

IN THE FAMILY COURT AT CHELMSFORD

Priory Place
New London Road
Chelmsford CM2 0PP

Wednesday, 14 November 2018

BEFORE:

HER HONOUR JUDGE LYNN ROBERTS

RE:

R (A Child)

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(Official Shorthand Writers to the Court)

THE APPLICANT appeared in person
MS M REARDON appeared on behalf of the First and Second Respondents
MS TOWNSEND (Solicitor of Essex County Council) appeared on behalf of the Third
Respondent

JUDGMENT (As Approved)

This judgment was delivered in private. The judge has given leave for this version of the judgment to be published on condition that (irrespective of what is contained in the judgment) in any published version of the judgment the anonymity of the children and members of their family must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

1. JUDGE LYNN ROBERTS: I give this ex tempore judgment about R who is a girl of seven who has been adopted. Her birth mother, M, seeks to have permission to make an application for contact with her pursuant to section 51A of the Adoption and Children Act 2002. Essex County Council which is the adoption agency which placed R has applied for permission to apply for an order prohibiting any direct contact between M and R, however that application has not been served on M properly and is not being proceeded with. There are problems with it in any event as it may well be that the local authority is not in a position to make such an application.
2. At the hearing on 2 October this year, I dealt with other applications made by M. She purported to issue an application for permission for contact with R in the name of her son, P, who is[a teenager] and who is the subject of a care order. I directed Cafcass to appoint an officer to act as litigation friend for P in those proceedings, as I considered that M was not the appropriate person to make such an application. That application has now been dismissed on 2 October on Cafcass's advice.
3. M also issued an application in relation to her own contact with P, pursuant to section 34 of the Children Act and that has been adjourned for six months as a consensual way forward is expected and I understand that it is being looked at whether P is able to return to live with his mother. The local authority tell me that P, who was thriving in his foster placement and very content there, has now unfortunately had his placement completely break down. The local authority consider there is a relationship between the proceedings which M has instituted and the collapse of that placement whilst recognising that there are other factors also in play.
4. In the application before me today M represents herself, Ms Townsend represents Essex and Ms Reardon represents the adopters. I have read statements from M and

from the Essex social workers, I have read papers from previous proceedings, I have read judgments from previous proceedings and I have heard submissions from M and the two advocates. It had been agreed at the last hearing that this hearing would be on submissions.

5. Part of M's case is that what has happened in the past should not be considered as significant in the decision today. She clearly feels that she has been treated unjustly and unfairly at every stage of the proceedings prior to this and that the court should only look at how she is now. I do not agree with this at all, it is my duty to consider what has happened in the past and the previous judgments as part of my overall deliberations, so I turn now to the background.

6. On 11 May 2016 the court made a final care order and a final placement order for R. The final care plan said that there would be letterbox contact between R and her mother twice a year once she had been placed for adoption, with the sharing of photographs and M would need to agree not to share the photographs on any form of social media. M appealed or sought permission to appeal and in August 2016 permission was refused. On 17 August 2016 there was the final contact between M and R during which M tried to remove R from the centre. In October 2016 R was placed with the people who have now become her adopters.

7. In the spring of 2017 there was a judicial review decision where Mr Justice Charles found that there had been procedural unfairness [in placing R for adoption] which resulted in R's placement becoming that of a foster child rather than a prospective adoptive child. A month later M's application to revoke the placement order [which she had been planning to issue at the time R was placed for adoption] was dismissed and R thereafter became a child placed for adoption. In August 2017 the proposed adopters signed the agreement for letterbox contact. On 7 September 2017 M was refused permission to oppose the application for adoption and I am sorry to say that she assaulted the social worker in court on that occasion.

