

RE J (ADOPTION: CONTACTING FATHER)
[2003] EWHC 199 (Fam)

Family Division

Bennett J

14 February 2003

Adoption – Unmarried father – Mother’s opposition to informing father of child’s existence – Existence of ‘family life’ under European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Art 8

The mother gave birth at the age of 16. The mother and father had been seeing each other for about 2 years and their relationship ended just after she became pregnant. They had had no contact with each other since then and the father knew nothing of the pregnancy or birth. The mother wanted the child to be adopted, and did not want the father to be informed. She gave the local authority details of the father only after receiving assurances that the father would not be informed of the child’s existence. The child was subsequently diagnosed as suffering from severe cystic fibrosis. The local authority sought declarations that it was in the child’s best interests for the father to be informed of his existence, and that it was lawful for the local authority to inform the father, notwithstanding the mother’s objection.

Held – granting a different declaration from that sought, namely, that it was lawful for the local authority not to inform the father or his family of the existence of the child, and that it was lawful for the local authority to place the child for adoption without consulting the father –

(1) There was no ‘family life’ for the purposes of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 between the father and child. The mother and father did not have a strong commitment to each other. They had never cohabited, their relationship took place in their teenage years and was comparatively short-lived, and they had not seen each other since the relationship came to an end. The relationship did not have sufficient constancy to create de facto family ties for the purposes of establishing the existence of ‘family life’ between the father and child (see para [23]).

(2) The exceptional facts of this case were such as to take it outside the general rule that fathers should be informed of applications to adopt or free for adoption. The potentially damaging consequences to the mother of the news leaking out into the community should the father or his family be informed of the birth outweighed any potential advantage to the child of informing the father. The child was likely to gain nothing from the father or his family being informed of his birth. The father, having had no wish for the mother to become pregnant, and having moved away from the area, was unlikely to want to have anything to do with the child. Given the child’s medical condition and care requirements, it was also unlikely that the father’s parents would want to care for the child. There was, therefore, likely to be little to be gained from seeking a placement within the father’s family. In addition, it was impossible to ignore the fact that the mother had revealed the father’s identity in the belief that he would not be informed of the birth (see paras [35]–[39]).

Per curiam: a failure to inform the father that he may be a carrier of cystic fibrosis was not an interference with his right to respect for private life under Art 8 of the European Convention (see para [24]).

Statutory provisions considered

Adoption Act 1976, ss 16, 18

Children Act 1989, ss 20, 22, 100

Adoption Agencies Regulations 1983 (SI 1983/1964), regs 7(3), 12(2)(aaa)
 Adoption Rules 1984 (SI 1984/265), rr 4(2), 15(2)
 European Convention of the Protection of Human Rights and Fundamental
 Freedoms 1950, Arts 6, 8

Cases referred to in judgment

B (Adoption by One Natural Parent to Exclusion of Other), Re [2001] 1 FLR 589, CA
Botta v Italy (1998) 26 EHRR 241, ECHR

H, Re; Re G (Adoption: Consultation of Unmarried Fathers) [2001] 1 FLR 646, FD

L (A Child) (Contact: Domestic Violence), In Re; In Re V (A Child); In Re M (A Child); In Re H (Children) [2001] 2 WLR 339, [2000] 4 All ER 609, sub nom
Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence) [2000] 2 FLR 334, CA

M (Adoption: Rights of Natural Father), Re [2001] 1 FLR 745, FD

P (Adoption) (Natural Father's Rights), Re [1994] 1 FLR 771, FD

R (Adoption: Father's Involvement), Re [2001] 1 FLR 302, CA

Z County Council v R [2001] 1 FLR 365, FD

Barbara Slomnicka for the local authority

Remy Zentar for S

Ross Duggan for CAFCASS

Cur adv vult

BENNETT J:

[1] S lives in the Midlands and is now 17 years old having been born on 1 November 1985. She lives with her mother and her sister who is 13. She and her sister attend the same school. D is now 17 years old and lives in the north-east. However, for some time he lived in the same place as S and became very friendly with S during that time. As a result, S became pregnant by D and a boy, J, was born to the mother on 6 March 2002 at a hospital in Manchester which was not S's local hospital. S has never seen J and told the hospital staff that she wanted him to be adopted. On 7 March 2002, S's mother took her home. S has subsequently made it clear that she does not wish D or D's family to know anything about her pregnancy and J.

