

RE A (A MINOR) (ADOPTION: CONTACT ORDER)

Court of Appeal

Butler-Sloss, Stuart-Smith and Farquharson LJJ

15 June 1993

Adoption – Contact – Uncontested care order – Freeing for adoption application by local authority – Judge finding that adoption in child's best interests – Judge dispensing with parent's consent to adoption – Judge freeing child for adoption – Judge terminating contact with father but making monthly contact order to mother – Whether continuing contact conflicting with freeing order – Whether mother's refusal to agree to adoption reasonable in the light of contact order – Whether issue of contact should be resolved before a freeing order application made – Whether parent could have continuing contact after adoption order made

The parents had married in 1990, shortly after the birth of their son, A, who was now 3 years of age. The parents had separated later that year and the mother formed a new relationship with another man. Social workers and the health visitor grew concerned about A's failure to thrive, bruising to him and the mother's care of him. There was no effective improvement and a place of safety order was granted. A was placed with long-term foster-parents. In November 1991 an uncontested care order was made in favour of the local authority, who had applied to free A for adoption and for leave to terminate contact between A and the parents. The parents applied for contact with a view to rehabilitation of A to the mother. All the applications came before the county court in September 1992. The guardian ad litem recommended that A should be freed for adoption but that contact should be continued, if possible, after the adoption. The local authority did not oppose some continuing contact between A and the mother. The judge found that there was no prospect of A's rehabilitation with the natural family and found that it was in A's best interests that he should be adopted. The judge therefore dispensed with the agreement of the parents to A's adoption, freed A for adoption and terminated the father's contact to A. The judge, however, ordered monthly contact for a period of 1½ hours between A and the mother until A's adoption took place. The local authority were unable to find prospective adopters who would agree to open adoption and wished to apply to reduce contact. The mother appealed against the freeing order.

Held – dismissing the appeal –

(1) An order freeing a child for adoption extinguished parental responsibility of those previously endowed with it and brought to an end the relationship between the child and his natural family. Parental responsibility was then assumed by the adoption agency, which in this case was the local authority. The parents became former parents and had no right to make an application under s 8 of the Children Act.

(2) The finding by the judge that A's welfare required him to be adopted was not challenged. It could be inferred from the judge's reasoning that adoption would still be in A's best interests even if the adopters could not tolerate any contact with the mother. Such a placement would not tip the balance against adoption on the welfare test.

(3) The authorities *Re E (A Minors) (Adoption: Parental Agreement)* and *Re C (Minors) (Adoption)* were no longer applicable after the implementation of the Children Act 1989. A judge now had the opportunity to free a child for adoption and preserve the contact between the child and the natural family pending adoption. A s 8 application, including a contact application, could be made

in any family proceedings which included those under the Adoption Act 1976. A contact order could not survive the adoption order, but a contact order could be imposed upon the adopters after the making of the adoption order with conditions. The mother retained the opportunity to take part in the decision on her future relationship with the child after the adoption order was made.

(4) In exceptional cases there was provision for the former parent, with leave, to be made a party to the adoption proceedings. However, one possibility was for the prospective adopters to give evidence in the contact application as to their approach to future contact with the natural parent after adoption. The prospective adopters would then be confident that so long as their application was *prima facie* viable, it would not be at risk from the mother's refusal to consent and the mother retained her right to be heard on the only outstanding issue.

Per curiam: It was evident that the degree of contact ordered by the judge had inhibited the finding of a suitable adoptive family. Infrequent contact between the child and the natural parent might be acceptable to prospective adopters. When a contact order was made with a freeing order, it was important that directions were given to provide, if possible, for continuity of judicial approach in subsequent hearings.

Statutory provisions considered

Adoption Act 1976, ss 12(3), 16(2)(b), 18(5), 19
Children Act 1989, s 8

Cases referred to in judgment

C (Minors) (Adoption), Re [1992] 1 FLR 115

E (Minors) (Adoption: Parental Agreement), Re [1990] 2 FLR 397, CA

Southwark London Borough Council v H [1985] FLR 989, [1985] 1 WLR 861, [1985] 2 All ER 657

APPEAL from an order made by Judge Batterbury in the Medway County Court

Susannah Walker for the mother

Mhairi McNab for the local authority

Ian Karsten QC and *Alan Inglis* for the guardian ad litem

BUTLER-SLOSS LJ:

This is an appeal by the mother of a little boy, A, now 3, born on 7 March 1990. She appeals from the order of his Honour Judge Batterbury made on 28 September 1992 in the Medway County Court. The parties before the court were the local authority in whose care A is, his mother, his father and his guardian ad litem. The judge held that it was in A's interests that he should be adopted; he dispensed with the agreement of both his mother and his father; he freed A for adoption; he terminated contact between him and his father and made an order for contact with his mother under s 8 of the Children Act 1989 to continue until the making of the adoption order. The contact was for 1½ hours once a month. The mother appeals against the making of the freeing order. The father does not appeal and has played no part in the appeal.

