

2014

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Deblasio, L. (2014) 'Hiding Behind the Law? A Critique of the Law and Practice under the Adoption and Children Act 2002', Plymouth Law and Criminal Justice Review, 6, pp. 148-172.

Available at: <https://pearl.plymouth.ac.uk/handle/10026.1/8996>

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The Plymouth Law & Criminal Justice Review

University of Plymouth

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## **HIDING BEHIND THE LAW? A CRITIQUE OF THE LAW AND PRACTICE UNDER THE ADOPTION AND CHILDREN ACT 2002**

*Lisamarie Deblasio*<sup>1</sup>

### **Abstract**

This article presents a critical analysis of adoption law in Britain. In particular, it focuses on provisions of the Adoption and Children Act 2002 (ACA), and the subsequent interpretation by the Family Courts, which appear to drastically compromise the rights of natural parents. Only in the last three decades has changed perception of family structure altered the theory of adoption. This is illustrated by way of adoption now being a service of permanency for children in the care of local authorities, which has developed to replace the traditional relinquishment of new born babies of previous decades. This historic adoption method was considered a fitting way of legally transferring babies from unmarried mothers to childless, married couples. The 2002 Act is underpinned by the welfare of the child being the paramount consideration. This article seeks to argue that in practice, there is reliance on legal fiction, and a disregard of flaws within the system, which not only contravenes any rights retained by birth parents, but creates legal voids for children, which conflict directly with the paramountcy principle.

**Keywords:** Adoption and Children Act 2002, Birth Parents, Parental Responsibility, No Delay, Contact, Dispensing with Consent, Adoption Breakdown.

### **Introduction**

The ACA reformed the law of adoption and at the same time there were radical changes to administration procedures at local Government level, with the aim of speeding up the adoption process. Since the ACA took effect in 2005, there has been significant debate as to whether adoption law is achieving its aims. Many argue that it is not, and as will be explained below, there is no shortage of criticism.

Adoption is undoubtedly controversial; it represents an extreme interference in family life. Governments have routinely reformed adoption since the handing over of new-borns became ethically unacceptable. It is now a best interest decision where, once the conclusion

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is reached that the child's welfare requires adoption; there is no scope for challenge. It has taken the form of a child saving rhetoric which provides the solution for the huge numbers of children delayed in the care system and arguably, it remains a money saving enterprise, because one cannot ignore the fact that once adopted, the child costs the State nothing. Once again it is in line for reform. The Government's current aim is to increase the number of adoptions with a well-researched and evidence based strategy. This worries many commentators, because Britain already has one of the world's highest rates of adoption, and previous reforms have not solved the problem of delay in the care system. There is concern that adoption has distorted from a course of last resort; to that of an automatic option when a child is received in care, under the guise of 'No Delay' in finding permanence, presented as being an essential element of paramountcy. This article suggests legal flaws and reveals arguments which reject adoption as a principle solution to children in State care.

The specific objective is to demonstrate where the law is not functioning effectively. It will offer that it is overly broad: and permits that birth parent's rights can be overridden by the effortless dispensing with their consent to adoption. It is also too restrictive, as with the extinguishment of parental responsibility, so that when operational problems occur, such as adoption breakdown, the law cannot exercise flexibility, and individuals who should be safeguarded, suffer as a consequence. It will be demonstrated that where fundamental errors of law lead to injustice, the courts *have* to place the welfare of the child as paramount, at the expense of any other consideration. Since the ACA was enacted, these compromises are defensible on policy grounds, but they appear to neglect a long-accepted principle of family law: that the best place for a child is with his birth family whenever possible.

## **1 Adoption Law Reform and the 'No Delay' Principle**

Following the enactment of the Children Act 1989 (CA),<sup>2</sup> there was a great deal of investment by the Government into review of adoption. In 1993 the Government published a White Paper, and followed with a draft Adoption Bill<sup>3</sup> which set out proposed reform to adoption law, principally 'To encourage wider use of adoption, particularly of children in care'.<sup>4</sup> The Bill never made it to statute, for mainly political reasons, notably the

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2 Which did not intend to create major reform of adoption law.

3 Adoption: The Future, Cm 2288 (1993) <http://www.parliament.the-stationery-office.co.uk/pa/cm200001/cmbills/066/en/01066x--.htm> August 2012.

4 House of Commons: *Adoption and Children Bill*, (19th October 2000, Bill 34), [6http://www.publications.parliament.uk/pa/cm](http://www.publications.parliament.uk/pa/cm) November 2012.

Government's defeat in the 1997 General Election. However, the matter came in to the forefront when the Waterhouse Inquiry report 'Lost in Care' was published.<sup>5</sup>

### ***The Problem of 'Drift in Care'***

The 1996 Waterhouse Inquiry<sup>6</sup> was centred on the abuse of children in care in Welsh children's homes during the 1970s. Preliminary police investigations were said to have been met with 'a wall of disbelief and a cult of silence'<sup>7</sup> by social workers and care home staff. The inquiry reported a catalogue of sexual, physical and emotional child abuse.<sup>8</sup>

The subsequent report was focused on the prevention and detection of child abuse and it made recommendations for the appointment of an independent Government body that needed to ensure the welfare of the child was paramount.<sup>9</sup> The Waterhouse inquiry has recently been subject to invective, with the discovery of unpublished files that were withheld, allegedly to protect the identities of high profile individuals, who were involved in the abuse scandal. Consequently, there have been calls for the publication of the files under freedom of information.<sup>10</sup> This raises questions about the soundness of the Waterhouse inquiry, which now transpires to have been somewhat less than transparent.

In 2000, in a speech to the Solicitors' Family Law Association, Dame Butler Sloss made reference to Waterhouse, with the key issue being the children concerned had been removed from their parents due to inadequacy of care, and had been placed in homes designed to protect them from neglect and abuse. They had then suffered equal if not more serious harm from the care system. She went on to identify the problem of vulnerable children 'stuck' in the care system for years, so called 'Drift in Care'.<sup>11</sup>

### ***The ACA 2002: A Response to Media and Political Pressure?***

The Government pinpointed adoption as a way of tackling Drift in Care. In July 2000, the white paper 'Adoption: A New Approach' was published. In the paper's forward, the Prime Minister stated that adoption was blighted with 'Poor performance and unacceptable delays,

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<sup>5</sup>The Honourable Sir Ronald Waterhouse., *Lost in Care*, Report of the Tribunal of Inquiry into the Abuse of Children in Care in the Former County Council Areas of Gwynedd and Clwyd since 1974, (16th Feb 2000), Publication, HC Session 1999-00 201  
<http://www.dh.gov.uk/en/Publicationsandstatistics/Publications>.

<sup>6</sup> Ibid.

<sup>7</sup> Questions and Answers that Surround a Catalogue of Abuse Against Children, *The Guardian*, 16 February 2000.

<sup>8</sup> Ibid.

<sup>9</sup> The child's welfare as paramount became the foundation principle of the ACA.

<sup>10</sup> BBC News, *Wales Child Abuse: Councils find Jillings Report Copies*, 12 November 2012.

<sup>11</sup> Bridge, C, Swindells, H., *Adoption The Modern Law*, (Jordan, 2003) p.24.

children in an already vulnerable position are being badly let down. We have to change this. We have to have a new approach to adoption'.<sup>12</sup> The ACA came into full effect on 30 December 2005. A major change was the alignment of the ACA with section 1 CA 1989, in which the paramountcy of the child's welfare was established as a guiding principle. Section 1(1) and (2) ACA provide that whenever a court or adoption agency is coming to a decision regarding adoption, the child's welfare, throughout his life, is a paramount consideration.<sup>13</sup> According to the Government the following ideals underpinned the law comprised in the ACA:

1. Children have the right to grow up in a loving family which can meet their needs in childhood and beyond.
2. Children are best being brought up by their birth family where possible.
3. The wishes and feelings of the child will be actively sought and taken into account at all stages.
4. The role of the adoptive parents when offering a permanent family to a child who cannot live with their birth family will be valued and respected.<sup>14</sup>

Further guidance on the objective of the Act was set out by Wall LJ in *Re F* 2008:

The Act has four objectives: The first to simplify the process. Secondly to enable a crucial element of the decision making process to be undertaken at an earlier stage. The third was to shift the emphasis to a concentration on the welfare of the child; and the fourth to avoid delay'.<sup>15</sup>

Whether the Act's objectives have proven accurate or have transpired to be an ideology is a debatable issue. Because delay was a key issue from *Waterhouse* and underpins the ACA, the starting point for critique is the no delay principle enshrined in the Act as follows:

- s.1(3) 'The court or adoption agency must at all times bear in mind that, in general, any delay in coming to a decision is likely to prejudice the child's welfare.  
s.22(1) 'A local authority must apply to the court for a placement order in respect of a child if – s.22(1)(d) the authority are satisfied that the child ought to be placed for adoption.

