

## Adoption: The journey to where we are now

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Lord Justice McFarlane asked the question, is adoption still the best option? He asked it in the context of care proceedings involving older children who have been deeply affected by their experiences at home prior to removal into care and their adoption. He posed this question in a wide-ranging lecture<sup>1</sup> in March 2017 on the balance between child protection and the right to family life. In the lecture, Lord Justice McFarlane, a senior judge who sits full time in the Court of Appeal and who has been recently appointed as the next President of the Family Division, pointed to some key changes to adoption over the years, namely the characteristics of the young people placed for adoption, the support or lack of it provided once they are adopted, and the challenges posed by social media to the confidentiality of the adoptive placement.

This is the first of two articles examining adoption, how it has changed and the current challenges posed within it. This first piece aims to provide a snapshot of the history of adoption and what the current system of adoption is.

### **What are we talking about when we refer to the care system?**

Local authorities (councils) are legally responsible for safeguarding and promoting the welfare of children in their area. A looked after child is one who is the care of a local authority. A child can be in local authority care with parental consent or following a court order. Public law cases, also called care proceedings, are the typical means by which children are removed from their parents. The Children Act 1989 governs this. The threshold for state intervention in family life is if a child is suffering or is likely to suffer significant harm. Once this is satisfied, the court turns to welfare considerations and determines what type of court order is required in the child's best interests.

In care proceedings a local authority is obliged to draw up a care plan, detailing where it considers a child should live on a long-term basis. If a local authority believes a child should remain in its care permanently, it must normally seek a care order at the end of the court proceedings. The options for children vary from living with their parents under a care order or

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<sup>1</sup> The Inaugural Bridget Lindley OBE Memorial Lecture, "Holding the Risk: The Balance Between Child Protection and the Right to Family Life", 9 March 2017

a supervision order, living with family members or friends, to foster care or adoption. Approximately three-quarters of children who are looked after are in foster care.<sup>2</sup>

If a care order is granted, a local authority shares parental responsibility with parents. If the local authority believes that a child should be adopted, it will seek what is called a placement order, permitting it to place a child for adoption with prospective adopters. Prospective adopters can then apply to the court for an adoption order after a child has lived with them for 10 weeks.<sup>3</sup>

Adoption remains the most contentious of the outcomes in care proceedings, due to the severing of the relationship between the child concerned and their birth family. Adoption transfers all legal parental rights and responsibilities to the adoptive parents.

Adoption in England is facilitated by an adoption agency, either as part of a local authority or by an independent voluntary agency (formerly known as a voluntary adoption agency). Local authorities have children in their care, whereas independent voluntary adoption agencies do not. Local authorities alone can apply for a placement order.<sup>4</sup>

### **The Adoption Act 1926 and subsequent Acts in 1930s**

Some adoption societies formed during the first world war, as a result of the alleged large numbers of 'war babies'.<sup>5</sup> A Committee was appointed in 1920, called the Hopkinson Committee, to consider the desirability of making legal provision for adoption. At this stage there was no law permitting legal adoption.

The Hopkinson Committee's attention had been drawn to the lack of security felt by some who had taken permanent 'charge of a child', those foster parents who had no definite legal rights over the child and who ran the risk that at any time the 'natural parents may appear and disturb it, claim to take it away and even attempt to levy blackmail'.<sup>6</sup> The Committee heard evidence from witnesses who said it was not uncommon that when a child reached an age where it could work and earn wages, parents would claim it back 'simply to take its earnings'.<sup>7</sup>

One of the prevailing principles behind adoption is made clear in the Report: the belief that it is better for a child to be brought up in another home as part of a family rather than an institution, 'family life should be the normal condition'.<sup>8</sup> The Report in 1921 recommended urgent legislation for adoption,<sup>9</sup> however no legislation followed.

The Tomlin Committee returned to the issue in 1924 and provided three reports. The Tomlin Committee was concerned that mothers of illegitimate children who only seek temporary

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<sup>2</sup> 74%, Children Looked After in England (including adoption), year ending March 2017, Department of Education [SFR/50/2017, 28 September 2017]

<sup>3</sup> Section 42 of the Adoption and Children Act 2002.

<sup>4</sup> Section 21 of the Adoption and Children Act 2002.