The background to this appeal is that the mother and father began to cohabit in 1989 and married shortly after the birth of A. They parted in October 1990. A new boyfriend, B, who remained until very recently, took his place. In late 1990, A first came to the attention of social workers and from then until 2 May 1991 both the social workers and the health visitor became increasingly concerned about his failure to thrive, some bruising, the filthy state of the house, the lack of hygiene and the lack of

adequate care given to him by his mother. He went into hospital on three occasions and his mother was allocated a special child-minder to help teach her how to care for A. Despite a great deal of help from social workers there was no effective improvement and A was removed on a place of safety order and placed with foster-parents with whom he has remained but who are not long-term carers. On 11 November 1991, after several interim care orders, the Medway Family Proceedings Court committed A, without opposition from either parent, to the care of the local authority. On 7 September 1991 the mother gave birth to a daughter, S, whose father is B. Although there were concerns about S there have been no recent plans to remove her from her mother, who has made an enormous effort to look after her properly and has considerably improved the hygiene in the house.

The local authority applied to free A for adoption and for leave to terminate the contact between the child and each parent. Both the mother and the father applied for contact with a view to rehabilitation in due course to the mother. All the applications were heard together on 28 September 1992, the decision under appeal. At the hearing the guardian ad litem advised the judge that A should be freed for adoption but also that the contact between the child and his mother, sister and B was beneficial to him and should be continued, if possible, after adoption. The local authority then withdrew their opposition to some continuing contact with the mother after the freeing order.

The judge found that there was no prospect of rehabilitation with the natural family and long-term fostering was a less suitable option for this little boy than adoption. However, he accepted the evidence of the guardian ad litem and ordered monthly contact until the adoption hearing took place. He took into account the possibility that there might be contact after adoption, but left that decision to be made by another court.

We have been told that the local authority have sought prospective adopters who would agree to open adoption, and have not found any. They are also unable to place the child with prospective adopters while the present contact arrangements are in place. They intend, therefore, to apply to reduce contact very substantially and hope to find adopters who would agree to very limited contact between the child and his natural family.

The guardian ad litem has remained more sanguine than the local authority about the prospect of open adoption for A. The extent to which the local authority has explored all the options available and looked further afield than its own county for potential adopters will no doubt be explored in the pending contact application at which the mother will have an opportunity to be heard. It is not an issue before this court save as to its relevance to the refusal by the mother of her agreement to the adoption in the freeing application.

Miss Walker, on behalf of the mother, raised a number of issues under two headings: that the judge erred in finding that A's welfare required him to be freed for adoption, and he erred in finding that the mother unreasonably withheld her agreement to the proposed adoption at the freeing stage. She accepted, however, that she could not argue against the judge's findings that there was no prospect of rehabilitation and that adoption was in the child's best interests. Her submission centred upon

the unsuitability of making a monthly contact order side by side with dispensing with the consent of the parent enjoying that degree of contact. It was premature to make a freeing order at a time when the mother continued to have a part to play in the child's life and when the extent, if any, to which she would have a future role was entirely uncertain. The mother ought to have the opportunity to be heard at the time of adoption on the unresolved issue of future long-term contact. In those circumstances it was neither in the child's interests to make the order nor was the mother unreasonably withholding her agreement to adoption.

The effect of an order freeing a child for adoption is to extinguish parental responsibility of those previously endowed with it and thus to bring to an end the relationship between the child and his natural family (see Adoption Act 1976, s 12(3)). The child is in a sort of adoptive limbo and parental responsibility is assumed by the adoption agency, in this case, the local authority (s 18(5)). The parents become former parents, ss 18(5), 19 and have no right to make an application under s 8 of the Children Act 1989. The finding by the judge that the welfare of A requires him to be adopted is not challenged and on the evidence is unassailable. Consequently, the consideration as to whether the freeing application prematurely curtailed the mother's right to oppose the adoption of her son has to take into account that, on the first test of welfare, the case for adoption is very strong and is likely to remain so on the subsequent adoption proceedings. Insofar as there may be a conflict between two concepts, the benefits of adoption and the benefits of continuing contact with the mother, I infer from the judge's reasoning that adoption would still be in the child's best interests even if the adopters chosen for him could not tolerate any contact with the mother. Such a placement might be less good for the boy but would not tip the balance against adoption on the welfare test. In my judgment, although he did not spell it out, the judge clearly had in mind the possibility of adoption with no contact.

He went on to consider the mother's refusal to agree to the adoption in the light of his finding on welfare. There was no prospect of rehabilitation. The judge accurately assessed the fragility of the relationship between the mother and B, who has now left. He dismissed the alternative of long-term fostering and held that a reasonable mother would recognise that adoption was the right decision for her son.

The only issue which remains arises from the unusually high degree of contact ordered by the judge and the exclusion of the mother from taking any part in the adoption hearing. Does that exclusion make her refusal to agree at the freeing stage reasonable, although it might be unreasonable at the adoption hearing?

