



Neutral Citation Number: [2021] EWCA Civ 801

Case No: B4/2021/0140

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE FAMILY COURT
SITTING AT CHELMSFORD
Her Honour Judge Dawson
CM387/19

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/05/2021

Before:

LADY JUSTICE KING
LORD JUSTICE BAKER
and
LORD JUSTICE MALES

Re L (A Child: Step-Parent Adoption)

Ms Fiona Munro (instructed by **Sills & Betteridge LLP**) for the **Appellant**
The First Respondent appeared in person
Ms Geraldine More O’Ferrall (instructed by **Dack Pearson**) for the **Respondent Guardian**

Hearing date: 23 March 2021

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 10:00am on 26 May 2021.

Lady Justice King:

1. This is an appeal against the making of an adoption order by HHJ Dawson on 21 December 2020 in relation to a boy ‘L’ who is 11 years old. The effect of the order was for L to be adopted by the partner of his mother (‘the mother’). L’s mother and the Children’s Guardian consented to the making of the order. L’s natural father MV, (‘the father’) who has parental responsibility in respect of L, opposed the making of an adoption order.
2. The mother’s partner was referred to throughout the hearing and the judgment as ‘the step-father’, this was notwithstanding that the mother and he are engaged but not yet married. I shall, with no disrespect to the father, similarly in this judgment refer to the mother’s partner as ‘the step-father’.
3. The issue on appeal is whether the adoption order should now be set aside in circumstances where the judge did not have her attention drawn to and did not therefore refer in her ex tempore judgment to: (i) the leading domestic case on step-parent adoptions *Re P (a Child)* [2014] EWCA Civ 1174 or the European case of *Söderbäck v Sweden* [1999] 2 FLR 250; or (ii) the provisions of s.46(6) Adoption and Children Act 2002 (‘ACA’).
4. Having heard submissions by Ms Munro on behalf of the father and Ms More O’Ferrall on behalf of the Children’s Guardian, neither of whom appeared below, and from the step-father in person, we dismissed the appeal. The adoption order therefore stands. The following are my reasons for dismissing the appeal.

Factual Background

5. The documentation and information before the court is both fragmented and incomplete. Piecing together the relevant history as best I can, it is clear that the mother had a somewhat chaotic and hedonistic lifestyle in her late teens and early twenties. This is a period of her life about which with the benefit of maturity, she now feels both embarrassed and ashamed. The judge summarised the mother’s lifestyle, describing how aged 19 she was drinking and taking drugs. It was at this time that the mother had a somewhat casual and not exclusive, relationship with the father who was then in his 30s.
6. The mother became pregnant and gave birth to L in 2009. During that year the mother had formed a new relationship with a Mr B. The mother dearly wished her expected baby to be the child of this new relationship and not of her relationship with the father. She did not tell the father she was pregnant or that she had had a child. L was registered as the child of Mr B and given his surname. For a while the new relationship prospered, and the mother had a little girl in September 2010.
7. When L was about three, the father who had been throughout unaware of L’s existence, asked for a DNA test after having seen (or having been told) that judging from his

physical appearance, L might well be his child. The mother agreed and a DNA test duly confirmed that the father is L's biological father. L is, therefore, a child of dual British/Albanian heritage.

8. In August 2012, Social Services became involved with L due to the allegedly abusive relationship between his parents and he was registered as a Child in Need. Particular concerns centred around the emotional harm being caused to L as a consequence of his contact with his father. L was upset before seeing his father and there were behavioural problems on his return, school was independently voicing its concerns about L's welfare.
9. In 2012, the father made an application for a child arrangement order and in November 2012, Cafcass filed a Section 7 report. It became apparent that L believed that Mr B was his father. Whilst Social Services had significant concerns about the father having contact with L, it was agreed that L should learn who was his true father and be gradually introduced to him on a supported basis.
10. In April 2013 a contact order was made in favour of the father, but contact did not run smoothly.
11. At some time during these, the first set of proceedings, the mother and Mr B separated. The mother's statement filed in the adoption proceedings describes her as having seen significantly more of the father during this period of time following the breakdown of her relationship with Mr B. That this was a volatile and abusive relationship is evidenced objectively by the fact that in October 2013, as a consequence of his behaviour towards the mother, the father was made the subject of a community order following criminal proceedings in the magistrates' court.
12. On 3 March 2014 L's surname was changed by deed poll from that of Mr B to that of the father.
13. It is unclear when and in what circumstances the mother once again broke off any personal contact with the father, although it is accepted that contact with L continued in compliance with the court order of April 2013. In October 2014 the father made an application to the court for a declaration of parentage, to have his name added to L's birth certificate and to be granted parental responsibility. The mother for her part asked for L's contact to be supervised. She said that L was on occasions, very distressed prior to contact and was returning from contact displaying aggression towards her.
14. L's contact was moved to a contact centre whilst Social Services undertook work on the father's parenting style which, he accepted, had previously been 'aggressive and harsh'.
15. On 11 March 2015 the father was granted parental responsibility for L and a Child Arrangements Order was made for L to live with his mother and to spend time with his father. The order provided for L to stay overnight with his father each alternate weekend and for the father to see L each alternate Thursday after school.
16. It is common ground that between 2015 and contact ceasing in 2016, the father took L on visits to both Ireland and Albania with the mother's consent.

