RE P (MINORS) (ADOPTION)

Court of Appeal

May LJ and Waterhouse J

29 July 1987

Adoption – Adoption by parent and step-parent – Application by natural mother and stepfather to adopt two children by her previous marriage – Third child not included in application but residing with applicants – Social worker and guardian ad litem opposing application on grounds that adoption order might be divisive to the three children and concerned over stepfather's alleged drink problem and his refusal to discuss matter – Judge refusing to grant application – Whether his decision 'plainly wrong' in all the circumstances.

The parents of three children had divorced and custody had been granted to the mother. Both parties had remarried. The mother and stepfather wished to give security to the younger children and applied to the county court to adopt them. The eldest child intended to keep in touch with the father and did not wish to be adopted. The younger children and the natural father were in favour of the adoption application. Both the social worker and guardian ad litem opposed the application because of the divisive nature of an adoption order to the three children and concluded that the application was premature as the family was in the process of adjustment to the divorce and remarriage and recommended the making of a joint custody order in respect of the three children. In the course of the hearing, there was an allegation that the stepfather had a drink problem and further enquiries were made. The guardian ad litem reported that she was unable to comment on the problem because the couple were unwilling to discuss the matter which suggested a lack of communication between them and, in any event, the stepfather had refused to discuss the matter with her. The judge refused to grant the application for two reasons. First, that although he accepted that the stepfather's drink problem was of diminishing concern, he took account of the apparent lack of communication between the couple and the stepfather's refusal to discuss the matter. Secondly, he was of the view that an order could be divisive and it would not be in the long-term interests of the children to dissociate the younger children from the elder child. Accordingly, he dismissed the application. The appellants appealed. It was contended that the judge's conclusions were plainly wrong on the following grounds: that the judge had made procedural errors by failing to comply with r. 23(4) of the Adoption Rules 1984 (SI 1984 No. 265) in that he had not invited the younger children to attend the hearing, there being no special circumstances rendering their attendance unnecessary; that he had been wrong not to interview the children on the subject of the adoption; that he had attached excessive weight to the stepfather's alleged drink problem and had failed to give adequate weight to the views of the children.

Held – dismissing the appeal –

(1) The underlying purpose of r. 23(4) of the Adoption Rules 1984 was to ensure that a child in respect of whom an adoption order was about to be made, fully understood the nature of the order. Although it was clearly necessary that a child capable of understanding should comprehend the nature of the order, the attendance of the child might not be necessary in any particular case in the light of information contained in the guardian ad litem's report. In the present case, there had been no breach of the rule since no adoption order had been made. Furthermore, the judge had before him ample evidence as to the children's views, and therefore it was wrong to say that he was under a duty to interview the children

before reaching his decision. There was no reason to believe that his decision would have been significantly affected by any discussion with the children. Accordingly, there was no substance in the procedural criticisms.

(2) It had been necessary for the judge to weigh in the balance all the relevant considerations, in particular, the response of the appellants to the enquiries on the stepfather's drink problem and his refusal to discuss the matter with the guardian ad litem and the impact, including the psychological impact, of an adoption order on the three children as a whole and individually. It was clear that the judge had all those relevant considerations in mind in reaching his conclusions and his opinion had been supported by two experienced persons, the social worker and the guardian ad litem who had had full knowledge of the relevant facts of the case. It followed that it was impossible to say that the judge had been wrong in his conclusions and there were no grounds to interfere with his decision.

Note The judgments were given prior to the relevant parts of the Adoption Act 1976 coming into force. Therefore, footnotes have been added showing the replaced provisions.

Statutory provision considered

Adoption Rules 1984 (SI 1984 No. 265), r. 23(4)

Cases referred to in judgment

D (Minors) (Adoption by Step-Parent), Re (1981) 2 FLR 102

G v G (Minors: Custody Appeal) [1985] FLR 894; [1985] 1 WLR 647; [1985] 2 All ER 225, HL

S (Infants) (Adoption by Parent), Re [1977] Fam. 173; [1977] 2 WLR 919; [1977] 3 All ER 671, CA

Miss Jacqueline Marks for the appellants;
Mrs Patricia Dangor for the guardian ad litem;
Miss Monica Ford for the local authority.
The father did not appear and was not represented.

