



Neutral Citation Number: [2021] EWFC 45

Case No: LS386/20

**IN THE FAMILY COURT**  
**SITTING IN LEEDS (REMOTELY)**

Coverdale House  
East Parade  
Leeds

Date: 18/05/2021

**Before:**

**THE HONOURABLE MR JUSTICE COBB**

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**Between:**

**Ms A**

**Applicant**

**- and -**

**Ms B**

**Respondent**

**The Local Authority**

**E**

**(By her Children's Guardian)**

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Re E (Adoption by One Person)  
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Ms A in person

Ms B in person

**Mr Alex Taylor** (instructed by **Local Authority Solicitor**) for the Local Authority  
**Mr Michael George** (of **JWP Solicitors Limited**) for the Children's Guardian

Hearing dates: 28 April 2021  
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**Approved Judgment**

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**THE HONOURABLE MR JUSTICE COBB**

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

## The Honourable Mr Justice Cobb:

### *Introduction*

1. Can two people, who are no longer in a loving relationship with each other and who were never married or civil partners, nevertheless be a “couple” under the *Adoption and Children Act 2002* (‘ACA 2002’) – i.e. “living as partners in an enduring family relationship” – so as to permit one (Ms A) to apply for an adoption order in respect of a child born to the other (Ms B), while they were in a loving relationship?
2. This is the important question, arising in the context of an application brought under *section 51(2) ACA 2002* (‘*Adoption by One Person*’), which falls for determination in these adoption proceedings.
3. On the particular facts of this case, where a cohesive, “integrated”<sup>1</sup>, family life has been created by Ms A and Ms B for the subject child (Emma<sup>2</sup>) and her older brother (Theo<sup>3</sup>) notwithstanding the end of their loving relationship, I feel able on balance to answer the question affirmatively. Ms B is Emma’s ‘parent’ in all senses of the word (genetic, gestational, psychological); there is no doubt on the evidence that Ms A is every bit as much her other psychological parent: see *Re G* [2006] at §39 below.
4. In dealing with this application, Ms A is unrepresented, as is Ms B; Ms B actively supports Ms A’s application. The Local Authority, which is represented by Mr Alex Taylor, argues strongly that the *ACA 2002* should be interpreted in such a way as to enable Ms A’s application to proceed and supports the adoption of Emma by Ms A on welfare grounds. Mr George acts for Emma, on instructions from the Children’s Guardian; the Guardian expresses no view one way or another on the interpretation of the law, but is supportive of the application for adoption (if it can proceed) on welfare grounds.
5. I am very conscious that no party seeks to argue against the construction of the *ACA 2002* advocated by Mr Taylor. I have nonetheless endeavoured to address the possible counter-arguments in the judgment which follows.

### *Background facts*

6. The outline background facts are these.
7. Between 2011 and 2020, Ms A and Ms B were in a fully committed, loving, and exclusive relationship. In that period, they decided to start a family. They agreed that Ms A should be the biological mother of their first-born child; through a process involving a sperm donor, Ms A became pregnant and in 2015 a son, Theo, was born. In January 2018, Ms B successfully applied to adopt Theo, and in this way, both Ms A and Ms B became in law and reality Theo’s parents.

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<sup>1</sup> This is the social worker’s word: reference the Annex A report – see §14 below.

<sup>2</sup> Not her real name

<sup>3</sup> Not his real name

8. Ms A and Ms B then decided to expand their family and have a second child. They chose the same sperm donor so that their children could be biologically related. On this occasion, it was agreed that Ms B would be biological mother, and that Ms A would adopt – a reversal of the previous arrangement. Ms B became pregnant, and in 2018, Emma was born. Emma’s actual given name has familial connections for both Ms A and Ms B.

9. Ms A’s evidence is that:

“[Emma] was very much wanted by both myself and [Ms B]. We were both committed to her conception and have both played an equal role in her life from this time. I have been involved in all aspects of [Emma]’s care from birth, with the only exception being breastfeeding. This includes the sleepless nights, the hospital stays, teething, all her development leaps and her growth spurts. I continue to meet all of her needs, be those emotional, physical, behavioural and social... she calls me ‘mummy’<sup>4</sup>”.

10. Shortly after Emma’s first birthday (in the summer of 2019), the relationship of Ms A and Ms B came to an end; they fell out of love and they decided to separate. In January 2020, Ms B moved out of the home; the separation was mutually agreed and amicable. On separation, they agreed to implement a shared care arrangement for the children, and this indeed has been the case for the last 16 months.