[2] On 27 March 2002, J was diagnosed as suffering from cystic fibrosis. I have before me a report of 13 December 2002 by a professor of paediatric gastroenterology and honorary consultant paediatrician, in which he said:

'J suffers from cystic fibrosis which is a common inherited condition, and is incurable. The disease is characterised by recurrent respiratory tract infections and malabsorption of nutrients because of a lack of digestive enzymes. Projected survival of patients with cystic fibrosis is currently into the forties, although there is considerable variation. J first developed symptoms in early infancy when he apparently developed signs of intestinal obstruction. Subsequent investigations confirmed cystic fibrosis with genetic analysis showing he has two copies of the commonest cystic fibrosis gene mutations, the Delta F508 mutation. This is generally associated with more severe disease, characterised as above.'

Opinion

J is likely to need lifelong treatment including chest physiotherapy, digestive enzymes and vitamin supplementation. He is likely to experience recurrent respiratory infections that will require oral or intravenous antibiotic therapy. Over time, it is likely that he will develop lung impairment with the majority of cystic fibrosis patients dying from respiratory complications.

As there is a firm genetic diagnosis in this case, it is unlikely that any further background knowledge of his genetic parents would be of benefit in either deciding on a prognosis or assisting in his future care and treatment. Survival in cases of cystic fibrosis is significantly influenced by social circumstances and there can be little doubt that the better his treatment is supervised and the more regularly he receives treatment which complies with changes in therapy, the better his outlook. It is vital that J is placed with a caring and stable family and receives appropriate support.'

[3] On 21 October 2002, the local authority issued an originating summons seeking the following orders:

'1 A declaration that it is in the best interests of the child for the plaintiff (ie the local authority) to arrange for a social worker to make contact with the child's father to inform him of the existence of the said child and consult him in relation to the permanent placement of the said child.

2 Declaration that notwithstanding the objection of the defendant (ie S) it is lawful for the plaintiff to arrange for a social worker to make contact with the child's father to inform him of the existence of the said child and to consult him in relation to the permanent placement of the said child.'

The mother strongly objects to the father knowing anything about J.

[4] On 26 November 2002, District Judge Atkinson granted the local authority leave to apply pursuant to s 100 of the Children Act 1989. He made various orders as to the filing of evidence and ordered that the matter be listed for hearing on 6 February 2003 on the basis of submissions only.

[5] There are three statements in front of me. The first in point of time is that of Miss C, a social worker employed by the local authority, of 21 October 2002. S made a statement on 20 January 2003, as did her mother. Nobody asked for S or her mother to give evidence and be cross-examined. Neither Miss Slomnicka, counsel for the local authority, nor Mr Duggan, counsel for J's guardian, made any criticisms of the evidence given by S and her mother other than that it was 'uncorroborated'. I see no reason why I should not accept it.

[6] It is apparent that D and S had been going out for about 2 years and that their relationship ended just after S became pregnant. Thus, the relationship would have ended in the middle of 2001 when both D and S were about 15 or 16. At the end of the summer 2002, D left the Midlands and went to live with his mother in the north-east. D's father remained living in the Midlands.

[7] When S first suspected that she was pregnant she did not tell anybody and tried to blank it out of her mind. She did not even tell her mother. She only found out that S was pregnant on 5 March 2002 when late at night S was in her room crying with pain as she had gone into labour. S told her mother that she did not want anyone to know about the pregnancy and the child. Thus it was arranged that she would not go into the local hospital but would go to a hospital in Manchester. After J was born the hospital staff contacted social services.

