



Neutral Citation Number: [2023] EWFC 114

Case No: 1-2023

IN THE FAMILY COURT

Civil and Family Justice Centre
Quay Parade
Swansea SA1 1SP

Date: 12/07/2023

Before :

MR JUSTICE MOSTYN

Between :

**Andrew
- and -
(1) Beatrice
(2) David
(3) Charlie**

Applicant

Respondents

**The applicant, first respondent and third respondent appeared in person.
The second respondent did not appear and was not represented.**

Hearing date: 6 July 2023

Approved Judgment

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MR JUSTICE MOSTYN

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.

Mr Justice Mostyn:

1. In this judgment I shall use the following pseudonyms:
The applicant: ‘Andrew’;
The third respondent (Andrews’s stepson): ‘Charlie’;
The first respondent (Andrew’s wife, and mother of Charlie): ‘Beatrice’;
The second respondent (Charlie’s natural father): ‘David’.
2. The Adoption and Children Act 2002 contains the following provisions:
 - i) Section 49(2):
An application for an adoption order may only be made if the person to be adopted has not attained the age of 18 years on the date of the application.
 - ii) Section 47(9):
An adoption order may not be made in relation to a person who has attained the age of 19 years.
 - iii) Section 44(2) and (3):
(2) An adoption order may not be made in respect of the child unless the proposed adopters have given notice to the appropriate local authority of their intention to apply for the adoption order.
...
(3) The notice must be given not more than two years, or less than three months, before the date on which the application for the adoption order is made.

Core facts

3. Charlie is now aged 18½. Two days before his 18th birthday, Andrew applied to adopt him.
4. Andrew’s application is strongly supported by Beatrice and by Charlie himself.
5. Andrew, Beatrice and Charlie all appeared in person before me. Andrew has recently discharged his solicitors and has elected to act in person.
6. Until recently, Andrew’s application was opposed by David, but in the last few days David has withdrawn his opposition to the application and has discharged his solicitors. He did not appear before me either in person or by counsel.
7. The involvement of lawyers until recently has meant that the legal issues were clearly delineated in the position statements and evidence that were filed when Andrew and

David were professionally represented. Thankfully, I have not had to do my own research from scratch.

8. Andrew and Beatrice did not do a very good job in their internet research about the time limits and other conditions set out above. They got the idea that the adoption application could be made after Charlie turned 18. They only found out that that this was wrong very late in the day. As stated above, Andrew only made the adoption application two days before Charlie's 18th birthday. The local authority was told about the application at the same time. Section 44(2) and (3) was therefore not complied with. The question I have to decide is whether this non-compliance vitiates Andrew's adoption application.

The preliminary issue

9. A preliminary issue has been formulated by Morgan J. That issue is whether the notice requirement in s. 44(2) and (3) is, in the words of Lord Penzance in *Howard v Bodington* (1877) 2 PD 203 at 211, "imperative or directory". If it is imperative, then compliance with it is a strict and unyielding condition of the exercise by the court of its power to make an adoption order. By contrast, if it is directory then partial compliance, or even total non-compliance, will not necessarily prevent the court from exercising that power. In such a case the court has a discretion whether to allow the application to proceed. In deciding on which side of the line the non-compliance falls, the court looks at the underlying purpose of the requirement. Lord Penzance stated at 210:

"I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act..."

10. In this case, if the minimum notice period of three months is imperative then the upshot will be that an adoption order cannot be made. This is because Charlie has now turned 18 and so a new application (preceded by three months' notice to the local authority) is barred by s. 49(2).
11. The minimum three months' notice requirement exists for reasons of administrative efficiency. It is to enable the local authority to have enough time to prepare thoroughly the vital Annex A and Suitability reports. This of itself strongly suggests that the requirement is directory rather than imperative.

Testing a logical proposition

12. A well-known technique for testing a logical proposition is to apply to it an extreme set of facts. Let us assume that a trust exists, the terms of which provide that on the death of the life tenant the valuable trust funds will vest in his children absolutely in remainder; but if the life tenant has no children, then on his death the funds will go to charity. The life tenant has no children, but he does have a 10-year-old stepdaughter, who he has brought up and treated as his own child from infancy. He therefore wishes to adopt her so that she might become the remainderman. To this end he has just given the local authority notice of his intention to adopt with the intention of issuing the adoption application in three months' time. However, on a routine visit to his doctor

last week he is found to have a terminal illness. Tests establish that he has only a month left to live.

13. Is it seriously to be suggested that in such circumstances the court would not have the power to abridge the notice requirement, and to dispense with all other formalities, so as to accelerate the process to enable an adoption order to be made before his death?
14. I suggest that in such circumstances the court would find a way to do so. It is unthinkable that the court would allow a literal, black-letter, interpretation of the statutory provisions to shut the door on an adoption and thereby to mete out such injustice. The solution would, of course, treat the notice requirement as directory rather than imperative.

