Squaring the Adoption Triangle: reconciling the competing needs of sibling children

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ABSTRACT

Siblings are important – so far, so obvious – and yet the sibling relationship does not feature in the commonly-described 'Adoption Triangle'[1] of birth parent, child and prospective adopters.

Social workers construct care plans, making recommendations to the court as to the appropriate arrangements for each child with whom the court is concerned, but responsibility rests upon the judge to sanction or prohibit the severance of a sibling relationship. In so doing, the judge must afford paramount consideration to the welfare of the child who is the subject of the application – even though the decision may have significant implications for the welfare of the siblings left behind.

This thesis explores, primarily through the prism of judicial decision-making, the extent to which the significance of the sibling relationship is recognised and respected within the jurisdiction of the courts of England and Wales; the extent to which the legal framework

[1] A term coined, inter alia, in 'The Adoption Triangle' (Floud, 1982 p.50).

facilitates or impedes that recognition and respect, and the scope afforded by the law for judges to reconcile the competing needs of sibling children.

In order to provide context, the thesis contains a literature review and consideration of the theory of judicial decision-making; the application of that theory in practice is explored by direct survey of family judges and analysis of reported cases, concluding not only with findings based upon the research undertaken, but also with recommendations generated by those findings for further research, as well as areas in which the relevant law may benefit from further clarification or amendment.

My thesis has been inspired by the recognition that, currently, the child protection system is at risk of failing to promote and preserve essential sibling bonds. Whilst there may be limited circumstances in which the separation of siblings provides the least detrimental care option, children deserve to be confident that all appropriate attempts will be made, by social workers and judges alike, to preserve and promote positive sibling relationships. This research is designed to consider to what extent the law, and its judicial application, honours and facilitates that aspiration.

Acknowledgements

I acknowledge a huge debt of gratitude to all those who responded to the survey which forms the central part of this research, as well as to all the colleagues, friends, supervisors and family members who have encouraged me to complete this research.

Although I have relied upon and analysed data gleaned from a survey of my judicial colleagues (as set out in Chapter 6 of this study), I take full responsibility for any errors or omissions.

The work is dedicated to my siblings, living and departed, and to my late husband.

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CHAPTER 1

INTRODUCTION

> Children of the same family, the same blood, with the same first associations and habits, have some means of enjoyment in their power which no subsequent connection can supply; and it must be by a long and unnatural estrangement by a divorce which no subsequent connections can justify, if such precious remains of the earliest attachments are ever entirely outlived (Austen, 1813 – re-printed 1971, p.198).

1.1. Setting the Scene

Siblings are important. Those '*first associations and habits'* have the potential to provide sibling children with the security of shared experience, support and (usually) affection, together with a template for the life-long negotiation of the minefield of all manner of inter-personal relationships. Those propositions seem, at first sight, so entirely obvious that it might be thought surprising that a study relating to the separation of siblings was not redundant even

before the ideas prompting it had germinated and taken root. However, that would be a simplistic approach for two reasons: firstly, there may occasionally be good and valid reasons why separation is either inevitable or the least-worst option, and secondly, children may sometimes be separated, as I shall discuss, for reasons of expedience – one child may be attractive to prospective adopters, whereas an older child of the family may be harder to place. One sibling may be ready to be adopted; another may be so entrenched within his family dynamic that it is not in his best interests to pursue an adoptive placement. Official policy proscribes any presumption in favour of siblings remaining together:

> The Government considers there should be no presumption about whether to separate or place siblings together; decisions should depend upon the individual needs of each child and local authorities should have in place a robust decision-making process (Department for Education, 2014, p.11).

Individual need is one issue, but expedience is quite another. The purpose of this study is to fill a gap in existing research by exploring whether the law, as judicially applied, is complicit in the sacrifice of the needs and rights of children to preserve sibling

relationships in order to expedite and cement adoptive placements. To put it another way, it will explore whether the law, and the judicial decision-making which the law shapes and demands, reinforces or challenges the temptation to air-brush aspects of a child's situation which militate against what would otherwise be considered the obvious outcome of placement for adoption. As Her Honour Judge Lazarus puts it:

> How is it that adoption appears to have become a kind of orthodoxy that requires inconvenient matters to be ignored and others to be twisted to its support? (*Re A (A Child: Flawed Placement Application)* [2020] EWFC B2).

My study will consider the appropriate balance between offering the security of an adoptive placement on the one hand, whilst, on the other hand, not neglecting the long-term implications for sibling relationships. Ultimately, by exploring legal principle and its application within its broader social and cultural context, I intend to reach a conclusion as to whether the current law is apt to meet the needs of the entirety of a sibling group – and if not, how it might usefully be amended.

The task has been approached primarily through the prism of judicial decision-making, both in theory and in practice, utilising the research questions (further explained within my Methodology chapter (Chapter 4)) as a focus and anchor for analysis and synthesis. The research questions as follows:

1. Do the courts sufficiently consider the potentially-competing welfare interests of sibling children in making placement decisions which may result in the permanent severance of the sibling relationship?

2. Even if separate placements are inevitable, is sufficient attention given to preserving sibling relationships by direct and indirect contact?

3. Is it possible for law and practice to reconcile differing and competing welfare implications for individual siblings, and especially for siblings who are left behind whilst other siblings are received into adoptive families? Should the law be modified specifically to recognise the significance of the sibling bond?

Social workers propose care plans, theoretically informed by the robust decision-making process alluded to by the Department for Education (supra); parents and those representing the children may accept or challenge those care plans – but ultimately the responsibility for endorsing or rejecting plans for sibling separation rests upon the judge charged with determining the case. The judiciary, in turn, depends upon having the necessary statutory armoury to discharge the duty enjoined within the judicial oath to '*do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will'* (derived from Promissory Oaths Act 1868, as amended). How is a judge, faced with competing plans for sibling children, to fulfil the imperative to 'do right' by one child without compromising the needs and rights of others within the sibling group? And would additions or amendments to that statutory armoury assist or hinder the fulfilment of that task? Those questions encapsulate the dilemma which this study is designed to confront.

I have a long-standing interest in the subject of adoption of children from care – sometimes emotively referred to as 'forced adoption', although it should be acknowledged that some brave parents will

concede their inability to care for their child and will unselfishly refrain from opposing that child's permanent transplantation into another family. My interest was sparked by my experience over many years as a children's solicitor, primarily representing children (and occasionally parents) in care and adoption proceedings; it has been further developed during my more recent career as a family judge, confronting on a daily basis the issues which form the subject-matter of my study. I also have a long-standing personal interest in the sibling dynamic.

Adoption has featured highly on the United Kingdom's domestic political agenda for many years, with numerous changes in policy and practice designed to encourage greater use of adoption as an outcome for care proceedings. As Marsh and Thoburn (2002, p.131) note, politicians have embraced adoption as a '*quick exit from care'*. However, such enthusiasm fails to confront how best to ensure the over-arching welfare of the entirety of a sibling group with differing care plans, and, in making far-reaching decisions for children in my professional capacity, I have become increasingly concerned that the needs and rights of such children to preserve sibling relationships are at risk of being sacrificed on the high altar of achieving adoptive placements. This has life-long implications

for each member of the sibling cohort, and requires an appropriate balancing of the security of an adoptive placement weighed with and against its short, medium and long-term consequences for sibling relationships. It also requires careful assessment of the advantages and disadvantages of the proposed care plans for each child, recognising that in some limited circumstances the separation of siblings may be an entirely appropriate choice; that in other circumstances it may be a state-imposed source of significant harm, and that for some sibling children it may simply be the least-worst plan which can be devised in the particular circumstances of the case.

The final catalyst for the formulation of this study was my attendance at an inspirational Voice of the Child conference in July 2015 organised and conducted by the young people who comprise the Family Justice Young People's Board (FJYPB) – an organisation sponsored by the Child and Family Court Advisory and Support Service (Cafcass) and made up of children and young people who have had direct experience of the family justice system or have an interest in children's rights and the family courts. One of topics discussed was that of sibling separation, and the pain which the subject generated was palpable. FJYPB members have

formulated a number of guides for those involved in family justice, and their guide to working with siblings (FJYPB, 2019) enjoins professionals, inter alia, to listen to the voice of each child individually, and to consider both individual and combined needs. The substance of that plea both informs and underpins all that follows within this study.

1.2 The Challenge of Sibling Separation

The problem of sibling separation is easier to articulate than to resolve. The imperative of maintaining the sibling bond is, in the majority of cases, self-evident, but the delicate balancing of competing priorities required by social worker and judge alike provides extensive and fertile ground for research. Simmonds (2017) encapsulates the social-worker dilemma thus:

> Together or apart – that is the question that perplexes many practitioners. How do I find a placement where the adopters or foster-carers have the practical resources such as housing, emotional strength, resilience and commitment over time and the insight to fully understand what taking one, two, three or four siblings might mean? …It is an enormous and challenging question that frequently defies straightforward answers.

In exploring that 'enormous and challenging question', it is important to hold in mind that the term 'sibling' may, from the child's perspective, embrace a notion which extends beyond the purely biological: as noted within my literature review chapter (Chapter 2), children are less formal than adults in defining relationships and a sibling in any given context may extend to an un-related child with whom the child shares, or has shared, her life.

In the case of *Re S-C (Children)* [2012] EWCA Civ.1800, the Court of Appeal declined to give judicial guidance on the issue of sibling placements. Giving the leading judgment, Baron J explained the rationale thus:

> The grounds of appeal also contemplate that this court should lay down general principles in relation to the way that sibling groups should be dealt with in the context of care proceedings. Speaking for myself, I would decline to make any pronouncements of a general nature because each case is unique and different on its facts. The court will always be required to provide bespoke solutions targeted on the needs of each particular child. Accordingly general guidance in this field would not be in point.

Mrs Justice Baron's pronouncement valuably reinforces the cardinal legal principle that each case is indeed unique and that each child requires a bespoke solution to the conundrum of how best to promote his holistic welfare; that said, it does not assist in considering how best to reconcile the competing needs of members of the same sibling group. Within this study, and in formulating my conclusions by reference to the research questions, I will consider whether the current law is sufficiently flexible and inclusive, or whether it would benefit from modification to ensure that the judiciary is equipped to promote, protect and respect the interests of **all** members of the sibling group as far as humanly possible, and notwithstanding the almost inevitable conflicts of interest which may arise when differing care plans are formulated.

It is necessary to emphasise that whilst recognising that adoption has become a political issue, this work is entirely apolitical in nature, and recommendations as to any modification of the law are prompted by the conclusions of the research and not by any political agenda – judges are, by the nature of their calling, required to refrain from any political activity, even if such activity is entirely divorced from their professional lives.

1.3 Chapter Outline

1. Chapter 1, this introductory chapter, has been designed to set the scene for all that follows. As will be apparent, it explains the motivation for the study, and why it aspires to be a necessary contribution to the body of scholarship pertaining to the adoption of children and all the complexities thereby entailed. It also sets out the chapter route map underpinning this study.

2. In order to locate the study within its research context, the second chapter will provide an overview of the relevant literature, both historical and contemporary. Essentially, this chapter will evaluate the importance of the sibling relationship as seen throughout a very wide body of research literature, noting the indicators and contra-indicators relevant to the promotion of that relationship. The literature is further explored from the perspective of the degree of respect afforded by law and practice to the sibling bond, and the consequences of failing to appreciate the implications of severance of that relationship.

3. The third chapter is devoted to an analysis of the theoretical aspects of judicial decision-making, exploring the issue by reference to a wide body of historical and contemporary literature. The chapter endeavours to highlight the complexity of the judicial decision-making process, with each case requiring an outcome which is balanced, bespoke and, above all, fair and just. It sets the scene for the research which follows, underpinning the analysis of the data gleaned both from a survey of family judges and from a detailed exploration of reported cases.

