Neutral Citation Number: [2024] EWHC 1059 (Fam)

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/04/2024

Before :

MRS JUSTICE LIEVEN

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Re X and Y (Revocation of Adoption Orders)

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Mr Dorian Day and Ms Samantha Smith (instructed by **Boardman, Hawkins & Osborne LLP**) for the **Applicant**
Ms Elisabeth Richards (instructed by **Greens Solicitors**) for the **First Respondent**
The Second Respondent did not attend and **was not represented**
Mr Timothy Bowe KC and Mr Mark Cooper-Hall (instructed by **Whatley Recordon Solicitors**) for the **Third and Fourth Respondents**
Mr Nick Brown (instructed by the **Local Authority Legal Department**) for the **Fifth Respondent**

Hearing date: **6 March 2024**

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Approved Judgment

This judgment was handed down remotely at 10.30am on 25 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MRS JUSTICE LIEVEN

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 and legal bloggers, must ensure that this condition is strictly complied with. Failure to do so may be a contempt of court.

Mrs Justice Lieven DBE :

1. This is an application to revoke an adoption order in respect of two children, X and Y, aged 17 and 16 respectively. The application is made by their adoptive mother, AM. I note that both girls have been assessed as being Gillick competent, and were represented separately from the Guardian.

2. The Applicant adoptive mother, AM, was represented by Dorian Day and Samantha Smith, the birth mother, BM, was represented by Elisabeth Richards, the birth father was not represented and did not attend, the children were represented by Timothy Bowe KC and Mark Cooper-Hall and the Local Authority ("the LA") were represented by Nick Brown. The Guardian was present and acting in person.

3. The issue in the case is whether I should accede to AM's application to revoke the adoption orders. That in turn raises two sub-issues; whether I have power to revoke in these circumstances, and if I do have the power, whether I should choose to exercise it in respect of one or both children. The primary argument put forward by Mr Day is that there is a power to revoke under the inherent jurisdiction of the High Court, but in the alternative, he submits that there is a power to revoke an adoption order in s.31F(6) of the Matrimonial and Family Proceedings Act 1984 ("MFPA").

4. There is a subsidiary issue as to whether I should allow the girls to change their name to BM's surname, so that it aligns with their birth mother's name.

The chronology

5. X and Y were placed for adoption at the conclusion of public law proceedings in 2010. Care orders and placement orders were made on 12 August 2010 and both children were placed with AM on 6 August 2012 when X and Y were just over 5 and 4 years old respectively. It is relevant that the children had spent a prolonged period in foster care, in at least two placements, during which they had significant contact with their birth mother, BM.

6. AM's statement in support of her application discloses a picture in which both children struggled with being in an adopted placement, with them having little understanding as to why they could not spend time with their birth family. AM describes difficulties with managing the children's behaviour from a very early stage of the placement. AM decided that the children should spend time with their birth mother, BM, and extended birth family, following a programme of Therapeutic Life Story Work. This unusual situation resulted in the girls calling BM "mummy B" and AM being called "mummy" or "mum." AM states that from this point on, X felt more settled in her care and it "felt like she was finding the missing pieces of who she was."

7. AM says that in the period between 2017-2019 X was saying she wanted to live with BM, although Y was clear she wanted to remain with AM. Therefore, from quite an early stage there has been a difference in the position of the girls in this regard.

8. At the time of the adoption BM had a third child, Z, who was placed to live with his maternal grandmother under a Special Guardianship Order. Z returned to live with BM in September 2015. BM then had two more children, with a different father, who have lived with her throughout.

9. During 2020 AM allowed BM and her youngest children to move in with her and the girls during lockdown, to escape an abusive relationship. In June 2021, the relationship between AM and BM broke down. In July 2021 Y alleged that AM had hit her with an iPad. According to AM, Y "clearly felt being back with her birth family would be helpful and has continued to state she no-longer wants a relationship with me."

10. In August 2021, X and Y left their adoptive mother and moved to live with initially a maternal aunt, and then BM. Y made allegations of physical and emotional abuse against AM. At that point both children said they wanted to live with BM. A parenting assessment undertaken by the LA recommended the children stay with BM.

11. The children became subject to child protection plans with the LA due to concerns of sexual harm and exploitation in respect of X. She had been a victim of a sexual assault after meeting an older man on the internet in April 2022.

12. At that point X said that she wanted to return to AM's care. However, in May 2022, X was introduced to her birth father (the Second Respondent "BFX") and moved to live with him. In November 2022 both birth parents had positive parenting assessments.

13. On 23 November the social worker spoke to both girls and he recorded that:

> *"[Y] wants to stay with Mum:*
>
> *I've never had the proper love from a mum, but my mum gave birth to me so we have that connection and she has just tried to make sure that the last bit of my childhood has been good.*
>
> *[X] met with [the social worker] and said she wanted to stay with her father but see [AM] more often as she liked spending time with her."*

14. On 9 February 2023 the LA applied for interim care orders in respect of the girls on the basis that they were beyond parental control. The LA sought supervision orders and invited the court to grant child arrangements orders in respect of both girls, presumably to regulate their existing placements with their birth mother and father respectively. This would provide parental responsibility to their caregivers, it not in effect being exercised by AM.

15. On 17 March the Guardian met with Y and she said she wanted to remain with BM and did not want AM to have parental responsibility. X said in April that she wanted to remain with her birth father, and to have a relationship with AM.

16. On 19 April the Guardian's final analysis stated:

> *"[Y] and [X] were removed from parental care at a young age due to concerns in respect of [Y] sustaining a non-accidental physical injury and care proceedings resulted in their being placed for adoption, this severing links to their birth family. The accounts given by [Y] and [X] suggest that they did not receive the safe, consistent and attuned care which they required whilst they were in foster care and those given by their adoptive mother [AM], suggest that [Y] and [X] difficult life experiences, have at least in part, affected their ability to invest in their*

> *adoptive placement, which in turn has led to the breakdown of the relationship and adoption with [AM].”*

17. On 24 April 2023 AM applied to revoke the adoption orders.

18. On 5 May 2023 the Court made Child Arrangement Orders by which Y was live with BM, and X to live with BFX. However, on 6 May X went to live with her birth mother.

