



Neutral Citation Number: [2020] EWCA Civ 1591

Case No: B4/2020/1821

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE (FAMILY DIVISION)**  
**Mr Justice Mostyn**  
**FD20900627**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 26 November 2020

**Before :**

**LORD JUSTICE PETER JACKSON**  
**LORD JUSTICE BAKER**  
and  
**LORD JUSTICE LEWIS**

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**PROSPECTIVE ADOPTERS**

v

**SHEFFIELD CITY COUNCIL**

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**Deirdre Fottrell QC and Tom Wilson** (instructed by **Goodman Ray LLP**) for the **Appellant**  
**Prospective Adopters**  
**Ruth Cabeza** (instructed by **Sheffield City Council**) for the **Respondent Local Authority**

Hearing date : 19 November 2020  
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**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 at 10:30am on Thursday, 26 November 2020.

## **Lord Justice Peter Jackson:**

### *Introduction*

1. In July 2020, two children who had been placed for adoption by a local authority moved from the care of their prospective adopters and returned to foster care. In August, the prospective adopters asked for one of the children to be returned. When the local authority refused, they issued adoption proceedings and also applied for an order for the child's return. In a decision given on 21 October 2020, Mostyn J dismissed the application for a return order and struck out the adoption proceedings. The prospective adopters, having appealed from both decisions, no longer challenge the dismissal of the application for a return order and their appeal in that respect will be dismissed. However, they maintain their appeal from the striking out of the adoption proceedings because they wish to adopt the child or at least to have a voice in the planning for her future.
2. The appeal primarily turns on the application of Section 35(1) of the Adoption and Children Act 2002 ("ACA 2002"), which reads:

“(1) Where a child is placed for adoption by an adoption agency and the prospective adopters give notice to the agency of their wish to return the child, the agency must

(a) receive the child from the prospective adopters before the end of the period of seven days beginning with the giving of the notice, and

(b) give notice to any parent or guardian of the child of the prospective adopters' wish to return the child.”

The local authority contends that the prospective adopters gave notice under this section when the children left their care and the Judge agreed. The consequence would be that the placement for adoption had come to an end and that the prospective adopters accordingly had no right to apply for an adoption order without first obtaining the leave of the court.

3. There is a subsidiary issue as to whether, if the prospective adopters did not give notice, the local authority did so itself under s. 35(2). The Judge decided that it did not need to give notice but that it had anyhow done so tacitly.

### *The facts*

4. G (9) and M (7) are sisters who had very unsettled early lives, with repeated changes of carer. In March 2019 they were made the subject of placement orders and were then matched with the prospective adopters, Mr and Mrs A. After introductions, the children were placed with them in September 2019. From an early stage the girls' behaviour was very difficult to manage. The As responded in an exemplary way but the situation would have challenged any parents. Concern was felt about both children, but the culminating problem was a number of assaults by G on her younger sister. In early July 2020 the As suggested that the children needed to be separated for their own protection, but the local authority would not agree to this without

undertaking a sibling assessment. Before that could happen, matters reached crisis point and on 22 July both children were removed at the request of the As and placed in separate foster homes.

5. On 14 August the As asked the local authority to return M, but not G. That request was refused and on 7 September they made an application for an adoption order in respect of M. On 25 September, an application followed under the Human Rights Act 1998 ('HRA 1998') seeking an order for M's immediate return to their care. That application and the adoption application came before the Judge on 9 October. In a judgment delivered on 21 October he dismissed the application for an order under the HRA 1998 and struck out the adoption application. On 4 November I granted permission to appeal.

*The relevant communications*

6. The Judge found that notice under s. 35(1) was given in an email written by Mrs A on her mobile phone on 21 July. This message (number 3 below) was one of a series of emails from the As to a group of twelve social work professionals over the days leading up to the removal of the children. The communications vividly demonstrate the overwhelming challenges that existed at the time:

(1) From Mr and Mrs A at 21.46 on Saturday 18 July:

"To reiterate and confirm our previous concerns:

- The girls ARE at risk of serious harm here from themselves/ one another
- We cannot keep the girls safe from themselves/ one another
- G's behaviour is deteriorating every day, and she is becoming less and less able to cope

After several serious incidents this week where G has caused herself serious harm (At school, at home, in front of other members of family), threatening to kill herself, and destroying M's possessions, we are at crisis point. I have called, and left a message with Sheffield's out of hours team and I would like somebody to call me as soon as possible.

Tonight, after having a couple of hours with my sister who came from London to see me for first time since Lockdown began, I have come back to [Mr A] in G's room unable to stop G biting herself manically all over body, up arms and legs, he's come away to open door for me, hoping she may stop too without the attention, I go up, G's legs covered in blood as it looks like she's bitten in two places really hard, I manage to get her down for hug and stop her, and manage to settle. Then M calls [Mr A] in several times. Once he's happy G is ok with me, goes into M. She then tells him G has hurt her private parts

again. G can hear with me. And starts diving for her shoulders with her teeth. Eventually I can restrain and calm her.

Apparently when I was drying my hair before I went to see my sister, M and G had been colouring. M had gone to loo and G had followed her. [Describes assault on M's private parts by G.]

M has two huge bruises... She is in significant pain tonight. It is horrific.

We are beyond devastated that yet again this has happened in our home when we already feel like we're doing everything in our power and have been so desperately asking for help.

M cannot be subjected to this any longer.

G cannot be expected to cope with this any longer, and needs urgent, specialist help.

We will all be traumatised by tonight's events.

Every day the retraumatising of the girls is becoming more and more significant.

Please somebody call us.

[Mrs and Mr A]"

(2) From Mrs A at 00.13 on Tuesday 21 July:

"Hi all,  
After a day of general calm with [G] alone with me, tonight we had our most prolonged period of self harm which resulted in us calling an ambulance.  
It had begun at bedtime after finding two more of [M]'s headbands broken to smithereens under G's pillow.  
G ran off into another room and immediately started hurting herself. For the next two and a half hours [Mr A] and I were trying to keep her safe from herself whilst she attempted to bite herself, headbutt floors doors and walls, gauging her eyes, kicking and hitting doors (Including glass doors ) floors and me, pulling her hair out, grabbing at anything she could - hangers, pegs, microphone stands, shoes, head slides... anything she could do to harm herself whilst screaming, wailing, laughing... total delirium. After 20 mins we called the CAMHS crisis - and then began a succession of being passed from pillar to post whilst in total crisis. We decided an hour in that we'd take her back to ED, and she started to calm as we prepared to go. So we sat for a couple of minutes, before 5 minutes later, it

all began again. In desperation [Mr A] called Sheffield who told us to ring an ambulance.

