suitable than an adoption order in this case. However, Mrs Adcock took the opposite view.

In *Re M (Adoption or Residence Order)* [1998] 1 FLR 570, Ward LJ said at 598:

> 'I ask myself whether the decision of this mother to veto the adoption comes within a band of possible reasonable decisions judging that question objectively by endowing her hypothetically with a mind and temperament capable of making reasonable decisions after having had regard to the totality of the relevant circumstances. She must in my judgment take it in the light of, and at the conclusion of, all the evidence and submissions presented to the court in which the judge expresses his conclusions and therefore finds the facts insofar as they were in dispute. She is not to make up her mind bound by the findings of the court. To impose those findings on her as the yardstick of reasonableness may lead to the error against which Lord Hailsham warned in *Re W* when he urged the court to be extremely careful not to substitute its view as to reasonableness for that of the parent. I remind myself that he said at 700D:

> "The question in any given case is whether a parental veto comes within the band of reasonable decisions and not whether it is right or mistaken. Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable."'

Ward LJ continues:

> 'So, in my judgment, a reasonable parent does not place the relevant factors in her scales with the benefit of hindsight of the judge's findings or opinions.'

Although not the most important issue in this case, it is relevant in my judgment that an adoption order is made for life, whereas a residence order ceases to have effect either at the age of 16 or 18. There can be no doubt that, in an appropriate case, it is advantageous for a small child to grow up in the knowledge that he remains a child of the family until the adoptive parents die. Furthermore, K, who S regards as his sister, is an adopted child and S might feel, if no adoption order is made, that he is in a less favoured position than K. Mr Everall submits that if the child is to live with Mr and Mrs A rather than his natural father, then a residence order coupled with an order under s 91(4) of the Children Act 1989, limiting further applications, would provide wholly adequate protection and security. Mr Everall relies heavily, and naturally, on the evidence give by Dr Banks, the guardian and Dr Cameron. Again, he invited our attention to the relevant passages in the reports and the transcripts.

The judge took the view that the need to have confidence in S's stability and security, both from his point of view and the point of view of the A's, led him to the conclusion that S's welfare would be best safeguarded and promoted by an adoption order rather than a residence order. In my view that was a decision he was entitled to reach on the evidence as a whole and one with which this court should not interfere.

(3) Withholding the father's consent to an adoption order

The third issue is whether it has been shown that the judge was wrong to find that the father was withholding his consent to adoption unreasonably. The judge directed himself correctly in relation to the law and asked himself the appropriate question, namely, what a reasonable parent would have done in all the circumstances, bearing in mind that the reasonable parent would put the child's welfare first. The judge took into account the factors which were placed before him on behalf of the father and he then considered the counter-factors. He said that a reasonable father would take into account the risk of the mother reappearing and seeking to rock the boat. He would appreciate that permanence and security were essential for S's well-being and should override all other considerations. He should take into account the confidence that an adoption order would bring with it. That confidence would in itself facilitate contact between the father and his child.

It is recognised that the most helpful guidance to be found by a court in considering this issue in an adoption case is in *Re W (An Infant)* [1971] AC 682 to which the judge referred in his judgment. In his speech at 698 Lord Hailsham quoted an important passage from the judgment of Lord Denning MR, in *Re L (An Infant)* [1968] P 119. He then said at 699:

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'But the test is still reasonableness, or its opposite, and reasonableness, or its opposite, must be judged, as Russell LJ observed in the instant case [1970] 2 QB 589, 598, and as both counsel agreed, by an objective (as distinct from a subjective) test. Indeed, I cannot myself readily visualise circumstances in which the words "reason", "reasonable" or "unreasonable", where either word is employed in English law, is

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normally a question of fact and degree and not a question of law so long as there is evidence to support the finding of the court. It seems to me that the passage in Jenkins LJ's judgment in *Re K (An Infant)* [1953] 1 QB 117 immediately following that which I have quoted above is too often forgotten and deserves to be better remembered. He said at p 130:

> "It is unnecessary, undesirable and indeed impracticable to attempt a definition covering all possible cases of that kind. Each case must depend on its own facts and circumstances."

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In my opinion, besides culpability unreasonableness can include anything which can objectively be adjudged to be unreasonable. It is not confined to culpability or callous indifference. It can include, where carried to excess, sentimentality, romanticism, bigotry, wild prejudice,

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caprice, fatuousness or excessive lack of common sense.

This means that, in an adoption case, a county court judge applying the test of reasonableness must be entitled to come to his own conclusions, on the totality of the facts, and a revising court should only dispute his decision where it feels reasonably confident that he has erred in law or acted without adequate evidence or where it feels that his judgment of the witnesses and their demeanour has played so little part in his reasoning

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that the revising court is in a position as good as that of the trial judge to form an opinion.'