WATERHOUSE J:

This is an appeal by prospective adoptive parents from the refusal of their adoption application by Judge Christopher Lea sitting in the Slough County Court on 19 May 1987. The appellants are the natural mother and stepfather of the two children who were the subject of the application. They are a son, N, born on 9 March 1984, who is now 13 years old; and a daughter, L, born on 13 November 1976, who is thus 10½ years old. They are both children of the natural mother's marriage to D. There is a third child, M, born on 27 September 1971, who is now approaching 16 years. He was not included in the application to adopt, but he lives with the two applicants. The mother, who is now 40 years old, married D, a man of about the same age as her, on 5 July 1968. He has had a varied career and latterly has been employed as a security manager for a large group at Ruislip.

The marriage broke down at the time of his voluntary redundancy in another employment and the decree nisi was pronounced on 30 November 1984 on the mother's petition based on D's behaviour. On that date the custody of all three children was committed to the mother. The evidence before the court below was that D was largely indifferent to all three children, although provision was made in the custody order for reasonable access to him.

Soon after the decree had been made absolute, that is, on 1 June 1985, the mother married the first appellant, P. It seems that, shortly before, she

and the children had set up home with him at Windsor on 15 May 1985. A further child has subsequently been born to the couple, a daughter H, born on 28 August 1986. P is of Dutch nationality and was brought up in Holland in a large family. He is the second of seven children, is now 46 years old, and is a qualified engineer. He was previously married on 28 February 1968 but that marriage came to an end in June 1982. During the marriage he lived and worked mainly in Germany and there are two children of it, a boy born on 13 December 1968 and a daughter born on 18 October 1971, who both live with their mother in Holland. P has been in the United Kingdom for the past 5 years and is now employed by an American company at Reading as a service engineer, with a comfortable income. He is thus able to provide his new family with a good living standard.

As for the natural father, D, he also remarried on 19 December 1985. His new wife has two sons aged 15 and 11 years by a previous marriage. His mother is 71 years old and lives in Wantage. She has a bachelor brother of the natural father living with her. There is also a younger married brother who has children.

The mother's father died when she was a baby and she was brought up by her mother, with a stepfather who married her mother when she (the natural mother) was 6 years old. The mother and stepfather are now aged 64 and 79 years. There is also a bachelor brother living with them at Abingdon.

The case presented on behalf of the appellants to the judge below was that the purpose of the application was to give security to the younger two children, N and L. It was said that they had a good relationship with the adoptive father and that he had been sensitive in dealing with them. It was stressed also that they were disaffected with their natural father because of his indifferent attitude to them since the divorce and his behaviour during the marriage. It was a plank in the appellants' case that the natural father supported the application and he was said to be strongly in favour of it: he wanted to be free of commitment to the minors and was willing for the eldest child, M, to be included in the application. His attitude to the children was said to be that any approaches that they wished to make to him should be by them rather than by him and he was somewhat cynical about the possible motivation for any such approaches if they were to be made. On the other hand, he was said to be willing to pay maintenance for the children if there was no adoption order.

A further point made on behalf of the appellants was that, whilst M did not wish to be adopted, he was reported as saying that he did not object to his brother and sister being adopted. It seems that he is concerned about his relationship with his natural father and intends to keep in touch with him, even though the father's response has been lukewarm at best. M does not wish to have his name changed and he had some difficulty in accepting his stepfather at first, although they had achieved a better relationship by the time of the application.

The evidence before the court was that the children who are the subject of the application wish to be adopted. They are, of course, still comparatively young, but they are capable of some understanding of the nature of the application and they were said to support it. Reliance was placed particularly on the views of the boy, because the girl is younger, but the

surname of the girl had already been registered as that of the stepfather at her school. The boy N was said to be articulate and intelligent and to have no desire to maintain any contact with his natural father. He was particularly interested in changing his surname to that of the stepfather.