17. During the course of 2015 the mother and the step-father, who had known each other for some time, began a relationship. They started to live together in 2017 and in due course bought a house. The mother had a baby (her third child) in September 2017. The mother and stepfather are engaged to be married. The pandemic permitting, they intend to marry in the autumn of this year, 2021.

September 2016

18. Contact continued in compliance with the court order. Although there were undoubtedly some happy times, the evidence from the Social Services records demonstrates that for L, it was largely a difficult and often distressing relationship. Matters came to a head in the summer of 2016. On the mother's account the father asked if he could take L to Albania for two weeks to spend time with his family. The mother felt that a week would be long enough for L to be away from home. The father refused to accept this proposed compromise and went alone. The father made no contact with L whilst he was away, missed his birthday and did not resume contact on his return. Some 9 weeks later, the father turned up at L's school unannounced on a Thursday night to collect L for contact pursuant to the court order. The father does not accept that the gap in contact was as long as 9 weeks or that there were any difficulties in contact. Notwithstanding the factual dispute, what is significant is that there had been a gap in contact and that the father arrived at school unexpectedly causing L considerable distress.
19. On his return home that evening, L was angry with his mother and step-father, shouting at them and demanding to know why they had made him go with his father. It was explained to L that there was a court order in place. The next day L told his teacher that he did not want to see his father anymore and that evening L rang his father and told him that he would not go on any more contact visits.
20. L has not seen his father since September 2016, now 4 years 6 months ago. Prior to these proceedings being issued, the father had made no effort to see L or to enforce the contact order through the courts. The father says variously that he suffered from depression, that he could not afford to go to court and that as he had the benefit of a contact order, it was for the mother to comply or alternatively to make an application to vary the order.
21. It is a significant loss to both the father and L that despite considerable efforts having been made by both Social Services and by the mother (after her poor start) to promote a happy and worthwhile relationship between the father and L, contact has come to an end and there is no prospect of it being in L's best interests for it to be resumed in the foreseeable future. The father for whatever reason was unable to provide L, then only a little boy, with safe, happy and predictable contact with the consequence that seeing his father had a serious effect on L's happiness and behaviour as observed both at school and at home.
22. The step-father has become L's psychological father and L has increasingly sought the reassurance of his step-father being his 'real' father. All the evidence including that of the Children's Guardian, confirms that L has been the driving force behind the application to adopt and it was in that context that the step-father applied to adopt L on 18 December 2019. The strength of his desire to be adopted and his understanding of

what this would mean were demonstrated when L saw the judge on 8 December 2020 in the presence of the Children's Guardian via Teams from L's school. L said that *'My birth dad is officially still my dad. If the adoption is granted, then [the stepfather] would officially be my dad'. He would have all the roles of my dad.* The judge pointed out to L that it was a big step for the father no longer to be officially related. L responded by saying that he did not want anything to do with the father who he said was *'unpredictable, and I was upset at school and home when seeing him'*.

