



Neutral Citation Number: [2024] EWCC 27

Case No: RG92/22

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

160-163 Friar St, Reading

Date: 08/08/2024

Before :

Mr Justice Williams

Between :

**IN & JN
- and -
RL & DL**

Applicants

**1st & 2nd
Respondents**

**-and-
The Local Authority**

3rd Respondent

**-and-
W (A child)**

4th Respondent

Re W (Gifted Child: SGO / Adoption)

Martha Gray (instructed by Rai Solicitors) for the Applicants
Kitty Geddes (instructed by Rotheray Bray Solicitors) for the 1st and 2nd Respondents
Alexandra Conroy Harris (instructed by the Joint Legal Team) for the Local Authority
Alice Darian (instructed by RWK Goodman solicitors) for the 4th Respondent

Hearing dates: 1, 2, 3, 4 and 5 July 2024

Approved Judgment

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

.....

Mr Justice Williams

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

Mr Justice Williams:

1. It is rare after a legal career spanning some 38 years to come across a novel family problem. In this case a baby (W) was ‘gifted’ as an act of love and compassion by one sister (Mrs L) and her husband (Mr L), who already had two boys, to another ‘sister’ and her husband (Mr and Mrs N) who were desperate but unable to have their own family. And so baby W has been raised by Mr and Mrs N since he left hospital. He views them as his mum and dad. Mr L and Mrs L and their 3 children (another son was born after W) were to W his uncle, aunty and cousins although in truth they are his biological parents and his brothers. An SGO was made in 2019 but in November 2022 Mr and Mrs N made an application to adopt W. Mr L and Mrs L do not consent to his adoption. In the course of the adoption proceedings W has been told the truth. I am to determine whether to make an adoption order or to maintain the Special Guardianship order. It is agreed whatever substantive order I make that a spending time with order should also be made which specifies the time that W should spend with his birth family. It is clear from both sets of parents that they were motivated by noble but short term and adult-centric emotions when they made the decision that W should be ‘gifted’. From what I have seen and read, none of them appreciated the magnitude of the possible consequences for themselves and W and his brothers of that gifting but they have lived the consequences and will continue to do so for the rest of their lives. They were adults when they took the decision and so they must bear their own responsibility. W was a baby who had no say in a decision that has set his life on a near unique and uncharted trajectory where the consequences for him are very hard to predict. His brothers had no say. W most of all will live with the consequences of that compassionate but adult-centric decision. It will surprise no one reading this that within a very short space of time the decision began to create distortions in the fabric of the families lives which

continue to this day and will likely continue. Mrs L experienced what seems like quite serious post-natal depression and in the fullness of time she and Mr L concluded that to fill the W shaped gap in their lives another child was needed. That seems to have worked to some degree. Mr L is demonstrably torn by regret and honour; he has thought deeply about what he might be confronted with from W and his own sons as they grow into adolescence and adulthood. He has become emotionally distanced from Mr N who was his best friend for some years. Mrs N and Mrs L are still close and the impact on their relationship has not been much illuminated in this hearing; I sense it must be profound, but their love and respect provides a protective veneer which masks what has happened to their relationship at a more profound level. At an instinctive level Mr and Mrs N sense the absence of the blood tie to W and his blood tie to Mr L, Mrs L and his brothers and this underpins their insecurity and anxiety and their yearning to be a family like any other with all the joys and responsibilities associated with that bond.

2. In amongst that maelstrom of adult emotion is a little boy whose world axis was altered by the revelation that it was not as he had thought. He was said to be distressed and confused trying to adjust to this strange new world. The evidence suggests that at his current age and stage of development the revelation has not disrupted his attachment to his mum and dad or led to any significant behavioural or developmental changes. That is perhaps not so surprising given what is important to him psychologically at this stage of development, which are more the physical and material realities of his daily life. He continues to live with his mum and dad; goes to school, lives in the same wider family environment and sees his uncle, aunt and cousins monthly. It seems from what he says that he would like to become his mum and dad's blood child – to be completely theirs and they to be completely his. I think he understands adoption in this sense and in the short term that might have some meaning to him.

Approved Judgment

3. It hardly needs to be said that nothing I do will really affect any of those feelings although I hope that the outcome will be a positive one and will add to the foundations already laid so as to continue the development of a structure which will promote W's welfare throughout his life.

The Parties Positions

4. The parties' positions at the commencement of the hearing were as follows
 - i) The Applicants sought ;
 - a) An adoption order.
 - b) A child arrangements order for monthly contact of up to 5 hours until W is 18.
 - c) Life Story work from a professional trained in Therapeutic Life Story work.
 - ii) The Respondents sought:
 - a) The adoption order application to be dismissed.
 - b) The SGO to remain in place,
 - c) and a contact order to be made providing for contact taking place once a month for 5 hours. Whilst they understand the basis of Dr Duffy's recommendation that contact should take place with Mr and Mrs N present to show that the adults have a positive relationship, the parents do hope that Mr and Mrs N would trust them to take W out without their supervision.

Approved Judgment

- iii) The Local Authority position was;
 - a) Support for the adoption application
 - b) A spending time with order
 - c) They will provide post order support in relation to Life Story work.
 - d) The Applicants may request further special guardianship or post adoption support.
- iv) The Guardians position was;
 - a) She supports and endorses the approach of Dr Duffy and so opposes the making of an adoption order.
 - b) She supports the continuation of the SGO which has promoted W's welfare to date.
 - c) The Guardian supports the making of a Child Arrangement Order in respect of W spending time with Mr L and Mrs L and concurs with Dr Duffy's recommendations in this regard.

5. I have sought in the body of this judgment to incorporate the main points advanced by each of the parties in their Position Statements, Skeleton Arguments, Evidence and Closing Submissions but inevitably this will be an incomplete recitation of all that I have heard and considered.

The Legal Framework

6. A Special Guardianship order was made in 2019. It will endure until W reaches 18 unless I make an adoption order or unless an application is made to discharge it. Mr and

Mrs N can apply without leave, Mr L and Mrs L would require the leave of the court;
s.14D Children Act 1989.

7. The PLWG Guidance on SGOs says

The purpose of the order is to create a permanent family life for the child or young person with all the advantages and challenges that accompany this. It lasts until the young person reaches 18, but can be varied or discharged.

8. There are clear differences in the effect of SGO's compared to adoption. The Table attached to the letter of instruction to Dr Duffy identifies the legal differences. An SGO maintains the legal link between the child and the birth parents – he remains their child legally and they remain his parents legally, likewise sibling status is preserved. Inheritance rights are thus unaffected and for W to inherit from the Applicants wills would be required. He would not inherit their estate automatically on intestacy. The SGO enables the SG to exercise parental responsibility to the exclusion of all others with PR. There are limited exceptions to the rights of the SG to exercise PR and these relate to removal from the jurisdiction for more than 3 months and change of name. For W the latter is not relevant as the birth parents identified his surname as on the birth certificate.
9. In relation to the adoption application, I must treat as my paramount consideration in accordance with s.1(2) of the 2002 Act, W's welfare throughout his life.
10. Section 1(4) of the Adoption and Children Act 2002 provides:

*“The court or adoption agency must have regard to the following matters
(among others)-*

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

Approved Judgment

- (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, 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.*

11. Section 1(6) also requires the court to consider the whole range of powers available to it and the no order principle applies.
12. This case graphically illustrates the reasons why the state has enacted detailed statutory provisions in relation to adoption which are reflected in primary and secondary legislation and in much guidance. Significant state attention has also been given to

alternatives to Adoption including Special Guardianship and surrogacy. Ensuring the welfare of the child concerned lies at the heart of all of this. Individuals making their own arrangements as these families did by-passes all of those safeguards. As it happens they have until now managed the situation relatively well through the strength of the personal relationships and their commitment to the agreement they reached but also because W has been sufficiently young not to have started to ask his own questions. It is ironic that the application issued by the Applicants intended to consolidate the strength of their family unit by legalising their de facto mum and dad status has had the effect of introducing a degree of instability to them and an element of unhappiness to W.

13. In the context of a private adoption application such as this, s.47(1)-(2) of the Adoption and Children Act provides that:

"An adoption order may not be made if the child has a parent or guardian unless 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 (c) That the parent's or guardian's consent should be dispensed with"

14. Section 52(1)(b) ACA provides:

"The court cannot dispense with the consent of any parent or guardian of a child to the child being placed for adoption or to the making of an adoption order in respect of the child unless the court is satisfied that-

(b) the welfare of the child requires the consent to be dispensed with."

15. In *Re P (Placement Orders: Parental Consent)* [2008] 2 FLR 625, the Court of Appeal held that the word "requires" has a connotation of the imperative i.e. what is demanded rather than what is merely optional or reasonable or desirable. What has to be shown

is that the child's welfare throughout her life requires adoption as opposed to something short of adoption. The child's circumstances may require statutory intervention, perhaps may even require the indefinite or long-term removal of the child from the family and his or her placement with strangers, but that is not to say that the same circumstances will necessarily require that the child be adopted. The question at the end of the day is whether what is required is adoption. In determining whether to dispense with the parents' consent the parents' reasons for withholding consent will also need to be taken into account. Where the reasons are adult centred, a reflection perhaps of a rejection of the courts conclusion that parents present a serious risk of harm and that rehabilitation of the children is not possible, the weight the reasons are given in the overall evaluation will be different to that where, as here, consent is withheld for a child-centric reason. A well-founded objection is not a trump card but a welfare based reason will obviously be of some weight in the exercise.

16. The proportionality of the decision is central to dispensing with consent. At paragraphs 54 – 60 of *Re P (A Child)* [2014] EWCA Civ 1147, Lord Justice McFarlane says this:

[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
....

"54. In paragraph 31 the judge described the 'connotation of the imperative' arising from the word 'requires' in ACA 2002, s 52 which establishes the test for dispensing with parental consent. He went on to hold that an applicant must establish that the child's 'welfare would be prejudiced significantly if the order were not made'. Although the judge does not make express reference to the decision of this court in Re P (Placement Orders: Parental Consent), he plainly had regard to it as the phrase "the connotation of the imperative" is taken from the leading judgment of Wall LJ in that case. The central paragraphs of that judgment (being paragraphs 124 to 128) are well known and I have set them out below. Re P was a public law case in which adoption

away from the family was proposed against the wishes of the parents. Reference by Wall LJ to the Strasbourg case law in that context is therefore to *Johansen v Norway* with no mention made of *Söderback v Sweden*. Caution is therefore required in reading that judgment in the context of a step-parent adoption, albeit that the statutory test in s 52 is precisely the same for both categories of adoption. The reason for caution is that, whilst the statutory wording is the same, the degree of interference with family life and evaluation of proportionality under Art 8 are likely to be different.

55. The core guidance given by Wall LJ in *Re P* actually precedes the oft quoted passage which starts at paragraph 124. At paragraph 116, with respect to the interpretation of s 52(1)(b) regarding dispensing with parental consent on the grounds that the child's welfare 'requires' it, Wall LJ said:

"116. The guidance is, we think, simple enough. The judge must, of course, be aware of the importance to the child of the decision being taken. There is, perhaps, no more important or far-reaching decision for a child than to be adopted by strangers. However, the word 'requires' in s 52(1)(b) is a perfectly ordinary English word. Judges approaching the question of dispensation under the section must, it seems to us, ask themselves the question to which s 52(1)(b) of the 2002 [Act] gives rise, and answer it by reference to s 1 of the same Act, and in particular by a careful consideration of all the matters identified in s 1(4).

117. In summary, therefore, the best guidance, which in our judgment this court can give is to advise judges to apply the statutory language with care to the facts of the particular case. The message is, no doubt, prosaic, but the best guidance, we think, is as simple and as straightforward as that."