4. The fourth chapter within this study addresses the methodologies employed in order to formulate and thereafter to explore the research questions. It is designed to supply a full context to the area of study and to explain the methodology utilised to obtain and to analyse the data supporting the examination of the identified issues.

5. The fifth chapter provides an exploration of the legal framework underpinning and facilitating the difficult welfare decisions which the courts confront on a daily basis. This framework sets out the relevant statutory provisions, but also addresses the importance of the binding precedents created by the higher courts which guide and prescribe the practical interpretation of such provisions.

6. Within the sixth chapter, I explore the data gleaned from a questionnaire distributed to family judges throughout England and Wales, analysing their answers to a number of focused questions set out in the questionnaire which appears as Annex 1 to this study. This demonstrates judicial decision-making in practice, as described by the survey's judicial respondents.

7. The seventh chapter provides the second part of the examination of practical judicial decision-making, based upon an analysis of relevant family cases reported by Circuit and District Judges from the inception of the Family Court on 1 April 2014 to the end of December 2020. A synopsis of all relevant cases appears as Annex 4 to this study. The chapter includes a comparison between the approach described by judges, as gleaned from the questionnaire responses, and how issues are addressed in practice, as elicited from case reports, paying particular attention to the issues of sibling separation and provision for post-adoption contact. The chapter concludes with analysis of the reported cases by reference to the research questions.

8. The eighth chapter is devoted to discussion and analysis of judicial decision-making, as revealed both through the questionnaire responses and consideration of reported cases. It explores the extent to which the findings elicited from each of the research methods are consistent and explores the reasons for any perceived inconsistencies. The chapter then considers the research findings within the context of the explored literature, again with a view to identifying and analysing any obvious inconsistencies. Finally, it examines the reasons for any apparent discrepancies in the judicial approach to sibling separation.

9. The final chapter seeks to draw the threads of the project together by summarising the current legal framework to provide the context in which I then discuss proposals for change to that framework, inspired primarily by the evidence provided by my judicial respondents. It also seeks to apply the findings of the project, both theoretical and practical, to the research questions. I then make a number of proposals which flow from the research data, including identifying research gaps or those areas where further research would be interesting and/or advantageous in addressing the issues raised within this study. Finally, the study concludes with recommendations as to how, if at all, the dilemmas identified

within the research questions are susceptible of resolution, although in making such recommendations, I am conscious of the number of identified research gaps, indicating that recommendations at this stage are little more than a work in progress.

…….

It will be apparent that the majority of this study concentrates upon the impact of law and policy within England and Wales, although reference to other jurisdictions has at appropriate points within the project provided useful illumination or comparison.

Throughout this thesis I have, unless the context otherwise requires, used the male and female pronouns interchangeably when making reference to a child, in order to minimise the ungainly repetition of ‘he or she’. The law is believed to be correct as at 31 December 2021, and where English law diverges from the law of Wales, the law stated is that applicable in England.

CHAPTER 2

LITERATURE REVIEW: DO SIBLINGS MATTER?

INTRODUCTION

> Relationships with sisters and brothers form one of the longest lasting family bonds that many people experience. Ties with siblings form part of many people's lives from their early years into older adulthood … sibling relationships comprise a complex interplay of biological, social, emotional and cultural elements, not merely a simple association between biology, law and residence (Ribbens et al (2011, p.176)).

2.1 The Starting Point

Within the majority of families, to emphasise the significance of the sibling relationship is to do little more than state the obvious. It is equally obvious that there may be circumstances which compel a cautious approach to that relationship – for example, where there is evidence of inter-sibling abuse. However, the starting point in

considering the welfare of children within a sibling group will usually entail concern to maintain and promote the bonds between the children. This much was acknowledged by the Department for Education (2021, p.52):

> Being able to live with brothers and sisters where they are also looked after is an important protective factor for many looked after children. Positive sibling relationships provide support both in childhood and adulthood and can be particularly valuable during changes in a young person's life, such as leaving care… Wherever it is in the best interests of each individual child, siblings should be placed together. There are often some practical steps that can be taken to overcome some of the more logistical reasons for being unable to place sibling groups together. Where siblings placed together in foster care may be separated when one turns 18, the responsible authority should consider whether staying put arrangements may be beneficial for all the children involved.
>
> Siblings should not be separated when in care or when being looked after under voluntary arrangements, unless this is part of a well thought out plan based on each child's needs. When large families require care away from home, every effort should be made to provide accommodation where they can remain together.

It is reasonable to expect that this statement of ministerial intent would be reflected within the law underpinning placement for adoption, primarily located within the Adoption and Children Act 2002, as well as in in local authority policy documents up and down the land: sadly, such an expectation is not reflected in reality. The statement cited falls to be considered within the context of the earlier Ministerial pronouncement cited (p.8, supra) but conveniently repeated here:

> The Government considers there should be no presumption about whether to separate or place siblings together; decisions should depend on the individual needs of each child and local authorities should have in place a robust decision-making process.

Whilst it is difficult to argue against the principle of decision-making geared to the needs of the individual child, it is also important to recognise that presumptions may be displaced, and the presence of a presumption of shared placement serves to concentrate the mind of decision-makers as to whether separation is indeed the appropriate outcome, rather than unthinking reliance upon the absence of presumption as a Government-derived

justification for separation without the discipline of rigorous analysis. This chapter will explore and review the literature relating to the positives and negatives of separating siblings when making permanent placement decisions. It will include separation which stops short of adoption because, despite very significant differences between foster-care and adoption, there is much overlap in the considerations applicable to each type of placement and a corresponding overlap in reported research. Although the literature concerned with child placement decision-making is located predominantly within the discipline of social work practice, such practice is – or should be – informed by the teachings of psychology, psychiatry and child development studies, and all decision-making requires to be scrutinised through the prism of the underlying legal framework. Put another way, and as will be emphasised within the chapters addressing judicial decision-making, the courts are dependent upon good-quality social work assessments to inform that decision-making; social workers in turn must consider the psychological, emotional and mental health implications of the far-reaching recommendations which they are required to make. Sometimes those recommendations will be informed by a specific psychological or psychiatric assessment of each child, but frequently there will be no such expert assistance,

as will be discussed in addressing the legal framework underpinning child-protection decisions.

2.2 What is a Sibling?

As Monk and Macvarish (2018, p.120) put it, ‘‘*sibling relationships' are not an issue waiting to be discovered*'. It is common sense that a necessary precursor to any consideration of the optimum arrangements for sibling children must be an understanding of the term 'sibling', particularly as viewed through the eyes of the child. In dictionary definitions, siblinghood requires a biological relationship: for example, Robinson and Davidson (1999) insist within the Chambers 21st Century Dictionary that a sibling is '*a blood relation … a brother or sister'* – a claim echoed by Fowler et al. in the Pocket Oxford Dictionary of Current English (1969) – '*one of two or more children having one or both parents in common'* and by Summer, editor of the Longman Dictionary of Contemporary English (2007) who simply defines a sibling as a '*brother or sister'*. In contrast, Liddy (1998, p.24) queries to what extent a presumption of the right to respect for family life arises in the context of '*relationships between unrelated and partly-related children reared for a period together under one roof and with*

successive parent-figures, not necessarily related by marriage'. She notes the comment by Judge Pettiti in the case of *X, Y and Z v. United Kingdom* (1997) 24 E.H.R.R.143 that family life is not a '*mere aggregate'* of the individuals living under one roof, and of the relationships between the children of first and second families '*whether legitimate, natural, successive or superimposed',* and concludes that greater clarity is needed as to the law's approach to less conventional relationships. Respect for family life, as enshrined within Article 8 of the European Convention on Human Rights, will be further explored with Chapter 5 of this study when the legal framework falls to be discussed.

In adopting a more practical and pragmatic approach, Ward (1984, p.322) observes that in some cases, it is important to keep together children who are not biological siblings but have become what she describes as '*psychological siblings'*; this theory is reinforced by the unspecified author of a bulletin issued by the Child Welfare Information Gateway (2013, p.2), who asserts that children are less formal than adults in identifying siblings, and cites the research of Sturgess et al.(2001) as evidence that children's perception of closeness is not influenced by whether a sibling is a full, half, or merely a step-sibling. The author of the bulletin also notes that ties

may develop between foster-children with whom there is no other biological or social connection, described as '*fictive kin'*. That description was also referred to by Hegar and Rosenthal (2011, p.1246) who cite the proposition of Bank and Kahn (1982) that strong sibling ties arise out of frequent contact and *'unusual need for each other due to diminished parental influence or other factors'* as support for the argument for including within the categorisation of sibling those children with sibling-like ties, such as adoptive and step-siblings, as well as perhaps fictive siblings. Shlonsky et al (2005, p.707/8) note that one problem in interpreting sibling studies is variation of definition:

> The primary problem with current sibling definitions are the groups that they often leave out including: paternal siblings, fictive kin, foster care co-residents and other hard to track relationships ... Another challenge is the concept of fictive kin, or those children who are raised together and have strong relationships but are not related by legal or biological bonds. Other, less frequently considered sibling-type relationships include children who share long-term foster care placements. Strong relationships may develop between children who co-reside, yet are unrelated, and this poses yet another risk of separation if placements change.

Washington (2007, p.432) takes up the theme of necessary definition, proposing that further studies should attempt a clear definition of '*sibling*', and questioning, apparently rhetorically, whether children with the same father but different mothers are siblings – and then pondering the implications if they have never met. Similarly, Washington queries whether children with the same two biological parents but who have never met should be considered to be siblings, posing the equivalent question in respect of biologically-unrelated, but clearly attached, step-siblings. Washington also sign-posts the reader to attempts being made by Lery et al (2005) to address the difficulties of definition and the consequential challenge for those seeking to address the needs of children in sibling and quasi-sibling groups. At p.784, Lery and her co-authors assert that research on siblings is constrained by the lack of criteria defining what constitutes a meaningful sibling relationship. They propose undertaking further exploration of identifying siblings via records appertaining to the place of removal, but add (p.790) the obvious caveat:

> … administrative data cannot reveal the quality of sibling or fictive kin relationships, only whether or not

> relationships exist based on biological links or shared addresses.

In a similar vein, Thelen et al (2013, p.191) consider and contrast sibling relationships arising from shared parentage as opposed to those derived from the shared experience of step-siblings and fictive kin, reminding of the need to take a nuanced approach to each individual relationship rather than adopting a binary or formulaic approach which considers such relationships either to be risky or to be protective. Monk (2018, p.18) identifies the problem of termination and definition, noting examples of kinship vocabulary which include terms such as ‘stranger siblings’ (Jones and Henderson, 2017, p.2) and, colourfully, ‘splintered siblings’ (Hegar and Rosenthal, 2011, p.1248).

The 2011 Census revealed that 11% of ‘couple families’ were, at that time, step-families (defined as couple families including at least one step-child) (Office for National Statistics, 2014). Although there was a further census in 2021, the release of the data from that census was too late to inform this study. In view of the prevalence of ‘blended’ families, as well as families where the children share only one common parent, the remainder of this

chapter will, save where is otherwise obvious from the context, refer to siblings in the broadest sense, without distinguishing, in particular, between full siblings, half-siblings and step-siblings. For the avoidance of doubt, I will refer to step-siblings as including those whose parental figures are either married, or in a civil partnership, or merely cohabiting, despite the insistence contained within s.4A Children Act 1989 that, for the purposes of acquiring parental responsibility, a step-parent is defined as a person who is married to, or joined in civil partnership with, the child's natural parent.

It is fair to conclude from the totality of the literature that the apparent simplicity of dictionary-attributed meanings to the term 'sibling' is more appropriately described as simplistic, with the reality being a multiplicity of relationship-variations which demand a much more nuanced approach. That said, there appears to be little research literature specifically and exclusively addressing the separation of so-called 'fictive kin' and therefore I have not included such children within a separate category when considering the significance of siblings generally. Furthermore, as will be seen within Chapter 7, exploring reported cases, the concept

of fictive kin was not referred to within any of the many cases considered.