[8] On 7 March 2002, a social worker of the local authority, Miss T, visited S and her mother. During the meeting, according to S, Miss T asked her a lot of questions about her family saying that she needed it for her records. Miss T asked S to give her details of J's father but S refused. According to S, Miss T asked her over and over again for details and she felt very pressurised. Miss T told her that she needed this information for her files, it would not go any further, and that under no circumstances would D be informed. S says that Miss T told her that the information was only needed if, for instance, J was 18 and wanted to access the information on his file. She eventually told Miss T after she had been promised that D would not be told because otherwise S would be in trouble. Miss T said that she would not put it in her forms which she had to complete but would just note it down in a notebook.

[9] Miss C, in her statement, said that Miss T supplied S with information about adoption, left a form for S to read and sign and that S fully understood the implications of J being adopted.

[10] J was discharged from hospital on 11 March 2002 and placed with foster carers. S had signed the consent forms placing J in the care of the local authority under s 20 of the Children Act 1989.

[11] S was not informed about J suffering from cystic fibrosis until after she had completed her GCSE exams in the summer of 2002. S was then duly told.

[12] On 9 July 2002, Miss T had a meeting with her area manager. Miss T said that she had told S that D would not be contacted and that his details would remain on J's file for him to pursue in later life. S and her mother had then asked for D's name and details to be erased from the file and Miss T had stated that the information would not be used.

[13] It seems to me from the evidence of Miss C that it was the diagnosis that J suffered from cystic fibrosis that persuaded the local authority that it ought to approach D and tell him about J.

[14] The only people apart from the local authority who know about J's birth are, of course, S and her mother. S's sister and her 84-year-old grandmother, with whom she has a very good relationship, know nothing. S is worried that if D and his family are told about J it will have serious repercussions on her, her sister, and her grandmother. S is currently studying for her A-Levels. She is very concerned that if it becomes known that she has had a baby that she will be bullied or tormented and thus will not be able to continue with her schooling. She is also worried about her sister who is at the same school. S and her sister know of a schoolgirl who became pregnant whilst still at their school and she was forced to leave as her life became impossible due to taunting and unpleasant comments. As for her grandmother, she is a pillar of the small community and S believes that she would be extremely embarrassed and ashamed.

[15] S's mother has said that D, if told about J, would not be able to keep the information to himself and would certainly tell his friend, X, who goes to the same school as S. Further, D would tell his father and the information would leak out into the local community that way as well. According to S and her mother, D comes from a fractured family. His parents have separated which he found very difficult to come to terms with. He was not able to live with his mother and so moved to live with his father and stepmother. He has apparently been in trouble with the police on occasions concerning vandalising a car and possibly criminal damage. D was expelled from school for a time and was only allowed to return after he had seen a psychiatrist. D has a very short temper. Although he never hit S, he came close to doing so. He told S, when one of the girls in their school became pregnant, that if she ever became pregnant he would 'leather' her.

[16] S's mother in her statement said that S is continuing with her education but she has been very depressed and upset. She has been deeply worried about the possibility that details of J's birth will become common knowledge. She is very concerned for S should D and his family be told about J.

[17] S does not believe that D or his family would wish to care for J. D's father has remarried. He has two children of a year and a few months old. D's mother has also remarried and has living with her children from her first marriage aged 19 and 18. D has a brother who has fathered a child who has cystic fibrosis.

[18] The law in this field has been comprehensively set out in the judgment of Dame Elizabeth Butler-Sloss P in *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646 between paras [15] and [35] regarding English domestic law and paras [37]–[43] regarding the European Convention of the Protection of Human Rights and Fundamental Freedoms 1950 (the European Convention). I shall not, therefore, repeat what the President said but I shall show how the facts of this case fit with reference to the law.