It was stated in the Department of Health circular that a primary purpose of the new Bill was to 'cut harmful delay' to the adoption process of adoption.<sup>16</sup> In the year ending 31 March 1999, 12,000 children had been in care for longer than five years. If a child had remained in care for 18 months there was only one chance in five that they would have been adopted within four years.<sup>17</sup> Dey writes 'the backdrop to the ACA 2002 was one of Government

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<sup>12</sup> The Secretary of State for Health, White Paper, *Adoption: A New Approach*, (December 2000 Cm 5017) p.3. <http://webarchive.nationalarchives.gov.uk> .

<sup>13</sup> Bridge, C., *Adoption: the Modern Law*, p.94.

<sup>14</sup> Herring, J., *Family Law*, (5<sup>th</sup> Ed, Longman, 2011) p.668.

<sup>15</sup> *Re F (A Child)(Placement Order)*[2008] 2 FCR 93 at para.72.

<sup>16</sup> Dey, I., 'Adapting Adoption: A case of Closet Politics?' *International Journal of Law, Policy and the Family* 19(3) (2005) p.293.

<sup>17</sup> *Ibid.*

responding to media and political pressure concerning local authority delays in the placement of children'.<sup>18</sup> Indeed there was clearly a pressing need for an effective solution for children in long term care. However, it was noted that commitment to working with birth families to aid reunification with their children was completely overlooked. There is no compelling evidence that this policy has changed today, with the Government's 2012 Action Plan for adoption having little meaningful intention regarding work to be done in that context.<sup>19</sup>

In 2001, the DoH published the National Adoption Standards,<sup>20</sup> which ran with the Government's proposals to reduce delays with reform of the administrative process. They placed a target on Local Authorities (LAs) to increase adoption by 40% in the following four years. This was designed to 'concentrate the minds of local authority managers'.<sup>21</sup> In reality the targets did little to increase the amount of adoptions. In 2002, 5,680 orders were made; this had fallen to 4,637 in 2007.<sup>22</sup> There was also the suggestion that many children had been placed inappropriately by LAs in order to meet the said targets, the Government strongly denied the allegation.<sup>23</sup> Allen argues 'It is not difficult to see how such a policy could have propelled some staff into reaching premature decisions in favour of a adoption at the expense of birth families who might have come up trumps given more time'.<sup>24</sup> The Local Government Association voiced concerns in a memo to the House of Commons about adoption targets during the passage of the Bill: 'There are real concerns about targets which may rush agencies into placing children for adoption when the best plan, in accordance with the wishes of the child, may be to work with the birth family to enable them to care for their child'.<sup>25</sup>

As previously noted, there is very little evidence that suggests working toward birth parent/child reunification has ever been a priority. This is a notion that has been described as 'a striking contrast'<sup>26</sup> to other EU States where there are very few looked after children, and even fewer adoptions.<sup>27</sup> An example is Denmark, where adoption from State care is extremely rare. The social welfare system places huge financial priority on assisting impaired

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<sup>18</sup> Ibid.

<sup>19</sup> An Action Plan for Adoption: Tackling Delay, (14 March 2012) ref DFE-00030- 2012 <https://www.education.gov.uk> .

<sup>20</sup> Department of Health, *National Adoption Standards for England*, (August 2001) p. A2 <http://www.dh.gov.uk>.

<sup>21</sup> Allen, N., *Making Sense of the New Adoption Law* (Russell House, 2003) p.61

<sup>22</sup> Herring., *Family Law*, p.667.

<sup>23</sup> BBC News, *Forced adoption claims dismissed*, 2 February 2008.

<sup>24</sup> Allen., *Making Sense of the New Adoption Law*, p.62.

<sup>25</sup> Ibid.

<sup>26</sup> Bridge., *Adoption The Modern Law*, p.33.

<sup>27</sup> Welstead, M., and Edwards S., *Family Law*, (2<sup>nd</sup> ed., Oxford University Press) p.248.

families to ensure they keep their children with them.<sup>28</sup> This leads one to question why Britain continues to conduct its childcare law as if adoption from care were the ideal failsafe solution, when in practice it is beset with problems.

Concerns have been raised that the demands of adoption targets influencing LAs into placing adoption before reunification with birth parents could cause incompatibility with Article 8 of the European Convention.<sup>29</sup> Harris-Short argues in respect of Article 8 'if a child is taken into care it should be a temporary measure. Any measures taken by the State whilst the child is in care should be consistent with the aim of reuniting the natural parent with the child'. She refers to the decision in *Hokkanen v Finland* 1996<sup>30</sup> where the court held:

The State is under a positive obligation to take all reasonable steps to facilitate reunion between the parent and the child. It must be questioned whether, if the State proceeds straight to adoption without first attempting to help a family under the auspices of a care order, has it taken all the reasonable steps to reconcile the parent with the child.<sup>31</sup>

This question was undoubtedly intended to give pause for thought to States who may overlook the issue of family support before adoption, and thus conflict with its obligations under the Convention. It will be shown later that the welfare of the child being paramount is generally persuasive enough for the courts to override objections that adoption has been fast tracked, before an alternative solution has been considered. The debate continues that any risks involved in fast track adoption such as adoption breakdown, can be measured against the benefits that adoption brings to children, but as Herring argues 'Research on adopted children indicates that there is no difference in the well-being of adopted children and children living with their biological parents'. He suggests that there is not enough research to support that adoption is, for example, more superior than long term fostering or special guardianship.<sup>32</sup>

It can be argued then that the No Delay principle is not the ideal solution to drift in care. There *are* benefits where fast track is applied to young children to whom birth parent reunification is impossible. However, there is criticism that no delay has been taken out of context, with the 'rush' to adopt children under pressure of targets, when it may not be in the

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<sup>28</sup> *Ibid.*

<sup>29</sup> Harris-Short, S, Miles, J., *Family Law Text, Cases and Materials*, (Oxford, 2007) p.1012.

<sup>30</sup> *Hokkanen v Finland* (App No 19823/92 [1996] 1 FLR 289.

<sup>31</sup> Harris-Short, S., 'The Adoption and Children Bill-a fast track to failure?' *Child and Family Law Quarterly*,405 (2005) p.424.

<sup>32</sup> Herring, *Family Law*, p.668. Special Guardianship is a provision under s.14A Children's Act 1989, which does not sever the parental responsibility of birth parents, yet provides legal stability and permanence for a child and his special guardian(s).

child's best interest, and indeed disregarding any rights the natural parents have left in respect of their children. There is further concern that 'fast track' adoption is creating higher numbers of adoption breakdowns.<sup>33</sup> Making hasty decisions on adoption will continue to be a legal gamble. Ultimately, extreme care must be taken when judgments are being made that have lifelong impact on children and their families. It remains to be seen whether the recent proposals on tackling delay will lead to reform and thus address the massive backlog of children waiting for permanence, or whether these tactics, like the previous policies, do little to increase adoption but do more to corrode the rights of birth parents.