2.3 Psychological and Developmental Studies

Although Stewart and Marvin (1984, p.1322) propose that in recent years, child development researchers have re-discovered the sibling, Hegar (2005, p.720) notes that research into the importance of sibling placement remains under-emphasised. Four years later, Conger et al. (2009, p.46) identified that very little heed was taken of siblings, or of the implications of separation through adoption or foster-care within those families who were considered to be facing '*adverse conditions'*. As recently as 2013, Buist et al. commented (p.98) that the sibling relationship is one of the most neglected in psychological research, despite it being very important for individual development. As alluded to within the introductory chapter, the paucity of research in this area was both identified and mitigated by Monk and Macvarish (2018), prompting further debate, albeit primarily within the realms of legal scholarship.

My starting-point in examining sibling attachment and its protective potential is to consider studies relating to the general

population, before examining those of specific relevance to children in respect of whom there are child protection concerns. Of the latter group, the majority of the literature concerned with children's psychological and mental health does not, in considering issues of sibling separation, distinguish between children placed in long-term foster-care and those placed for adoption. This is perhaps surprising, given that it is reasonable to assume that contact between siblings in foster-care is likely to be easier to achieve than contact between separately-adopted siblings – and indeed by virtue of Children Act 1989 Schedule 2 paragraph 15(1), the local authority has a duty to promote contact between a child in its care and, inter alia, any relative, unless not reasonably practicable or consistent with the child's welfare. The term 'relative' is defined by s.105 (1) of the 1989 Act to include a brother or sister (of full or half-blood). It does not extend to the less formal categories of relationship which, as discussed above, may still be perceived by the child to be a sibling relationship, and of course does not single out siblings for especial consideration – a point to which I will return later in this study.

Bowlby and Ainsworth (2009, p.72) observe:

> Although we have made progress in examining mother-child attachment, much work needs to be done with respect to studying attachment in the micro-system of family relationships … another important topic, sibling attachment, has been tackled by a few researchers … but triadic studies of attachment relationships … are sorely lacking.

Stewart (1983) conducted a study of 54 families who were not known to the child care system, exploring the protective effect of an older sibling during maternal absence, but in the presence of a benign stranger adult. It is recorded within the study that 52% of older siblings were able to comfort and reassure the younger child, with such behaviour being more likely to be shown by older brothers to younger sisters, and by older sisters to younger brothers, rather than towards a same-sex sibling. Stewart proposed that the lesser likelihood of attachment exchange between same-sex siblings was unsurprising, on the basis that such siblings may experience greater rivalry – citing a study by Sutton-Smith and Rosenberg (1970) – although those authors also postulated that the

children showing less attachment behaviour may be modelling themselves on their same-sex parent.

In the following year, the study by Stewart and Marvin (supra) looked at interactions amongst 57 families, again drawn from the general, rather than from the care, population. At p.1330, the researchers note that approximately 50% of children between the ages of three and five comforted and reassured infant siblings, but then contend that:

> The more important finding, however, was the relationship between caregiving and social cognition: those older siblings capable of making 'nonegocentric' inferences about another's point of view were more likely than their 'egocentric' counterparts to engage in this care-giving activity… (this) strongly supports the hypotheses that, at least by the end of preschool years, children are able to serve as subsidiary attachment figures for their infant siblings.

The authors further note (p.1331) that it is only after the young child has reached the point that separation from mother is no longer a

significant source of distress that she could be expected to assist in comforting a younger sibling: a finding which clearly gives considerable pause for thought in assessing the protective potential of older siblings within the context of children who have been removed from their parents in circumstances of suspected or proven abuse, and who may well, notwithstanding any experience of abuse, be very distressed by that removal. This concern was reinforced by the findings of a study undertaken by Teti and Ablard (1989, p.1526) which concluded that:

> The potential for older siblings to serve as subsidiary attachment figures for infants was heightened when older siblings' attachment to the primary caregiver was secure … the lowest proportion of older siblings' caregiving in response to infant distress and the highest proportions of older siblings' hostility directed to infants were found in dyads with a less secure older child and an insecure infant.

Place (2003, p.262) observes, within the context of parental disputes, that

> …it is also important to recognise that the child's sense of identity and ability to resolve identity issues depend upon the acknowledgement of biological roots and heritage, and it is this that is the basis for viewing the maintenance of links with birth parents as important.

It is self-evident that the maintenance of links with siblings is also an important component of promoting the child's identity, and will be of particular significance when there are real difficulties or contra-indications to be considered in determining whether to promote the relationship between child and parent.

It is commonly the case that children adopted from care will have had difficult early life histories, frequently including disorganised and anxious attachments to the primary care giver: the inevitable implication of the Stewart and Marvin and Teti and Ablard studies is that such children may struggle to develop secure and nurturing inter-sibling relationships. This in turn calls into question whether therapeutic intervention should be offered to improve the sibling

relationship, or whether it is more appropriate to plan for permanency in separate placements. The importance of optimising the relationship between siblings is powerfully illustrated by the work of Buist et al. (2013) (supra) who, having analysed 34 separate studies, concluded that the combination of more sibling warmth, and less sibling conflict, results in less problematic behaviour, including fewer incidences of internalizing behaviour which may lead to problems such as depression. The authors explain the benefits of good sibling relationship quality by reference, inter alia, to its impact upon emotional regulation, diminished risk of anxiety, and development of trust, security and self-confidence. Sibling conflict, by contrast, can lead to learned negative and problematic behaviour – thus, by inference, casting doubt upon the wisdom of some such children being placed together in the event of being removed from their families.

Mandelbaum (2011, p.1) cites the New Jersey Supreme Court case of *L v G* [1985] 497 A.2d 215, in which it was held that '*Siblings possess the natural, inherent and inalienable right to visit with each other'*. She observes (p.3):

> Psychologists remind us that our relationships with our own siblings are likely the longest lasting relationships that we will have – more longstanding than our relationships with our parents, friends, spouses or partners. Simply put, our siblings are there for us, through good times and rough ones, often without our even asking.

Whilst acknowledging the challenges for social workers and family judges in making the difficult decisions entailed in determining whether to prioritise permanency over the maintenance of biological family ties, Mandelbaum proposes a new statutory scheme within the North American context, such scheme to include a rebuttable presumption for the maintenance of an established sibling relationship, although by means of direct contact rather than necessarily by residing together. Mandelbaum contends that this is consistent with recent psycho-social research, although concedes that the circumstances in which the presumption may be rebutted include those cases where there is evidence of inter-sibling abuse. This proposal is of course the obverse of the current UK Government guidance (supra) which cautions against any such presumption.

Further support for the potential value of the sibling relationship emerged from research by Gass et al. (2007) which involved consideration, in a longitudinal study of 120 families, of the protective potential of sibling relationships. The conclusions reached included that sibling affection has a protective effect regardless of the quality of the relationship between mother and child, and that positive sibling relationships are an important source of support for children experiencing stressful life events. At p.172, the authors note that:

> After having experienced stressful life events, children who had affectionate relationships with their siblings were less likely to experience a change in internalizing when compared to those children without affectionate sibling relationships.

That finding supported the similar conclusions of a study a decade earlier by Jenkins and Smith (1997), but the Gass study also poses the question whether affection between siblings provides a sense of safety in the face of family adversity, or is simply a distraction from such adversity. Gong J. et al. (2009) considered the fate of 155 siblings suffering from a very specific form of adversity, having

been orphaned as result of each parent contracting AIDS. The authors note (p.535) that a number of studies of children whose parents are absent from their lives found that:

> … after losing both parents, siblings may serve as a valuable source for the provision of security, comfort and psychological support which was once ascribed mainly to parental figures for children in times of stress, fear and anxiety.

The authors' conclusions (p.539) include that separation of the subject children from siblings was associated with significantly higher scores for anxiety, depression, anger and disassociation, and that severing the sibling bond through involuntary separation can have serious, life-long emotional consequences. It should be noted that a limitation to the relevance of that study is the lack of any data indicating whether there were problems within the families studied which were additional to the death of the parents: for example, it is not known whether the children's adverse circumstances had encompassed any form of abuse.

Not all the research studies considered confine their consideration of protective potential to relationships between younger sibling children: Tucker and Updegraff (2009) explored the nature of relationships between adolescent siblings, commenting (p.16) that reciprocal support roles within adolescent sibling relationships are not always associated with healthy development, but rather may lead the teenagers to become '*partners in crime*' and '*co-conspirators'*. This theory was also postulated by Slomkowski et al. (2001), who noted that such sibling support may be responsible for sibling similarity in engagement in deviant activities such as substance abuse and sexual risk-taking. However, and despite the potential for siblings to reinforce negative behaviour, Tucker and Updegraff, citing Conger, Conger and Elder (1994) and Jenkins (1992), noted (p.22) that:

> When parents in high-stress homes are distracted or unavailable, positive sibling relationships and the provision of support from elder siblings have protective effects for children and adolescents.

That theme of protective potential was explored in a study by Dance et al. (2002) which examined outcomes in respect of 63 children

who were placed outside their birth family in middle childhood and beyond, looking particularly at children who had been preferentially rejected – in other words, treated less favourably by their parents than one or more siblings. The authors concluded that those children, even if they had been scapegoated within the birth family, generally enjoyed better outcomes when placed with a more parentally-favoured sibling rather than alone. As the authors note, this observation resonates with the conclusions of Festinger (1986) and of Rushton et al. (2001), who found that negatively-treated children placed with a sibling tended to settle well in placement. The beneficial aspects of maintaining siblings in placement together are reflected in the findings of Jones (2016b, p.326) who cites studies by Albert and King (2008) and Leathers (2005) which conclude that sibling children who have been fostered together are more likely than children separated from one or more sibling to exit to a permanent placement, whether via adoption or guardianship.

It is well-recognised that abused children are at grave risk of emotional, psychological and psychiatric harm – for example, Chicchetti and Toth (1995) observe that being the victim of any type of abuse, or growing up in an atmosphere of violence, is thought to distort a child's emotional resilience, attachment, sense

of self and peer relationships. Similarly, Bailham and Harper (2004) note that there are two diagnostic disorders of attachment: reactive attachment disorder and disinhibited attachment disorder, with the manifestation of the former being most noticeable in a child's difficulty in developing appropriate social relationships. Mash and Wolfe (2002, p.377) indicate as follows:

> Children from abusive and neglectful families grow up in environments that fail to provide consistent and appropriate opportunities that guide development. Instead, these children are placed in jeopardy of physical and emotional harm … Yet their ties to their families – even to the abuser – are very important, so child victims may feel torn between a sense of belonging and a sense of fear and apprehension.

The overall themes emerging from the psychiatric and psychological literature reviewed is the importance of seeking, in the majority of cases, to nurture safe familial bonds, and especially the sibling relationship, as a protective factor to mitigate the harm likely to have been suffered as a result of abuse or other adversity in its many and varied forms.

2.4 Social Work and Social Policy Studies

Rushton et al (2001, p.1), in reporting on a longitudinal study of 61 children placed for adoption between the ages of 5 and 9, note that:

> Concern as to the benefits and problems of placement with or without siblings should … be of major interest to child care professionals. Surprisingly, however, the topic has received little research attention.

At first sight, it is difficult to discern why it could be thought reasonable or fair to place so little obvious emphasis upon a bond of manifest importance – and yet adoption policy has long purported to be based on concepts of fairness and concern for all affected by the adoption of children. Teague (1989, p.117) cites the Hurst Report, published in 1954, which attempted to spell out an adoption procedure which would be fair to all parties:

> The parties were seen to be essentially three: the natural parents of a legitimate child, or the mother of an illegitimate child, the adoptive parent or more usually parents, and the child.