<sup>5</sup> Home Office and Scottish Home Department, *Report of the Departmental Committee on the Adoption of Children*, Cmd 9248, September 1954, page 2. Also referred to as the Hurst Committee.

<sup>6</sup> *Report of the Committee on Child Adoption*, Cmd 1254, 1921, page 5, paragraph 13.

<sup>7</sup> *Ibid*, page 5, paragraph 13.

<sup>8</sup> *Ibid*, page 4, paragraph 11.

<sup>9</sup> *Ibid*, page 4, paragraph 9.

provision for their child may feel compelled by social or economic pressure to give up their child. The Committee felt that safeguards should be in place.<sup>10</sup> It also recommended the consent of natural parents to adoption should be obtained unless consent could be dispensed with on the grounds they had disappeared or abandoned the child or become incapacitated from giving such consent.<sup>11</sup>

The Committee expressed firm views about the secrecy surrounding adoption: 'There are those who attach great importance to an element of secrecy in adoption transactions and by secrecy is meant not merely that the transaction itself should not be a matter of common notoriety but that the parties themselves should not become known to each other'. The Committee disapproved: 'We think that this system of secrecy would be wholly unnecessary and objectionable in connection with a legalised system of adoption and we should deprecate any attempt to introduce it'.<sup>12</sup>

The Second Report by the Tomlin Committee<sup>13</sup> provided a draft of the Bill which was the basis of the Adoption Act 1926. The Third Report<sup>14</sup> addressed various administrative issues.

The Adoption Act 1926 made legal adoption possible for the first time. The effect of an adoption order made by the court was to extinguish 'all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished'. All such rights, duties, obligations and liabilities vested in and were enforceable against the adopters 'as though the adopted child was a child born to the adopter in lawful wedlock'.<sup>15</sup> Whilst this may be worded differently today, the effect of adoption is still the same.

Restrictions were put in place: Other than two spouses, no adoption order could be made authorising more than one person to adopt,<sup>16</sup> and age restrictions were put in place: the applicant must be over 25, only less than 21 if a relative. No order could be made if the sole applicant was male and the infant was female unless the court was satisfied there were special circumstances to justify it.<sup>17</sup>

This first Adoption Act contained within it the principle that adoption should be consensual in the majority of cases. Parental consent was to be given to a specific adoption by a named adopter. The idea of adoption by consent is extremely rare in current adoption practice, even rarer to know the identity of adopters. The Act set out that a court could dispense with parental consent in narrow circumstances: if satisfied the person had abandoned or deserted the infant, could not be found, was incapable of giving consent, or if liable to support the child and had persistently neglected or refused to do so or 'is a person whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with'.<sup>18</sup>

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<sup>10</sup> *Child Adoption Committee*, First Report, Cmd 2401, 1925, page 5, paragraph 11.

<sup>11</sup> *Ibid*, page 8, paragraph 25.

<sup>12</sup> *Ibid*, page 9, paragraph 28.

<sup>13</sup> *Child Adoption Committee*, Second Report, Cmd 2469, 1925.

<sup>14</sup> *Child Adoption Committee*, Third and Final Report, Cmd 2711, 1926.

<sup>15</sup> Section 5 of the Adoption Act 1926.

<sup>16</sup> Section 1(3) of the Adoption Act 1926.

<sup>17</sup> Sections 2(1) and 2(2) of the Adoption Act 1926.

<sup>18</sup> Section 2(3) of the Adoption Act 1926.

The welfare of the child is referred to as one of the matters that the court must be satisfied of prior to making an order, with due consideration being given to the wishes of the infant having regard to their age and understanding.<sup>19</sup> Parental consent was not required if the court was satisfied 'in all the circumstances of the case it is just and equitable and for the welfare of the infant that no such consent should be required' when a child has been brought up by a person/two spouses under any de facto adoption for a period of 'not less than two years'.<sup>20</sup>

In part the rationale for adoption by consent was to reduce the possibility of future interference from a birth parent. To reinforce this, the Act required the court to be satisfied that parents understood what they had consented to, in particular that they would be 'permanently' deprived of their parental rights.<sup>21</sup> The Act does not allow payment or reward in relation to adoption except that which the court may sanction.<sup>22</sup>

The Act enabled an adopted person to obtain a birth certificate in the name by which they were known, and it contained a degree of privacy, only in the newly established Adopted Children Register could the original birth certificate be traced.<sup>23</sup>