The specialist mental health nurse called us back around 30 mins later and whilst G had begun to calm, she told me/ him she still wanted to hurt herself so he thought, especially because of her age, they needed to send an ambulance to send to ED, especially as she had had a second wave of distress earlier.

An hour later, G had calmed, and was allowing me to look after her, and she had started to fall asleep. With our CAMHS appt first thing, I thought at 22.30 (3.5 hours after it began), as she was started to drop off, it better that she got some sleep, so called Ambulance service to cancel.

As well as the worry for G, tonight M was again subjected to a huge trauma. Whilst we were trying to soothe/ restrain G, M was cowering behind our bed holding onto her toys for dear life, sobbing hysterically. She cannot continue to be exposed to this trauma and abuse. Luckily my neighbour took her from me, so she didn't have to be exposed to the entirety of it as she was shaking and terrified, and obviously didn't want to be left alone with my friend K but obviously it was a necessity to protect her. The headbands tonight, were the last of M's... this week G has destroyed every single one of M's headbands. Ones we've tried to fix before. Precious personalised books and presents from foster carers and family. Bracelets. Toys. Anything that is precious to M she always targets. Never anything of her own. M, at this stage, has very little that hasn't been broken, and this week, alongside the harm she has suffered at G's hands, the threats of G to kill herself, M screaming from the back of the car as I'm driving that G is hurting herself and screaming "she's bleeding mummy" will scar her for life.

This is too much.

We'll do CAMHS in the morning, both girls desperately need help. But as we have been saying for weeks, they are no longer safe to live together. We are beyond waiting for help.

[Mrs A]"

(3) From Mrs A at 13.36 on Tuesday 21 July:

"Hi all,

I thought by this point, after the email I sent last night, somebody may have been in contact to help us. We have had a lovely supportive text from [the school social worker], who has been incredible throughout, but I'm afraid this lack of action from everyone else is just reflective of the way we have been treated throughout.

[S] from CAMHS was very thorough and kind this morning but this is the support we should have had in October when we asked for it. We and the girls have been under incredible stress

from that point, and it was impossible to think it could get worse, and in the last four weeks it has.

If you are unwilling to act to protect M from G, when the most serious of harm is happening, you are leaving M to live with her abuser and face further harm, and G destroying herself and everyone around her.

If you cannot protect us all now at the worst of times, I'm afraid that is it.

We are heartbroken.

We are not social workers and the response is not adequate from yourselves.

Please come and get the girls.

And wherever you place them I beg you separate M from G.

We are no longer able to continue.

[Mrs and Mr A]

NB As I have been writing this email I have seen [C, the children's social worker] has tried to phone 5 minutes ago. I am not going to be ringing back."

(4) From Mrs A at 22.30 on Tuesday 21 July:

"Hi all,

Tonight at bedtime we have had yet another disclosure from M. M told us it had happened when [Mr A] and I were on the phone to [S] from CAMHS sometime between 10-11.30. We had set M up on our level in the kitchen colouring in and making cards, G was in her bedroom upstairs playing with dolls.

CAMHS had told us beforehand, that the girls would need to be around as part of assessment, so we felt this set up the safest way, and [Mr A] jumped to check at any sound, and was checking regularly too.

M told us Tonight she had needed the toilet so had gone up for a wee. As she stood up to dry her bottom, G came in and [describes assault on M's private parts by G, breaking the skin and causing bruising].

M then told us she hated herself. She is a bad person, and asked us why this kept happening to her. Why G hurts her.

I have not addressed this with G, as we have had yet another awful night of G hurting herself and me, and at the point of disclosure, G finally seemed to have settled a little in bed.

G's inner arms are a total mess from biting, she's ripped out hair again and was trying to grab anything she could for long periods of time tonight. At one point when she was trying to grab my earrings out, i managed to get one out and she started screaming 'STAB ME, STAB ME' over and over again.

I have also attached a couple of pictures of the things of M's that G has destroyed in last 24 hours- many of the things we have previously fixed, M's book I made for introductions front

and inside, other special books, and gifts from us, grandparents, friends, nanna and [L and D]. I have no idea how M has anything left.

Tonight G also poured soap all over the floor again, water all over the floor and then later wee'd all over the floor. There's also toothpaste and faeces she's put into the towels too.

We called Sheffield out of hours to log M's latest disclosure. They advised to call 111 as M was in pain but on calling them M was finally asleep, and they'd wanted me to wake her up to talk about the pain, which I didn't feel was the right move. If she is still in pain tomorrow morning, which considering how purple they are again, they said to call back.

Also to ensure there's no confusion, I had showered M this morning before the CAMHS appointment and the previous bruising had subsided a lot to just being a bit grey.

This is most definitely new bruising..., in addition to the less sore marks...

Clearly the girls are both deeply traumatised and each have really significant mental health issues that need to be treated by a specialist immediately.

[Mrs A]"

(5) From Mrs A at 07.36 on Wednesday 22 July:

"Hi all

G woke up, what appeared quite calmly.

I have spoken to her about M's disclosure.

Whilst she will not talk at all, she has nodded that yes she did hurt her sister again, she understands that has bruised and hurt M, and she understands no one should touch anyone's private parts.

She will not talk and at this stage, I'm not going to push further.

We've found more destruction this morning, but I have managed to talk her down from self harming thus far as at the breakfast table she started slowly rolling her sleeve up in preparation.

Once again. These children are not safe together. M can no longer be subject to this abuse and G is totally in crisis and needs immediate psychological support.

[Mrs A]"

(6) From Mr S (children's social work team manager) to Mrs A at 09.56 on Wednesday 22 July:

"[Mrs A]

I'm sorry I did not call you myself yesterday, I was working from home and had no access to emails until I came to the office in the afternoon for an update were I had seen your email from the night before.

After we had spoken Monday I had spoken with [the Independent Reviewing Officer] and had emailed [C] asking her to ask for a follow up from the CAHMS appointment on Tuesday morning before calling you, I was thinking if we had the CAHMS update from the appointment and the timescales for [the psychologist's] work commencing then [C] would have been in a much better position to plan with you when she called you in the afternoon.

Obviously that was preceded by your request for the children to be removed from yourselves to places of safety basically from G's incidents or targeting M further. Given the circumstances we have identified separate foster placements for the children in Sheffield where the girls actually have stayed with the foster carers before being placed with yourselves so will know them when they arrive.

