CHILD PARAMOUNTCY V FAMILY PRIVACY: ‘JUDICIAL BALANCING’ OF HUMAN RIGHTS PRINCIPLES IN FAMILY LAW

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1. Introduction

‘Legal ties may be extinguished but that does not mean the birth family will be forgotten.’
(per Ormrod J, in Re D (Minors) (Adoption by Step-Parent) [1980] 2 FLR 102)

This paper examines the conflicting legal notions of family life and child paramountcy as enshrined in Human Rights law, and demonstrates that the judicial ‘balancing’ of these interests in domestic courts often results in an outweighing of child welfare in favour of preserving adult-centred family sanctity. Socio-historical factors underpinning modern attitudes are outlined, as are the legal issues surrounding identity, social fear of ‘blood-ties,’ and the need for lifetime protection of vulnerable children. Concerns over ‘child-biased’ legislative reforms within the UK are addressed, as is the suggestion that European Convention rights might weaken. Relevant jurisprudence from several jurisdictions is analysed with a view to finding common ground and suggestions for reform.

The key theme remains that of whether our pre-occupation with privacy and parentage must firstly be admitted before it can ultimately diminish and enable child welfare norms to develop fully; by removing the legal presumption that children are always best raised by natural parents, delays within child protection proceedings might lessen. Likewise, in acknowledging a right to genetic ‘identity’, open adoption and more flexible forms of indirect contact may become more widely accepted. Given the UK’s plans to promote
adoption as a means of child protection\(^1\), such issues must be addressed to end the traditional veto of adult rights over child welfare.

2. ‘Narrow Secret Sanctum’- The Historical and Social Significance of Family Life

‘This universal respect for ‘the conceptual and institutional space called the family realm’ often arguably translates into an analysis of wider issues such as social control, or perhaps into proposed ‘clinical remedies’ for social problems.’ (Rodger, 1996:28)

As Kahan and D’Ath (1989:33) have argued, ‘Britain does not have an explicit family policy.’ Instead, the law fluctuates between media-led calls for increased interventionism and public fears over diminishing family privacy (Campion:1995). As Lyon (2003:639) observes, ‘interfering in other peoples’ lives is not something which comes easily to those living in the United Kingdom.’ This mode of ‘reluctant but necessary intervention’ (Finch: 1989:7) may arise from a traditional fear of jeopardising ‘the narrow secret sanctum’ of family units (Allen, 2003:10), underpinned by subconscious values ‘traditionally placed on …sanctity of the home.’ (Cobley: 1995:15) Driven by piecemeal child protection reforms and Western preoccupations with ownership, it is unsurprising that, historically, ‘any state intervention in family life was made with extreme caution’ (Cobley, 1995:16).

This approach crosses cultural boundaries, with children in many societies existing within a socially sanctioned ‘legal vacuum’ of non-protection (Eekelaar, 1977:241). As Goode

\(^1\) Every Child Matters
(1964:4) noted, family is the ‘only institution, other than religion, which is formally
developed in all societies’ and the only one ‘charged with transforming a biological
organism into a human being’. This may explain why it is so revered; by reflecting
‘existing social norms’ (Cobley,1995:4) family well-being serves as barometer for wider
society. (Kempe, 1962) As a means of social control, (Rodger, 1996) it presents a
‘bounded system of social interaction,’ providing ruling elites with ‘focus of analysis and
clinical remedy’ for social flaws like child abuse (Dale et al, 1986). Political reluctance
to intervene possibly signifies fear of latent social disorder; if this stable unit may tend
towards altering its nuclear image\(^2\), so might other long-established social norms. (Silva
and Smart, 2001)

Although parental responsibility seems the ‘essential feature of Western democratic
society’ (Archbold: 2000) it is not unique to modern, Eurocentric culture. Japanese feudal
Dozokus relied upon ancestor reverence, whilst Chinese ‘clan temples’ maintained
genealogical links via sacred tables. Neither system interfered with family units despite
sharing heritage or ‘clan’ surnames. Polynesian ‘kindred groups’ and early Semitic or
Indo-European tribes displayed similar reluctance (Campion, 1995:11) despite equal
respect for kinship (Spencer:1893). In relation to Africa, Goode (1964:8) suggested that
where ‘children are highly coveted…..inquiry into their biological paternity would be
unlikely.’ Thus non-Western acceptance of ‘shared responsibility for the children of
others’ perhaps negatives a need for overt privacy (Puxon, 1971).

Similarly, Roman doctrine (Nicholas:1962) placed great ‘emphasis on parental rights’ and ownership. Adoption preserved ‘purity of the family and transmission of… property’ rather than safety of vulnerable infants (Olmesdahl,1977:262). Monocratic doctrines of *Patria Potestas* protected families from State interference; *Paterfamilias* granted patriarchs ‘unfettered power of life and death’ over relatives, meaning that, in law, there was ‘little difference between son and slave’ (Nicholas: 1962:67). *Tollere Libere*, where unwanted infants were exposed to the elements, derived from *Ius Abutendi* (the right to destroy one’s chattels) and was legal until 5th Century Justinian reforms. Although fathers lost rights to any child ‘raised up’ by another, they retained power to redeem children sold into slavery (Nichols, 1962).

Thus, until recently, children were ‘mere possessions of their parents’ in Anglo-European law (Campion,1995:8). Many were consigned to social oblivion via urban ‘revolving door’ foundling homes. (Boswell: 1991) Parents had ‘allowed’ their children to become destitute; whilst philanthropists exposed workhouses and factories, they opposed State intervention, blaming personal responsibility, Lombrosian pathology, or inviolate nature of domestic hearth. (Whately Cooke Taylor: 1874) As with Roman doctrine, Renaissance activists sought promotion of wider social welfare (Herring, 2004) by fighting destitution (Campion, 1995). This correctional rather than rights-based approach

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3 750 BC – 560 AD See XII Tables 450 BC  
4 Under *Ius Vitae Recisque*, Censors would note ‘gross abuses’ of power by patriarchs but not interfere within private families. See Olmesdahl (1977) Ibid at 17  
5 By 560 AD this had been reduced to ‘reasonable chastisement’ with a duty to ‘educate and maintain’ See Nicholas 1962  
6 See Re P (1996) 2 FLR 314 where an attempt at spousal strangulation was deemed ‘not relevant to child issues’ and supervised contact granted.
(Cannan, 1996) sought regulated family life (Squires, 1990) via socially ordered patterns of existence. This ‘proto-Welfare State’ placed families within a ‘broader debate about social and moral behaviour’ (Rodger, 1996:121) and established interventionist blueprints for the next four centuries.

Elizabethan Poor Law (1601) further stigmatised families by making State ‘help’ as publicly shameful as possible, with a uniformed ‘deserving poor’ and physical and emotional separation of families. ‘Evil influences’ of ancestral biology were minimised by ‘complete removal from the taint’ (Holman, 1988:11). By the 20th century, limited State interference was acceptable, if presented for the greater good. Regard for patriarchy still hindered ‘direct political intervention into the private affairs of family’ however (Donzelot, 1980: Rodger, 1996:34). Although the ‘underclass’ (Hendrick, 1994) was open to scrutiny and ‘Victorian emphasis on ….permanently removing’ (Tunstill, 1985:72), wealthier parents usually escaped notice. For them, Blackstone’s comments (1765) that they ought merely to maintain offspring applied. Bowen LJ in Re Agar Ellis (1883) summarised prevailing attitudes, arguing, ‘It is better that people should be left free’. Clearly, private cruelties posed no serious ‘threat to the values, morals and standards of the higher social classes’ (Holman, 1988:12, Archbold, 2000).

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7 See R v Marais (1910) CPD 542 where it was suggested (unsuccessfully) that criminal sanctions do not apply to parents.
8 Per Bowen LJ in Re Agar Ellis (1883) 24 Ch D 317 at 355
Piecemeal reform followed lengthy consultations on public scandals.\textsuperscript{10} Although the Guardianship of Infants Act 1886 ‘promoted’ child welfare, parental wishes often prevailed instead. Only after cruelty cases on both sides of the Atlantic did Governments admit that children lacked basic legal protections of animals\textsuperscript{11}. (Cobley, 1995) The Prevention of Cruelty Act 1889 and Custody of Children Act 1891 constituted frank admissions that abuse warranted sanction. Although police could remove children, charities provided their `substitute care’; little discussion of children’s interests occurred.\textsuperscript{12} Contact was deemed pointless as parents had relinquished their rights (Holman, 1988). Saving offspring from bad parenting and poor material conditions seemed key. Humphrys v Polak (1901) perhaps reassured parents, when it found their rights to be incapable of legal transfer\textsuperscript{13}.

