BAAF ADOPTION & FOSTERING

"New Directions: Help or Hindrance?"

Today brings the opportunity to review the changing face of adoption and fostering in a new century. The title for the day is "New Directions: Help or Hindrance?" This begs the question. For whom are the new directions a help or potential hindrance? It is important to identify at the outset the person at the centre of our consideration. That person is the child. Not just any child, but each particular child. Every child is an individual. Each child is unique. Each child we consider in social work practice, or legal proceedings is a person whose welfare may be advanced, or set back, by the interventions of social work services and legal services.

Children should now have a voice. This is the effect of article 12 of the United Nations Convention on the Rights of the Child. States Parties to the Convention are required to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child. Children's welfare is to be paramount in relation to adoption. Article 21 provides that States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration. Children do not however have a vote. They are politically powerless. It is therefore easy for their voice to be drowned and their welfare overlooked in relation to matters of policy and legal structure.

If children were to have a "vote" in relation to policy and legal structure, what would they say? In 1999 BAAF published a book called "Adopted Children Speaking". Here are some of the things that children said:

> "I wanted a family that would take care of me and not leave me alone. And when I wanted them, they always come. And feed me properly, and look after me, and be kind …"
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> "I was worried whether I would be allowed to get adopted or not. And if I was not, what would I do and where would I go?"
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> "I was three when I first went in there (a community home), I was eight when I came out. So I had a long wait …I did not like it. I think I had to wait too long."
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> "I was scared because I had never seen a judge before – that's the first time I ever did and I never know what it was going to be like. So I was scared."

The message from children to politicians, practitioners and lawyers is remarkably consistent. They want secure and predictable relationships. They do not want to have to wait in limbo for too long. They want to know that those making the decisions about them can be trusted. These are not new considerations.

Adoption is important to a small group of children who cannot look to their birth families to provide secure and predictable family life. It is important that the criteria for identifying who those children are is clear and coherent, but at the same time the law must be sufficiently flexible to allow society to meet the needs of the individual child. The process of adoption must be well managed to ensure that needs are met within a reasonable time.

Consent to adoption

At the centre of most litigation about adoption is the question of whether a parent should give consent to adoption. There are a number of grounds for dispensation of consent. One of the two most common grounds is that the parent is withholding agreement unreasonably[1]. The House of Lords has told us that this has to be viewed from the perspective of the "objective reasonable parent"[2]. The "objective reasonable parent" is also a creature of Scots adoption law[3]. This person is frankly a fiction, or as the Court of Appeal in England has said " a non-existent paragon". The Court of Appeal suggested that a judge might ask himself "whether, having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views and interests of the objecting parent or parents"[4].

The alternative most common ground for dispensing with consent is that the parent has persistently failed without reasonable cause to discharge parental responsibilities[5]. This involves picking over the parent's past behaviour in a manner that is pejorative. It invites "pantomime" litigation ("Oh yes you did…."). It leaves the damaged parent even more damaged and writes up for the child's future benefit just how bad is his or her genetic pedigree. It risks a focus on the ills of the parent rather than the welfare of the child.

We needed a new test. We needed a test that did not involve resort to fictional creatures. We needed a test that focused on the child, while respecting the parent. The Adoption Policy Review Group recommended a simple the test for dispensation with parental consent, on the basis that

(a) the parent or guardian cannot be found or is incapable of giving consent; or
(b) the child's welfare requires consent to be dispensed with.

The Review Group report states that this test should be qualified by a provision that any court applying the test should have regard to article 8 of the European Convention on Human Rights. It is debatable whether this required to be stated expressly, given the terms of section 6 of the Human Rights Act 1998, which requires public authorities, including social work authorities and courts to act in a way that is compatible with the Convention. The proposed test was actually identical to that in

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[1] Adoption (Scotland) Act 1978, section 16(2)(b).
[2] *In re W (an infant)* [1970] 2 QB 589.
[3] *Lothian Regional Council v A* 1992 SLT 858
[4] *Re C (a minor) (Adoption: Parental Agreement: Contact)* [1993] 2 FLR 260; *City of Edinburgh Council v K and F,* 2006 FamLR 37.
[5] Adoption (Scotland) Act 1978, section 16(2)(c).

the Adoption and Children Act 2002. There is therefore some practical experience of it. Ministers accepted the report.

In its first incarnation the Scottish Adoption and Children Bill did reflect the Review Group's recommendation. Anxiety was then expressed as to whether the section would be Convention compliant. It was amended and then amended again. The result in the 2007 Act is a complex checklist. Taking it at its simplest (and paraphrasing slightly in order to do so), the consent of a parent may be dispensed with if:

(a) the parent is dead;
(b) the parent cannot be found or is incapable of giving consent;
(c) - the parent has parental responsibilities or rights (other than contact), but is unable satisfactorily to discharge those responsibilities or exercise those rights and is likely to continue to be unable to do so; or
- the parent has no responsibilities and rights as a result of a permanence order (other than one granting authority for adoption), and it is unlikely that the responsibilities or rights will be restored to the parent; .
(d) where neither of the conditions in (c) applies, the welfare of the child otherwise requires consent to be dispensed with[6].