I know [C] had been speaking with [your social worker's] manager yesterday and they had agreed [C] would collect the children around 11am this morning and move them to the separate foster carers. I would want to consider this as a respite type placement initially and work with yourselves and the girls in regards to identifying a way forward for the future and look at the therapy needs and relationship between the children with the psychologist. I anticipate this with both [the psychologist] and CAHMS This will also include a assessment of the dynamics of the girls relationships and if this can be sustained or not in the future.

If you would prefer [C] to meet the girls at school or whilst one of you is not there we could arrange it that way.

I know this will be an emotional time for all involved and would ask the children are not impacted by any discussions at this point.

If needed please ask [your social worker's] manager if you would prefer the children to be collected from school if needed and [C] can liaise with her.

Please call if needed  
Regards  
[Mr S]"

### *Subsequent events*

7. On 24 July a Child Looked After Review took place, attended by the As and seven professionals. The report of the meeting recorded that:

“The girls have moved into separate temporary support care placements.”

The Chair's Summary stated:



“This has been a horrendous time for all involved and [the As], G and M are in a very heightened distressed & traumatic state. [The As] became so concerned about the girls safety and psychological state, they asked for the girls to be temporarily accommodated separately, whilst psychological assessments are undertaken. [The As] are having video contact with the girls and the girls are having some supervised direct contact with one another in a neutral venue, before they go on separate holidays with the foster carers. Some contact should take place between the girls, to help with feelings of loss and separation ... [Mrs A] has had a CAMHS feedback session today and that will be shared with all concerned. It is clear that the family needs a more detailed and specialist psychological assessment and a sibling assessment. Sheffield... has submitted an application to fund [the psychologist’s] work and Social Care has agreed to fund any gaps in funding in order to start the work. The level of trauma and anxiety is so high at the moment – there needs to be a cooling off and reflection period to allow for the planning of immediate support measures.”

The ‘Overall Aim of the Plan was recorded as “Adoption”.

8. Contact, face to face and on screen, continued between the girls themselves and between the girls and the As. On 14 August, Mrs A sent text messages to her adoption social worker and to the Independent Reviewing Officer saying that she and Mr A understood that M was being moved to another foster carer for respite:

“Surely we should at least be allowed to provide that, especially as it’s in the child’s best interest.

There’s no reason that she can’t come home, as it’ll be more trauma if she has another placement. We know assessment still has to be done but we can’t put M through anymore.”

The local authority, which was concerned about treating the children differently, did not agree and M went to another foster carer before returning to the previous foster carers on 1 October. In the meantime, the As continue to ask for her return.

9. On 7 September, Ms M (Senior Fieldwork Manager) sent this email to the As:

“Dear Mr and Mrs A

In relation to contact with yourselves... I was awaiting further case discussion with the independent psychologist as to M’s interim placement. This occurred with [C, the social worker] on 01.09.2020 and the psychologist concurred with my decision that it would be premature to return M to your care whilst assessments were undertaken. At this juncture we do not know what the independent psychological assessment or the sibling assessment will identify as outcomes for both children.

The rationale for my decision not to return M to your care is based on the following observations:

- The impact of a possible future removal
- The emotional impact upon G of this move
- It is premature whilst assessments are ongoing
- That it was in fact recognised by yourselves that caring for the children was becoming too challenging and you were struggling to keep them safe therefore requested the children be received into care.

M has returned to her previous foster carer's and thus this avoids further introductions to unknown carer's is not necessary at this time.

The children will return to their school... during the assessment period as to change school at this time again would be premature. ... Should the assessments conclude that neither child is returned to your care this will afford G and M to have an ending with their friendship groups and their teachers.

I appreciate how difficult the current situation is for you and that you would like M returned to your care, however as the adoption order was not as yet granted you do not have parental responsibility for G and M.

[C], as a qualified Advanced Social Worker, has all the competencies required to undertake such assessment in consultation with the children's carer's, information you have previously provided, the independent psychologist and school. [C]'s assessment will also be informed by the psychological assessment... I will also be offering [C] reflective and challenging supervision on this, and all of her other children on her caseload.

Yours Faithfully  
[Ms M]"

This was the first time the local authority had suggested that the As did not have parental responsibility for the children, but that was based on the misunderstanding that they would only acquire it when an adoption order was made.

10. On 7 September the adoption application was filed. On 9 September the local authority wrote to the As' solicitors in response. It stated that it would be inappropriate to return M at the present time but that it was not ruling out that option once there had been assessment and careful planning. It continued:

"Turning to the legality of the situation, I have not had time to consider all the file recordings of discussions and correspondence passing between the Authority and your clients. I do not accept that it would not be possible for a simple request for children who had been placed for adoption to be removed to act as a termination of the adoptive placement by the prospective adopters pursuant to section 35 of the Adoption and Children Act 2002. However I acknowledge that it is a possibility at least that the request for removal did not have that effect in this case. Whatever Social Care department's

understanding of the technical position with regard to the nature of the placements, they clearly intended to try to continue to involve your clients in the processes, and to explore the possibility of a return of one of the children. If the adoptive placements are still subsisting then I also accept that your clients would continue to hold parental responsibility for the children.

However, in the light of your clients' apparent disengagement from the assessment process and demand for the immediate placement of M, and in the light of the Authority's views on the appropriateness of such a step ahead of the conclusion of that work, the Local Authority has been obliged to review the status of the parental responsibility arrangements for the children. As you will be aware, under section 25(4) of the Adoption and Children Act 2002 the Authority may determine that the parental responsibility of any prospective adopters is to be restricted to the extent specified in any such determination. In the light of your clients' position the Local Authority has determined that, to the extent that they may continue to hold parental responsibility for the children, that responsibility shall be limited to the extent that it shall not be exercised so as to require either child to be returned from their current placements."

Upon receipt of this letter, which engaged appropriately with the legal issues, the As issued their application under the HRA 1998.

11. The psychological assessments of each child were completed on 27 September and concluded that the children staying together was not a viable option in the short term. On 7 October a 'Together or Apart' assessment conducted by the children's social worker recommended that the plan be changed from adoption to separate foster placements with a view to the children living together at some stage in the future. The return of M to the As was not recommended.