Under The Guardianship of Infants Act 1925 welfare gained paramountcy, in theory (Cobley, 1995). Whilst The Adoption Act 1926\textsuperscript{14} permitted ‘total legal transplant’ (Allen, 2003:14) of parental rights, State scrutiny replaced informal, inter-familial supervision. Although aspects of the natural relationship were `carved out’ added to the adoptive one, (Josling and Levy; 1984) the Tomlin Report\textsuperscript{15} avoided offending polite

\textsuperscript{10} E.g In 1871, ‘illegitimate’ infants were privately adopted for a fee and then left to die by bogus philanthropists Parliament introduced compulsory birth registration.
\textsuperscript{11} See Dennis O’Neill’s murder by his foster parents, highlighted by Lady Allen of Hurtwood, in her letter to The Times, 15\textsuperscript{th} July, 1944 which led to Monckton (1945) Curtis (1947) and Clyde (1946) Reports. As with the Climbie Report (2004) ‘breakdown in communication’ and ‘administrative confusion over responsibility’ were cited as a contributory factors.
\textsuperscript{12} Barnardo’s made foster parents sign agreements to prevent all correspondence with birth parents. See Holman 1988 pg 7-19 on enforced emigrations.
\textsuperscript{13} (1901) CA 385
\textsuperscript{14} Aimed at redressing the profit, advertising and financial inducements.
\textsuperscript{15} from Hopkinson Committee, 1921
society by allowing only ‘legitimate blood’ to gain inheritance rights. As Heywood (2001) notes, ‘neglectful home and the substitute home became exclusive of each other.’ Contact was rarely considered as the system sought to reinforce parental shame (Holman, 1988). Despite heraldry, The Children and Young Persons Act 1933 endorsed child removal as preferred solution. Tizard (1977) observed that, despite the Welfare State, poverty ensured that a powerless adult subclass received closest scrutiny; Rickford (1994) notes that such ‘policing’ provided surveillance rather than support.

As Birlingham and Freud (1942) suggested, war-time evacuations raised middle-class awareness of the psychological impact of family separation; numerous single mothers created a ‘golden age’ (Kornitzer, 1959) of interventionism. Family sanctity remained, but with inverted emphasis on ‘blood ties’. Extreme secrecy protected infertile adoptive parents, allowed birth mothers to return to society, and shielded adoptees from stigma (Kornitzer, 1952). The ‘buffeted pendulum’ effect of rapidly changing value positions however, (Fox-Harding, 1991) ensured that parental rights repeatedly challenged interventionists. The Gamon Report (1947) sought ‘psychological security’ within family settings; this justified absolutist policies of ‘origin separation’ (Korntizer, 1952; Holman, 1988) and recalled both Poor Laws (Herring, 2003) and Victorian ‘self-mortification’ (Smith, 1984).

Legislation permitted reformist ‘moral welfare’ (Benet, 1976) and confidential cures for infertility (Smith, 1984). Secrecy protected everyone from their respective social ‘flaws’.

‘Matching’ infants to parents by shared characteristics or background was commonplace (Lockridge, 1947) and supported by studies on ‘nature versus nurture’17 (Thomas, 1977; Jaffe and Fanshel, 1970). Access to birth records was rare18, with some academics advocating elaborate anonymity devices19 for ‘the sake of all concerned’ (Kornitzer, 1952; Spencer, 1893) As Raynor (1980) noted,

> In our society, love is very much bound up with exclusive possession. It hurts most adoptive mothers to acknowledge that another woman has claim to their child and that the child might one day recognise her claim20.

Parental ownership seems key as did concern for family rather than child (Peller, 1961). ‘Blood-ties’ however, continued to haunt; infants were often ineligible for adoption if their biological history was socially inadequate. Incestuous or mixed race parentage meant ‘blacklisting’ as did physical imperfections (Smith: 1977; Jaffe and Fanshel 1970). Psychologists eventually inverted this by promoting the ‘birthright’. Hurlock (1955) stressed the need for stable self concept whilst Bowlby (1958) developed ‘attachment theory’ on abandoned infants. Schechter (1960) studied ‘psychotic and neurotic states’ of adoptees, whilst Sandler and Joffe (1967) linked genetic identification to emotional development. Rogers (1961) noted assignment to ‘side of the family’ as influential, whilst Frisk (1964) described genetic ego. Krugman (1964) studied adoptee pre-occupation with

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17 See Thomas R M, ‘Comparing Theories of Child Development’ (1977)
18 In Scotland, adoptees could access records at 17 under the 1930 Act.
19 Kornitzer advocated advising that they’d been orphaned
20 See also Kellner-Pringle M ‘The Needs of Children’ (1967)
biological fantasy, as Sants (1964) highlighted ‘genealogical bewilderment\(^{21}\)’ and endorsed ‘family romance’ theory (Freud, 1957).


\[^{21}\text{Sants (1964) refined Wellisch’s (1952) theories that identification is easier with resemblance. He suggested that adoption best suited orphans.}\]
\[^{22}\text{Seebohm Report (1968) Cmnd 3703}\]
\[^{23}\text{Adoption Act 1975; see Northern Ireland’s near- equivalent 1987 Order Article 54. ‘Long term welfare’ was replaced by ‘throughout childhood’ in the final draft.}\]
\[^{24}\text{See Kahan and D’Ath’s suggestion (1989) that Kempe’s work was over-influential; ‘Families and Children’ (pgs 30-59) in ‘Child Care Research, Policy and Practice’ Open University (1989) at 59}\]

Interventionists conversely stressed the harmful effects of contact (Macaskill, 1985). Sturge and Glaser (2000) describe the ‘double-edged sword’ which renders children legally invisible (Buchanan et al, 2001) building upon the work of Morris (1985) which highlighted how children’s wishes were ignored.25 Renewed focus on parental rights and blood-ties exposed children to high risk parenting; the belief that children belong with genetic parents (Freeman, 1975) was deeply shaken by the Colwell tragedy26. The ‘permanency movement’ argue for increased adoptions, arguing that children can not relate to two sets of parents simultaneously. (Goldstein et al, 1973) ‘Preventionists’ were derided as archaic ‘kinship defenders’ (Fox, 1982) despite some NGO’s voicing their support27. Legislation enabling easier severance of ties (Parton, 1985) was finally enacted via the Children Act 1975 (Tunstill, 1985:72). As Rodger (1996:188) observed,

26 The abused child was returned home then killed by her stepfather. The Press blamed ‘blood-tie worship’ and called for stricter ‘removal’ policies.
27 CPAG, NCOPF, Gingerbread, MIND and the BASW.
'child protection policy in Britain (was) driven less by scientific and social research than by quasi-legal administrative processes that signal procedural shortcomings'.

Language of ownership diminished under the Children Act 1989; ‘Contact with’ replaced ‘access to’ one’s children, whilst ‘residency’ took over from ‘custody’. Parton (1985) predicted greater preventionism, emphasising advance identification of potential victims. Some Academics suggest ‘shared parenting’ following this move towards parental responsibility (Miles and Lindley, 2003; Fisher et al 1986). Similarly, children are ‘looked after’ rather than ‘in care’; this stresses the continuing role of parenthood (Alcock, et al, 1998) and the temporary nature of intervention, with contact remaining possible. As Eekelaar (2003:255) suggested,

‘law should be slow to intervene in private law contact issues, unless it is clear that a parent is behaving in a way which directly harms a child’.

Indirect harm however, such as witnessing domestic violence, has been the subject of legislative debate and judicial discourse on contact and the ‘weighting’ of scales (Herring, 1999). Jurisprudence dealing with child welfare, human rights, identity issues and parental veto should therefore be examined.

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28Re P (1996) 2 FLR 314 where attempted strangulation was ‘not relevant to child issues’ and supervised contact granted. The 2002 Act redefines ‘harm’ to include witnessing of physical harm to another.
3. **Clashing Conventions and Judicial ‘Balancing’**

‘*Despite the law’s interpretations, the welfare principle remains potentially open to myriad meanings and is in that sense, indeterminate*’ (Sclater and Kaganas, 2003:168)

The ‘problematic clash’ of rights (Miles and Lindley, 2003:249) elevated family life concerns (Smith, 1984); pre-occupation with ancestry, though inconsistent with a proper exercise of State power (Daube:1959), still informs social policy and judicial reasoning. Article 8 of ECHR provides parents with a means of challenging intervention, by ‘shielding’ them somewhat from the UNCRC’s welfare principle. This may alter following enactment of The Adoption of Children Act 2002, with its emphasis on lifelong protection (Choudry, 2003). As adoption is linked to child protection, strengthening of paramountcy may have repercussions for cases where biological ties are relevant.