The Adoption Proceedings

23. Unfortunately there was considerable delay in progressing the adoption hearing largely as a result of there being uncertainty as to whether the father had been granted parental responsibility for L. The father, unsurprisingly, believes that this was a deliberate ploy on the part of the mother to create distance as between him and L. However that unfortunate situation came about, the result was that the hearing did not take place until 21 December 2020, over a year after the application had been made.
24. The father who represented himself throughout, filed a statement and wrote a letter to the court. The father highlighted the extensive contact he had enjoyed albeit for a limited period of time. The father alleged that the mother had brainwashed L and suggested that as she has had different children from different men, it would only be a matter of time before her relationship with the step-father also came to an end. The father's position as set out in his letter and repeated in his oral evidence at court, is that the step-father *'can be the father, I don't mind, but no adoption'*. Later he went on to say in relation to the mother and stepfather that L has *'a good mum and dad, but to take my rights straight away for no reason that is, that is little bit harsh, that is wrong'*.
25. The judge heard evidence from Ms Rachel Hobbin the social worker who had prepared two Annex A reports and who had therefore in order to fulfil her statutory obligations, spent time with both the parents and the stepfather. The unequivocal view of Ms Hobbins was that adoption was in the best interests of L. Given the mother's somewhat turbulent domestic history it was important that proper consideration was given as to the stability of the relationship as between the mother and stepfather. Ms Hobbin was satisfied from her enquiries that the mother and stepfather are in a long-term stable relationship.
26. Ms Hobbin described how the school had told her that they had been independently concerned about contact and that L's behaviour has changed for the better since he has been in a settled, stable environment with no contact. Ms Hobbin told the court that the contemporaneous evidence from the Social Services' file supported the mother's account of the abusive nature of her relationship with the father.
27. The Children's Guardian, Ms Ruddock, was equally clear that adoption was in the best interests of L. Ms Ruddock confirmed her view that the mother and stepfather are in a stable relationship and have a settled home life. Ms Ruddock described L telling her that he never knew *'what kind of Dad he was going to meet'*. L told Ms Ruddock that he was at times very upset and at times hid because he did not want to go to contact, he said that he was worried that this application would *'bring his dad back into his life'*.

28. The judge therefore determined the application against the background of the emphatic evidence of both the adoption social worker and the Children's Guardian that adoption was in L's interests, coupled with L's undoubtedly strong desire to formalise his relationship with his psychological father.
29. The father for his part was utterly opposed to the making of an adoption order. Whilst his main preoccupation during the hearing was in relation to 'his rights', it should not be forgotten that prior to walking away from contact in late 2016, he had maintained close and regular contact with his son and had fought tenaciously to gain both legal recognition as L's father and to obtain parental responsibility.

The Statutory Context

30. The statutory context to the step-father's application is contained in the Adoption and Children Act 2002 ('ACA 2002').

31. Section 47 specifies the conditions for making an adoption order:

“(1) An adoption order may not be made if the child has a parent or guardian unless one of the following three conditions is met; but this section is subject to section 52 (parental etc. consent).

(2) The first condition is that, in the case of each parent or guardian of the child, the court is satisfied—

(a) that the parent or guardian consents to the making of the adoption order,

(b) that the parent or guardian has consented under section 20 (and has not withdrawn the consent) and does not oppose the making of the adoption order, or

(c) that the parent's or guardian's consent should be dispensed with.”

32. As the father has parental responsibility, his consent is required before an adoption order can be made. Absent consent, the court has a power to dispense with paternal consent pursuant to s.52(1)(f) ACA 2002 if;

- a) the parent or guardian cannot be found or lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent; or
- b) the welfare of the child requires the consent to be dispensed with.

33. In determining whether or not to dispense with parental consent, the child's welfare throughout his or her life is the court's paramount consideration (s.1 ACA 2002) and in coming to its decision the court must have regard to those matters found in s.(1)4 ACA, commonly known as the 'adoption welfare checklist' namely:

“(a) the child's ascertainable wishes and feelings regarding the decision (considered in the light of the child's age and understanding),

- (b) the child's particular needs,
- (c) the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person,
- (d) the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,
- (e) any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,
- (f) the relationship which the child has with relatives, [with any person who is a prospective adopter with whom the child is placed,] and with any other person in relation to whom the court or agency considers the relationship to be relevant, including—
 - (i) the likelihood of any such relationship continuing and the value to the child of its doing so,
 - (ii) the ability and willingness of any of the child's relatives, or of any such person, to provide the child with a secure environment in which the child can develop, and otherwise to meet the child's needs,
 - (iii) the wishes and feelings of any of the child's relatives, or of any such person, regarding the child".

34. Before making an adoption order, s.46(6) says that:

"..the court must consider whether there should be arrangements for allowing any person contact with the child; and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings."