Precedents

15. In *Re A (A Child: Adoption Time Limits S44(3))* [2020] EWHC 3296 (Fam) [2021] 1 WLR 1381, the notice requirement had not been complied with. The notice had been given more than two years before the effective adoption application. In a comprehensive judgment Keehan J analysed many examples of the imperative/directory dichotomy. He “read down”, under s. 3 of the Human Rights Act 1998, the terms of s.44(3) to make them compatible with the Convention right to family life. He noted that the breach had caused no disadvantage or prejudice to any party or to the court, nor had it impeded the local authority in discharging its statutory duty. In such circumstances he held at [49]:

“In these circumstances and giving a purposive construction to the provisions of s.44(3) of the Act the adoption application may proceed notwithstanding the noncompliance with the requirement for the application to have been made within two years of the notice of intention to adopt having been given.”

16. The authorities referred to by Keehan J show that where the non-compliance relates to a time limit the Court will readily find that the requirement is directory and will allow the relief in question to be sought provided that the non-compliance was not done in bad faith.
17. But, in each of the cases cited by Keehan J it was agreed by all that the relief in question should be allowed. In this case I was faced, right up to the eve of the hearing, with active opposition to the adoption by David. His written evidence relied strongly on the literal words of s44(2) and (3). He rhetorically asked how he could be deprived of the benefit of clear statutory language.
18. I do not consider that the primary decision I have to make – whether the notice requirement is directory or imperative – depends on there being agreement between the parties. Obviously, if I find that the requirement is directory then David’s opposition, were it still active, would be an important element in the discretionary decision whether to allow the application to proceed.
19. The only family example that I have been able to find where a condition was held to be imperative, is the case of *Re Z (A Child) (Surrogate Father: Parental Order)* [2015] EWFC 73, [2015] 1 WLR 499 and *Re Z (A Child) (No 2)* [2016] EWHC 1191 (Fam),

[2017] Fam 25. The condition in that case was explained in para 1 of the first judgment by Sir James Munby P in these terms:

“When section 54(1) of the Human Fertilisation and Embryology Act 2008 provides that in certain circumstances the court may make a parental order on the application of "two people", is it open to the court to make such an order on the application of one person? Can section 54(1) be 'read down' in accordance with section 3(1) of the Human Rights Act 1998 so as to enable that to be done? These are the questions raised for decision here. In my judgment the answer to each question is clear: No.”

20. No amount of “reading down” could legitimately rewrite that provision to change “two people” into “one person”. Instead, Sir James issued a declaration of incompatibility under s. 4 of the Human Rights Act 1998, and on 3 January 2019 s.54A was inserted into the 2008 Act allowing a parental order to be made in favour of a single applicant.

Motives for seeking the order

21. In this case Andrew, Beatrice and Charlie wish to formalise Andrew’s de facto fatherhood of Charlie. It should not be thought that an adoption order would just be a piece of paperwork. On the contrary, it would have enormous spiritual, social and psychological significance to all three. In *Re A (A Child: Adoption Time Limits S44(3))* Keehan J held at [42]:

“The making of an adoption order in this case would be genuinely transformative for A and the applicant. It would give life-long legal recognition to the factual mother-daughter relationship that A has had with the applicant for her entire childhood. It is the only way in which the reality of A's family life can be given any legal recognition. The emotional and psychological consequences for the applicant and subject child in the particular circumstances of this case if the application is not allowed to proceed are enormous.”

22. In his witness statement Andrew stated:

“I will always support [Charlie’s] decisions in life and will always be there for him no matter the outcome. He is an amazing young man who makes me and his mother proud daily. To be his father legally would be an honour and one that would mean so much.”

23. In his witness statement Charlie stated:

“As far as I am concerned, the man who brought me up and who I consider to be my father is [Andrew]. He has made me who I am now. As far as I am concerned, he is my dad and I love him as that. He brought me up to be a man with morals. It is him who I turn to for emotional support ... In my eyes [Andrew] is my

father and I always refer to him as my dad. I want him to be recognised officially as my dad.”

24. I heard oral evidence from Andrew, Beatrice and Charlie. Their evidence was sincerely expressed with a very moving content. It was obvious to me that the emotional and psychological consequences of a grant or refusal of the application before me would be enormous. Andrew told me that everyone knew that he was Charlie’s true father and that it was of overwhelming importance to both of them that this reality should be formally recognised. Beatrice and Charlie echoed that evidence.
25. I received oral evidence from the assigned social worker at the local authority who told me that the absence of the minimum period of notice prior to the issue of the application had not prejudiced the preparation of the reports (the drafting of which in fact had already been started but which were paused in order for the preliminary issue to be determined). She told me that she did not anticipate any difficulty in having the reports ready by the beginning of October in time for the hearing of the adoption application which will be heard, if I decide the preliminary issue favourably to Andrew, on 17 October 2023 by Morgan J.

Decision

26. I reach exactly the same conclusion as Keehan J. In my judgment the notice requirement in s.44(2) and (3) is directory rather than imperative. The failure in this case to comply with the notice requirement has not prejudiced any party or the court. Nor has the local authority been impeded or compromised by virtue of that lack of notice in the preparation of the vital reports. The non-compliance was accidental and there is no question of it being in bad faith.
27. I therefore exercise my discretion to allow the adoption application to proceed to a final hearing.
28. I shall make an order in the following terms:

“The applicant’s adoption application shall be determined at a final hearing on 17 October 2023 on its merits notwithstanding that the applicant was in breach of the requirements set out in ss. 44(2) & (3) of the Adoption and Children Act 2002 by failing to give at least three months’ notice of the said application to the relevant local authority.”