## 2 The Statutory Guillotine: Open Adoption versus Extinguishment of Parental Responsibility

The legal effects of adoption under section 46 are as follows:

- (1) An adoption order is an order made by the court...giving parental responsibility for a child to the adopters or adopter
- (2) The making of an adoption order operates to extinguish-
  - (a) the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the ordersection 67 provides that:
  - (1) An adopted person is to be treated in law as if born as the child of the adopters or adopter-

The ideology that a child becomes 'as though born' to the adoptive family raised objections at the Bill stage by those keen to uphold civil rights, including the Family Rights Group who classed the presumption as 'deeply offensive to birth parents'.<sup>34</sup> Nevertheless these provisions provide the transfer of parental status from birth parents to adopters. The biological truth becomes void; as if the child was never born to them. Baroness Hale explained the concept in *Re P* 2008 noting 'It creates...a new legal relationship, not only between the child and her adoptive parents, but between the child and each of her adoptive parents' families'.<sup>35</sup> This statutory guillotine may have been historically apposite with the relinquishment of new born babies, but can it be said to tailor to the new adoption law which, it has been suggested, has moved from the irrevocable legal transplant to a model of service/contract between birth families, adopters and the LA.<sup>36</sup>

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<sup>33</sup> Research into adoption breakdown is currently being carried out by Professor Julie Selwyn at the Hadley Institute of fostering and adoption, 6 January 2012  
<http://www.communitycare.co.uk/articles/06/01/2012/117910/ministers-order-first-official-study-into-adoption-breakdown.htm>.

<sup>34</sup> Allen, Making Sense of *the New Adoption Law*, p.15.

<sup>35</sup> *Re P (Adoption: Unmarried Couple)* [2008] UKHL 38, at para.8.

<sup>36</sup> Harris-Short, *Family Law*, p.996.



Whilst the move to the provision of permanency for State cared for children was a beneficial adaptation to a social problem, it was not without its perceived difficulties, and the persistence of applying historic policy to contemporary adoption has attracted academic and judicial criticism. Bridge argues that 'children know their family; they have, memory and attachments which cannot be erased. Legal links may be severed but emotional ties remain'.<sup>37</sup> Similarly in *Re D* 1980, LJ Ormrod noted that 'there is no magic in an adoption order, legal ties may be extinguished but that does not mean the birth family will be forgotten'.<sup>38</sup>

The legal transplant has also been challenged by Bainham, who is highly critical of the effect of sections 46 and 67 suggesting that it does not necessarily place the child's welfare as paramount, but rather 'Much of the case for permanency seems to rest on meeting the insecurities of long term carers, it is questionable whether the only means of addressing these insecurities is through 'constructed affiliation'.<sup>39</sup> He also believes that what is overlooked is the changing face of adopters who may no longer be so adverse to post adoption contact if it would be in the interest of their child. Research findings by Ryburn report that 'birth family contact appears to strengthen children's sense of attachment to their adoptive parents'.<sup>40</sup> Research carried out as long ago as the 1970s found that the secrecy model was not beneficial to adopted children, who needed information about their past, to form a sense of who they were.<sup>41</sup> Equally natural parents should have knowledge that their adopted child was happy and safe.<sup>42</sup>

### ***The Theory and Practice of Post Adoption Contact***

The following passage is a frequently cited argument used to oppose contact in adoption proceedings:

Continuing contact will impact on the child's ability to attach to his new carers. Direct contact is not necessary for identity purposes; life story work will be done and there will be an annual letter if it is in the child's best interests. Contact will restrict the pool of prospective adopters.<sup>43</sup>

This line of reasoning was challenged by Neil and Young, who studied post adoption contact and found evidence to the contrary. In particular, direct contact helped the natural parents to

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<sup>37</sup> Bridge, *Adoption: The Modern Law*, p.87.

<sup>38</sup> *Re D (Minors)* [1980] 2 FLR 102 at para.105.

<sup>39</sup> Bainham, A., 'Arguments about parentage,' *Cambridge Law Journal*, 67(322) (2008) p.349.

<sup>40</sup> Ryburn, M., 'In Whose Best Interests? Post-adoption contact with the birth family', *Child and Family Law Quarterly* 11(2) (1998) p.59.

<sup>41</sup> Sants, HJ., 'Genealogical Bewilderment in Children with Substitute Parents' *British Journal of Medical Psychology* 32 (2011) p.133.

<sup>42</sup> Triseliotis, J., 'In Search of Origins' *The Experience of Adopted People*, (Routledge, 1973) p.79.

<sup>43</sup> Ray, P., 'Placement for Adoption or Legal Limbo?', Family Law.co.uk, (19 August 2012).

overcome their grief. They produced a strong argument against adopters feeling burdened by contact sufficient for a court to refuse to allow it. They suggest that in practice the difficulty of direct contact is often overestimated, and with the correct support can be straightforward and meaningful in the long term.<sup>44</sup> These findings and others like them do not appear to have overly influenced the courts in supporting direct contact. The standard procedure remains indirect annual letterbox.<sup>45</sup> It is argued respectively that this may be more of an easy option for LAs, who have full discretion to discontinue it at any time, and for the court, to avoid the dilemma of direct contact versus the clean break within section 46.

Pre the ACA, the courts had indicated that contact in this context was not an automatic right (*Re K D* 1988).<sup>46</sup> They have shown equal reluctance to make orders for contact at the making of an adoption order, usually emphasising the nature of the legal transplant and the interference with the rights of the adoptive parents. In *Re C* 1988<sup>47</sup>, upon an application for contact between siblings, Lord Ackner stated ‘the court will not, except in the most exceptional case, impose terms as to access to members of the child’s natural family. To do so would create a potentially frictional situation and this would not promote the welfare of the child’. Caroline Bridge points out that the 2000 White Paper, *Adoption: A New Approach* barely referred to post-adoption contact and appeared ‘not to embrace it’<sup>48</sup>. Perhaps this goes some way to explain why more recent cases demonstrate the courts’ unwillingness to interfere with adoptive placements by ordering contact. In *Re R*,<sup>49</sup> Wall LJ stated ‘contact is more common, yet the jurisprudence I think is clear. The imposition on prospective adopters of an order for contact which they do not agree to is unusual’. Harris-Short suggests that despite the social work profession becoming more sympathetic with the research findings on open adoption, the courts remain indisposed because of the ‘difficulty in reconciling a move toward openness with the traditional legal understanding of the nature of an adoption order’.<sup>50</sup> It can be said then, that the ACA has done little to date in the way of persuading the courts to view adoption in a more modern context.

Despite such reservations, section 46(6) places a duty on the court to ‘*consider*’ whether the child should have contact with any person and should take into account existing and

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<sup>44</sup> Young, J, Neil, E., ‘*Contact After Adoption*’ *The Child Placement Handbook: Research, Policy and Practice*, BAAF, (2009).

<sup>45</sup> Be My Parent, *What is Indirect Contact?*, 5 November 2012.

<sup>46</sup> *Re K.D (A Minor) (Ward: Termination of Access)* [1988] AC 806 Where it was held that both a right and an assumption of parent contact could be overturned in the child’s best interest.

<sup>47</sup> *Re C* [1988] 1 All ER 705.

<sup>48</sup> Bridge, *Adoption: The Modern Law*, p.232.

<sup>49</sup> *Re R (Adoption; Contact)* [2006] 1 FLR 373.

<sup>50</sup> Harris-Short, *Family Law*, p.1042.

proposed arrangements. Welstead suggests the law in section 46(6) does protect parental interest, 'it recognises the geonics of family life-that for many children, maintaining contact with birth relatives may be vital to their development'.<sup>51</sup> In practical terms the courts also have the jurisdiction under ACA section 26(5) to make a contact order under section 8 of the Children Act at the same time as the application for the adoption order is heard. This is an unusual but not unheard of result, and sibling contact was ordered in *Re P* 2008<sup>52</sup> although the Court of Appeal held in this case contact was of 'fundamental importance' it is a very rare occurrence.

In *Down Lisburn v H* 2006<sup>53</sup> Lord Carswell acknowledged the debate on post-adoption contact and the care that must be exercised when '*considering contact*' under section 46(6).