### Adoption societies and agencies

Whilst the 1926 Act legalised adoption, it did nothing to regulate the adoption societies which were often used. Eventually action was taken and Florence Hosburgh, the Member of Parliament for Dundee, headed the Committee considering this.<sup>24</sup> By 1936, the entries in the adopted children register were 5,185.<sup>25</sup> At that time, more than 1,200 children were placed with adopters every year by societies describing themselves as adoption societies and probably several hundred by other agencies.<sup>26</sup> The three largest adoption societies were all relatively recent, founded in 1913, 1917 and then 1920.<sup>27</sup>

From the outset adoption societies had their detractors. Some witnesses before the Hosburgh Committee felt that that the work of adoption societies and agencies should not be encouraged, because of the risks inherent in any system of adoption. The Committee itself felt that 'for the child a good family life is to be preferred to life in an institution, however excellent, and adoption has the additional advantage that a child brought up as a member of the adopters' own family enjoys a sense of security which otherwise it might not acquire'.<sup>28</sup>

This was the first Committee to address in more detail the welfare of the child, stating clearly 'it appears to us beyond question that the first duty of the adoption society is to the child'<sup>29</sup> and that adoption societies should make full inquiries 'not only into the economic and social circumstances of applicants for children, but also into their suitability on other grounds to

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<sup>19</sup> Section 3(b) of the Adoption Act 1926.

<sup>20</sup> Section 10 of the Adoption Act 1926.

<sup>21</sup> Section 3 of the Adoption Act 1926.

<sup>22</sup> Section 3(c) and Section 9 of the Adoption Act 1926.

<sup>23</sup> Section 11 of the Adoption Act 1926.

<sup>24</sup> *Report of the Departmental Committee on Adoption Societies and Agencies*, Cmd 5499, 1937.

<sup>25</sup> *Ibid*, page 4.

<sup>26</sup> *Ibid*, page 8, paragraph 7.

<sup>27</sup> *Ibid*, page 5, paragraph 4.

<sup>28</sup> *Ibid*, pages 5-6, paragraph 5.

<sup>29</sup> *Ibid*, page 10, paragraph 10.

receive the care of a child'. The Report heard evidence about children adopted in circumstances when the adoption should not have taken place.

The Report stated it was important that parents should 'fully understand the consequences of handing over a child for adoption and they should be made aware they have both a duty and a right to attend court'.<sup>30</sup> It recommended that a parent was given a memorandum in a prescribed form explaining the effect of legal adoption and their rights and duties and that the signature of a parent was obtained stating they have read and understood it.<sup>31</sup> The Report noted that some parents had signed blank consent forms despite the legislation requiring specific consent to a named adopter.<sup>32</sup>

The Hosburgh Committee's recommendations formed the basis of the Adoption of Children (Regulation) Act 1939. This provided for the registration of adoption societies. It required a local authority to be notified of any informal adoption of any child under 9 years old. It required supervision by local authorities of children placed through a third party for adoption and provided for a probationary period in cases arranged by an adoption society. It also made it illegal to advertise children for adoption or to adopt for financial reward save by a local authority. Due to the outbreak of war in 1939, it did not come into force until 1943.

It was only in the Adoption of Children Act 1949<sup>33</sup> that a level of State monitoring was introduced for all adoptions. A probationary period of 3 months was required before an adoption order could be granted and an applicant for an adoption order must have notified the welfare authority in the area where they were resident at least 3 months earlier of their intention to apply for an adoption order.<sup>34</sup> This was already required in the case of children placed by adoption societies. The Act was similar to previous Acts requiring parental consent, with similar grounds for dispensing with it.<sup>35</sup> For the first time, the Act provided that adopted children were treated as children for the purposes of intestacies and wills. It enabled an application for an adoption order to be made without the natural parents knowing the adopters' identity. It set out provisions for registration in the Adopted Children Register.<sup>36</sup> It restricted adoption to infants of at least 6 weeks old by introducing the provision that a mother's consent document was not valid before then.<sup>37</sup> This six week requirement remains the law today.

### The Hurst Committee

The number of adoption orders had risen steady from just under 3,000 in 1927 to a peak of over 21,000 in 1946. In 1953, the Hurst Committee<sup>38</sup> was appointed to review adoption policy and law. Adoptions were averaging about 14,000 annually at the time of the Report.<sup>39</sup> The numbers of adopters were 'far greater than the number of children readily available at

<sup>30</sup> *Report of the Departmental Committee on Adoption Societies and Agencies*, Cmd 5499, 1937, page 22.