8. On 6 October 2017 I made the adoption order for R and in April 2018 M issued this application under section 51A. At some point in 2018, I know not when, M issued proceedings in the Manchester County Court against Essex, against Family Finders and against HHJ Vavrecka who had made the care and placement order, for relief which is unclear to me and that case was struck out in Manchester on 11 June 2018. On 13 July 2018 M signed the agreement for letterbox contact with R and letterbox contact has got underway. Indeed, I have read the first letter M has sent to R and it was charming.
9. I turn now to the law which is quite complicated and also to most people quite novel. Section 51A says that:

"(2) When making the adoption order or at any time afterwards, the court may make an order under this section:

(a) requiring the person in whose favour the adoption order is or has been made to allow the child to visit or stay with the person named in the order under this section, or for the person named in that order and the child otherwise to have contact with each other"

10. Only certain persons fall under the category of a person named in the order. They are set out in section 51A(3) and include:

"(a) any person who (but for the child's adoption) would be related to the child by blood ... marriage or civil partnership"

So, that clearly covers M

11. Whilst the category of persons who may be named in a post-adoption contact order is broad, the right to apply for an order is limited. The adopted parent and the child have an automatic right to make an application under section 51A(4)(a) and (b). All other persons who are identified as having the ability to be named in the order must

seek the leave of the court to make the application (section 51A(4)(c)). When deciding whether to grant leave to those persons, so to be clear, when deciding whether to grant leave to M, the court must consider the following:

"(a) Any risk there might be of the proposed application disrupting the child's life to such an extent that ... she would be harmed by it (within the meaning of the 1989 Act)."

Secondly, "The applicant", that is M's, "Connection with the child" and thirdly:

"Any representations made to the court by:

- (i) the child, or
- (ii) a person ... in whose favour the adoption order is or has been made."

12. I must take into consideration section 67 of the Adoption and Children Act which states that a child is to be treated as if born to the adoptive carers once an adoption order is made.
13. I also have to take into account case law. Case law in relation to the granting of leave under section 24 is helpful, as there is not case law I am aware of under section 51A. I consider that the case law under section 24 is relevant because it suggests that I should consider whether the proposed application has a real prospect of success and that inevitably I have to take into account R's welfare. To assess the prospects of success, I must take into account the case law on the substantive application. Again, I have not come across a case on section 51A but there are cases on contact after adoption.
14. There is the case of *Re: C* [1993] 1 FLR 832, the 1993 case which suggests that once an adoption order has been made the issue of contact should only be subsequently

reopened if there some fundamental change in circumstances. Similarly, a more recent case but also one decided before section 51A was enacted is *Re: T [2011] contact* which says that in order to obtain leave to apply for contact a family member, in this case M:

"Must satisfy the court that any decision of the adopters to oppose contact is sufficiently contrary to the best interests of the child or sufficiently unreasonable to warrant the court overriding the discretion concerning contact conferred on the adopters by the adoption order. Leave to apply is likely to be granted where adopter totally resile from an earlier agreement on contact"

And that principle comes from the case of *Re: R Adoption:Contact [2006]*.

15. In 2010 the Court of Appeal ruled in *Re: J (A Child) (Adopted Child: Contact) [2010]* EWCA Civ 1527 that it would be highly unusual to impose a requirement on adoptive parents to provide a photograph of the adoptive child to the natural parents in opposition to the adopters' wishes.
16. If I grant leave to M, the welfare checklist contained in section 1 of the Act is my guide and then it would be R's welfare throughout her life which is my paramount consideration.
17. I turn to the evidence. M's evidence: In her first statement of May, M says that:

"The local authorities have not upheld the conditions set on my behalf in agreement with the court."

I do not understand that criticism as M had refused to sign the letterbox contact agreement until 13 July this year. The evidence from the local authority, which is fully documented, is that M stated at a meeting on 9 December 2016 that she would not sign the agreement and that remained her position until these proceedings were underway.

M has today explained to me that she thought signing up to that agreement was an acceptance of the adoption which she was not, at that stage, ready to do.