35. For the purposes of the present appeal, there are two routes whereby the partner of a parent can adopt the child of their partner:

- i) Section 50(2)(a) provides for the making of an adoption order to a couple where 'one of the couple is the mother or the father of the person to be adopted and has attained the age of 18 years';
- ii) Section 51(2) provides for the making of an adoption order on the application of one person where the court is satisfied that 'the person is the partner of a parent of the person to be adopted'.

36. A 'couple' can be married or civil partners or, as is the case here, 'two people (whether of different sexes or the same sex) living as partners in an enduring family relationship'

- S144(4) (b) ACA 2002. It follows therefore that there is no necessity for the mother and step-father to be married in order for him to be eligible to adopt L.
37. The most usual form of ‘partner’ application is by the ‘one person’ route pursuant to s51(2) ACA 2002. This is because adopting as a couple has the unwelcome and artificial effect of changing the legal relationship between the mother and child from a natural one to an adoptive one. The step-father made his application under s.51(2) ACA 2002.
38. The legal effect of an adoption order under s.51(2) can be summarised as follows:
- a) The child is treated as if born as a child of the step-parent for all purposes (s 67(1) ACA 2002);
 - b) The child is treated in law as not being the child of any other person other than the step-parent adopter and the natural parent who is that step-parent’s partner (s67(3)(a) ACA 2002);
 - c) The natural father’s parental responsibility for the child will be extinguished (s46(2)(a) ACA 2002);
 - d) The adopter obtains parental responsibility for the child (s46(1) ACA 2002).
39. It should be noted that adoption which has the effect of depriving the father of parental responsibility, does not provide the only means whereby the step-father could be granted parental responsibility for L without the natural parents being deprived of their parental responsibility. Once married, Section 4A Children Act 1989 (‘CA 1989’) allows the court to make a parental responsibility order in favour of a step-parent either with the consent of both parents with parental responsibility (s.4A(1)(a)) or by court order (s.4A(1)(b)).
40. The only other route open to an unmarried partner seeking parental responsibility would be by the making of a child arrangements order naming the step-father as a person with whom L is to live. Such an order would automatically give the stepfather parental responsibility while the order remains in force. S.12(2) CA 1989.
41. In *Re P (A Child)* [2014] EWCA Civ 1174; [2015] 1 FLR 1327 (‘*Re P*’), McFarlane LJ (as he then was) took what he described at para. [1] as a ‘timely opportunity to consider how an adoption application brought by a child’s step parent is to be approached.’
42. Having set out the historical context starting at para. [38], McFarlane LJ went on to consider the European Court of Human Rights (‘ECtHR’) case of *Söderbäck v Sweden* [1999] 1 FLR 250 (‘*Söderbäck*’). *Söderbäck* was a case where the parents had never cohabited and the father’s contact with the child had been very limited. As McFarlane LJ recorded at para. [42], the ECtHR held that Article 8 was engaged, but that an adoption order was not disproportionate in the light of the purpose of the adoption which was to consolidate and formalise the child’s family ties in the light of the father’s limited contact with her. McFarlane LJ went on to quote from that part of the judgment in *Söderbäck* which explained the distinction between cases involving the permanent

placement of a child outside the family with a view to adoption and adoption by a step-parent as follows:

“31. The Court considers that the present case falls to be distinguished from the *Johansen* case in the following respects. While it is true that the adoption in the present case, like the contested measures in the *Johansen* case, had the legal effect of totally depriving the applicant of family life with his daughter, the context differs significantly. It does not concern the severance of links between a mother and a child taken into public care but, rather, of links between a natural father and a child who had been in the care of her mother since she was born. Nor does it concern a parent who had had custody of the child or who in any other capacity had assumed the care of the child.”

43. Having considered the approach of the European Court in *Söderbäck*, McFarlane LJ went on to discuss the proper approach to step-parent adoptions in this jurisdiction. He said:

“46. In an adoption application the key to the approach both to evaluating the needs of a child's welfare throughout his or her life and to dispensing with parental consent is proportionality. The strong statements made by the Justices of the Supreme Court in *Re B* and taken up by judges of the Court of Appeal in subsequent decisions to the effect that adoption will be justified only where 'nothing else will do' are made in the context of an adoption being imposed upon a family against the wishes of the child's parents and where the adoption will totally remove the child from any future contact with, or legal relationship with, any of his natural relatives. Although the statutory provisions applicable to such an adoption (in particular ACA 2002, s 1 regarding welfare and s 52 regarding consent) apply in precisely the same terms to a step-parent adoption, the manner in which those provisions fall to be applied may differ and will depend upon the facts of each case and the judicial assessment of proportionality.”