[56] The more frequently quoted passage that follows was not intended to detract from the simple and straightforward, case-specific, approach described in paragraphs 116 and 117. Wall LJ expressly states that this is so at paragraph 118:

"Without wishing to qualify in any way the clarity and simplicity of what we have just said, but in deference to Mr Geekie's [counsel] careful argument, we think we should add a few words about the Strasbourg jurisprudence to which he referred us."

57. What follows in paragraphs 119 to 128 is entirely focused upon dispensation of parental consent, where that is being actively withheld, in a public law child protection case. At paragraph 124 Wall LJ sets the context in these terms

"In assessing what is proportionate, the court has, of course, always to bear in mind that adoption without parental consent is an extreme - indeed the most extreme - interference with family life. Cogent justification must therefore exist if parental consent is to be dispensed with in accordance with s 52(1)(b). Hence the observations of the Strasbourg court in *Johansen v Norway* ... "

[58]. Having quoted from *Johansen*, Wall LJ immediately goes on at paragraph 125 to apply the Strasbourg approach to proportionality in such cases to the interpretation of 'requires' in s 52(1)(b), and it is in this passage that the phrase "connotation of the imperative" appears: "This is the context in which the critical word 'requires' is used in s 52(1)(b). It is a word which was plainly chosen as best conveying, as in our judgment

it does, the essence of the Strasbourg jurisprudence. And viewed from that perspective 'requires' does indeed have the connotation of the imperative, what is demanded rather than what is merely optional or reasonable or desirable."

59. This key passage in *Re P* then concludes in the remaining three paragraphs [126 to 128] as follows:

126. What is also important to appreciate is the statutory context in which the word "requires" is here being used, for, like all words, it will take its colour from the particular context. Section 52(1) is concerned with adoption - the making of either a placement order or an adoption order - and what therefore has to be shown is that the child's welfare "requires" adoption as opposed to something short of adoption. A child's circumstances may "require" statutory intervention, perhaps may even "require" the indefinite or long-term removal of the child from the family and his or her placement with strangers, but that is not to say that the same circumstances will necessarily "require" that the child be adopted. They may or they may not. The question, at the end of the day, is whether what is "required" is adoption.

127. In our judgment, however, this does not mean that there is some enhanced welfare test to be applied in cases of adoption, in contrast to what Mr Geekie called a simple welfare test. The difference, and it is an important, indeed vital, difference, is simply that between section 1 of the 1989 Act and section 1 of the 2002 Act.

128. In the first place, section 1(2) of the 2002 Act, in contrast to section 1(1) of the 1989 Act, requires a judge considering dispensing with parental consent in accordance with section 52(1)(b) to focus on the child's welfare "throughout his life." This emphasises that adoption, unlike other forms of order made under the 1989 Act, is something with lifelong implications. In other words, a judge exercising his powers under section 52(1)(b) has to be satisfied that the child's welfare now, throughout the rest of his childhood, into adulthood and indeed throughout his life, requires that he or she be adopted. Secondly, and reinforcing this point, it is important to bear in mind the more extensive 'welfare checklist' to be found in section 1(4) of the 2002 Act as compared with the 'welfare checklist' in section 1(3) of the 1989 Act; in particular, the provisions of section 1(4)(c) - which specifically directs attention to the consequences for the child "throughout his life" - and section 1(4)(f). This all feeds into the ultimate question under section 52(1)(b): does the child's welfare throughout his life require adoption as opposed to something short of adoption?

[60] *It is plain that there is no justification to be found in Re P, or elsewhere, for the stipulation imported by the judge in the present case to the effect that 'requires', in every case, necessitates a finding that the child's 'welfare would be prejudiced significantly if the [adoption] order were not made.*

[61] *... Where the application is for a contested, public law adoption with a placement, against the active opposition of parents, with strangers, the guidance offered from paragraph 118 (in response to Mr Geekie's submissions) is likely to be highly relevant. But the core of the guidance is that which appears at paragraph 117 - 'apply the statutory language with care to the facts of the particular case'. In that regard, the context of the particular case will be of particular significance: where on the spectrum of intervention*

by adoption does this case sit? In broad terms the spectrum 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. In between there will be step-parent adoptions which are actively opposed by 'Parent B', who is himself fully involved in the life of his child, or step-parent adoptions, like the present, where Parent B, whilst not consenting, has played no active parental role for some years.

[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."

17. Before making an adoption order, s.46(6) ACA 2002 provides 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."

18. The judicial task is always to evaluate all the options and undertake a holistic evaluation of the child's need in the context of the specific facts of the case before it.
19. I take account of the Article 6 and Article 8 rights of the children and the parents. I remind myself that, where there is a tension between the Art.8 rights of the parents on the one hand and the Art.8 rights of the child on the other, the rights of the child prevail: see *Yusuf v. The Netherlands*.
20. There is little if any research or case-law which assists with cases such as this where a child has been gifted. There are some examples of adoption applications in respect of older children ([*The Prospective Adopters \(AA AND BB\) v CC* \[2017\] EWHC 3506 \(Fam\)](#) and [*Re N \(Adoption - Surrogacy\)* \[2024\] EWFC 41](#)) which illustrate older children wishing to have their need to have their social and psychological parentage

legally recognised into adulthood. W may have the same need although he is not yet able to articulate it and is unable to articulate any thoughts on competing considerations such as remaining legally bound to his brothers – a fact that would exist (in the usual course of life) long after his parents and his birth parents have passed on.

21. In *Re N* [2024] EWFC 41 in which Mrs Justice Theis considered whether to make an adoption order in respect of an 18-year-old, born as a result of a surrogacy arrangement, whose birth parents opposed the making of the order. Theis J notes that:

‘There is a positive obligation on the State to ensure de facto relationships are protected and recognised by law and for such protection to be real and effective and not theoretical and illusory (see Marckx v Belgium 2 EHRR 330 [31]). In determining whether any interference with the Article 8 rights is proportionate it is necessary to consider the context. For example, in a situation that involves a choice as to whether a child is adopted by strangers the interference with the Article 8 rights are likely to be more significant than in a situation such as this, where all parties are known to each other and the order sought simply reflects in legal terms the reality in which the child's family life and relationships have been conducted for some significant time’ (§46-47).

22. Shortly before *Re N* in *Re Z (Surrogacy: Step-parent Adoption)* [2024] EWFC 20 Theis J considered what orders to make where a surrogacy arrangement had gone wrong and a parental order had been set aside and where the surrogate fathers sought a step-parent adoption order which was opposed by the child’s birth mother. In that case Theis J was asked to consider many of the arguments which have arisen in this case including the contention that adoption would make the child feel more settled, that it would reflect his lived experience past and future and that some form of contact order would promote his identity needs in respect of his mother. On the facts of that case she concluded that adoption should not be granted because the child’s welfare did not require his mother’s consent to be dispensed with.

The Evidence

23. The Bundle on Caselines runs to about 450 pages. I do not intend to set out here a lengthy recitation of that evidence. Much of the evidence is not in dispute. There are relatively few issues of fact which need to be determined. This case revolves largely around the evaluation of agreed evidence. To the extent that evidence is in dispute it is largely expert or professional evidence which is disputed. For instance, the Applicants and The Local Authority submit that Dr Duffy and the Guardian have approached the case with the wrong threshold in mind and that they have failed to give due weight to certain factors. The birth parents and the Guardian submit for instance that the social worker has placed too much weight on the usual benefits of adoption and has failed to give due weight to the interference with the legal relationship between W and his brothers and that they have placed too much emphasis on the legal issues including special guardianship ending at 18 rather than the substantive relationships.
24. In this judgment I shall therefore seek to explore those areas which seem both most significant and most in contention rather than the full range of matters. The Annex A report of the social worker runs to some 76 pages and contains a huge mine of information about both families most of which is not in dispute.
25. Mr and Mrs N both filed statements and gave evidence with the assistance of a Punjabi interpreter. This appeared to enable them to give their evidence satisfactorily although it may be that some subtlety was lost although I also conclude that Mr N thinks and expresses himself in more black and white or concrete terms than engaging with the complexities and subtleties of the emotional consequences. Their commitment to W is unquestionable and will be lifelong; their love and pride is that of his parents. His evidence about 'psychological parents' was to acknowledge the concept without being able to articulate much which illustrated an understanding of it as a distinct form of

parenthood. He did not think W would feel any sense of rejection from his birth family – the reason it seemed for his belief was that he had been their son from Day 1 which fails to grasp the importance of biological roots or the likely feelings he will develop as he enters adolescence, Mr N took the lead in the evidence. He said they would accept support rather than seeing that almost certainly they need support in understanding the consequences for a child of not being brought up in their birth family and in this case of the consequences for them all of the gifting. The impression he gave – as did Mrs N – was that this was very simple; W had lived with them since a baby, viewed them as his mum and dad and that adoption would make it permanent and that maintaining some contact and some knowledge of how he came to be with them was the start and the finish. I obviously summarise but within this there was really very little reflection of how complicated things might become for W and them as he grows up. He sought to answer the questions as best he could although was somewhat defensive but more significantly his evidence was very much focussed on actions or practicalities rather than on any emotional content. The impression he gave was that he either could not or chose not to engage with the complexities of the emotional consequences of the gifting rather than on day to day life. He could for instance see there was a benefit to W in seeing his birth family but was unable to explain why and what the consequences might be for W or he and Mrs N if there wasn't such contact. The lack of emotional connection or insight into the complexities that this gives rise to contrasted strongly with the depth of consideration Mr L has clearly given and was able to articulate. Giving all allowance one can for the stress of giving evidence and the impact of interpretation it seems probable that for Mr and Mrs N they have been able to avoid facing the difficult questions which W will have (and which they themselves might have of themselves) because their lives are filled with living life as a family rather than living each day in

the knowledge that a child is missing. To say that they don't think he feels rejection by the birth family in relation to what he said to the Guardian and to say that they will explain and everything will be clear in front of him seems to me to significantly underestimate what he may be feeling now but much more importantly to fail to see the potentially far more complicated questions likely coming down the line. To answer a question about how he might feel about being adopted by saying he might question why we didn't adopt him is to avoid the subject. Much of what they say about the background and the trail which has led to this hearing is not controversial. Whilst it is clear that W was gifted to them to bring up as their own child it is less clear that it had always been the intention that he would be adopted. The issue of adoption is referred to in the special guardianship report of 2019 albeit in terms which do not suggest that it had always been the Applicants' intention to adopt W. The substance of the discussions at that time suggest adoption was a recent suggestion and the fact that an SGO was only applied for in late 2018 points to the likelihood that the question of W's legal status in the care of the Applicants had not really featured in the discussions about the gifting. That would be consistent with the lack of thought given to the medium to long-term implications for the families or for W of the gifting. In 2019 the Applicants said they would like to adopt him, but the birth family made clear that they would not consent and considered the issue should only be considered when W was of an age to give a view. The making of the adoption application itself in November 2022 seems in part to have arisen because of the tension that had developed over contact. In their initial statement they refer to wishing to apply for a passport so they can visit extended family in India and preferring the permanency and security of an adoption order as W's official legal parents. It was not motivated by a need to reassure W or to settle matters from his perspective because at this stage he believed Mr and Mrs N were his parents and the

totality of the evidence suggests that a significant part of the motivation arose from their adult insecurity. Mr N was able to agree that contact should be a priority and that W and the family might need to make sacrifices to their routines but this was rather superficial and had not been matched over Covid or more recently where W's commitments in the South East have dictated the nature of contact in the Midlands which suggests that the Applicants do not really understand the medium to long term importance of developing and maintaining those relationships for W in terms of the value of the relationships but also so that when the almost inevitable questions come they are able to answer them in the knowledge that they have promoted the relationship to the fullest extent commensurate with getting on with the other part of their lives. I did not detect in their statements or their evidence an acceptance or recognition that the unique nature of how they became parents determines that they will never have a family life of the sort they may have contemplated or wish for and that whilst they can live that 'ordinary' life in the day to day activities and interactions they will always be living an 'extraordinary' life and that this will inevitably shape them. The observation that they had dealt with Mr L and Mrs L's one concern about adoption illustrates their distance from impact of the gifting. Their observation that adoption would give *'us the permanency, stability and security that other parents take for granted and they would not have to worry about our status and relationship'* also illustrates a sense that adoption is a panacea which it almost certainly is not. Mr N works 6 days a week and so is less involved in the day-to-day interactions with W, others and the birth family. It is Mrs N who has had to deal most directly so far with the consequences of the disclosure to W of his history. Mrs N I think found the process of giving evidence harder than Mr N and there were sections of her evidence where there was significant confusion or a lack of clarity about events. One illustration was over who had first told

