



Neutral Citation Number: [2020] EWCA Civ 797

Case No: B4/2020/0479

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT AT BARNET
HHJ McKinnell
18/72

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2020

Before:

THE RIGHT HONOURABLE LADY JUSTICE KING
THE RIGHT HONOURABLE LADY JUSTICE ASPLIN
and
MR JUSTICE KEEHAN

Re T (A Child: Refusal of Adoption Order)

Ms L Briggs (instructed by **Bindmans**) for the **Appellants**
Ms S Morgan QC and Mr T Wilson (instructed by **Goodman Ray Solicitors**) for the **1st Respondent**
Ms C Irvine (instructed by **the Local Authority**) for the **2nd Respondent**
Ms J Rayson (instructed by **FMW Law**) for the **3rd Respondent**

Hearing date: 17th June 2020

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 11.00a.m. on Thursday 2 July 2020

Mr Justice Keehan:

Introduction

1. At the end of a remote hearing on 17 June 2020 we informed the parties that this appeal would be allowed and an adoption order made. This judgment contains my reasons for reaching that conclusion.
2. The appellants appeal against the order of HHJ McKinnell made on 13 February 2020 when she dismissed their application for an adoption order in respect of one child, C, who is 3 years of age. They were granted permission to appeal by Peter Jackson LJ on 6 April 2020.
3. The First Appellant is C's maternal grandmother. The Second Appellant is her husband, but he is not biologically related to C.
4. C has lived with his grandmother and step-grandfather since he was two days old (for ease of reference I shall hereafter refer to them collectively as 'the grandparents'). A special guardianship order was made in their favour on 13 February 2017. They made an application for permission to apply for an adoption order on 9 July 2018 which was granted on 18 September 2018. Their application was dismissed on 5 November 2018 when it was realised that they had not complied with the provisions of s.44 Adoption and Children Act 2002 ('the 2002 Act'). They made a further application for an adoption order on 21 December 2018.
5. The mother of C has not had any contact with him since the day after his birth.
6. The mother opposed the application for an adoption order and she opposed this appeal. C's biological father is not known. The local authority had supported the making of an adoption order before the judge but it took a neutral stance on the appeal. The children's guardian supported the making of the adoption order and was also neutral on the appeal.
7. At the outset of the hearing we considered an application made on behalf of the grandparents to admit two new statements in evidence, a joint statement by them and a statement from the mother's sister which had not been before HHJ McKinnell. The statements related to events which took place on 13 February 2020, the date when judgment was given on the adoption application. The first matter, that the mother had left her psychiatric hospital without permission or the knowledge of the nursing staff was made known to the judge at the hearing on 13 February. The second matter related to a telephone call made by the mother to her sister in the late evening of that day in which various threats were made by the mother.
8. Ms Morgan QC and Mr Wilson, counsel for the mother, took the pragmatic decision not to oppose the application for the statements to be admitted although the mother did not accept the entirety of the sister's account of the telephone conversation. The London Borough of Barnet and the children's guardian did not oppose the application.
9. We were satisfied that, pursuant to CPR r.52.21(2), the two statements should be admitted in evidence. We reminded the parties that a consequence of our decision was that we were satisfied that the third limb of the *Ladd v. Marshall* test had been met,

namely that the evidence must be apparently credible though it need not be incontrovertible.

The Facts

10. The grandmother is in her early 60's and the step-grandfather is in his late 40's. They were married in 2005. They are both of black South African parentage. The grandmother has another daughter who has three children of her own.
11. The grandmother is an experienced social worker and the step-grandfather has worked for a number of non-governmental organisations. They have been foster carers for many years and have fostered many children of all age ranges. One former foster child, now in his early 30's, could not read or write when he first moved to live with the grandparents: he now has a career in the legal profession. He has maintained contact with the grandparents and is a regular visitor to their home along with his children and his step child: the grandparents treat him and them as a part of their family.
12. When discussing their application to adopt C with the children's guardian the grandparents explained their cultural approach to family relationships in the following terms:

“Within our family culture, titles are assigned based on relationships and position and not solely on age, legal or biological ties. Hence, consistent family members and close family friends have taken ongoing roles as “grandparents”, “uncles”, “aunties” and “cousins”. For example, [S] is our grandchild and [C]’s 22-year-old legal cousin however takes the role and title of uncle; and [the mother]’s legal step-father and has taken this role for over 20 years, albeit he is only 3½ and 6 years respectively older. [The mother] does not refute our position in her statement, nor that this is [C] and her own family’s race, culture and identity. Our long established complex family configurations are explained to all openly and honestly without surprises. They are understood and easily explained by family members including the children. They reflect southern African cultural norms and family constructs, significantly differing from traditional English family structures. Our family establishment has been highlighted by professionals as strongly supporting [C]’s ability to develop his own identity and belonging and critical to enabling his sense-making of his life story. As our adopted child [C] nor any other family member would refer to [the mother or her sister]..... as his sibling, as he will not be, and there are neither circumstances where such legal definitions will be required. It is clear within our family that [C] does not as yet have any siblings, albeit we are considering adopting a younger child/baby from outside the family to be raised alongside him as a sibling. Following [C]’s adoption (if our application is successful), our family relationships, enacted roles and titles will remain as they have been assigned. As such adoption cannot skew relationships or family dynamics, they are different already, and are not wrong. [The mother] is [C]’s mother and is referred to him in an age appropriate way, currently as his ‘Tummy Mummy’. [C] will also know, as does the whole family, that [the mother] is [the grandmother]’s daughter and is his mother, although she does not parent him. [The mother] is and will always be part of our and [C]’s family and world, although he has only seen her at birth and may not be able to have any contact with her, as given the risks, are neither the other children in the family able to. We have always strongly encouraged this approach as being in [C]’s best interest, for

example [the mother] saw [C] twice at the time of birth, on our insistence as we were mindful of the relevance of this to his life story. Our approach reflects the lengthy discussions and advice received from social services on this matter since [C]’s birth to date, so that he is safeguarded and understands his family story in an age appropriate way, whom we are to him and why he does not live with his biological mother and father. [C] does not have a legal father and all attempts to identify his biological father have proven unsuccessful. Only adoption will provide [C] with a legal father. If adopted, [C] will gain a legal father whom will be one of his primary carers and his main male, African/black (of a similar racial ethnicity as [C]) positive role model.”

13. The mother had been diagnosed with paranoid schizophrenia and with an emotionally unstable personality disorder. She has a long history of drug abuse and she has a substantial history of criminal convictions for violent offences and using racially abusive language. Between 2009 and 2015 the mother was convicted of three offences of robbery; for the first of these she was made the subject of a hospital order.
14. In April 2016 the mother was detained under s.3 of the Mental Health Act 1983. She was considered to be a high risk to herself and to others. Whilst pregnant she had continued to smoke heavily, at times she refused to eat and she repeatedly struck her stomach causing bruising. On one occasion, she walked into the road in front of a bus whilst on leave and then assaulted the member of hospital staff who reported the incident. She made threats to kill the grandmother and to kill her unborn baby.
15. The safety plan devised at a pre-birth child protection conference specified that the mother would be permitted to see C for a few moments after his birth in the presence of police officers, but she would not be permitted to hold him at any time. The police officers who were present at C’s birth on 14 August 2016 removed him from his mother pursuant to their powers under s.46 of the Children Act 1989 (‘the 1989 Act’).
16. On 15 August 2016 the London Borough of Barnet (‘the local authority’) issued care proceedings in respect of C.
17. He was placed with the grandparents on 16 August 2016 and has since remained in their care.
18. In late 2016 the mother was convicted of harassment which related to her making threats to kill the grandmother. She was sentenced to 12 weeks imprisonment and the court made an indefinite restraining order against her preventing her from making contact with her mother or entering the locale of the grandparents’ home.
19. On 13 February 2017 the care proceedings concluded with the judge making a special guardianship order in favour of the grandparents.
20. In March 2017 the mother breached her restraining order by walking into the grandparents’ home and asking where her son was. In June she was convicted of breaching her restraining order on this and on two other occasions.
21. In July 2017 the mother again breached the restraining order by attending the grandparents’ home and demanding to see C. Just 8 days after being convicted of this breach the mother attended their home in the early hours of the morning. She shouted

that the step-grandfather was a ‘bastard’ and a ‘paedophile’ and she smashed windows in the family home and in the family car.

22. On 26 June 2018 the mother was sentenced to 24 months imprisonment for breaches of the restraining order. The exclusion element of the restraining order was extended. Since then the mother has either been a serving prisoner or detained in a psychiatric hospital.
23. On 18 September 2018 the grandparents were granted permission to apply for an adoption order. Six days after being served with the adoption application papers the mother telephoned the grandmother from hospital and said ‘I hope you die. You should not be looking after my child’.
24. There were no further such events until the evening of 13 February 2020. In her witness statement the sister described the telephone call made to her by the mother:

“I told [the mother] that she should not be calling me and as soon as I said this, [the mother]’s tone switched and she became very angry. All of a sudden she completely lost it and shouted a barrage of abuse, for example she called me a “fucking stinking bitch”. She started screaming down the phone; I recall her saying “Where’s my son?”, “He’s my son”, “I am [C’s] real mum”, “I am his real Mum”, “Where’s [the grandparents]”, “Where’s Mum”, “where is he, where is my son”, “They’ve no right to him, I’m gonna get him back, he’s mine”, [the step-grandfather]’s a bastard” and “They’re greedy, they just want to steal him away”. I initially attempted to reason with [my sister] and try and explain to her that this behaviour was not fair on [C] and that it is extremely stressful for the whole family. She said that she didn’t care and that “He’s my fucking son”. There was nothing I could say after this as [the mother] would not let me get a word in. This continued for some minutes; during the call I received a text from my parents saying that they were outside. They did not ring the doorbell as I had asked them not to as this would make me panic, so when I received the text I went and opened the door for them. [The mother] would not have known that they had turned up at the house during the call. [She] continued to shout the same abuse at me down the phone and also said “I am not your fucking sister”. She also made several threats to my life and said “Fucking tell me where they are, tell me where he is, he’s mine, I’m gonna get him back, I’m gonna fucking kill you”. [The mother] went on to say that [the grandparents] are breaking the law, and she continued to call [the step-grandfather] a “Fucking bastard”. During the call, [the mother] was asking me where [the grandparents] are; I do not know whether she had attended [their] address to look for them first, there was just no way of me knowing. The call felt like it went on for much longer than it did but it would not have been more than 3 to 4 minutes. She became uncontrollably angry and eventually, [the grandmother] suggested that I should end the call as it was very upsetting. I wasn’t able to deal with it any longer. After I ended the call, I was extremely shaken and worried about what [the mother] would do next. It was an incredibly traumatic day for me, but I think it was a lot worse for [the grandparents] as they, and [C], are always [her] main target. I also asked [the grandmother] to stay the night with me as I didn’t want to stay by myself.”

25. This extensive extract from the sister’s witness statement is highly material to the issues in this appeal because it illustrates (a) the degree of the mother’s hostility towards the

grandparents, especially the step-grandfather; (b) the degree and extent of her verbal aggression; (c) how very speedily the mother can become very aggressive; (d) the fact that the mother has not given up the hope of having C in her care or regular contact with him; and (e) the extent of the adverse impact of the mother's conduct upon family members.

The Judgment

26. Early in the course of her judgment the judge gave a summary of her decision in which she acknowledged that C had a loving and supportive family and that his needs were clearly being met by the grandparents. She concluded this part of her judgment at para. [19] with the following:

“Having considered this case carefully, I do not consider that an adoption order is necessary or proportionate. This is not a “nothing else will do” situation. The special guardianship order has worked well. The applicants have been able to meet [C]’s needs under the special guardianship order. He is thriving in their care.”

27. When considering the legal principles to be applied the judge said:

“36. There is no real dispute about the applicable law.

37. Any order should be the least interventionist order that meets the child’s welfare needs.

38. The welfare checklist in s.1(3) of the Children Act 1989 and s.1(4) of the Adoption and Children Act 2002 must be applied. In particular, the likely effect on a child throughout his life of being adopted has to be considered including his relationship with his birth mother. In this case, [C] will continue to live within, and be a member of, his birth family. Consideration has to be given to whether the relationships within the family will be skewed by an adoption order.

39. The child’s welfare throughout his life is the court’s paramount consideration.

40. In considering the two different options (adoption order or continuing special guardianship order), the court should not knock out one option but must consider them side-by-side. The court has to balance one against the other, considering the advantages and disadvantages in each option and decide which option is best for the child.

41. The court has to be satisfied that nothing else will do before making an adoption order.

42. [C], his mother and the applicants have article 8 rights to a private and family life. Those rights can only be interfered with if it is necessary, proportionate and in the best interests of the

child. The need to safeguard a child's welfare justifies interfering with the parties' article 8 rights."

28. The judge referred to the psychiatric report prepared by Dr. McEvedy in respect of the mother in November 2019 and noted that his principal conclusions and opinions were:

"25. Dr McEvedy prepared a psychiatric report dated 29 November 2019 of the mother. He considers that there is support for a diagnosis of relapsing psychosis (history of relapsing serious mental illness leading to repeated detained admission to hospital, deterioration in prison when non-compliant with antipsychotic medication for a prolonged period and her own description of hearing hallucinatory voices as well as a paranoid element to her thinking). He referred to the mother's history of substance misuse including long-term use of cannabis, crack cocaine in recent years and spice during her most recent period of imprisonment. He referred to the mother's extensive history of convictions as well as her lack of remorse (including at his interview with her) for previous aggressive behaviour including towards her own mother (one of the applicants). Dr McEvedy considers that there also appears to be an antisocial personality element [E75]. He states that the prognosis for the mother is uncertain given her history of repeated hospitalisations [E76]. He reports that there are various features (including disturbed mental state and behaviour in recent years, imprisonment and hospitalisation) to indicate that the mother's problems of extreme emotional variability, impulsivity and poor control of frustration, as well as potential for aggression to others, remain [E76]. Dr McEvedy's opinion is that the mother has demonstrated by her conduct towards her own mother (including threats), as well as repeated breaches of the restraining order and criminal damage to the applicant's property (the mother admitted during his interview with her that she had thrown a brick through the applicants' window in 2017), as well as her ill feeling towards her step grandfather (one of the applicants), that there is some enduring risk to them. Whilst Dr McEvedy accepts the mother's account that she would never intentionally harm a child, his view is that her degree of behavioural disturbance, including aggression, at times must be seen as posing a risk to a child, particularly when her thoughts and feelings around him and his care and her lack of contact with him are so highly emotionally charged [E76]."

29. The only witnesses who were required to give oral evidence before the judge were the social worker and the children's guardian. It had been agreed by all parties that the mother and the grandparents did not need to give oral evidence: their respective cases

had been set out on their witness statements. The judge explained her reasons for not accepting the conclusions of the social worker in these terms:

“51. Ms Speke is a fair, compassionate and child focussed professional. I have no doubt that she will treat the mother fairly. I do not, however, agree with her conclusion that an adoption order is necessary or proportionate in this case. It may bring some benefits but it will not reduce the risks, it will not stop the mother making applications if that is what she decides to do and it will not improve the love, support and care that [C] is already enjoying. It will remove the only remaining relationship between [C] and his birth mother. Relationships will be skewed, generations unnecessarily recast and [C] will be left wondering why his grandparents had to legally replace his mother.”

30. The judge similarly did not accept the recommendation of the children’s guardian:

“60.I disagree with the Guardian’s recommendation because, whilst I recognise many advantages in an adoption order, I do not consider that an adoption order in this case is either necessary or proportionate, particularly when the mother has not made any of the feared applications and, save for the October 2018 phone call referred to in paragraph 66 below, has not done anything to undermine the placement/breach the restraining orders in the last two years. The Applicants sought a special guardianship order knowing that the mother posed a risk and that she may make applications in the future. She has made no applications and she has not done anything in the last two years to undermine the placement even when she has been unwell. The Applicants’ commitment to [C] is clear. Whilst an adoption order may provide additional reassurance for the Applicants and [C], and provide [C] with a legal father, they have the reassurance that any application to discharge the Special Guardianship Order would be carefully considered and analysed by the Courts and any appointed Guardian. Whilst there are benefits in the making of an adoption order, those benefits do not make an adoption order necessary or proportionate. [C]’s welfare throughout his life does not require the making of an adoption order at this time.”

This is the only part of the judgment where the judge referred to the fact that one consequence of making an adoption order was that C would have a legal father, the step-grandfather. This issue does not feature in the welfare analysis which the judge undertook later in her judgment.

31. Under the heading of ‘Welfare findings’ the judge said:

“65.[C] is benefitting from consistent, safe, secure and reliable care. The applicants have a high level of insight and are

ensuring that he grows up knowing who the people in his family are. They are being honest with him about who his “tummy mummy” is. He is being brought up within his birth family and his cultural needs are being met. If he is adopted, his only relationship (legal) with his mother will be cut. He has not seen his mother since he was born. His mother’s mental health difficulties, substance misuse and criminal behaviour may mean that he is unable to spend time with his mother unless she is able to make the changes that she wants and needs to make. As [C] grows up, his sense of identity will become more and more important. He will want to know who his mother is and if he is adopted he will want to know why his birth mother had to be removed as his legal mother. If he is adopted, he will grow up as the legal son of his grandparents when he was in fact born into a different generation. An adoption order in this case will add confusion in terms of identity and the necessity for an adoption order cannot be justified. It may add to [C]’s sense of loss which he is likely to feel (if not already felt) by not being brought up by, or seeing, his birth mother. He may feel further rejected by her, although it is clear to me that she loves him very much. She is very unwell and vulnerable. She has been unable to safely care for herself for some time, let alone [C].

66. In practical terms, little will change by the making of an adoption order. [C] will continue to be cared for by the applicants. They will continue to have the benefit of a life-long restraining order. The risks will not be reduced. The mother has done nothing to disrupt [C]’s placement since December 2017. She made some phone calls to the applicants in October 2018 and left a message saying: “I hope you die. You should not be looking after my child.” [H198]. However, the reality is that she agreed, and continues to agree, to the applicants looking after [C]. In her statement and letters she makes it clear that that is where [C] should live. The mother has not applied for a contact order to date and recognises that she needs to make changes before she can see [C].”