In other words, the conventional 'adoption triangle', with, notably, no mention made of any sibling left behind as the child goes forward for adoption. Sir Keith Joseph (Hansard, 1973) built on the concept of fairness by describing the Houghton Report (1973) as showing concern for all the people involved in adoption and fostering – defined as the natural parents, adoptive parents, childless couples and foster parents. Whilst the children were not included in that list, Joseph went on to note that the Houghton Report '*unequivocally puts the welfare of children first'* – which from the context can only be construed as a reference to the child who is the subject of adoption plans, not to the child or children destined to be left behind.

Despite such twentieth-century pronouncements deferring to adult concerns but ignoring the non-adopted siblings, commentators from the later part of the last century have not all been slow to recognise the significance of the sibling relationship. Ward (1984, p.322) observed that:

> In each decision, the loss of siblings must be weighed for each child against the benefit of a permanent home … often when parents are absent physically or

> emotionally, the principal attachment is to a sibling … although feelings of loss may not come to the surface in the early stages of placement, grieving over a lost sibling may be lifelong.

Ward counters the suggestion that some children may, by virtue of their histories, require the undivided attention of their care-giver, observing (in a comment repeated word for word, without attribution, ten years later by O'Leary et al (1994, p.43)) that there is a particular danger in making such an assumption, and that:

> The presence of other people who can pay attention to the child will provide relief for the parents from the child's unceasing needs for nurturing.

It is interesting that the argument is couched in terms of giving relief to the adoptive parents, although of course it is in the interests of the adopted child that all possible assistance is provided to sustain the adoptive placement. O'Leary et al (1994) develop Ward's proposition by asserting that:

> Many of the reasons given for separating brothers and sisters and then for allowing them to remain separated,

> can be linked to administrative expediency or a symptomatic reaction from workers' fears and stereotypes … whilst making plans for permanency, the right of siblings to live together needs to be at the forefront of social work planning in order to balance the competing wishes of carers and other interested parties … for too long, the focus on adult-child relationships, important as these are, has tended to be at the expense of appreciating the significance of sibling relationships.

That formulation was advanced some twenty-eight years ago: has much changed in the ensuing nearly three decades? Adoption policy in recent years has been the subject of extensive governmental scrutiny. In 2000, the then-Prime Minister Tony Blair instigated a review of adoption (Policy and Innovation Unit, (2000)); this resulted in – or, in any event, coincided with – an increase in the numbers of adoption orders made; nevertheless the later Coalition Government led by David Cameron considered that yet more emphasis was required upon the perceived benefits of adoption from care, leading to a raft of initiatives commencing in 2011.These included the report of the Adoption Expert Working Group (2012) on re-designing adoption, and the Department for

Education's Action Plan for Adoption: Tackling Delay (2012) which set out a number of initiatives, including the controversial creation of the unfortunately-named Scorecards to 'encourage' local authorities to maximise timely placement for adoption. The evangelical Governmental zeal underpinning these initiatives did not prevent a notable silence on the subject of separating siblings when not all within the sibling group are deemed suitable for adoption.

The former Coalition Government's raft of initiatives were arguably prompted, or at least strongly encouraged, by a campaign instituted by The Times in the course of 2011, and which included the commissioning and publication of a report by Sir Martin Narey, setting out his views on the importance of promoting the practice of adoption (Narey, 2011). Those views were given effective Ministerial endorsement by the appointment of the very same Sir Martin Narey as a special adviser to the Government on adoption policy. However, enthusiasm for the views expressed by Narey was not universal, with Kirton (2013, p.97) noting that:

> Open adoption is largely ignored or critiqued, while Narey (2011) asks why adopters cannot be regarded as the 'real and

> only' parents. Such views are very much at odds with those of adopted children themselves, to whom birth families are important in varying ways … more broadly, the attempt to counterpose children's and parents' interests is at best somewhat simplistic, given the varied and often complex ways in which their lives are interconnected.

It is noteworthy that the young people who comprise Cafcass' FJYPB (vid. Chapter 1 – FJYPB (2019)) are very clear about the need to consider the voice of each child individually, and although Kirton focuses on the adult/child relationship, his observations self-evidently apply with equal if not greater force to the relationships between siblings. Within the same article, Kirton (p.104), citing in part Morgan (1998), is also sceptical about the increased political emphasis upon adoption:

> Adoption has long played well in the media and with the political right, portrayed as a relatively straightforward union of children in need and loving parents, which also provides desirable forms of social mobility and costs savings in the shorter and longer terms. Such political and economic appeal is likely to remain a key priority for the Coalition Government.

In a separate research study, Kirton (2018) explored the treatment of the subject of the adoption by various segments of the Press between 2010 and 2014. He concluded that (p.7):

> The desirability of higher levels of adoption went almost entirely unquestioned. Errors and misleading presentation were not uncommon. One of the most important was the blurring of boundaries between adoption (in all its forms) and that from state care, with contemporary figures for the latter frequently juxtaposed with dramatically higher overall ones from the 1970s to demonstrate the 'scandalous' or 'disastrous' decline in adoption (but implicitly from care).

In summarising his findings, Kirton observes (p.23):

> The view presented to readers was of adoption as (typically by far) the best option for looked after children and hence the importance of increased and quicker adoption. Attention was then focused on the many perceived barriers, which can be summarised as 'bureaucracy', inefficiency, and an anti-adoption culture rooted in 'political correctness' (above all on race). Implicitly and often explicitly, the interests of adopters are placed centrally, with children's interests tightly aligned. In narrative terms, both are cast as the

> victims, to the villainous social workers/local authorities and the heroic reformers (Reyes, 2011). By contrast, birth parents (usually mothers) are almost invisible, present implicitly only as 'abusers' other than in stories of 'forced adoption', where their individual or collective respectability is invariably emphasised. Contact in adoption is similarly marginalised, save for a small number of articles approving of reforms to reduce it.

In that thorough examination of numerous articles and Press releases, Kirton makes no mention of any reference to the siblings who may be left behind as a result of the adoption of one or more of their number, and it may thus be assumed that the Press was similarly silent on the subject.

The all-Conservative immediate successor to the Coalition Government maintained its anxious enthusiasm for adoption, adding inexorably to the concern that the welfare of siblings with non-adoption care plans may not receive the same care and attention as the siblings for whom adoption is deemed a suitable outcome. Subsequent administrations, including Boris Johnson's 2020 Conservative Government, have maintained their predecessors' unquestioning commitment to adoption, appearing to

treat it as an all-encompassing panacea to address the misfortunes of children unable to reside within their family of origin. On 16 January 2020, the Department of Education issued a Press Release entitled 'Councils Urged to Prioritise Adoption'. The main thrust of the document was to encourage Councils not lightly to reject prospective adopters: it was silent on the issue of the suitability of individual children, let alone sibling groups, to be adopted. It included the following exhortation from the Minister:

> Gavin Williamson has called on councils not to shy away from putting children forward for adoption, and has asked them to review their practices following a drop in the number of assessments recommending adoption as the best option for a vulnerable child.

The Press Release included a hyperlink to a letter bearing the same date and issued by Michelle Donelan, then Children and Families Minister, to all Directors of Children's Services. The letter laments a decline in the making of Placement orders, and announces (in bold type, clearly for added emphasis):

> **Adoption will therefore be a priority for the new Government and we also wish to see a renewed focus on adoption by all local authorities.**

The Press Release and the accompanying letter fall to be considered in the light of statistics published on 5 December 2019 (Department for Education, 2019) which demonstrate that the number of children adopted from care had reduced from a high of 5360 in 2015 to 3570 in the year ending 31 March 2019. It is understandable that a Government committed to maximising adoptive placements should be anxious to understand and address the barriers to adoption, but it is also noteworthy that at no point in Donelan's lengthy letter is there any allusion to the needs of sibling children, whether as the prospective subjects of adoption applications or whether beyond the reach of proceedings relating to one or more siblings. The letter equally fails to acknowledge the complexities associated with the adoption of a child away from his or her birth family, instead maintaining relentless optimism, including within an annexed document entitled 'Who can Adopt: The Facts' which concludes with the following un-evidenced assertion:

> More importantly, it is not true that most adoptions breakdown. The vast majority of adoptions (97%) are successful and the experience of ordinary family life gives children the opportunity to rebuild their lives after a difficult start.

Whilst neither the literature nor the Government appears to pay significant attention to the fate of children left behind when their siblings are adopted, various studies have explored the merits and demerits of placing children together or apart. Hegar (2005, p.719), one of the prominent researchers in this area, observes (within the context of an article reviewing 17 studies from several countries, including the United States of America and the United Kingdom) that

> Since the decades when the orphan trains carried children westward, placement of siblings has been a child welfare issue.

Within the same study, Hegar noted that since the displacement of children by World War II, British researchers have paid consistently more attention to siblings in care than have their North American counterparts – although the efficacy of that scholastic

attention is called into question by the scandal associated with the British Child Migrant Programme, in which approximately 150,000 children were sent abroad, predominantly to Australia and Canada, between the years of 1920 and 1967 – resulting in the issue of an official apology by the then-Prime Minister, Gordon Brown, (Hansard, 2010), which included the following admission:

> In too many cases, vulnerable children suffered unrelenting hardship and their families left behind were devastated. They were sent mostly without the consent of their mother or father. They were cruelly lied to and told that they were orphans and that their parents were dead, when in fact they were still alive. Some were separated from their brothers and sisters, never to see one another again. Names and birthdays were deliberately changed so that it would be impossible for families to reunite.

One of the earliest studies of sibling separation in the twentieth century was undertaken by Theis and Goodrich (1921), drawing attention to the number of siblings who were separated in foster-care. In 1976, Alridge and Cautley considered whether the presence of a sibling within a foster placement could be said to be positive

or negative, and found that opinion amongst the foster-carers was approximately evenly divided (27% regarded the presence of a sibling as entirely positive, with 25% asserting that it was entirely negative), whereas the social workers regarded sibling presence as entirely positive in 45% of cases, and entirely negative in 35%. Social workers' positive ratings were predominantly within the context of younger children and those with fewer behavioural problems – echoing the adverse impact of the '*partners in crime'* findings in respect of some adolescents, as reported by Tucker and Updegraff (supra).

Rather more recently, Wedge and Mantle (1991, p. 83), writing within the British context, noted that:

> Whenever practicable, in all social work activity with children and families, sibling relationships should be enabled to take their natural course in recognition of the (sometimes closet) importance of brothers and sisters to one another.

Staff and Fein (1993) undertook a study of 262 children in the care of an American voluntary agency over a period from 1976 to 1990.

They noted that approximately 70% of sibling pairs had been placed together, with about two-thirds remaining together for the duration of their placement career. The authors found that sibling pairs placed together were more likely to stay in their first placement than sibling pairs who were separately placed – although the authors made it clear at the outset of the study (p.261) that nothing was known about the children's pre-placement presenting problems nor the placement decision process, and it is thus a limitation of the study that it is not known whether the breakdown of some of the placements could have been predicted in the light of individual histories. Despite that limitation, Staff and Fein assert (p.268) that

> Placing siblings together is a successful child welfare practice for the most part. Placing siblings apart, if indicated by specific diagnostic judgments, is not a problem if minimizing placement disruptions is the goal. Disruption, however, as crucial a measure of permanency as it is, may not be the ultimate measure of placement success. Family connection, adjustment in the placement, and other qualitative considerations … are part of the whole picture.

In 1996 and again within the North American context, Smith conducted a survey exploring the attitudes and beliefs of social workers and foster-parents as to the placement of siblings, together or apart: at p.372, she notes that over half the foster-mothers surveyed did not believe that placing siblings together made it easier for the fostered children to be incorporated into the family, whereas a majority of the caseworkers considered that the addition of a sibling would make it harder for the foster-parent to incorporate the fostered children into that family. She concluded that more research was required, tentatively advancing the rather obvious proposition that foster-parents might not be receiving adequate preparation for fostering siblings.