Despite recent ‘remarkable episodes of law reform’ (Allen, 2003:13) the Climbié Report (2003)\(^{29}\) recommended a ‘major overhaul of child protection’ (Corby, 2003:235). The 2002 Act aims to modify judicial approaches to family autonomy by reinforcing the importance of child welfare; deriving not only from the UNCRC,\(^{30}\) but from domestic equitable principles of Guardianship and Wardship, (O’Halloran; 1994) it may limit the effects of parental ‘veto’. By focusing on lifetime protection, it implies a right of access to genetic ‘identity’ which many adoptees and their estranged relatives currently seek. This has implications for private Contact hearings, and may see Courts redefining contact

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\(^{29}\) Lord Laming (2003) Recommendations include better communicate between agencies and having case supervisors read their files. White Paper. FCO. Cm. 5941

\(^{30}\) It does not specifically mention ‘paramountcy’ referring instead to ‘primary consideration’; paramountcy is referred to in adoption legislation.
to include indirect access to relatives. The Act acknowledges the need for compromise between classic adoption and fostering, by introducing ‘Special Guardianship Orders’ which may permit substitute family environments without severing biological links.

By denouncing ‘parental unreasonableness’ as the test for dispensing with parental consent to adoption (i.e. ‘Freeing Order’ applications), the Act reinforces the current need for judicial ‘rebalancing’ of children’s rights. Adult-bias has arisen from narrow interpretations of the Children Act 1989 and its rigid depiction of ‘parental responsibility’. Drafted following a series of moral panics over family decline (Herring, 2004), it sought to reassure parents and to perhaps effect ‘social engineering’ by reinstating the patriarchal sexism of nuclear family stereotypes (Smart, 1997). The main issue is likely to remain reconciliation of child welfare with Article 8 rights to family life, especially within adoption and contact disputes. As Herring (2004) notes, domestic Courts tend to ‘weight’ the scales in favour of parents, when faced with such dilemmas, thus elevating parental autonomy beyond the reach of the welfare principle. Judicial strategies include non-enforcement (e.g. where harm is indirect); re-focusing of issues (child interests re-defined to include parental wishes, or ‘best interest’

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31 Sections 56-61 of 2002 ACT
32 Previously ‘unreasonableness of parent in withholding consent’ under the 1976 Act s.19
33 Olsen (1992) argues that child welfare infringes women’s rights by ‘trumping’ them in hard cases.
34 By (i) use of the statutory intervention threshold, below which the state cannot intervene.; (ii) having parental rights merge with children’s interests or relying on ‘presumptions’ of nature, (iii) acknowledging welfare then curtailing it in favour of parental autonomy
35 See Re D 1993 2 FLR 1- per Waite LJ
presumptions unquestioningly accepted\(^{36}\); and by limiting welfare through strict application of Article 8\(^{37}\). The 2002 Act may prevent ‘rebalancing’ by replacing parental ‘unreasonableness’ with straightforward child welfare requirements\(^{38}\).

The potential for conflict has already been highlighted. Bainham (1999) conceded the significance of the welfare principle, but suggested that lawyers categorise parental and child rights into ‘primary and secondary’ divisions to establish when each ‘type’ might prevail. Schneider (1993) noted its ‘unpredictability’, and its propensity for inter-family conflict, whilst Sclater and Kaganas (2003:155) suggest that weakened family life rights might result. Reece (1996) noted that children are not the only actors in the process, while Altman (1997) queried the principle’s longevity, suggesting that it works best as rhetorical concept. Herring (2003) points out that if welfare was broadly interpreted, children might learn to make sacrifices for greater family good, with such altruism creating awareness of their wider social obligations. Whilst this might suit minor family matters, it cannot be applied to child protection cases. The notion of children foregoing rights may be acceptable in relation to socio-economic freedoms, but not in relation to instances of inhuman or degrading treatment which frequently provoke applications for Emergency Protection.

\(^{36}\) E.g. children should always remain with ‘natural’ family; that contact is mainly desirable, and that mothers are preferred option in Residence Orders. See Templeman LJ in Re KD (A Minor) 1988 AC 806 at 812

\(^{37}\) Re E (1997) FLR 638

\(^{38}\) S.52
Likewise, ‘family sanctity’ can no longer be pleaded by governments who fail to honour their international obligations. Traditional reluctance to ‘see our children having rights to anything, let alone a right to protection’ (Lyon, 2003:639) has led to scrutiny of our child protection systems. Domestic family law is now ‘internationalised’ (Douglas, 1997; Silberman, 2000) with ‘remoulded, dynamic principles’ of welfare linking children’s identity rights firmly to their right to exist within families. (Kilkelly, 2002:202) That substitute families are included in the definition indicates increasing judicial awareness of the modern nature of family life and of changing relationships within modern society. Despite this, some Courts refute the ‘shift from the biological to the social definition’ (Hughes, 2003:33). Yet with most children now under State care prior to adoption, the ‘current policy of rehabilitation’ (Eekelaar, 2003:265) compliments the presumption of beneficial contact; these norms may, ironically, weaken under the 2002 Act which permits domestic Courts to regulate contact as necessary\textsuperscript{39}.

Conversely, the ‘proportionality’ requirement of human rights law suggests that harsh intervention should only occur where welfare demands it. As Kilkelly (2002:295) noted, the ECHR ‘like other international instruments of its time, contains no specific references to adoption.’ Nor does it does it confer rights to a ‘replacement family’ (unlike the UNCRC). Judicial caution suggests a rights-based approach, derived ‘from the demands of adults rather the needs of children’ (Herring, 2003:130). There is frequent use of the option to ‘make no Order.’ Delay frequently compounds the issue, as children remain

\textsuperscript{39} sections 26 and 27. See Family Homes and Domestic Violence (NI) Order 1998 which amended the Children (NI) Order 1995 allowing Courts to deny abusive parents contact.
with abusive families or in care. If welfare were the primary consideration, judiciaries might have to sanction quick intervention instead. Again, if contact included ‘indirect’ forms, judicial reluctance to grant it might diminish.

Calling for more discussion on the nature of paramountcy, Choudry (2003) highlights the fundamental clash of human rights principles within the Act’s new process for Freeing Orders. Birth parent rights may be most affected, hence the call to return to MacDermott LJ’s position in J v C (1970) which would elevate welfare from ‘paramount consideration’ to that of a

‘process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks and choices and other circumstances are taken into account and weighed, the course to be followed will be that which is most in the interests of the child welfare.’

Northern Ireland Courts have followed this dicta; should the 2002 Act be extended to that jurisdiction it will sideline this mode of interpretation and minimise ‘weighting’ (Herring, 2003). Given that the current Adoption (NI) Order 1987 closely follows the 1976 Act, it is unfortunate that the reforms do not extend to that jurisdiction. Unpredictable judicial attitudes further compound the situation. The following section

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40 J and another v C and others (1970) AC 668
analyses several cases from Northern Ireland which demonstrate judicial approaches to paramountcy and family life.

4. Northern Ireland-Paramountcy Outbalanced?

‘Parenthood has begun to supercede marriage as the bedrock of the family’ (Bainham et al, 1999: 14)

Given its vague wording, Article 8 ECHR provides little guidance on how judicial ‘weighting’ might occur. Northern Ireland Family Courts adhere rigidly to a set blueprint in Freeing Order applications, where the Adoption Order 1987 states that ‘paramountcy’ is not the primary consideration in such cases.41 Where Care Orders are heard, the ‘care issue’ must be considered in full before ‘freeing’ can be considered42; this avoids compromise of ‘the application of the paramountcy principle’43, which, conversely, must be considered in all other child proceedings44. Before granting Care Orders, Courts must ‘look at the question of contact’45; thus the ‘no Order’ option is often exercised, with the same reasoning used to effect the Freeing Order. Article 9 of the 1987 Order clearly states that,

41 It is parental unreasonableness in withholding consent to the adoption
42 Re D (Simultaneous Applications For Care And Freeing Order) 1999 2 FLR 49
43 Per Gillen J in Re A [2001] NIFam 23 at pg 8
44 E.g. Emergency Protection under Article 63, Child Assessment under Article 62, or private law Orders under Article 8 of Residency, Contact, Specific Issues or Prohibited Steps.
45 Re A [2001] ibid at n 75
'in deciding any course of action in relation to the adoption of a child, a Court or adoption agency shall regard the welfare of the child as the most important consideration'.

Courts must focus on Article 16(2)(b) if birth parents object. Discourse centres on parental behaviour, to gauge if consent is being unreasonably withheld. Authority for this derives from Hailsham LJ’s pre-Children’s Convention ruling in Re W (An Infant) [1971] which established that welfare per se is not the test in such cases, but parental unreasonableness alone. Thus,

‘is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the context of the totality of the circumstances’.