19. A supervision order for the children was granted to the LA until 4 May 2024. However, by 17 October 2023, X had moved back to live with AM and stated that she wished to continue living with her. That move happened after X had provided an interview with the police in respect of her allegation of assault.

20. It can be seen from the above summary, that Y has remained fairly settled with BM, her birth mother, since August 2021. X has, perfectly understandably, changed her mind on a number of occasions and has moved between different adults.

21. Initially both children supported the application to revoke the adoption orders. In November 2023, the court adjourned the case to enable X to reflect on her position. At the time she was living with her birth mother (the placement with her birth father having broken down) however shortly afterwards she moved to live with AM. She stayed with AM, maintained a life there and attended College in the area. AM was responsible for her daily care until 16 February 2024, whereupon X went to stay with BM.

22. The children’s solicitor spoke to X and Y to confirm their instructions on the application and, on 15 February 2024, filed a detailed position statement, which alerted the court and the parties to a change in X’s position. Whereas before she had supported the application, she was now content for her adoption order to remain in place. The position of each girl can be summarised in this way –

    a. X no longer wanted to be ‘unadopted.’ According to the social worker’s statement dated 26 February 2024 X told him on 23 January 2024 that her adoption order could be revoked but that she would in fact be ‘happy either way’.

    b. Y continued to support AM’s application. She has remained clear for some considerable time that she wishes to be ‘unadopted.’ Furthermore, Y wants to change her surname from AM’s surname to BM’s surname.

23. As mentioned above, on 16 February 2024 X travelled to stay with her birth mother as part of a planned visit over the half-term break. The social worker’s statement deals with events from around this time, but it appears from paras 3.4 and 3.5 that X decided to stay with BM due to arguments with AM and posted her house keys through the letterbox. AM has interpreted this as a sign that X does not intend to return home.

24. Neither X nor Y has contacted their solicitor about these events. It seems that X told the social worker that she wanted to live with her birth mother and attend College and

apprenticeships in the local area. That said, at para 4.91 of his statement, the social worker states that he considers it to be a "real possibility" that X may again choose to live with AM.

25. I met Y on 1 November 2023 by Teams and she told me at that stage that she supported the revocation application. I met X on the morning of the hearing. She was significantly more reserved than Y but told me that she too wanted to stay with BM and supported the application.

The Law

Statute

26. The application to revoke raises a complex issue of law, namely whether there is any power in the High Court to revoke an adoption order made under the Adoption and Children Act 2002 ("ACA").

27. The making of an adoption order operates to extinguish the parental responsibility which any person other than the adopters or adopter has for the adopted child immediately before the making of the order, see s.46(2)(a) ACA.

28. Section 67(1) and (3) of the ACA state:

> *"**67 Status conferred by adoption***
>
> *(1) An adopted person is to be treated in law as if born as the child of the adopters or adopter.*
>
> *...*
>
> *(3) An adopted person—*
>
> *(a) if adopted by one of a couple under section 51(2), is to be treated in law as not being the child of any person other than the adopter and the other one of the couple, and*
>
> *(b) in any other case, is to be treated in law, subject to subsection (4), as not being the child of any person other than the adopters or adopter;*
>
> *but this subsection does not affect any reference in this Act to a person's natural parent or to any other natural relationship."*

29. The only statutory ground for revocation of an adoption order is under s.55 of the ACA, which states:

> *"**55 Revocation of adoptions on legitimation***
>
> *(1) Where any child adopted by one natural parent as sole adoptive parent subsequently becomes a legitimated person on the marriage of, or formation of a civil partnership by, the natural parents, the court by which the adoption order was made may, on the application of any of the parties concerned, revoke the order."*

30. This provision does not apply in the present case. It is however of some relevance because it shows that Parliament did consider the issue of revocation when making the ACA, but only created this one, very narrow, ground for revocation.

31. By s.2(9) of the Children Act 1989 ("CA") a person who has parental responsibility for a child cannot surrender or transfer any part of that responsibility. I note that an ability to revoke an adoption order, certainly on welfare grounds, would thus put an adoptive parent into a different legal situation from a birth parent. This seems to be contrary to the statutory scheme in the ACA.

32. Mr Day relies on s.31F(6) of the MFPA, which states:

> *"**31F Proceedings and decisions***
>
> *...*
>
> *(6) The family court has power to vary, suspend, rescind or revive any order made by it, including—*
>
> *(a) power to rescind an order and re-list the application on which it was made,*
>
> *(b) power to replace an order which for any reason appears to be invalid by another which the court has power to make, and*
>
> *(c) power to vary an order with effect from when it was originally made."*

The caselaw

33. The nature of an adoption order and the power to set one aside on the grounds of procedural irregularity was considered by the Court of Appeal in *Re B (Adoption: Jurisdiction to Set Aside)* [1995] 2 FLR 1. Swinton-Thomas LJ described the effect of an adoption order as follows:

> *"An adoption order has a quite different standing to almost every other order made by a court. It provides the status of the adopted child and of the adoptive parents. The effect of an adoption order is to extinguish any parental responsibility of the natural parents. Once an adoption order has been made, the adoptive parents stand to one another and the child in precisely the same relationship as if they were his legitimate parents, and the child stands in the same relationship to them as to legitimate parents. Once an adoption order has been made the adopted child ceases to be the child of his previous parent and becomes the child for all purposes of the adopters as though he were their legitimate child."*

34. Lord Bingham MR observed at [251] that:

> *"The act of adoption has always been regarded in this country as possessing a peculiar finality. This is partly because it affects the status of the person adopted, and indeed adoption modifies the most fundamental of human relationships, that of parent and child. It effects a*

> *change intended to be permanent and concerning three parties. The first of these are the natural parents of the adopted person, who by adoption divest themselves of all rights and responsibilities in relation to that person. The second party is the adoptive parents, who assume the rights and responsibilities of parents in relation to the adopted person. And the third party is the subject of the adoption, who ceases in law to be the child of his or her natural parents and becomes the child of the adoptive parents."*

35. These observations were made in the context of the provisions of the Adoption Act 1976. However, the coming into force of the ACA, whilst introducing several reforms, did not change the fundamental character of adoption or the legal effect of an adoption order.