'There have been differences of opinion about the desirability of contact, which is propounded by some as beneficial, while others are more cautious and urge a degree of flexibility and avoidance of doctrinaire policies. They point out that in the wrong case, contact can lead to disturbance of children and a burden on the adopting parents. There is, however, general agreement that contact can contribute to a feeling of identity for adopted children and help dispel feelings of rejection'.

It is hoped that judicial views such as this will become more apparent in the future and will move away from the idea that on-going contact between a child and his birth parent was 'repugnant to the purpose of adoption'.<sup>54</sup>

### ***Factual Problems with Severing Links and Contact***

A problem with the law in this area appears to be the statute, ignoring the reality of research findings. The Hadley Institute published a paper on non-infant adoption. The research concerned children aged between three and 11 years. In the follow-up seven years later, the children had reached adolescence. Many had formed their own views on contact, which ranged from not wishing for birth family contact, to insisting on restoring contact even 'ringing or 'texting' their parents whenever it suited them'.<sup>55</sup> This illustrates that there is inconsistency with the notion of severing links, and older children, who reach an age where they are making autonomous decisions about contact with their parents. This appears to support

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<sup>51</sup> Welstead., *Family Law*, p.250.

<sup>52</sup> *Re P (Children) (Adoption: Parental Consent)* [2008] 2 FCR 185.

<sup>53</sup> *Down Lisburn Health and Social Services Trust v H* [2006] UKHL 36 [2007] 1 FLR 121, A case on appeal from Northern Ireland.

<sup>54</sup> Gilmore, S, Glennon, L., *Hayes & Williams Family Law*, (3<sup>rd</sup> ed, Oxford, 2012) p.706 This was suggested by the Court of Appeal in early case law.

<sup>55</sup> Selwyn, J, et al., *Costs and Outcomes of Non-Infant Adoption*, Hadley Centre for Adoption and Foster Care Studies (April 2006) <http://www.bristol.ac.uk>.

Bainham's argument that the legal transplant should be an exception rather than a rule.<sup>56</sup> It is of note that approximately 70% of adopted children have some form of contact with their natural family, but it is clear that this is predominantly indirect and by informal agreement rather than by an order. Contact such as this also tends to be a continuation of arrangements made at the time of the care order, with contact orders made at the time of the adoption order very unlikely.<sup>57</sup>

The Government did not cement the issue of post-adoption contact in the ACA, and this has caused the courts difficulty in reconciling contact with the doctrinaire policies of adoption law. However, the concept of adolescent children insisting on communicating with birth families places an almost antiquated and absurd picture of the statutory guillotine in contrast to such reality. This was eloquently summarised by LJ Oliver in *Re V* 1987,<sup>58</sup> who stated that if it were appropriate to continue with contact post adoption then 'It could be doubted whether the severance of legal ties which adoption effects is the necessary intervention'.

### **3 Dispensing with Parental Consent to Adoption**

At the committee stage of the 2002 Bill, Lord Howe suggested that a test for dispensing with parental consent would need to provide that adoption would, after considering all other options, be the only option available to the child.<sup>59</sup> The concerns raised in seeking this provision were 'to ensure proper weight was given to parental rights in respect of the child' and, in respect of the Human Rights Act 1998, and also to ensure the threshold for dispensing with consent was clear.<sup>60</sup> The Government responded by confirming the test's suitability by the following factors; parental rights were protected by the term '*requires*' in section 52(1)(b). Apparently '*requires*' meant that dispensing with consent must take into account all relevant welfare factors, including the child's mental and emotional needs, this meant the test would not be satisfied in marginal cases. Further, parental protection was provided by the welfare checklist in section 1(4)(f)(ii).<sup>61</sup> It was confirmed that the Government believed the provisions were compatible with the HRA by aligning the test with the grounds set out in *Johanson v Norway* 1997<sup>62</sup> which states 'the deprivation of parental rights and access should only occur in exceptional circumstances justified only if motivated by an

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<sup>56</sup> Bainham, *Arguments about Parentage*, p.349.

<sup>57</sup> Herring, *Family Law*, p.685.

<sup>58</sup> *Re V (A Minor) (Adoption: Dispensing with Agreement)* [1987] 2 FLR 89 at para.98.

<sup>59</sup> Amendment no 76, Hansard, HL Deb, cols CWH260/1 & 263-269 (11 July 2002) <http://www.publications.parliament.uk/pa/ld200102/ldhansard> January 2013.

<sup>60</sup> *Ibid.*

<sup>61</sup> s1(4)(f)(ii) the ability of any of the child's relatives to provide the child with a secure environment in which the child can develop and otherwise to meet the child's needs.

<sup>62</sup> *Johanson v Norway* (1997) 23 EHRR 134.

overriding requirement pertaining to the child's best interests'. As for Lord Howe's concerns about a clear threshold for dispensing with consent, Choudrhy argues that the test for this remains as nebulous as the significant harm test in section 31 of the CA 1989 which provides no actual legal definition, and is therefore excessively broad.<sup>63</sup>

### ***The Legal Significance of Consent***

One must consider that parental consent is the bedrock of adoption. This has been long established in domestic law, and it also underpins International law, in treaties such as The Hague Convention<sup>64</sup> and The UN Declaration on the Rights of a Child.<sup>65</sup> This principle has the fundamental aim of protecting the rights of birth parents. The birth parents must consent to their child's adoption.<sup>66</sup> Consent by sections 52 and 52(5) provide that '*Consent*' means consent given unconditionally and with full understanding of what is involved'. Section 52(1) gives the courts power to dispense with consent:

The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption unless the court is satisfied that-

- (a) the parent or guardian cannot be found or lacks capacity to give consent, or
- (b) the welfare of the child requires the consent to be dispensed with.

It is the latter provision that has caused much concern. Firstly, section 1(4) contains a simple welfare checklist which the courts 'must have regard to' when deciding whether to order adoption.<sup>67</sup> The welfare test is used by the court to decide whether it is in the child's welfare to be adopted. It therefore also comes into play where consent is concerned. If the welfare of the child requires adoption, then of course a parent's refusal to consent can be overridden, and this is entirely constructed on the wording of section 52(1)(b). Dispensing with consent may then become 'a foregone conclusion'.<sup>68</sup> Cooke strongly criticises the provision. She states it is improper to children and birth families that there are no safeguards<sup>69</sup> in place for the child's interest in remaining part of his birth family. 'However dependable a judge's view

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<sup>63</sup> Choudrhy, S., 'The Adoption and Children Act 2002, The Welfare Principle and the Human Rights Act 1998- A Missed Opportunity?' *Child and Family Law Quarterly*, 119, (2003) p.120.

<sup>64</sup> Department for Education, (26 April 2012), The 1993 Hague Convention on the protection of children adopted from abroad to prevent child trafficking and abduction seeks the full informed consent of a birth parent to the statutory removal of parental responsibility <http://www.education.gov.ukhagueconventiononprotectionofchildtrafficking> 26 April 2012.

<sup>65</sup> Articles 2 and 6 of the UDRC afford the child legal protection of his welfare being paramount and the right to remain with his birth mother unless in exceptional circumstances.

<sup>66</sup> On establishing whose consent is required, the legal mother must always consent. Only a father with parental responsibility is required to consent.

<sup>67</sup> s1(4) includes the following (non-exhaustive) welfare considerations: the child's wishes, feelings and needs. The effect on the child of losing their birth family and becoming adopted. The child's age, sex and relationships with birth relatives; and any harm the child has suffered.

<sup>68</sup> Cooke, E., 'Dispensing with Parental Consent to Adoption'- a choice of welfare tests, *Child and Family Law Quarterly* 9(3), (1997) p.263.

<sup>69</sup> The Children Act 1989 s.31(2) contains a threshold criterion which must be satisfied before a care order is made.

of welfare; a test which allows the 'compulsory' removal of a child and the severing of his entire legal relationship is unacceptable'<sup>70</sup>

Bridge suggests that dispensing with parental consent may become 'a rubber stamping exercise' and asserts the need for judicial vigilance to avoid 'the potential for social engineering'.<sup>71</sup> She asks 'have the parents any voice left to them under the ACA'? The Government maintained that they do indeed have a voice, in respect of the welfare test (which asks the court to consider the birth family) *and* with the decision to dispense with consent by arguing 'the courts will be obliged to consider the impact of the child ceasing to be a member of his birth family and the change that adoption will bring'.<sup>72</sup> It is argued here that even pre the ACA the potential for 'draconian' conduct was evident in cases such as *P, C & S v UK* 2002,<sup>73</sup> and indeed the ACA provides that dispensing with consent becomes an even less demanding exercise for the courts.