44. McFarlane LJ went on to draw a ‘qualitative difference’ between adoption by total strangers and an adoption by family members in a child protection case where rehabilitation is not compatible with the child’s welfare saying:

“47... adoption by strangers being at the extreme end of the spectrum of interference and adoption by a family member being at a less extreme point on the scale. The former option is only justified when 'nothing else will do', whereas the latter option, which involves a lower degree of interference, may be more readily justified.”

45. McFarlane LJ continued at para. [48]:

“Where an adoption application is made by a step-parent, the approach of the ECtHR in *Söderbäck v Sweden* should be applied according to the facts of each case. In doing so the following central points from the judgment in *Söderbäck* are likely to be important:

a) There is a distinction to be drawn between adoption in the context of compulsory, permanent placement outside the family against the wishes of parents (for example as in *Johansen v Norway*) and a step-parent adoption where, by definition, the child is remaining in the care of one or other of his parents;

b) Factors which are likely to reduce the degree of interference with the Art 8 rights of the child and the non-consenting parent ['Parent B'], and thereby make it more likely that adoption is a proportionate measure are:

i) Where Parent B has not had the care of the child or otherwise asserted his or her responsibility for the child;

ii) Where Parent B has had only infrequent or no contact with the child;

iii) Where there is a particularly well established family unit in the home of the parent and step-parent in which 'de facto' family ties have existed for a significant period.”

46. In this context, McFarlane LJ at para. [61] emphasised the importance of considering the context of each particular case which will run from ‘a fully opposed, public law 'stranger' adoption at one extreme, to an adoption within the child's existing 'de facto' family unit, which is made with the consent of both parents’ at the other end of the spectrum. He also identified cases in between these two extremes as being cases such as the present case where a step-parent adoption is actively opposed by a noncaring parent who has played no active role in the life of the child for some years, in contrast to an opposing parent who remains fully involved in the life of the child. McFarlane LJ went on at para. [62]:

“The reason why context is important is that, in each case, it is necessary to evaluate the proportionality of the intervention in family life that is being proposed. For the child, and for the child's welfare throughout his life, there will be a qualitative difference between adoption by strangers, with no continuing contact or legal relationship with any member of the birth family, on the one hand, and an adoption order which simply reflects in legal terms the reality in which the child's family life and relationships have been conducted for some significant time. In ECHR terms, no adoption order will be justified in terms of its interference with family life rights unless it is 'necessary' and 'proportionate', but in assessing those factors the degree to which there is an interference will be relevant. In short, in the present

case, the loss to A, and the loss to her father, of his legal status as her father who holds parental responsibility for her, interferes with their respective family life rights to a relatively modest degree.”

47. In a short concurring judgment, Briggs LJ (as he then was) noted that the making of the adoption order was not merely a matter of legal consequences but: ‘lies also in the commitment of the adoptive father to becoming the child's parent for life, rather than just parent for the duration of his relationship with the birth mother’. He went on: ‘nothing short of adoption makes the adoptive father the child's 'Dad' in the fullest sense’. With respect, it seems to me that Briggs LJ precisely sums up the present situation as seen through L’s eyes.
48. In summary, the combination of *Söderbäck* and *Re P* serve to emphasise that there is an important qualitative difference in the degree of interference with the Article 8 rights of a child and any non-consenting parent as between so called stranger adoptions on the one hand and step-parent adoptions on the other.
49. The critical difference as between stranger adoptions and step-parent adoptions was summed up by McFarlane LJ at para. [47] (set out at para. [43] above) when he said that a stranger adoption is only justified when ‘nothing else will do’ whereas step-parent adoption involves a lower degree of interference and may be more readily justified. It follows that the test in a step-parent adoption is lower. It is not an order of last resort and the ‘nothing else will do’ test found in *Re B (a child)* [2013] UKSC 33, [2013] 2 FLR 1075, at [104], [130], [198], [215] (*‘Re B’*) is not the correct test. The fact that the interference of a step-parent adoption is less extreme may render adoption proportionate in a case where the proposed adopter is a step-parent in circumstances where it may not be where the applicant is a stranger.
50. Looking at the factors highlighted by McFarlane LJ from *Söderbäck* and set out at para. [44] above, it could be said that the proportionality exercise would, in this case, be conducted as follows:
 - i) Whilst the father has not had the care of L, it was only as a result of his persistence that his biological relationship with L was recognised. This led to the declaration of parentage, the granting of parental responsibility and the changing of L’s surname to that of his own. Against that is the fact that as a direct result of his behaviour and attitude, social services became involved, L became a Child in Need and ultimately the father was charged and convicted in the Magistrates Court for his aggression and harassment towards L’s mother;
 - ii) Although contact was frequent for a period of time and included staying contact and trips abroad, there has been no contact since September 2016 and the father has made no effort since that time either to enforce the contact order which is in existence, or otherwise to seek to resume direct or indirect contact with L;
 - iii) The stepfather is L’s psychological father. L has an understanding of the meaning of adoption and wishes to be adopted. Both social services and the Children’s Guardian believe it is in L’s best interest for him to be adopted.