Shlonsky et al (2005), surveying the literature relating to siblings in foster-care, noted (p.699) a significant professional consensus that:

> Arguments for maintaining siblings in care rest upon the pain of loss that children experience when important relationships are disrupted, leading to an impaired ability to form such relationships or attachments with others over time

but concluding that, nonetheless, the sibling tie is relegated to being of lesser importance than attachments between parents and children.

Leathers (2005), in another North American study, commented on the lack of empirical knowledge to assist in understanding why siblings are separated or how different patterns of placement relate to outcomes. Her study considered 197 adolescents and concluded that the predominant factors leading to separation decisions were lack of placements for sibling groups, and the emotional and behavioural problems of some of the children. At p.817, she notes that her study supports the importance of avoiding separating siblings, commenting, perhaps rather obviously, that:

> The maintenance of sibling ties might be particularly important for children in foster care given the enormity of the losses that they have already experienced.

Within the context of larger sibling groups, Leathers' study suggested (p.814) that it was not necessary for the entire sibling group to be placed together for children to benefit from a placement with one or more siblings, and that consistency of placement with

siblings, rather than the number placed together, was associated with better adaptation and more positive outcomes.

Washington (2007, p.426) notes that

> Most social work practice guidelines favour placing brothers and sisters together in the event that they are removed from their parents … This position has strong support in the literature. Numerous studies have found negative outcomes for children placed apart from their siblings.

She observes that sibling relationships have repeatedly been identified as key to the emotional well-being of children in foster-care, but laments (p.432) what she perceives to be the minimal incorporation of theory into social work research with regard to siblings in foster care.

The majority of the literature surveyed (such as Wedge and Mantle (1991), and Staff and Fein (1992)) is predicated upon the assumption that sibling co-placement is beneficial and focuses very much upon the assessment and quantification of the advantages

flowing from such co-placement. However, as may be inferred from, for example, the studies of Slomkowski et al. (2001) and Buist et al (2015) (supra,) there are circumstances in which it is neither desirable nor possible for children to be placed together. Herrick and Piccus (2005), writing with the additional insight of having each spent time within the care system, note (p.847):

> … sibling connections are extremely important to children in foster care, and except in situations where there are safety concerns, such as sibling abuse or extreme trauma that is triggered by sibling contact, professionals should make every effort to maintain sibling relationships.

There appears to be limited attention within social policy and practice literature either to the identification of the type of abuse/trauma referred to by Herrick and Piccus which would militate against an ongoing sibling relationship, or to appropriate strategies to address or mitigate the difficulties, with a view to re-uniting the siblings. Some indication of the scale of the problem of physical inter-sibling abuse appears within a study by Khan and Cooke (2008), who considered, by reference to a cohort of 111 young people known to the Scottish criminal justice or care systems, the risk factors for inter-sibling violence. Approximately

90% of the subjects admitted to perpetrating violence upon one or more sibling, with some 10% inflicting life-threatening or life-lasting injuries leading to hospitalisation. The authors cite the studies of Allison and Furstenberg (1989), Amato (1999) and Bray (1999) in support of the proposition (p.1524) that:

> Research findings report that siblings in blended families have a higher tendency to exhibit behavioural and emotional problems, lower social competence, fewer socially responsible behaviours and problematic family member attachment than fully-biological siblings who live with each other.

Another very serious problem within some sibling relationships is that of sexual abuse. A study by Cyr et al. (2002) records that girls are as greatly traumatised by inter-sibling incest as by father-daughter incest, with over 90% of victims showing clinically-significant distress. Dayan et al (2011) reporting on a study of social care-provider decision-making in France, and addressing factors militating for and against joint sibling placement, noted (p.330) that:

> La maltraitance intra-fraternelle, en particulier l'inceste, est le critère le plus souvent évoqué par les auteurs, comme contre-indication au placement conjoint.

(Informal translation: inter-sibling ill-treatment, especially incest, is the most frequently-advanced reason for not placing siblings together).

The authors comment (p.334) that in every case where care-providers considered a joint placement to be inappropriate, it was emphasised that it was the life in common, and not the sibling bond per se, which was thus fractured. The authors further note (p.335) the importance of the sibling bond in forging a child's identity. The study concludes, as do so many, with a comment upon the complexity of the issues involved and an indication that further research is required.

The literature review undertaken by Dayan et al. does not, perhaps unsurprisingly, refer to a paper by Hargett (1998) in which he advances a formula for addressing the very serious problem of inter-sibling incest with the objective of sibling reunification. Hargett's study is located firmly within a faith group and is

predicated upon the assumption that the children remain within the care of two committed parents who are willing fully to engage in a lengthy therapeutic process and to maintain high levels of vigilance in the event of reunification. Those pre-conditions may be seen as limiting the relevance of the study to children who had not previously been removed from the care of their parents, but some of Hargett's observations are of universal application in cases of inter-sibling abuse – for example, he emphasises (p.94) that each case is remarkable and that any intervention should concentrate on prompt assessment and treatment, focusing on reconciliation and reunification. Whilst acknowledging that reunification is unlikely where wider family members have participated or colluded in some degree in the sexual abuse, he suggests (p.95) that '*non-offending'* parents or guardians may be able to understand and enact the appropriate level of supervision, security and safety which are necessary precursors to reintegration – the clear implication being that sufficiently committed foster-carers or adopters could in theory provide the support required.

Barratt (2015, p.192), writing from a psychological perspective, provides a note of caution:

> …with the benefit of hindsight, we sometimes question the reason that younger children can be placed with older, emotionally damaged and needy siblings. They have sometimes left the family home prior to the birth of a sibling and feel that they cannot be the loveable small child that they see, and so they feel desperately jealous, angry, and, because of their behaviour, bad, which can lead to a spiralling of their behaviour … The decision of who to place together is often a pragmatic one; however, the experience of caring for a sibling group can be very challenging.

That note of caution is very relevant within the context of applications by parents for permission to oppose the making of an adoption order in circumstances where a subsequent child remains in their care: this will be further explored within Chapters 5, 6 and 8.

2.5 CONTACT BETWEEN SEPARATED SIBLNGS

The question of contact between sibling children separated by adoption looms large within my concluding chapter, and is an area which receives significant attention within Chapter 6, addressing the questionnaire responses. As noted, (Dayan, supra), there is a

distinction to be drawn between sibling separation and fracturing the sibling bond. This sentiment was echoed by Cossar and Neil (2013, p.69) who record that whilst the literature shows that for the majority of children, entry into the care system involves separation from at least one sibling, and the loss thereafter of contact with that sibling or siblings, the authors' observation was that the children did not feel that it was necessary for siblings to live together, but did consider contact to be important. The legal issues relating to post-separation contact will be discussed within chapter 5, but in terms of the impact upon the children concerned, Cossar and Neil observe (p.73) that:

> The process of negotiating an acceptable level of closeness is difficult when children are adopted from care as there is often limited opportunity for interaction outside of the actual contact event. The opportunity for relationships to develop is stymied if contact plans are decided at the point of adoption and there is no opportunity for review in the light of the changing needs of the parties … some contact arrangement may continue that might be better curtailed, whilst other opportunities for closer relationships to develop might be missed.

One of the serious consequences of placement of a child for adoption may be the loss of all direct contact with any siblings placed elsewhere – a potential disadvantage which may be compounded by the knowledge that other siblings have remained within the birth family. Rushton and Dance (2003, p.265) observe in this connection:

> … in relation to assessing and preparing the children for placement, it is crucial that children's understanding of their circumstances and their readiness to accept a new family is explored if brothers and sisters are to remain within the birth family. How is the child to make sense of that? Does the child harbour a dream of returning?

It is noteworthy that that key text does not explore the advantages and disadvantages of maintaining contact between the 'exiled' sibling and those remaining at home, although (p.150) the authors advance the proposition that, in the absence of evidence to the contrary, *'it seems reasonable to proceed cautiously and aim for the maintenance of contact with siblings wherever possible'.*

One prime advantage of ongoing sibling contact is the assistance such contact brings to the process of the child developing his or her

identity. Haimes and Timms (1985, p.79) refer to the risk of an adopted child becoming a sort of '*psychological vagrant'*, with no certainty for such children as to whether they should align themselves with their natural or with their adoptive families. McCoy (2006, p.33) develops this argument by an assertion (within the context of transracial adoption, but with obvious implications for any child separated from parents and siblings) that:

> Establishing one's own identity is a major task in life. Not resembling the family who brought you up may have stimulated intense feelings of loneliness … The search for personal identity is complicated because of the mystery of genetic background.

However, as noted above within the context of placement separation, not all relationships between separated siblings may be viewed as positive. A study by Edwards et al. (2006, and cited by Cossar and Neil, supra, p.68) found that in some cases, contact could re-traumatise children – although in other cases, it was helpful for siblings to be able to discuss with each other their past, often shared, experiences. This theme was pursued by Macaskill (2002), who notes (p.77) that when children have deeply abusive histories, contact between siblings requires very careful planning,

with clarity about boundaries, together with appropriate monitoring and support. She stops short, however, of cautioning against contact taking place, providing instead a balanced account of why children want contact with their siblings, and the barriers to such contact as perceived by birth parents, adopters and social workers. Macaskill reports (pp.78/9) that some children wish to have contact with their siblings because of a strong emotional bond '*forged ... during a traumatic childhood*'; others had concerns about the safety of siblings, whereas in some cases, a sibling may have adopted a quasi-parental role to a younger child.

The barriers identified by Macaskill to direct contact included parental jealousy if the adopted child is able to maintain a relationship with a sibling but not with the parents; adopter fear that contact might trigger very negative behaviour; in some cases, a wish on the part of the adoptive parents to block out the reality of the child's adopted status and pretend that he or she is their birth child. In the case of children where inter-sibling sexual abuse has occurred, the adoptive parents were also reported to dread a reawakening of sexual feelings between the siblings.

Macaskill notes that social worker resistance to contact was partly resource-based, and partly linked to concern about the children experiencing flashbacks to abusive experiences, although acknowledging its importance in many cases (p.86):

> For some children the uniqueness of the sibling bond was more than just a strong blood tie because it was rooted in trauma. Many siblings had survived abusive family experiences together and consequently there was an unspoken empathy between them … it had been important to salvage something positive from the wreckage of their family life.

In a study of 76 families, Macaskill records that a small number of children were deeply traumatised by the loss of sibling contact, to the extent that it profoundly affected their ability to settle in placement, with the adoptive parents expressing frustration that they could not facilitate the contact which they felt would be in the best interests of the child. In contrast, MacDonald and McSherry (2013, p.91) found that some adoptive parents were concerned that sibling contact would bring forward the point at which the adopted child became curious about his birth family, before the adopters felt prepared to address the issue – the adoptive parents expressed

concern about being caught ‘off guard’. Nevertheless, Pepper (2017, p.1114) notes that

> Adoptive parents may be more willing to facilitate direct contact between a sibling in another adoptive placement, but less willing to facilitate contact with a sibling still living with family, or even in foster care but having ongoing contact with family members. Adopters may fear disruption, or breach of the confidentiality of the placement. The courts have acknowledged that it is unlikely to be in the best interests of a child to impose obligations on adoptive parents for contact they do not agree to.

Mullender and Kearne (1997, p.140), reporting on a study of 347 children, make the obvious observation that the severance of the legal tie by adoption does not end social and emotional connections, proposing (p.141) that:

> The qualitative material in this study has highlighted the fact that there is a case for focusing on the viewpoint of siblings of adopted people as a separate and unique group of birth relatives with their own interests and feelings which need to be addressed.