W about her not being his tummy mummy and [Aunty L] being it. At one stage she seemed to say he had been told by the Life Story worker and had been happy but on further enquiry it seemed she had told him, and he had been distressed. There was similar difficulty in establishing whether she had told the school of the revelation to W so that they could look out for any signs of its impact. She seemed eventually to say she had told W's teacher it was best not to tell the other children but had told her. There could be a miscommunication in this regard but it seems less likely. She seemed to deny that there had been any event such as that described by Mr L of W getting his Life Story book and wanting to talk about it and Mrs N shutting it down and it seemed she denied calling Mrs L and asking her not to talk about W's origins with him. In so far as they are in dispute I preferred the evidence of Mr L as it was clear and persuasive but also because it fits in with Mrs N not telling the school and the general impression I took from their evidence that they are searching for normality for their family unit which involves them 'being' W's mum and dad and that when reality intrudes on this that they tend to push it away or suppress it.

26. Overall Mr and Mrs N are plainly and deeply committed to their son. They are bringing him up in a family environment which priorities him and meets his needs. They are clearly very good parents. The evidence illustrates a flaw in their ability or willingness (or a mix of the two) to embrace and incorporate the consequences of the unique way in which W became their son. Their tendency is to put their heads in the sand save where it is unavoidable and that I think derives from a wish that W was their biological son not a son gifted to them. To all intents and purposes, he is their son and will remain their son but the less they are able to acknowledge his real origins the more likely they are storing up trouble for the future. W's origins clearly do not need to be part of the daily routine but when he does have questions they need to be answered sensitively,

and frankly and from a position of self-confidence. If W detects anxiety and upset associated with such questions he will likely not ask them and internalise any feelings of worry or curiosity and down that road lies the risk to his attachment, feelings of rejection, uncertainty with the consequent risks to his emotional or psychological well-being. In the context of this case that is an important flaw and one which at present seems more likely to be preserved by an adoption order rather than addressed. I acknowledge that the security of adoption could make them less anxious but at present I am concerned they see it as a panacea which might lead to the maintenance of their current attitude so that questions are answered simply by 'well you are our son we adopted you'. The reality is that adoption does not deal with all the more complex questions which likely lurk in the background.

27. Mr L gave evidence on his own behalf and that of Mrs L. He gave evidence without an interpreter and was articulate, measured and insightful. His recall for detail and his apparent connection with events suggested he was a reliable historian on factual disputes. His account of the occasion when W raised the subject and went off to get his Life Story book and was given an angry look by Mrs N and told not to discuss the Life Story book seemed a real memory as did the subsequent telephone call. The core of their evidence is that they gifted W out of love and that they always intended him to be raised by the Applicants as their son but with their involvement in his life. It was to be permanent and irrevocable. They maintain that the issue of adoption should not be dealt with until he is of an age where he is big enough to make his wishes known. They said *'To be clear, if it was ever his express, informed wish for the Applicants to adopt him, then we would fully support this'*. It is clear that for Mr L that whilst he adheres to the decision made in 2017 and that they say they do not regret that decision that is only part of the story. It was evident that Mr L carries with him a sadness for what they have

given up which is mitigated to a degree by the satisfaction they get from having helped to make their sister and best friend a complete family but which endures, nonetheless. He was clear and I do not doubt for a moment that the decision which they took is one they will never seek to resile from however hard they have found it. Nor will they seek to exercise parental responsibility or to interfere in any way in how W is raised by the Applicants; save that if they felt a decision was seriously harmful to him they might seek to intervene but even on permanent relocation they would support this if it were part of the Applicants plan for life. Mrs L suffered quite serious depression after the gifting although the arrival of their 4th son and the happiness of their family of 5 has enabled them to chart a way forward. It is clear that none of the 4 adults had really any notion of what the impact of the decision would be. Although Mr L described children gifted within their community, the reality of those examples was that the child's parent had been incapable of caring for them and so they were far removed from the gifting of W. That sense of sadness and indeed of guilt underpins their position that they will now take no further step which might add to the sense of rejection that they think W might have arising from the gifting and the fact that his birth mum and dad chose not to raise him themselves along with their other children. It is clear that the enormity of this decision was not evident to them at the time and their awareness of the consequences for W has developed over time. The evidence of Mr L suggests no real thought was given to the legal aspects of the gifting but by 2018/19 it was clear that he and Mrs L had concluded that W should have some say in the decisions about his adoption. It is clear that the perspective that Mr L and Mrs L have informs their thinking and perspective on events as that of the Applicants does. Their daily experience of W not being a part of their family has clearly led to them thinking very deeply about the issues which will arise for W and that would seem to have equipped Mr L well to be

able to answer even very challenging or hostile questions that W might ask in a way that the Applicants are very far from in terms of their ability to answer them in a helpful way or their willingness to engage with them rather than cut off discussion. I did not sense that Mr L and Mrs L actively want to discuss the issue with W outside the context of Life Story work but rather that they were prepared for questions (including difficult ones) when W wanted to ask them. Their experience in explaining the situation to their own children must also have contributed to their ability to articulate now how they would deal with it. He thought when W was about his eldest's current age he would be able to cope with the discussion over the reality of his situation and to address some of the consequences. However, that regret also leads them to interpret any issues over contact from the perspective that the Applicants now see them as a hindrance to getting on with their daily lives and that contact is a tick box exercise. Whilst they are right to some degree in that perception there have also been some real practical issues. They also tend to overlook the fact that it was their decision to move to the Midlands (for good reasons for their family) but in consequence contact involves a 5 hour round trip rather than a 1 hour trip. For Mr N, if he has worked 6 days, a 5 hour round trip to the Midlands on his day off is probably not attractive and if his back is causing problems (as Mr L acknowledged it sometimes did) there are bound to be some occasions when contact simply will not be practicable or when the Applicants prefer to prioritise another event. His account of a call with Mr N when they discussed the fact contact was not happening in accordance with the expectations of the SGO and whether it would need to go to court also rang true but as it happens was not actioned by Mr L although it seems to have played a role in the Applicants issuing their adoption application. That sense of regret is also a contributor to an adult need for contact with W, a need to maintain knowledge of him and closeness to him both physically and emotionally

which will not necessarily always be needed from W's perspective. Knowing he is loved by Mr L and Mrs L, feeling close to them and thus not abandoned will no doubt promote his sense of well-being and support his ability to process the fact of his being gifted by them to the Applicants. Striking the right balance will be difficult and my sense of the position of Mr L and Mrs L is that they might over-estimate W's needs, eliding it with their own, whilst the Applicants would tend to under-estimate his needs, they perceiving themselves as fulfilling them all and W only needing the love of an aunt and uncle and the engagement with cousins rather than something closer to minimise his sense of exclusion or abandonment.

28. Mr L and Mrs L's management of the situation so far has been impeccable and has undoubtedly played its part in how happy and secure W is with the Applicants. The fact they have come to terms with the loss and addressed their guilt and regret has put them in a good place to help W deal with the questions which arise. Going through the process of answering questions with their own elder sons must have added to this capacity although the nature of the questions they have faced from their children will be materially different in quality and depth to questions W might have but in so far as they could be prepared without professional support they are there. They would continue to treat W as the son of Mr and Mrs N and would not seek to undermine that. They would deal with questions in an open and supportive way. Insofar as one can gauge the position their sons have also been brought on board although there may be changes in their attitude as they move from 13 into mid-teens and their early adulthood. They have much to offer and their ability to support W should be utilised.
29. Dr Duffy, is a clinical psychologist who was instructed as a Part 25 Expert as I considered it necessary to have expert evidence on W's psychological presentation, his

attachment and the likely impact on him psychologically of making an adoption order or maintaining a special guardianship order and issues relating to contact. The Letter of Instruction contained 15 questions. She gained her doctorate in 2007 and has worked in the NHS specialising in Child and Adolescent Mental Health and developmental trauma in Looked After and Adopted Children. She currently works in the private sector. She filed a report on 30th May 2024 which runs to some 55 pages [E127] and subsequently answered supplementary questions [183]. She gave oral evidence over the course of about 3.5 hours on the first day of the hearing. Her report and her evidence demonstrate that she undertook her task with conspicuous attention to detail and thoroughness including the extent to which she met with or spoke to those with knowledge of the family. One of her meetings with the Applicants was hampered by the interpreter being of the wrong Punjabi dialect but apart from that hitch her enquiries were as complete as one could hope. She acknowledged that the situation of a child being gifted from one family member to another was not something she had dealt with in her clinical work and that she could not draw on any research which dealt with the situation and so she gave her opinion based on her understanding of child development and psychology and on her accumulated experience. Ms Gray criticised her for approaching the evaluation from the standpoint of the legal test being adoption could only be approved ‘if nothing else will do’ and submitted that her conclusion on the risk of psychological harm to W arising from adoption failed to properly evaluate the strengths of his attachments and the mitigations which would be in place to minimise any adverse impact. One has to take the report and her oral evidence in its entirety rather than isolating individual paragraphs which might on a detailed textual analysis open a window for criticism. Overall I thought that in her written evidence and in her answers, Dr Duffy was thorough, considered, balanced and that in matters which related

to child psychology demonstrated her expertise in that field. Inevitably in a report of this sort and particularly having regard to the 15 questions asked her evidence included more than pure child psychology but to the extent that she went beyond pure psychology this was part of her remit and she did not trespass into areas in which she might not have had relevant expertise. Her evidence included the following:

- i) The results of the psychological assessment of W undertaken considering his educational, emotional, social and behavioural development show that W has no difficulties in all areas of his development. Therefore no individual therapeutic support was recommended for W during this time. In all areas of his life the evidence about W evidenced him thriving in the care of the Applicants. There were some concerns in 2019 about their tendency to indulge him and that he would benefit from more boundaries, and this was replicated by what Dr Duffy and the Guardian saw. She considered they would benefit from some positive parenting to help them understand children's behavioural development.
- ii) W spoke about not liking it when his older brothers argue and how it annoyed him which suggests either they are just more annoying than other cousins or a closer connection with them which is disturbed by them arguing. On observation they played well and he was clearly treated by them as somewhat special.
- iii) W is confused as to why he has two sets of parents. He wishes he was from Mrs N's tummy and Dr Duffy considers he wants to be the biological child of the Applicants and he views his birth family as extended family. He wants his family to be complete. It is highly probable he will, as he grows older, have more thoughts and feelings about his birth family. Dr Duffy said in evidence this was likely to be around the time of emerging adolescence which is another

developmental stage. He may come to question why he does not live with them or he may continue his strong attachment to Mr and Mrs N and wish to have less to do with his birth family. He may wish to see more or less of his brothers. As he reaches puberty and his teenage years it is probable he will have more questions and may feel a sense of anger towards his birth parents and may wish to distance himself emotionally from them. At 13 or 14 children have more questions around their sense of belonging and can develop complex feelings about abandonment and he may ask difficult questions about how he came to be adopted and his brothers didn't. It is hard to predict which way he will go but the likelihood is the questions will be asked. So far the clear message of love and commitment by both families has ensured he is securely attached. But if he comes to feel abandoned – and the simple fact of his being gifted has to be dealt with whether it is adoption or an SGO – may give rise to a variety of difficulties including low mood, depression, anxiety and attachment difficulties in how he interacts with others. The message of adoption – even if Life Story work is done - may be received by him as abandonment by his birth family and this adds to the level of risk in his teenage years. An SGO is less likely to add to this risk as it does not contain the additional message that his birth family relinquished all legal connection to him