*The proceedings before the Judge*

12. The only witness evidence was in the form of two statements from the As, which included these passages:

"18. On 21 July, we had reached crisis point and we sent an email to the local authority asking for both of the girls to be accommodated in foster care. This email is attached at "[email (2)]". Following a very difficult day, we reached the view that the only way we knew how to keep M safe, if they were not going to remove G from the home, was to ask that both to be removed into respite for M's safety, a copy of our subsequent email dated 21 July 2020 is attached at "[email (3)]". We had only ever intended this to be a respite placement. We were not getting the help that we, or the girls, desperately needed. We had our CAMHS assessment that day which confirmed for us

everything that we had been saying about the girls and their needs. The CAMHS worker could not believe that we had been left for this long without any psychological help for the children. By 1pm, still no one from the local authority had been in touch to discuss the incident from the previous evening.”

“20. Making the request that day for temporary accommodation was the only thing that we could do to keep M safe in light of the local authority refusal to move G. We had only ever intended this to be a respite placement. It was not our intention to terminate the adoptive placement for either of the girls and the local authority did not take this email as such. This is clear from the email we received in response from the social work Team Manager, [Mr S] attached at “[email 6]”. This email was sent before the girls were moved and confirmed the basis on which we all agreed to the children’s accommodation.”

“22. At no point did we relinquish our parental responsibility (PR) and in fact since the girls were put into respite care we continued to exercise our PR in being informed on developments, having contact with them and being consulted with decisions concerning the girls. Minutes from the Review meeting in July also confirm that the plan for adoption remains and that the foster placements are classed as temporary placements, these are attached at “A8”.”

13. Accordingly, the As argued that the children continued to be placed with them and that they retained parental responsibility. They contended that they had asked the local authority to accommodate the children under s. 20 Children Act 1989 (‘CA 1989’) and that on 14 August they had withdrawn that consent. In refusing to return M, the local authority had acted unlawfully and in breach of their Article 8 rights and those of M. Its subsequent attempt to restrict the As’ parental responsibility was of no effect. As to the adoption application, M had “had her home” with them since September 2019 so as to satisfy the ten week requirement in ACA 2002 s. 42(2).
14. The position of the local authority was that the email of 21 July had brought the placement to an end, and with it the parental responsibility of the As. The refusal to return the children was not unlawful and the As had no standing to make an adoption application.

#### *The judgment*

15. This is to be found at [2020 EWHC 2783 \(Fam\)](#).
16. As to what constituted notice under s.35(1), the Judge held that:

“16. ... for a notice to be given under section 35 ACA 2002 the intention of the notice giver must be to end the placement permanently and a request for temporary respite care is not sufficient. I accept that it is not necessary for adoptive parents

to have a detailed knowledge of the legal niceties of section 35 ACA 2002. They must intend, no more, no less, to bring about the consequence of section 35(1) ACA 2002 i.e. for the children to be returned permanently to the local authority and no longer placed with them.”

17. As to whether the email at 13.36 on 21 July amounted to notice:

“16. I have read that email carefully in the context of the earlier and later correspondence and in the light of the conduct of the parties. I accept the submission that one should approach messages sent in fraught circumstances with caution and should be slow to import a meaning that brings about far reaching and drastic consequences where this was not clearly intended. ...

17. It can be seen that the test for what constitutes a notice under section 35 is a question of law but that whether a specific communication satisfies that test is a question of fact.

18 I have reached the clear factual conclusion that the email of 21 July 2020 was a notice under section 35 ACA 2020 and as such brought the placement of the children with the prospective adopters to an end. I have come to this conclusion for the following reasons:

i) The local authority had repeatedly told the prospective adopters that it would not countenance the children being separated at this time. In the words of counsel for the local authority it was either both of the children or neither of the children. In the context of the ever-deteriorating behaviour from G and the crisis between 18 and 21 July 2020 it is clear that the prospective adopters had finally reached the conclusion that it was best for them to care for neither of the children rather than to continue caring for both children together. This explains why they now asked for M, who was far less challenging, to be cared for by the local authority as well as G;

ii) The email uses the language and tone of permanence. It is not caveated in any way nor does it make any suggestion, even implicitly, as to the prospect of the children returning to the prospective adopters. The prospective adopters had come to the end of the road. “*That is it,*” they say; “*We are no longer able to continue*”. The postscript to the email evidences the strength of feeling of prospective adopters in wanting finality and wanting to disengage from the local authority;

iii) The prospective adopters had previously rejected the idea of respite care (I note the local authority’s submission that it intended this respite care to be provided by the

family of the prospective adopters and not by the local authority) because in their words they wanted a solution and not a temporary fix. The solution had to be permanent and they did not see respite care as such;

iv) That the social worker later emailed saying he would “want to consider this as a respite type placement initially” does not assist the applicants. Rather it reinforces the view that this was not a respite placement. The social worker would only “want to consider” i.e. treat it as a respite-type placement if indeed it was not a respite-type placement. Evidently at this time the local authority was still hoping that the situation could be salvaged in some fashion. This also explains the local authority’s actions in subsequently continuing to involve the prospective adopters in decisions regarding the children and in facilitating contact with them. It does not, however, detract from the undoubted fact that on 21 July 2020 the prospective adopters had given notice to return permanently the children;

v) I do not attach much weight to the children apparently being returned with only a few days’ worth of clothes. The prospective adopters argue that this is indicative of their intention only ever being that the children be placed in respite care. However, events were fast-moving, and one would not necessarily expect prospective adopters to pack systematically every last possession of the children. Further, G was sent with only a few days’ worth of clothes notwithstanding that the prospective adopters accept that her placement with them has come to a permanent end;

vi) It is unreal for the prospective adopters to argue that the email of 22 July 2020 was not good notice under section 35 ACA 2002 not only vis-à-vis M but also vis-à-vis G as well. They argue that, even now, the placement with G with them has not come to an end. Yet under no circumstances do they want G back and accept that she should be placed elsewhere;

vii) The submission that a social worker had represented to the prospective adopters that they continued to share parental responsibility after 21 July 2020, which would only be true whilst the placement subsists, is unpersuasive. It is of minor significance and does not directly affect the clear intention of the email of 21 July 2020. Counsel for the local authority rightly points out that the social worker’s misapprehension of the law cannot change the law and that the statement has since been corrected by the local authority.

19. For all these reasons I dismiss the application under the Human Rights Act 1998. A consequence of this is that the prospective adopters did not have standing to bring their application for an adoption order on 7 September 2020 because M had not been living with them for a period of ten weeks preceding the application (section 42 ACA 2002). The adoption application will therefore be struck out.”