11. Currently Theo and Emma spend exactly half their time with Ms A (Wednesday, Friday and Saturday nights, and alternate Sunday nights), and half their time with Ms B (Monday, Tuesday and Thursday nights, and alternate Sunday nights). Ms A and Ms B have a very good relationship with each other; they are in almost daily contact with each other, they often socialise together; they plan birthday and Christmas celebrations for the children in a way which enables them to spend the day together. They help each other out with practical tasks, and on the evidence which I have seen, they flexibly operate this shared care regime to the considerable benefit of both children.

12. I am told that Theo and Emma, who are of course related genetically through their father, are inseparable; they have what Ms A described as a “fabulous” relationship with each other. Significantly Emma views both Ms A and Ms B as her parents, and they regard her as their daughter; all the evidence which I have seen points to the fact that Emma is a much-loved member of this family. Ms B says this:

“[Ms A] and myself made the decision to have children. Although we are not in a relationship, our parenting and friendship and caring relationship is united, and [we] unconditionally love both of our children as a family. Although we are not living together we parent our children together as separated parents would. [Ms A] has the most loving, caring, and strong relationship with both children and

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<sup>4</sup> Ms B is known as ‘Mama’.

are both treated the same. [Emma] and [Theo] are lucky to have such a wonderful inspirational parent....

... I have adopted [Theo] and I feel [Emma] should be no different. I want the same for [Emma]; she shouldn't feel any different as [Theo]. In the upbringing of both children it is incredibly important that we have this formalised, as this is what we have both wanted – from deciding to have children that we have a family together and that [Emma] and [Theo] remain together and both children have a place in both our families”.

13. In June 2020 (i.e., after the end of the relationship of Ms A and Ms B), Ms A formed another relationship, with Ms C. This is a loving and devoted relationship, but they do not actually live together; Ms C, who lives about a half-hour's drive from Ms A, has children aged 7 and 11 who are in school local to her home, and she is for that reason currently loath to move. Equally, Ms A does not wish to disrupt the shared care arrangements for Theo and Emma. In the autumn of 2020 Ms A and Ms C decided to start their own family, though this has not yet come to pass. I am advised that Ms C and Ms B “get on with each other” and there have been social events at which both families have been together.
14. In November 2020, Ms A applied to adopt Emma.
15. An *Annex A* report has been prepared; it contains the following important passages:

“[Ms B] is completely supportive of the plan for [Emma] to be adopted by [Ms A], this has always been the plan, and [Ms B] clearly sees this as being very much in [Emma's] best interests. [Ms B] stated that [Emma] is entirely integrated into the family of [Ms A].... They are a close family unit and enjoy spending time together as a family ... [Ms B] reported that she has little contact with her [wider] family except for her father but has a close relationship with [Ms A's]. All of the family members expressed their unwavering support of this adoption...”.

The report concludes:

“I am satisfied that they are a close family unit and despite the change in relationship status, remain partners in parenting and will continue to co-parent the children. I believe they are prioritising the children's well-being and have worked out a coherent and realistic plan where the children will be cared for together across to family homes. ... [Emma] is completely integrated into the family of [Ms A]. This is the only family she has ever known, and she is very much loved.  
...

... Although the couple are no longer in a romantic relationship I consider that they continue to have an enduring

family relationship as they maintain a strong family ethic, they are working closely together, co-parenting both children as a team and have consistently considered the children's welfare as paramount. I believe they will strive to maintain a solid relationship so as to meet the needs of both children. Having met with both parents independently I believe that they share a common goal and vision as to how this will be achieved."

*The statutory regime*

16. *Section 46* of the *ACA 2002* ('Adoption orders') provides that:

"An adoption order is an order made by the Court on an application under *section 50* or *51* giving parental responsibility for a child to the adopters or adopter".

17. *Section 49* of the *ACA 2002* ('Applications for adoption') provides that:

"An application for an adoption order may be made by —  
(a) a couple, or (b) one person, but only if it is made under *section 50* or *51* and one of the following conditions is met".

The conditions referred to above pertain to the domicile and habitual residence of the applicant(s) and the age of the subject child.

18. Applications for adoption by one person are provided for in *section 51 ACA 2002* ('Adoption by one person'). That section opens with some qualifying criteria (minimum age, and status). *Section 51(2) ACA 2002* then materially provides that:

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

Who is a 'partner' for this purpose? *Section 144(7) ACA 2002* ('General Interpretation') provides that:

"For the purposes of this Act, a person is the partner of a child's parent if the person and the parent are a couple but the person is not the child's parent."

How should we understand the term 'couple' in these circumstances? *Section 144(4) ACA 2002* provides that:

"In this Act, a couple means – (a) a married couple, or (aa) two people who are civil partners of each other, or (b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship."