- iv) If an adoption order is made which alters his relationships with his birth family it may cause him to feel abandoned by them. Although there are differences between him and his brothers now in who they live with and their relationships with each other the severing of the legal tie may in later life create a potential issue. At present an adoption order would reflect what W wants and what Mr and Mrs N want. His developmental age at 6 is to look for immediate

gratification and he does not understand the court process or the long-term implications of adoption. Later however his adoptive status and difference from his brothers could cause a great deal of emotional conflict for W. He could feel rejected and not good enough. Life story work can help to address this but research into adopted children supports the existence of potential difficulties to mental health, identity, genetic mirroring and medical history. It is highly likely that as W grows older he will have a number of difficult questions about the reasons as to why he was adopted when he continues to have regular contact with his biological family from birth. The act of 'gifting' a child is fundamentally different to a child being adopted to another family in the more familiar sense and this fact gives rise to greater complexity in assessing W's possible reactions.

- v) W's older brother, who is in his early teens, was worried if an adoption order was granted although he said they would make it work. However the birth parents concerns are such that it would probably significantly change their relationship with him. A contact order can maintain their relationship but given the approach of the Applicants there is the potential for adoption to have a significant adverse effect on the relationships.
- vi) Continuing the SGO will create some confusion for W as he has been told he will be adopted but he has the emotional resilience which means it is not likely to have a detrimental impact on his psychological well-being. At 18 when it expires he may have a sense of confusion around his sense of belonging as an adult but this sense of identity and belonging can be addressed in Life Story work. A means by which W could express his views on whether he wanted to

be adopted before he reached 18 could be implemented which would give him the opportunity to express a view. He should not bear the responsibility though but he could be asked his views. The Applicants will be disappointed if an Adoption order is not made but it is unlikely to undermine their care in a way which would impact on W. The SGO carries with it a message that his birth family want him to remain an important person in their lives and they do not want to relinquish him. That can have a positive psychological meaning for him. His emotional security has been supported by the SGO and an adoption order will not necessarily add to that – as long as he continues to live with the Applicants as he has so far that emotional security is met by their care. He will continue to be part of their family under an SGO up to and beyond 18. Inheritance can be dealt with under a will – it does not require adoption.

- vii) W's attachment needs were also considered, he presents with a healthy and secure or stable attachment style. W has demonstrated emotional resilience and has been offered a high level of nurture and consistent parenting from his parents Mr and Mrs N. Their love for him and his love for them is evident. He is highly sensitive to their needs now. His response to the truth about his origins has not caused any significant distress. W's relationship with his birth siblings and parents is a positive one and he is happy to see them and not distressed when they leave. This relationship does not have any detrimental impact on his emotional and psychological development. He is a happy and settled young boy.
- viii) The position of Mr L and Mrs L is that they have doubts about the willingness of the Applicants to prioritise contact and wish for an order for 5 years with the opportunity thereafter to review to meet W's needs.

- ix) The impact of both the Special Guardianship Order and an Adoption Order are considered and the impact on W's well-being and on his relationships in the future. After carefully considering both options it is my recommendation that the Adoption Order is not granted and for the Special Guardianship Order to continue with a specific Contact Order in place. There are few additional benefits to W in adoption and there are some significant risks in terms of consolidating possible feelings of rejection. A benefit is the formal recognition of them being his parents, but it is the emotional security which derives from the substance of the relationship which is more important. His legal identity is one component in his security – the psychological and emotional components are more important.
- x) In her report she said

The psychological impacts for W if an Adoption Order is made are discussed in detail earlier in this report in question 7.6. In my opinion the number of factors against an adoption order do not demonstrate that 'nothing else will do' in this case. I believe that the current arrangements for the SGO are more suitable for W's needs. 7.8.4 It is also important to note that an Adoption Order might contribute to W developing a more negative and critical view of his birth family.

This formed the essence of Ms Gray's submission that Dr Duffy had approached the question of adoption on the basis of too high a threshold – using the B-S approach rather than a more nuanced approach which reflects the spectrum on which cases such as this create in terms of the proportionality of interference by the state with family relationships. If one considers the report in its entirety, it is clear that Dr Duffy was looking at the substance of W's life and the psychological issues which arise from the alternate paths. She said "My main focus was to complete a thorough psychological assessment of W and to consider the decision around an SGO or an adoption order being granted. My expertise are not in the legal position of the child and inheritance rights." Her overall conclusion is that Adoption does not offer anything significantly more than the SGO in benefits of securing W's security and stability or sense of permanence within the family and that (for a number of reasons) it presents risks to his future emotional well-being through in particular building in a sense of rejection and the risk of his relationships with his birth family not being given the priority they deserve. Those are matters of substance which her opinion is of value on whatever her approach to the legal threshold. It is also the case the

Dr Duffy placed some reliance on adoption giving more rights to the Applicants than SGO and she considered this a detriment. Whilst the difference in practical terms in this case between adoption and SGO, particularly adoption coupled with a contact order are limited what Dr Duffy was driving at was that in her evaluation if the Applicants considered adoption gave them more autonomy that might sound in a diminution of the importance placed on the maintenance of the familial ties. She said, *“I do not believe that Mr and Mrs N are considering the long-term consequences of adoption for W and how this can negatively affect his sense of identity and could also negatively affect his relationship with his birth family.”*

- xi) Her initial view was that that decisions within these court proceedings should be completed now and not re-addressed in the future when W is older as she considered it *not appropriate for a child of any age to decide whether they should be adopted* but in her oral evidence she accepted that allowing W the opportunity to express a view before he reached 18 would have some potential advantages in terms of ensuring he could have his voice heard and if he wanted to be adopted that this could be acted on.
- xii) Dr Duffy recommended a change in frequency and duration of contact in order to create contact which was of more substance and value than the squeezed time currently experienced. She said she believed it was ‘imperative’ for regular contact to continue. She said *it is likely over time he will emotionally mature and his birth family will become more important to him. His birth family represent a major part of his identity and during the assessment I was frequently told that W looks very similar to his younger brother. Therefore I believe that it is crucial for W’s emotional and psychological development to have ongoing and regular contact with his birth family.* Longer contact would enable him to develop more meaningful relationships with his birth family and to feel less rushed. 5 hour visits once a month would meet this along with indirect contact. The arrangements would need to be reviewed over time. At present Mr and Mrs

N should be present at contact to support W's understanding that the families can work together,

- xiii) The impact upon W if an Adoption Order is not granted is discussed and recommendations are made for the Life Story Book to be adapted to meet W's needs and to specifically be related to the sensitive nature of this case. In addition to the Life Story Book being adapted specific recommendations are made for W and his SGO parents to receive support from a professional trained in Therapeutic Life Story Work. It is recommended that this professional works closely with W and his family to explain the narrative to W and to help him process this over time.
- xiv) In her dealings with the Applicants she got the impression that whilst part of their motivation was to be clear that W is loved by them and is their son a motive for seeking adoption was to give them security in knowing W could not be removed and that they could take decisions without reference to the birth parents. They engaged fully with her and were in the main open in their discussions. Her account gives a sense of them underplaying some of the tensions (around contact) and not recognising some of the complexities that were likely to arise coming down the line as W got older; they did not think he would need further support and likened his position to that of other adopted children rather than recognising the uniqueness of his situation.
- xv) Dr Duffy considered that *Due to this unique situation for W I believe that it would be help for W to receive support from a professional who is trained in Therapeutic Life Story Work. Therapeutic Life Story Work gives a child an opportunity to make sense of their life story in a safe place and enables them to*

make sense of their thoughts and emotions. The trained professional can spend time meeting both sets of parents and agree a way forward for W and the family.

She considered the work should be collaborative with both the Applicants and the birth parents involved in it.

30. The Social Worker completed the Annex A report [E1-76] and filed a statement. She is clearly a very experienced social worker in the area of adoption and fostering and like the others she acknowledged her work was almost always with children who could not live with their birth family for some reason. This underpinned her approach to why permanency was needed for them and what best met that need. Although she acknowledged the unique factor in this being that W was gifted from a family perfectly able to care for him her evidence was essentially founded on an approach which derived from children removed from their parents and I thought she had wrestled with the potential complexities that the gifting variant presented. Of course, when she prepared her main report which took place over many months her understanding had been that the birth family consented subject to satisfactory arrangements for contact being in place. Her core reasoning is expressed as follows:

The Local Authority remains of the view that W has a right to stable, consistent care for the remainder of his childhood. It is also necessary for W's Welfare needs to be met throughout his life. He needs permanent carers that can meet his day to day needs and give him re-assurance as he grows and reaches adulthood and beyond. Whilst as parents, Mr N and Mrs N are able to make decisions for the remainder of W's childhood, there are implications for W for being "next of kin" to Mr N and Mrs N both in terms of inheritance and also should either of them become unwell and require decisions being made for their care. 25. The birth parents have requested for the adoption application to be delayed until W is able to consent to the adoption. However, it should be taken into account that a delay could be prejudice to W's life and detrimental as his status will not be finalised. It is also suggested that it is not appropriate for a child (of any age) to be put in a position where they must decide if they should be adopted by their life-long carers or not. W would most likely have incredibly conflicted loyalties since he would not want to disappoint the couple who have raised him, or his birth parents. As much as birth parents would like W to be part of the decision regarding his adoption, my view is that W should be absolved from this

huge responsibility and that it is necessary for the adults around him to make this life changing decision. W needs to have permanence and a sense of belonging.

The Local Authority is therefore in support of an Adoption Order with a view to W adopted by his current carers as it is of the belief that this is the only option that will offer W permanency and the life-long legal family arrangement, not offered by orders such as Special Guardianship Orders. 27. A Contact Order will allow W to remain part of his birth family since his special guardians are family members and his identity will be promoted. Through the life story work undertaken with him, W will know that he was not abandoned by his birth family and that they remain committed to him.

Should an Adoption Order not be granted, W's parents would retain parental responsibility and would continue to be involved in W's upbringing, including contributing to major decisions that could affect his future. They would also have a right to challenge any legal order in place or the level of contact he has with them. Mrs L and Mr L accept that Mr N and Mrs N will be making any decisions that may arise about W's health or education and do not anticipate needing to interfere in these decisions, even if they were life-changing for W. The reality of W's life is that Mr N and Mrs N make all the important decisions in his life and will do so in the future without consulting W's birth parents. This reality emphasises how W's birth parents have relinquished their decision-making role as W's parents and that an Adoption Order would not impact this. 29. An Adoption Order would give W permanence in the special guardians' family that he would need in order to continue to flourish. An assessment of the special guardians and referee interviews have affirmed that Adoption with the current carers is in W's best interests to achieve permanence.

