



PRIVATE FOSTERING ADVICE REGARDING "GIFTED" CHILDREN

A guide to the legal framework governing the duties of a local authority in relation to private adoption applications when the mother has 'gifted' the child to the applicant adopters.

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2 Introduction

2.1 Objectives of this advice

2.1.1 This advice is intended to provide practical advice and guidance for social workers on the legal framework and practical considerations, when it made aware that there is a child has been placed for adoption under a private arrangement. As such this advice has not been prepared with the level of legal reference one might find in a skeleton argument. Instead it has been prepared with a view to being accessible to non-lawyers.

2.2 Limitations on this advice

Please note that the writer is not an expert on UK immigration law, and neither is she an expert in the family law in any jurisdiction other than England and Wales. If there are cross border issues which require advice in relation to family law in another jurisdiction or issues relating to immigration and the citizenship entitlement of the child concerned, the local authority will need to seek advice from an expert appropriately qualified or advise the adopters to do so (in particular see chapter 5 of this document).

2.3 Abbreviations

2.3.1 Adoption and Children Act 2002 - ACA

2.3.2 The children Act 1989 - CA

2.3.3 Adoptions with a Foreign Element Regulations 2005 - AFER

3 Private relative adoptions

3.1 Prohibition against private adoptions in s.92 ACA

Although in general terms s.92 ACA prohibits anyone other than an adoption agency from making arrangements for the adoption of a child, there are limited exceptions to this general approach set out in subsections 3 and 4, which, taken together, permit private adoptions in limited circumstances. A private adoption will be lawful if the proposed adopters fall within the criteria set out in s.92(4) ACA, namely that in relation to the child the proposed adoption is:

(a) *the prospective adopters are parents, relatives or guardians of the child (or one of them is), or*

(b) *the prospective adopter is the partner of a parent of the child*

3.2 Definition of relative for purpose of s.92 ACA

Section 144(1) ACA defines the work 'relative' for the purpose of the ACA, and when considering whether or not a person falls into the category of relative for a private adoption it provides that:

“relative”, in relation to a child, means a grandparent, brother, sister, uncle or aunt, whether of the full blood or half-blood or by marriage [or civil partnership]”

Accordingly, if a parent places their child with a relative falling within this definition, and intends that the relative should adopt their child, the arrangement is lawful and no offence is committed by the parent or the relative.

3.3 Notice to the local authority

Before adopters can apply to adopt their child, they must give not less than 3 months' notice to the local authority, as per s.44(3) ACA. However, in the case of a private adoption by the child's relatives, they are not entitled to give this notice until the child has had its home with them for a period of not less than 3 years (which need not be continuous) in the preceding 5 years (as per s.42(5) ACA). In the event that this condition is not met, the proposed adopters will need to apply to the court for permission to apply to adopt pursuant to s. 42(6) ACA. For a child under three years of age this criteria will not have been capable of being met.

3.4 Permission to apply to adopt

3.4.1 The Application for permission under s.42(6) is governed by Part 18 of the FPR 2010, and PD18A which identifies the relevant information to include in the form. This is set out in section PD18 3.3 which states:

An application notice relating to an application under section 42(6) of the Adoption and Children Act 2002 (permission to apply for an adoption order) must include –

(a) the child's name, sex, date of birth and nationality;

(b) in relation to each of the child's parents or guardians, their name, address and nationality;

(c) the length of time that the child has had his or her home with the applicant;

(d) the reason why the child has had his or her home with the applicant;

(e) details of any local authority or adoption agency involved in placing the child in the applicant's home; and

(f) if there are or have been other court proceedings relating to the child, the nature of those proceedings, the name of the court in which they are being or have been dealt with, the date and type of any order made and, if the proceedings are still ongoing, the date of the next hearing.