*Section 144(5) ACA 2002* makes clear that partners in an enduring family relationship cannot be a person and his/her parent, grandparent, sister, brother, aunt, or uncle.

*The arguments*

19. Mr Taylor argues that Ms A is entitled to pursue this adoption application because she is still a ‘partner’ of Ms B in the sense of being a co-parent, and is still a ‘couple’ with her “in an enduring family relationship” which is created and consolidated by their active shared co-parenting of Theo (and now Emma). I must confess that when the issue was first presented to me, I was far from convinced that the *ACA 2002* could or should yield this construction.
20. Mr Taylor submits that there are essentially three interlinking routes by which the court can conclude that Ms A’s situation falls within the letter and spirit of the legislation, to enable this adoption application to proceed.
21. First, he argues that Ms A and Ms B continue to enjoy an ‘enduring family relationship’<sup>5</sup> as parents, in both law and in fact, which has been created through their historic, and ongoing, joint parenting of Theo. Ms A and Ms B are also ‘living as partners’ in the sense that they participate in, and co-operate with, a fully integrated shared care arrangement in which the time for their children is split equally; they also plan and enjoy many activities together as a ‘family’ of four, including birthday celebrations, days out, and family meals. He argues, with some force, that the incorporation of the word ‘family’ in the statutory phrase is crucial; ‘family’ usually denotes a relationship beyond a ‘couple’ which often includes children or others linked by kinship to a person or couple. He argues that had *section 144(4)* simply defined a couple as “two people living as partners in an enduring relationship” then there might not be as much scope to argue that a shared commitment to parenting a subject child creates such a relationship or that a shared and enduring commitment to a sibling does so.
22. To support his contention that it is entirely justifiable to establish family relationships through someone else, he referred me to *section 5* and *schedule 1* to the *Interpretation Act 1978* for its definition of “any relationship between two persons” which itself references *section 1* of the *Family Law Reform Act 1987* which provides that:

“(1) In this Act and enactments passed and instruments made after the coming into force of this section, references (however expressed) to any relationship between two persons shall, unless the contrary intention appears, be construed without regard to whether or not the father and mother of either of them, or the father and mother of any person through whom the relationship is deduced, have or had been married to each other at any time” (emphasis by underlining added).
23. He contends that this definition materially can permit the court to ‘deduce’ Ms A’s and Ms B’s ongoing ‘relationship’ through a third person, namely Theo; he goes on to argue that through Theo the court can deduce that this relationship is an “enduring family relationship”.
24. Secondly, he argues that the language and structure of *ACA 2002* is sufficiently adaptable (my word not his) as to allow me to interpret it in such a way as to fit the needs and circumstances of family life in 2021. Moreover, the court *should* so interpret

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<sup>5</sup> *Section 144(4) ACA 2002.*

it so as to serve, rather than deny, the best interests of this child (Emma) and children generally; this after all is the essential ethos of the *ACA 2002*. He references the clear view of the professionals (the social worker and Guardian) that it is likely to be in the interests of Emma that she be adopted by Ms A, and afforded the same legal status vis-a-vis Ms A and Ms B as her sibling, Theo.

25. He drew my attention, by analogy to the current situation on the facts of this case, to the position of a sole applicant under *section 51(3)(b)* and *section 51(3A)(b) ACA 2002*, and argues that if, for instance, Ms A had been at one time married or the civil partner of Ms B but at the time of the application had “separated” and they were “living apart”, and where that “separation is likely to be permanent”, there would be no bar on Ms A making the application. Indeed, he argues (correctly in my view) it would not have affected her ability to apply for an order if, having separated in those circumstances, Ms A was at the time of the application in a committed relationship with Ms C, or indeed another person.
26. He supported this argument by reference to the decision of Hedley J in *Re T and M (Adoption)* [2010] EWHC 964 (Fam); [2011] 1 FLR 1487, a decision founded on *section 50 ACA 2002* (‘Adoption by a couple’). In his judgment, Hedley J considered specifically the phrase “living as partners in an enduring family relationship” and said this:

“These words are no doubt chosen so as not to require the residence of both in the same property. That is not surprising as historically many a parent has had to work abroad whilst the family remained at home without in anyway imperilling an enduring family relationship. Nor is that unusual today with people having to move jobs often at short notice. What is required is: first, an unambiguous intention to create and maintain family life, and secondly, a factual matrix consistent with that intention. That is clearly a question of fact and degree in each case” (§16) (emphasis by underlining added).