18. The Judge then considered the position if, contrary to his finding, notice had not been given by the As. He found that in that case the local authority did not need to give notice, but that it had anyway given tacit notice to end the placement. In coming to that conclusion, he reviewed the relevant statutory provisions:

“28. The scheme is completely logical in circumstances where following a placement order (a) a child has been placed with adoptive parents; (b) the child is actually living with them; but (c) the local authority has decided to end the placement. It is clear, however, that the framers of the legislation did not contemplate the scenario (which, for the purposes of this part of the judgment I assume to be the case) where the child is not living with the adoptive parents but has been returned to the local authority for a period of respite care.

29. Assume that during this period of respite care the child made revelations of serious abuse by the adoptive parents. Mr Wilson, counsel for the applicants, argues that in such circumstances the local authority either has to return the child to the adoptive parents and then initiate the section 35 procedure to get the child back a week later; alternatively the local authority has to apply, in reality against itself, for an emergency protection order or interim care order. I cannot accept this submission which has an air of unreality about it.

30. In my judgment, in this scenario it is obvious that the local authority has the power to decide to terminate the placement. As the child is already with the local authority there is no need for notice to be given to the adoptive parents. The local authority therefore just makes the necessary decision. That decision would be challengeable in judicial review proceedings or in freestanding human rights proceedings. That, in effect, is what has happened in this case. The applicants sought the return of M on 14 August 2020. The local authority declined to return her and in making that decision they tacitly made the decision to terminate the placement. That decision is challengeable in the ways I have indicated. The applicants have decided to go down the route of a freestanding human rights application. In this scenario the application would fall to be determined on an interim basis on its merits using the conventional criteria applicable to such applications.

31. I reject the submission that the local authority has retained M “unlawfully” since 14 August 2020. Again, this is a submission which seems to me to be tinged with unreality. The local authority has retained M pursuant to its overarching parental responsibility. The applicants lost their parental responsibility when the local authority made its tacit decision on 14 August 2020. The fact that they later made an adoption application does not alter the legal position.

32. Were this situation to arise again in the future it would be better that the decision to terminate the placement should be explicitly set out in a fully reasoned letter rather than being made tacitly.”

*The appeal*

19. The grounds of appeal are that:

- (1) The Judge made a material error of fact and law in concluding that the placement had been terminated by the As.
- (2) The Judge erred in law in determining that the local authority was entitled unilaterally to terminate the children’s placement during a period of respite care without either:
  - (1) Giving notice pursuant to section 35(2) ACA 2002; or
  - (2) Issuing proceedings seeking an emergency protection order or an interim care order.

The effect of this error is that prospective adopters who agree to a child being accommodated for respite purposes are deprived of the procedural safeguards, imposed by Statute and Article 8 ECHR, which would otherwise be available to them.

- (3) In any event, the Judge erred in law in determining that the local authority was able unilaterally to terminate the children’s placement with the Applicants on the basis of a ‘tacit decision’ and without giving express written notice to them of this step.
20. Ms Deirdre Fottrell QC, with Mr Tom Wilson who appeared below, asserts that the findings that notice had been given by the As or tacitly by the local authority are perverse. They invite us to set aside the order dismissing the adoption application and to remit those proceedings to a judge of the Family Division for urgent case management. The appeal in respect of the refusal of an order for M’s immediate return is not pursued because of the complex welfare issues that now arise in relation to both girls’ futures. Furthermore, during the hearing of the appeal, Ms Fottrell withdrew the argument, rejected by the Judge, that the As had agreed to the children being accommodated under s. 20 CA 1989 and that the local authority had acted unlawfully in refusing to return M.
21. For the local authority, Ms Ruth Cabeza, who also appeared before the Judge, invited us to uphold his ruling and to dismiss the appeal. She rightly reminded us that the conclusion that notice was given is a finding of fact and that the question is not what



conclusion we would reach ourselves but whether the Judge's conclusion was supportable or not. Here the Judge was entitled, indeed bound, to find that the placement for adoption came to an end when the children were collected by the local authority. Ms Cabeza realistically recognised the difficulties with the Judge's alternative conclusion that tacit notice had been given by the local authority at a later stage and she did not seek to uphold his statement at paragraph 30 that as M was already with the local authority there was no need for it to give notice at all.

22. We are grateful to counsel for their submissions, from which there developed a broad consensus about the legal position of these children. In the end the decisive issue between the parties is the question of whether the As gave notice that brought the placement to an end. The answer to that question determines whether they were entitled to issue the adoption application.
23. The interpretation of s. 35 calls for an understanding of its place within the overall statutory scheme. Before addressing the Judge's approach to the question of notice, I will therefore consider the nature and consequences of placement for adoption and of the return of children who have been placed, matters that fall under adjoining sub-headings in Chapter 3 of the ACA 2002.

#### *Placement for adoption*

24. The placement of a child for adoption is a momentous step in the child's life that fundamentally alters the status and relationships of the child, the birth parents, and the prospective adopters. Whether it is achieved with parental consent under s. 19 ACA 2002 or following a placement order under s. 21, it creates a new legal environment that continues until the making of an adoption order or the ending of the placement. So, for example, upon the making of a placement order, *the child* will no longer be subject to a care order (s. 29(1)) but will instead be a child looked after by the local authority (s. 18(3)). *The birth parents* can only apply to revoke the placement order with leave of the court, and then only if the child has not been placed (s. 24(2)). Upon placement, parental responsibility is given to *the prospective adopters* (s. 25(3)) and the child cannot be removed by anyone other than the agency (s. 30 (1)), and then only after notice has been given under s. 35(2). As approved adopters, they are entitled to apply for an adoption order without seeking the leave of the court, and can do so after only ten weeks, a much shorter time than in the case of other applicants (s. 42). For its part *the local authority* has parental responsibility for the child (s. 25(2)) and has the power to determine that the parental responsibility of a parent or guardian, or of prospective adopters, is to be restricted to the extent specified in the determination (s. 25(4)).
25. The placement of a child for adoption therefore involves much more than the child moving to the home of the prospective adopters in a physical sense. This can particularly be seen from s. 18(1), which provides that an agency may not only place a child with prospective adopters but, where it has placed a child with any persons, leave the child with them as prospective adopters. This is of course the situation with a foster-to-adopt arrangement or where local authority foster parents become adopters.
26. At the same time, the ACA 2002 provides for a considerable regulatory structure. The Adoption Agencies Regulations 2005 impose wide-ranging responsibilities upon

the local authority in relation to the establishment of adoption panels, and to decisions about whether a child should be placed for adoption, whether prospective adopters should be approved as suitable to adopt, and whether a child should be matched and placed with approved prospective adopters. They also require the local authority to keep the progress of the placement under regular review. The Adoption Support Services Regulations 2005 require the local authority to carry out an assessment of the need for adoption support services, including to prospective adopters, who are defined for this purpose as adoptive parents. The services that may be provided include respite care, and assistance where the disruption of an adoptive placement has occurred or is in danger of occurring (regs. 3(2)(e) and (f)).