Arguably, ‘totality of circumstances’ could provide sufficient discretion to promote paramountcy as key. Courts however invariably refer to current social values to gauge whether ‘advantages of adoption for the welfare of the child appears (sic) sufficiently strong to justify overriding the views and interests of the objecting parent’. Courts clearly balance competing interests of parent and child in finding that ‘welfare’ of one side outweighs ‘interest and views’ of another; this weights the scales towards child welfare, instead of parental unreasonableness. Judges usually then opt to follow

46 Re K [2002] NIFam 13
47 Re W (an infant) (1971) 2 All ER 49
48 Per Gillen J in Re A (2001); See also Re F (Adoption: Freeing Order) 2000 2 FLR 505
Hershman and MacFarlane, (2002) who state that the test is reasonableness and nothing else.\textsuperscript{49} The ‘cautionary note’\textsuperscript{50} approach of cases such as Re H and Re W (1983)\textsuperscript{51} seems to have been followed rather than Re B-M (2001) where the Court of Appeal held that advantages of adoption justified overriding objecting parents.\textsuperscript{52} Thus Freeing Orders involve a two stage process of determining whether adoption is in a child’s ‘best interest’ and then looking for parental ‘unreasonableness’; they draw upon ‘adult-friendly’ judgements\textsuperscript{53} such as Ormrod J’s in Re H (1981) where it was held that,

\begin{quote}
‘adoption gives us total security and makes a child part of our family and places us in parental control of the child; long term fostering leaves us exposed to changes of view of the local authority, it leaves us exposed to applications and so on by the natural parent.’\textsuperscript{54},
\end{quote}

The dicta is telling; child welfare is not mentioned, although one presumes that it underpins the reasoning. The use of the word ‘control’, recalls Paternalism. Judicial concern over leaving adoptive parents exposed indicates genuine fear over loss of family autonomy and strength of blood ties. This was repeated in Re NI and NS (2001) to justify exclusion of paramountcy and prevent promotion of welfare to primary consideration. In Re J (Freeing Without Consent) [2002] the Court’s approval of Thorpe LJ’s dicta in Re D

\textsuperscript{49} Despite the shift in Re F (2002) and Re C [1993] towards greater emphasis on welfare  
\textsuperscript{50} Per Gillen J in Re NI and NS [2001] NIFam 7  
\textsuperscript{51} Re H and Re W (adoption: parental agreement) (1983) 4 FLR 614  
\textsuperscript{52} Re B-M (a child) (Adoption:Parental Agreement) 2001 1 ACR 1 (Referred to in Re NI and NS [2001])  
\textsuperscript{53} Endorsed by MacDermott LJ in Re MC and by Gillen J in Re NI and NS [2001] ibid  
\textsuperscript{54} Re H (1981) 3 FLR 386
(Grant of Care: Refusing of Freeing Order) [2001] confirmed that, for the judiciary, ‘the past is the surest guide to the future’.

Courts must therefore perform elaborate dances around the welfare principle to grant Freeing Orders. If a Care Order is also required, this must be dealt with first, so that paramountcy may be applied; contact too, must be dealt with before Care Orders are made. When ‘freeing,’ Courts must first apply paramountcy to see if adoption should proceed, but then relegate the principle to focus on ‘parental unreasonableness’ alone to dispense with parental consent. The Freeing Order then discharges the Care Order, but allows Contact Orders to be granted, but only where it is ‘better for the child than making no Order,’ which is seldom the case. Human rights are usually mentioned fleetingly, with acknowledgement of the need for ‘proportionality.’ There may be reluctance to dwell on the issue, as Gillen J’s dicta in Craigavon and Banbridge Community Health and Social Services Trust v JKF (2000) indicates. Here he applauded the fact that, ‘very properly, given the facts of this case, counsel did not invoke to any material degree the European Convention.’ Endorsing the Practice Direction in Daniels v Walker (2000) he noted that human rights ought not to be ‘routinely paraded in cases of this nature’.

He stressed the wide margin of appreciation, echoing Kilkelly (2002:298) that ‘it is a matter of domestic law whether the child’s best interests are paramount or merely of

55 Re D (Grant of Care: refusal of Freeing Order [2001] 1 FLR 862 at 869
56 Again, the status quo is usually preserved by the ‘make no Order’ principle
58 Craigavon and Banbridge Community Health and Social Services Trust v JKF, In The Matter Of [2000] NIFam 56
59 Daniels v Walker 2000 1 WLR 1382 at page 1387
60 Per Gillen J in Craigavon and Banbridge Community Health and Social Services Trust v JKF ibid at n.58
‘special importance’ in such matters.’ Unsurprisingly, the lesser of two equally harsh options is often chosen, with contact sacrificed to promote ‘family security’, rather than child welfare paramountcy.

In Re K (2002) for example, the Court embraced and then avoided paramountcy after a brief nod to the UNCRC-inspired ‘welfare checklist’ to decide against birth family contact. Here, a neglected child’s maternal grandmother was refused a Residence Order and thus any chance of gaining parental responsibility. Although the Court stressed its regard for the welfare principle (and to 1999 DHSS Policy Guidance61) it held that the domestic ‘threshold criteria’ for intervention had been reached, and therefore ‘love for this child (was) simply not enough to secure his care and protection62’. Likewise, in considering the Contact Order, the Court felt that the prospective adopters’ views had to be ‘taken carefully into account’63 and accordingly made no Order. The Children’s Convention which protects the child ‘throughout his life’ did not merit mention. Whilst issues of neglect in this case (and fear of potential abuse) demanded substitute care, indirect contact might have preserved the child’s long-term welfare by giving him access to his genetic identity.

Similarly in Re A (2001) the ‘child’s interests (were) not paramount’;64 other factors did merit discussion, such as the natural parents’ failure to ‘recognise’ or ‘appreciate’ State

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61 i.e. ‘family life cannot be overstated’ Departmental Guidance: Permanency Planning for Children: Adoption-Achieving the Right Balance, May 1999. para 2.1
62 Re K [2002] NI Fam 13 at pg 10
63 Per Gillen J ibid
64 Per Gillen J
efforts at family rehabilitation. Re F (2000) was referred to, with its call for child welfare to be taken into account despite its lack of paramountcy ‘at this stage.’ With contact however, Gillen J stressed that ‘the crucial test’ was that of ‘best interest’; given that adoption was the likely outcome, he advised that parties should ‘gradually break their final bonds’ (over the course of the following month) with Contact denied after this. Whilst child protection necessitated Freeing, if lifelong child welfare had been applied, (or contact interpreted to include indirect access) child might have eventually learned that her birth father had kept photographs of her and made numerous toys for her whilst in prison.

Likewise in Re J and S (2001) the adopted child would have learnt that her birth mother objected to adoption proceedings to prevent there being ‘any evidence in writing that she ..agreed’ to the relinquishment, to spare the child’s feelings later. Similar issues led the same Court to refuse a Freeing Order three years later on the grounds that little is known of ‘the long term impact of a child learning of his adoption in the context of an opposed application’. This approach endorses the Children’s Convention’s focus on child protection throughout life and perhaps bodes well for its eventual incorporation into domestic law.

65 Ibid
66 Ibid
67 Birth mother was a drug-user, birth father was frequently incarcerated
68 Re J and S (2001) NIFam 13; also a factor in birth mother’s refusal to consent in Re JKF (2000) ibid
69 Per Gillen J in Re P, Freeing Without Consent [2004] NIFam 6
Likewise, In Re E and M [2001] the seriousness of Adoption Orders were acknowledged. Despite domestic violence, alcohol problems, neglect and emotional abuse, the Court stressed that,

‘parenthood’ also involves ties and relationships of natural love and affection, held by parents towards their children and children towards their parents, even in adversity. To break those ties is a grave matter. To do so against the wishes of the parent who loves that child is more so.\(^{70}\)

Explaining that the law requires less than paramountcy, and that child welfare is not the sole criteria, the Court looked to parental views and rights. Referring to the repealed Adoption Act 1967, Higgins J stressed that no paramountcy test was contained therein.\(^{71}\) Endorsing Article 8, the Court held that the parents had not withheld consent unreasonably; Freeing was denied and Contact granted, to rehabilitate ‘natural ties’. This conflicts with previous cases where ‘time (seemed to be) of the essence’ as ‘children simply cannot wait indefinitely for parents to change’.\(^ {72}\)

It must be conceded however, that the approach of Hale LJ in Re W and B [2001] seems to be gaining ground. Here it was held that,

\(^{70}\) Re E and M [2001] NIFam 2 Per Higgins J at pg 23-25
\(^{71}\) See s5(1) Adoption Act 1967 ‘welfare of the infant shall be the paramount consideration’.
\(^{72}\) Re C (Freeing for Adoption) [2002] NIFam 1
\(^{73}\) Per Gillen J in Re J (Freeing Without Consent) [2002] NIFam 8
'a public authority may act incompatibly with the (European) Convention rights in a care case. ......to secure for a child who has been deprived of a life with his family at birth, a life for the new family who can become his new family for life to make up for what he has lost..the notion can readily be inferred from the concept of positive obligations inherent in Article 8\textsuperscript{74}'.

Although this related to Care Orders, Gillen J applied it to Re J (Freeing Without Consent) [2002] because it appeared relevant to ‘all applications touching upon the future of children\textsuperscript{75}. By the same token, paramountcy might yet be applied to parental consent disposals. Clearly, observations that ‘post-adoption contact of any kind may have a limited value\textsuperscript{76}’ are out of step with both the Children’s Convention and at least one frequently cited ‘natural’ presumption\textsuperscript{77}, namely that benefit derives from birth family ‘contact’. Unfortunately the former attitude tends to dominate even where blameless birth siblings are involved\textsuperscript{78}.

