How willing is the court to allow wider family members to intervene late, challenge assessments and oppose an adoption order being made?

1. Family Procedure Rules

a. Part 1 (the Overriding Objective)*, Part 4 (General Case Management Powers) and Part 12 (Public Law Proceedings) of the FPR 2010 and Practice Direction 12A (Guide to Case Management) are of particular relevance.

> * "(1) These rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly, having regard to any welfare issues involved.
> (2) Dealing with a case justly includes, so far as is practicable –
> (a) ensuring that it is dealt with expeditiously and fairly;
> (b) dealing with the case in ways which are proportionate to the nature, importance and complexity of the issues;
> (c) ensuring that the parties are on an equal footing;
> (d) saving expense; and
> (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

b. Under r12.3(3):

> "Subject to rule 16.2, the court may at any time direct that –
> (a) any person or body be made a party to proceedings; or
> (b) a party be removed."

c. PD12A 1.3(6) sets out the Public Law Outline, which states that:

i. The Social Work Chronology to be filed with the Application Form is to contain a genogram and family members and their relationships to the child.

ii. The identification of additional parties, including intervenors, should be done at the case management stage.

2. Statute

a. Section 17 of the Children Act 1989 imposes a duty on local authorities to promote the upbringing of children in need by their families so far as is consistent with their welfare.

b. Section 22C requires local authorities to place looked-after children with parents or relatives unless that would be inconsistent with their welfare or it is not reasonably practicable.

c. In care proceedings, the court must have regard to the checklist contained in Section 1 which includes having regard to the capacity of the child's parents and of other relevant persons to meet the child's needs.

d. In adoption proceedings in particular, the court must have regard to the checklist contained in Section 1 of the Adoption and Children Act 2002 which includes having regard to the lifelong effect on the child of ceasing to be a member of the original family and becoming an adopted person, to the relationship the child has with relatives (under s144 this means grandparents, siblings, and aunts and uncles), to the relatives' ability and willingness to provide a secure environment and meet the child's needs, and to the wishes and feelings of the child's relatives regarding the child.

The statutory regime, coupled with the Public Law Outline, are plainly in favour of the involvement and consideration of the wider family within care proceedings relating to children.

3. Case law

The following cases explore the nature of intervenors in care proceedings, and the extent to which the courts are willing to allow them to intervene late in adoption proceedings.

Role of intervenors

***Re W (a child)* [2016] EWCA Civ 1140**

a. *Re W (a child)* [2016] EWCA Civ 1140 concerned a judgment from a fact-finding hearing in which the judge rejected the allegations of sexual abuse and made serious allegations against a social worker and a police officer involved in the case. These serious allegations included that they had lied to the court, and that they had

subjected the child to a high level of emotional abuse. This case sets out a helpful description of intervenor status, and how it fits within the procedural framework. Lord Justice McFarlane sets out that:

i. "[28] Although the word "intervenor" is not used within the FPR 2010, or, indeed, earlier versions of the rules, the concept of there being an "intervenor" status, falling short of full party status, has been accepted on a case-by-case basis in the family jurisdiction."

ii. "[30] If it is necessary to describe an 'intervenor' in terms which are compatible with FPR 2010, Part 12 this can easily be achieved by reference to r 12.3(3) (see para 27 above) and r 12.3(4):

> (4) If the court makes a direction for the addition or removal of a party under this rule, it may give consequential directions about:
>
> (a) the service of a copy of the application form or other relevant documents on the new party;
>
> (b) the management of the proceedings.'

An 'intervenor', in the sense used in Re S and Re B, can be seen simply as a person who has been added as a 'party' for a specific part of the proceedings and whose role in the proceedings (and exposure to the case papers) is controlled and managed using the powers within r 12.3(4)."