31. In her evidence she acknowledged that the draft Life Story book had wrongly suggested that W had been adopted and that it had to be amended. As the Annex A social worker I was unsure why she did not have responsibility for the liaison with the life story work but I accept she did not. There was therefore an unfortunate breakdown in communication which led to W getting a premature message about his adoption and that has led to more confusion than the revelation of his birth alone might have produced. She thought that confirming his adoption would add to his security rather than emphasising his abandonment and that Life Story work would help redress that possibility by explaining his gifting was an act of love not abandonment. Over the years he will process it in different ways and at present it does not appear to have had a significant impact on him because his stability comes from his daily life. She emphasised that openness and honesty in answering his questions was critical to helping

him process the gifting and that the issues were likely to emerge more as an adolescent. She considered that his feelings of rejection would arise because of his gifting and were unlinked to the nature of the order. She thought Dr Duffy had under-estimated the value added by adoption and the sense of belonging it would bring. That security is certainly a usual and established advantage of adoption but I thought the social worker relied heavily on the usual benefits which accrue but she had not gone through the process of seeking to test whether this usual assumption applied as fully to this unique situation. She was concerned about W being left at 18 without legal ties to the Applicants and foresaw both emotional and practical disadvantages of this both of which are potentially true but can be addressed by W having the opportunity to express his views in his adolescence. Thus I thought her analysis did not have the nuance that emerged from the Guardian's or Dr Duffy's. She considered the Life Story work to be a very important component in making adoption a success which makes it more surprising that the situation developed as it did. She also thought he would be caught in the middle and exposed to tension if the adoption was not made because it would lessen the Applicants anxiety and would bring a finality which the birth family could adjust to whereas an SGO would leave open the issue of a future return to the issue of adoption. That is certainly a possibility although since the SGO was made the tension has not been around issues of the adoption/parenting but around maintaining the contact relationship. She considered that seeking his views would cause problems for him as it would cause conflicted loyalties. In a sense this must be true although it does not take into account that the birth family are neutral as to outcome and would not be advocating a position but rather supporting him in saying what he really wanted.

32. The Life Story worker did not give evidence but had filed a statement. In it she said the following about how W had the news broken to him about his family.

Approved Judgment

- i) Unfortunately, I was unwell during that week and the meeting had to be cancelled. However, following discussions with the social worker I was made aware that Mr N and Mrs N had already started to talk to W about his birth family and that W was informed that Mr L and Mrs L were his biological parents.
 - ii) W was informed that Mr N and Mrs N were not his birth mum and dad. Mrs N informed the social worker that W became upset and insisted that Mr N and Mrs N were his mum and dad, W appeared to be in denial and did not wish to engage in any further discussions. He would distract himself by watching TV or playing.
33. The Guardian had filed three reports. She had commenced as a court reporter to obtain the consent of the birth parents but when it appeared they did not consent she became W's Guardian. She has extensive experience in social services of Kinship care and adoption and as a guardian in adoption breakdown situations. She has experience of one other 'gifting' case. She gave evidence in a reflective and considered way and seemed to have been better able to adapt her thinking to the highly unusual circumstances of W's situation which made clear that she was not applying generalised principles applicable to adoption and special guardianship but a nuanced and fact specific analysis. In particular she had been able to capture the life-long aspects of W's welfare in a way which added extra weight to her analysis. Significant aspects of her evidence include the following:
- i) There are no concerns about the care provided by the Applicants to W or the quality of his relationship with them. He is indulged to a degree and needs some guidance with complying with boundaries. She considers he has a strong psychological tie to them which will endure.

- ii) At present his psychological tie to his brothers is not strong but the importance of this relationship and the legal link will come later in life both as he comes into adulthood and appreciates the tie is more than with cousins and even later in life when the Applicants and Mr L and Mrs L pass on ; he will, all things being equal, have three full brothers which could be legal and biological.
- iii) She had concerns about the extent to which the Applicants were comfortable talking about W's background and she considered this a concern as adoption would likely require them to be more open and comfortable as the challenges from W would need to be explored and processed. Her view of the Applicants currently was that they were not really accepting of the possibility of problems arising with W and so would be unprepared which made it harder to see them helping W process them in a healthy way and that they were not where she would hope they would be. She thought the messaging he would get would not emphasise the importance of birth family because they themselves did not appreciate it. What W had said to her suggested he already may feel a sense of rejection which the Applicants did not appear to acknowledge.

He told me "My birth parents didn't care about me that much. My mum and dad wanted to care about me more. [Uncle and Aunty] didn't choose my name, my mum and dad did." He went on to say "They (Mr L and Mrs L) wanted 3 boys, so my mum and dad chose me. They wanted to care for me more and love me more."

However, the Guardian considered that at present he was increasingly comfortable with the situation including saying in response to why he was lucky "*because I have two sets of parents who love me!*" Her concern was that as he grows older it will be important for his sense of self-worth that he receives reassurance.

- iv) At present they feel a degree of insecurity which may be assisted by a reduction in the frequency of contact. W told the Guardian

"Dad doesn't like it when we go to the Midlands (for alternating contact sessions), because it's far and he gets tired", "I think the Midlands ones are not my actual brothers because dad said they are not in my family. Every time they are silly with me and I don't like it. Dad says to Mr L "Why are your children messing with my family?"

He spoke about thinking that Mr L and Mrs L had encouraged their children to 'fight' with him (implying rough, physical play) but could not explain why he thought this. It is acknowledged that this process has been stressful and emotive for all involved, and W may have interpreted things in a way that is not factual. However, it is important that he is protected from adult frustrations and does not feel caught in the middle or conflicted between the adults.

- v) Her initial contact with Mr L and Mrs L revealed a difference in the understanding of the social worker and herself as to their consent. *They expressed concern that W would feel he had been 'abandoned' by them, and that this would be added to by the making of an Adoption Order, noting that "kids can be cruel and say things sometimes; 'You're adopted, your parents didn't love you." The thought of W experiencing this caused Mr L and Mrs L evident distress.*
- vi) The birth parents said they would be led by experts on what was best but their preference was for adoption not to proceed until W was old enough to have a view. The Guardian was of the view that they had not and would not interfere in how the Applicants chose to raise W and that they were satisfied that W was being well raised by the Applicants,
- vii) Both the Applicants and the birth parents spoke of gifting being culturally not unusual, but adoption was less usual and is significant within their community.
- viii) W currently sees his birth parents and brothers as more akin to extended family because he has never lived with them and this and the different lives they lead will endure. However, that difference in itself does not mean the legal tie is unimportant.

Approved Judgment

- ix) the court must be concerned with W's welfare throughout his life. It is perhaps inevitable that the implications of this Order will be much more profound as W grows up, and his understanding of his circumstances grows. W's identity as an 'adopted person' will affect him throughout his life. Whilst he continues to have Mr and Mrs N in a parental role, I remain concerned that there has been very limited consideration of the impact throughout W's life of severing his sibling bonds. Research indicates these are often the most enduring bonds throughout life, and there has been little acknowledgement of the impact of this loss well into adulthood, exacerbated by the fact that W is an only child in his home.
- x) She considered that the concerns about W feeling adrift at 18 if he was not adopted were over-stated as in her experience it was the quality of relationship that was most important and children reaching 18 under an SGO did not feel cut adrift just because of the SGO expiring. If they felt a part of the family, that would endure and in this case there was no reason to think the Applicants' commitment would change; he would remain their son and he would be very sure of their love for him. She accepted that adoption and the formal ties had an important psychological symbolism and reflects his de facto relationship but in terms of the nature of the commitment to him it would not alter. There is an important psychological symbolism also in ending the legal tie to the birth family. She thought the issue of his status if there was one would come to him between 16-18 based on her experience of children subject to SGO's
- xi) She gave clear and powerful evidence about the child focused messaging that W should be given and that was not to focus on the legal nature of the order (which was adult information) and its consequences but on the fact that his home

with the Applicants was his forever home. She considered that further discussion would be needed later as the nature of the information shared should evolve so that if he were suffering significant emotional turmoil related to not being adopted and he strongly wished to be adopted that Adoption could then be considered on its merits at that time. If he then wanted to be adopted the birth parents would likely support it and consent. She did not think that the simplicity of the adoption outcome had sufficient benefits over the SGO to make it the best welfare outcome as she considered both conferred a permanence which could be delivered in child appropriate messaging which would evolve as he got older. She said it was incredibly important that W should be able to discuss his position openly with the Applicants and that it would be incredibly damaging if he felt he could not discuss it with them. It was unfortunate he had been given Life Story work which focussed wrongly on adoption when it had not been approved but it did not mean that adoption now was the right option.

- xii) It was not possible to explore W's views on the application in a meaningful way because he was adamant that he has already been adopted by Mr and Mrs N, telling me "they adopted me because they wanted to care about me more and love me more and make me breakfast." He went on to tell me "everything is still the same, I will live here and they have adopted me."
- xiii) She explained that the reference in her report to the 'nothing else will do' test was inappropriate but she emphasised that what was important to her then was the SGO framework seemed to be working and that severing his legal ties with his birth family and dispensing with consent in that context required careful consideration. She considered that it was her holistic welfare analysis that

Approved Judgment

resulted in her conclusion that adoption was not in his welfare interests rather than the application of the nothing else will do test.

- xiv) She considered that the order for contact should be through his minority and could be defined now albeit it would likely develop with his age but that the certainty of a framework in an order was beneficial for all. Initially she had considered a 5 year period appropriate but had taken on board Dr Duffy's opinion.
- xv) In her holistic analysis she carried out the side by side comparison of the advantages and disadvantages of adoption and continuation of the SGO ultimately concluding that his needs had been well met for several years and that SGO was as capable of supporting permanence as adoption, particularly as there is no evidence of W questioning the commitment of the Applicants and his status but without the downside of severing the legal ties with his birth family with the enhanced risk of rejection that would carry.

The Parties Positions

- 34. The opening positions are set out in their Position Statements filed for the commencement of the hearing and the overall positions did not alter much although the basis for the positions did develop.
- 35. In support of the contention that an adoption and contact order would best promote W's welfare on behalf of the Applicants Ms Gray made the following essential points.

Law

- i) This is not a 'nothing else will do' case. On the spectrum between state removal and step-parent adoption it is closer to the latter but still not easily comparable.

Approved Judgment

This is a family re-arranging itself and this goes to the proportionality of making an adoption order. The interference in this case is plainly less.

- ii) There is a positive obligation on the court to ensure de facto relationships are protected and recognised and where adoption simply reflects the long term reality the interference of an adoption order with Art 8 rights is less significant

Facts

- iii) an open adoption is the ideal route for securing W's lifelong welfare needs without which he will be left adrift in adulthood. This could have a wide-ranging and enduring impact on his sense of identity, psyche, relationships, and inheritance rights.
- iv) Dr Duffy and the Guardian applied a 'nothing else will do' approach and so they set the bar too high in reaching their conclusion
- v) The termination of the legal relationship between W and his birth family is a modest loss as W does not and has never seen them as his parents and it was never intended he should. Any loss in legal terms in relation to status or parental responsibility is moderated by the maintenance of post-adoption contact. Likewise with his brothers the loss is a limited one as he does not have an established sibling relationship with them
- vi) As an 'open' adoption family relationships will be maintained which also reduces the extent of the interference and moderates its impact
- vii) Dr Duffy's assertion that adoption will amplify the sense of rejection is based on speculation and conjecture as she accepted she had no experience of a gifting case and was not drawing on other cases. She cannot say what will happen to W

Approved Judgment

and she should have acknowledged there was a great deal of uncertainty about her opinion. The court cannot attribute any weight to it as the court doesn't know how he will respond – there should have been greater acknowledgment of the mitigating factors including his strong attachment, the good relationship with the birth family, the impact of a child arrangements order, the Life Story work and the fact the birth family would accept the outcome.