[19] J is being voluntarily accommodated by the local authority under s 20 of the Children Act 1989. The local authority is, accordingly, under the duty imposed by s 22. S has parental responsibility of J. D is not a 'parent' for the purposes of the Adoption Act 1976 and has no right to consent to, or refuse his consent to, adoption or freeing for adoption under ss 16 or 18 of the Adoption Act 1976. D is not entitled as of right to be given notice of adoption/freeing for adoption proceedings under rr 4(2) or 15(2) of the Adoption Rules 1984. However, a court giving directions for the hearing of an application for adoption of J or freeing for adoption may direct that D be given notice of the proceedings.

[20] The local authority, as the adoption agency, has obligations of counselling S and D, to obtain information about them, and to ascertain if D intends to apply for an order in respect of J. Those obligations need only be carried out if 'reasonably practicable'. Under reg 12(2)(aaa) of the Adoption Agencies Regulations 1983 the local authority must notify D of the proposed placement of J if to do so would be in J's best interests. The local authority is obliged, when considering if adoption of J is in his best interests, to satisfy itself that sufficient assessment has taken place to rule out rehabilitation or the placement of J with relatives, so far as it is reasonably practicable to do so. Unless D is made a respondent to an application for the adoption of J or freeing for adoption, the application would be uncontested. If D were to attend the hearing to object to an application being granted and provided good

grounds, it would have to be carefully considered. Finally, in considering D's position, it must be remembered that he is a parent for the purposes of the Children Act 1989 and is entitled to apply for residence or contact even without a parental responsibility order.

[21] Between paras [29] and [34] of *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646 the President set out the case-law, ie *Re P (Adoption) (Natural Father's Rights)* [1994] 1 FLR 771, *Z County Council v R* [2001] 1 FLR 365 and *Re R (Adoption: Father's Involvement)* [2001] 1 FLR 302. At para [35] she said:

'The English courts, therefore, recognise that in an adoption application (and this includes applications to free for adoption) the position of the natural father who does not have parental responsibility is, nonetheless, to be considered, and a decision has to be taken in each case whether to give him notice of the proceedings and whether to make him a respondent. The statutory framework to give him an opportunity to intervene in the proceedings is in place. The decision whether to give him that opportunity will have to be made in each case on its particular facts. As a matter of general practice, I would expect judges or district judges giving directions in adoption or freeing for adoption applications to inform natural fathers of the proceedings unless for good reasons the court decides that it is not appropriate to do so. The desire of the mother for confidentiality may carry more weight in some cases than in others.'

[22] The relevant Articles of the European Convention are Arts 6 and 8. The President set out in *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* the relevant case-law. In the instant case, the first issue is likewise whether there was a family life in respect of which there may be a breach. The question of the existence or non-existence of 'family life' is essentially a question of fact depending upon the real existence in practice of close personal ties. The notion of the 'family' is not confined to marriage and may encompass other de facto 'family' ties.

[23] In the instant case, D is J's biological father and has the right to make Children Act applications. He is entitled to respect for his family life in respect of J. However, the relationship between D and S was not one of cohabitation, took place in their early to mid-teens for a comparatively short time, and broke up. Since then D and S have not seen or contacted each other. Their commitment to each other was probably no more than teenage boyfriend/girlfriend; in any event it was not a strong one. In my judgment, there are no exceptional facts to show that their relationship had sufficient constancy to create de facto family ties and there is nothing substantial to show that D has a right to respect for his family life with J.

[24] That is not the end of the matter under the European Convention. It is submitted by Mr Duggan that, under Art 8, D's right to respect for his private life requires that he have access to the information that he is or may be a carrier of cystic fibrosis since it is an important piece of information for his future life. Mr Duggan was frank enough to say that he could cite no authority for this submission. I do not propose to say anything of a general nature about it. But in the instant case, even if Art 8 is engaged on this point then I do not accept that a failure to inform him would be an interference with such a right.