18. M said there was no guidance provided to her but the local authority have shown me documents that that is not the case. She spoke in her letter of having been misdiagnosed as having bipolar disease but told me that she in fact suffers only from emotionally unstable personality disorder borderline type. I understand that in the care proceedings the court had the benefit of [Dr ...'s] opinion who referred to M being diagnosed as suffering from both conditions, so that is not a novel point. In any event, the possible change is that M says she does not have bipolar disorder was known to HHJ Vavrecka when he refused M permission to oppose the adoption order.
19. In her further statement M sets out that she has now signed the letterbox contact agreement and has arranged to have counselling with [.....]. The rest of her statement focuses on P but she concludes by saying that she is not struggling with her mental health and she has confirmed that to me today and says, and I quote:

"I'm coming to terms with not having my son and daughter in my life and I don't understand why. There seems to be a total disregard of mine and my children's wellbeing and emotional welfare and all the emphasis is on everyone but us."

20. The evidence of the local authority: [the social worker] did a quick statement for the last hearing but then when given more time did a fuller one. She says the adoptive parents have already provided one letter for M since she signed the agreement. She explains that the local authority are no longer prepared to provide a photo of R to M as per the care plan because of M's self-reported attempts to locate R in June last year. They also worry that M may place such a photo on social media as she indeed did that in 2016 after the placement order had been made
21. The local authority adoption social worker had met with one of the adoptive parents between the adjourned hearing and the submission of the statement and [the social

worker] in her second statement includes information from that meeting as well as her other evidence and professional opinion. She sets out how much work has been done to prepare R for adoption over several months and she says, and I quote:

"R's foster carer advised before placement with her adopters that R had emotionally invested in her adoptive family and was confident in her knowledge that her adoptive family was forever."

22. After R was placed, the adoption social worker continued to work on the life storybook and to assist in settling R into her new family. She has learnt subsequently that R, and I quote:

"Experienced anxiety around visits from the adoption social worker and she required reassurance that the worker was no longer looking for another family and she would not be moved again."

23. R is also reported as having been worried that M would remove her when she was older and that the social worker would bring her mother to see her. However, as time passed and more work was done with R she presented as more emotionally regulated and settled in her placement in general. Her express worries about her mother coming to remove her have stopped but [the social worker] believes such worries would resurface if this application was to proceed.
24. The local authority considered that R would be very confused and unsettled by the proposal of direct contact at such an early stage in her adoptive placement. [The social worker] said that the adoptive parents would have to be able to present it positively but if they were emotionally stressed by the prospect R would be likely to pick this up, as she remains a hypervigilant child.
25. [The social worker] sets out that R had various difficulties, for example with extreme aggression, when first placed but the work that has been done with her has allowed her

to show such behaviours less frequently and she is also now making progress educationally and her delay in that area is reducing.

26. The last time R saw her mother in August 2016 her mother tried to take her away with her and filmed her, encouraging her to state she wanted to live with her mother. R has referred to this episode when talking first to her foster carer but also to her new parents and said she was frightened by this. The social worker doubts that M's behaviour would be any different if there was any future direct contact. She also thinks the adoptive parents would need to be present for any direct contact to look after R and reassure her but points out that this would place both R and the adopters in an impossible position.
27. [The social worker] thinks that reintroducing M now to R is likely to destabilise her as it would go counter to all the work and reassurances the child has been given. She also considers M would need to engage in detailed work first to prepare her for direct contact and she would need fully to accept that R has new parents and [the social worker] does not think M is capable of this. She points out that M had tried to remove R from school when the placement order was made and as I have already said, remove her from contact.
28. The evidence of the adoptive parents: they tell me that R is making good strides in catching up with her schooling and is thriving. They refer to the difficulties caused to them by the continuing litigation initiated by M and are worried that giving M leave for this application will mean that the litigation continues. They tell me that M is spoken about in a positive and open manner. Their priority is to raise R in a secure and loving environment. They have always been in agreement with the plan for letterbox contact. They say:

"R is getting older and despite our efforts to keep matters such as this away from her, inevitably she will begin to sense that something is going on. At the start of these proceedings a social worker visited us to drop off the court papers. R is a sensitive and

bright child and picks things up very easily. She sensed that the visit was from somebody to do with Social Services and for a short period of time afterwards became unsettled and anxious. The longer these court proceedings continue the harder it will become to prevent R from picking something up and risk unsettling her further."