Looking at the test from the perspective of the child there is now a problem. Every case starts with a focus on the parent. Unless the parent is dead, vanished or incapax, the battle lines of the litigation will be drawn up around the parent's past behaviour, not the security and predictability required by the child.

In practice this will result in long and bitter litigation. Reams of social work notes will be lodged. Reports and minutes will be scrutinised. Evidence will be lengthy. Cross-examination will be detailed, as parents deny this or that alleged aspect of failure. The child is left asking "what is going to happen to me?" That is after all the point of the litigation.

The section does get to welfare at (d). This was added just before the third reading of the Bill. BAAF, among others, pointed out to Ministers that children could be left in very difficult situations, if they had been placed with prospective adopters, put down roots and an adoption order was justified in order to allow the *de facto* family to become the legal family. If the child had been born to a drug abusing parent, who had meantime reformed, adoption could be ruled out altogether. The section as originally drafted could also prevent baby adoptions, as it would be a foolhardy adopter who considered caring for a baby unless there was something permanently wrong with the parent. The risk of a change of heart would be too great. The new drafting closed down the possibilities for children.

The final condition (d) was introduced to meet this problem. There is doubt whether it achieves the objective. Where, for example, a parent is able to discharge parental responsibilities, or is likely to be able to do so in the future and there is no permanence order, then consent cannot be dispensed with in terms of (c), but (c) has been 'applied'. On one view it is difficult to see how (d) will ever be reached. On the other hand, if (d) trumps the conditions in (c), then there was no point in including (c) at all.

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[6] Adoption and Children (Scotland) Act 2007, section 31.

Human Rights

The problem over grounds for dispensation of consent appears to have arisen from a concern over human rights of the parents. There is considerable misapprehension about the impact of the European Convention on Human Rights in relation to adoption. Article 8 of the Convention demands respect for family life, but the European Court of Human Rights have been at pains to point out that a parent cannot rely on article 8 to insist on action that is contrary to the welfare of a child. In any competition between the article 8 rights of the child to respect for family life and the article 8 rights of the parent, the interests of the child should always prevail[7]. It needs to be writ large that the European Convention on Human Rights does not prevent politicians, social work practitioners or the courts from making good decisions, within a reasonable time, that allow children to enjoy security and predictability.

The Convention does provide a sharp reminder to public authorities that they must respect the rights of parents, but that is no more than good practice. This can be seen from a proper analysis of the case where the European Court of Human Rights first considered adoption. This is *Johansen v Norway*[8]. In *Johansen* a mother had a long history of difficulties. She had been involved with a violent and drug abusing partner. Her first child had special needs and mental health problems. He was placed in a children's home. The mother's lifestyle was chaotic. She rejected help. She did not attend to her own health needs. When a second baby was born the authorities decided that the child would be at risk if not taken into care immediately. The mother had access twice a week. Her situation improved. Her son returned to live with her. Nevertheless when the younger child was six months old the authorities decided that she should be placed permanently with another family and the mother's access was terminated. The European Court of Human Rights approached the case in the way that has become standard. They looked first of all at the scope of article 8 and then went on to consider:

Was there interference with the applicant's right to respect for family life? The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life and measures that hinder such enjoyment amount to an interference with the right protected by article 8. Interference is not however the sole determining factor. There are three further matters to consider.

Was the interference in accordance with the law? The mother in *Johansen* argued that the relevant law was too vague and therefore arbitrary. This was disputed on the basis that precise legal rules could not be formulated and that scrutiny by the court represented a safeguard against the law being arbitrary. The mother dropped this aspect of her argument. This point was argued in the later case of *Kuijper v Netherlands*[9]. There a 17 year old wished to be adopted by her stepmother. Her birth mother had a right of veto, which could only be overridden if its use amounted to "misfeasance". The birth mother complained that adoption was not "in accordance with the law" because the discretionary power to override her veto was too wide, was

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[7] *Yousef v The Netherlands,* (2002) 36 E.H.R.R. 345.
[8] (1996) 23 E.H.R.R. 33.
[9] (2005) 41 E.H.R.R. SE 16.

unclear and was therefore arbitrary. The Court disagreed. It pointed out that it was necessary to avoid excessive rigidity and to keep pace with changing circumstances. Judicial interpretation and assessment of fact was inevitable and did not make the application of the law unforeseeable. Specific conditions, such as those now found in section 31, of the 2007 Act are not a necessary element of the law.