The court had before it the required report from the local authority under r. 22(2) of and Sch. 2 to the Adoption Rules 1984 (SI 1984 No. 265) made by a social worker, Mrs L, in which she reached the conclusion that the adoption order should not be recommended. Commenting on the children's attitude (that is, N and L) she said, 'Apart from a name change, which is important to these two children, life for them would likely remain the same, with or without an adoption order.' The last paragraph of her conclusions read as follows:

> 'Should an adoption order be made excluding [M], I feel this boy could be adversely affected in future years. [M] feels that his father has more feelings for him than his brother and sister. His mother disagrees and [the father] showed me no evidence of this. Should the time come when [M] feels rejected finally by his father, he will need to at least feel he is equal to his brother and sister. [M] has said he would want to be included in a joint custody order between his mother and stepfather. I therefore respectfully recommend that Mr and Mrs [P] return to the divorce court and apply for a joint custody order on [the three children]. Due to the short time span between the divorce, remarriage and adoption application and because [M] would not be included in an adoption order, I feel a joint custody order would be more appropriate in this case.'

The guardian ad litem, Mrs S, reached a similar conclusion in her first report and said:

> 'From my observations, this family are still in the process of adjusting to all that has happened to them. The children and the mother still seem insecure. In my opinion, the effect of an adoption order could further isolate [M] from the family. Therefore, I am in agreement with Mrs [L]'s conclusion that a joint custody order would be more appropriate in this case.'

There were two further reports by Mrs S for projected hearing dates. She had become aware that P was suffering from high blood pressure and osteo-arthritis in his knees and ankles. Neither constituted a serious medical problem, but the doctor had disclosed an approach in confidence by the natural mother in November 1976 in relation to an alleged alcohol problem of P. The second report of Mrs S contained some details of the attitudes of the parties to this matter. At the request of the judge, Mrs S made further inquiries about the alleged drink problem and the third report, by way of an addendum, set out the following conclusions:

> '[The mother] was anxious during my visit and appeared to minimize the concern she had felt regarding her husband's drinking last year. She was unable or unwilling to indicate to me how much her husband had been drinking. [The stepfather] was not prepared to discuss this matter with me. Therefore, I am unable to offer an opinion as to whether or not he has a problem related to alcohol.

> [The mother and the stepfather's] reticence in discussing this matter and the manner in which [the mother] dealt with this issue (seeking advice from Dr [D] without her husband's knowledge) suggests to me that this couple do not communicate openly with each other when difficulties arise. I am of the opinion that [the mother and stepfather] are probably still insecure in their own relationship and for this reason do not support the making of an adoption order.'

At the hearing on 19 May 1987 both Mrs S and Mrs L gave evidence and were cross-examined by the solicitor then appearing for the appellants but both of them adhered to the views expressed in their reports. Mrs S, for example, said that a factor in her reasoning was that the application was premature and she thought that it would create an unnatural division in the family to separate M from the others. She thought also that security would come from the relationship in the family, rather than through an adoption order. Mrs L agreed in cross-examination that the younger two minors gave the impression that they wanted to be adopted, but she thought that they were more concerned to have their surname changed.

The appellants also gave evidence and dealt, *inter alia*, with P's health and drinking habits. P referred to stress at the time of H's birth, partly due to conflict with his former wife about contact with his children, and it appears that the natural mother suffered from depression following H's birth. This was said to be the background to her concern about the impact of P's drinking on his health. P said, however, that he had responded quickly by reducing his drinking to its former innocuous level.

In his judgment, the judge referred to two main ingredients in the reasons put forward by the local authority and the guardian ad litem for opposing an adoption order. These were, first, the adoptive father's drinking problem and the events surrounding it; and, second, the divisive effect in relation to the three children of an adoption order.

In relation to the first, the judge accepted that the weight to be given to it had diminished in the light of the recent evidence, but he referred to a number of concerns associated with it, such as the apparent lack of communication between the appellants and P's refusal to see the guardian ad litem to discuss the matter.

As for the second factor, the judge summarized the effect of the evidence that I have outlined by saying, 'To make an order for two and not three could be divisive, despite the fact that the two younger children might have resentment for M later on.' The judge's conclusion was that any court reviewing the long-term interests of the children would be very reluctant to dissociate the younger two children from M. He thought that the court would need to look for rather compelling reasons when reviewing the case. It was far from easy to weigh the substance of the guardian ad litem's concern about the relationship between the appellants and consideration of the children's interests. The judge concluded:

> 'At the moment they enjoy a happy family relationship which would not be greatly changed if the adoption order were to be made, except for the change of surname for the adopted children which would then be different from that of their elder brother. Bearing those considerations in mind I am not persuaded that it would be in the best interests of the children to grant the application.'