Ironically, whilst the Courts show awareness of the need to ‘develop identity values in relationships\textsuperscript{79}, they often remain silent over contact, by making no Order and allowing passage of time (Fox, 1982) to deprive children of origin. This is justified by denying the blood-tie’s significance, as in Re JKF (2000), where, because the child had never known

\textsuperscript{74} Re W and B;Re W [2001] UK HRR 9228 at para 55
\textsuperscript{75} Re J (Freeing Without Consent) [2002] NIFam 8 at pg 14
\textsuperscript{76} Per Gillen J in Re A [2001]NI Fam 23 Ibid
\textsuperscript{77} See Re T (A Minor) [1998] EWCA Civ 1871
\textsuperscript{78} See Re NI and NS ibid; no Contact Order, but Contact ‘encouraged’ between estranged siblings.
\textsuperscript{79} Re J and S [2001] NIFam 13
her birth mother ‘as her mother,’ there was ‘no existing relationship in being’\textsuperscript{80}. Denying contact, (apart from a final visit to hand over photographs for her life history file) it was felt that this ultimately avoided ‘confusion in the child’\textsuperscript{81}.

The impact of the ECHR is perhaps gradually filtering in through cases such as Re C and B (Children) (Care Order: Future Harm) (2001) where it was held that,

\begin{quote}
‘intervention in the family must be proportionate...the aim should be to reunite the family when the circumstances enable that...cutting off all contact and the relationship between the child and their family is only justified by the overriding necessity of the interests of the child’\textsuperscript{82}.
\end{quote}

Despite citing this in Re C [2002], Contact was denied, with social workers advised to ensure that it would ‘gradually diminish’ so the child could adjust to no longer seeing her mother\textsuperscript{83}. The use of the term ‘overriding necessity’ in Hale LJ’s judgement however, might presage eventual acceptance of paramountcy, as it compliments the language and reasoning of much European jurisprudence. Moreover, such denial of Contact is at odds with private law cases involving non-resident parents. Here there is frequent reliance on the presumption that contact ‘is desirable both for the child and the parent’\textsuperscript{84}, and an apparently greater desire to comply with domestic legislation. Human Rights issues are

\textsuperscript{80} Per Gillen J in Re CBCHSST v JKF, In The Matter of [2000] NI at 76
\textsuperscript{81} Ibid at 78
\textsuperscript{82} Per Hale LJ in Re C and B (Children) (Care Order: Future Harm) 2001 1 FLR 611
\textsuperscript{83} Re C (Freeing for Adoption) [2002] NI Fam 1
\textsuperscript{84} Re C (No Contact Order) [2002] NiFam 14 per Gillen J at para 1(4)
often discussed at length, with both ECHR and Children’s Convention being cited.\textsuperscript{85} There is reluctance to limit contact, or intervene with family sanctity. In Re C, [2002] for example, it was held that ‘as a matter of principle, domestic violence of itself cannot constitute a bar to contact’.\textsuperscript{86} Contact seems ‘intended to be for the benefit of the child rather than the parent’ which suggests that paramountcy can be invoked more easily in private law. Cases such as Re M (Contact: Welfare Test) (1995) support this, where the Court sought to,

\begin{quote}
‘cast the principles into the framework of the checklist of considerations

\ldots\ldots ask whether the fundamental emotional need of every child to have an enduring relationship with both his parents \ldots is outweighed by the depth of harm which, in the light inter alia of his wishes and feelings, this child would be at risk of suffering.’\textsuperscript{87},
\end{quote}

The harm a child can suffer in later years was also mentioned. Hallman J’s dicta in A v L (Contact) (1998) might also prove controversial if applied to Contact applications following Freeing. Here the Court recommended Contact to allow the child to,

\begin{itemize}
\item \textsuperscript{85} ibid; see also Re C Contact: Grandfather [2004] NIFam 5 and Re NS & Ors [2002] NI Fam 20
\item \textsuperscript{86} per Gillen J Re C [2002] ibid para 3
\item \textsuperscript{87} 1 FLR 274
\end{itemize}
‘gently assimilate the truth about his parentage. To say and do nothing now is
in truth storing up a potential bombshell for the future, which might be very
damaging’.88

Ultimately however, there is a tendency to invoke weighting and thus render
paramountcy void, as in Wall J in Re H (Contact Order) (2002) where,

’a proper application of the checklist in Section 1(3) …..is equivalent to the
balancing exercise required in the application of Article 8…..necessary for
the protection of the rights and freedoms of others’89.

The ‘checklist’ requires the Court to look beyond ‘best interest’ of the child; it does not
remove the onus to make welfare paramount (McKeown, 2003) as suggested here.
Notions of paramountcy and family life rights may be mutually exclusive, just as judicial
weighting destroys primacy. If Courts are not elevating child welfare to a position of
primacy, they are perhaps being mindful of the need to comply with the ECHR’s ‘adult-
friendly’ provisions on family and privacy. It would appear that recent discourse on this
‘living instrument’ has however attempted somewhat to bring it in line with the UNCRC
(Choudry, 2003).

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88 per Hallman J in A v L (Contact) (1998) 1 FLR 361 at 366d
89 per Wall J in re H (Contact Order) (2002) 1 FLR 22 at page 37
5. Paramountcy—‘Absorbed’ by the ECHR?

‘Biology continues to be significant’ (Pryor, 2003:56)

As judicial support for the ECHR increases, elements of the Children’s Convention also seem influential, despite the potential for conflict. European jurisprudence displays the usual weightings (Herring, 1999) perhaps to satisfy the requirements of both Conventions. Whilst paramountcy might weight the scales against parents (Choudry, 2003) the converse can be argued; the application of the fifty year-old ‘adult-orientated’ ECHR often counters or limit the child’s ‘best interests.’ In Olsson v Sweden (1988) for example, the European Court considered whether there had been a breach of the rights of 'all concerned.' In this case, three children with learning disabilities were taken into care against their parents’ wishes on grounds of neglect; contact was limited due to their separate placements with foster carers. It was held that the rights ‘of the family’ had been violated, especially ‘the children's best interests and their rights under Art 8.’

Although child ‘primacy’ is not mentioned, the judges seem mindful of forthcoming UNCRC.

Whilst Choudry (2003) argues that this shows acceptance of paramountcy, family sanctity was nevertheless held to have been violated by disproportionate intervention. Given the overarching need for child protection in this case, it is odd that family sanctity and blood-ties took precedence. It was noted during the hearing, that one of the children,

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'ran around outside and was often taken care of by the police. He could not control his urine and bowels, was teased by his friends because he smelled badly, and he was even undressed by them, according to the school welfare officer.... Food problems have also occurred, according to the school nurse....the boy is short-sighted and needs to wear glasses, but he does not do so.\(^{91}\)

The relevant domestic measures, as in Northern Ireland, centre on an Act drafted decades previously; likewise, the ‘significant harm’ test is not dissimilar to the Swedish threshold where, "an important reason for intervention must be that a minor is exposed to physical maltreatment\(^ {92}\)."

Similarly, in Johansen v Norway (1997) Article 8 was violated when a Care Order was granted in respect of a newborn. The birth mother had addiction problems and a violent partner; contact was denied and the child moved into long term foster care, on the grounds that the mother might be tempted to abduct her. It was argued that very little contact had occurred, rendering them strangers. Although it was later conceded that ‘contact could have contributed to a stable development of the child's identity had it been allowed to continue,\(^ {93}\) fair balance had to be achieved. Despite the importance of child welfare, adult carers needed to remain ‘confident that it is they who take decisions about important events in the child's life.\(^ {94}\).' Although the birth mother established a breach of

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\(^{91}\) ibid para 12  
\(^{92}\) Ibid para 36  
\(^{93}\) Johansen v Norway 17383/90 1996 ECHR 31  
\(^{94}\) Ibid at para 74
her rights, the Court stressed the need to reassure future adopters and thus avoided any discussion of rights to identity which may have been apposite here.

Private law cases are similar. In Hokkanen v Finland (1996) issues of obstructed contact and contested residence were discussed. The Court referred to the Children’s Convention, and endorsed paramountcy by stating that the rights of ‘all concerned (must be) taken into account...more particularly the best interests of the child.’95 Again the notion of balancing appears; the Court did not deliberate on either contact or identity, merely noting that the child’s wishes should be considered. This principle was repeated in L v Finland (2000) where children in foster care did not wish to see their birth father (sexual abuse was alleged but not proven) or grandparents (who had frightened them by telling them they’d ‘been kidnapped’ by the State). The Court considered the Article 8 rights of the children at length, stressing that,

‘childhood is a short but very important period in a person's life, considering his or her future development. Mistakes made by the parents towards their children are thus serious and cannot always be repaired’.96

It highlighted the child-centred focus of domestic statutes and noted that it would not alter biological ties,

\[95 \text{[1996] 1 FLR 289 at para 55} \\
\text{96 Ibid at 113. See also Elsholz v Germany 25735/94 (13 July 2000)}]
'mother and the father remain as custodians and guardians of the child who has been taken into care. The fact that a child has been taken into care and placed in a foster family does not prevent the child from later meeting his or her parents as an equal adult and thereby creating normal family ties.\(^97\) This establishes a valuable precedent, which attaches importance to the best interests of the child. By suggesting that parental interest might be overridden where child health and development are at risk, a useful basis for child protection arises.