3.4.2 The respondents are identified pursuant to rule 18.3 which states:

(1) The following persons are to be respondents to an application under this Part –

(a) where there are existing proceedings or the proceedings have been concluded –

(i) the parties to those proceedings; and

(ii) if the proceedings are proceedings under Part 11, the person who is the subject of those proceedings;

(b) where there are no existing proceedings –

(i) if notice has been given under section 44 of the 2002 Act (notice of intention to adopt or apply for an order under section 84 of that Act), the local authority to whom notice has been given; and

(ii) if an application is made for permission to apply for an order in proceedings, any person who will be a party to the proceedings brought if permission is granted; and

(c) any other person as the court may direct.

3.4.3 Accordingly in my view the only automatic respondent will be the parents with PR. Since the rules preclude the applicants from giving notice to the local authority without the permission, it will not be an automatic respondent under rule 18.3(b)(i). However it is possible that upon issue the court will join the local authority under rule 18.3(c). It may also make the child a party and appoint a children's guardian.

3.4.4 The application for permission to apply to adopt is made on Form FP2.

3.5 Annex A report

The annex A report is completed in the same way as it would be for a step-parent adoption.

3.6 Private fostering

Private fostering is defined in s.66 CA, and specifically excludes arrangements made by a parent for their child to be cared for by a relative (per s.66 (1) (a) (iii) CA). S.105(1) CA defines relative as:

“relative”, in relation to a child, means a grandparent, brother, sister, uncle or aunt (whether of the full blood or half blood or [by marriage or civil partnership]) or step-parent

Accordingly, when a parent places their child with a relative for the purpose of adoption, it will not give rise to a private fostering arrangement.

3.7 Child arrangement order

In my view, it will be sensible for the local authority to encourage the proposed adopters to apply for a child arrangement order so that there can be some judicial oversight of the placement at an early stage, and also so that if granted, the proposed adopters can also be granted parental responsibility to authorise them to exercise parental responsibility for the child while they are caring for it pending the adoption. This could be applied for at the same time as the permission application is issued.

4 Private adoptions by non-relatives

4.1 Offence under s.93 ACA

4.1.1 When is the offence committed?

The offence under s.93 is committed when a person knowingly breaches the prohibitions contained in s.92. If convicted of the offence, the court may pass a sentence of 6 months' imprisonment and/or a fine of up to £10,000.

4.1.2 Can s.92 ACA be breached without committing the offence in s.93 ACA?

In the event that a child is placed for adoption in breach of s.92 ACA, they commit a criminal offence under s.93 ACA if they knew or had reason to know that their actions were in contravention of the relevant prohibition in s.92 ACA. So, for example:

- if a mother hands her baby over to her best friend,
- says please can you adopt my baby,
- the best friend agrees, and
- prior to the best friend approaching the local authority asking about how to go about the adoption process, neither the mother, nor the best friend, were aware of the provisions of s.92 ACA, it is unlikely that they would be guilty of the offence of being in breach of s.92 ACA.

However, even though such a placement does not give rise to a criminal liability on the part of the adopters or the parents, it is nonetheless an unlawful placement.

4.2 Impact on an adoption application when placement was made in breach of s.92 ACA

Ultimately, when considering an application for adoption the court's paramount consideration is the welfare of the child throughout their lives, as per s.1 ACA. If the placement came about in breach of section 92, irrespective of whether there was also an offence under s.93 ACA, the court will have to consider the factors in s.1 ACA, although the circumstances under which the placement was effected will undoubtedly fall to be considered within the circumstances of the case when the court is determining whether or not the adoption is in the best interest of the child.

4.3 Permission to apply/notice of intention to adopt/Annex A

Sections 3.3 – 3.5 will apply with equal effect to an unlawful placement.

4.4 Private fostering

Pending the making of any residence order the placement will be a private fostering arrangement and, once notified of the arrangement, the local authority will need to assess and monitor the placement in accordance with Part IX CA and the Children (private arrangements for Fostering) regulations 2005.

4.5 Child arrangements order

In my view the adopters should be encouraged to seek a child arrangements order as a matter of urgency so that the placement can be given court approval and the adopters can exercise parental responsibility for the child. If granted, the requirement to monitor as a private fostering placement will fall away.