- viii) Dr Duffy's conclusions were also undermined by her error over the legal implications of adoption and SGO in terms of the rights of the adoptive family.
 - ix) Adoption will simplify the delivery of the Life Story work and will fulfil W's wishes
 - x) Deferring the decision places undue responsibility on him and he will feel he has to choose.
36. On behalf of Mr L and Mrs L and in support of their contention that W's welfare was best promoted by the continuation of the SGO and a contact order Ms Geddes made the following essential points.

Law

- i) Dispensing with consent needs the court to conclude welfare **requires** it. Requires involves a proportionality evaluation and on the spectrum of state removal or step-parent adoption the context of this case is everything with proportionality.
- ii) The voice of the child is not heard fully at this stage as he is 6 and his current understanding is that maybe he is adopted but he has little real understanding given his age and situation of what the life-long implications are.

Approved Judgment

- iii) The dicta of Theis J in *Re H* about protecting de facto relationships requires the court to consider the range of orders it can make to protect that de facto relationship. An SGO provides protection for the family which isn't illusory

Facts

- iv) On the spectrum of proportionality the following support the SGO being the proportionate disposal; W won't remain with a birth parent; his birth parents don't consent for valid reasons; they will continue to play a role in contact; their PR is preserved; it would remove a legal relationship with his legal relatives including his brothers; the parents' consent is withheld in accordance with their original understanding and to avoid exacerbating feelings of abandonment
- v) Adoption is disproportionate and his welfare does not require consent to be dispensed with.
- vi) The court cannot remedy the consequences of the original decision the parties made – adoption doesn't correct it. It isn't a cure-all for the Applicants' fears – it doesn't make them his biological parents.
- vii) The SGO has supported his welfare – simplifying the message about his legal status does not improve his welfare compared to an SGO and a child arrangements order. He will continue to remain settled in their care, it minimises the risk of him feeling rejected, it maintains a link into his adolescence and allows for later exploration of his relationship with his birth family and decisions can be looked at later.
- viii) The alleged benefits of adoption are over-stated at best
 - a) His emotional needs have been met to date

Approved Judgment

- b) There are other aspects to permanency than an adoption order – the legal and emotional are separate
 - c) He will not cease psychologically to be their child at 18
 - d) The SGO Guidance identifies that form of order better fits his situation.
- ix) The criticism of the SGO as a vehicle for permanency is not made out
- a) The birth parents have never undermined the Applicants parenting of W
 - b) W's sense of belonging to the Applicants comes from his psychological status not his legal one
 - c) Dr Duffy, an expert in child psychology concluded the risks to W were greater under adoption than under an SGO; the Applicants can't openly discuss what it means; they can't mentalise it for W, they can't see what he loses, they aren't well placed to mitigate its effects by talking openly to him
 - d) Contact should be defined to set a minimum level to provide clarity. A mechanism to be review in 4 years should be incorporated, so when he is 11.
37. The Local Authority maintain the position they took arising from the Report completed by the social worker. Ms Conroy Harris emphasised the following
- i) The act of gifting carries with it a risk of harm which can best be addressed by making his family unit as secure and permanent as possible by adoption.

Approved Judgment

- ii) Adoption has known and recognised benefits in providing permanence and stability which SGOs do not; they have not been part of the landscape long enough to compare them in particular in being able to explain their effect to a child. The SGO ends at 18 and so W does not have permanence. Although it can be revisited before he is 18 this uncertainty is unhelpful and places a burden on W
- iii) An adoption order will allow the Applicants to claim W and for him to feel claimed by those he knows as his mother and father. Whilst it will carry with it rejection this is outweighed by being claimed and the Life Story work can explain the context to mitigate any sense of rejection
- iv) Adoption in this particular factual context is not disproportionate as it consolidates all W has known and does not unduly interfere with a de facto relationship only a legal one. The nature of his relationships with his birth family will not change under adoption but will be maintained. His family relationships are not those of parent and child or brother and siblings. In creating the legal relationship with the Applicants it gives W a secure base from which he can navigate and explore other issues.
- v) The concerns of Dr Duffy and the Guardian derive from their experience in state led removal not this situation.
- vi) Leaving the decision to later is to create uncertainty and delay and neither are beneficial to W. Uncertainty undermines the Applicants' ability to provide their best parenting without adding anything of value to the birth family.

38. On behalf of the Guardian's position that the SGO should endure in conjunction with a defined spending time with order, Ms Darian made the following points
- i) The Guardian's analysis is founded on her evaluation of the benefits and detriments of the alternative orders not on what legal threshold applies. The suggestion her conclusion is a result of a false premise in relation to the legal threshold is misplaced.
 - ii) This situation is not directly comparable to a step-parent adoption or to state led adoption. It requires a different analysis to reach a conclusion on what is best for W.
 - iii) The court should place weight on the expert evidence of Dr Duffy. Her analysis is based on her psychological evaluation of W and the risks which are relevant to that now and in the future. She did not reach her conclusion based on the legal test but the psychological impact on W of the alternatives.
 - a) Adoption carries with it clearer risks of detrimental effect of feeling rejected and the impact on W's attachment this carries. The SGO carries a lower risk. These are not speculation but expert based opinions having regard to the nature of the adults and W in this case and they should carry weight.
 - b) Dr Duffy did not think that W understood the implications of adoption at this age and considered it likely his views would change as he got older. This is a significant factor for W. Adoption has irrevocable consequences

Approved Judgment

- c) Dr Duffy did not think that the Applicants were thinking of the long-term consequences for W and how adoption might negatively affect his sense of identity and his relations with his birth family. They are not best placed to promote his understanding of his history and are reluctant to engage in open discussion. This is particularly relevant if an adoption order is made.
- d) If W cannot have those discussions he is more likely to be adversely affected by the emotional harm Dr Duffy identifies.
- iv) The Guardian has herself seen the possible feelings of rejection W feels but he is young and we don't know how this will develop. Adoption makes irrevocable decisions for him now when we don't know how he will feel later in life.
- v) Whilst adoption has a superficial simplicity to it that under-estimates the potential magnitude of later adoption linked negative consequences linked to feelings of rejection. The nature of his relationship with his brothers must be seen for what it is now but it may change significantly as they get older.
- vi) The SGO is designed for permanence and so far it has worked for W.
- vii) W's views must be considered but he is young, he does not fully understand his current position, there is little evidence he doesn't feel claimed – he sees himself as their son at present. The Guardian does not think the decision should be his but that he should have an informed say at a later stage when the court and adults can consider the holistic picture.
- viii) Adoption currently is not required to promote W's welfare to the best extent. Adoption with its irrevocable nature would be disproportionate at this point.

Evaluation

39. The nature of the background to this application is unusual if not unique. Importing any generalities is inapt. This decision must be made on the very specific facts of this case by which I mean not the gifting alone but looking at the penumbra of facts about W, the Applicants, the birth family, facts which surround the gifting and which stretch into the past, which feature in the present and which one can foresee in the future. The personalities of the adults which are fully formed and unlikely to shift much given their ages and that of W which will undoubtedly develop and change significantly as he moves from childhood into adolescence and in due course adulthood.
40. I am conscious that the novelty of the case poses a challenge to all involved – mostly those living the daily reality but also for the professionals and myself. Inevitably in a case as unusual as this the court brings its own accumulated experience to bear in seeking to discern how the fundamental – or basic – principles of the welfare of children can be best served. I have little doubt that different judges would see aspects of a case such as this differently but as we all must be guided by the framework that is provided and which guides and shapes our decision making that must be my starting point.
41. Whilst this is not unique it is certainly a sufficiently rare situation that no one apart from the Guardian has any direct experience of a gifting case. The child welfare learning derived from state pursued adoptions arising from care proceedings through to step-parent adoptions is of some but only limited help as is the knowledge base arising from failed surrogacy. Special Guardianship is sufficiently new on the landscape that there is limited learning to be gleaned from that on whether it has worked better than adoption. All the professionals involved are feeling their way forward in the case as to some degree as are the two sets of parents; Mr L and Mrs L particularly. For Mr and

Approved Judgment

Mrs N, they like W, have lived the life of a nuclear family and it seems through that lived experience they have been able to push to the sides the consequences of the choice they made in terms of how it would be addressed in the future. Their application was not made because W knew his position and they wanted to give him a permanency he was missing.

42. Looking at the factors included within the s.1(4) welfare checklist the following must be factored into the ultimate paramount welfare conclusion, the decision on the necessity of dispensing with parental consent and the proportionality of the interference with the article 8 rights of all the relevant family members.

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

43. It appears from what W has read in the Life Story book and from what he has said that he has some conception of adoption and that he may see it as remedying the unwelcome news that he was not in fact the biological son of those he regards as his mum and dad. He may also think that he has already been adopted although it is not clear to me whether he thinks that the fact that he lives with people who are not his tummy mummy and dad already makes him adopted. Given he is only now rising 7 and when he was spoken to by adults about his position he was somewhere between 6 and 7 his understanding of adoption as a legal concept is likely to be very limited indeed and as a form of family is likely to be a fairly simplistic one. I think it is fair to conclude that W at present wishes his family unit to be as close to a typical bio-social one as can be achieved and that currently he regards 'adoption' as achieving that ideal standard. Looking at the decision in the short term he wants to be adopted. Although it is difficult to extrapolate much directly from the learning in relation to children who have been the subject of state led adoption whether as a baby or as an older child who has some

experience and memory of life with the birth family I think Dr Duffy is right to identify and to lay weight upon the likelihood of W's views developing as he grows older particularly in adolescence and young adulthood when his thinking about who he is will likely be at its most turbulent or active. Any attempt to look into the future can always be said to be speculative but one must draw on such expertise as exists in relation to child development and on such experience and common sense as can fairly be brought to bear in a novel situation. The rarity of his situation may very well make his questions about himself and of Mr and Mrs N and his birth parents more pointed, challenging or critical than might often be the case with a child brought up outside his birth family whether in an adoptive family or not. It is possible, although I think less likely, that his experience of life with life story work may not generate any difficult questions for him or for others and that he will make the transition to adolescence and adulthood with no more troubling issues than the average teenager (if there is such a thing). I think it is more likely that he will have questions related to why he was gifted by his biological parents and why that gift was accepted by Mr and Mrs N. Those questions might be posed in a relatively benign way out of curiosity but there is a real possibility that they will be asked in a very challenging and hostile manner. The way in which Mr and Mrs N and the birth family have been able to deal with such curiosity as W shows in the intervening years will almost certainly in the view of the professionals influence the way in which it emerges in adolescence. At present as I set out below, the approach of Mr and Mrs N is such that he is less likely to be able to discuss this openly and productively with them and so the risk of him internalising his feelings and them emerging in a more negative or harmful way is magnified. The range of his wishes and feelings in the future may therefore be wide indeed. At one end of the spectrum he may feel entirely satisfied with his life with Mr and Mrs N and may wish to be their adopted

child. If that is so then adoption now would have been to deliver what he might subsequently wish for. There is of course an interplay between the order that is made now and how W and the adults deal with questions in the future. My assessment is that adoption now would likely reinforce the tendency of Mr and Mrs N's to view themselves as a nuclear bio-social family and thus reduce their openness to exploring the implications of adoption. At the other end of the spectrum might be intense hostility and anger towards Mr and Mrs N for taking him from his birth family and his brothers and a strong desire not to be their adopted child but to return to his biological roots. Another possibility would be 'A plague on both your houses'. What seems to me to be an important component in the overall welfare evaluation is to recognise this range of potential future views and to identify that W has a right to have a say. Although that right exists now it is an attenuated right given his age and his lack of understanding. Adoption because of its irrevocable nature will prevent his right to express a view being convertible into a legal reality although of course he will be able to choose with whom he lives or socialises regardless of the legal outcome. A special guardianship order provides legal security in the meantime but leaves open the possibility of W being able to actively contribute to the legal outcome when he is able to express a more informed view. As a decision with lifelong consequences which is fundamentally different to a child arrangements order and where the adult decision-making in 2017 was taken essentially in disregard of the welfare consequences for W it seems to me that his right to be consulted requires recognition.

the child's particular needs,

44. W's needs are in many respects those of any six year old. In many ways his emotional needs match those of any 6 year who is not to live with his birth parents but with another family member. The gifting adds a different dimension to his emotional needs though.