Similarly, Yousef v The Netherlands (2003) saw paramountcy protect a child raised by maternal grandparents from unwanted contact with her birth father. No breach of Article 8 was incurred by preventing him from registering himself as legal father; if there was ‘any clash …the interests of the child should always prevail’.\(^98\) This position represents merger of the two Conventions into one guiding principle, where child protection is at issue. It also qualifies P, C & S v United Kingdom (2002) where the 'over-riding requirement of the child's best interest...may not apply in all contexts depending on the nature of the parent child relationship’. Here, the Court found that removal into care of a newborn shortly after birth violated both parties’ rights, despite the mother’s history of child abuse and mental illness. The Court highlighted the harm done to the child (for example by not being breastfed) and the later adverse effects of the separation by stating that, had it not occurred,

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\(^{97}\) Ibid at 125

\(^{98}\) Yousef v The Netherlands (33711/96) ECHR 710 (5 November 2002) at para 66
'It would have allowed S. to retain the comfort and security of knowing her parents loved her, avoided any damaging sense of abandonment and reinforced S's sense of family and personal identity.\textsuperscript{99}'

A ‘degree of natural bonding through contact visits\textsuperscript{100} with birth parents existed but this was outweighed by the adopters’ wishes as they ‘were opposed to direct contact.’ The needs of the child to achieve ‘establishment and reinforcement of her new home\textsuperscript{101} were given priority. After Freeing, the local authority absolved itself of further responsibility, leaving decisions over contact to the adopters. The significance of blood ties perhaps lies in their ability to one day re-appear and disrupt security of ‘new’ families.

In Gorgulu v Germany (2004) however, the Court held that ‘long term effects’ of separation from biological parents should be considered at domestic level to avoid Article 8 breaches\textsuperscript{102}. The German Court of Appeal refused contact and pleaded paramountcy with the following dicta,

\begin{quote}
‘Having regard to the unrest and insecurity occasioned by the unresolved legal dispute, any contact with his natural father would be a physical and psychological strain for the child. Suspending access for a certain time would allow... inner repose and emotional balance\textsuperscript{103}.
\end{quote}

\begin{flushleft}
\textsuperscript{99} Ibid at 101  \\
\textsuperscript{100} Ibid at 103  \\
\textsuperscript{101} Ibid at 112  \\
\textsuperscript{102} Gorgulu v Germany (Application No 74969/01) [2004] 1 FLR 894  \\
\textsuperscript{103} Ibid at para 27
\end{flushleft}
Avoiding the Children’s Convention, the Court focused on proportionality, where within the

‘balancing process, particular importance should be attached to the best
interests of the child which, depending on their nature and seriousness, may
override those of the parents.’ 104

This suggests that the UNCRC has been ‘absorbed’ by the ECHR, allowing for long-term views on ‘best interest’ beyond childhood. The disclaimer however (‘may rather than must override’) again weights the scales in favour of adults. Bridge (2004) argues that this could support natural parents seeking reunion with their children; given lingering social reluctance to endorse blood ties however, and judicial tendencies to merge ‘paramountcy’ with parental interest, nervous adopters should not be overly worried. The stable home (Winnicott, 1965) free from the influence of birth family, arguably remains key among judiciaries. Yet, as Eekelaar (2003:265) suggests, though domestic provisions provide for bypassing of the gateway of ‘significant harm’ (to permit increased intervention) this will occur rarely, due to the UK’s current ‘policy of rehabilitation within the family.’

The suggestion that open adoptions may become more common must be considered against judicial attitudes on family sanctity and children’s rights. A merging’ children’s interests with those of parents (by either ‘disguising 105, them as issues of child welfare, or by relying on legal presumptions) continues at both domestic and international levels.

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104 Ibid at para 43
105 See for example Re D (1993) where ‘major emotional harm’ to parent might effect child
Given that the preferred ‘judicial solution has been to favour adoption over contact in cases where adoptive parents object to contact’ (Eekelaar, 2003:268) the notion of family sanctity appears to still haunt. Thus a means of retaining one’s identity via contact with ‘families of origin,’ whilst achieving ‘placement security’ (Talbot and Kidd, 2004) and maintaining adequate child protection remains the holy grail of family law.

6. **Access to Origins-Lessons from America?**

‘The intangible fibers that connect parent and child have an infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases. ”


In the United States, the need to preserve links with ancestors has been addressed in several cases. One which involved indigenous identity rights was *In re Bridget R.*, et al, Minors (1995) (‘The Rost Twins’ case) where the California Court of Appeal considered whether the Indian Child Welfare Act 1978\(^{106}\) had been complied with. Here, children of Native American descent were adopted at birth by an unrelated white couple. The Act required that voluntary termination of parental rights be witnessed in writing before a judge, not less than ten days after birth. Any relinquishment not meeting these requirements would be invalid and could be declared so by the child, birth parent, custodian, or tribe members\(^{107}\).

\(^{106}\) 25 U.S.C.A. 1901

\(^{107}\) 25 U.S.C.A., Section(s) 1913, subd. (a)
The formalities were not complied with in this case, but the Court applied the ‘existing Indian family’ doctrine to determine if the birth parents were statutorily protected. They first had to demonstrate ‘a significant social, cultural or political relationship with their tribe’. Because the birth father had ‘at all relevant times, resided several hundred miles from the tribal reservation’, did not participate in tribal life and had not revealed his Pomo tribal ancestry (lest it impede or delay the adoption), the Court remanded the case for determination on their relationship with the Pomo Tribe. It was felt that, if such a relationship did not exist, consent would be binding, as the Act would not apply. If however, a significant social, cultural or political relationship was demonstrated, then a full Guardianship hearing would be held to decide whether the twins should be removed from their adoptive parents and raised instead by their Native American grandmother.

Significantly, the Court endorsed the In Re Jasmon O (1994) principle that ‘children are not merely chattels belonging to their parents, but rather have fundamental interests of their own’ and that matters of family life are compelling and rank among the most basic of civil rights. Unfortunately, little time was given to the issue of domestic violence. The Court heard that,

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109 B093520 (Super. Ct. No. BN1980 consol. w/BC114849)
110 Ibid pg 4
111 8 Cal.4th 398, 419
on numerous occasions during March, Richard hit and kicked Cindy and pushed her down, broke furniture, and abused the one-and two-year-old children by picking them up by the neck and shaking or dropping them, poking them in the face, or hitting them in the head. On at least one of these occasions, Richard was intoxicated.\textsuperscript{113}

Parental rights were supported by the

\begin{quote}
'\textit{historic respect -- indeed, sanctity would not be too strong a term -- traditionally accorded to the relationships that develop within the unitary family}'\textsuperscript{114}.
\end{quote}

The Court conceded that, 'constitutional protections of family relationships, have focused more often upon the rights of parents than those of children.'\textsuperscript{115} Referring, much like the Northern Ireland judiciary, to much earlier jurisprudence, such as Stanley v Illinois (1972), the judge reiterated that the interest "of a man in the children he has sired and raised . . .undeniably warrants deference."\textsuperscript{116} More encouragingly, dicta from Lehr v Robertson (1983) was cited, which,

\begin{quote}
"\textit{emphasized the paramount interest in the welfare of children and ....noted that the rights of the parents are a counterpart of the responsibilities they have assumed.}\textsuperscript{117}\textquotedblright
\end{quote}

\begin{itemize}
\item \textsuperscript{113} B093520 (Super. Ct. No. BN1980 consol. w/BC114849)
\item \textsuperscript{114} Michael H. v. Gerald D. (1989) 491 U.S. 110, 123 [105 L.Ed.2d 91, 109 S.Ct. 2333
\item \textsuperscript{115} Ibid at 284; at page 11
\item \textsuperscript{116} Stanley v. Illinois (1972) 405 U.S. at p. 651
\item \textsuperscript{117} Lehr v. Robertson (1983) 463 U.S. at p. 257
\end{itemize}
In Re Marilyn (1993) was also mentioned, confirming that parental rights to ‘care, custody and management’ of children are not absolute; as

> ‘children too, have fundamental rights -- including the fundamental right to be protected from neglect and to have a placement that is stable (and) permanent\(^\text{118}\).’