***Cumbria County Council v T (Discharge of Intervenors)* [2020] EWFC 58**

a. *Cumbria County Council v T (Discharge of Intervenors)* [2020] EWFC 58 concerned a case in which the key issue was whether the father had abused the child or whether the mother falsely believed that he had or had fabricated false allegations. The mother alleged that the father and seven interveners had sexually abused the child, but the local authority was not seeking findings against them and was instead seeking the cross-findings against the mother.

b. MacDonald J made the following comments in concluding that the intervenors should be discharged:

i. [55] "When considering whether to accord a person intervener status on a specific issue within proceedings, each case has to be looked at on its own merits and the court has to identify the particular reason why it is necessary for a person to intervene or to remain an intervenor."

Role of wider family

***A, B and C (adoption: notification of fathers and relatives)* [2020] EWCA Civ 41**

a. *A, B and C (adoption: notification of fathers and relatives)* [2020] EWCA Civ 41 concerned three joined appeals in relation to whether a local authority had a duty to notify the birth father and the wider family about a relinquished child. This case was concerned mainly with adoption without notifying the birth father, however, some comments are made and are useful on the matter of the involvement of wider family members in adoption proceedings. [Jackson LJ]

b. The court found that the decision whether to notify the birth father or wider family members did not engage the welfare principle because it was not a decision relating to a child's upbringing, but a decision about who should be consulted about such a decision.

   i. [33] "Nonetheless, as Cobb J notes [Re H 2019 below], the statutory material as a whole provides strong indicators of the importance of engagement of the wider family in the adoption process. In the circumstances, any request for an adoption that excludes a father or close family members will naturally be carefully scrutinised by social workers and the court. That instinct is reinforced by the established domestic and European case law that emphasises that non-consensual adoption can only be approved if, after consideration of the realistic options, nothing else will do."

   ii. He also made the following guidance to future courts in considering whether there needs to be a notification of wider family where adoption is being contemplated by the court:

   [89] "The substance of the relationships.

   (3) Aside from the presence or absence of parental responsibility and of family life rights, an assessment must be made of the substance of the relationship between the parents, the circumstances of the conception, and the significance of relatives. The purpose is to ensure that those who are necessarily silent are given a notional voice so as to identify the possible strengths and weaknesses of any argument that they might make. Put another way, with what degree of objective justification might such a person complain if they later discovered they had been excluded from the decision? The answer will differ as between a father with whom the mother has had a fleeting encounter and one with whom she has had a substantial relationship, and as between members of the extended family who are close to the parents and those who are more distant.

The likelihood of a family placement being a realistic alternative to adoption.

(4) This is of particular importance to the child's lifelong welfare as it may determine whether or not adoption is necessary. An objective view, going beyond the say-so of the person seeking confidentiality, should be taken about whether a family member may or may not be a potential carer. Where a family placement is unlikely to be worth investigating or where notification may cause significant harm to those notified, this factor will speak in favour of maintaining confidentiality; anything less than that and it will point the other way."

***Re H (Care and Adoption: Assessment of Wider Family)* [2019] EWFC 10**

a. *Re H (Care and Adoption: Assessment of Wider Family)* [2019] EWFC 10 concerned a five-month-old child living in a foster placement, where his older siblings had all been adopted. The parents sought to care for him together, but the local authority had concerns due to their history of alcohol and substance misuse and alleged domestic violence.

b. The maternal family knew of his birth but did not put themselves forward as potential carers. The paternal family were unaware of the child's birth. The father was adamant that that remain the case. The local authority sought guidance on their duty to notify the paternal family of the birth with a view to their being assessed as potential kinship carers.

c. Cobb J made the following assessment of the statute in coming to the conclusion that the paternal family should be informed:
   i. [45] "… none of the provisions of statute, regulations or rules to which I have referred, impose any absolute duty on either the local authority or the Children's Guardian, or indeed the court, to inform or consult members of the extended family about the existence of a child or the plans for the child's adoption in circumstances such as arise here. However, the ethos of the *CA 1989* is plainly supportive of wider family involvement in the child's life, save where that outcome is not consistent with their welfare."

   ii. [48] "… the court, and/or the local authority or adoption agency, is enabled to exercise its broad judgment on the facts of each individual case, taking into account all of the family circumstances, but attaching primacy to the welfare of the subject child.