36. Within this context it also remains true under the ACA that, as observed by Lord Bingham MR at [253]:

> *"An adoption order is not immune from any challenge. A party to the proceedings can appeal against the order in the usual way. The authorities show, I am sure correctly, that where there has been a failure of natural justice, and a party with a right to be heard on the application for the adoption order has not been notified of the hearing or has not for some other reason been heard, the court has jurisdiction to set aside the order and so make good the failure of natural justice. I would also have little hesitation in holding that the court could set aside an adoption order which was shown to have been obtained by fraud."*

37. Lord Bingham observed in *Re B (Adoption: Jurisdiction to Set Aside)* that the courts have been very strict in their refusal to allow adoption orders to be challenged, otherwise than by way of appeal. In giving examples of the types of failure in natural justice that might justify the revocation of an adoption order, at [245-246] in *Re B (Adoption: Jurisdiction to Set Aside)* Swinton Thomas LJ gave the following examples:

> *"There are cases where an adoption order has been set aside by reason of what is known as a procedural irregularity: see In re F. (R.) (An Infant) [1970] 1 Q.B. 385, In re R.A. (Minors) (1974) 4 Fam. Law 182 and In re F. (Infants) (Adoption Order: Validity) [1977] Fam. 165. Those cases concern a failure to effect proper service of the adoption proceedings on a natural parent or ignorance of the parent of the existence of the adoption proceedings. In each case the application to set aside the order was made reasonably expeditiously. It is fundamental to the making of an adoption order that the natural parent should be informed of the application so that she can give or withhold her consent. If she has no knowledge at all of the application then, obviously, a fundamental injustice is perpetrated. I would prefer myself to regard those cases not as cases where the order has been set aside by reason of a procedural irregularity, although that has certainly occurred, but as cases where natural justice has been denied because the natural parent who may wish to challenge the adoption has never been told that it is going to happen. Whether an adoption order can be set aside by reason*

> *of fraud which is unrelated to a natural parent's ignorance of the proceedings was not a subject which was relevant to the present appeal...As the case law stood, certainly in 1976, the powers of the court to set aside an adoption order as known to Parliament would, in my view, have been limited to the power to set aside such an order on the basis of a breach of natural justice such as I have described above, and not an inherent power to set aside an adoption order by reason of a mistake or misrepresentation."*

38. And at [248]:

> *"There is no case which has been brought to our attention in which it has been held that the court has an inherent power to set aside an adoption order by reason of a misapprehension or mistake. To allow considerations such as those put forward in this case to invalidate an otherwise properly made adoption order would, in my view, undermine the whole basis on which adoption orders are made, namely that they are final and for life as regards the adopters, the natural parents, and the child. In my judgment Mr. Holman, who appeared as amicus curiae, is right when he submits that it would gravely damage the lifelong commitment of adopters to their adoptive children if there is a possibility of the child, or indeed the parents, subsequently challenging the validity of the order."*

39. As I understand the caselaw that analysis remains the position of the Court of Appeal authorities. In *Re Webster v Norfolk County Council* [2009] 2 All ER 1156 the Court of Appeal, noting that under the Adoption and Children Act 2002 adoption is the process whereby a child becomes a permanent and full member of a new family, and is treated for all purposes as if born to the adopters, reiterated at [149] that:

> *"This is a case in which the court has to go back to first principles. Adoption is a statutory process. The law relating to it is very clear. The scope for the exercise of judicial discretion is severely curtailed. Once orders for adoption have been lawfully and properly made, it is only in highly exceptional and very particular circumstances that the court will permit them to be set aside."*

40. And at [163] that:

> *"The question, therefore, is whether or not a substantial miscarriage of justice, assuming that this is what has occurred, is or can be sufficient to enable the adoption orders in the present case to be set aside."*

41. With respect to what might be a substantial miscarriage of justice sufficient to justify the revocation of an adoption order, in *Webster* Wall LJ indicated that, given the public policy considerations relating to adoption and the authorities, even a serious injustice suffered by a birth parent will not of itself justify the revocation of an adoption order. Wall LJ was clear that only a highly exceptional and very particular circumstance could lead to such an outcome. Thus, in *Webster*, as set out at [2] and [3], the children had been denied the opportunity to argue that they should grow up together with their parents as a family in breach of the Article 8 rights *and* the fact

that the parents had been wrongly accused of physically abusing one of their children and three of their children had been removed wrongly and permanently from their care, *did not* amount to sufficient justification to revoke the adoption orders in that case.

42. On the other side of the procedural line, in *Re K (Adoption and Wardship)* [1997] 2 FLR 221 where an adoption order was set aside in circumstances where there had been [227]: *"inept handling by the county court of the entire adoption process"* and [228]: failure to comply with the requirements of the Adoption Rules, *"procedural irregularities go[ing] far beyond the cosmetic", "a fundamental injustice ... to [the child] since the wider considerations of her welfare were not considered"* and *"no proper hearing of the adoption application."* Butler-Sloss LJ held [228] that: *"there are cases where a fundamental breach of natural justice will require a court to set an adoption order aside."*

43. These authorities show that (a) a court can only set aside an adoption order in *"highly exceptional and very particular circumstances";* and (b) the only ground for setting aside is a *"substantial miscarriage of justice",* see *Webster* at p.163. It is not entirely clear to me why the Court of Appeal adopted a power to set aside or revoke an adoption order on the grounds of substantial miscarriage of justice, rather than allowing an out of time appeal on the grounds of breach of natural justice. Nor in these cases is there any consideration of the use of the inherent jurisdiction in the context of a statutory scheme, which gives a very limited power to revoke. However, these cases are in the Court of Appeal and therefore binding upon me, and there is no argument in this case as to there having been a substantial miscarriage of justice, so the ground for revocation accepted by the Court of Appeal does not arise in the present case.