He further cited *Re CC (Adoption Application: Separated Applicants)* [2015] 2 FLR 281 where the court (Moynan J, as he then was) was again concerned with a joint application under *section 50 ACA 2002* by a married couple. He referred to this authority to demonstrate that the fact that the applicant couple had separated in that case was *not* regarded as relevant to the question of the court’s jurisdiction to make the order sought. Mr Taylor pointed out that there is no requirement in the *ACA 2002* that a couple’s marriage be subsisting at the time of an application. He rightly submits in my judgement that the state of a marriage is a relevant consideration under *section 50 ACA 2002* as to whether the order *should* be made, not whether it *can* be made.

27. Mr Taylor then looked across at the caselaw generated under the *Human Fertilisation and Embryology Act 2008* (‘*HFEA 2008*’), arguing that further analogy can be drawn with how the court has approached parental order applications, where proof that the applicants must be (if not married or civil partners) “living as partners in an enduring family relationship” (*section 54(2)(c) HFEA 2008*) is similarly required. He argued that given the broad and indeed liberal way in which many aspects of *section 54* have been interpreted over the years (i.e., in this and other respects) I should have no real

difficulty in finding that “living as partners in an enduring family relationship” can exist even when the adults are maintaining two households.

28. *Section 54(2) HFEA 2008* reads:

“The applicants must be –

- (a) husband and wife,
- (b) civil partners of each other, or
- (c) two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.”

I found it instructive to consider a number of authorities (some of which I was referred to, some of which I was not) which have considered this phrase “living as partners in an enduring family relationship”, and other key phrases in *section 54* of the *HFEA 2008*, and I discuss them below, taking them in chronological order.

29. First, although I was not referred to it, while preparing this judgment I considered, *Re X (A Child), (Surrogacy: Time Limit)* [2015] 1 FLR 349 [2014] EWHC 3135 (Fam), [2015] Fam 186, in which Sir James Munby P held that where a child split his time between the two homes of separated commissioning parents, he could still be said to be living with both his parents. He said this at §67:

“X had his "home" with the commissioning parents, with both of them, albeit that they lived in separate houses. He plainly did not have his home with anyone else. His living arrangements were split between the commissioning father and the commissioning mother. It can fairly be said that that he lived with them.”

In an earlier section of the judgment, §52, Sir James Munby P had laid the groundwork for interpreting the statute in this way:

“The starting point is clear and remains essentially unchanged from that identified by Lord Penzance in *Howard v Bodington* (1877) 2 PD 203 and most recently re-stated by Sir Stanley Burnton in *Newbold and others v Coal Authority* [2013] EWCA Civ 584, [2014] 1 WLR 1288. I must consider *section 54(3)*<sup>6</sup> having regard to and in the light of the statutory subject matter, the background, the purpose of the requirement (if known), its importance, its relation to the general object intended to be secured by the Act, and the actual or possible impact of non-compliance on the parties. The question, as posed by Lord Steyn in *Regina v Soneji and another* [2005] UKHL 49, [2006] 1 AC 340, is, Can Parliament fairly be taken to have intended total invalidity? As Toulson LJ put it in *Dharmaraj v Hounslow London*

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<sup>6</sup> Which deals with time limits for the application.

*Borough Council* [2011] EWCA Civ 312, [2011] PTSR 1523, Is any departure from the precise letter of the statute, however minor, to be fatal? And the assumption, as Sir Stanley observed, must surely be that Parliament intended a "sensible" result." (emphasis by underlining added).

At §54 of the same judgment, Sir James Munby P said this:

“A parental order, like an adoption order, has an effect extending far beyond the merely legal. It has the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences. It creates what Thorpe LJ in *Re J (Adoption: Non-Patril)* [1998] INLR 424, 429, referred to as "the psychological relationship of parent and child with all its far-reaching manifestations and consequences." Moreover, these consequences are lifelong and, for all practical purposes, irreversible”.

30. It is also notable that parental orders were granted to the commissioning parents at the conclusion of the litigation known as *Re A & B (C & D) No.1* [2015] EWHC 1059 (Fam) and *Re A & B (C & D) No.2* [2015] EWHC 2080 (Fam), even though they were living apart by the time of the hearing following an acrimonious separation; in that case, the children did not even have overnight contact/stays with one of the commissioning parents / applicants as his accommodation was not suitable. Theis J felt able to read the *HFEA 2008* purposively to find that the children's 'home' was 'with' the applicants; she was influenced in her conclusion by the fact that this was in the best interests of the children, and that:

“... although the parents have separated, they remain married. The evidence indicates that despite the differences between them they both remain committed to the children and ensuring their needs are met”,

and

“... to not construe it in such a way could have detrimental long-term consequences for the children and the applicants, which is precisely what the section sets out to prevent” (see §67-76 of the *No.2* decision).