   iii. [49] In exercising that broad discretion, I would suggest that the following be borne in mind. There will be cases (if, for instance, there is a history of domestic or family abuse) where it would be unsafe to the child or the parent for the wider

family to be involved in the life of the child, or even made aware of the existence of the child. There will be cases where cultural or religious considerations may materially impact on the issue of disclosure. There will be further cases where the mental health or well-being of the parent or parents may be imperilled if disclosure were to be ordered, and this may weigh heavy in the evaluation. But in exercising judgment – whether that be by the local authority, adoption agency or court – I am clear that the wider family should not simply be ignored on the say-so of a parent. Generally, the ability and/or willingness of the wider family to provide the child with a secure environment in which to grow (*section 1(4)(f)(ii) ACA 2002*) should be carefully scrutinised, and the *option itself* should be "fully explored" (see [28]). The approach taken by Sumner J in the *Birmingham* case more than a decade ago, to the effect that "cogent and compelling" grounds should exist before the court could endorse an arrangement for the despatch of public law proceedings while the wider family remained ignorant of the existence of the child (see [29] above), remains, in my judgment, sound. This approach is in keeping with the key principles of the *CA 1989* and the *ACA 2002* that children are generally best looked after within their own family, save where that outcome is not consistent with their welfare, and that a care order on a plan for adoption is appropriate only where no other course is possible in the child's interests (see *Re B (A child)* and *Re B-S*)."

Late intervention, challenging assessments and opposing adoption

CD v A local authority and others [2020] EWHC 3411 (Fam)

a. *CD v A local authority and others* [2020] EWHC 3411 (Fam) was concerned with a mother's application to oppose an adoption order and in which applications for four family members to intervene in the proceedings were dismissed.

b. Each of the four family members had been negatively assessed as proposed carers for the children prior to the final hearing. The principal reason for concern in respect of each family member was that they did not "fully (or at all) acknowledge that the injuries were perpetrated by either the Mother or Father" [36].

c. Peel J also made the following comments in concluding that the family members could not challenge their assessments at this stage:

    i. [35] "I am wholly unpersuaded by either the Mother or the four family applicants on this point. All the applicants were negatively assessed before the trial (in the case of the maternal aunt she was not putting herself forward). None of them succeeded in challenging the assessments. I reject the complaint of three of them that they were not fully appraised of their assessments. Each of them learned that the outcome was negative. Each of

them could and should have checked the precise contents of their assessments if they wanted to. To do nothing when they purported to be serious applicants is inexcusably lax on their parts and cannot now be used as a justification for further assessments. Further, I am quite sure that the parents could have fully informed the family members as to the assessments. They may in fact have done so (given their apparently close relationship with these family applicants, why would they not have done so?), but they certainly had every opportunity to do so, particularly as they advanced kinship carers at the substantive fact finding and welfare hearing."

d. The mother later appealed to the Court of Appeal but was refused permission on the ground relating to the assessment of the wider family members.

***A county council v M and another (T intervening)* [2021] EWFC 35**

a. *A county council v M and another (T intervening)* [2021] EWFC 35 concerned a case in which the parents of the child concerned had decided that he would be placed for adoption. The maternal family were aware of the decision, however, when the paternal grandmother became aware of the child, she sought to care for him under a Special Guardianship Order. The local authority sought permission not to carry out any assessment of her as a potential carer.

b. Judd J made the following comments:

    i. [39] "I will, as has been suggested, look at the applications together. Just as parents do not have a right of veto of family members, or a right to have their child adopted, a family member does not have a right to an assessment, nor, without being granted leave, a right to make an application for the child to live with them. I have to make my decision in circumstances where, if the grandmother is not assessed or granted leave to apply, Baby H will be adopted. As Ms Henke states, if this happens, at the time of the adoption application the court will have no competing option to consider, despite the need to consider the welfare checklist under s 1(4)(c) and (f) ACA."

c. The local authority's application was granted and the grandmother's dismissed. This was on the basis of the disruption that this would cause to the child, and they assessed that the grandmother's application to care for the child was unlikely to succeed, and so to allow her application would be to unnecessarily delay permanency for the child.