That last passage is an extremely important one. Mr Everall invited our attention to the relevant provisions in the Adoption Act 1976 and to the relevant authorities in addition to *Re W*. In particular Mr Everall places

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reliance on *Re M (Adoption or Residence Order)* [1998] 1 FLR 570 and *Re E (A Minor) (Adoption)* [1989] 1 FLR 126. However, in both those cases, as is nearly always so, the decision itself depended on the particular facts of the particular case. Further, and more important, in both cases the Court of Appeal held that the judges had misdirected themselves in relation to the law to be applied to the issue as to whether the consent of the parent to an adoption order was unreasonably withheld, whereas in this case the trial

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judge directed himself properly and correctly as to the law which he then applied.

Very naturally, Mr Everall says that if three experts who gave evidence in the case, Dr Cameron, Dr Banks and Mrs Alway, were of the opinion that a residence order rather than an adoption order was more appropriate, then it cannot sensibly be said that the father is withholding his consent

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unreasonably, or that his decision does not come within the bound of decisions which a parent can reasonably make. That is an attractive argument but is, in my judgment, a non sequitur. It overlooks the fact that the test is an objective and not a subjective one. It does not matter how many witnesses take the view that a residence order would be the right order if an

objective parent, at the conclusion of all the evidence, or at any other point of time which may be relevant, would conclude that the paramount interest of the child plainly required that an adoption should be made. Mr Everall submits that the judge did not ask himself the question whether the decision made by the father came within the bound of reasonable decisions that a parent might make, but having cited at length from *Re W* he must have had that question in mind when he came to his conclusion.

Mr Everall submitted that the father was entitled to rely on the importance of family tie and the fact that he comes from a family which has a strong sense of unity and family values. He submits that in effect the judge substituted his own views for those of the father. He criticises the judge's reliance on the concept that if a residence order as opposed to an adoption order was made, the father might at some future date seek to rock the boat. In my judgment that prospect is not so remote that the judge would wholly ignore it.

Finally, Mr Everall relies on the sense of great injustice felt by this father by reason of the local authority, to inform him of the existence of his child and the breach of duty owed to him by the local authority. He says that there was a breach of Art 8 of the European Convention on Human Rights and invited our attention to the case of *Keegan v Ireland* (1994) 18 EHRR 342. Those are all very relevant considerations. Mr Everall's submissions were again supported by Miss Slomnicka on behalf of the guardian who stressed the central importance of the blood and family tie.

An issue arose in this case as to the point of time at which the judge should judge the reasonableness or otherwise of the father's refusal to give consent to adoption. Mr Everall says that the appropriate point of time is at the conclusion of all the evidence in the case. Mr McFarlane submits that the appropriate point of time is the point when the judge has made his decision on welfare grounds as to where the child should live. There is, of course, an unreality in relation to asking questions of that kind. That unreality is in itself created by the concept of the hypothetical reasonable father. There is no doubt in this case that at both points of time the father would have withheld his consent.

Mr Everall relied on the passage of Ward LJ in *Re M (Adoption or Residence Order)* [1998] 1 FLR 570, 598 which I read earlier. There can be no doubt that that passage in Ward LJ's judgment was apt and right on the facts of that case. However, in that case, there was no issue in relation to the child's residence as it was common ground that the child should continue to live with the alternative family.

In my view, the resolution of this issue is not central to this case, because the result would be the same in either event and this particular point was not considered by the judge. However, in a case such as the present where the child's permanent home is very much in issue, in my judgment, it is logical and correct to take the issues in sequence and for the judge to arrive at a conclusion as to where the child's permanent home should be and then, in the light of that conclusion, arrive at the further conclusion as to whether or not the parent's consent to adoption has been unreasonably withheld.

In *O'Connor and Another v A and B* [1971] 1 WLR 1227, Lord Reid said at 1229:

> 'Adoption cases depend so much on general impression rather than the ascertainment of particular facts that when the judge at first instance has seen the parties an appeal court must be slow to reverse his decision

A unless he has misdirected himself as to the law or has otherwise clearly gone wrong.'

That is a very important statement of principle. At 1237 he emphasised that it was to the court of first instance to which Parliament has vouchsafed the primary responsibility of weighing the various conflicting considerations, the one against the other.

B The judge was very firmly of the opinion on the totality of the evidence that it was in S's best interests that an adoption order should be made. He thought, rightly, in my view, that an adoption order was more likely to facilitate easy contact between S and his father than a residence order. He was confident that an adoption order would secure S's stability in the family of Mr and Mrs A. In my judgment he considered all the relevant facts and

C the relevant law. I confess that I have found this the most difficult aspect of this appeal but, in the end, I am not persuaded that the judge was wrong to come to the conclusion that he did on this issue and to make a finding that the father was withholding his consent unreasonably.

In those circumstances, it is not necessary for the court to consider the interesting issue raised by Mr McFarlane on the cross-appeal and I do not propose to do so.

D For the reasons I have given, I would dismiss this appeal.

MANTELL LJ: I agree.

BUXTON LJ: I agree that this appeal should be dismissed for the reasons given by my Lord.

E *Appeal dismissed. No order for costs on the cross-appeal. Legal aid Taxation of father's costs. Leave to appeal to House of Lords refused.*

Solicitors: *Wilford Monro* for the father
Patrick Smith & Co and *local authority solicitor*
Griffiths Robertson for the guardian ad litem

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PHILIPPA JOHNSON
Barrister

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