### ***An Erosion of Rights under the ACA?***

The law was changed by the introduction of the welfare checklist in to section 1(4) ACA, to bring adoption law in line with the welfare test in section 1 CA 1989. The welfare test is then used as a yard stick for dispensing with consent under section 52(1)(b). Initial response to this provision at Bill stage, was that it endorsed social engineering.<sup>74</sup> However, any suggestion of social engineering in the intention of the Act was said to be repelled by the courts. Cooke argues 'the value to children of being brought up by their own parents is deeply ingrained in the courts; they insist social engineering is harmful to children, even if the effect on their parents is not considered'.<sup>75</sup> She gives the example of *Re KD* 1988,<sup>76</sup> where Lord Templeman asserted the natural parent was the right person to raise the child in all but exceptional circumstances. It is of note that this case was heard pre ACA. The ACA has blurred the distinction between the old two stage test which allowed flexibility when consent was not given. Once the courts find that adoption is in the child's interest under the welfare test in section (1)(4), 'the scales are heavily loaded in favour of finding that the welfare of the child requires consent to be dispensed with under section 52(1)(b)'.<sup>77</sup> An important question presents itself: have the courts continued to uphold the value of the

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<sup>70</sup> Cooke, *Dispensing with Parental Consent to Adoption*, p.263.

<sup>71</sup> Bridge, *Adoption: The Modern Law*, p.152.

<sup>72</sup> *Ibid.* p.153.

<sup>73</sup> *P, C & S v United Kingdom (App No 56547/00 [2002] ALL ER (D) 239* which involved the unnecessary and unconsented removal of a new born from her mother.

<sup>74</sup> This being the legal power to remove children from parents and put them with other parents whom are considered to be better by social standards.

<sup>75</sup> Cooke, *Dispensing with Parental Consent to Adoption*, p.261.

<sup>76</sup> *Re KD (A Minor) (Access: Principles)* [1988] 2 FLR 139.

<sup>77</sup> Bridge, *Adoption: The Modern Law*, p.111.

natural parent, or has the easy route to dispensing with consent in section 52(2)(b) created a loophole which suggests compatibly with the convention, but is also a match made in heaven with the No Delay principle? This allows the courts to override parent's objections and gets children adopted in record time.<sup>78</sup>

It is said that the courts have considered that the word 'requires' from section 52(1)(b) has 'the connotation of imperative that adoption is the only solution'<sup>79</sup> and for that reason parental consent must be dispensed with.<sup>80</sup> In *Re P* 2008,<sup>81</sup> the court gave guidance on the question of dispensing with consent. They referred to dicta of Lord Macdermott in *J v C* 1969,<sup>82</sup> who stated that when deciding to dispense with consent, it should be vital 'that the child's welfare rules upon and determines the course to be followed'. If indeed the child's welfare required adoption, then the courts must 'be aware of the importance to the child of the decision being taken' and be mindful that 'it is a no more important and far-reaching decision for a child than to be adopted by strangers'. In certain circumstances it may be difficult to argue against the decision being the correct one, but cases differ, and evidentially consent in very many cases is dispensed with, therefore it is possible that the test is too objective. When the courts dispense with parental consent, which they did in 1,500 out of the 3,200 adoptions in the year ending March 2008, they are said to acknowledge that this power presents the 'most extreme interference with family life'.<sup>83</sup> In the context of parental rights, Welstead writes:

Adoption places the welfare of the child as paramount but what exactly is the welfare of the child? The stability and permanence emphasised in the legislation has become the Holy Grail credo, but at what price? She continues 'And is it right at a time of developing human rights to dispense with the right of the parent to a family life by dispensing with consent. What value is placed on the prospect of rehabilitation with the natural family? If future rehabilitation was a priority then fewer children would be put up for adoption.'<sup>84</sup>

Others share this view; Bridge calls the extending of the welfare test to dispense with parental consent a '*significant erosion of the natural parents standing in adoption proceedings*'.<sup>85</sup> When one considers this was a view expressed at a time when Britain was embracing the birth of legally enforceable human rights, we could pose the question as to whether the rights of birth parents should matter less than any other group.

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<sup>78</sup> It is said the 2 principles must comply with Art.6(1) of the ECHR and the obligation is on the State to ensure the proceedings are carried out expeditiously.

<sup>79</sup> *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535. As per Wall LJ at 124-125.

<sup>80</sup> Probert, R., *Cretney and Proberts Family Law*, (7<sup>th</sup> ed., Thompson, 2009) p.397.

<sup>81</sup> *Re P* [2008] EWCA Civ 535.

<sup>82</sup> *J v C* [1969] 1 All ER 788 at para.821.

<sup>83</sup> Welstead, *Family Law*, p.278.

<sup>84</sup> *Ibid.*

<sup>85</sup> Bridge, *Adoption The Modern Law*, p.111.

Herring acknowledges the concerns around section 52(1) but argues that there *are* means within 52(1)(b) that parental rights *could* be safeguarded.<sup>86</sup> The word *requires* may suggest that there is scope to dispense with consent based on the slightest interest of a child. However, as discussed in *Re P*, the court held that ‘requires’ in such context, means more than just reasonable or desirable but ‘required’ in the interest of the child’. It is respectfully argued that this reasoning appears somewhat circular in the context of dispensing with consent, because ‘required’ will always be ambiguous in terms of its meaning. Herring goes on to say that in situations where a child has lived with, and become attached to potential adopters for a length of time, then this will provide a strong argument for dispensing with consent.<sup>87</sup> This is indeed a position which requires careful balancing, but often there is such a fine distinction in favour of one placement over another, it can be almost impossible to discern what is right for the child. Some will always argue the natural parent presumption should prevail, (*Re KD*).<sup>88</sup> Others will suggest the presumption is dead in favour of the child’s interests.<sup>89</sup>

Even with the ‘balancing’ of rights by way of the welfare checklist, there is no doubt that the provisions live dangerously close to legitimising social engineering. Some argue that the courts are alert to this risk and act accordingly; whilst others suggest the discretion is far too broad. There appears to be no easy solution to the problem of parents’ rights versus welfare. It has been suggested that a recommendation that was made at the consultation stage of the ACA should be considered as an amendment.<sup>90</sup> This being that the test must find that the advantages of the child being adopted are ‘*significantly greater*’ than any other alternative option which could then justify dispensing with parental consent.<sup>91</sup> Refusal of consent to adoption is said to be a primary cause of ‘drift’ in care. Therefore, when one considers how resolute the Government remain on tackling delay, it is surely apparent why they should want to make it simple to dispense with consent, but does that make it right? As with many aspects of law, the theory of dispensing with consent to adoption is of idealistic, balanced and impartial decision making, which is, by nature destructive to personal relationships. It is not clear from the findings that consent is given enough weight because it is very difficult to argue against decisions that cite the welfare of the child as requiring consent to be dispensed with; and that may be precisely what the Government intended.

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<sup>86</sup> Herring, *Family Law*, p.683.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Re KD (A Minor) (Ward Termination of Access)* [1988] AC 806.

<sup>89</sup> *Re B (A Child)* [2009] UKSC 5 Their Lordships preferred to consider what was best for the child rather than general assumptions or presumptions.

<sup>90</sup> Choudhry, S., *The Adoption and Children Act 2002, The Welfare Principle and the Human Rights Act 1998*, (2003) p.120.

<sup>91</sup> Lowe, N, Douglas, G., *Bromley’s Family Law*. (10<sup>th</sup> ed, Oxford University Press, 2007) p.859.