This is not a child who cannot live with his birth parents because they have died, are physically or mentally incapacitated, are imprisoned, are in the grip of addiction or who are for other reasons unable or unwilling to look after him. There is no straightforward explanation which can be proffered to him as it can to most children. The evidence, in particular that of Dr Duffy but also from others, together with common sense, suggests that he has a particular emotional need for attuned carers who will be able to deal in the most sensitive and supportive way to the fact that his birth parents were perfectly capable of caring for him but they chose to give him away as an act of compassion to fulfil a need that Mr and Mrs N had to create a family outside the parameters of biology or of the systems the state has created to facilitate the establishment of non-biological families. His psychological well-being as he grows into adolescence and into young adulthood and perhaps beyond will be shaped by how well this need is fulfilled.

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,

45. One can identify a range of possible outcomes for W some of which I have identified in terms of the questions he may have in the future. It is much more likely that he will experience a feeling of rejection or abandonment by his birth family than not. Quite how this will emerge is harder to define. It is easier to explain to a teenager and probably more understandable to the teenager that their parents were unable to look after them because of their own problems and that they were not abandoned because they were not wanted. Although the birth family and Mr and Mrs N may find it easy to rationalise their decision it may be seen very differently by W. The extent of the heartache which was detectable in Mr L's evidence gives a hint of the possible impact on W. Whilst this will be a fact whether W lives with Mr and Mrs N under an SGO or an adoption order I have no difficulty in accepting the evidence of the birth family and the opinion of Dr

Duffy that there is a risk that the termination of the legal links between W and his birth parents and his siblings may add a further and significant layer of harm. Of course the termination of the legal relationship will have the usual consequences in ending the birth parents' parental responsibility, the legal relationship of parent/son and of brothers and of creating new legal relationships between the Applicants and W. Whilst in the short term it may be the case that the likely effect on W of adoption as compared to special guardianship is limited, and perhaps more positive in cementing his feeling of belonging with the Applicants the medium to long term effects are harder to predict but are undoubtedly significant and possibly profound. Practical matters such as inheritance or next of kin status can be addressed with wills and Powers of Attorney. Defining the effect of ceasing to be the brother of his three siblings in W's 20's or 60's is much more nebulous but could be profound. Likewise, the impact of being the child of Mr and Mrs N when he is 40 compared to being the legal child of his birth parents. I accept that some, perhaps all, of the accepted benefits of the permanence that adoption provides might accrue to W although I do not think that those benefits are as readily inferable in this case as in others. Or at least if they are they are more nuanced or have potential detriments which would not be present in many other situations. The difficulty in defining the effects at this point in time suggests that a decision with irrevocable consequences may not be the best for W.

the child's age, sex, background and any of the child's characteristics which the court or agency considers relevant,

46. It was said that gifting a child was not unknown within the community from which the birth parents and Mr and Mrs N come. It was also said that adoption is less well recognised and perhaps carries more stigma. When it came to examples of gifting however neither Mr L nor Mr N gave the example which was akin to the gifting of W

but which was more characteristic of children being placed with relatives because of the unavailability a birth parent. I do not think that the reluctance of Mr and Mrs N to be more open about W status with the school is necessarily a cultural issue as opposed to a reflection of a desire that Mr and Mrs N have to normalise their position vis a vis the outside world. His background being gifted though is unique and relevant in ways discussed elsewhere.

any harm (within the meaning of the Children Act 1989 (c. 41)) which the child has suffered or is at risk of suffering,

47. W appears to be prospering in the care of Mr and Mrs N. Any harm done by the revelation of who his birth parents are and the fact that his mum and dad are not his biological parents appears to have been short lived; at least that is the outward impression. Inevitably, W carries with him a latent risk of harm arising from his gifting. Clearly he is at risk of suffering future harm as he emerges into adolescence and adulthood and questions as to his identity, origins, his self-worth etc begin to arise. At its lowest level the harm may be modest, his life experience may moderate his desire to ask or answer those questions. However the stark facts of his origins also carry with it the risk of profound emotional instability with potentially lifelong consequences for his mental health, trust in others, personality formation and psychological well-being. This risk is materially different it seems to me to that which exists with a child removed from his parents by the state due to the harm they have caused or are likely to cause or to the termination of a relationship involved in a step parent adoption.

48. A key component in Dr Duffy's thinking is that an adoption order carries with it a message of abandonment. Added to the inherent difficulties that will arise for W from his being gifted and the very challenging emotions that may generate for him, the

maintenance of the legal tie is a form of commitment to him by his birth family which ameliorates the sense of abandonment. That sounds fairly abstract but it seems to me that it potentially has substance. This case is most unusual in the ranks of children living away from their birth family. In most cases there is a clear explanation which can be given which has child centred welfare at its heart. Even in such cases the impact on the child emotionally may be very significant. In a case such as this where W cannot be given any reason which explains a benefit to him of his being placed with the Applicants it seems to be that the risks to him of psychological fallout may very well be compounded. A child can at least grasp something about their parents being unwell or in prison as a reason or that in a step-parent adoption the other birth parent has played no role in their life and so there is a clear benefit to them in adoption. But for W there is no such reason. This is purely about satisfying the Applicants' desire for a family (but not an external adoption) and the L's wish to help them. W's needs are nowhere to be seen in this decision making and so things which might reduce the impact of that are significant. He may adjust to this fact without problems. But he may struggle and experience suggests that accepting that reality will present challenges. His brothers are similarly blameless in the story and so the maintenance of a legal link to them, the birth family's wish to ensure he remains a part of them legally which may be symbolic to a degree has the potential to be of considerable significance to W it seems to me. When he and his brothers are long past 18 perhaps all will be reconciled to the decision their parents made but that is far from guaranteed and it may be that the legal relationship of remaining brothers could be very important to W and to his brothers.

49. The loss in terms of PR for Mr & Ms L is limited. However the status issue for W and the birth family is a much more significant component, Status can be hard to define in terms of weight but is significant. The loss of relationship with his brothers is modest at the present time but there are short, medium and long term elements which need to be considered.

the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant including ;

the likelihood of any such relationship continuing and the value to the child of its doing so

50. The evidence supports the broad conclusion that both the Applicants and the birth parents will ensure contact is maintained. However, they see contact through different prisms and thus their commitment to it and its benefits is different. Each of them has an adult component - their needs - and a child component. For the Applicants they accept they should adhere to the agreement they struck that the birth parents would remain involved in his life. As a matter of honour, familial duty and friendship they will adhere to that. There is I accept a component in their thinking which recognises the advantages to W of knowing his birth family - although it seems they would rather that he had not known about their true identity so soon. However, there are also feelings of a desire to promote the independence of their family unit free from the constraints in time which come with maintaining the regular relationship. At its root a part of them would like to break free and do just as they would choose as an independent unit. There is also I detect a component of anxiety that developing too close a relationship jeopardises the integrity of their family unit. If they were not aware before (and I think they must have been) there is regret in the birth family about the gifting and so there is a lurking but irrational fear that somehow, they might go into reverse, that W might return to his birth family. The events around Covid and the breakdown in contact whilst no doubt in part arising from genuine concerns about Covid also seem to have been influenced by the parties underlying attitudes to the maintenance of the relationship. The birth family's commitment is complete, and they would move heaven and earth to maintain it; that might include interpreting Covid restrictions in the most beneficial way to maintaining it and it certainly involves them travelling from the Midlands in a way which clearly prioritises the contact as part of their lives. The converse would appear to be that the

Applicants interpreted Covid in a way which did not allow for the prioritisation of the relationship and since February Mr N's back pain has created an obstacle to them travelling to the Midlands. In any event the fact that it is squeezed into an early Sunday so W can return to football suggests that it is not as much a priority for the Applicants and this it seems is likely due to a complex mix of their lack of recognition of the real importance of maintaining and extending those relationships with his brothers and birth family together with a latent wish to have their independence and to live their lives in a way which is not restricted by the bonds created by the gifting of W. However, that fact may be inconvenient in terms of their autonomy as a complete family but fact it is. Whilst I accept that there is an underlying commitment to maintaining W's relationship with his birth family the evidence supports the conclusion that their commitment is significantly different in magnitude to that of the birth family. As W grows older and expresses views more strongly - particularly if they are not to travel to the Midlands and he has other things to do that would it seems to me to feed into a wish in the Applicants to assert their independence as a family and to live life as they choose rather than in obligation to the birth family. There is it seems to me a risk that in making an adoption order that this would tend to promote the independence of the Applicants and to feed the risk of contact not getting the priority it deserves. That is not to suggest they would seek to extinguish the relationship as the birth family fear - I think the bonds between the sisters and the family honour would hold them together, but it is not hard to see a slow erosion linked to the desire the Applicants have for autonomy. Given the limits to the understanding of the emotional importance to W of this and indeed the importance to them in maintaining the stability of W's position with them and the issues with ensuring boundaries are set and adhered to there is in my view a risk that adoption

will feed the drive for autonomy whereas an SGO will promote the importance of that invisible but strong bond that the gifting has created.

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,

51. The Applicants are completely committed to W and will provide him with a secure home where he is loved and cared for as an adored son. The totality of the evidence about the Applicants demonstrates that in respect of his physical, educational and emotional needs they are well equipped to meet the usual needs of a boy such as W. However, they do appear to have a limitation in so far as their ability to meet his emotional needs arising from his being gifted to them and all that flows from that in terms of his coming to terms with the reasons why he is not being raised by his birth parents and with his 3 brothers but with the Applicants. It seems clear from the evidence of the professionals - fortified by common sense - that the success of a placement of a child with another family is enhanced if the carers are able to deal sensitively and openly with questions that the child has about his identity and the reasons for his not being brought up by his birth family. So far W has had little reason to question this. Until earlier this year he believed the Applicants were his mum and dad - full stop. Now he knows that this is not so; he did not come from his mum's tummy but from Mrs L's and his dad is not the man who put him in Mrs L's tummy. He has found that upsetting although it is not playing out in his daily life and behaviour but he does even now have questions. The evidence (which I accept) demonstrates that Mr and Mrs N struggle with this reality emerging into their family. They have not told the school so they could see if there was any problem for W emerging at school - important as he might find it hard to talk to his mum and dad as it might upset them. When W got his Life Story book to