32. Towards the conclusion of her judgment the judge set out the advantages and disadvantages of the special guardianship order and of an adoption order when she said:

“Realistic Options

67. There are two realistic options. I have already set out some of the advantages and disadvantages in either option and this judgment must be read as a whole.”

The judge then set out the advantages and disadvantages of a special guardianship order. She considered that the main advantages were that the mother would remain as C’s mother and that C would continue to thrive in the care of his grandparents. The principal disadvantage of a special guardianship order was it had ‘less stability and permanence

than an adoption order'. The judge then turned to consider the advantages and disadvantages of an adoption order in the following terms:

“Adoption Order

70. The advantages of an adoption order are that [C] would legally be the applicants' child. He would benefit from inheritance rights and all the other benefits that come with being their legal child. His place in the applicants' family will be more secure and more permanent and they will be his parents throughout his life, not just until he is 18 years old. The applicants look after him as his parents and he sees them as his parents. An adoption order would reflect his experience of being parented by the applicants. [C]'s allocated social worker and guardian both support the making of an adoption order. The local authority, Guardian and applicants all support the making of an adoption order. An adoption order will reduce the applicants' anxiety and may send a clear message to the mother/set clear boundaries for her.

71. The disadvantages are that his only existing relationship with his birth mother would be severed. In legal terms, she would not be his mother. That is likely to be a profound loss for [C] during his lifetime. He may feel a greater sense of rejection. He may wonder why it was necessary for all of his ties to his birth mother to be cut. He has no relationship with his mother other than his legal relationship and that would be severed by an adoption order. His place in the family and his family relationships will be skewed. Whilst he may not sit down with a family tree and try and piece it all together, he is bound to wonder why others decided that it was necessary for his grandparents to legally replace his mother. An adoption order will not really change anything. It will not reduce the risks. It will not change his lived experience. The support, contact arrangements, need for therapeutic support and so on will not change under an adoption order. It will not simplify [C]'s life story. It will add an additional complexity because his legal relationship with his grandparents and his mother will change. Legally, he will be moved into a different generation within his birth family. Legally, his mother will be his sister. Legally, his birth family relationships will be skewed. The mother may feel a greater sense of injustice by being cut off as his mother and having her parental responsibility (and rights) removed. She may not understand the boundaries set by an adoption order. It may make the situation between the applicants caring for [C] and the mother worse. It is an unnecessary and disproportionate response to the risks and concerns, particularly when the mother has not made any application to court in the last 3 ½ years, not disrupted the placement and has not breached the restraining order for some time now. The last incident was in October 2018, now 16 months ago. It is not necessary on the facts of this case. The mother opposes the making of an adoption order.

Conclusion

72. For the reasons I have set out in this judgment, I refuse the application for an adoption order. I disagree with the professionals' analysis of the necessity for an adoption order on the facts of this case. I also disagree with their assessment that an adoption order is proportionate in the light of the risks. This is not a case where “nothing else will do.” This has been a finely balanced decision. In my judgment, the balance falls in favour of continuing the special guardianship order. An

adoption order is neither necessary nor proportionate in the short, medium or long term.”

Grounds of Appeal

33. The grandparents contended that the judge was wrong to refuse to make an adoption order and rely on the following grounds of appeal:
- i) the judge erred in concluding the adoption order was unnecessary and in particular:
 - a) she gave insufficient weight to the overarching legal and psychological security offered by adoption;
 - b) gave insufficient weight to the enduring impact on the child and the appellants of the mother’s actions;
 - c) had insufficient regard to the necessity for future court proceedings to manage the mother’s parental responsibility and the disruption that will be caused to C by those proceedings; and
 - d) gave undue weight to the availability of a s.91(14) order to mitigate the difficulties that would be experienced by the appellants; and
 - ii) gave excessive weight to the distortion of legal relationships if an adoption order was made.

Submissions

34. At the hearing Ms Briggs, counsel for the grandparents focussed her submissions on the following principal matters:
- i. the judge failed to give sufficient consideration to the legal and psychological security offered by adoption;
 - ii. she failed to take account of the serious adverse impact of the mother’s conduct on the grandparents, their family and C – in the past and in the future;
 - iii. she failed to consider the potential for, risks of and consequences of future aggressive, threatening and under-mining conduct by the mother;
 - iv. she failed to consider the benefits for C of having a legal father if an adoption order was made;
 - v. she placed excessive weight on the skewing of family relationships if an adoption order was made; and
 - vi. she failed to have regard to the cultural approach of the maternal family to family titles, roles and relationships which were more fluid, flexible and, in terms, practical than that traditionally practised in this jurisdiction.