#### 4 Finality, Injustice and Legal Voids of Adoption law

An adoption order is irrevocable<sup>92</sup> and once made, there are no statutory grounds for natural parents to apply to the court for any order concerning their child. Any application first needs to obtain leave of the court as they are no longer a legal parent. In *Re B* 1995<sup>93</sup> Swinton Thomas LJ made it clear:

There is no case in which it has been held that the court has the inherent power to set aside an adoption order by reason of misapprehension or mistake. To invalidate an otherwise properly made order would undermine the whole basis on which these orders are made, namely they are final and for life as regards to adopters.<sup>94</sup>

Few cases have provided grounds where an order *may* be revoked,<sup>95</sup> for example where parental consent to adoption was given based on a fundamental mistake (*Re M* 1991).<sup>96</sup> Here, Glidewell LJ stated that the revocation of an adoption order in this case was 'if not unique then wholly exceptional' to the law and should not be held as some precedent for similar cases.<sup>97</sup> Revocation may also be considered where the adoption procedure involved a 'fundamental defect in natural justice'. There should however, be no illusions as to the virtual impossibility of these exceptions being applied by the courts. This is illustrated by the case of *Webster* 2009.<sup>98</sup>

The Websters were mistakenly found to have harmed their child B, and this led to the removal and adoption of their three children. During care the proceedings of a fourth child, new expert evidence was provided in respect of B. The report held 'powerful opinion' that B's injuries were caused by scurvy and iron deficiency and not abuse. This was accepted by the court and the care proceedings halted. The parents applied to have the adoption orders in respect of their three children set aside. In his judgment Wall LJ followed that of Swinton Thomas LJ in *Re B*, and confirmed that 'only in highly exceptional and very particular circumstances can adoption be set aside'.<sup>99</sup> His rationale for this was, once the child was adopted he ceases to be the child of his previous parents and becomes the legitimate child of the adopters. Let us consider the regret expressed by Wall LJ:

For Mr and Mrs Webster, the case has been a disaster, quite apart from any breach of their rights under the ECHR. They have been wrongly accused of physically abusing one of their children, and three of their children have been removed wrongly and permanently from their care. The only mitigation, from their point of view is the local authority's belated recognition that they are able to care for B. The case has

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<sup>92</sup> The making of the adoption order is provided under ss 46-51.

<sup>93</sup> *Re B (Adoption: jurisdiction to set aside)* [1995] 2 FLR.

<sup>94</sup> *Ibid*, at para.8.

<sup>95</sup> Herring, *Family Law*, p.690.

<sup>96</sup> *Re M (A Minor) (Adoption)* [1991] 1 FLR 458; [1990] FCR 993.

<sup>97</sup> Welstead, *Family Law*, p.254.

<sup>98</sup> *Webster v Norfolk CC* [2009] EWCA Civ 59.

<sup>99</sup> Herring, *Family Law*, p.691.

been a worrying and deeply regrettable experience, not least because, in the result, a family which might well have been capable of being held together has been split up'.<sup>100</sup>

It could be inferred from this judgment that although regretful, *any* matter which leads to a flawed adoption can be ignored, unless there was procedural error, merely because an adoption order is irrevocable. The fact that the Webster's children had been adopted for four years was considered to be an acceptable conclusion, yet it remains that the children were removed from their parents in error. There is something about this case and others like it that lack a missing component of justice. It thus raises the question as to whether mistakes which concern the separation of children from their parents are simply justified at law in this way; and that LAs and the courts can 'hide behind the law' in the ACA rather than admit mistakes. Whilst it is fair to say in Webster that the adoption was based on the belief that significant harm had occurred, and indeed the balance could not be restored by acting against the best interests of the children by disrupting the adoption. Critics argue that cases such as this highlight the inconsistency of the adoption order. Fortin makes the point 'an order may ostensibly benefit the child, it also deprives the child and his birth parents of a unique relationship in a family, which can never be retrieved'.<sup>101</sup> Thus, there may be an argument here for adoption being suitable in only the most exceptional circumstances.

### ***Hiding behind the Law? The 'Legal Void' of Failed Placements and Adoption***

Under the ACA the welfare of the child is the *paramount* consideration. Further, the ACA asserts that the welfare of the child must be paramount '*through his entire life*' thus the decisions made to have a child adopted should be based on 'lifelong implications'.<sup>102</sup> If a failed placement or adoption occurs, there are indeed lifelong legal and factual complications. Failed adoption is a real risk where older children present with issues that were either unconsidered or unforeseen at the time of adoption.<sup>103</sup> Harris Short points out 'The fundamental problem...is that the majority of adopters still seem to expect 'trouble free babies' and not older children with challenging backgrounds and complex needs'.<sup>104</sup>

The adoption order provided by the ACA is final and irrevocable,<sup>105</sup> only a further adoption order can remove the parental responsibility (PR) of the adoptive parents.<sup>106</sup> The courts have

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<sup>100</sup> *Webster v Norfolk CC* at pp.3-4

<sup>101</sup> Fortin, J., *Children's Rights and the Developing Law*, (3<sup>rd</sup> Ed, Cambridge, 2009) p.536.

<sup>102</sup> Probert, *Cretney and Proberts Family Law*, p.383.

<sup>103</sup> Herring, *Family Law*, p.692, suggests that findings from research in 2003 found that where a child is over 10, around 50% of adoptions break down.

<sup>104</sup> Gilmore, *Hayes & Williams' Family Law*, p.671.

<sup>105</sup> With one exception, that revocation may occur under the ACA s.55(1) when a child adopted by one natural parent is subsequently legitimised by the marriage of his natural parents.

<sup>106</sup> Bridge, *Adoption The Modern Law*, p.204.

been consistent in their aim to uphold the irrevocability of orders in the face of some difficult cases, but there is an argument which this article puts forward, of the serious flaw of the legal transplant model, when adoption breaks down.

There are no official records of the numbers of adoption breakdowns in Britain. At the time of writing, the Department of Education have commissioned the Hadley Institute<sup>107</sup> to research breakdown.<sup>108</sup> A study carried out in America which incorporated adoption practice in Britain; found that practitioners received *no education or training* in respect of adoption research and the impact of disruption.<sup>109</sup> Herring writes:

There are no official statistics on the rate of breakdown. One study found 8% broke down after an order was made. Another found it was 20%. The impact of failed adoption on the child can only be imagined. Indeed, it is possible that it will cause the child more harm than would have been suffered by the child if adoption had not been attempted. It is therefore crucial that the Government's attempts to increase the number of adoptions do not lead to an increase in the rate of breakdown.<sup>110</sup>

In their 2012 Action Plan on tackling delay in adoption,<sup>111</sup> the Government rejected the seriousness of breakdown.

Some argue that efforts to speed up adoption will lead to an increase in adoption breakdown, by forcing social workers and local authorities to make rushed and therefore argued that the true figure was much lower around 10%, but it is too simplistic to argue that speedier adoption will lead to more adoption breakdown.<sup>112</sup>

This article respectfully argues that the issue of breakdown is too important to dismiss so readily. What is significant is that placements *and* adoptions are breaking down, regularly. In the year ending March 2012, 3,450 looked after children were adopted. If an average of 13% breakdown is taken from Herring's statistics of between 8% and 20%. This means that in one year, approximately 448 adoptions fail, and the children are returned to care. The Government routinely promised to increase rates of adoption in 2002, and in their 2012 reform proposal they continue in the same vein. Herring notes 'The Government is convinced adoption benefits children'.<sup>113</sup> It is issues such as these where adoption may have been rushed into without considering other options, or the long term consequences. This can

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<sup>107</sup> The Hadley Institute of Adoption and Fostering, The University of Bristol.

<sup>108</sup> Community Care, *Ministers order first official study into adoption breakdown*, (6 January 2012) <http://www.communitycare.co.uk/articles/06/01/2012/117910/ministers-order-first-official-study-into-adoption-breakdown.htm> February 2012.

<sup>109</sup> Coakley, J, Berrick, J., 'Research Review: In a Rush to Permanency: Preventing Adoption, Disruption' *Child and Family Social Work*, 13. (2008) p.110.

