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Step-parent adoption after the death of a parent: Article 8 and family relationships

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Introduction

Step-parent adoption is a legal mechanism under s 51(2) of the Adoption and Children Act 2002 ('ACA 2002') that permits the partner of one of the child's birth parents to adopt that child, without the parent themselves having to adopt their own child. Ordinarily, the effect of the order is to terminate the existing parental relationship (and any parental responsibility) with the child's other birth parent, and make the child the legal child of their one original birth parent and that parent's new partner. In light of the Article 8 interference with various people's right to respect for their private

and family life, and the availability of orders granting a step-parent parental responsibility without the need for an adoption order (CA 1989, s 4A), step-parent adoption is relatively uncommon, but there are cases where it is the best way to reflect the child's lived experience and future family relationships.

Re H (Step-Parent Adoption: Human Rights) [2023] EWHC 3186 (Fam) was such a case, heard last year by the President, Sir Andrew McFarlane. The story starts in another EU country, where the mother and birth father were from. They had a very short relationship and had separated before the child, H, was born. H had never had any contact with him, and the birth father had never expressed any interest in H; the birth father was not named on H's birth certificate and did not have parental responsibility for H. The mother entered a new relationship when H was an infant. Her new partner was British, and the family moved to the UK, and married when H was just 2 years old. They lived as a family, H's step-father being his father in every practical sense. McFarlane P held in his judgment in *Re H* that 'it is accepted, as indeed it obviously must be, that the applicant step-father and H have the fullest possible family life relationship'. A step-parent adoption order would have been readily granted on the facts if it had been sought at this stage.

Sadly, however, before any application could be made under s 51(2), H's mother died when H was just 13 years old. As the immediate period of grief began to pass, H's precarious legal position became apparent to him. He had no one in his life with parental responsibility, and his only surviving parent was a total stranger to him living in another country. We were instructed by the step-father to seek a step-parent adoption order in relation to H, and were delighted to be able to represent him pro bono for the High Court stages of this important application. H himself, now 17, was strongly supportive of the application. He attended all the hearings, he had his own legal representative as well as writing to the court to express his clear views in favour of the adoption order.

The legal problem

Under s 51(2) of the ACA 2002, it is provided that:

> 'An adoption order may be made on the application of one person who has attained the age of 21 years if the court is satisfied that the person is the partner of a parent of the person to be adopted.'

This provision is to be read alongside ss 46(3)(b) and 67(2) of the ACA 2002:

> 'An Adoption order…
>
> In the case of an order made on an application under 51(2) by the partner of a parent of the adopted child, does not affect the parental responsibility of that parent or any duties of that parent within subsection 2(d).'

and

> 'an adopted child is the legitimate child of the adopters or adopter and if adopted by …
>
> b. one of a couple under section 51(2)
>
> is to be treated as the child of the relationship of the couple in question.'

The problem in H's case is the wording of s 51(2) itself – the applicant needs to satisfy the court 'that the person *is* the partner of a parent of the person to be adopted'. Sadly, due to the death of H's mother, his step-father was no longer the partner of H's parent. On its face, this provision was therefore not applicable to H's situation.

H's step-father could, instead, have sought a single-person adoption order under s 51(1) of the ACA 2002. No doubt such an application could have been granted. However, the consequence of that

order is to make the child legally the child only of the person adopting him or her. In H's case, it would have meant that not only was his birth father removed as his parent, but so too would be his deceased mother. In itself, it seems offensive to say that H should have to lose his legal relationship with his deceased mother in order to have a legal parental relationship with his step-father, but there are also significant practical consequences.

One consequence is that one's wider kinship relationships – the identity of one's grandparent, aunts, uncles, cousins, and so on – is determined, as a matter of law, by the identity of one's parents. Removing H's mother as his legal parent would have the effect, in law (though not in fact), of also terminating his relationship with his wider maternal family, with whom he was close. Related to this (though not an issue on the facts), there are potential consequences in terms of inheritance for a child from losing one side of their lineage. Finally, for H specifically, he had citizenship of his mother's country of origin. It was not proportionate to get expert advice in this case about the potential consequences of H losing his relationship with both birth parents, but it was at least possible that doing so would create difficulties for H in relation to his citizenship. (The adoption order would automatically grant him British citizenship, so there was no risk of him becoming stateless.)

Against this background, on the step-father's behalf, we sought an order that s 51(2) should be 'read down' using s 3 of the Human Rights Act 1998 (HRA 1998), so as to allow a step-parent adoption order to be made.