27. The above is far from being a complete survey of the nature and effect of placement for adoption but it is enough to show its highly consequential nature. In practice, as is well-known, these decisions are made with painstaking care at every stage because the stakes are so high for everyone concerned, and particularly for older children. In turn, the procedures that the adoption agency must observe are mirrored in the degree of commitment that will have been shown by approved prospective adopters for them to have got to the point where a child can be placed with them.

*The return of children placed for adoption*

28. Sections 30 to 35 of the ACA 2002 fall under the sub-heading ‘Removal of children who are or may be placed by adoption agencies’. As already noted, s. 30(1) prohibits the removal of a child placed for adoption from the prospective adopters by anyone other than the adoption agency, and s. 34(1) is to like effect where a placement order is in effect. Sections 31 to 33 deal with the recovery of a child by a parent in various circumstances where consent is withdrawn or a placement order is refused.
29. Section 35, which contains the mechanism for the return of a child placed for adoption at the behest of the prospective adopters or of the adoption agency, reads as follows:

**“35 Return of child in other cases**

(1) Where a child is placed for adoption by an adoption agency and the prospective adopters give notice to the agency of their wish to return the child, the agency must

(a) receive the child from the prospective adopters before the end of the period of seven days beginning with the giving of the notice, and

(b) give notice to any parent or guardian of the child of the prospective adopters’ wish to return the child.

(2) Where a child is placed for adoption by an adoption agency, and the agency

(a) is of the opinion that the child should not remain with the prospective adopters, and

(b) gives notice to them of its opinion,

the prospective adopters must, not later than the end of the period of seven days beginning with the giving of the notice, return the child to the agency.

(3) If the agency gives notice under subsection (2)(b), it must give notice to any parent or guardian of the child of the obligation to return the child to the agency.

(4) A prospective adopter who fails to comply with subsection (2) is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding three months, or a fine not exceeding level 5 on the standard scale, or both.

(5) Where

(a) an adoption agency gives notice under subsection (2) in respect of a child,

(b) before the notice was given, an application

(i) for an adoption order (including a Scottish or Northern Irish adoption order),

(ii) for a special guardianship order,

(iii) for a child arrangements order to which subsection (5A) applies, or

(iv) for permission to apply for an order within subparagraph (ii) or (iii),

was made in respect of the child, and (c) the application (and, in a case where permission is given on an application to apply for an order within paragraph (b)(ii) or (iii), the application for the order) has not been disposed of, prospective adopters are not required by virtue of the notice to return the child to the agency unless the court so orders.

(5A) ...

(6) ...”

Section 144(1) prescribes that “notice” means notice in writing.

30. There has been no previous reported decision on the meaning of s. 35(1). By contrast, s. 35(2) has been considered several times. It is well-established that where a local authority seeks to bring a placement to an end it must act with procedural fairness towards the prospective adopters. It may be unlawful for it to give notice without first giving prospective adopters the opportunity to deal with the concerns and ‘head off’ the notice: *R v Devon County Council Ex Parte O (Adoption)* [1997] 2 FLR 388 at 395 (Scott Baker J); *DL and ML v Newham London Borough Council and Secretary of State for Education* [2011] 2 FLR 1033 at [115] (Charles J); and *RCW v A Local*

*Authority* [2013] 2 FLR 95 at [32] (Cobb J). This process (which concerns the status of the placement) would not prevent the physical removal of the child in the meantime under an emergency protection order or an interim care order if for some reason the child should not remain with the prospective adopters for another seven days.

31. The decisions under s. 35(2) underscore the significance of any decision to bring an adoptive placement to an end. It was suggested to us that an equivalent obligation of procedural fairness should be read into s. 35(1). But the sub-sections are not direct counterparts. Prospective adopters are under no obligation to act as if they were a public authority and, as discussed below, the focus under s. 35(1) is upon what they intended. Where there is ambiguity about that, it might be argued that a local authority is under a duty to clarify the situation before acting on the supposed notice (but that is not in my view the position in this case and I need say no more about it).
32. For s. 35(1) to be engaged, “the prospective adopters must give notice [in writing] of their wish to return the child”. In my view the notice, however it is expressed, must amount to a clear and unequivocal statement that the prospective adopters no longer wish to be regarded as prospective adopters for the child and that they therefore wish to hand the child permanently back into the care of the adoption agency. Anything less than this would be out of keeping with a scheme of legislation that places such significance upon the status of placement for adoption. It is not, however, necessary that the notice is given with an understanding of the legal framework; it is enough that the prospective adopters understand that, in ordinary language, they are withdrawing from the plan to adopt.
33. In the same way, s. 35(2), which allows the local authority to give notice of its opinion that the child should not remain with the prospective adopters, is to be read as referring not only to the child remaining physically with the prospective adopters, but to the ending of their status as prospective adopters, with all that this entails.
34. The giving of notice under either sub-section places the local authority under two immediate obligations: (a) to receive the child physically from the prospective adopters within seven days, and (b) to give notice to any parent or guardian. In a case under sub-section (1), the fact that the authority has or has not carried out its obligations in full or in part does not determine whether notice has been given, but it may reveal its understanding of the prospective adopters’ intentions and thereby cast light on what those intentions were.
35. Once notice has been given and the child has been returned, the placement for adoption comes to an end and the prospective adopters no longer hold parental responsibility. The placement order remains in effect unless and until it is revoked by the court. The child remains a looked after child and the local authority must make arrangements for his or her living arrangements under s. 22C CA 1989, no doubt through placement in foster care in the first instance. The mechanism under s. 20 CA 1989, which exists where a local authority does not have parental responsibility, does not apply.
36. Where valid notice has not been given but the child has left the care of the prospective adopters, whether for respite care or otherwise, parental responsibility will continue to be held by the prospective adopters and the child’s living arrangements will equally fall under s. 22C. If there is a disagreement about the return of the child, the local

authority can, at least in the short term, exercise its powers under s. 25(4) to restrict the parental responsibility of the prospective adopters by determining that they may not insist upon the child's return. As to the broader question of the child's status, the local authority may itself give notice under s. 35(2) if it considers that it should do so. Either way, the legislation allows the child's situation to be regularised, both in regard to physical living arrangements and as to legal status. If the prospective adopters have any complaint of unlawfulness, they can make it by means of an application for judicial review or under the HRA 1998.