The fact that the commissioning parents were legally married in that case is noted, but what appears to have been of more consequence to the ultimate decision was (a) that the parents were committed to the children and (b) the consequences for the family of not making the order.

31. In support of the purposive construction of the statute. Mr George drew my attention to the judgment of Russell J in *F and M (Children) (Thai Surrogacy) (Enduring family relationships)* [2016] EWHC 1594 (Fam) in which she referred to the Parliamentary debates which preceded the enactment of the *HFEA 2008* and the Ministerial acknowledgement that the decision of whether a relationship is an 'enduring family

relationship’ would be a matter of fact for the courts (§29). Mr George further underlined for me the importance of treating family legislation as dynamic, pointing to Russell J’s observation that:

“... the families in which children live and are brought up are increasingly diverse and often more fluid than in the past; the enactment of the *HFEA 2008* came about in recognition of this change” (§16).

32. In *F and M (Children)* (above) Russell J had also referenced, among other authorities in this area, *A v P (Surrogacy: Parental order: Death of Applicant)* [2011] EWHC 1738 (Fam) in which the *HFEA 2008* was quite significantly ‘read down’, so as to enable an order to be made to the sole surviving commissioning parent (one of the commissioning parents having died during the legal proceedings).
33. Mr George further referred me to *Re N* [2019] EWFC 21. On the facts of this case the applicants for a parental order (who were not apparently married or in a civil partnership) had separated by the time of the hearing (after making the application). Theis J said this:

“[37] The aim of *section 54* is to allow an order to be made which has a transformative effect on the legal relationship between the child and the applicants. The *article 8* rights of the applicants and the child are engaged. N has lived with the applicants all her life and is biologically related to K. The effect of not making an order will be an interference with that family life in that their factual relationship will not be recognised by law, there will be no legal relationship between N and the applicants, she would be denied the social and emotional benefits of recognition of that relationship and would not have the legal reality that matches the day to day reality.

[38] When considering the provisions in *section 54(2)* in that purposive light it is clear the applicants were in an enduring family relationship at the time they made their application. *Section 54(2)* requires that the applicants must be two persons who are living as partners in an enduring family relationship, which they were when they made their application. In my judgment, in the absence of any other express time requirement, that requirement is satisfied in this case.

[39] The requirement in *section 54 (4) (a)* is also met as the evidence demonstrates that even though the applicants have been living in separate homes since August, N has always been with one of them since then and as a result her home has been with them, albeit divided between two properties”.

34. I then considered *Re X (Parental Order: Death of Intended Parent Prior to Birth)* [2020] EWFC 39, [2020] 2 FLR 1326, where I noted in particular what Theis J said at

§93-95; this is a lengthy passage of that judgment, which is not reproduced here, but which is of importance and should be read with this judgment. Theis J's conclusion in that case was that the *HFEA 2008* could, and indeed should, again be read down in order to permit the parental order to be made; to do otherwise would be incompatible with the "underlying thrust of the legislation being construed" and the words sought to be implied "go with the grain of the legislation". She concluded:

"The *HFEA 2008* sought to provide a comprehensive legal framework for those undertaking assisted conception, with the aim of securing the rights of any child born as a result. That policy and legislative aim remains intact if the order sought in this case is made."

35. Mr Taylor finally cited *Re A (a child: surrogacy: section 54 criteria)* [2020] EWHC 1426 (Fam); [2021] 1 FLR 357 in which Keehan J held that the fact that the applicants, the biological mother and father of the child who was born as the result of a surrogacy arrangement, were separated and living in separate homes was not fatal to an application for a parental order given that they were committed to playing key roles in the child's life, and that *section 54(2)(c)* ("two persons who are living as partners in an enduring family relationship" see §28 above) should be read in a purposive and ECHR complaint manner.
36. Mr Taylor's third main argument was founded on the *ECHR* Convention Rights of the family, Ms A and Emma in particular, notably *Article 8*: "the right to respect for [their] private and family life". He submitted that, so far as is possible, the *ACA 2002* should be read or given effect to in a manner which is compatible with those convention rights: *section 3 Human Rights Act 1998*.
37. He argued that in relation to Theo and Emma, their *Article 8* rights are engaged because the legal status of their shared parent, Ms A, is key to their private and family life. He contended that if Ms A were to be ruled ineligible to apply to adopt Emma, the State would be interfering with that right by denying an opportunity for the siblings to have the same legal parents. This would create an asymmetry in the status of their parents which amounts to an interference in family life. He argues that it is meaningful for the children to have a legal parent, rather than just having a person who exercises parental responsibility
38. He went further in arguing that the court has a duty under *Article 14 ECHR* not to discriminate against Ms A on the ground of her status as a single person, unmarried and not in a civil partnership. He pointed to the fact that marriage is a 'status' and can found the basis of a claim of discrimination (see Lord Hoffman at §6-8 in *Re P* [2008] UKHL 38 / [2008] 2 FLR 1084); he argued that a lawfully married couple who are permanently separated, or civil partners who are permanently separated, would not be prevented from making an adoption application as they do not need to show that they are in an 'enduring family relationship' (see again *section 51(3)* and *section 51(3A)* above). His argument is that having different eligibility criteria as between married couples (or couples in a civil partnership) and unmarried couples should not create discrimination in terms of the effect of such criteria where the best interests of a child are concerned; he submits that an unmarried Ms A should be just as eligible to have a court consider her substantive application for an adoption order as much as a married Ms A would be.