<sup>31</sup> *Ibid*, page 49.

<sup>32</sup> *Ibid*, page 19.

<sup>33</sup> <http://www.educationengland.org.uk/documents/acts/1949-adoption-children-act.pdf>

<sup>34</sup> Section 5 of the Adoption of Children Act 1949.

<sup>35</sup> Section 3 of the Adoption of Children Act 1949.

<sup>36</sup> Section 12 of the Adoption of Children Act 1949.

<sup>37</sup> Section 3(3) of the Adoption of Children Act 1949.

<sup>38</sup> *Report of the Departmental Committee on the Adoption of Children*, Cmd 9248, 1954.

<sup>39</sup> *Ibid*, page 4, paragraph 19.

any one time'.<sup>40</sup> Risks that may lead to unhappiness were noted: 'children must be protected from unnecessary separation from natural parents who, with adequate help and guidance, could provide security and love in their own home. They must be protected from adoption by people who are unsuited to the responsibility of bringing them up or want a child for a wrong motive. When they have settled satisfactorily in their adoptive home they must not be interfered with'.<sup>41</sup>

The Hurst Committee was clear that despite the practice of most adoption courts emphasising the necessity of telling a child they are adopted, it was still all too common for adopters to try to conceal the adoption.<sup>42</sup> The Committee stated that adopters should understand that with this secrecy they may seriously jeopardise a child's emotional development and future happiness. The Committee felt that despite various shortcomings, 'the general result of legalised adoption has been to increase immeasurably the happiness and well-being of over a million members of the community'.<sup>43</sup>

Having heard evidence from adoption societies of all types, the criticism which appeared the most valid related to the lack of care taken in placing the child.<sup>44</sup> The second major criticism was that most societies did not employ trained workers.<sup>45</sup> The Committee stressed it was vital to establish before a child is placed that the mother is not seeking adoption to overcome present difficulties.<sup>46</sup> It recommended that children placed by adoption societies were as fully protected as children placed by a local authority.

The extent of adoption arranged by third parties or directly by families was considerable, more than one-third of the adoption orders made each year.<sup>47</sup> Only about one quarter of the adoption orders made were those arranged by societies or local authorities.<sup>48</sup> Almost all the witnesses the Committee heard stressed the undesirability of third party adoptions,<sup>49</sup> the interests of the child not receiving much, if any, consideration.<sup>50</sup> The Committee did not feel able to fetter the goodwill of neighbours and did not think it wise to prohibit direct or third party placements.<sup>51</sup>

The Committee did consider the issue of whether a parent's consent could be dispensed with by giving paramount importance to the welfare of the child. The Committee recommended the removal of the ground that consent is unreasonably withheld<sup>52</sup> with the additional ground of dispensing with consent of a parent who has made no attempt to discharge the responsibilities of a parent.

The Hurst Report led to the Adoption Act 1958, which implemented most of the Committee's recommendations. The Adoption Act 1958 allowed adoption agencies to place children not under their control with adopters, such as those looked after by local authorities. This

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<sup>40</sup> *Report of the Departmental Committee on the Adoption of Children*, Cmd 9248, 1954, page 4, paragraph 19.

<sup>41</sup> *Ibid*, pages 4-5, paragraph 19.

<sup>42</sup> *Ibid*, page 6, paragraph 22.

<sup>43</sup> *Ibid*, page 6, paragraph 23.

<sup>44</sup> *Ibid*, page 9, paragraph 35.

<sup>45</sup> *Ibid*, page 9, paragraph 36.

<sup>46</sup> *Ibid*, page 10, paragraph 36.

<sup>47</sup> *Ibid*, page 12, paragraph 45.

<sup>48</sup> *Ibid*, page 12, paragraph 45.

<sup>49</sup> *Ibid*, page 11, paragraph 43.

<sup>50</sup> *Ibid*, page 11, paragraph 43.

<sup>51</sup> *Ibid*, page 12, paragraph 47.