29. Their view is that M has not accepted the adoption and they point to the continuing litigation and her recent attempts to talk to Ms X, who acts for the adopters, in a way which they considered somewhat deceptive. They say that during the adoption proceedings she tried to trace R by trying to work out from redacted documents where R went to school. They are worried for the future and say, "This inevitably places strain and uncertainty on us."

30. The submissions - M: She showed me certificates which show that she has obtained qualifications which will allow her to obtain good work and she may work abroad she tells me. She has also started the counselling and has had a session with [...] already. She did not challenge the factual accuracy of the evidence I have been given by the local authority and the adopters but challenged its relevancy now. She told me she did accept the adoption and was not seeking to get her daughter back. She reminded me that she herself was adopted and was very keen to ensure her daughter did not feel some of the emotions that she had felt. She wanted her daughter to know she was there for her and she felt contact was important because you do not know what might happen in the future. She felt strongly that the fact that the local authority were looking at P returning to live with her should be given great weight in this application. She felt it showed that she would not harm R in any way.

31. She told me clearly she would not give up and felt that the law gave her the right to make applications in relation to R and she would do so. She was very concerned that the local authority have not tried to talk to her about the applications and about the progress she felt she was making.

32. Ms Townsend submitted that HHJ Vavrecka had already assessed whether there should be direct contact when making the final care and placement orders and he had concluded that direct contact would add to the insecurity and confusion that R is currently experiencing and he would be concerned that it would be an ongoing risk in a long-term placement. The local authority submit there is no reason to take a different view now and indeed the evidence suggests that his view then still is applicable now. Their concern is very much to secure the stability of R in her placement. They accept that they were soundly criticised by Charles J in the judicial review decision but point out that this is a different issue and there has not been procedural unfairness since. They consider that the evidence shows that M has not accepted the placement with the adopters and R's welfare needs must dictate that permission is not given.
33. In her submissions, Ms Reardon refers me to the analysis by HHJ Vavrecka on the issue of contact, which I have already referred to. The reasons he gave at the time for those conclusions are still valid she submits, as M lacks insight into the harmful effects of her parenting, she is focused on getting R back but that R's needs are to settle into her new family. She tells me that the adopters remain committed to letterbox contact but that if leave were to be given R would be at risk of being disrupted. She would have to be visited by social workers and her views and progress discussed with her. She might have a children's guardian too. This would inevitably result in the reassurances that have been given to the child being doubted by her. The anxiety that continued litigation will cause her parents is high and the chances are also high that R would become aware and become harmed by it.
34. Ms Reardon told me that M has spoken to her outside court and said that this will not stop, that she will appeal, she will do judicial review, that R is her daughter. Ms Reardon said to me that this approach causes the most concern and if the application was to proceed after today the anxiety of the adopters would increase. She says that the longer the uncertainty the more significant the impact. She told me that the adopters wanted an end to this litigation before R is harmed by it. They want an order that any future application for permission by M is first considered by a circuit judge on the papers with a view very much to discouraging further litigation.