The Court should therefore read *section 144(4)(b) ACA 2002* in a manner which ensures that there is no such discriminatory effect.

39. Finally, and although this was a point not raised in argument, I consider it important to reference in this judgment the speech of Baroness Hale in *Re G (Children)* [2006] 2 FLR 629 at §33 to which I have already referred:

“There are at least three ways in which a person may be or become a natural parent of a child, each of which may be a very significant factor in the child's welfare, depending upon the circumstances of the particular case.”

As indicated above, while Ms A is not the gestational or genetic parent of Emma, she is a psychological parent to Emma as the evidence (summarised above) indisputably reflects:

“§35 ... the relationship which develops through the child demanding and the parent providing for the child's needs, initially at the most basic level of feeding, nurturing, comforting and loving, and later at the more sophisticated level of guiding, socialising, educating, and protecting. The phrase "psychological parent" gained most currency from the influential work of Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child* (1973), who defined it thus:

"A psychological parent is one who, on a continuous, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfils the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological, adoptive, foster or common law parent."

### *Conclusion*

40. As earlier indicated (§19), when this application was first presented to me, I was sceptical about its prospects. My uncertainty was located in the statutory language itself, and in particular the words/phrases: “*the partner*”, “*a couple*”, “*living as partners*” in *sections 51(2), 144(7) and 144(4)* respectively. I was struck by the use of the definite article in *section 51(2)* suggesting that the applicant would have to be *the* partner of a parent of the person to be adopted, not *a* partner; this suggested some degree of exclusivity of relationship between the applicant for an adoption order and the parent of the subject child. Of course, in this case Ms A is currently *the* partner of Ms C; she is a *former* partner of Ms B. The word ‘couple’ denoted a close personal (similar to conjugal) relationship, and ‘living as partners’ suggested ‘living *together* as partners’ – though notably (indeed significantly) the word ‘together’ is not in the *ACA 2002*.
41. Moreover, I note that there is a requirement that the applicant is the partner at the time when the order is made rather than at the time the application is made; *section 50(1) ACA 2002* omits such a requirement. An application brought under *section 51(2) ACA 2002* appears deliberately to establish this hurdle, and requires some scrutiny as to the applicant and parents’ relationship, not within the context of consideration of the

*section 1(4)* welfare criteria, but as a pre-requisite to an application being permitted to proceed further by the Court.