44. However, there are then a series of first instance decisions in the Family Division of the High Court where judges appear to have extended the grounds for setting aside or revoking an adoption order beyond those of fundamental breach of natural justice.

45. In *PK v Mr K* [2015] EWHC 2316 (Fam) Pauffley J revoked an adoption order in circumstances where the child had been the subject of serious physical assaults by the adoptive parents. They had relinquished responsibility for the child and did not oppose the applications and the child she had been re-united with her biological mother for a period of time.

46. The foregoing approach was apparently endorsed by Sir James Munby P in *Re O (A Child) (Human Fertilisation and Embryology: Adoption Revocation)* [2016] 4 WLR 148. The actual issue in that case was however quite different from a revocation on welfare grounds. The Judge noted at [27] that:

> *"There is no need for me to embark upon any detailed analysis of the case law. For present purposes it is enough to draw attention to a few key propositions: (i) Under the inherent jurisdiction, the High Court can, in an appropriate case, revoke an adoption order. In relation to this jurisdictional issue I unhesitatingly prefer the view shared by Bodey J in In re W (Inherent Jurisdiction: Permission Application: Revocation and Adoption Order), para 6, and Pauffley J in PK v K, para 4, to the contrary view of Parker J in In re PW (Adoption), para 1. (ii) The effect*

> *of revoking an adoption order is to restore the status quo ante: see In re W (Adoption Order: Set Aside and Leave to Oppose), paras 11–12. (iii) However, "The law sets a very high bar against any challenge to an adoption order. An adoption order once lawfully and properly made can be set aside 'only in highly exceptional and very particular circumstances'": In re C (A Child) (Adoption: Placement Order), para 44, quoting Webster v Norfolk County Council, para 149. As Pauffley J said in PK v K, para 14: "public policy considerations ordinarily militate against revoking properly made adoption orders and rightly so." (iv) An adoption order regularly made, that is, an adoption order made in circumstances where there was no procedural irregularity, no breach of natural justice and no fraud, cannot be set aside either on the ground of mere mistake (In re B (Adoption: Jurisdiction to Set Aside)) or even if there has been a miscarriage of justice (Webster v Norfolk County Council). (v) The fact that the circumstances are highly exceptional does not of itself justify revoking an adoption order. After all, one would hope that the kind of miscarriage of justice exemplified by Webster v Norfolk County Council is highly exceptional, yet the attempt to have the adoption order set aside in that case failed."*

47. In *HX v A Local Authority and others (Application to Revoke Adoption Order)* [2020] EWHC 1287 (Fam) MacDonald J held that despite a wholescale a failure by the local authority and guardian to locate a father during care and placement proceedings this was not regarded as sufficiently highly exceptional to render it a miscarriage of justice.

48. The key legal principles relevant to revocation were summarised by MacDonald J at [38]:

> *"i) An adoption order effects a change that is, and is intended to be legally permanent. The effect of an adoption order is to extinguish any parental responsibility of the natural parents. Once an adoption order has been made, the adoptive parents stand to one another and the child in precisely the same relationship as if they were his legitimate parents, and the child stands in the same relationship to them as to legitimate parents. Once an adoption order has been made the adopted child ceases to be the child of his previous parent and becomes the child for all purposes of the adopters as though he were their legitimate child.*
>
> *ii) There are strong public policy reasons for not permitting the revocation of adoption orders once made, grounded in the nature and intended effect of an adoption order but also in the grave damage that would be done to the lifelong commitment of adopters to their adoptive children if there was a possibility of the child, or indeed the parents, subsequently challenging the validity of the order and in the dramatic adverse effect on the number of prospective adopters available if prospective adopters thought that the natural parents could, even in limited circumstances, secure the return of the child after the adoption order was made.*

> *iii) Within this context, the courts discretion under the inherent jurisdiction to revoke a lawfully made adoption order is severely curtailed and can only be exercised in highly exceptional and very particular circumstances.*
>
> *iv) Those highly exceptional circumstances must comprise more than mistake or misrepresentation or serious injustice and amount to a fundamental breach of natural justice."*

49. The current high point of this line of authorities is Theis J's decision in *AX and BX v SX and others* [2021] EWHC 1121. That case has some clear similarities to the present case. There was no suggestion of any procedural irregularity in the making of the adoption orders. The adoption had broken down and the children had returned to live with their birth family. There was evidence of a serious adverse impact on the children if the application was not granted:

> *"77. The starting point in these applications is the lodestar provided in paragraph 149 in Webster. The position could not be set out more clearly. The court's discretion under the inherent jurisdiction to revoke a lawfully made adoption order is severely curtailed and can only be exercised in 'highly exceptional and very particular circumstances'. The permanent and lifelong nature of adoption orders and the very powerful public policy reasons, as articulated in the cases, underpin this rationale. The cases, Webster included, have given examples of when, on the very particular facts of the case, the discretion has and has not been exercised. Obviously, each case is highly fact dependent. In my judgment, there is no exhaustive category of cases where the court may exercise its discretion, although Webster and other cases make it clear the very steep hill that has to be climbed and why.*
>
> *78. I also reject the submission that welfare can play no part in the exercise of the court's discretion. The cases demonstrate it clearly has been to a greater or lesser extent, depending on the circumstances of the case (for example Re M, PK and Re O). That approach is not inconsistent with the provisions in s 1 (7) ACA 2002, which expressly includes welfare considerations in applications to revoke an adoption order. It is not necessary for me to determine whether welfare in the exercise of the court's inherent jurisdiction should specifically be guided by the statutory framework for welfare as set out in s 1 ACA 2002, although I agree with the submissions that it should not be inconsistent with it."*