35. My analysis and decision. I have read all the papers and listened carefully to what has been said today. I understand the strength of feeling M has about her application. She loves her children very much but I do not agree with her submissions and I will not give her the permission she seeks. My job is to focus on R and not on M however much sympathy I may have for her. I am satisfied that if M is given leave to apply for a contact order, there will be a grave risk that R's life will be so disrupted that she would be harmed by it.
36. Harm is defined in the Children Act as ill-treatment or the impairment of her health or development. There are very many reasons for this. R came to the adopters with many difficulties. She had behavioural difficulties, she had difficulty in regulating her emotions, she was insecure, she was worried, she was behind academically. Through therapeutic work by the professionals and her adopters working together, this has greatly shifted. There are profound changes to be noted, all to R's benefit and all of which will increase her chances to meet her potential and to lead a full and happy life. She has been given reassurances and security about being permanently in her new family, about not seeing M again, about leading a normal life and about her parents being committed to her and in my judgment all of this would be at risk if there was to be a fully-contested contact hearing.
37. I am told that this child is hypervigilant, that she picks up on her parents' emotions, that she was destabilised by knowing that the social worker had even been round. Anything which halts her progress and potentially makes her distrust what she has been told to date will be against her interests and will risk harming her development, her ability to do well academically and in her emotional regulation and in her happiness. I think all these risks would inevitably happen if she became aware that these issues were being looked at again or even if professionals started visiting once more. This is also the case because the adoptive parents will, in my judgment, inevitably suffer more stress if this litigation is allowed to continue and with a child like R this stress is likely to be picked up.

38. The worse that could happen would be for the placement to break down and I am not prepared to risk that happening, as it would be wholly contrary to R's interests. The adopters oppose leave being given and have given cogent reasons for doing so which I have set out and which I accept and I consider that I must give great weight to their view.

39. I also take into account my assessment of the prospects of M succeeding in an application for contact if leave was to be given and I do not consider her prospects to be more than minimal. Not only are there all the factors which I have set out raised by the local authority and the adopters about the effect on this child and on the adoptive family which I accept, but I have to take into account that M has the diagnosis of emotionally unstable personality disorder borderline type which is a serious diagnosis. Her behaviours to date are in line with that diagnosis and I do not see a reasonable prospect of M behaving reasonably and in R's best interests in the future. In my judgment M does not accept all the implications of the adoption order and she is unable to accept that R's best interests lie in being raised without her in R's life. Her written evidence shows no understanding of the reality of the position she is in and having heard her, I do not think that she is able to see things from R's perspective or indeed to put R's welfare before her own. She is very much focused on the unfair way she perceives she has been treated and the effect on her. In other words, the factors which HHJ Vavrecka set out against direct contact do still apply.

40. I do not see how any contact would work on an emotional or a practical level. It would be, in my judgment, unsafe for it to take place physically as M has been violent and has tried to remove R, and emotionally because it would be traumatic for R and her parents in my view.

41. I am not dealing with P today. I am aware that he is a {teenager} with learning difficulties whose placement has recently broken down and that the local authority is looking to see if he can go back to live with his mother. His situation is completely different from R who has a new family, who is much younger and where there is no prospect whatsoever of a return to live with M. The issues therefore are completely

different as I am deciding today about the possibility of M proceeding with an application for direct contact with R and I do not agree with M that what is happening with P changes this case in any way. I find that, as I have said, M does not have at all reasonable chances of success in achieving contact with R if this case was to proceed.

42. There is no question here of the adopters having resiled from any agreement. The only change from the original care plan is that the local authority are now not offering M a photograph of R because of the risk she poses to R's security and that is a decision which is fully justified by what has happened over the past two-and-a-half years.
43. I therefore do not give M permission to apply for a contact order. Furthermore, I agree with Ms Reardon that in view of the amount of litigation that has already taken place, which has prevented the adoptive family and R having any normal life and in the light of M's expressed attitudes it would be right that any future application for permission is reserved to myself or any future designated family judge for this area to be considered on the papers initially. I want to ensure that R and her parents are spared the stress of future litigation as much as possible.
44. I dismiss the local authority's application for permission to apply for an order preventing contact or prohibiting contact and I remind the parties that any application for permission to appeal any orders made today must be lodged within 21 days at the Court of Appeal.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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This transcript has been approved by the Judge