42. However, having heard argument, and for the reasons which I set out below, I have been persuaded that this application should be permitted to proceed. I say so for the following reasons.
43. First, I am satisfied that the *ACA 2002* should be construed in such a way as to achieve a ‘sensible’ result, having regard to, and in the light of, the statutory subject matter, the background, the purpose of the legislative test, its importance, its relation to the general object intended to be secured by the Act, and the actual or possible impact of an outcome if I were to reject my preferred this construction (see Sir James Munby P in *Re X* at §52 which is cited at §29 above).
44. In this regard, I must deal with two discrete points which arose in argument: (a) whether Emma’s welfare should be viewed as paramount in my determination (‘the welfare factor’), and (b) whether it matters greatly that the applicant has never been married or a civil partner of the parent of the child (‘the marital status of the applicant’).
45. (a) *The welfare factor*: The *ACA 2002* has as its essential ethos the promotion of the best interests of children through adoption; it seems to me that I can and should take into account Emma’s best interests when reviewing all of the factors listed in §43 above and reaching my view on this issue. However, I do not agree with Mr Taylor when he argued that in deciding on whether this application can be permitted to proceed, I can and should place Emma’s interests as paramount in my consideration. *Section 1 ACA 2002* (which includes the paramountcy principle at *section 1(2)*) applies “whenever a court... is coming to a decision relating to the adoption of a child”. This is *not* such a decision; it is a decision as to whether the application to adopt should be entertained by the court at all. That said, I feel that I can and should have in consideration the welfare of Emma as one of the factors in the case, and I can confirm that it would indeed be in her interests that Ms A be given the opportunity to adopt her.
46. (b) *The marital status of the applicant*. In this regard, I accept Mr Taylor’s submission that the fact that Ms A and Ms B have never married or been civil partners should not be a ‘disqualifying’ factor. He points out that had Ms A been married or a civil partner of Ms B, but at the time of the application had “separated” and been “... living apart”, in circumstances in which “the separation is likely to be permanent”, she would not have been debarred from making the application (see *section 51(3) / section 51(3A) ACA 2002*). Indeed, it would not even have mattered if, having separated in those circumstances, she was at the time of the application in a committed relationship with another person (i.e., Ms C). So I accept Mr Taylor’s argument that, when looking at the overall purpose of the *ACA 2002* Ms A should not be in a worse position because she was never married or in a civil partnership with Ms B – even though they were for some time in an exclusive and committed relationship – where what is ultimately at stake is at a best interests’ determination about the legal status of the child Emma.
47. Thus, as the legislation does not require any enduring conjugal relationship between a legally married applicant and his/her spouse (or between civil partners), it would be unreasonable in my judgement for the situation to be different for an applicant who happened never to have married or entered into a civil partnership. As Hedley J held in *Re T and M (Adoption)* (see §26 above), what *is* required is an unambiguous intention

to create and maintain family life, and secondly, a factual matrix consistent with that intention. That is clearly a question of fact and degree in each case.

48. As Mr Taylor rightly points out there are very many couples who ‘live apart together’, who do not live under the same roof, but are in an enduring family relationship. Indeed, Ms A and Ms C are a case in point – in a committed relationship, as partners, with each adult enjoying a step-parental role in respect of the children of the other, but for reasons entirely driven by their individual wishes to prioritise schooling arrangements for their own children over a wish to cohabit, actually not living together.
49. I turn next to my second main reason for my decision, linked as it is to the first. I am persuaded that a long line of distinguished judges of the Family Division and the Court of Appeal have been willing liberally to read down the equivalent phrase in the *HFEA 2008* (“living as partners in an enduring family relationship”); while there may be some distinguishing factual features between the parental order cases cited above and this case, as Sir James Munby P made clear in *Re X* (citation above) *adoption* orders and *parental* orders share the common characteristics of extending far beyond the merely legal, incorporating “the most profound personal, emotional, psychological, social and, it may be in some cases, cultural and religious, consequences” (see again §29 above). In this regard, as Theis J observed in *Re N*, the effect of the order is “transformative”, and I consider that what she said at §37 to §39 of her judgment (which I have reproduced at §33 above) of direct relevance to these facts.
50. Thirdly, just as Sir James Munby P in *Re X* and Theis J in *Re N* relied heavily on *Article 8* considerations to support the outcomes which they reached, so do I. I feel empowered to do so having regard to what Lord Nicholls said in his speech in the House of Lords decision of *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] AC 557. He gave the court very considerable latitude in the way it could interpret legislation in order to give effect to Convention rights

“[32] From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under *section 3* impossible. *Section 3* enables language to be interpreted restrictively or expansively. But *section 3* goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting *section 3* was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.”  
(emphasis by underlining added).

He added:

“The meaning imported by application of *section 3* must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'.”

51. In applying this approach, I have been careful to temper my keenness to adopt a Convention compliant construction by what Lord Rodger said in the same case at §115:

“In any given case, however, there may come a point where, standing back, the only proper conclusion is that the scale of what is proposed would go beyond any implication that could possibly be derived from reading the existing legislation in a way that was compatible with the Convention right in question. In that event, the boundary line will have been crossed and only Parliament can effect the necessary change.”

52. Taking the strong judicial steers from the authorities to which I have just alluded, I am satisfied that I should interpret the *ACA 2002* in such a way as to give legal respect to the rights of Ms A, Ms B, Theo, and Emma to enjoy family life in its most complete form, through the possibility of securing that relationship legally by adoption.