<sup>52</sup> *Ibid*, page 31, paragraph 120.

required submitting local authorities to the same regulation as adoption agencies. Adopters were required to give 3 months' notice to local authorities of their intention to adopt. Anonymous adverts offering to care for children were prohibited. The Court was permitted to dispense with parental consent to adoption if the parent or guardian of the child had persistently failed without reasonable cause to discharge the obligations of a parent or guardian. It also set out that children awaiting adoption or placed with strangers, below the upper limit of the compulsory school age, were deemed a 'protected child' and were to be visited 'from time to time' by officers of the authority and the premises where they were could be inspected.

Three subsequent Adoption Acts, in 1960, 1964, and 1968, did not make any fundamental changes.

### The Houghton Committee

In 1972, the Houghton Committee was set up to consider the policy relating to the provision of adoption.<sup>53</sup> It set out that for children who cannot be brought up by their own parents, 'society must offer a satisfactory alternative plan for the care and future development of such children'.<sup>54</sup> Interestingly the Committee recognised that in some cases 'there is a strong bond with the wider natural family which should not be severed'.

In terms of numbers, adoptions had risen steadily from 14,668 in 1958 to a peak of 26,986 and then declined. The provisional figure for orders registered in 1971 was 23,399. There had been a fall in the number of babies being offered for adoption, this was attributed to abortion, contraception, unmarried mothers becoming less disadvantaged, and the changing attitude to illegitimacy. There was no shortage of suitable couples wishing to adopt.<sup>55</sup> At the time of the report, there were 63 voluntary adoption societies in England and Wales and 96 of the 172 local authorities in England and Wales acted as adoptions agencies and the number was slowly increasing.<sup>56</sup> In 1971 voluntary societies placed about 5,650 children for adoption compared with about 4,130 placed by local authorities.<sup>57</sup>

The Committee moved away from the Hurst Committee's reluctance to prohibit third party adoptions recommending this be made an offence once the new registration procedure for societies came into force.<sup>58</sup>

In 1966, 66% of adoptions were by non-relatives, 29% by parents (mainly natural parent and step parent but in a few cases natural parent alone) and 5% by other relatives. Since then the number of adoptions by parents and step parents had increased and there were 10,849 adoptions by a step parent in 1970. The Committee expressed disquiet about adoption by relatives, stating that it severs in law but not in fact an existing relationship of blood or of affinity and creates an adoptive relationship in place of the natural relationship.<sup>59</sup> The

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<sup>53</sup> Home Office and Scottish Education Department, *Report of the Departmental Committee of the Adoption of Children*, Cmnd 5107, 1972.

<sup>54</sup> *Ibid*, page 4, paragraph 16.

<sup>55</sup> *Ibid*, page 5, paragraph 20.

<sup>56</sup> *Ibid*, page 10, paragraph 32.

<sup>57</sup> *Ibid*, page 12, paragraph 41.

<sup>58</sup> *Ibid*, page 25, paragraph 92.

<sup>59</sup> *Ibid*, page 27, paragraph 97.

Houghton Committee felt that discovery later in life that a child's parents were their grandparents may be more damaging than in other adoptions.<sup>60</sup> The Committee recommended guardianship should normally be the appropriate means of recognising the position of relatives who seek to care for a child.<sup>61</sup> The status of guardianship is now found in law in the provisions for special guardianship.<sup>62</sup>

The issue of parental consent was considered by the Committee. The majority of witnesses supported the proposition that the child's welfare should be the first and paramount consideration, some witnesses supporting this on the assumption that the courts would recognise that the child's welfare included maintaining links with natural parents where this was in the child's interests.<sup>63</sup> However, some witnesses feared that the law would be weighed too heavily against the natural parents and the courts might place too much emphasis on wealth and social status.<sup>64</sup> This debate was very much a precursor to how the law has evolved in respect of parental consent, the paramountcy of the child's welfare and the perception held in some quarters of bias against natural parents.

The Adoption Act 1976 aimed to professionalise and regulate adoption. It set out the duty of local authorities to establish adoption services, and the procedure for their approval. It did not make the child's welfare the paramount consideration, however it did establish that any decision in relation to adoption by a court or adoption agency shall have regard to all the circumstances, the first consideration being given to the need to safeguard and promote the welfare of the child throughout their childhood. The Act did not permit adoption by unmarried couples (same sex and opposite sex).