<sup>110</sup> Herring, *Family Law*, p.692.

<sup>111</sup> An Action Plan for Adoption: Tackling Delay, (March 2012) ref DFE-00030- 2012 <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DFE-00030-2012>, at para.35 March 2012.

<sup>112</sup> *Ibid.*

<sup>113</sup> Herring, *Family Law*, p.666.

lead to failed placements and adoptions and where Herring states one can only imagine the impact, the following case studies illustrates that impact clearly.

### ***Re X and Re A & S: Cases of Statutory Orphans***

The following two cases demonstrate how adoption law is failing children and their families. In *Re X 2008*<sup>114</sup> two boys (X) were adopted from care in 2005 at the ages of seven and four due to parental ill health. In 2008 the adoption broke down. The details of the case as presented here were obtained through primary research conducted by the author in 2013 utilizing private documents on adoption breakdown with the aim of demonstrating the problems with failed adoption. The LA would not provide information to the birth mother (M) other than to confirm annual letterbox arrangements would continue. At this time X had been made the subject of final care orders in favour of the LA, which meant their status was governed by the CA, which in turn meant the legal standing of issues such as contact had changed.<sup>115</sup> It transpired that X was not going to return to their adopters. Despite this fundamental change in circumstances the LA were able to 'hide' behind the law in the ACA, and refused to acknowledge the adoption had broken down. M applied to the court for leave for disclosure. The application was opposed by the LA, who argued that M's application was void as 'in the eyes of the law she was no longer the mother of X', nor was there any legal obligation upon them to disclose the childrens' circumstances. They agreed to consult with M in the future if any decisions were changed. For these reasons M's application was dismissed.

By 2010 X had been in care for two years with no contact with either the adoptive parents or their birth family. The only remedy left to M was the LA complaint procedure which is a legal requirement under CA section 26(3).<sup>116</sup> The complaint process took over two years without being resolved. During this time M was consistently told that contact was not in the care plan. Much of the complaint was upheld by independent reports and inter alia, concerns were raised that no independent person had been permitted to speak with X to determine their wishes and feelings.<sup>117</sup> Despite the LA concurring with all of the recommendations they failed to act on them.

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<sup>114</sup> *Re X (Adoption Breakdown)* Northampton County Court (2008) Unreported.

<sup>115</sup> s.34(1) places a compulsory duty on an LA to ensure a looked after child has appropriate contact with his parents and as there is no specific statutory provision following failed adoption this section ought to apply if in the child's best interest.

<sup>116</sup> s.26(3) requires every local authority to establish a representations procedure that can be used by any person deemed to have a sufficient interest.

<sup>117</sup> The child's wishes and feelings being a fundamental right under the Children's Act.

The Independent Reviewing Officer (IRO) is a legal appointee and is required pursuant to section 118 ACA. He has a statutory duty to advocate for the child in care during case reviews. The DfE website states that the IRO 'should promote the voice of the child'.<sup>118</sup> This includes the obligation to raise concerns if the LA is acting contrary to the wishes of a child with competence. In the case of X, the IRO advised M that X had never requested contact with their birth family.

M discovered the complaint outcome had no teeth and no legal enforceability, so she used the evidence which upheld her complaint to reapply for leave of the court. This time leave was granted. Waine J advised that the only way M could regain parental responsibility for X was to adopt them herself. A guardian ad litem visited X and reported her concerns that they had been requesting contact with their birth family since the adoption broke down, but had given up asking, as no one was listening. Following this report the LA submitted that it was now supporting contact between X and M, but failed to provide any explanation why they had denied X this right since they had returned to care. The court duly ordered that the LA promote a plan for contact without further delay. Here adoption did not provide the happy ending that the Government is committed to constructing and, as Harris points out, 'adoption is not a utopia: immense pain and damage can be caused to children should it fail'.<sup>119</sup> It should be noted that there is no provision in the ACA to cover circumstances where an adoption has failed post order. It may be inferred that this failure to recognise that adoption does fail, is placing children who this happens to, at a serious disadvantage.

The theory of X is such that, not only did X exist in a statutory void with no legal parent since the adoption broke down. Their voices were unheard and they were deprived of their rights to any family contact. This conduct suppresses the paramountcy principle, and suggests inconsistency with Article 8 of the Convention and Articles 3 and 25 of the CRC.<sup>120</sup> What also arises from this situation is that following failed adoption, an LA has unaccountable control over the child's life. The LA can decide whether or not to advise the birth parents, and they can withdraw any contact which was taking place during the adoption. They can be almost certain that a parent stands little chance of securing leave of the court. Although it can be

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<sup>118</sup> Department for Education, *Independent Reviewing Officers (IRO)*, (12 July 2012), <http://www.education.gov.uk/childrenandyoungpeople/families/childrenincare/a0065612/iro> January 2013

<sup>119</sup> Harris-Short, *Family Law*, p.995.

<sup>120</sup> The UN Convention on the Rights of the Child Article 3 'All organisations concerned with children should work toward what is best for the child. Article 25 'Children who are looked after by their local authority should have their situation reviewed regularly'.

argued that most LAs will act accordingly in the child's interests, it has long been accepted that the absence of checks and balances creates potential for abuse of power.<sup>121</sup>

There is the additional difficulty of adoptive parents who still have PR for children who no longer live with them, with the natural parent holding no PR, unless they adopt their birth children. In the case of X, if it was not for the court agreeing to grant leave to the parent it no longer recognised in law, X stood to languish in care, the by-product of failed adoption, with no voice and no rights, dependent on an IRO who was not fulfilling his statutory duty. This is not an acceptable state of law. It is of note that the local authority in X was subject to an Ofsted report,<sup>122</sup> where the findings were inadequate and immediate notice to improve was issued. The service to birth parents was particularly criticised by 'there being no evidence of birth parent involvement in planning for their children and no evidence of meaningful support provided to them'.<sup>123</sup> This report led the Director of Children's Services to publish a statement promising immediate improvement.<sup>124</sup>

Injustice has also arisen in situations where children have been legally freed for adoption but never adopted. In *Re A & S*<sup>125</sup> two boys who were described by Jackson J as 'statutory orphans' had spent most of their lives in care. Both were made subject to freeing orders<sup>126</sup> under the previous law in 2001. Following a failed placement, the LA abandoned plans for adoption in 2004, yet no applications were made to revoke the freeing orders.<sup>127</sup> The elder boy sought legal action against the LA to prevent a move after he had spent three settled years with foster carers. Upon this litigation the freeing orders were finally revoked 11 years after they were made. The facts of the case state that the boys had been subjected to between 36-40 respite care placements with 22 different carers in their childhoods.

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<sup>121</sup> British constitutional law contains the doctrine of Separation of Power of the Legislature, the Executive and the Judiciary to provide checks and balance to prevent abuse of position.

<sup>122</sup> Ofsted., *Social Care Inspection, Reference SC056764*, (1 March 2012) [www.ofsted.co.uk](http://www.ofsted.co.uk)

<sup>123</sup> Commission for Social Care Inspection., *Inspection Report of Adoption Service of Northamptonshire County Council*, (28 November 2005), [www.csci.org.uk](http://www.csci.org.uk).

<sup>124</sup> Northamptonshire County Council, *Response to Ofsted's Inspection of Adoption Services*, (30 March 2012) <http://www.northamptonshire.gov.uk/en/news/Newsreleases/Pages/PR2891.aspx>.

<sup>125</sup> *A & S v Lancashire County Council* [2012] EWCH 1689 Fam.

<sup>126</sup> Freeing orders under s.18 Adoption Act 1976, extinguish a child's membership of his birth family and pass sole parental responsibility to the adoption agency or LA. They ceased to be available after December 2005 when the ACA placement order became law.

<sup>127</sup> Freeing orders can be revoked by the court by application s.20 AA 1976.