50. When summarising the relevant legal principles in the case, Theis J concluded at [80(7)] that:

> *"Welfare can, in appropriate cases, be taken into account in deciding whether to exercise the court's discretion where the highly exceptional and particular circumstances of the case justify it (see Re M, Re B, Re PK and Re O). The extent to which it can, or should be taken into account will vary, depending on the circumstances of the particular case."*

81. The relevant considerations in this case are as follows:

(1) The order sought in this case is supported by all parties and reflects the factual reality of their respective day to day position, both in the short and long term.

(2) For A she has been living back with her natural family for over two years and shares a home with her natural mother, three younger siblings and her own child. They live and identify as one family.

(3) For B she has been back living within her natural family for over two years. Although, not currently being cared for by Ms T, Ms T continues to exercise de facto parental responsibility in relation to B and B identifies herself as a member of the natural family.

(4) Both A and B feel very strongly about their legal status, they feel very much a part of the natural family and want their legal status and identity to reflect that.

(5) Ms T has directly and indirectly cared and provided for both A and B over the last two years. The child arrangement orders in relation to both A and B in 2019 restored her parental responsibility in relation to both of them. Ms T identifies with A and B as her children and as siblings to her three younger children. Ms T provides a home for A's child, who she regards as her grandchild although at the moment she has no legal relationship with him.

(6) Mr and Mrs X accept the relationship between them and A and B has permanently and irretrievably broken down. They accepted the interim threshold criteria were established in the care proceedings in 2018 and made it clear to Ms N in her recent report their position to no longer wanting to be regarded as the legal parents of A and B."

51. There has been some debate in this case about whether there is a "test" of exceptional circumstances before an adoption order can be set aside. Mr Brown submitted that "exceptionality" is not a test, but rather an outcome, relying on *Re O* at [27(v)]; *Re A (Adoption: Notification of Fathers and Relatives)* [2020] EWCA Civ 41 at [89(7)] and *Manchester City Council v Pinnock* [2010] UKSC 45, in which Lord Neuberger said:

"Exceptionality

51. It is necessary to address the proposition that it will only be in "very highly exceptional cases" that it will be appropriate for the court to consider a proportionality argument. Such a proposition undoubtedly derives support from the views expressed by Lord Bingham and has been referred to with apparent approval by the EurCtHR in more than one case. Nevertheless, it seems to us to be both unsafe and unhelpful to invoke exceptionality as a guide. It is unhelpful because, as Lady Hale pointed out in argument, exceptionality is an outcome and not a guide. It is unsafe because, as Lord Walker observed in Doherty v Birmingham [2009] 1 AC 367, para 122, there may be more cases than the EurCtHR

> *or Lord Bingham supposed where article 8 could reasonably be invoked by a residential tenant.*
>
> *52. We would prefer to express the position slightly differently. The question is always whether the eviction is a proportionate means of achieving a legitimate aim. Where a person has no right in domestic law to remain in occupation of his home, the proportionality of making an order for possession at the suit of the local authority will be supported not merely by the fact that it would serve to vindicate the authority's ownership rights. It will also, at least normally, be supported by the fact that it would enable the authority to comply with its duties in relation to the distribution and management of its housing stock, including, for example, the fair allocation of its housing, the redevelopment of the site, the refurbishing of sub-standard accommodation, the need to move people who are in accommodation that now exceeds their needs, and the need to move vulnerable people into sheltered or warden-assisted housing. Furthermore, in many cases (such as this appeal) other cogent reasons, such as the need to remove a source of nuisance to neighbours, may support the proportionality of dispossessing the occupiers."*

52. In *R v Kelly* [2000] QB 198 Lord Bingham, gave a construction of 'exceptional' which has been followed in later cases. He said [209]:

> *"We must construe 'exceptional' as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered."*

Change of name

53. In circumstances where a child arrangements order is in place, applications to change a child's surname are governed by s.13(1) CA. The principles relevant to Y's application to change her name are well known and set out in *Dawson v Wearmouth* [1999] 1FLR 1167, *Re W, Re A, Re B* [1999] 2 FLR 930 and *Re W (Change of Name)* [2014] 2 FLR 221. Each case must be decided on its own facts with the welfare of the child as the paramount consideration and with all relevant factors being weighed in the balance.

The inherent jurisdiction

54. It is clear from the caselaw set out above that the Courts have used the inherent jurisdiction to found a power to revoke adoption orders outside the statutory scheme.

55. However, none of those cases refer to the principles that restrict the use of the inherent jurisdiction where there is a statutory scheme in play.

56. In *FS v AM* [2020] EWHC 68 Sir James Munby considered the scope and use of the inherent jurisdiction in great detail. The legal issue in the case was not the revocation

of an adoption order, but the analysis of the use of the inherent jurisdiction remains wholly applicable:

> *"100. Before going any further a few general remarks about the inherent jurisdiction may not be out of place. Counsel remind me of Lord Donaldson of Lymington MR's famous description (In re F (Mental Patient: Sterilisation) [1990] 2 AC 1, 13) of the common law – here, the inherent jurisdiction – as the "great safety net which lies behind all statute law, and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interests of society as a whole." But the choice of metaphor is revealing: the inherent jurisdiction is a safety net, not a springboard. And Lord Donaldson would have been the first to acknowledge that the inherent jurisdiction, whatever its theoretical reach, is, in settled practice, recognised as being subject to limitations on what the court can and should do. For an example, see his observations in In re R (A Minor) (Wardship: Criminal Proceedings) [1991] Fam 56.*
>
> *101. I recognise of course that, as Singer J said in Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend) [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, relief can be granted in what he acknowledged was a "novel" case. As he said (para [8]):*
>
> *"the inherent jurisdiction of the High Court can, in an appropriate case, be relied upon and utilised to provide a remedy ... the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values."*
>
> *102. I emphatically agree. Striking examples are its recent use in cases of forced marriage, female genital mutilation and, more recently radicalisation. So, as I said in Re SA (Vulnerable Adult with Capacity: Marriage) [2005] EWHC 2942 (Fam), [2006] 1 FLR 867, para 45:*
>
> *"New problems will generate new demands and produce new remedies."*
>
> *103. But novelty alone does not demand a remedy. Any development of the inherent jurisdiction must be principled and determined by more than the length of the Chancellor's foot (John Selden, Table Talk, 1689; Selden Society, 1927)."*

57. He then turned to the reasons why the inherent jurisdiction was not available in that case, and the restrictions that arise upon the use of the inherent jurisdiction:

> *"132. "The third reason why the inherent jurisdiction is not available to assist the applicant is because of the fundamental principle which I summarised in In re X (A Child) (Jurisdiction: Secure Accommodation), In re Y (A Child) (Jurisdiction: Secure Accommodation) [2016] EWHC 2271 (Fam), [2017] Fam 80, where I referred (para 37) to:*
>
> *"the well known and long-established principle that the exercise of the prerogative – and the inherent jurisdiction is an exercise of the*

prerogative, albeit the prerogative vested in the judges rather in ministers – is pro tanto ousted by any relevant statutory scheme."

133. The question in that case was whether the inherent jurisdiction could be exercised to put a child in secure accommodation in a case which fell outside the provisions of section 25 of the Children Act 1989. Having gone through the authorities, I said (para 45):

"Section 25 does not, to use Lord Dunedin's phrase, [in Attorney General v De Keyser's Royal Hotel Ltd [1920] AC 508] at p 526, cover "the whole ground", it is not, in contrast to the legislation being considered in B v Forsey 1988 SC (HL) 28, a comprehensive statutory scheme intended to be exhaustive. To have recourse to the inherent jurisdiction in a situation, as here, wholly outside the territorial ambit of the statute, does not, to use Lord Sumption YC's phrase in In re B (A Child) (Reunite International Child Abduction Centre intervening) [2016] AC 606, para 85, "cut across" the statutory scheme, nor, to use Sir John Dyson YC's phrase in R (Child Poverty Action Group) v Secretary of State for Work and Pensions [2011] 2 AC 15, para 34, would it be "incompatible with" the statutory scheme."

134. Mr Amos referred me to Anderson v Spencer [2018] EWCA Civ 100, [2019] Fam 66. Although it is not apparent that either the Court of Appeal or the judge at first instance (Peter Jackson J, [2016] EWHC 851 (Fam), [2016] Fam 391) had been referred to these earlier authorities, their approach was exactly the same. Holding that the inherent jurisdiction had not been ousted, Peter Jackson J said (para 71(1)):

"The [Family Law Reform Act 1969, as amended] is the only statute concerned with testing for evidence of biological relationships. It is comprehensive in relation to cases falling within its scope ... In contrast, the testing of DNA post-mortem falls distinctly outside the scope of the legislation. The FLRA cannot be read purposively or convention-compliantly so as to cover cases of the present kind. I therefore do not accept that a power to give directions for post-mortem DNA testing has been ousted by the Act."

The Court of Appeal agreed (para 40):

"The Act is, of course, comprehensive in relation to cases falling within its ambit ... whereas post-mortem testing is, as the judge put it 'distinctly outside the scope of the legislation'."

135. The point was put very pithily by Lieven J in JK v A Local Health Board [2019] EWHC 67 (Fam), (2019) 171 BMLR 184, para 57:

"The inherent jurisdiction cannot be used to simply reverse the outcome under a statutory scheme, which deals with the very situation in issue, on the basis that the court disagrees with the statutory outcome."

> *136. Of course, on one view this all depends on the degree of generality or specificity with which one chooses to define or describe the ground or scope or ambit of the relevant statutory scheme. In DL there was a bright-line distinction between incapacity and capacity, the relevant legislation dealing exclusively with the former. In In Re X there was similarly a bright-line distinction between secure accommodation in England and secure accommodation in Scotland, the relevant legislation dealing exclusively with the former. In Anderson v Spencer there was a bright-line distinction between testing inter vivos and testing post mortem, the relevant legislation dealing exclusively with the former.*
>
> *137. The legislation with which I am here concerned is rather different. Between them, the 1973 Act and the 1989 Act provide a comprehensive statutory scheme dealing, along with much else, with the circumstances in which a child, including, as here, an adult child, can make a financial claim against a living parent (I put the point this way to make clear that I have not overlooked section 1(1)(c) of the Inheritance (Provision for Family and Dependants) Act 1975). More specifically, the legislation, in its general reach, applies to the applicant, as to every adult child, and is comprehensive in relation to cases falling within its ambit. Furthermore, as Mr Warshaw and Mr Viney point out, the legislation deals explicitly with the very claims the applicant seeks to make; indeed, in the case of the 1989 Act it explicitly prohibits the claim he seeks to pursue. There is accordingly, in my judgment, no scope for recourse to the inherent jurisdiction. To exercise the inherent jurisdiction in these circumstances would simply be to do what Lieven J has rightly said is impermissible.*
>
> *138. For all these reasons it is quite clear, in my judgment, that the inherent jurisdiction is not available to the applicant."*

58. For the reasons set out in the Conclusions below, I consider that these principles apply in the present case.

Submissions

59. Mr Day, on behalf of AM, submitted that the Court had found a power to revoke adoption orders under the inherent jurisdiction. He very fairly pointed out that the Court of Appeal decisions had all proceeded on the basis of substantial miscarriages of justice, see *Webster*. It was only at the level of the High Court that revocation on the basis of welfare considerations had been adopted.