His right can be protected in the circumstances of this case. He must know that his brother is a carrier and he can take steps to inform himself or be advised as to whether he himself is likely to be a carrier.

[25] Accordingly, it is my opinion that, insofar as D is concerned, Art 8 is in no way engaged. Since no issue arises under Art 8 in respect of D, there is no issue under Art 6.

[26] I return, therefore, to the central issue whether it is, in the instant case, appropriate to depart from the 'general practice' (per the President at para [35] in *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646 or the 'general rule' (per Bodey J in *Re M (Adoption: Rights of Natural Father)* [2001] 1 FLR 745) that fathers should be informed of applications to adopt/free for adoption (in which I would include impending applications) unless there are good reasons to the contrary.

[27] Miss Slomnicka submitted that the local authority took a neutral stance and was not 'pressing' (her word) for disclosure to D of the existence of J. However, D's brother and/or family are caring for a child with cystic fibrosis and may be willing to care for J. The local authority has a duty under s 22 of the Children Act 1989, so far as is reasonably practicable, to ascertain the wishes and feelings of D and to give due consideration to them in making any decision about J. Similar duties arise under reg 7(3) of the Adoption Agencies Regulations 1983. When considering if adoption is in J's best interests, the local authority must satisfy itself that sufficient assessment has taken place to rule out rehabilitation or the placement of J with relatives. No such assessment can take place unless D and his family are told about J. D's extended family may be suitable for placement. Adoptive placements, particularly for a child with J's health problems, are difficult to find. Thus, it was in J's best interests that at least a placement with a member or members of D's extended family should be investigated. That cannot be done unless D and his family are told about J and the issue of a familial placement explored.

[28] Further, Miss Slomnicka submitted that if D is not told, there is a risk that he may, in the future, find out. Considering J's long-term welfare, it is said that it is better for the matter to be faced up to at this early stage rather than later.

[29] As to the European Convention, Miss Slomnicka referred me to a passage in the judgment of the President in *In Re L (A Child) (Contact: Domestic Violence); In Re V (A Child); In Re M (A Child); In Re H (Children)* [2001] 2 WLR 339, sub nom *Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H (Contact: Domestic Violence)* [2000] 2 FLR 334 at 351–352 and 345–346C respectively. She thus submitted that when there is a serious conflict between the interests of a child and one of its parents which could only be resolved to the disadvantage of one of them, then the interests of the child had to prevail under Art 8(2). J's best interests may require placement with D's extended family, if available. No harm or detriment can come to J by disclosure of his existence to D and his family. Thus, his best interests must prevail over those of S and any other member of her family.

[30] Mr Duggan advanced broadly similar arguments.

[31] Mr Zentar, for S, submitted that there should be no disclosure about J to D and his family for the reasons given by her and her mother in their statements. He said Art 8(1) was engaged in the private life of J, S, her sister, S's mother and grandmother. He referred me to *Botta v Italy* (1998) 26 EHRR

241. Although the European Court of Human Rights held that Art 8 was not applicable, it appears to have approved of the Government of Italy's submissions, in particular at para 32, namely that private life includes a person's physical and psychological integrity and that Art 8 is primarily intended to ensure, without outside interference, development of the personality of each in his relations with other human beings. Thus, in the instant case, S's psychological integrity would be compromised and possibly seriously jeopardised by others, whether in her family or in the local community, knowing that she had given birth to a child when only 16. Her schooling might be interrupted. Her sister's psychological integrity could also be severely impaired.