Although paramountcy was not expressly mentioned within In Re Bridget R., the proposed amendments to the ICWA78 seem to rely on the principle\(^\text{119}\). Similarly, In Re Haley A. (Adoption) (1996)\(^\text{120}\) a birth mother sought to have her daughter returned after relinquishment at birth. She refused to sign final consents, negating the requirement of six months’ ‘abandonment’. In considering best interest the Court referred to psychological testimony, which found the adopters’ home ‘more stable, supportive and nurturing, having no record of violence, threats of violence, alcoholism or chaos.'\(^\text{121}\) The child had bonded with her adopters, regarding them as psychological parents and becoming attached to them. Removal was thought likely to render her ‘fearful and anxious as a short term effect.’\(^\text{122}\) The Court stressed that, in such cases, custody of the child must be determined by consideration of best interests, including relationship with the adoptive parents. Authority for doing this derived from cases such as Matter of Adoption of J.J.B.

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\(^{118}\) H.,5 Cal.4th at p. 306  
\(^{119}\) Many tribes opposed the amendments, given the numbers of indigenous children relinquished for adoption. See http://www.nicwa.org at 05.06.05  
\(^{120}\) Mark A.V.Elizabeth L.Contra Costa County Superior Court No. 9400055 (1996)  
\(^{121}\) Ibid at page 11  
\(^{122}\) Ibid
(1995)\textsuperscript{123}, Bookert v. Roth (1995)\textsuperscript{124} Matter of Custody of C.C.R.S. (Colo. 1995)\textsuperscript{125}. In Re Bridget R was distinguished by virtue of the signed consents. Here, the birth mother had changed her mind, legally, within the six month period. Although the Court conceded that, ‘the ensuing litigation has consumed another two years during which this child has lived with the only parents she has known as such’\textsuperscript{126} it went on to rule that there was no other option but to return the child to her birth mother. Displaying strong reluctance to do so, it held that,

\begin{quote}
‘\textit{Were this fact to determine the outcome of the case, however, we would not only condone the contravention of appellant’s rights but encourage adoptive parents to refuse to honor legitimate demands for return of a child in the hope that sufficient time would pass to convince Courts to retain the status quo.}’\textsuperscript{127},
\end{quote}

Deploring their statutory obligations, the judges stressed that they did

\begin{quote}
‘\textit{recognize, and deeply regret, the havoc that will be wreaked upon the life of a two and a half year child as a result of this decision, the directive of section 8804 must be followed and the child returned to appellant}’.\textsuperscript{128}
\end{quote}

\textsuperscript{123} 119 N.M. 638 [894P.2d 994, 1008-1009]
\textsuperscript{124} U.S. [133 L.Ed.2d 110, 116 S.Ct. 168]
\textsuperscript{125} 892 P.2d 246, 257-258
\textsuperscript{126} Op cit at 291; per Kline J at page 25
\textsuperscript{127} Ibid
\textsuperscript{128} Ibid
The suggestion that the transition be effected ‘sensitively’ suggests awareness of child welfare; disregard for expert psychological opinion suggests that child paramountcy might not have been the key consideration in this instance however.

The doctrine of parental autonomy was perhaps most strongly endorsed in Troxel v Granville (2000)\textsuperscript{129}. Here, a mother opposed the amount of ‘access’ granted to paternal grandparents,\textsuperscript{130} the State Court of Appeals considered the constitutionality of the statute which permitted any person to petition for visitation rights at any time. The Court would decide whether contact served the child’s best interests.\textsuperscript{131} It was held that this provision violated the mother’s ‘due process right to make decisions concerning the care, custody and control of her daughters\textsuperscript{132}’ and therefore infringed her fundamental right to raise children\textsuperscript{133}. The Court relied upon legal presumptions that ‘fit parents act in their child’s best interests\textsuperscript{134}, and argued that government interference violated Constitutional rights.\textsuperscript{135} To rule solely on the best interests of the children would have meant that the State had illegally sought to ‘inject itself into the private realm of the family to further question fit parents’ ability to make the best decisions regarding their children.\textsuperscript{136}\textsuperscript{,} Intervention per se was not the problem; rather it was the Court’s failure to grant any

\begin{footnotes}
\item[129] 530 US 57 (2000)
\item[130] Children’s father was deceased.
\item[131] Washington Rev. Code § 26.10.160 (3)
\item[132] Per O’Connor J p 5-17
\item[133] Under Stanley v Illinois 405 US 645
\item[134] Parham v JR 442 US 584 at 602
\item[135] Washington v. Glucksberg, 521 U.S. 702, 720
\item[136] Reno v Flores 507 US 292, 304
\end{footnotes}
‘special weight\textsuperscript{137} to the mother’s opinion which led to the breach of her Constitutional parental rights.

The ‘strong winds blowing from the Courts’ (Eekelaar, 2003:260) of Europe appear to have swept across the Atlantic. The Western bias of both the ‘adult-centred’ European Convention and the United States Constitution suggests that similar findings will continue to be made in relation to cases involving welfare and blood-ties. Reliance upon legal presumptions, rigid statutory definitions of contact, and social reluctance to permit ‘open’ adoption have all conspired to relegate paramountcy, preserve family sanctity and endorse the ‘adult veto’. Ironically, inversion of the contact issue in relation to disappointed adopters in In Re Haley A. (1996) might yet prove significant for this area of family law. If such a dilemma arose within the UK’s jurisdiction, might Parliament not feel compelled to create a new type of Contact Order which permits disappointed adoptive parents or long term foster carers to preserve links created through child nurture? Alternatively, if the best interests of the child were to be weighted as truly paramount, the right to contact might evolve more fully into a child-centred right. The concluding section will suggest ways in which paramountcy might be better protected.

\textsuperscript{137} Toxel v Granville ibid at pg 8-14
Conclusion: Child Welfare Paramountcy as a Human Right?

‘The heartless treatment of children, from the practice of infanticide and abandonment through to the neglect, the rigors of swaddling, the purposeful starving, the beatings, the solitary confinement and so on, was and is only one aspect of the basic aggressiveness and cruelty of human nature, of the inbred disregard of the rights and feelings of others’ (Langer, 1973)

Blood-ties remain double-edged within family law jurisprudence; their power is such that they may be preserved in private cases even where ‘harm’ has occurred, yet completely severed in public cases to ensure ‘new family permanency’ even where deliberate child harm was absent. If private adoptions ultimately replace state funded child protection however, paramountcy must be more stringently applied so that child welfare is not relegated to the level it ‘enjoyed’ in the 1950’s (Ross, 2001). Although Bailey-Harris (2001) noted that psychiatric underpinnings of child-focused approaches are now acknowledged by Family Courts, she argues that interdisciplinary expertise has often been used selectively to reinforce presumptions about the benefits of contact. Tolerance towards ‘indirect’ harm such as the witnessing of domestic violence has permitted Contact Orders to be granted in private cases even where it perpetuated abuse and provided little benefit to the child. Likewise, lengthy delay under the ‘make no Order’ principle (to allow time to effect severance of blood ties or rehabilitate them) can compound effective protection. The dichotomy between private and public law cases is pronounced; there is clearly a need for increased protection where a Care Order has been granted, but given the loss of origin which accompanies most adoptions, it seems

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138 See for example Re L [2000] 2 FLR 334
139 See Re L (Contact-Domestic Violence) Re V, Re M, Re H [2000] 2 FLR 334
odd to confine the presumption of ‘beneficial contact’ only to private law cases (Talbot and Kidd, 2004)\(^{141}\). Similarly, the need to preserve identity and reduce feelings of rejection (Murch et al, 1999) must be accorded equal importance.

The legal fictions surrounding the process (Sutherland, 2001) would possibly diminish if the notion of ‘multiple parenthood’ (Griffiths, 2001) gained legal and social acceptance. Open adoption may yet provide the best means of minimising barriers between birth families, children and adopters\(^{142}\). If adoption has moved beyond its original purpose of enhancing social opportunity for children towards one of protection from further or potential harm, then promises of absolute family privacy are unrealistic (Ross, 2001). Challenging prevailing mindsets may result in a reduction of the numbers of potential adopters which the Government hopes to recruit, but if the practice is to be properly rooted in child-focused, empowering practice (Talbot and Kidd, 2004) substitute parents should not be promised wide discretion to withhold contact between birth relatives.

As Humphrys (2003) notes complex issues surrounding identity rights have enriched pro-contact discourse.\(^{143}\) Talbot and Kidd (2004) highlight the increasing recognition of the importance of biological ties and point to positively changing legal attitudes towards ‘kinship placements’. These, together with proposed Special Guardianship Orders, represent ‘halfway houses’ between traditional adoption and fostering (Mahmood, 2004).