The test for freeing a child for adoption was either parental consent, or that their consent is dispensed with. The grounds for dispensing with consent were that they could not be found, were incapable of giving agreement, were withholding agreement unreasonably, abandonment, neglect or ill-treatment including that they seriously ill-treated the child and the child's rehabilitation into their household was unlikely.

## The Children Act 1989

In the 1980s the Interdepartmental Review of Child Care Law was established in 1984. It was a response to the Report of the House of Commons Social Services Committee on Children in Care. It provided a report.<sup>65</sup> The approach taken to children at risk of harm and families in need of support was changed radically by the Children Act 1989, which came into force in England and Wales on 14 October 1991. It remains in force and the main piece of legislation relating to children.

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<sup>60</sup> Home Office and Scottish Education Department, *Report of the Departmental Committee of the Adoption of Children*, Cmnd 5107, 1972, page 30, paragraph 111.

<sup>61</sup> *Ibid*, page 31, paragraph 115.

<sup>62</sup> The Adoption and Children Act 2002 provides the legal framework for special guardianship under the Children Act 1989. Section 115(1) of the 2002 Act inserted new sections 14A-F into the Children Act 1989

<sup>63</sup> Home Office and Scottish Education Department, *Report of the Departmental Committee of the Adoption of Children*, Cmnd 5107, 1972, page 60, paragraph 209.

<sup>64</sup> *Ibid*, page 60, paragraph 209

<sup>65</sup> (1985) *Review of Child Care Law. Report to Ministers of an Interdepartmental Working Party*. (HMSO, London).



One of its central principles was that children are usually best looked after within their family. Local Authorities were under a general duty to safeguard the welfare of children within their area who are “in need” and so far as is consistent with this, to promote children’s upbringing by their families, by providing a range of services.<sup>66</sup> The focus in section 17 embodied a shift to a more proactive partnership with parents, with services to be provided to families in distress. The range of support services that may be provided were wide.

It established the child’s welfare as the ‘court’s paramount consideration’, a significant move from it being the ‘first consideration’ and it established beyond doubt that the welfare of the child took centre stage. It set out that delay is ‘likely to prejudice the welfare of the child’. It espoused the ‘no order’ principle, the philosophy behind that being non-interventionist, the court should only make a court order when it considers that doing so would be better for the child than making no order at all.

### A shift in focus to adoption

Although the Children Act 1989 appeared to focus on preventative work and services, soon there were concerns that it had led to children remaining at home in circumstances when they should have been removed from the care of their parents.

In 1993 the White Paper, *Adoption: The Future* stated, ‘there is however some concern that local authorities may sometimes work to keep a child with an unsatisfactory family for too long when it would be better to apply to the court for an order authorising an alternative family placement with perhaps a view to adoption’.<sup>67</sup> At the time of the White Paper, step-parent and relative adoptions accounted for about half the total of adoptions, and without those adoptions the total number of children being adopted was some 3,500 a year.<sup>68</sup> The White Paper did not propose that unmarried couples should be able to apply for adoption.<sup>69</sup>

The newly elected Labour Government followed this White Paper with one of their own, setting out their vision for adoption. This White Paper in 2000<sup>70</sup> set out its belief that ‘more can and should be done to promote the wider use of adoption’.<sup>71</sup> It set a target of increasing by 40% and if possible 50% by 2004-2005 the number of looked after children adopted.<sup>72</sup> In 1999 the number of adoption orders made was 4,323, the lowest annual number made since 1974.

The Labour government enacted the Adoption and Children Act 2002. In it, the child’s welfare throughout their life is the paramount consideration. It takes account of the lifelong consequences of adoption. Regard must be had to the effect on the child (throughout life) of having ceased to be a member of the original family and becoming an adopted person. Agencies and courts must consider the child’s relationship with relatives and other relevant

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<sup>66</sup> Section 17, Children Act 1989

<sup>67</sup> Department of Health, Welsh Office, Home Office, Lord Chancellor’s Department, *Adoption: The Future*, November 1993, Cm 2288, page 5, paragraph 3.16.

<sup>68</sup> Department of Health, Welsh Office, Home Office, Lord Chancellor’s Department, *Adoption: The Future*, November 1993, Cm 2288, page 5, paragraph 3.9.

<sup>69</sup> *Ibid*, paragraph 4.39.

<sup>70</sup> Department of Health, *Adoption, a new approach*, Cm 5017, December 2000.