Powerfully, they quote (p.143) the comments of a sister of an adopted child to the effect that people overlook the loss to non-adopted siblings of living with a '*ghost'*, and point out that siblings, having played no part in the events leading to the loss of one or more of their number, nor having been consulted about it, felt '*deeply grieved'* by their loss, regarding the situation as inherently unjust. That study provides a rare example of consideration being given to the impact of adoption upon a non-adopted sibling, and thus resonates very strongly with the rationale for this project. There is also as yet little research material documenting the impact of ubiquitous social media upon unplanned contact between adopted children and their birth families, although it is a problem with which every family judge is likely to be familiar. The ease of tracing adopted children may well be compounded by the frequent insistence by social workers that adoptive parents retain the child's given names, however unusual those names may be: it would be fascinating to undertake further research into the balance to be struck whilst on the one hand promoting a child's identity by retention of her given names, whilst on the other hand guarding against informal and potentially de-stabilising social media contact with the family members from whom that identity is derived.

Whilst many adoptions are characterised as 'closed' – ie the identity of the adopters is not known to the birth family – Jones (2016a) suggests that there has been a significant shift over the last four decades towards open adoption, with ongoing contact, direct or indirect, between the adopted child and significant birth family members. Jones reviews the literature relating to openness in adoption, and records (p.89) that whilst there is limited research addressing directly the views of children placed in an open adoption, such research as has been conducted points to the advantages for the child of continuing a relationship with an attachment figure, including being reassured that the birth relative is safe, promoting identity, and increasing understanding of the birth parent's difficulties, thus reducing self-blame. That said, she acknowledges that research points to the need to consider each case individually, with contact not necessarily indicated for children who have experienced neglect or abuse, where a parent is in denial about past abuse, or where sibling contact exposes a child to the risk of negative behaviours or abuse.

It is very common for local authorities to propose indirect contact by means of letters sent once or twice yearly, with Neil (2004) describing this as the '*standard plan'* for children adopted from

care. However, many birth parents struggle to maintain this, no doubt from any combination of difficulties including commitment, literacy limitations, lack of organisational skills and profound distress that their child has been adopted. Jones (2016a) also raises the issue of local authority efficiency as an obstacle to successful indirect contact. She concludes (pp.95/96):

> There has been little attention to the long-term needs of birth families following adoption … much greater attention is needed to the development of sensitive support and interventions for *all* members of the adoption triad engaged in the process of re-modelling family relationships … Adoption is increasingly being promoted as a means of meeting the needs of vulnerable children who can no longer live with their biological family … current government reforms do little to address the contradictions of adoptive kinship faced by members of the adoption triad …'

Despite the conspicuous care with which Jones addresses the issue of progress towards greater openness in adoption, it is notable that she speaks only in general terms of the birth family, without treating sibling contact as being in any way distinguishable from contact with birth parents – indeed, the references throughout her

paper to the adoption triad exclude the sibling as a birth family member of any individual significance. However, this has to be considered within the context of the policy climate which gave rise to the Department for Education's consultation 'Contact Arrangements for Children: A Call for Views' (2012b). In a Press release announcing that consultation (Department for Education 2012a), Sir Martin Narey, writing in the capacity previously-referenced as Government Adviser on Adoption, says of the decision to issue that and an associated consultation that it

> follows advice from me to ministers in which I have expressed anxiety about the amount of contact we allow and the potential of that to harm children. The second issue, on which I have also expressed concern, is about the extent to which we try to keep brothers and sisters together in planning for their adoption.

It should be noted that Narey's expressed concern was not about insufficient attempt being made to keep siblings together, but rather that such attempts may be contrary to the interests of the individual child and may hinder the prompt identification of adoptive placements:

> On siblings, I have concluded that while we should and must do more to recruit adopters willing to take on the challenge of adopting two or more children simultaneously, we need to ensure that local authority and court decisions are informed by the research evidence which tells us - much as it might surprise us - that keeping siblings together may not always be in the interests of individual children. For example where, through a period of neglect, an older child has been effectively parenting a younger child, it can be vital for them to be separated so that each child can develop a positive attachment with their new parents.
>
> And the adopter challenge of successfully compensating for an early life of neglect, where a child has often suffered significant harm, will often be more manageable when adopters are coping with just one child, not two, three or four.

Narey's reservations about the value of birth-family contact are very clearly signposted in his foreword to the consultation (2012b, p.2) where he observes:

> I believe that contact should happen much less frequently by the time a child receives a Placement Order. At this point,

> reunification within the birth family is only a remote possibility … after adoption, birth family contact, including letterbox contact, should take place only when the adoptive parents are satisfied that it continues to be in the best interests of their child.

With great respect to Narey, whose position as Government Adviser on Adoption was followed by the chairmanship of the National Adoption Leadership Board, it is unclear whether his professional background renders him well-qualified to formulate the views expressed, and there is no indication that those views are the product of any academically-rigorous enquiry. In a response to the consultation, Neil et al. (2012) refute the need for any change to legislation, arguing for individualised decision-making, and strongly opposing any movement towards a presumption against post-adoption contact. They propose (p.13):

> There should be a clear rationale for contact in every case with clarity about the child's needs in relation to attachment and family belonging, loss and adoptive identity, and protection from potential harm.

It is noteworthy that that latter suggestion focuses on the needs of the adopted child, and does not consider the position of any siblings, although self-evidently, the concept of family belonging extends to relationships with siblings as well as with birth parents.

Narey's expressed anxieties fly in the face of the preponderant weight of scientific and social policy literature which leads inexorably towards a starting point that, absent specific contra-indications, siblings should indeed remain together, and where that cannot be achieved, should continue to enjoy the benefit of an ongoing relationship – with cases where that cannot safely be managed being very much the exception to the general rule. I will explore within Chapter 5 the statutory framework underpinning post-adoption contact and the principles to be derived from case law addressing this issue.

As previously indicated, it was beyond peradventure, when this project was first conceived, that the issue of maintaining sibling bonds post-adoption had loomed large neither within academic enquiry nor within social policy generally. However, Monk and Macvarish's Nuffield Foundation-sponsored study, Contact and the Law: An Overlooked Relationship (2018) significantly addresses

that omission. The authors describe it (p.6) as '*the first socio-legal study in England and Wales to focus on siblings'*, emphasising that it is an exploratory study about how the sibling relationship is included and understood in care and adoption proceedings, and identifying what might impede effective contact provision between separated siblings. At p.7, the authors note that sibling contact orders are exceptionally rare in both care and adoption proceedings – although of course not all contact between family members is governed or prescribed by court order, despite the caution expressed by Bainham (2015, p.1362) that the only way to ensure post-adoption contact is by the making of appropriate court orders.

The key findings of Monk's research (p.80) include cross-professional acknowledgement that adoption severs both the legal and the real relationship between siblings, and an assumption that the importance of the sibling relationship is routinely outweighed by other factors and assumptions. At p. 84, Monk and Macvarish observe that:

> A strong bifurcation in the conceptualisation of older and younger children allows for the younger child's interests to be explicitly separated from, and prioritised over, the

> continued existence of the sibling group or the needs of the older child for a normal relationship with his or her siblings based on co-residence or extensive contact.

This proposition encapsulates the dilemma for the court in being required to give paramount consideration, when considering the making of care or placement orders, to the welfare of the child – and yet, when dealing with a sibling group, having to reconcile competing welfare priorities. Monk's research tends to support the theory that the interests of younger children are privileged over those of their elder siblings – a theme to be further explored in addressing the legal framework for such proceedings – indeed it is stated in terms (p.86) that '*assumptions about the benefit of adoption for younger children routinely outweigh the impact on an older sibling.'* The recommendations made by Monk and Macvarish (p.122) include the need to address the inconsistency and lack of coherence in relation to the definition of the term 'sibling'; the extension of the duty imposed upon local authorities by virtue of s.34(1) Children Act 1989 to promote parent/child contact, such that it should also extend to sibling contact; and steps to enhance rigour in the assessment of sibling relationships.

One of the positive outcomes of the Monk/ Macvarish research was a modest flurry of articles addressing aspects of the issue of sibling ties, including an article by Hansen (2019) in which the author considers the extent to which the right to family life enshrined Article 8 of the European Convention on Human Rights is respected when considering ongoing contact between an adopted child and the birth family: she notes (p.220) that '*kinship practices and developing relationships after adoption are complex in a way that has been acknowledged sociologically but perhaps not grappled with legally'* – an observation which resonates with the concerns which prompted this study.

It is clear that much of the literature focuses on the needs and rights of the child who has been adopted, and not upon those of the un-adopted sibling children left behind. It is unclear why there is such a dearth of literature specifically applicable to that left-behind group, although many of the principles and policy threads discussed apply equally to the adopted and to the unadopted. I will be considering, in examining the legal framework, whether legal principles are as blind to the plight of the 'left behind' sibling as social policy appears to be – or, as proposed by Hansen (supra) even blinder – but it is clear from all the literature surveyed that

whilst it may in limited circumstances be impossible for children to live together, the maintenance of the sibling connection is highly prized by the majority of siblings themselves and, in most cases, a force for good.

Emphatically, siblings DO matter, and within the next chapter I will explore how the theory underpinning judicial decision-making helps or hinders the preservation, where appropriate, of the sibling bond.

CHAPTER 3

JUDICIAL DECISION-MAKING : THEORY AND CONTEXT

> Judicial decision-making is an exercise of State power. Irrespective of the nature of the case in which a judge makes a decision, it is and must be the rule of law in action … It is very often the case that the most sensitive decisions a judge has to make are those that arise within the family justice system, particularly those involving children …Ryder (2018).

3.1 The Challenge of Family Justice

> Judges hearing care cases in the Family Court are engaged in one of the most difficult of all judicial tasks. The decisions are of huge significance for children and their families. The evidence is often difficult and distressing, and the level of emotion high … Lord Justice Peter Jackson, *Re DAM children* [2018] EWCA Civ. 386.

All family judges, from the most junior to the most experienced, would identify with the sentiments expressed by Lord Justices

Ryder and Jackson – although with the added observation that hearing applications which may result in irreversible, non-consensual adoption, creates an even greater challenge. When the potential for permanent separation of siblings is added into the equation, the court is presented with a challenge unequalled in any other area of jurisdiction: as Gupta (2010, p.197) observes below, balancing competing sibling interests is a matter of considerable complexity:

> Decision making in public law family court proceedings regarding siblings in permanent substitute care is an extremely complex and contested area of practice. This is particularly the case where the siblings have competing interests and where it would appear that there is no option which would avoid harm to either child.

That observation applies with equal force to the dilemma facing social workers involved in formulating siblings' potentially-divergent care plans; it likewise applies to Independent Reviewing Officers and to Children's Guardians (Officers of the Children and Family Court Advisory and Support Service) responsible for the critical analysis of such plans, and, perhaps above all, to those – judges or lay justices – charged with the anxious responsibility of

adjudicating upon those plans. The purpose of this chapter is to consider the theory which underpins that adjudication. In order to provide context, I intend firstly to set the scene by a brief exploration of the history leading up to the creation of the Family Court; thereafter the chapter will examine the task of judicial decision-making. I will also consider the perceptions and the reality of the role of the judiciary in public law proceedings relating to children. In chapters 6, 7 and 8, I will explore how theory translates into practice, interrogating original data derived from this study and considering the lessons to be learned, and conclusions to be drawn, from cases heard and determined in the Family Court.

3.2 (a) The Family Court

The Family Court is a relatively recent statutory creation, having been established by virtue of s.17 Crime and Courts Act 2013 on 22 April 2014. The then-President of the Family Division, Sir James Munby (2014a, p.1) announced the inauguration of the Family Court in striking language:

> We stand on the cusp of history. 22 April 2014 marks the largest reform of the family justice system any of us have seen or will see in our professional lifetimes … On 22 April 2014 the

> Family Court comes into existence and the Family Proceedings Court passes into history…Taken as a whole, these reforms amount to a revolution. Central to this revolution has been - has had to be - a fundamental change in the cultures of the family courts. This is truly a cultural revolution.