51. Whilst for obvious reasons the judge did not conduct her analysis by reference to *Söderbäck*, it is clear that she had each of these matters in mind when deciding if adoption was in L's best interests.

The judgment

52. The judge set out in a little more detail the background sketched out earlier in this judgment. In particular she noted (at para. [20]) that the independent records from police and social services 'add weight to the accuracy' of the mother's account of the father's propensity to use threats, harassment and intimidation to get his own way and that 'his behaviour in L's presence did not keep L in mind and did not keep him physically safe'. In a long interview with the father, conducted for the preparation of the Annex A report, the father did not accept any responsibility for the breakdown of his relationship with L and did not accept that L was ever unhappy with, or frightened of, him.
53. In relation to his meeting with L, the judge regarded L as articulate and said that L had left her in no doubt as what he wanted from the application, namely for the step-father to adopt him 'because he is a dad'. The judge was satisfied that L understood the meaning of adoption.
54. In relation to the father, the judge noted that he was very much focused on his rights to see his child, his allegation that there was unspecified corruption and that he 'needed to see justice'. The judge found the father to be vocal and loud, unable to concentrate on what he was being asked and failed to consider L's welfare or how he proposed to rebuild a meaningful relationship with him should the order not be made. So far as the father was concerned, the judge concluded:

"42. I can see why it would be hard for a child, even an older child like L, to make sense of what the father is saying or indeed feel settled and safe in his presence in the face of such erratic and forceful behaviour."

55. The judge then turned to the law. As indicated earlier, the judge was not referred to either *Re P* or *Söderbäck*. She did, however, approach the matter through the correct statutory prism, namely that L's welfare throughout his entire life was the court's paramount consideration assessed against the criteria set out in the adoption welfare checklist. The judge proceeded carefully to go through those matters in the checklist which she believed to be significant. Having done so, the judge went on to approach her decision-making process as follows:

"52. In terms of considering this order, I have to bear in mind the court's full range of powers, including those under the Children Act. I should not make an order unless I consider it better for L than making no order at all and when considering whether to make an order I have to have regard to the provisions of the European Convention on Human Rights, particularly Article 8, which requires me to maintain family life. I consider this applies not just to the maintenance of the family life L has at the

moment, but also maintaining or supporting family life with his father, who is his biological and cultural inheritance.

53. I also remind myself that adoption is a draconian order which brings about permanent legal separation of parents and children. It should only be sanctioned if the court considers nothing else will do.

54. I do not consider that this is a case where no order should be made. That would leave L in limbo and would be very much against his best interests, emotionally. He wants to feel settled and secure.

55. I consider then the realistic options available to the court are a Children Act order which could be a residence order and parental responsibility to the applicant stepfather. The advantages of that order would be that it would not sever the legal relationship between L and his father. It would in particular, leave the door open to the father making applications for contact or enforcement in the future, if he wishes to do so. The disadvantages are that it would not provide L with permanent stability; nor would it provide him with the legal paternal relationship he seeks from the application to reflect what he sees as the stepfather's enduring role in his life."

56. The judge went on to highlight the advantage to L of confirming 'legal membership' of the family which accords with his wishes and feelings but 'does not prevent L from seeking contact with his father in the future'. The judge concluded:

"57. My decision then, weighing the pros and cons of those options in the circumstances of this case, is that an adoption order is the only order that will give L the best chance of a happy and secure future as part of a loving family."