### *Section 42 Adoption and Children Act 2002*

37. Finally, so far as the law is concerned, I briefly mention ss. 42(1) and (2) ACA 2002. Section 42 is headed 'Child to live with adopters before application'. It contains a condition that where an application for an adoption order is made by prospective adopters of a child placed by an adoption agency "the child must have had his home with [the prospective adopters] at all times during the period of ten weeks preceding the application".
38. This condition, which is also found in other legislation, has been considered in a number of contexts, notably international adoption and surrogacy. The authorities were fully analysed by Cobb J in *Re TY (Preliminaries to Intercountry Adoption)* [2019] EWHC 2979 (Fam) at [24] and he reached the conclusion that the phrase 'must have had his home' has been and should be interpreted flexibly. In that case the child had not lived with the applicant for adoption throughout the prescribed six-month period. Likewise, in *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam), a case where the applicants for a parental order had separated, Keehan J observed at [58], that:
- "The term 'home' must be given a wide and purposive interpretation. The authorities make clear that the term is not and should not be restricted to cases where the applicants live together under the same roof.
39. The approach taken in these cases is entirely in line with the decision of his court in *Re G (A Child) (Adoption: Placement Outside Jurisdiction)* [2008] Fam 97. This concerned s. 84(4) ACA 2002, which contains the same condition as that found in s. 42. In the judgment of the court (Sir Mark Potter P, Wall and Lloyd LJ) it was said that whether the condition was satisfied was a matter of fact and degree and that the sensible and purposive construction given to the provision by the trial judge was to be approved.

### *Was notice given by the prospective adopters in this case?*

40. Applying this legal framework, I turn to the issues on this appeal.
41. In my view the only reasonable conclusion to be drawn from the evidence in this case is that Mr and Mrs A did not give notice under s.35 ACA 2002. My reasons are as follows.
42. Firstly, the contemporaneous evidence, recited above but repeated here, supports this conclusion most strongly:

- (1) The only witness evidence was from Mr and Mrs A:

“18. On 21 July, we had reached crisis point and we sent an email to the local authority asking for both of the girls to be accommodated in foster care. ... By 1pm, still no one from the local authority had been in touch to discuss the incident from the previous evening.”

“20. Making the request that day for temporary accommodation was the only thing that we could do to keep M safe in light of the local authority refusal to move G. We had only ever intended this to be a respite placement. It was not our intention to terminate the adoptive placement for either of the girls and the local authority did not take this email as such. This is clear from the email we received in response from the social work Team Manager, [Mr S] attached at “[email 6]”. This email was sent before the girls were moved and confirmed the basis on which we all agreed to the children’s accommodation.”

- (2) There was no evidence to contradict this account. On the contrary, the local authority’s perspective as recorded strongly supported it:

- On 22 July, before the children were removed, Mr S stated:

“Obviously [the CAMHS appointment] was preceded by your request for the children to be removed from yourselves to places of safety...”

and

“I would want to consider this as a respite type placement initially and work with yourselves and the girls in regards to identifying a way forward for the future.”

- On 24 July, the CLA Review recorded that

“The girls have moved into separate temporary support care placements.”

and the Chair’s Summary stated:

“[The As] became so concerned about the girls safety and psychological state, they asked for the girls to be temporarily accommodated separately, whilst psychological assessments are undertaken. ... It is clear that the family needs a more detailed and specialist psychological assessment and a sibling assessment. ... The level of trauma and anxiety is so high at the moment – there needs to be a cooling off and reflection period to allow for the planning of immediate support measures.”

and the ‘Overall Aim of the Plan remained “Adoption”’.

- On 7 September, the team manager wrote:

“I was awaiting further case discussion with the independent psychologist as to M’s interim placement. This occurred with [C, the social worker] on 01.09.2020 and the psychologist concurred with my decision that it would be premature to return M to your care whilst assessments were undertaken.”
- On 9 September, the local authority legal department very fairly wrote:

“I do not accept that it would not be possible for a simple request for children who had been placed for adoption to be removed to act as a termination of the adoptive placement by the prospective adopters pursuant to section 35 of the Adoption and Children Act 2002. However I acknowledge that it is a possibility at least that the request for removal did not have that effect in this case. Whatever Social Care department’s understanding of the technical position with regard to the nature of the placements, they clearly intended to try to continue to involve your clients in the processes, and to explore the possibility of a return of one of the children. If the adoptive placements are still subsisting then I also accept that your clients would continue to hold parental responsibility for the children.”

- The first time that the local authority contended that the As had actually terminated the placement by their email of 21 July was when the matter came before the court below. In response to a question from Baker LJ, Ms Cabeza was unable to identify a single instance of the local authority having previously taken that view.

(3) Where the interpretation of a notice depends on the subjective intention of the sender, and where the sender and the recipient know each other’s position well, a finding that the sender’s true intention was the opposite of what each party understood it to be at the time will require cogent explanation if it is not to be regarded as perverse.

43. Secondly, that cogent explanation is not found in this case. The Judge directed himself broadly correctly in law at paragraph 16 and rightly expressed caution about importing a meaning with far-reaching and drastic consequences into messages sent in fraught circumstances, but he did not carry this approach through to paragraph 18. Taking his reasons one by one:

- (1) It does not follow from the fact that the local authority would not separate the children that the As’ request for them both to be removed for their own protection amounted to notice to end the placement.
- (2) The parsing of a message sent on a mobile phone in a crisis is unlikely to be a reliable guide to its meaning. The obvious interpretation of this email and its postscript in the context in which it was sent is not as a notice to withdraw but

as a cry for help. To the extent that a detailed examination of the words was appropriate, they do not support a conclusion that the As were using the language of permanence and disengagement. Instead of reading the message as a whole in its context, the Judge focussed unduly on particular words and emboldened only parts of sentences, for example:

**“If you cannot protect us all now at the worst of times, I’m afraid that is it.”**

It is therefore not correct to say that the email was not caveated in any way.