The appellants now appeal on the ground that the conclusion of the judge was 'plainly wrong'. In support of the appeal they rely essentially on six points of criticism, of which the last two are procedural. The procedural grounds are that neither of the minors was invited to meet the judge and that there were no special circumstances rendering their attendance unnecessary. The judge was thus prevented, it is said, from making his own assessment of their attitudes to the proposed adoption.

Rule 23(4) of the Adoption Rules 1984 (SI 1984 No. 265) provides:

> 'Subject to paragraphs (5) and (7), the judge shall not make an adoption order or an interim order except after the personal attendance before him of the applicant and the child.'

Paragraph (5) provides:

> 'If there are special circumstances which, having regard to the report of the guardian ad litem (if any), appear to the court to make the attendance of the child unnecessary, the court may direct that the child need not attend.'

We have been told that the judge caused a telephone communication to be made to the appellant's solicitors on the day before the hearing, indicating that it was not necessary for the children in this case to attend. It is said on behalf of the appellants that that was a wrong decision by the judge, because there were no special circumstances in this case. He thus deprived himself of the opportunity to talk to the children, at least to confirm their views and the basis of their support for the adoption application.

In my judgment, this aspect of the appeal is founded on a misunderstanding of the underlying purpose of the provision in r. 23(4). That purpose is to ensure that a child in respect of whom an adoption order is about to be made understands fully, as far as he or she can, the nature of the order. That comment is in harmony with the note that appears in the current edition (14th edn) of Volume 1 of *Rayden on Divorce*, p. 1218 (note 8). It is clearly necessary that a child who is capable of understanding should understand the nature of the order about to be made, although the attendance of a child may be unnecessary in any particular case in the light of information contained in the guardian ad litem's report. In the event, there was no breach of the rule here because an adoption order was not made.

In order to further the appeal in the instant case the appellants would have to persuade this court that it was necessary for the judge himself to interview the minors who were the subject of the application in order to ascertain the basis of their support for the adoptive parents' application. It is clear, however, that the judge had before him ample evidence from Mrs L and the guardian ad litem as to both the children's views and the reasons for them. In my judgment, therefore, it would be quite wrong to say that the judge in this case was under a duty to see the children before reaching a decision. Furthermore, I have no reason to think that his decision would have been significantly affected by any discussion with the children. Accordingly, there is no substance in the procedural criticisms.

The third ground of appeal also has a procedural element in it, because objection is made that the judge took into account evidence of the guardian

ad litem that the appellants' general practitioner had been consulted by the mother about P's alleged drink problem, without there being any evidence by affidavit or otherwise from the general practitioner. A particular point made in this context was that the relevant communication by that doctor had been made to Mrs L in a letter dated 11 February 1987 but that the letter had not been produced to the judge. The reality of the matter, however, is that the substance of that letter was faithfully reported in a section of one of the reports of the guardian ad litem, so that all the information contained in the letter was before the judge. An affidavit in similar terms would not have affected the evidential position in any material way. Furthermore, it is clear that the judge took the view that any drink problem that P had experienced had been of a temporary nature. He referred expressly to the diminishing significance of the point in his judgment. What was of continuing concern to the judge, and to the guardian ad litem, was the response of the appellants to enquiries about the matter, rather than the cause of the enquiry itself: they were troubled about the apparent lack of communication between the appellants and a lack of co-operation on the part of P in relation to which all the relevant evidence, including that of the appellants, was properly before the court. The evidential criticism made in the notice of appeal, therefore, has no substance and the appeal cannot succeed upon that ground.