Discussion

57. It is undoubtably the case that the task facing both the judge and this court would have been more straightforward had the judge been referred to *Re P*. The question now is whether the judge's failure to have in mind the approach to step-parent adoptions, as set out in *Re P* means that the adoption order made by the judge should be set aside and the matter be remitted for fresh consideration by a judge at first instance.
58. In my judgment it does not.
59. No fault can be found with the judge's application of the statutory requirements relevant to the application which included consideration of the adoption welfare checklist. The judge was unaware that the ECtHR and McFarlane LJ had prescribed a lower test in cases where the application for adoption is made by a step-parent rather than by a stranger. As a consequence, the judge applied the more stringent *Re B*, 'nothing else will do' test before concluding that an order for adoption was in L's best interests and

that the making of the order was proportionate in Article 8 terms. In my judgment there is nothing in the judge's judgment which would have rendered it susceptible to a successful appeal by reference to the *Re B* test. It follows that given that the greater must include the lesser, there can be no basis for interfering with the judge's welfare based decision, a decision which was wholly in line with the objective evidence of the social worker and Children's Guardian and accorded with L's strongly expressed wishes.

60. It follows in my judgment that the judge's failure specifically to refer to the approach in *Re P* does not on analysis undermine the order she made.

Section 46.6

61. That leaves only the provisions of s.46(6) ACA to consider. I set out the terms again here for convenience:

“The court must consider whether there should be arrangements for allowing any person contact with the child; and for that purpose the court must consider any existing or proposed arrangements and obtain the views of the parties to the proceedings.”

62. Unfortunately, as with *Re P*, the provisions of s.46(6) ACA were not brought to the judge's attention. It follows that there is not, as there should be, either in the judgment or recorded as a recital to the order, confirmation of compliance with the mandatory requirement that contact arrangements have pursuant to s.46(6) ACA, been considered. Upon reading the judgment it is clear that the judge did consider each of the elements of s.46(6) ACA, albeit that they were not pulled together and dealt with as a specific issue. In my judgment, such an approach is unsatisfactory and the judge's consideration of the matters which are required specifically to be considered under s.46(6) ACA should be readily ascertainable in one place. Even so, I have concluded that there is just enough in the judgment to satisfy me that the court fulfilled its obligation under s.46(6) ACA and accordingly that the adoption order should not be set aside in order for contact to be considered.
63. In reaching that conclusion I am not endorsing the approach seen in this judgment. A parent who is having their consent set aside and an adoption order made despite their opposition, is entitled to have the issue of contact properly considered and specifically dealt with, either in the judgment itself or in a recital, whichever is more appropriate on the facts of the case.
64. I should make it clear that for my part, had I concluded that the judge had failed to comply with the terms of s.46(6) ACA then, given that pursuant to CPR 52.20(1) the Court of Appeal has all the powers of the lower court, I would have allowed the appeal, set aside the adoption order, and proceeded together with My Lords to consider s.46(6) ACA. There is, in my judgment, ample material before the court to conclude that there should be no arrangements for contact and the views of the parties are well known. Having carried out that exercise and reached that conclusion, I would then have proceeded to remake the adoption order. It follows therefore, that the outcome so far as L, the parents and the step-father are concerned, would have been the same.

Conclusion

65. It is for these reasons that the parties were informed that the appeal would be dismissed.

Lord Justice Males:

66. I agree.

67. It is unfortunate that the requirements of s.46(6) ACA, which are mandatory, were not brought to the judge's attention. As a result it is not apparent from her judgment whether she had them in mind, although if she did, I would have expected her to say so. However, her judgment makes all the necessary findings which are relevant to the issue of contact between the father and L.

68. I agree with Lady Justice King that it is good practice for contact to be dealt with as a specific issue, either in the judgment or in a recital to the order. Failure to do so may in some cases mean that an adoption order will have to be set aside, with unhappy consequences for all concerned.

69. In the present case, however, there can be no doubt, on the findings made by the judge, that no order should be made for contact between the father and L. Indeed it is largely because of the disturbing consequences of such contact in the past and L's firm resolve to have no further contact with the father in future that an adoption order in favour of the stepfather is appropriate. If necessary, therefore, I would join in the course proposed by Lady Justice King at [63] above. That is not to say, however, that such a course will be appropriate, or even possible, in other cases."

Lord Justice Baker

70. I agree that the appeal should be dismissed for the reasons given by King LJ.