Miss Walker suggested that two decisions of this court supported her argument that continuing contact of a substantial amount by the mother was incompatible with a freeing order. Both cases were decided before the implementation of the Children Act 1989.

In *Re E (Minors) (Adoption: Parental Agreement)* [1990] 2 FLR 397 the mother's application for access was adjourned pending the hearing of the freeing application and the mother did not have an opportunity to show the advantages of continuing access by her with the children. In *Re C (Minors) (Adoption)* [1992] 1 FLR 115 the father had had access to the children which was beneficial for them and it was held that it was

premature to apply to free them for adoption until the issue of access had been resolved. In each case the judge found that the parent had not unreasonably withheld his agreement and this court did not upset that finding. Balcombe LJ in *Re C* said at p 133:

‘We wish to repeat, with all the emphasis at our command, what was said (in *Re E* at pp 410-411) that where children are in care, but are enjoying beneficial access by their parents, it is premature to issue an application to free children for adoption until the issue of access is first determined – see *Southwark London Borough Council v H* [1985] FLR 989 at p 992 – and it is wholly inappropriate to assert, in the application, that a parent who seeks to continue such access is (ie at the date of the application) unreasonably withholding his or her consent to the order freeing the children for adoption.’

Mr Karsten QC for the guardian ad litem has submitted that these two cases are no longer applicable since the coming into force of the Children Act 1989. In my judgment he is right. At the time of the judgment of Balcombe LJ it was not possible to attach a condition of access to a freeing order although it could be attached to an adoption order. The effect of the freeing order was to terminate any earlier access order without the power in the court to continue contact during the limbo period prior to adoption. Since the Children Act, as is shown in the present case, a judge has the opportunity both to free but also to preserve contact between the child and the natural family pending adoption. The wider jurisdiction of the court now exists since a s 8 application, including a contact application, can be made in any family proceedings, and by s 8(4)(d) this includes proceedings under the Adoption Act 1976. Although a former parent, this mother retains the right to be heard on contact. She will have the right to respond to the local authority’s application to vary the existing contact order and to apply herself to vary it. The contact order cannot survive the adoption order, but a contact order can (in theory at least) now be imposed upon adopters after the making of the adoption order as the alternative to the making of an adoption order with conditions.

Unlike the parents in *Re E* and *Re C* (above), the mother can be heard on the only issue which remains: whether she can have continuing contact after an adoption order is made. Applying the test of the reasonable parent, she would recognise that A should be adopted and that she retains the opportunity to take part in any decision on her future relationship with him. In those circumstances I do not see how this court can properly interfere with the decision of the judge, made in the exercise of his discretion, that the mother was unreasonably withholding her agreement under s 16(2)(b) of the Adoption Act.

There are, however, some unsatisfactory features to this case. Despite the optimism of the guardian ad litem, 8 months after the freeing order a suitable adoptive family has not been found for this child. It would appear evident that the degree of contact ordered by the judge has been the inhibiting factor and for many of us, monthly contact would seem incompatible with the likely view of most prospective adopters to adoption. We are moving perceptibly into a new and broader perception of adoption, as is shown by the *Review of Adoption Law* (Department of

Health, October 1992). The view, however, of open adoption embraced by the experts does not seem to be shared by many prospective adopters. Infrequent contact with the family up to two or three times a year may be acceptable. I find it difficult to believe that twelve times a year is appropriate for A and his mother. Further, when a contact order is made side by side with a freeing order it is important that directions are given to provide, if possible, for a continuity of judicial approach in subsequent hearings to ensure that the judge hearing the adoption application is not faced with an outstanding contact order in favour of a parent who has no right to be heard on the occasion when the effect of the adoption order is to extinguish the contact order. If a freeing order is made with a s 8 contact order, the judge should give the appropriate directions to ensure that, if possible, the judge who hears the adoption application is also the judge who hears any contact application affecting the former parent. A situation must not be allowed to arise where one judge finds that it is in the interests of the child that the mother should continue to see him throughout his childhood, whereas another judge hears an adoption on the basis of no future contact with the natural family. There is provision for the former parent, with leave, to be made a party to the adoption proceedings, although such a course would seem to me to be exceptional. One possibility is for the prospective adopters, subject to confidentiality, to give evidence in the contact application as to their approach to future contact after adoption in proceedings in which the mother was a party. This might have great advantages over the issue of consent being heard at the adoption hearing. The prospective adopters would be confident that so long as their application was prima facie viable, it would not be at risk from the mother's refusal to consent, whereas the mother retained her right to be heard on the only outstanding issue.

I would dismiss the appeal.

STUART-SMITH LJ:

I agree.

FARQUHARSON LJ:

I also agree.

Appeal dismissed.

Solicitors: *Redfern & Stigant* for the mother
Local authority solicitor
Stantons for the guardian ad litem

DEBORAH DINAN-HAYWARD
Barrister