I turn to what is the substance of the appeal. Counsel for the appellants submits that the conclusion of the judge was plainly wrong on the basis of the evidence that was before him. That submission is formulated in various ways, but essentially what is said is that the judge attached excessive weight to the evidence about P's alleged drink problem and to the views of M about his own adoption. On the other hand, the judge failed to give adequate weight to the views of the children N and L. Together, it is said, these alleged errors led the judge to a decision that was plainly wrong. A final argument advanced on behalf of the appellants is that the judge failed to consider what was an essential question in the case, namely, whether or not the making of a joint custody order was a better solution than the making of an adoption order.

It is accepted on behalf of the appellants that this was a case in which the judge had to exercise a discretion and that this court would not be justified in interfering with his decision except in accordance with the principles most recently laid down by the House of Lords in *G v G (Minors: Custody Appeal)* [1985] FLR 894 and, in particular, in the speech of Lord Fraser, at p. 899, in which he gave guidance about the role of an appellate court.

Section 3 of the Children Act 1975[1] provides that:

> 'In reaching any decision relating to the adoption of a child, a court or adoption agency shall 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; and shall so far as practicable ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.'

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1 Repealed and re-enacted in the Adoption Act 1976, s. 6.

Further, s. 10(3) of the same Act [2]2 provides:

> 'Where the application is made to a court in England or Wales and the married couple consist of a parent and step-parent of the child, the court shall dismiss the application if it considers the matter would be better dealt with under section 42 (orders for custody etc.) of the Matrimonial Causes Act 1973.'

It will be apparent from what I have said earlier that the judge did not make any express reference to the question whether a joint custody order would be better in the brief judgment that he delivered at the conclusion of the case. It is, however, equally clear that the alternative of the joint custody order was fully in the minds of the local authority and the guardian ad litem and was the basis upon which they made their recommendations. It is impossible, in my judgment, for this court to accept that this experienced circuit judge did not have clearly in mind the provisions of s. 10(3) of the Act of 1975, which governs all adoption applications by a natural mother and a stepfather. Equally, he must have had in mind the primary duty to promote the welfare of the children laid down in s. 3 of that Act and the due consideration to be given to the children's wishes and feelings.

Even on that footing, however, it is argued on behalf of the appellants that a plainly wrong decision was reached in this case. We have been referred to two cases decided in this court in support of that argument. The first is *Re S (Infants) (Adoption by Parent)* [1977] Fam. 173. That was a case in which the Court of Appeal considered an adoption application in respect of three children aged 6 to 11 years that had been refused by the judge below. This court concluded that the decision should be upheld, but reliance is placed upon passages in the judgment of Ormrod LJ in which he dealt with the nature of the discretion to be exercised in a case of this kind. Thus, at p. 178A, Ormrod LJ said:

> 'The effect of s. 10(3), in our judgment, is to require the court, even in a case where adoption would safeguard and promote the welfare of the child, to consider the specific question whether, even so, the case might be "better dealt with" under s. 42(1) of the Matrimonial Causes Act 1973, presumably by a joint custody order in favour of the natural parent and the step-parent, or by leaving the child in the custody of the natural parent. In cases like the present one the question becomes: "Will adoption safeguard and promote the welfare of the child better than either the existing arrangements or a joint custody order under s. 42?"
> On this view, the learned judge's misdirection, if misdirection it was, is a minor matter because he went on to consider, correctly and carefully, all the factors properly relevant to his decision. He thought that, although the father had consented to the proposed adoptions and his interest in the children was at present "admittedly minimal", it might be advantageous for them to be in contact with their father; they might be interested later in rediscovering him and might be able to "reforge their links with their real father". He also said:

2 Repealed and re-enacted in the Adoption Act 1976, s. 14(3).

> "To me it seems that custody recognizes the reality of the situation, whereas adoption imposes an artificial status. Whatever order the court makes, it cannot alter the fact that Mr R is their stepfather and Mrs R their real mother and Mr S their real father."'

The second case to which we have been referred, in which the conclusion of this court was to the opposite effect, is *Re D (Minors) (Adoption by Step-parent)* (1981) 2 FLR 102. In that case the court again had to consider the question posed by s. 10(3) of the Act of 1975 in the context of an application by a mother and stepfather to adopt two girls aged 13 and 10½ years. In that case the application to adopt the children was made in 1980, some 7 years after the relevant divorce and approximately 4 years after the marriage of the natural mother to the stepfather. It is also a case in which the father had, in effect, cut himself off from the children, certainly for a period of at least 2 years before the adoption application. The evidence before the judge below was wholly in favour of the adoption application, save that the guardian ad litem in a comprehensive report thought there was a fine balance against an adoption order being granted.