4.6 Surrogacy

This type of situation is most likely to occur in a surrogacy arrangement. Under the Human Embryology and Fertilisation Act 2008, a couple can apply for a Parental Order if they meet the requirements of that Act. This order is tailor made for surrogacy situations and they do not ordinarily involve local authorities. However, if the intended parent is a single person, or there has been a double gamete donation, the option of a parental order will not be available to them. Accordingly, the only legal option for re-alignment of parenthood is adoption. Such a situation would, if the child is not a relative of the adopters by virtue of s.144(1) ACA, be an unlawful private adoption. As this is relatively new legal territory, it is my view that the permission hearing and adoption application should probably be issued in the Family Court and allocated to a Judge of the Family Division.

5 Complexities arising out of international elements

5.1 Child born in UK to parents who are habitually resident outside of the British Islands with a plan that the child will be placed for adoption with a person or couple living in England.

5.1.1 Is this an offence under s.83 ACA?

If a child is born in the UK then the child is not brought into the UK for the purpose of adoption, even if the mother travelled to the UK for the purpose of the birth. This is because under English law a child does not have an independent legal personality until after it is born. Accordingly, when a child is born in the UK, even if its parents are habitually resident somewhere else, the child is not brought into the country for the purpose of s.83 ACA and no offence is committed.

5.1.2 Does the court have jurisdiction to hear the adoption application?

Firstly, it is important to note that in an adoption the jurisdiction of the court to make orders arises out of the status of the adopters not out of the habitual residence of the child. So the habitual residence of the child is not a relevant factor to the jurisdiction of the court to entertain an adoption application.

Furthermore, the child is not likely at the time of the birth to be habitually resident in any jurisdiction, and, if the local authority is of the view that protective measures are required under s.31 then it will have jurisdiction under Brussels IIA to make an order on the basis that the child has no place of habitual residence and is present in England and Wales.

5.2 Child brought to UK by birth parents to place the child with adopters who live in the UK

If the adopters are habitually resident in England and they arrange with the parents for the child to be brought to the UK with the intention that the parent will place the child with them for the purpose of adoption, they commit an offence under s.83 ACA. Unlike the offence under s.93 ACA, it does not matter whether or not the adopters were aware of the requirements of section 83 ACA or the corresponding regulations under AFER. However, the decision as to whether to prosecute the adopter or the parents for the offence under s.83 ACA will be a matter for the CPS, which in turn is obliged (as it is in all cases) to have regard to the public interest when deciding whether or not to bring charges against a person who appears to have committed a crime.

As with breaches under 92 ACA (see paragraph 4.2 above), a court hearing an application for an adoption order will be governed by the welfare of the child under s.1 ACA and a breach of s.83 will not, in and of itself, be a bar to the adoption proceeding.

5.3 Immigration issues and citizenship

As set out in the introduction the writer is not an expert on immigration issues. However, the following matters are worth considering:

- 5.3.1 If at least one of the child's parents are British then the child is likely to be entitled to British citizenship. This will be complicated if the British parent was born overseas and/or the British parent is the unmarried father of the child. Legal advice should be sought in this situation.
- 5.3.2 If the child's parents are not British citizens and the child is born in England, the child will not obtain British citizenship simply by virtue of having been born here. Equally, they will not have entered the UK on an independent visa, but may be included on a dependent on their parents' visa. In any event, I would recommend that the local authority advise the adopters to seek immigration advice in this situation.
- 5.3.3 If the child was brought in the UK after birth, then, unless it was smuggled into the UK illegally, it is likely to be dependent on the parents' visa (or if they are members of the EU on their right to freedom of travel within the EU). It will be important for the Local authority to advise the adopters to clarify the child's entitlement to live in the UK and to take advice on appropriate steps to regularise the child's immigration status if necessary.
- 5.3.4 If the child was brought into the UK in breach of s.83 ACA this may complicate the child's immigration status and the adopters should be advised that specialist immigration advice may be necessary.
- 5.3.5 If the adopters are British, then upon the making of an adoption order the child will be entitled as of right to British citizenship, notwithstanding any difficulties with his or her own status.

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