***Re C-D (A Child)* [2020] EWCA Civ 501**

a. *Re C-D (A Child)* [2020] EWCA Civ 501 was concerned with an appeal by the mother against the care order made by the court. The main concerns of the local authority were

domestic violence, the father's criminality and the mother's mental health. A number of assessments were obtained, including a special guardian assessment of the maternal aunt which did not recommend placement with her. The maternal aunt was given permission to and did attend the hearing. The trial judge made a care order, finding that a placement with the maternal aunt would not meet the child's needs.

b. The mother appealed on a number of grounds, including that "(5) appropriate provision was not made to ensure MA [maternal aunt] had effective access to justice".

c. Wright J distinguished the instant case from *In Re P-S*, and drew attention to earlier case law on the question of whether someone should be added as a party:

   i. "[58] I would first note that the circumstances of the present case are very different from those in *In re P-S*. In that case both the Local Authority and the Guardian proposed that the children should live with their respective grandparents following positive special guardianship assessments. The failure to make them parties in those circumstances meant that, as set out in Ryder LJ's judgment, at [56], they "did not have effective access to justice" such that the "procedure was unfair".

   ii. [59] That this conclusion depended on the situation in that case and is not of more general application can be seen from the judgment of Sir James Munby P in the same case. In the course of his judgment, at [67], he referred to what had been said by McFarlane LJ in *In re W (A Child) (Adoption: Grandparents' Competing Claim) [2017] 1 WLR 889* and what he had said in *In re S (A Child) (Interim Care Order: Residential Assessment) (Note) [2015] 1 WLR 925*. This was in the context of how the court should respond to a prospective special guardian being "identified late", at [66], but is clearly of more general application. In the former case, McFarlane LJ had said, at [70], that, using colloquial language, the first question was whether the proposed special guardian was "a runner". In the latter case, Sir James Munby P had referred, at [38], to the need for the court's appraisal to be "evidence based, with a solid foundation" and, at [68], for the court to determine what evidence was "necessary to enable the judge to come to a properly informed conclusion". I would also draw attention to what Black LJ said in *Re B (Paternal Grandmother: Joinder as Party) [2012] 2 FLR 1358* about the relevant factors when the court is deciding whether to join a party to care proceedings including, at [48], "plainly the prospect of success of the application that is proposed"."

d. In the instant appeal, Wright J found that even if an application for her to be joined had been made earlier in the proceedings, that application would have been rejected because of the prospects of success of the maternal aunt's SGO application. Further, she found that the trial judge had ample evidence to consider the issue of the SGO in

favour of the maternal aunt. The trial judge's determination was therefore not undermined by the absence of the maternal aunt as a party.

***Re W (A Child) (Adoption: Grandparents' Competing Claim)* [2017] 1 WLR 889**

a. *Re W (A child) (adoption: grandparents' competing claim)* [2017] 1 WLR 889 concerned a case where a child had been placed with prospective adopters at seven-months old. They applied for an adoption order, but social services later identified the child's grandparents. The grandparents had been unaware of the child's existence, and sought to oppose the adoption order, and asked that the court grant a special guardianship order in their favour.

b. At first instance, the prospective adopters' application to adopt the child was dismissed and the special guardianship order made in favour of the paternal grandparents. The prospective adopters appealed on the basis that the judge's welfare evaluation was wrong.

c. MacFarlane J stated that in balancing the options of an adoptive placement versus a family placement "the existence of a viable home with the grandparents should make that option "a runner" but should not automatically make it "a winner" in the absence of full consideration of any other factor that is relevant to her welfare." [70]

d. He was also clear that there is no 'right' or presumption in favour of a child being brought up by his or her natural family:

    i. "[71] The repeated reference to a 'right' for a child to be brought up by his or her natural family, or the assumption that there is a presumption to that effect, needs to be firmly and clearly laid to rest. No such 'right' or presumption exists. The only 'right' is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life (in an adoption case) in a manner which is proportionate and compatible with the need to respect any ECHR Art 8 rights which are engaged."