Dealing again with s. 10(3) of the Act of 1975, Ormrod LJ said at pp. 104H – 105E:

> 'It is, I think, important to note the terminology of the section. The section requires the court to dismiss an application for adoption if it considers that the matter would be *better* dealt with by means of a joint custody order. It is not a question of showing that an adoption order is itself better. The court has to consider whether or not the matter can be *better* dealt with by means of a joint custody order.
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> It is a very difficult decision to make because it is extremely difficult to know what criteria should be used in reaching the decision. The various financial provisions of the Matrimonial Causes Act 1973 and the Family Law Reform Act 1969 as well have now extended to the point when it is almost impossible to show any financial benefit from an adoption order. There may be some residual benefits which are of relevance in some cases but, in the vast majority of cases, it is impossible to show any material advantage to the children in an adoption order over and above custody. So the court has to consider very difficult psychological issues in coming to the conclusion that the matter can be better dealt with in one way or the other.
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> For my part, I find this an extremely difficult jurisdiction for the reason that I am by no means clear myself what are the appropriate criteria. Obviously, an important factor in the matter, although by no means conclusive, is the fact that, under s. 3 of the 1975 Act, the court, in considering making an adoption order, is required by statute to ascertain, so far as practicable, "the wishes and feelings of the child regarding the decision and given due consideration to them . . ." That, to my mind, must be an important consideration when dealing with children of the age of these children. They are fully old enough to understand, as I have said before, the broad implications of adoption and, if they actively wish to be adopted, even if they cannot give a very coherent reason for that wish, to refuse an adoption order in the face of

> that wish does require, as Brandon LJ said in the course of argument, some fairly clear reason. It does not appear from the learned judge's judgment that this point was in the forefront of his mind. It is, however, to me an important one.'

In supporting the appeal in the present case, counsel for the appellants has understandably sought to place heavy reliance upon the expressed views of the children N and L. But the views of those children were not necessarily decisive of the matter. It was necessary for the judge to weigh in the balance all the relevant considerations and, in particular, the impact (including the psychological impact) of an adoption order upon the three children as a whole and individually, contrasted with the potential effect upon them of a joint custody order.

In the end, counsel has been reduced to suggesting merely that the judge gave insufficient weight to particular factors on the one hand, and too much weight to others. Submissions of that nature are not sufficient in themselves to establish that the conclusion of the judge was plainly wrong. We have to be satisfied, before we can interfere, that the conclusion drawn by the judge was outside the ambit within which reasonable disagreement is possible. It is clear that the judge had all the relevant considerations in mind in reaching his conclusion and his opinion was supported by two experienced persons, the social worker who made the report for the local authority and the guardian ad litem, who had full knowledge of the relevant factors in the case. In my judgment, therefore, it is impossible to say that he was plainly wrong in his conclusion. On the contrary, I think that, on the evidence before him, he reached a correct conclusion that the adoption application was at least premature and that a joint custody order was a better solution at the present time.

For these reasons I would dismiss this appeal.

MAY LJ:
I agree that this appeal should be dismissed for the reasons which have been given by Waterhouse J. I wish to stress that that result does not involve criticism of anyone concerned. The judge had to carry out the balancing exercise on *all* the material before him. That he did and he reached the decision which is now appealed against.

Notwithstanding the cogent submissions which Miss Marks has put forward on behalf of the appellants, I am in no way satisfied that the judge's decision was plainly wrong; indeed, had it been a matter for me, I would have reached the same conclusion on this application at this time.

I would, therefore, also dismiss this appeal.

Appeal dismissed. No order as to costs save legal aid taxation of the appellants' and the guardian ad litem's costs.

Solicitors: *Minet Pering*, agents for *Charles Coleman & Co.*, Windsor, for the appellants;
Kidd Rapinett for the guardian ad litem;
Solicitor for the Berkshire County Council for the local authority.

B.C.