<sup>71</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/263529/5017.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/263529/5017.pdf)

<sup>72</sup> *Ibid*, page 4

<sup>72</sup> *Ibid*, page 5

people, and the likelihood and value of its continuation. The ability and willingness of relatives to provide a secure environment for development, and to meet the child's needs, and the wishes and feelings of relatives must also be taken into account. Relatives in this context are not limited to those with a biological relationship. As in the Children Act, the principles of no delay and 'no order' are present.

The Act allowed for adoption by civil partners, married and unmarried couples, and sole adopters. Parental consent must be given 'unconditionally and with full understanding of what is involved'.<sup>73</sup> The test for dispensing with parental consent became purely a welfare determination, namely that the welfare of the child requires parental consent be dispensed with.

### The situation today

Today the majority of children adopted come from the care system. The factors that drive care proceedings are diverse. What has been termed by the Association of Directors of Children's Services as 'the toxic trio' of domestic abuse, parental mental health and parental substance misuse, 'continue to be a major and increasingly prevalent reason for the involvement of children's social care in children's and families' lives'.<sup>74</sup> These proceedings are usually stressful and difficult for parents. The decisions reached in these proceedings have life-long consequences for the families involved and they are also important to society.

Adoption is arguably the most contentious of the outcomes of care proceedings, but it is not the most common. There were 72,670 looked after children at 31 March 2017,<sup>75</sup> 61% of whom were being looked after due to abuse or neglect. Most of these children are in foster care. In 2017, 4,350 looked after children were adopted, down 8% on 2016 and down 19% from the peak of 5,360 in 2015. In the year ending 31 March 2017, the average age at adoption was 3 years and 4 months, similar to 2015 and 2016, but slightly lower than the average age of 3 years and 8 months in 2013.<sup>76</sup> In terms of age, 5 to 9 year olds represented 21% of looked after children who were adopted, 7% were aged under 1 year and the remaining 1% were aged 10 years and over.

Courts are conscious of the enormity of approving a care plan for adoption. The President of the Family Division, Sir James Munby, stated (when he was Munby J) in *Re L (Care: Assessment: Fair Trial)*:

'[I]t must never be forgotten that, with the state's abandonment of the right to impose capital sentences, orders of the kind which judges of this Division are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make. It is a terrible thing to say to any parent – particularly, perhaps, to a mother – that he or she is to lose their child for ever'.<sup>77</sup>

<sup>73</sup> Section 52 of the Adoption and Children Act 2002.

<sup>74</sup> *Safeguarding Pressures Phase 5*, December 2016, the Association of Directors of Children's Services Ltd (ADCS), page 3.

<sup>75</sup> Children Looked After in England (including adoption), year ending March 2017, Department of Education [SFR/50/2017, 28 September 2017]

<sup>76</sup> *Ibid.*

<sup>77</sup> [2002] EWHC 1379 (Fam); [2002] 2 FLR 730, at paragraph 150

A court determining a care plan for adoption must strike the right balance between the rights of parents, and the child, in maintaining their existing family life and the rights of the child to be protected from significant harm. The Supreme Court and the Court of Appeal have both addressed the severity of adoption.<sup>78</sup>

### Concluding summary

Adoption is often an emotive subject, which has attracted controversy and newspaper headlines over the years. It has changed immensely over time and has evolved from being unregulated and private to being utilised as an outcome for children in the care system, reflective of the changes in society. Whilst initially consensual, albeit that the social mores of the time and economic realities may have made the presence of such consent illusory, few adoptions are now consensual with the majority being court determined with parental consent dispensed with on the grounds that a child's welfare requires it. The methods of adoption have transformed from adoptions often being facilitated by third parties, to adoption now being professionalised and highly regulated, and very much part of the child protection system in place.

The children placed for adoption have changed from being young babies, placed in adoptive homes by unmarried mothers, to being older children whose parents have been determined by the court as being unable to look after them. The majority of children who are looked after have suffered abuse or neglect. These children, most often not babies, are then adopted and are more likely to have memories of their home life before being adopted. These changing characteristics of the children who are adopted, both in terms of age and what has happened to them prior to being adopted, present their own challenges. It is to these challenges that we turn next, and they are examined in the second article on this complex issue.

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<sup>78</sup> For example, the Supreme Court case of *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; the Court of Appeal case of *Re B-S (Children) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ 1146

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