    ii. "[73] It may be that some confusion leading to the idea of their being a natural family presumption has arisen from the use of the phrase 'nothing else will do'. But that phrase does not establish a presumption or right in favour of the natural family; what it does do, most importantly, is to require the welfare balance for the child to be undertaken, after considering the pros and cons of each of the realistic options, in such a manner that adoption is only chosen as the route for the child if that outcome is necessary to meet the child's welfare needs and it is proportionate to those welfare needs."

e. The court in this case found that the ISW and the children's guardian had fallen into error by assuming that there was an automatic presumption in favour of the natural family, and therefore the case was remitted for a rehearing.

***A (Children)* [2019] EWCA Civ 609**

a. *A (Children)* [2019] EWCA Civ 609 was concerned with an appeal by the father against the making of an adoption order as the maternal grandfather had put himself forward as a potential carer for the children. The father sought leave to oppose the making of the adoption orders on the basis that this constituted a change in circumstances.

b. In dismissing the appeal, Moylan LJ made the following comments regarding the grandfather's late application to be considered as an alternative carer:

i. [37] First, I agree with the judge's conclusion that the maternal grandfather's proposal that he might care for the children was not, and I repeat again the words from *In re P*, "a change of a nature and degree sufficient … to open the door to the exercise of the judicial discretion". I recognise, of course, the consequences of the making of an adoption order and that such an order can only be justified if no other order is possible in a child's interests. However, in this case someone, including in particular either parent and/or the grandfather, could have proposed during the course of the care proceedings that the grandfather be considered, very probably with the grandmother, as a carer of the children. No one did. This makes this case very different from the circumstances present in the decisions both of *Re LG* and of *A and B v Rotherham Metropolitan Borough Council*. As referred to above, in both of those cases relatives of the child, who had been unaware of the care proceedings, sought to care for the child at a very late stage of the process. In the present case, it is clear that the maternal grandfather was aware of the care proceedings, in which his wife was significantly involved, and that he could have been put forward as a carer for the children. I accept that, as set out in *In re P,* the court must not set the test too high. But, it is difficult to see how a very late proposal by a known family member in circumstances such as have occurred in this case could or would be a sufficient change in circumstances to come within the provisions of the Act."

***LG (A child) (adoption: leave to oppose)* [2015] EWFC 52**

a. *LG (A child) (adoption: leave to oppose)* [2015] EWFC 52 Baker J = concerned an application by a father for leave to oppose an adoption application. In the initial care proceedings, the father had lied to the local authority that his family had known about

the child. The child was placed with prospective adopters. The father then told his family about the child, and they contacted social services wishing to care for her. His family were positively assessed, and a recommendation was made in favour of the paternal grandfather.

b. The prospective adopters had argued that the court should take into account policy considerations, including the impact that an increased risk of late challenges to adoption orders would have on prospective adopters. The court made the following comments in respect of this submission:

    i. "[31] In the context of the evaluative exercise, I have considered the policy considerations that lie at the heart of Miss Hyde's submissions. It is of course important that prospective adopters are not discouraged from coming forward. It is equally important that adoption applications are brought to a conclusion speedily so that the child can settle in the new family. It is also important that all possible family placements are identified as quickly as possible. On the other hand, as the President observed in Re B-S , I must keep at the forefront of my mind what might be described as the fundamental policy consideration identified in *Re B (Care Proceedings: Appeal) [2013] UKSC 33* , that adoption is the 'last resort' and only permissible if 'nothing else will do' and that, as Lord Neuberger emphasised, the child's interests include being brought up by the parents or wider family unless the overriding requirements of the child's welfare make that not possible.

d. The court in this matter granted the father leave to oppose the adoption, and the prospective adopters withdrew their application to adopt the child, with the result that the child moved quickly to her grandfather's care.

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