60. He submitted that, if I were to find no power to revoke in this case under the inherent jurisdiction, I could instead use the power in s.31F of the MFPA. He accepted that this had been a difficult and controversial provision in the context of financial remedy proceedings, but the words of the provision were wide enough to encompass an adoption order.

61. On the facts of the case he said that this case was highly exceptional, and thus met the test in *Webster* because of the fact that the adoptive parent was the applicant for revocation; the fact the adoption placement had wholly broken down (certainly in respect of Y); that the children were now subject to child arrangement orders for them

to live with the birth parents, and X was now living with BM. The case was therefore very similar to that before Theis J in *AX*.

62. The position in respect of Y was clearcut given that she had not lived with Y for 2.5 years and had been absolutely clear in her view that she no longer wished to have a relationship with AM or have the status of being adopted.

63. He accepted the position of X was less clear, but submitted that X had now given a clear and settled view that she wished the order to be revoked and thus for her to return to being the child of her mother.

64. Ms Richards on behalf of BM, supported the revocation of both adoption orders on the basis that it was in accordance with the children's wishes and feelings, and in their best interests.

65. Mr Brown supported the revocation in respect of Y but not for X. He submitted that there was power under the inherent jurisdiction to revoke an adoption order. He said the key factors were welfare (throughout life); Article 8 and public policy. The impact of the decision was a profound one for the child, but there was not a "test" of exceptionality, rather if all the factors led to revocation then the case would be exceptional.

66. He relied on the evidence, and welfare analysis, of the social worker. In respect of Y all the factors point in favour of granting the application. Her wishes and feelings have been clear and consistent. The continuation of the adoption order would place a great strain on her life and be strongly contrary to her welfare interests.

67. Under Article 8, he submitted that this pointed to revocation, largely on the same grounds.

68. In respect of public policy considerations, he submitted that although there was public policy that would "ordinarily militate against revoking", see Munby LJ in *Re O* at [27], that would not always be the case. The public policy to support the intention behind the adoption order i.e. permanence, was not met here because the adoption had never provided Y with the stability and permanence that was intended. There is also a public policy interest in meeting the welfare interests of the children, and *"not seeing the perpetuation of a legal fiction"* (his skeleton argument), in circumstances where Y has been living with her birth mother since mid 2021.

69. In respect of X, he submits that the factors point away from revocation. Her wishes and feelings have fluctuated and given the profound nature of the decision to be made there is no clearly reliable basis for making the decision.

70. Mr Bowe, on behalf of the children, supported the submission that there was power under the inherent jurisdiction to revoke an adoption order. As set out above, X shortly before the hearing decided that she too wished the order to be revoked. He emphasised how important it was, particularly for Y, that their sense of identity matched the legal position. Y was suffering considerable psychological and emotional harm from the current situation, and the impact on her identity. He said her situation was very similar to that in *AX* and *PK* and the Court should adopt a similar approach.

71. In respect of X, although her relationship with AM had not broken down to the same degree, he submitted that she now strongly felt the order should be revoked. Further it would create emotional harm for both girls if their status was not the same.

72. He also submitted that the case was extremely unusual, because of the factual chronology set out above, and the support for the application from the adoptive parent. She herself felt that it was in the girls' best interests for their legal status to be reinstated with their birth parents.

Conclusions

73. The first issue in this case is whether I have power to revoke the adoption order made under the ACA on the grounds of the welfare interests of the two children concerned. In my view I do not.

74. The ACA sets out a detailed and comprehensive scheme for the making of adoption orders. It is clear that those orders are intended to be lifelong and puts the parent/child relationship in the same situation as birth parentage, which is self-evidently irrevocable save through an adoption order. The statutory scheme does cover revocation, but only in one very narrow category of case, legitimation.

75. The proposition being advanced by the parties, and accepted by Theis J in *AX*, is that the inherent jurisdiction of the High Court can be used to create a much wider category of revocation, namely where there is a welfare ground to do so and the case is considered "exceptional".

76. The Court of Appeal has accepted a power to revoke under the inherent jurisdiction in cases where there has been a "fundamental procedural irregularity", see *Webster*. It is not entirely clear why those are not cases where an appeal against the order could not have been allowed out of time, on the grounds of breach of natural justice. On one analysis the orders were never validly made because of procedural error and therefore are either void or voidable. Revocation is one legal mechanism to achieve this result. If the order is void in public law terms, then there would have to be some legal mechanism to set it aside. In any event, the caselaw is binding upon me, and there is therefore undoubtedly a category of case where the power to revoke or set aside an adoption order under the inherent jurisdiction exists.

77. The grounds of the application in the present case are entirely different. They do not relate to the validity of the adoption orders when made, but are based on a subsequent change of circumstances, namely the breakdown of the adoption. The application is made solely on welfare grounds, and not on any procedural irregularity, and therefore falls outside the scope of any of the binding Court of Appeal authorities.

78. In my view it would be wrong in principle to use the inherent jurisdiction in the way being sought, essentially for the reasons given by Sir James Munby P in *FS v AM*, albeit in a different context.

79. As Sir John Donaldson said, the inherent jurisdiction is the "great safety net" to protect the interests of children, but it should not be used as an unprincipled and unlimited safety net. It is very tempting to use the inherent jurisdiction in this case because it is almost certainly in Y' best interests to revoke the adoption order,

although I am less sure about X. However, if there is no power to do so, the issue of best interests does not arise.