show Mr L and Mrs L Mrs N tried to stop this discussion. Later she rang Mrs L to ask her not to talk about it. Whilst I completely accept that for the adults to broach it with W should be done in a structured and planned way when the child raises the topic it is unhelpful and potentially harmful to W to shut down such questions. The result would be to internalise his feelings, worries, questions with potentially harmful consequences in terms of his relationships with the Applicants and his birth family and in terms of his emotional development. In their evidence Mr and Mrs N found it very difficult to engage with these complicated issues but rather seemed to see adoption as a panacea. They were unable to demonstrate that they had pondered over how to engage with the difficult questions W might have in the future. I accept that the process of giving evidence through an interpreter is not conducive to such openness on a difficult topic but the contrast with Mr L could not have been more marked. He had clearly grappled with the feelings of guilt and regret and how he might engage with W on why they had gifted him to the Applicants. I also appreciate that for the Applicants they have only had to grapple with the possibility of W asking questions very recently - for them they have been enjoying ordinary family life taking each day as it comes as mum, dad and son whereas Mr L and Mrs L have lived every day without their son and so the reality of their decision is visible and felt each and every day which is obviously more conducive to them thinking about it. Nor did the Applicants have the training that prospective adopters might usually have. However, it is a worry that neither Mr N or Mrs N are currently able to demonstrate that openness to talking with W, that self-scrutiny and emotional connection with the consequences of the gifting that places them in a position to deal constructively with issues as they emerge. At present they are unlikely to have to confront it much but as Dr Duffy identified, as W moves from childhood to adolescence and starts to ponder life in a more complex way they may

face some very difficult questions and some very critical questions as well as some very challenging behaviour. Unless they are able to develop a far deeper engagement with the possible consequences for W they are storing up trouble for themselves and for W. The sense that emerges from their discussions with professionals and their evidence is that they have a fairly deep-seated but well covered insecurity about the fact they are not W's birth parents and a fear (irrational at present) that W will leave them or Mr L and Mrs L will claim him back. It may be their lack of visible emotional connection with the consequences of the gifting itself arises from the fact that they are unwilling to confront their own role and responsibility for taking W in a quest to fulfil their adult needs and without addressing the consequences for W himself. Unless they are able to process any feelings of guilt, or any other emotion connected with the gifting they feel towards Mr L and Mrs L and W or themselves they are unlikely to be able to deal successfully with questions W might ask. True reflection is often painful. For prospective adopters they would receive training on how to deal with questions and this can be hard enough for adopters taking a child from care but this situation involves a far greater emotional complexity and Mr and Mrs N have had no training and at present appear both to lack the insight to grapple appropriately with the issues or a willingness to do so. That is a factor which I think is relevant to whether the adoption is likely to be as successful as they hope. It may be counterintuitive to them that the more they talk about it openly the more likely W is to settle and that the more they bury it the more unsettled he may be. Silence might work for an infant and a primary school child but experience tells the professionals that it is more likely the wrong approach for successful adoption. I think this is a relevant factor in considering the consequences of adoption in future. If one can be confident that adoption will be managed in the most constructive way by the adopters such that it has the best chance of success that

promotes adoption as being in the welfare interests of the child. If one has doubts about their ability to manage it and that the risk of a breakdown is greater than is contrary to welfare.

the wishes and feelings of any of the child's relatives or of any such person regarding the child.

52. Mr L and Mrs L were clear that in their opinion they do not believe that the adoption is necessary. They stated that currently under the SGO, Mr and Mrs N make all the decisions for W as they have parental responsibility and his birth parents do not interfere with how he is being raised. Mr L spoke of his concerns should the adoption order be granted, he stated that he worries that they would have no control over contact and that if he is adopted Mr and Mrs N could exonerate W from their life. Mr L and Mrs L's view that the current adoption application is too premature and that W should be asked when he is older. Mr L was clear in stating that he does not believe W should decide when he is older whether he wishes to be adopted, however it is best for professionals to wait until W is older to ascertain his wishes and feelings. When asked as to what age they would think is more suitable to ascertain W's wishes and feelings Mr L said that in their opinion around the age of 12 years old which is consistent with the age of W's older brother who is fully aware of the situation and understands why W does not live with the family. He said they would make it work if W was adopted. However W's other brothers who are somewhat younger are not fully understanding of the situation.
53. The court must consider the full range of its powers. In considering whether to make an Adoption order the alternative is in effect to make no order as to the status as the SGO will endure. A spending time with order will be made in either event.

54. The fact that an adoption order has two sides to it must feature in the evaluation. The advantage of the adoption is to add a further layer of security to W's home with the Applicants. I say a further layer because there are already many layers of permanency which derive primarily from the psychological attachment which exists between W and the Applicants, the existence of the Special Guardianship which endures and gives him permanence with the Applicants until W is 18 unless discharged by court order, the commitment by Mr L and Mrs L to adhere to the gifting agreement which has remained resolute over 7 years notwithstanding obvious regrets and the questions of their own children. However, the creation of that legal connection of parent and child that the adoption creates is the positive side of the coin.
55. The other side is the permanent severing of the legal relationship of the parents with W with the consequential severing of the legal relationship of brothers. As set out elsewhere the severing of the relationship with the parents is the termination of a legal relationship not the termination of the qualitative relationship they have had and could continue to have. I have reached conclusions elsewhere that making of an adoption order carries with it an enhanced risk that the qualitative relationship will be diminished because the conferring of parent status and the sense of autonomy that will accompany that will diminish the commitment of the Applicants to the relationship with the birth family. The termination of that legal relationship is therefore a lesser intrusion into the Article 8 rights of W and the birth family because W had never established the depth of family life with the birth family because he has never lived with them to develop those relationships of parent and sibling in the usual way. The severing of the legal relationship is permanent though. Subject to extraordinary circumstances there is no going back from the creation of that parent/child relationship between the Applicants and W and there is no way of resurrecting that parent/child/sibling's relationship

between W and his birth family. Whatever he might want in the future it will have ended.

56. In a unique situation such as this where so much of the accumulated learning about adopted children is so hard to graft onto the facts the permanence of the outcome adds a further layer of difficulty. In a situation where the adult decision making in 2017 took no proper or any account of the consequences for the child to embed that legally with no opportunity for W to express a view is a relevant factor. It is clearly potentially a matter of profound importance to him; having had his substantive relationship with his birth family converted to that of extended relations by the decisions of Mr L/Mrs L and Mr and Mrs N he may well wish to have a say on the nature of his legal relationships. It is entirely conceivable (and in my view more likely under an SGO) that he will say he wants Mr and Mrs N to be his legal parents and Mr L and Mrs L will I am sure hold to their commitment that they will then consent to his being adopted. However, it is conceivable (and in my view the risk is increased under an Adoption order) that his questions about his past will not be satisfactorily answered by the Applicants and he will question why his legal relationships with his parents and brothers was terminated and why he had no say on something that he could have.
57. The finality of the decision which has its benefits in that additional layer of permanence also has its loss in the absence of the opportunity for W to play a role in the decision about his future. Given he is now only rising 7 and that another 11 years have to run before the opportunity for him to express his views expires that is a very considerable window within which it will remain possible to promote that aspect of his Article 6 and Article 8 rights whilst ensuring that adoption can happen if it is the right thing for him. I accept that the downside of deferring the decision is to remove that additional layer

of permanence benefit for that period and any consequential psychological benefits that may come with it but I conclude that those are marginal (even allowing for the impact on the Applicants) given the lived reality of W and the Applicants will be that they are living as mum, dad and son. That lived permanent reality is what will be the best source of security for W and if that also fosters in the Applicants a greater willingness to ask themselves the difficult questions of themselves and to contemplate the difficult questions W might have of them as an adolescent that will be to all of their advantage.

Conclusion

58. The rare, if not unique circumstances of this case have presented a challenge to everyone. On the ground to the Applicants and to Mr L and Mrs L and to the 4 children who in different ways live with the consequences of the gifting each and every day. In the court process the professionals, lawyers and myself have had to apply familiar legal concepts to a novel factual landscape. That has undoubtedly stretched everyone as it is so rare to come across something unfamiliar in the world in which we operate. For the guardian and Dr Duffy that became visible in them referring to the ‘nothing else will do’ approach. For the social worker she seemed to struggle to adapt the usual advantages of adoption to take account of the unexpected variants in this case. That said all involved plainly were seeking to give of their best to reach the right result for W and the difference in views in this case turns on relatively small but significant areas of evaluation. A great deal is agreed. Of course, much that is well established in our accumulated knowledge of child development, adoption and human behaviour remains relevant but applying it within this factual context has needed a degree of anxious consideration not usually needed in answering questions about the benefits to children of becoming a permanent member of their family by adoption. Ultimately the decision has to be determined by going back to the basic question of W’s welfare and what

outcome holistically evaluated will promote his welfare best across his lifetime. That evaluation is one of fact, taking into account the s.1(4) checklist which must then be placed within the framework of whether it requires the court to dispense with the parents' consent to adoption and whether adoption is a proportionate interference with the Article 8 rights of those affected. The usual spectrum identified in the case-law from state interference removing children permanently from non-consenting but harmful parents through to a step-parent seeking to adopt a child whose other parent has been absent needs another axis added in a case such as this.

59. On the facts of this case and drawing together all that I have said above the holistic evaluation of the respective benefits and disadvantages of adoption and the respective benefits and disadvantages of continuing the SGO lead me to conclude that the continuation of the SGO will best promote W's welfare and that making an adoption order now would carry with it disadvantages and potentially harmful elements which outweigh the advantages of the additional layer of security that adoption might carry. Although the recognition of the de facto relationship could be characterised as more being consistent with adoption that would be to ignore the other fact specific features which undermine adoption as the most consistent legal and welfare founded order. I therefore conclude that adoption would currently be a disproportionate interference with the Article 8 rights of W primarily but also those of the birth parents and that the maintenance of the SGO is a proportionate response to the overall balance of rights involved. I therefore do not consider that the situation requires me to dispense with the birth parents' consent and I refuse the application for an adoption order. The SGO will endure.

60. I am clear however that the issue of adoption should be re-visited at some stage before the window of opportunity closes when the SGO expires as W reaches 18. It is possible that W will wish to cement his position as the de facto son of the Applicants by becoming their legal son. I do not consider raising the topic is to place the burden of decision making on him. His birth parents have been clear that they would support his making that decision if that is his wish. There should be no possibility of an emotional tug of war. If his Life Story has been openly and sensitively managed it is likely that the adults around him will discern what his views are and it is entirely possible it will emerge over time and in circumstances which are not pregnant with tension but as a natural progression emerging from the satisfactory answering of questions. However, it is of course possible that the other more problematic route develops in which case there might be a clear view expressed against or where it seems to the birth family it has become a sore they need to treat by consenting to adoption. It is likely that the issue will begin to emerge at some point after W is 11 and perhaps as he enters adolescence around 13. The revisiting issue should be capable of being incorporated into the Life Story work but might also be the subject of a letter from the Guardian or the court to be given to W when he reaches 13.
61. In order to give clarity to the arrangements and to ensure the contact takes place in a meaningful way and which cannot be subject to some of the uncertainties that have emerged since 2002 an order will benefit. All agree that it will promote W's welfare for an order to be made. That order should set a minimum visit each month alternating between the Midlands and the South East (or wherever each of the families happens to be providing they are within reasonable travelling distance). W and the Applicants will benefit by being able to develop a more autonomous life but W will benefit by more meaningful time with his brothers and his birth parents. A visit of not less than five

Approved Judgment

hours 12 times a year will promote that. Some may be built around family events. In practice it probably means

- i) a visit during each of the school holidays (2 in the summer)
- ii) a visit on 5 weekends during school term.

July (summer holiday)

August (summer holiday)

September (term time)

October (1/2 term holiday)

November (term time)

December (Xmas holiday)

January (term time)

February (1/2 term holiday)

March/April (Easter holiday and term time depending on when Easter falls)

May (Whitsun ½ term holiday)

June (term time)

62. One can foresee that this should have the flexibility to change and develop over time by agreement by the parties. It may be that W will want to go to stay with his brothers and their family, one or more of them may want to stay with him. The families should remain flexible but the underlying importance of those relationships should be promoted. If by the time W is 11 and his brothers are not interested in that format then it should be revisited by the parents and the boys and a new norm established.
63. That is my judgment.

Approved Judgment