35. We were referred to the case of *Re AJ (Adoption Order Or Special Guardianship Order)* [2007] 1 FLR 507 in which Wall LJ, as he then was, said at paragraphs 44-47:

“We respectfully disagree with Miss Henke that special guardianship orders have effectively replaced adoption orders in cases where children are to be placed permanently within their wider families. No doubt there are many such cases in which a special guardianship order will be the appropriate order, but as this court points out in para [61] and elsewhere in its judgment in Re S(Adoption Order or Special Guardianship Order), each case will fall to be decided on what is in the best interests of the particular child on the particular facts of the case. Moreover, each such decision will involve the careful exercise of a judicial discretion applied to the facts as found.[45]In the instant case, the judge’s findings of fact and his assessments of the parties are, in our judgment, not only of critical importance, but determinative of outcome. AJ had been with his paternal aunt and uncle since the age of 6 months. He and his carers both plainly need the assurance that the security of that placement could not be disturbed. That assurance could not be provided by a special guardianship order: it could only be provided by adoption.[46]The judge was, in our judgment, plainly entitled to find as a fact that the mother in particular had never given up on regaining AJ’s care. His two findings that there was a real possibility of future applications to the court, and that those applications would be disruptive of the placement were manifestly open to him on the evidence. All the expert evidence in the case, including, of course, that of Dr Banks, was to like effect. These factors are all clear pointers towards adoption.[47]In our judgment, it is no answer to assert that any application to revoke a special guardianship order and/or to seek a residence order requires the court’s permission, or that any application for permission to apply for contact and other s 8 orders can be regulated so as not to disturb the child or his carers by filtering them through s 91(14) of the 1989 Act. In situations where the parties are not in contact – where, for example, parties do not know where their former partners and their children are living – it may well be possible to direct that any application under s 91(14) shall not, in the first instance, be served on the resident parent, and that the application can thus be resolved by the court without the resident parent and the children concerned even being aware that it has been made. Such considerations do not, however, in our judgment, apply in cases such as the present where the parents of the child are having regular contact. In such cases it is unreal to suppose that Mr and Mrs T will be unaware that AJ’s parents had made an application to the court. Even if that application stood no prospect of success and was, in the event, dismissed, the threat of disruption and disturbance would remain.”

36. Further, we were referred to the schedule of differences between adoption order and special guardianship orders which is helpfully appended to the judgment in this case.
37. The views expressed in *Re AJ* were endorsed by the Court of Appeal in the subsequent case of *Re S (Adoption Order or Special Guardianship Order)* [2007] 1 FLR 819 where at paragraph 44 Wall LJ make the following observations:

“It is important to note also that the statutory provisions draw strong and clear distinctions between the status of children who are adopted, and those who are subject to lesser orders, including special guardianship. As we have already pointed out, the considerations in relation to adoption in the expanded checklist contained in s 10 of the 2002 Act require the court to address the question

of the child’s welfare throughout his life. We do not think this point needs any further explanation or emphasis. Its consequences are, however, significant.[45]Thus, although s 14C(1) of the 1989 Act gives special guardians exclusive parental authority, this entitlement is subject to a number of limitations. Attached to the skeleton argument prepared in the case of Re AJ(Adoption Order or Special Guardianship Order)[2007] EWCA Civ 55,[2007] 1 FLR 507 by Miss Lorna Meyer QC, Mr David Crowley, (the solicitor advocate for the child) and Mr Graham Jones (the solicitor advocate for the prospective adopters) was a helpful document entitled Schedule of Main Differences between Special Guardianship Orders and Adoption which set out those differences in tabular form.”

38. On the issue of the ‘skewing’ of family relationships if an adoption order was made we were referred to the observations of Wall LJ in *Re AJ (above)* where at paragraph 51 he said:

“We also respectfully agree with the judge that an adoption order in the instant case does not unduly distort the family dynamics. For the reasons which this court gives in paras [51] and [52] of its judgment in Re S (Adoption Order or Special Guardianship Order), the question of the likely distortion of family relationships by an adoption order is very fact specific, and should not be overplayed. In the instant case, AJ knows precisely who he is. He knows that his birth parents are Mr and Mrs J and that they are unable to look after him. He knows he is living with his aunt and uncle. He is not confused, nor is he likely to be in the future. What matters for him is that he should be fully accepted and cared for by his aunt and uncle as a member of their household, and as a brother to W. The difference between brother and cousin on the facts of this case is readily understandable: what matters is the relationship between the two children. In our view it is not a major or negative distortion of family relationships in this case for cousins to grow up together as brothers.”