80. It is clear from the caselaw cited above that the inherent jurisdiction cannot be used where there is a statutory scheme which covers the same ground, see *FS v AM*, but fundamentally going back to the principle set out in in *De Keyser Royal Hotels*. That cannot mean that there has to be a statutory provision that covers precisely the same issue, or there would never be a need to use the inherent jurisdiction. The point of the cases referred to is that where Parliament has created a comprehensive scheme, then the Courts cannot use the inherent jurisdiction to add provisions which "cut across" that scheme. The words "cut across" come from Lord Sumption in *Re B*, where he was dissenting, but the point he was making there is not itself controversial. Effectively the same point is made by Sir John Dyson YC in *CPAG* when he says that the inherent jurisdiction cannot be used when it would be "incompatible with" the statutory scheme.

81. In the present case the ACA is a comprehensive scheme, which covers the entire process of legal adoption. Critically in my view, it expressly deals with revocation of adoption orders, but only in a very limited category of case, that of legitimation. This must have been a deliberate choice by Parliament and fits with the overall scheme of adoption being a lifelong status. The entire tenor of the statute, and the "mischief", or to put it another way, the fundamental philosophy, of the ACA is that it creates a permanent and irrevocable change of legal status for both adoptive parent and child.

82. This is not a situation where it can be argued that Parliament simply did not contemplate the problem which the inherent jurisdiction is being relied upon to address. Although adoption breakdown may perhaps be an increasing issue, it will certainly have been well within the contemplation of Parliament in 2002 and indeed when Parliament considered earlier adoption statutes.

83. I did request counsel to do a Hansard search in order to be confident that there was no Parliamentary material which supported the Applicant's case. However, I am satisfied that the statute itself is clear, in the sense that there is no support for any wider power of revocation, so the tests in *Pepper v Hart* are not met and therefore the Parliamentary material is not admissible to the Court. I note, for the avoidance of any potential misunderstanding, that the material wholly supports an analysis that the statute was intended to create an irrevocable status.

84. I am very conscious that at least three judges in the High Court have found a power to revoke an adoption order on welfare grounds. However, in none of those cases was the caselaw on the limitations to the use of the inherent jurisdiction cited in the judgments. There was no consideration on the restrictions on the use of the inherent jurisdiction described by Sir James Munby in *FS v AM*.

85. In each of those cases the judges referred to the power to revoke on welfare grounds only being used in exceptional cases. It might be argued that it is appropriate to use the inherent jurisdiction in something that is truly an exceptional case, because Parliament cannot have been expected to contemplate such a situation arising, and therefore in a sense it falls outside the statutory scheme. However, in my view such an argument would be wrong. Firstly, as I have set out above, the prospect of an adoption breaking down and it being in the welfare interests of the child for the order to be

revoked, is something that would have been well within the contemplation of Parliament.

86. Secondly, it is not clear to me how truly exceptional the situation that arises in the present case actually is. The Court ordered the parties to investigate the evidence on the breakdown of adoption placements. However, producing a solid statistical basis has proved impossible. The only statistics produced have a figure of 4-9% of adoptions breaking down, although it is not clear precisely what that means. In any event, this figure suggests that adoption breakdown is far from being an exceptional situation.

87. Sadly, such failed adoptions have probably become more common with somewhat older children being adopted, and with social media making it much easier for children and their birth parents being able to trace each other. This will be particularly the case where the children are old enough to remember their birth parents when they are adopted.

88. It is submitted in this case that the exceptional circumstance is that it is the adoptive parent who is seeking to revoke the adoption orders. I accept that this is likely to be unusual, but the principle of whether the court has the power to revoke an order on welfare grounds cannot depend on the nature of the applicant. It might well be the case that in circumstances where the children were the applicant, an adoptive parent would agree to the revocation if they thought it was in the children's best interests.

89. I can deal much more swiftly with the submission that s.31F(6) of the MFPA gives a power to revoke an adoption order. This has been a controversial provision, where the breadth of the language used has led to considerable litigation and uncertainty over the scope of the power and whether it applies to final orders, see Mostyn J in *CB v EB* 2020 EWFC 35; MacDonald J in *N v J* [2018] 1 FLR 140 and Cobb J *Re A & B (Recission of Orders)* [2021] EWFC 76. None of these cases concern adoption orders.

90. However, I have no doubt that s.31F(6) was never intended to apply to the revocation of adoption orders under the ACA. Although the language is unconstrained, so on a pure linguistic approach it could apply to such orders, there is nothing in the terms of the amendments to the MFPA that suggest it was intended to apply to such orders. It would have been little short of extraordinary for Parliament to have introduced a power to revoke adoption orders, with no limitations or process, without including any further provisions.

91. A broad and unfettered power to revoke pursuant to s.31F(6) would be obviously contrary to the public policy considerations in respect of the finality of adoption orders, that are referred to in the caselaw set out above. Such a significant change to the statutory scheme for adoption would surely have included discussion papers and a broader public debate, none of which happened.

92. Therefore, although the argument is an ingenious one, it is in my view clearly wrong.

93. For these reasons, in my view, I have no power to revoke the adoption orders on the grounds of the children's welfare and I therefore must refuse to do so.

94. I do however wish to note, that I accept, certainly in the case of Y, it would be in her best interests to revoke the order. She plainly finds the present legal fiction distressing and the fact that it reflects neither reality nor her own sense of self, deeply upsetting. This has been her position consistently for a long period. The position is less clear cut in respect of X. I do not intend to carry out a detailed analysis of her welfare interests given that I have found I have no power to revoke. There may be strong grounds for Parliament to create a power to revoke adoption orders in very particular circumstances, but that does not change the important constraints on the use of the inherent jurisdiction.

95. Finally, I turn to the question of allowing both girls to change their names back to BM's surname. There can be no doubt that this is strongly in Y's best interests. I have referred above to the degree to which she feels distressed by her confused family identity and has done for a considerable time. She strongly identifies with her birth mother and has largely if not wholly rejected her relationship with AM. She has said very strongly that she wishes to be "unadopted". I hope that by allowing her to change her name, I can at least in part help her in this respect.

96. Although X is much less clear in respect of the adoption, she too has said that she wishes to change her surname. This application is granted.