[32] Mr Zentar submitted that S had only told Miss T of the identity of D having been assured he would not be told. He referred me to *Z County Council v R* [2001] 1 FLR 365, in particular to the passage in the judgment of Holman J at 374 where he said it could be a grave interference for a public authority to reveal information (given in confidence) to persons whom the informant particularly specified should not be the recipients of that information. He also referred me to a passage at 367, namely:

'So far as I know, it has not previously been suggested, nor judicially determined, that that confidentiality of the mother cannot be respected and maintained. If it is now to be eroded, there is, in my judgment, a real risk that more pregnant women would seek abortions or give birth secretly, to the risk of both themselves and their babies. That risk is perhaps illustrated by this very case. [The judge referred to certain facts of the case, and continued] One wonders what harm might have befallen Robin or the mother if she had tried to have a secret birth. There is, in my judgment, a strong social need, if it is lawful, to continue to enable some mothers, such as this mother, to make discreet, dignified and humane arrangements for the birth and subsequent adoption of their babies, without their families knowing anything about it, if the mother, for good reasons, so wishes.'

[33] As to where J's best interests lay, he conceded that an adequate placement may be difficult to find. But whether a member or members of D's extended family might look after J was speculative. Given that the family already had to look after one cystic fibrosis child and the fact that J suffered from severe cystic fibrosis, it was improbable they would wish to care for him. He relied on the opinion of the professor that J is likely to require lifelong treatment and care of a very high order. Survival in cases of cystic fibrosis is significantly reduced by social circumstances. Thus, there is no benefit to J for D and his family to be told about J since the likelihood of J being placed there is remote.

[34] The local authority see it as their duty, unless relieved of it by the court, to inform D and his family for the reasons advanced on its behalf. In the end it is a question of balance whether this case is exceptional with the result that D and his family should not be told about J. In my judgment, it is.

[35] So far as J's best interests are concerned, he will, or is likely to, gain nothing from D and his family being told. I have little doubt that D sees his relationship with S as a transient affair now best forgotten. He had absolutely no wish for S to become pregnant and indeed saw a possible pregnancy in a

very negative light. He has had no contact with S since their affair and has moved away from the area. If told about J, I suspect at best he would be uninterested, at worst he would have nothing to do with him. D is still only 17 years old, with his life before him. I think it improbable that either his father or mother would wish to care for J bearing in mind his requirements as I have set out. D's probable negative attitude is unlikely to persuade any other member of his family to consider looking after J (for his lifetime). I thus see little or no point in the local authority seeking a placement for J within D's family.

[36] I am satisfied that disclosure to D and his family is likely to lead to the news leaking out into S's local community. D's father lives there. X, D's friend, goes to the same school as S and her sister. Miss Slomnicka rather tentatively suggested that the risk of leaks into the local community could be mitigated by the court making an injunction against D and members of his family preventing them from disclosing the facts to others. In my judgment, such an order is highly unlikely to have the desired effect and is incapable of effective policing. In any event, the very fact that Miss Slomnicka put forward this suggestion highlights the risk of a leak.

[37] The consequences to S of her pregnancy and J's birth becoming known are likely to be very difficult, if not impossible, for her to cope with. If she were taunted or bullied at school, something which she not unreasonably fears, I can well see it becoming intolerable. Furthermore, her sister too would be at risk of being taunted as well as S with all the possible consequences that that might entail.

[38] It should also be borne in mind that Miss T led S to believe that D and his family would not be told. I am satisfied that had Miss T not given S that reassurance it is highly unlikely that S would have revealed D's identity. As has been made plain by the President in *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646 at para [53] and reiterated by her in para [45] of her judgment in *Re B (Adoption by One Natural Parent to Exclusion of Other)* [2001] 1 FLR 589, Miss T ought not to have placed S in the position she did. Whilst I accept that the desire of S for confidentiality is not in itself a reason for not informing D about J, I cannot simply ignore the fact that such reassurance was given to S which led her to identify D.

[39] Accordingly, for the reasons I have given, I shall exercise the court's inherent jurisdiction by declaring that it is lawful for the local authority not to inform D or his family of the existence of J and that it is lawful for the local authority to place J for adoption without consulting D. I would be grateful if counsel would draft the appropriate declaration.

Order accordingly.

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