Although the President did not spell out in terms the detail of that cultural revolution, one of the most obvious consequences of the establishment of a unified court is the scope for improved co-operation between the different tiers of first-instance judiciary (described below). Potter et al. (2015, p.180) explained the arrangements thus:

> The Family Court provides a single jurisdiction for family proceedings, bringing together the previously separate levels of court and court administration within a unified process and, in some places, in the same building. It is believed that a unified jurisdiction will promote a seamless, accessible system for all involved, contributing to reducing delay by removing boundaries and barriers within the process (previously) caused by separate administration and management systems.

The birth of the Family Court, as we now know it, was long-delayed: the first family court, such as it was, was established in 1858 as the Court for Divorce and Matrimonial Causes, but its substantive jurisdiction over children was largely confined to depriving 'undeserving' wives of the care of their offspring. Only seventeen years later, in 1875, it ceased to exist as a dedicated family court, having been combined with the Probate and Admiralty courts to form the Probate, Divorce and Admiralty Division of the High Court – strikingly referred to by Herbert (1934, p.109) as 'the Division for Wills, Wives and Wrecks' – a phrase which rapidly entered common parlance. This arrangement remained in being until the Family Division of the High Court was created in 1971, although the High Court was not accessible to all: most divorces, and any ancillary matters relating to children, were dealt with in the County Court, with the less affluent members of society being obliged to resort to the Police Courts – as they were then known – where magistrates presided over issues such as child maintenance and those few issues relating to child protection which were not dealt with by local authority administrative processes. The continuation of a multi-tier system was the more surprising in the light of the assurances given by the then Lord Chancellor, Baron

Gardiner (Hansard, 1969) as to the importance of a specific and dedicated judicial approach to family cases:

> This is a matter that concerns human feelings and it is most important that all family matters, whether they involve the parties to a matrimonial dispute or the care, adoption, or guardianship of children, should be dealt with in the most sympathetic atmosphere and by Judges and officials who really understand family problems and how to grapple with them. More and more emphasis is now laid on the importance of welfare: the welfare of every member of the family who may be concerned in any domestic case that comes before the courts.

Concerns had been raised by Gorell (1912 p.367 and passim) about the handling of matrimonial matters by magistrates within Police Courts in the very early part of the twentieth century, but it was not until 1970 that Judge Jean Graham Hall put forward what were then considered to be radical proposals for a dedicated, unified Family Court. This was followed in 1978 by Graham Hall's pamphlet 'Towards a Unified Family Court', published by the National Council for One-Parent Families (the forerunner of Gingerbread), with a preliminary annotation proposing '*a unified family court*

structure to further social and legal process in the judicial system of England'. Graham Hall laid emphasis upon the need for a '*uniform set of legal principles derived from a single moral standard applicable to all citizens*' and proposed collaborative working to ensure readily-available advice in related disciplines. By that time, Parliament had received the Report of the Committee on One-Parent Families, published as a Command Paper in July 1974. The committee behind the report had been appointed by Richard Crossman on 6 November 1969, under the chairmanship of Sir Morris Finer. The Finer Report's vision was of a Family Court and a Family law system which would command the confidence and respect of the whole community. As Finer puts it:

> There is no branch of legal administration for which the respect of the community is more important than the administration of family law, and in the ultimate resort, the case for a family court is that it is the institution through which respect for the law can be fully achieved.

Notwithstanding the optimism generated by the Finer Report, it was not until the enactment of Crime and Courts Act 2013 s.17 (vid. supra), amending the Matrimonial and Family Proceedings

Act 1984, that the unified Family Court became a reality, with the prospect and clear intent of putting the welfare of children at the heart of decision-making: an aspiration of obvious relevance to the subject-matter of this study.

It is questionable if the Family Court would yet be in being, but for the endorsement of the creation of single court within the Family Justice Review, chaired by David Norgrove. The Review's final report in November 2011 illustrated very starkly the extent to which family law is perceived not to command the universal respect upon which Finer had placed so much emphasis. Whilst the Family Justice Review report expressed the general agreement of all consultees that the legal framework underpinning family law is robust, it characterised its organisational structures as complicated and overlapping, with different organisations across the family justice system not trusting each other. It concluded that family justice does not operate as a coherent, managed system and in many ways is not a system at all. The Review proposed that to address this, there should be a Family Justice Service and one Family Court, with a single point of entry, replacing the then-tiers of Family Proceedings Court, County Court and High Court, although the Family Division of the High Court should (and does)

remain in being to deal with the exercise of its inherent jurisdiction and some international cases. Norgrove's vision was characterised by Doughty and Murch (2012, p.341) as giving rise to '*little or no controversy'.*

The Family Justice Review proposed the allocation of work to individual members of the judiciary according to its complexity, coupled with the flexible use of accommodation, and increased reliance upon technology – for example, to facilitate hearings by video-link or telephone. Sadly, the limitations of existing Court-service technology were highlighted during the Covid-19 pandemic, when the impetus for conducting hearings remotely threw into sharp relief the need to increase both the capacity and the quality of equipment required to dispense justice in a form other than by the conventional route of personally-attended hearings. I will consider in more detail the impact of the pandemic in Chapter 7 of this study.

Judicial continuity is perceived to be key, as is robust case-management. Although transparency of family justice was not within the remit of the Family Justice Review, the report makes reference to moves afoot to open up the family court to greater

public scrutiny – an issue which I will address further at a later point within this chapter. However, within whatever system or systems family justice is delivered, the critical component within such delivery is the role of the decision-maker – who, of course, is the judge responsible for determining the outcome of the proceedings. That said, Doughty and Murch, (2012, supra) expressed the clear view that the demands of the family justice system implicit within the recommendations of the Family Justice Review and in the creation of the Family Court would inevitably lead judges to be dependent upon the support services of administrators and court social workers (Cafcass officers) – reflecting the vision of Graham Hall (supra).

3.2 (b) The Judges of the Family Court

Although the family judiciary constitutes one discrete, collective body as the Family Court, that body has, inevitably, different limbs with different nomenclature. The judges within the Family Court may be lay justices (Magistrates); they may be District Judges (Magistrates Court) who sit within what was formerly the Family Proceedings Court; they may be District Judges who sit in Civil and Family Justice Centres; they may be Circuit Judges, or they may be

High Court Judges. They may be salaried judges or fee-paid appointees, in which latter case they will sit as Deputy District Judges, Recorders, Deputy Circuit Judges or Deputy High Court Judges, as appropriate. All these judges are properly described as 'first instance' judges, with High Court judges also being known as 'puisne judges': they make the decisions required in each case, and those decisions may or may not be the subject of appellate scrutiny by a higher tier of judiciary.

Decisions made by lay justices and District Judges may be appealed to a Circuit Judge; appeals arising from the public-law decisions (ie proceedings to which a local authority is a party) of a Recorder, Deputy Circuit Judge, Circuit Judge or High Court Judge are determined by the Court of Appeal, and a very small number of cases may thereafter be referred to the Supreme Court. Decisions by Circuit Judges, Recorders or Deputy Circuit Judges in private law cases (disputes between the parents or other carers of the child) are appealed to the High Court. Except in the case of decisions by lay Justices, permission is required to appeal a first instance decision, thus filtering out cases which are manifestly devoid of merit. The decisions of the higher courts set precedents which must be followed by those at Circuit, District and lay judiciary level: the

cases referred to in Appendix 4, and which provide the raw material informing the analysis set out in Chapter 7 of this study were all heard by judges whose decisions do not create binding precedent, but which were nevertheless worthy of study in order to inform the response to the research questions.

Allocation between the different tiers of judiciary is based largely upon the perceived complexity of each case, although some specific matters are reserved to particular levels of judiciary – for example, Wardship applications must be heard by a High Court Judge.

The Children Act 1989 provided for all new public law cases to be issued within the Family Proceedings Court, as it then was, with the expectation that the majority of such cases would conclude there, leaving only the most complex to be transferred to what was then the County Court, and even fewer to be transferred to the High Court. Over the course of time, that expectation has increasingly not been realised, despite the importance of lay justices to the functioning of family justice, as explained by Mr Justice Keehan (2018) (writing as the then-Family Division Liaison Judge for the Midland Circuit) who noted (p.1514) that

> It is important and necessary to stress the role played by the family magistracy. They hear the overwhelming majority of private law cases – on the Midland Circuit it is generally some 80% of all such cases. The volume of public law cases they hear varies more widely between care centres but, in the majority, it is around 40% of all public law cases.

He added, in the context of the increasing work-load demands upon the Family Court that:

> Without the dedication and commitment of the family lay justices in dealing with this heavy burden of work, the Family Court would cease to function. The current contingent of full-time family judges simply would not have anything like the capacity to take up and hear this huge volume of additional cases.

Those words highlight the pressures facing all members of the family judiciary – a theme pursued by the President of the Family Division (McFarlane, 2019, p.2) in emphasising the priority which he accords to the well-being of all those who work within the Family Justice system within the context of unrelenting increases in workload, fuelled not least by the increase in private law work

as a consequence of the reduction in publicly-funded advice in that area:

> In these highly pressured times, I think that it is neither necessary nor healthy for the courts and the professionals to attempt to undertake 'business as usual'. For the time being, some corners may have to be cut and some time-limits exceeded; to attempt to do otherwise in a situation where the pressure is sustained, remorseless and relentless, is to risk the burn-out of key and valued individuals in a system which is already sparely manned in terms of lawyers, court staff and judges.

It will thus be seen that decision-making in family cases takes place within a context of significant pressure of work, coupled with resource difficulties common to all the agencies who participate in the administration of family justice, and indeed common to public services generally. It should be noted in particular that public law proceedings rely heavily upon the availability of social workers, Cafcass Guardians and sometimes independent experts such as paediatricians and other clinical specialists: the pressures within all such services have the potential to create delay, and it is the responsibility of the Judge to manage the case in order to minimise

the delay, and of course ultimately to determine the case. As Bellamy (2020, p.3) succinctly explains:

> Whilst it is the responsibility of witnesses to tell the truth; the responsibility of expert witnesses to give sound, reliable, professional advice; the responsibility of lawyers to prepare cases thoroughly in order to ensure that the judge has all the evidence he or she needs to be able to make an informed decision; the responsibility of advocates to present cases fairly and honestly; the ultimate responsibility for making the decision rests with the judge. The buck stops with the judge.

3.3 Theories, Perceptions and Practicalities

To state the obvious, judges are humans, and bring to the task of decision-making all the strengths and difficulties inevitably associated with fallible humanity. Hunter (2014, p.89), reviewing an extensive study by Darbyshire (2011) conducted over a 10-year period of judicial shadowing, notes that:

> What all judges seem to have in common, according to Darbyshire's account, is that they are hard-working, enjoy

> their job, and are under-appreciated. They are nothing like the pompous, out-of-touch fools of media caricature.

Hunter then adds (p.91)

> Judges are frequently described in glowing terms – unfailingly polite, extremely nice, open, welcome, public-spirited, altruistic, uncomplaining and somewhat heroic … I'm sure this is true of many judges. I'm sceptical that it applies to all. There are hints that Darbyshire was steered away from those who might be unwelcoming, irascible or 'nutty'.

Clearly, Darbyshire's positive endorsements fall to be considered within the limitation suggested by Hunter that there was some attempt by court administrators to select the more amenable, user-friendly judges for the purposes of Darbyshire's research: furthermore, it is common-sense that judges are not exempt from human frailty, with all its attendant consequences for judicial behaviour.

More realistically, Barraclough (2003, p.997) summarises elements of the challenges facing judges as follows:

> I don't think that I would be quite comfortable being a judge … The difficulty is the necessary arbitrariness of having to impose order on a disordered world – to create categories where there are only gradations. It is like being faced interminably with those multiple-choice questions in exams where you want to say 'sometimes' but the only available answers are 'yes' or 'no'.