- (3) It does not follow from the fact that the As did not see respite care with family and friends as a permanent solution that their request for the girls to be placed in foster care for their own protection amounted to notice to end the placement.
  - (4) Mr S’s statement that he “would want to consider this as a respite type placement initially” cannot reasonably be read as supporting the conclusion that notice had been given, when it plainly points the other way. The fact that the local authority continued to work with the As was recognised by the Judge but he gave it no weight. When seen in context, for example of the CLA Review where the As and the children were described as “the family”, that was erroneous.
  - (5) The fact that both children were returned on the day without all their possessions may be a factor of relatively little weight, though one might have expected their possessions to have followed them shortly afterwards if this really was intended to be the end of the placement.
  - (6) The argument from logic that, because the As did not make a later request for G to be returned, they must have given earlier notice for both girls, is unsound.
  - (7) The Judge was right to say that a social worker’s misapprehension of the law cannot change the law, but for the reason given above he was wrong to place minor significance upon the view taken by all these social workers that the As continued to have parental responsibility. That was a matter of clear evidential significance.
44. Thirdly, the Judge described the email as showing a clear intention to end the placement. For the reasons given above, I respectfully disagree. On the evidence, the email was clearly not written with that intention. But if there was any doubt, it would have to be resolved in favour of an interpretation that supports a scheme of legislation that places such significance upon the status of placement for adoption. It must also be borne in mind that placement for adoption in all likelihood (and certainly in this case) confers on the prospective adopters and the children the right to respect for family life under Article 8 ECHR. The court should therefore not strain to find notice in anything less than a clear and unequivocal statement. A placement for adoption is a precious thing and nothing less will do to bring it to an end.



45. For these reasons, the Judge's conclusion that notice was given by the As under s. 35(1) was not one that was reasonably open to him, and I would allow the appeal on Ground 1.

*Was notice given by the local authority?*

46. In fairness to the Judge, it should not be forgotten that the main application before him was the application for a return order. The As were then arguing that they had placed M with the local authority under s. 20 CA 1989 and that its refusal to return her was unlawful. The Judge rightly had no time for that analysis and it has now been abandoned. However, the overreach seems in turn to have led to the argument about the lawfulness of the children's foster placements being framed with reference to the continuation or otherwise of the placement for adoption, when it was more appropriately to be seen as a concerning the restriction of the As' parental responsibility.
47. In my view, the refusal of the local authority to return M following the request on 14 August was lawful because it amounted to a determination restricting the As' parental responsibility under s. 25(4) ACA 2002. The determination was repeated in the email of 7 September and again formally repeated in the letter of 9 September. Even if, contrary to this view, the determination was not made until 9 September, after the adoption application had been issued, the children were no longer in the care of the As and s. 35(5) (which provides that a child need only be returned under a court order after adoption proceedings are issued) would not apply.
48. I accept that this is to treat the local authority's determination under s. 25(4) as having been a tacit one prior to 9 September. That is not objectionable, because it makes the scheme of legislation work as it should. A restriction on parental responsibility is a revocable step that regulates the here and now.
49. The case is different with regard to notice under s. 35(2), with its profound consequences and its procedural safeguards. It is clear to me that the local authority did not give notice under s. 35, tacit or otherwise, before the adoption application was issued in respect of M. In consequence the children remained placed for adoption when the application was issued and the As were entitled to make the application.
50. These matters lead me to this conclusion:
- (1) Whatever may have happened since, the local authority itself did not consider that it had given notice before the adoption application was issued. It was not (as Ms Cabeza very properly explained to us) in a position to form the necessary opinion until the assessments had taken place. Moreover, it did not take any of the steps that should have accompanied the giving of notice. It did not inform the birth parents of a development that would restore to them the right to apply for leave to apply to revoke the placement order. It did not convene a Disruption Meeting, required by its Children's Service Procedures Manual to take place between 28 and 42 days after the breakdown of a placement. In its legal letter of 9 September it did not assert that it had given notice. In short, it did not itself believe that it had given notice and in such circumstances it is impossible to find that notice had nonetheless been given.

- (2) Any notice must be in writing and there was no suggested instance of that happening.
  - (3) It is difficult, if not impossible, to accept that a transformative step of this kind can be taken tacitly. Apart from the lack of clarity that must result, notice under s. 35(2) triggers the statutory obligation to inform the birth parents. It is also accompanied by the procedural safeguards described above, which would likely be set to naught if notice could be tacitly given.
51. It also incorrect to say, as the Judge did at paragraph 30, that because the children were physically in its care, the local authority did not need to give notice in order to terminate the placement. If notice under s. 35 is not given by either side, the placement for adoption continues.
  52. I would therefore also allow the appeal under Grounds 3 and 2(i) and would dismiss the appeal under Ground 2(ii).

*In conclusion*

53. This outcome makes it unnecessary for the As to seek the leave of the Family Court to make an application to adopt M. Their application will be listed for early case management before a judge of the Family Division. We are not called upon to rule upon the application of the ten week condition in s. 42 ACA 2002, but it can be recorded that the local authority accepts that it is satisfied in this case, and there is no reason to believe that it is wrong about that.
54. I express the hope that a speedy and effective way can be found to resolve the predicament that these two children are in, perhaps by instructing a child psychiatrist with experience in adoption matters to advise not only on M's situation but also on G's. It is important that the children's situation is not distorted by the fact that only one of them will be subject to proceedings.
55. This appeal has shown that the adoptive placements of both children subsisted at the time of the hearing before the Judge. The only development since then is that it was said on the last page of the local authority's appeal skeleton argument that

“The local authority does not agree to return either G or M to the care of the prospective adopters and now gives notice under s35(2).”

That is not a satisfactory way to deal with service of a statutory notice. Proper steps should now be taken to resolve, and if possible agree, the children's status.

56. This is the first reported occasion on which the courts have had to consider notice given by prospective adopters. The experience of this case underlines two things:
  - (1) The vital importance of early specialist support for adoptive placements before they reach the point of breakdown. Knowledge of the insights contained in the psychological assessments that were commissioned after the children were removed would surely have helped the As and the social workers, and through them the children, and given their joint adoptive placement a better chance when it needed it.

- (2) The need for early legal advice. In this case the crisis on the ground was bad enough without the accompanying legal uncertainties. We were told that the local authority legal department was not consulted until 20 August. It cannot be assumed that the legal advice will immediately produce the right answers, but it should at least identify the right questions. It is not reasonable to expect prospective adopters to take the lead. Two adoption agencies, the local authority and the As' agency, were involved in the placement of these children. The onus was on them to clarify the legal position so that everyone should, so far as possible, have known where they stood.

**Lord Justice Lewis**

57. I agree.

**Lord Justice Baker**

58. I also agree.

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