39. In the event that this appeal was allowed, Ms Briggs invited the court to make the adoption order rather than to remit the matter for re-hearing before a different judge.
40. Ms Morgan QC and Mr Wilson resisted the appeal for the following principal reasons:
- i. The judge was engaged in a welfare analysis which involved the exercise of a judicial discretion and this court should be slow to interfere;
 - ii. on the evidence she was entitled to reach her conclusions and her decision to refuse to make an adoption order;
 - iii. this was a very finely balanced case and the judge’s approach to the exercise of her discretion could not be faulted;
 - iv. the special guardianship order was more than sufficient to enable the grandparents to meet C’s welfare needs now and in the future; and
 - v. an adoption order is a Draconian order which would sever all legal ties between this mother and this child.

41. The respondent relied on three reported decisions where the subject children had been, or were, made the subject of adoption orders in favour of family members, where the parent could not and would not accept that they could not care for their child: *Re AJ (above)* (CA), *Re M-J (Adoption Order or Special Guardianship Order)* [2007] 1 FLR 691 (CA) and *N v B (Adoption by Grandmother)* [2014] 1 FLR 369 (Theis J). It was submitted that the facts of this case were ‘a far cry’ from those in the above cases where it had been decided that adoption orders were merited and necessary.
42. When asked where in the judgment the judge had considered in her welfare analysis (i) the future adverse impact on the child and grandparents of the mother’s aggressive conduct; (ii) the grandparents’ cultural approach to familial relationships and (iii) the fact that an adoption order would enable C to have a legal father, Ms Morgan submitted we should infer from the totality of the judgment that the judge had considered each of these issues and/or we should conclude that the judge must have had regard to these matters.
43. On the issue of the order which should be made if the appeal was allowed, Ms Morgan urged the court to remit the matter for a rehearing on the basis that it might be necessary for further oral evidence to be heard, in particular from the mother.
44. Ms Irvine confirmed the local authority’s neutral position on the appeal. Ms Rayson, counsel for the children’s guardian, remained neutral on the grandparents’ appeal but, if the court allowed the appeal, urged the court to make an adoption order rather than to remit the matter for a re-hearing.

Discussion

45. I do not doubt the onerous task HHJ McKinnell faced when deciding the outcome in this case in the welfare best interests of the child. The judge, the social worker and the children’s guardian considered this to be a finely balanced case. In any event, the outcome of this case would have a significant bearing on C for the rest of his minority and, more likely than not, for the whole of his life. It was, therefore, incumbent on the judge to take into account all relevant matters, to weigh them appropriately in the balance and then to set out her welfare evaluation comprehensively in the judgment: not least, in order that the parties could understand why she had made the decision not to make an adoption order.
46. There are circumstances when an experienced family judge, such as this judge can be assumed to have taken into account a matter even though there is no explicit reference to it in the judgment. By way of example only, an experienced family judge is not expected to set out the welfare checklist of s.1(3) of the 1989 Act and/or s.1(4) of the 2002 Act in rote fashion in every case. In this case, however, it is submitted that important and relevant factors were not taken into account and that there is no explicit reference in the judgment to the judge having considered the same. On the facts of this case I would not be minded to infer that such important and relevant factors had been weighed in the balance by the judge when there is no reference to them in the welfare analysis sections of the judgment.
47. In her ‘Welfare Findings’ the judge said ‘[in] practical terms, little will change by the making of an adoption order’. This may be so, but the judge did not then go on to consider the emotional and psychological impact on C or on the grandparents of making

an adoption order. She did not refer to the sense of enhanced security an adoption would bring to C and to the grandparents: namely the assurance that his life with them was secure and permanent beyond the age of 18, nor to the fact that this would reflect the reality of C's current and future life. The judge did not refer to the adverse impact on the grandparents of the mother's past aggressive conduct towards them. She did not refer to the mother's conduct towards the children's guardian when she interviewed her in prison which left the guardian feeling intimidated and concerned about her own safety. She did not consider the potential future adverse impact on C or on the grandparents or their wider family resulting from the abusive, aggressive, and threatening conduct of the mother.