The human rights arguments

The President, in his judgment, accepted our argument that the unavailability of a step-parent adoption order under s 51(2) amounted to a breach of the Article 8 rights of both the applicant step-father and of H. The question therefore was what the court could do about that.

As is well known, s 3 of the HRA 1998 requires the court to interpret legislation in a Convention-compliant manner if possible:

> '3. Interpretation of legislation
>
> (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.'

Our application was for the court to 'read down' s 51(2), so that the words '(or was the partner until the time of the parent's death)' would be added to the end of that provision:

> 'An adoption order may be made on the application of one person who has attained the age of 21 years if the court is satisfied that the person is the partner of a parent of the person to be adopted (*or was the partner until the time of the parent's death*).'

As the President set out in his judgment, the approach to s 3 interpretation is guided by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 FLR 600. Lord Nicholls (para [32]) commends a broad approach to legislative interpretation, saying that for example s 3 may 'require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant'. However, as he went on to say (para [33]), it was necessary for the interpretation adopted to 'go with the grain of the legislation' or, as Lord Rodger put it (para [122]), to take an approach that 'leaves the essential principles and scope of the legislation intact' while still interpreting it in a way that is compatible with the Convention rights in question.

In considering s 51(2) and the proposed additional words to be 'read down' into it, in *Re H* the President said (para [30]):

> 'the outcome that is sought by the applicant and by H is, to my eyes, entirely compatible with the preservation and enhancement of their respective rights under Article 8. Not

> only would an adoption order in favour of the applicant under section 51(2) bring him into the correct legal status with respect to H which mirrors their lived reality, and indeed the reality that H has known since the age of 2 …, but it will maintain the extant legal family life relationship that he had had with his mother and continues to have with his maternal family.'

We drew support for our arguments on the step-father's behalf from a series of judgments, principally of Theis J, in the surrogacy context. While the legislative framework there is different, those cases also involve a 'transformative' court order that changes a child's legal parentage, and in that context the court has previously had to consider the effect of the death of one of the intended parents, either before the order was finalised or before any application was even made (see in particular *A v P (Surrogacy: Parental Order: Death of Applicant)* [2011] EWHC 1738 (Fam), [2012] 2 FLR 145 and *Re X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39, [2020] 2 FLR 1326).

Having set these authorities out and considered the wider arguments in relation to Art 8 that we put forward, the President concluded that our proposed wording should be adopted:

> 'To do so is entirely compatible with the underlying policy of the Act. Parliament deliberately created section 51(2) in order to provide a proportionate but needed route by which a step-parent could enter into equal status with a natural parent with whom they were in a relationship or to whom they were married, without dislocating the legal relationship that the natural parent had with his or her child.'

The step-parent adoption order was therefore made. H was able to remain the legal child of his deceased mother, and therefore to retain all the wider legal familial links with his maternal family, while also becoming the legal child of his step-father and having that life-long relationship with the only person he had ever known as being his father.

Discussion and comment

Re H is an important decision for a number of reasons. First, it paves the way for other families in similar situations to obtain orders that properly reflect their de facto family life. In cases where a child has an international family, as in *Re H*, the case also allows children to secure their nationality and cultural identities by ensuring that they can have a legal relationship recognised even if their parent dies and they subsequently are subject of a step-parent adoption order.

Second, *Re H* confirms the scope of the Human Rights Act to make positive changes for family law, using a human rights analysis to expand the scope of the law's protection and to recognise important familial relationships. A child who has already had the misfortune of experiencing the death of a parent should not then be placed in the invidious position of having to pick whether, in legal terms, to retain their relationship with their deceased parent or to gain a legal relationship with their social parent. *Re H* ensures that children in that position do not have to make the choice, and can have the benefit of both.

Third, the President's judgment reinforces the existing authorities in the surrogacy context where the Human Rights Act has been used to interpret statutory provisions to ensure that parental orders can be made in cases where one of the applicants has died either before the order can be made, or even before the child is born. In reference to Theis J's decisions in the surrogacy context, the President noted that 'I readily approve the course that she took' (para [40]). While the legal framework of surrogacy cases is quite separate from that governing step-parent adoption, the President noted that 'in reality the decisions that are being made and the policy imperatives that are in play with respect to the parentage of a new-born baby achieved through surrogacy are very much the same as the issues now some years after the event where adoption is now being sought with respect to H by his

step-father’ (para [40]).