The boys had requested contact with their mother, but this was prevented by the freeing order status and there had been 37 LAC<sup>128</sup> reviews which were chaired by the IRO for the boys, who made no attempt to challenge the freeing order status. The boys took legal action against the LA and the IRO. They have obtained human rights declarations from the court confirming there were breaches of Articles 6 and 8 of the Convention, and they are pursuing civil claims for damages.<sup>129</sup>

A & S prompted the Minister for Children to write to every LA in the UK, to request information about children who remained on freeing orders when there was no plan for adoption. He wrote 'I am disappointed that so many children freed for adoption have not been adopted nor had their care properly reviewed.' He went on to suggest that there was a lesson to learn from A & S 'that an awareness of their anomalous legal status and the associated implications is potentially devastating for the young person; proper steps must be taken to ensure the best interests of the child prevail throughout'.<sup>130</sup> This paper raises a question in respect of the Government's pledge in the 2003 paper 'Every Child Matters'.<sup>131</sup> Is it not a reasonable expectation that 'every child' should include the victims of the voids of placement and adoption failure?

Here the law has failed the children it should be protecting. The adoption order is a perfectly appropriate provision as long as the adoption does not fail. If it does, evidence shows far reaching legal and practical complications. Adoptions, and more regularly placements, do fail, and in the absence of accurate statistics one can only demonstrate the damage from the few cases and literature available, but the damage is real and should not be discounted. It is also clear that some LAs are reluctant to admit mistakes and indeed can make hasty decisions with an 'act now explain later attitude'. This cannot be what Parliament intended when it created the ACA. Like so many areas of law these cases come before the court when the damage has already been done, and any remedy will not alter that harm. One can simply reflect on the imperfection created by this law and hope that lessons have been learned. However, what is deeply concerning is that there appears to be little or no

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<sup>128</sup> Local authority care reviews are a statutory process which govern individual case management of all looked after children. LAC review must include: updates of the child and the child's views, and any orders made in respect of the child.

<sup>129</sup> Cook, T., *A & S v Lancashire County Council* [2012] EWCH 1689 Fam, *Freeing/Placement Orders, Human Rights Applications against LCC and Independent Reviewing Officer*, Michelmores Family Law Service Adoption Conference, 6 September 2012.

<sup>130</sup> Primary research by the author of private documents to illustrate the problems with statutory orphan status.

<sup>131</sup> Department for Education, *Every Child Matters*, (1 August 2003), DfES 0672 2003 <https://www.education.gov.uk/publications/standard/publicationDetail/Page1/DfES%200672%202003>; The report was responsive to the Victoria Climbié scandal but covers broadly children getting the most out of life and overcoming disadvantage to achieve their full potential.

recognition of the 'legal black holes' that adoption law has created. This article suggests that in situations such as this it must be determined what has happened, and what is going to happen to formerly adopted children, as currently it appears unclear whether they fall under the umbrella of the CA, or the ACA. Feasibly there ought to be an amendment in the law that alters the legal status of these children, so at the very least they do not become statutory orphans.

## **Conclusion**

The essence of adoption is a service for children, whose welfare is of paramount importance. Adoption also represents the most severe interference in family life, and consequently it should not be a decision made without considerable mindfulness and care. The ACA is undoubtedly essential legislation, which has transformed adoption in many ways. It can also be argued that parts of the Act are corrosive to the rights of birth parents, by providing that children can be adopted without consent. The principle of No Delay, which formed the framework of the ACA, was a conceptual theory that *has* gone some way to providing permanence for many children, who would otherwise be stuck in the care system. However, it has had limited success in reducing numbers significantly. No delay was also promoted by adoption targets, aimed at pushing LA's to make faster decisions about permanence. If one refers back to the Government's underpinning principles of the ACA, it could be argued that the child's right to be raised by his birth parents' is compromised by what some call 'forced adoption'. Rushed adoption also increases risk of disruption, and the ECHR made it clear that adopting children before attempting reunification was a violation of the State's Article 8 obligations. Despite this, the State *and* the courts have maintained that the ACA is compatible with the HRA 1998. The recent reform proposals aim to tackle delay by further reducing the time a child is in care. It remains to be seen whether this proposal makes it to law, but perception suggests that it will, because once again the problem of children being delayed in care is at crisis point. Perhaps an alternative method could be considered, such as providing educational support to parents who lack basic childcare skills, with the aim of keeping the family together. Proactive support such as this works in other countries, and may prevent the need to remove some children from their parents in the first place.

The extinguishment of parental responsibility coupled with post adoption contact, is a deeply paradoxical notion. The statute imposes the legal transplant, whilst the modern practice of on-going birth family contact is considered important for a child's identity. The courts state that section 46 is an essential requirement to give the child a new secure start, with a family,



who in law become the real parents. Respected family lawyers such as Bainham argue that the legal transplant is designed to meet the insecurities of adopters rather than promote the child's welfare. Where research has found that a large number of adopted children ask for contact, and indeed older children have memories and attachments, a question can be raised of what advantage such legal fiction has for these children? A child is unlikely to have a great understanding of the concept that their parents are no longer their parents in law, and arguably this may well create a negative effect on a child's feelings around contact.

The nature of section 46 caused the courts difficulty in upholding contact, and only in exceptional circumstances would this occur. This article argues that there is too little dedication to maintaining contact that may be in the child's interest. If one considers that the recent reform proposals do not appear committed to contact continuing, once a child is adopted, it may become even more unlikely that it will be sustained at Government level. There appears to be a strong need to establish exactly where the issue of contact and adoption stands. Currently there is conflict between the views of the Government, the courts and researchers. It would surely then be beneficial to consider which view, if any, is in the child's best interest.

The practice of dispensing with parental consent via the welfare checklist is argued to be draconian and infringing on the rights of birth parents to oppose adoption. Some offer that the statutory ease of dispensing with consent makes adoption an inevitable deduction, and is legitimatising social engineering. The Government deny this by aligning the word *requires* from section 52(1)(b) with case law from the ECHR, and they argue that *requires* equates to nothing short of necessity. However, if consent *can* be dispensed with purely as a formality, this arguably places a lower significance and value on the meaning of consent, and of a right to oppose adoption. This article argues that the word *requires* in the statutory sense is too broad in contrast to the seriousness of its effect. The recommendation is that there should be an amendment; to change *requires* a need for adoption, to a need so fundamental that no other option would suffice. This stricter test would still provide for dispensing in appropriate circumstances yet would allow a fairer distribution of rights.

The irrevocable adoption order is a provision the courts have been keen to uphold. The rationale behind such finality is primarily because that is what adoption is intended to be. Once again this brings us to the archaic genesis of the law compared to the modern-day practice. The order stands for permanence and is only revoked in exceptional circumstances. The courts felt that a family wrongly accused of abuse, and a new born taken

from its mother needlessly, did not meet the threshold for 'exceptional', thus the welfare of the child principle may also capacitate injustice.

The case studies of *Re X* and *Re A and S* demonstrated that failed placement and adoption can be devastating to children, and questionably worse for the legal voids that can follow where children appear to exist outside the provisions of both the CA and the ACA. There is no attention paid to these risks in the recent Action Plan by the Government. This commentary puts forward the view that the law *may* rightly justify overriding parent's rights with the best interest of the child, but the law designed to promote the child's welfare as paramount is failing them in some cases. There appears to be a strong aversion at both Government and LA level to acknowledge the deficiencies of adoption law, not least that adoption does not always stand for permanence. Any changes to the current system ought to incorporate a provision, whereby if a child's adopted or placed status changes, then the Act should provide for them over and above the statutory orphan position. A child should certainly never exist without a legal parent due to a defect in the law.

Adoption law is a Pandora's Box which, when opened only slightly, spills out deeply complex and concerning human rights issues and practical complications which are caught up in the process. The practice of adoption is at the core of many issues that regulate the ideal society we would like to exist in. Adoption confronts ideas about the quality of a family, and what significance should be placed on nature versus nurture, including what role the State should play in family matters. There are many expectations on what makes a suitable parent, and indeed *what* is in a child's best interest. This thesis suggests that a child's best interest should be sustained with altruism, honesty and kindness, but never self-interest. This topic would be well suited to further research into whether objectively; adoption can categorically be cited as an action based on a *child's* best interest.