53. Has family life actually been created on these facts? I do not propose to reproduce Munby J’s helpful distillation of the wide range of factual circumstances which have been construed as ‘family life’ in caselaw from his judgment in *Singh v Entry Clearance Officer New Delhi* [2004] EWCA Civ 1075 at §59 (though it repays re-reading), but it is useful to cite his summary at §72:

“...such is the diversity of forms that the family takes in contemporary society that it is impossible to define, or even to describe at anything less than almost encyclopaedic length, what is meant by “family life” for the purposes of Article 8. The Strasbourg court, as I have said, has never sought to define what is meant by family life. More importantly for present purposes, and this is a point that requires emphasis, the Strasbourg court has never sought to identify any minimum requirements that must be shown if family life is to be held to exist. That is because there are none. In my judgment there is no single factor whose existence is crucial to the existence of family life, either in the abstract or even in the context of any particular type of family relationship”.

54. It is notable that in *Kroon v The Netherlands* (1994) 19 EHRR, cited by Sir James Munby P in *Re X*, the Strasbourg court accepted that family life existed between two parents and their children even though the parents had never married, did not cohabit, and lived in separate houses. The court observed:

“32. ... where the existence of a family tie with a child has been established, the State must act in manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child’s integration in his family ...”.

55. On the particular facts of this case – as I have highlighted them in particular from §7-§15 above – it seems to me that ‘family life’ has been and is convincingly demonstrated. Ms A and Ms B have for some time been jointly committed to creating a family life with their children, as evidenced by the conception, birth and early upbringing of Theo, and the replicated arrangements in respect of Emma. I am satisfied that Ms A played an “equal role” in the care of Emma while the couple were together, and continues to play an equal role in the shared care regime which the parents have brought about for the children since their separation; I am satisfied that they see themselves as lifelong parents for these two children. As the adoption social worker has commented, and I accept, Ms A, Ms B and the children are a completely “integrated” and “close family unit”; Ms A and Ms B are truly ‘partners’ in parenting with a strong family ethic.
56. That all said, I feel that I must leave open the question whether the statutory requirement in *section 51 ACA 2002* for the applicant to be living “as [a] partner” in “an enduring family arrangement” with the parent of the child would be satisfied by an arrangement which lacked some of the key characteristics which are present in relation to this family. If family life had not been so clearly demonstrated by effective co-parenting of an *existing* child of the family; if the care of the child(ren) in separated homes had not been so obviously ‘shared’ as the arrangements which obtain here; if the relationship of the adults as co-parents had not been shown to be as amicable as that which exists between Ms A and Ms B, the conclusion may have been different.
57. Mr Taylor raises an interesting point about discrimination, but given my conclusion on his other arguments, I do not find it necessary to decide the case by reference to the claim of discrimination.

### *Conclusion*

58. Drawing the threads together:
- i) When interpreting legislative provisions, the court must have regard to the underlying purpose of the specific requirement within the Act, and ensure the interpretation does not ‘go against the grain’ of the intentions of Parliament and creates a ‘sensible’ result; this can include some consideration of child welfare, but child welfare will not be paramount;
  - ii) In interpreting the phrase “living as partners in an enduring family relationship” it is reasonable to have regard to the caselaw generated under *section 54 HFEA 2008*, given (a) the similar legal test; and (b) that the legal, personal, emotional, psychological, and social consequences of adoption orders and parental orders are so similar;
  - iii) The issue of whether people are living as partners in an enduring family relationship is a question of fact and degree, and it is a matter for the *court* to consider in every case;
  - iv) It is not necessary for the ‘partners’ to be sharing the same property in order to be living in a family relationship; what is required is an unambiguous intention to create and maintain family life and a factual matrix which is consistent with that intention;

- v) *Section 144 ACA 2002* should be read in a way which gives effect to *Article 8*, i.e., which does not create unnecessary or disproportionate interference with the right to respect the family life of all involved;
  - vi) There is no rule that requires that intimacy, conjugality, or co-habitation be a component of an enduring family relationship. These are not requirements for married applicants, nor are they requirements in relation to parental orders under the *HFEA 2008* which requires applicants for that order to be “living as partners in an enduring family relationship.”
  - vii) In the facts of this case, ‘family life’ exists between the Applicant, Ms A, and the child, Emma; a very notable aspect of that family life is the care and arrangements which Ms A and Ms B had previously made for Theo – much can be deduced about the relationships from this;
  - viii) Integrated family relationships have continued for all four members of this family notwithstanding the separation of Ms A and Ms B;
  - ix) The law permits me to conclude that Ms A and Ms B are living as partners in an enduring family relationship.
59. For the reasons set out above, on the particular facts of this case, I am persuaded that Ms A is entitled to bring the application for an adoption order in relation to Emma. Subject to my satisfaction on welfare grounds of the appropriateness of the order (which I will consider at a later hearing), the scene is set for Emma to have the same social and emotional advantages, and status, as Theo, whom she plainly regards as her brother.
60. That is my judgment.