Did the interference pursue a legitimate aim? The Court was satisfied in *Johansen* that the measures taken were aimed at protecting the "health" and the "rights and freedoms" of the child, and that these were, of course, legitimate aims. A similar view was taken in *Kuijper.*

Were the measures taken necessary in a democratic society? The answer to this question turned on whether the reasons for action taken were relevant and sufficient. The Court drew a distinction between taking a child into care where they were prepared to give domestic authorities a wide margin of appreciation, and restrictions on parental rights and access where a stricter scrutiny was required. The original taking into care in *Johansen* was not considered a violation of article 8, but this should have been a temporary measure, to be discontinued as soon as circumstances permitted. Deprivation of parental rights with a view to adoption could only be justified in exceptional circumstances, and if motivated by an overriding requirement pertaining to the child's best interests. The mother had been exercising access in a manner that was not open to criticism and her lifestyle was improving. Concern about a possible failure to co-operate and a risk that the mother might disturb the foster placement did not justify the authorities in failing to take any steps to reunite the mother and child. At this point the domestic authorities had overstepped their margin of appreciation. There was a violation of article 8.

The case of *Johansen* proscribes over-zealous permanent separation, in circumstances where this cannot be justified. It is not authority for the proposition that there can be no adoption. The European Court of Human Rights is supportive of adoption where this can be justified by an "overriding requirement pertaining to the child's best interests". There may be such a requirement where a parent has a long history of deficiency, and an attempt at rehabilitation has failed, as in *Scott v United Kingdom*[10]. There may also be such a requirement where there are *de facto* family ties between the child and the prospective adopter. This occurred in *Söderbäck v Sweden*[11]*, Kuijper v Netherlands* and *Eski v Austria*[12]. In each of these cases the court refused to hold that adoption represented a violation of the Convention.

The same conclusion was reached by the House of Lords in *Re B (A Minor) (Adoption: Natural parent)*[13]. A father had applied for an adoption order, the effect of which would have been to sever the child's relationship with the mother. The mother did not oppose the application. The judge granted it. The Official Solicitor appealed. A strong Court of Appeal (Dame Elizabeth Butler-Sloss P, LJs Hale and Potter) were influenced by article 8 of the Convention and reversed the judge's decision. The House of Lords reinstated the judge's decision. Provided an adoption order meets "a

[10] 2000 FamLR 102.
[11] (2000) 29 E.H.R.R. 95.
[12] [2007] 1 F.C.R. 453.
[13] [2002] 1 WLR 258.

pressing social need" and is "a proportionate response to that need" there will be no breach of article 8.

The Inner House of the Court of Session has come to exactly the same conclusion in *Dundee City Council v K*[14]. This was a root and branch attack on both the structure of the law and the decision (finally) to grant a freeing order. A strong bench, including both the Lord President and the Lord Justice-Clerk, rejected the challenge. Looking first of all at the legislation, the court held this was compliant with the Convention. The law did contemplate depriving parents of all parental rights and preventing them making any further application but this was in pursuance of a legitimate aim, namely the welfare of children. In some cases such a step was necessary. Furthermore the freeing order itself was made in accordance with the law, in pursuance of the legitimate aim of the welfare of the child, and was necessary in a democratic society, given the history of the parents' attempts to care for the child.

Human rights are not a challenge to the interests of children who need a secure and predictable family life. Properly understood they are a challenge to poor practice that fails to respect family life. Poor practice does not in any event serve the interests of children

Delay

The sad fact about the *Dundee* case was the length of time it took to reach a conclusion. Freeing proceedings were commenced in late 2001 when the child was 3 years old. A final decision was reached in late 2005 when he was 7. The parents argued that delay meant that the application should not be granted. The Inner House gave that argument short shrift. They would not countenance thwarting a remedy that best secured the child's welfare. On the other hand the child in that case was ill served by the proceedings.

If the child is the central figure in adoption proceedings, then delay must be addressed. The solution is not a broad statement of principle. We have such a statement in section 25A of the Adoption (Scotland) Act 1978. This section requires the court to draw up a timetable with a view to determining proceedings without delay. The section had little impact until sheriffs principal intervened with practice notes spelling out how delay should be reduced. Section 25A has not been repeated in the Adoption and Children (Scotland) Act 2007. We are promised new court rules, that build on the experience of the practice notes. This is an opportunity to promote focus in adoption proceedings, so that the needs of the child are not lost in a welter of adult concerns.

One lesson from the practice notes is that presenting an effective case is heavily reliant on preparation. In common with trends in modern litigation, adoption cases are becoming "front loaded". Parties must identify the issues in dispute, agree facts not in dispute, and have the basic facts set out in affidavits. If there are documents to produce, and in most adoption cases there will be documents, they should be presented in an orderly fashion, properly paginated. This takes time and effort.

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[14] 2006 SC 326.

Social work practitioners and lawyers must manage time to allow such effort to be made. It will pay dividends for the child.

An adoption case may also be demanding in terms of court resources. Such resources are under pressure. There are adult interests competing with the interests of children. Children are dependent on the Civil Court Review for a place in the court service for cases to be heard.

Conclusions

This is a moment of opportunity for children. If we place the interests of children at the centre of today's discussions and at the centre of the work that we are discussing, then each child will have the greatest chance of security and predictability within a reasonable time. It is not a vote, but it is the next best thing.

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