\(^{141}\) 2002 Act aims to redress silence of 1989 Act by highlighting harms suffered when children witness violence in their households as a result of seeing or hearing ill-treatment of another person.  
\(^{142}\) See Etter J ‘Levels of Co-operation and Satisfaction in 56 Open Adoptions’ (1993) 72 Child Welfare 257; Ryburn M ‘Openness in Adoption’ (1990) 14 (1) AD & Fos 21  
\(^{143}\) See also Sturge C and Glaser D ‘Contact and Domestic Violence-The Experts Court Report’ [2000] Fam Law 615
They are significant for older children who (to the unrelinquished eye at least) have more ‘visible’ connection with their relatives than newborns or infants. As an alternative to classic stranger adoption however, they still present problems over contact and withheld information. The adult veto, though curtailed slightly by the ‘best interest principle’, may continue to reassure advocates of family sanctity, in much the way that adopters are granted legal discretion to deny contact. If adoption agencies gain control over identifying information, this may mirror the controversial non-disclosure regulations of other jurisdictions. It is difficult to see how this ensures lifetime protection of children within the spirit of the Children’s Convention.

Described as ‘the most comprehensive single treaty in the human rights field,’ (Steiner and Alston, 2000:510) its Article 7 (1) grants the child a ‘right from birth to a name …and as far as possible, the right to know and be cared for by his or her parents’ whilst Article 8 (1) obliges States to ‘preserve his or her identity’. If these provisions were applied to the adult ‘veto’ powers of the Adoption and Children Act 2002, the UK Government may be found in breach; the withholding of background information and denial of contact with birth relatives pose further problems. Convention primacy may also find the merging children’s rights with those of adults (Herring, 1999) a further contravention. Similarly, Article 20(1) reiterates the need for ‘special protection’ for children deprived of ‘family environment’; Article 21 demands child primacy in adoption

144 They cannot be applied for by the children themselves; consent of all persons holding Residence Orders must be obtained first, hence an ‘adult-oriented’ veto exists. Further conditions attach if the child is under a Care Order.
145 Under s61 (3) ‘If the agency does proceed …it must take all reasonable steps to obtain the views of any person the information is about as to the disclosure of the information about him.’
146 Such as Quebec
practice. If pre-adoption freeing and post-adoption contact decisions are considered integral to adoption procedure, then legislative and judicial focus on birth parent unreasonableness and substitute family stability surely constitutes further breach.

Accepting paramountcy means that the scales will no longer ‘start even’ when judges are considering the conflicting human rights of children and parents. Proportionality should safeguard parental rights (Fortin, 1999) given its European ‘Convention approach’ (Eekelaar, 2002). The ‘concealment’ of adult rights behind those of the child seems set to become a judicial norm despite the ‘lack of transparency’ that results. The ‘fairness’ objection (Reece, 1996) to his rests upon the fact that ‘all concerned parties’ will not have their interests taken into consideration (Eekelaar, 2002). The case law examined herein however, suggests that judicial reliance upon the ‘adult-friendly’ ECHR, (drafted during the ‘golden era’ of parental rights) judicial weighting, and our entrenched social reluctance to interfere with family sanctity, will continue to serve as highly effective foils to child paramountcy for some time yet.

Despite the introduction of ‘child-centred’ legislation, the current focus on adult rights seems unlikely to change without full incorporation of the UNCRC into domestic law. Likewise certain legal presumptions will have to be dispensed with, if paramountcy is to be protected in the meantime. As Gillen J noted in Re J [2002] ‘the ideal situation is

\[147\] Article 3 states that the child’s best interests are the ‘primary consideration’ invoking ‘welfare checklist’ rather than paramountcy.

\[148\] R v Secretary of State for Home Dept. Ex Parte Gangadeen and Khan 1998 1 FLR 762

\[149\] See Payne v Payne 2001 1 FLR 1052, and Re B (A Child) (Adoption by one Natural Parent) 2002 1 All ER 641

\[150\] i.e. that the notion of ‘best interests’ conceals judicial concern for adult wishes

\[151\] See Re D (Care: Natural Parent Presumption) (1999) 1 FLR 134
for the children to be raised by the natural parent\textsuperscript{152}. The murder of Victoria Climbié challenges this assumption; like many abused children she was in the long-term care of a birth relative. There are risks with over-reliance upon rehabilitative policies (Talbot and Kidd, 2004); the danger of trusting to ‘good-enough’ (Winnicott, 1965) parenting has produced a litany of child tragedies since the 1960’s. The policy ‘pendulum-swing’ back towards protection rather than prevention has been driven by the realization that parents are capable of abject cruelty\textsuperscript{153}. Where young infants have been strapped into prams and starved or ignored for days at a time\textsuperscript{154}, had their fingernails ripped off\textsuperscript{155} or their kidneys permanently damaged through parental assaults\textsuperscript{156}, one cannot argue against speeded-up procedures for Freeing, with direct parental contact prohibited. That such cases currently take several years to be heard in Northern Ireland, is a sad reflection of our lingering reluctance to intervene within the private sphere of parenthood.

Society must accept that acting more quickly does not necessarily amount to increased intervention\textsuperscript{157} or to automatic breach of Convention rights. If less significance were to be placed upon blood-ties, fears of its disruptive influence might lessen. It is perhaps rooted in our Western pre-occupation with ownership; the viewing of children as ‘possessions’ (to be ‘accessed’ and given ‘custody’ over) still occurs despite the modifying language of recent legislation\textsuperscript{158}. Similarly, indirect forms of contact associated with long-term

\textsuperscript{152} Re J (Freeing without consent) [2002] NIFam 7
\textsuperscript{153} See Re H & Others (Minors) (Sexual Abuse: Standard of Proof) (1996) 1 All ER
\textsuperscript{154} Re G and S [2001] NI Fam 14
\textsuperscript{155} Re NI & NS (2001)
\textsuperscript{156} Foyle Health and Social Services Trust v LM [2004] NIFam 1
\textsuperscript{157} The ‘twin-track’ approach of the 2002 Act (rehabilitate but with view to adoption) seems an uneasy compromise.
\textsuperscript{158} ‘Access’ became ‘contact’, ‘Custody’ was renamed ‘residence’ under the 1989 Act and 1995 (NI) Order
fostering (annual meetings, letters, bundles of information) must be promoted. Under the Children’s Convention, the right to identity requires this element of ‘openness’ to be introduced into the adoption process. Kin placements further highlight the outmoded nature of classic adoption law. As Talbot and Kidd (2004) point out, kinship carers differ from stranger carers. They are usually poorer, older, and in worse health; the children they adopt are generally older, rendering contact with other family members more complex. Whilst classic Adoption Orders can be granted, complete origin severance will not usually be possible or desirable. As an alternative to costly long-term fostering or residential placements, increased numbers of adoptions will also necessitate consideration of the child’s ability to make decisions about their own lives.(Cantwell, 1993) Whilst the right to protection arguably conflicts with the child’s right to participate, (Eekelaar, 2002) this diminishes as the child grows older. As Lurie (2004) notes, The 1959 Declaration on the Rights of the Child (which presaged the Children’s Convention, and ostensibly echoed the adult-friendly tone of the ECHR) contains protections but not participation rights. Because these rights are perceived as threatening by many adults, they are more difficult to enforce. The judiciary may thus have to merge principles of protection and participation; where the right to ‘identity’ is pleaded, Courts may have to permit some form of contact with relatives and provide greater access to identifying information. Such measures might, conversely, enable judges to act more quickly in placing vulnerable children with new carers, reassured as they would be by the knowledge that complete ‘severance’ of origins will not occur. They are likely however, to continue to seek reassure adopters that their new family will be accorded the same ‘sanctity’ as that
accorded to families which arose ‘biologically’. In sum, the various Convention rights ought to be viewed as interrelated and mutually reinforcing rather than as conflicting with each other (Flekkøy and Kaufman 1997).

The underlying question remains as to whether prospective adopters would be willing to ‘share’ their child with his ‘genetic’ ancestors or siblings, or whether they would prefer the present system of separation and secrecy. Given that most adoptions now arise from child protection cases, human rights lawyers should be wary of any ‘adult-veto’ which reminds us of the Roman doctrines upon which our Western systems were originally based. It is ironic that the UK’s ‘unsophisticated’, inherent jurisdiction (O’Halloran, 1994) of equitable Wardship seems more capable of affording ‘absolute priority’ to child welfare than its most recent statute on child welfare. As Lindly LJ remarked in Re McGrath (1893),

‘The dominant matter for the consideration of the Court is the welfare of the child....The word welfare must be taken in its widest sense....nor can the ties of affection be disregarded’. 159

One hopes that dwindling welfare resources are not behind the UK Government’s recent decision to encourage more adoptions. Family sanctity should not relieve the State of its moral responsibilities towards children’s right to identity, nor of the financial burden which accompanies the protection of the vulnerable. There is no quick-fix solution to the age-old problem of child abuse; it is possible however to challenge judicial and social

159 Per LJ Lindly in Re McGrath (1893) 1 CH 143. See also Ward v Laverty (1925) AC 101
notions of ownership of children, through increased awareness and application of human rights principles. Ultimately, it must be remembered that, within the UK, ‘on average 1-2 children die from homicide each week’ 160 at the hands of parents or substitute carers. It is to our shame as adults, that the scales still seem heavily weighted against our children.

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