48. In my judgment these are serious omissions not least given the finding of the judge at paragraph [26] of her judgment that 'the mother remains a significant risk of significant harm to[C] and to the applicants'.
49. The judge took into account the detrimental consequences for C and for the mother of terminating C's legal relationship with her and of removing her legal 'rights' in respect of him. She did not, however, consider the potential benefits to C and to the grandparents of removing these 'rights' from her. It is true that the mother consented to the making of the special guardianship order and, from time to time, has told professionals that she accepted she could not care for C, but, as is amply demonstrated by past events, the mother justifies her aggressive and threatening actions based on her 'rights' to C.
50. The judge was clearly perplexed by the fact that an adoption order would 'skew' C's legal relationships. As Ms Briggs submitted, the judge referred to this issue on no less than eight occasions in the judgment. Given the weight accorded to this issue by the judge, it had to be balanced against (a) the cultural norms of familial relationships for this family, (b) the fact that as far as C is, and will be, concerned his grandparents are his 'mummy' and his 'daddy' and his mother is his 'tummy mummy' and (c) an adoption order would uniquely provide C with a legal father. Regrettably, none of these matters were taken into account by the judge in her welfare evaluation.
51. In my judgment the judge not only overplayed the importance of the 'skewing' of legal relationships on the facts of this case, she failed to factor into the balance the very important matters I have referred to above.
52. I regret to conclude that these omissions are so grave that the judge's welfare evaluation is fundamentally flawed and is vitiated. Accordingly, I would allow the appeal.
53. The issue then arises as to whether we should remit the application for a re-hearing before a different judge or whether this court should make the adoption order. The guardian was concerned about the adverse impact of further delay in this case. It is not an insignificant consideration that in light of the backlog of cases before the courts as a result of the measures taken to control the pandemic, and the limited capacity to conduct hearings, it is most unlikely that this matter would be re-listed for many, many months hence.
54. Of greater significance is the fact that this court has all of the evidence which was before the judge. Moreover, this court, unlike HHJ McKinnell, has the benefit of the evidence from the grandparents and from the mother's sister, about the events of 13 February

this year. The mother does not deny making the telephone call to her sister and whilst she does not accept everything set out in her sister's statement, I am satisfied I can find and accept that the mother was abusive, aggressive and threatening towards her sister and the grandparents. If C was ever to be exposed to such conduct it would undoubtedly cause him very significant emotional and psychological harm.

55. The mother has enduring and serious mental health problems. She is often non-compliant with taking her prescribed medication. As Dr McEvedy opined the mother's history would indicate that her problems of extreme emotional variability, impulsivity and poor control of frustration, as well as the potential for aggression to others, persist. Moreover, although the mother has said she would never intentionally harm a child, his view was that her degree of behavioural disturbance, including aggression, at times must be seen as posing a risk to a child, particularly when her thoughts and feelings around him and his care and her lack of contact with him are so highly emotionally charged.
56. The evidence indicates that the mother's serious mental health problems will endure and her explosive and aggressive conduct will persist for very many years to come. C, the grandparents and the wider maternal family are all at considerable risk, now and for the foreseeable future, from the mother's abusive, aggressive and threatening conduct.
57. Of course, an adoption order, in and of itself, is unlikely to prevent abusive, aggressive and threatening future conduct by the mother; just as the special guardianship order has failed to prevent such conduct in the past. The disinhibited and dangerous behaviour exhibited by the mother as a consequence of her mental illness represents however a long term continuing risk to both C and the grandparents, making it an absolute priority in C's interests to provide him and the grandparents with as much legal and psychological security as can possibly be achieved.
58. The superior benefits of an adoption order as opposed to a special guardianship order are that it would:
 - i. reflect the reality of C's life with his grandparents now and throughout the whole of his life;
 - ii. it would provide C and the grandparents with the security and reassurance that C's future life was securely and permanently with them in fact and in law;
 - iii. it would sever the mother's legal relationship with C which is a Draconian step for any court to take, but it would remove the mother's ability to interfere in his life whether by making applications to the court and/or requiring and demanding information about C's life;
 - iv. it would remove the obligation on the grandparents to seek the mother's consent for certain steps to be taken in C's life (eg remove him from the jurisdiction for a period in excess of three months);
 - v. it would enable the step-grandfather to be C's legal father as well as his emotional, social and psychological father in circumstances where the identity of C's biological father is unknown; and

- vi. it would send the clear message to the wider world that C was lawfully the grandparent's child.
59. The Art 8 rights of the mother and C are engaged but where there is a tension between the rights of the child, on the one hand, and the rights of a parent, on the other, the rights of the child prevail: *Yousef v. The Netherlands* [2003] 1 FLR 210.
60. In the most unusual and grave circumstances of this case I am satisfied that C's welfare requires him to be afforded the greatest possible security in his placement with his grandparents. I am satisfied that only an adoption order will provide C with the degree of security he requires in his welfare best interests. In the premises an adoption order is not only proportionate it is necessary.

Conclusion

61. The appeal is allowed and for the above reasons given above, I am satisfied that C's welfare requires me to dispense with the mother's consent pursuant to the provisions of s.51 of the 2002 Act. I dispense with the mother's consent and make an adoption order in respect of C in favour of his grandparents.

Lady Justice Asplin:

62. I agree.

Lady Justice King:

63. I also agree.