Barraclough's observations would be well-understood by any judge exercising any jurisdiction where an element of discretion is involved: whereas it might be possible to offer a straightforward affirmative or negative to a claim in relation to, for example, the non-payment of a debt or a boundary dispute, the family law jurisdiction, more than most, incorporates substantial elements of judicial discretion, albeit exercised, as explained within Chapter 5, within the confines and guidance of the statutory welfare checklists, and with full regard to binding precedent created by the substantial body of case law. Hall, in writing the foreword to Rackley (2013, p.xiv) describes the human dimension to judge craft:

> Judging is not just the mechanical application of clear rules to known facts. Judges have to make choices – when law

> runs out, when law is not clear, when law gives them a choice. Anyone, male or female, black or white, brings their own experience and values to making those choices.

Rackley (op. cit., p.146), writing from a feminist perspective, pursues this thread in noting that:

> Once we acknowledge that the law does not exist as a set of pre-determined rules where judges simply discover and apply to the facts in hand, it follows that judges must, at least on occasion, bring their own values to bear when deciding cases … insofar as people have different values and viewpoints, the values applied will differ from judge to judge with the result that different judges will judge differently. Divergence in values leads to divergence in judges.

Hale (2010, p.v), the first female judge appointed to the Supreme Court, provides a rather more nuanced explanation of the impact upon decision-making of individual circumstances:

> We take it as a given that all judges have to work within their judicial oaths … They cannot have an 'agenda' to shape the law to their own design. But they can certainly bring their

> own experience and understanding of life to the interpretation and development of the law or to its application to individual cases.

Hale (2014, p.27), by then Deputy President of the Supreme Court, further noted that women judges may make a distinctive contribution to decision-making, based upon their particular experiences:

> I can think of a few judgments where my experience and perceptions of life made a difference to my view of the law, often but not always a view which my brethren were then persuaded (not necessarily by me) to share: the nature of the damage done to a woman by an unwanted pregnancy; the definition of violence to include more than simply hitting people; the importance of seeing children as individual human beings rather than adjuncts of their parents; the realities of owning a family home jointly.

Lebovits (2017, p.11), an American Judge, notes as follows:

> Judges must act like they know what they're doing. They must conform to an image of integrity and wisdom … without breaking a sweat, complaining, seeking anything in

> return, or expecting (or wanting) a thank you. Nothing is easy about doing that day in and day out. Judging is stressful. Judges must cope with intellectual and emotional ups and downs…
>
> The high-stakes nature of exercising discretion to decide a case is taxing. All judges must decide the fate of litigants. Except when they have some discretion, judges must render decisions, not according to their beliefs, but according to the law. Judges inevitably render decisions that contradict their values.

All judges do of course have their own life experiences, viewpoints, unconscious bias and values, but it is an essential part of the judicial task to be aware of such personal history and proclivities and its impact upon thought processes. Within the context of this study, it must be acknowledged that judges, in common with society as a whole, may or may not be part of a sibling group, and those that have siblings may value that relationship to a greater or less degree, with individual experience having the potential to colour and shape that judge's approach to the importance of maintaining the sibling bond. However, awareness of all such issues is a vital prerequisite to the ability to put them to one side and thus to reduce the risk of

unconsciously influencing a decision which must be squarely based upon the available evidence and the application of the relevant law to that evidence. That task presents varying degrees of challenge, depending upon the background and temperament of the judge: in that context, it is pertinent to note that recent statistics relating to judicial diversity (Ministry of Justice, 2021, p.2) reveal that 34% of court-based judges are female, with only 29% of female judges in the High Court and above; only 5% of judges are from Asian background, and 1% are of Black heritage, with 2% from mixed ethnic backgrounds. It is reasonable to conclude that diversity of gender, background and experience within the judicial community will enrich that community as a whole, but that some judges will inevitably experience differing and greater degrees of challenge in ensuring that their decisions are squarely founded upon the evidence received, unfiltered by any conscious or unconscious pre-conceptions.

Whatever the popular perception, judges do live in the real world rather than in some remote legal ivory tower, and the majority of family judges will have practised either as solicitors or barristers within the legal discipline in which they are now called to exercise judgment – and thus most family judges will be very familiar with

the anguish experienced by almost all families involved in child protection proceedings. In very many cases, the parents involved in child protection litigation are themselves extremely vulnerable, sometimes as a result of having endured dreadful upbringings or for other reasons such as cognitive deficits, substance addiction, or mental health problems - and for the most part deserve sympathy rather than blame. Nevertheless, in order to discharge their duties, judges are required to focus on the welfare of the child concerned and to avoid being deflected by sympathy, antipathy, horror, impatience or any other of the wide range of emotions which such cases may inevitably provoke. Bacon (1625) is as relevant now as in the seventeenth century in expounding desirable (if not universally attainable) judicial qualities and attributes:

> Judges ought to be more learned than witty, more reverend than plausible and more advised than confident … patience and gravity of hearing is an essential part of justice, and an over-speaking judge is no well-tuned cymbal. It is no grace to a judge first to find that which he might have heard in due time from the Bar or to show quickness of conceit in cutting off evidence or counsel too short, or to prevent information by questions, though pertinent. The parts of a judge in hearing are four: to direct the evidence; to moderate length,

> repetition or impertinence of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much and proceeds either of glory and willingness to speak, or of impatience to hear, or of shortness of memory or of want of stayed and equal attention.

If Bacon had been writing in modern times, he might have added to his judicial person-specification the ability to do justice within an area of law where the judge must, in order reach the decision appropriate to the particular case, exercise a broad ambit of judicial discretion.

Bacon was not alone in taking an austere view of essential judicial virtues: Geng (2017, p.105) notes that Sir Edward Coke, sixteenth century Solicitor-General and eminent jurist, described the person of a judge as *'one who relinquishes the pleasures of friendship to pursue the right but lonely path of judicial impartiality'.* Geng (p.110) further refers to Coke as having identified the following necessary judicial attributes:

> To be a good judge, one must in effect act contrary to the dominant customs and rituals surrounding conviviality. Seeking popularity and cultivating friendship go hand in hand

> and neither should exist in the law. To resist temptation, judges must adopt stoic self-reserve perfected through devotion to study.

This rather alarming admonition is tempered by Geng's reference to Shakespearean wisdom to offer the following, rather more sympathetic, description of necessary judicial qualities:

> Comparison of judges to fathers, indeed loving fathers, distinguishes the popular discourse from the professional one … empathy, patience and fairness are the moral virtues of good judges.

Had Shakespeare lived in more recent times, it is reasonable to conclude that he may have regarded a comparison with loving mothers as equally valid. The judicial task within the context of family law requires all those identified virtues and more besides: Hedley (2016), a very distinguished and well-respected High Court (and formerly Circuit) Judge, now retired, comments that the key role of the family judge is to be the gatekeeper holding the balance between private rights and liberties and protection of the vulnerable, and also the regulator of the use of the court's powers

– which, as noted by Ryder (supra), are in turn an exercise of the power of the State. Hedley's stature as an exemplification of judicial wisdom and humanity was clearly acknowledged in the case of *Re TG (a Child)* [2013] EWCA Civ.5 when the then President, Lord Justice Munby, said this (paragraph 28):

> Since preparing this judgment I have had the pleasure and privilege of reading in draft the judgment of Sir Mark Hedley, who shortly after the hearing of this appeal retired after a long, varied and distinguished career as a judge. It is, if he will allow me to say so, a judgment which exemplifies his wisdom and humanity and reflects his deep understanding of both the forensic process and the human condition. I agree with every word of it.

The question begged by Munby's tribute is how all judges may aspire to emulate Hedley's deep understanding of the forensic process and the human condition in order to reach the appropriate decision in each case.

Judges decide cases by applying the law to the evidence received, but very frequently are faced with situations where the evidence conflicts, and where it is therefore necessary carefully to assess the

veracity of each witness and the integrity of the evidence provided. In the case of *Re W (a Child)* [2019] EWCA Civ.1966 at paragraph 77, Lady Justice King quotes Lord Justice McFarlane (as he then was) who, within the case of *Re V (A Child)(Inadequate Reasons for Findings of Fact)* [2015] EWCA Civ. 274 paragraph 15, explains the obligations upon trial judges as follows:

> Where oral evidence has been given by the key players it will often, if not always, be important to give a short appraisal of the witnesses' credibility and, where the testimony of one is preferred over another, a short statement of the reasons why that is so. The trial judge has had the privileged position of seeing the protagonists and using that privileged perspective to inform a conclusion on credibility.

Lucken et al. (2015, p.2058) consider judicial decision-making within what the authors describe as an '*environment of vast judicial discretion and competing allegations'* – observations set within the context of the granting or refusal of civil protection orders. They contend that judicial decisions involve a very black-and-white analysis of the facts, with no '*grey areas'*, suggesting that judges are seen as inclined towards a systems or situational approach to apportioning blame and credibility. It is difficult to relate those propositions to the complex, multi-layered decision-making

associated with child protection cases, but that is perhaps explained by the inquisitorial approach which of necessity pervades child protection work, notwithstanding that it remains an adversarial process, whereas civil protection (domestic violence) orders are firmly located within the realms of adversarial litigation. As the terminology implies, inquisitorial proceedings seek to establish the facts before applying the law – although, despite the inquisitorial aspects of such proceedings, child protection proceedings are nonetheless formally part of the adversarial system, and thus the person or body making allegations (in the case of child protection, the local authority) must discharge the burden of proving the case on the balance of probability. This was explained by Munby P in the case of *Re TG (a Child)* (supra, paragraph 70) in which he said this:

> It is a truism that family proceedings are essentially inquisitorial. But in certain respects they are inevitably and necessarily adversarial. Human nature being what it is, parents will fight for their children; so in care cases where the State is threatening to remove children permanently from the care of their parents, the process will inevitably be highly charged. But care cases are not merely adversarial in the colloquial sense; since the local authority has to establish

> 'threshold' they are also necessarily adversarial in the technical sense. If, as typically, the local authority seeks to establish threshold on the basis of what it asserts are events which happened in the past, then the burden is on the local authority to prove on a balance of probability that those events did indeed happen. And if it cannot do so, then its case will fail and must be dismissed.

Those remarks were preceded by the comments of Lord Nicholls within the case of *Re L (a Minor) (Police Investigation: Privilege)* [1997] AC 16 suggesting that family proceedings can blend both inquisitorial and adversarial features. Caldwell (2011, p.45), in debating the respective features of inquisitorial and adversarial legal systems, notes as follows:

> … any specialist family judge sitting in a common law jurisdiction is likely to attest that investigation and promotion of the individual child's welfare lies at the centre of any private law or public law proceedings involving children, and, if pressed, would pretty quickly concede that the welfare of the child who is the subject of proceedings is considerably more consequential than procedural rigour for the adult parties.

However, whether adversarial or inquisitorial, Judges have a duty to determine cases in accordance with the law: they are not in any sense custodians of society's morality. That point was emphasised over thirty years ago by Pannick (1987, p.58), who noted that

> Judges are appointed to decide cases according to law. They are not moral tutors to the rest of the population.

Those words are as relevant today as when first written, and provide a particularly salutary warning within an area of law where moral and welfare decisions may sometimes be almost indistinguishable. For example, judicial condemnation of the behaviour of a mother who repeatedly enters into ill-advised, short-term relationships with violent partners may be perceived as making a moral judgment – but the reality is that the court is more likely to be concerned about the welfare impact upon her children of being repeatedly exposed to the emotional, physical and possible sexual risks associated with the introduction into their lives of multiple partners about whom their mother may know very little indeed – as well as being anxious about the welfare of the mother herself. Lady Hale, in the landmark adoption case of *Re B*,

paragraph 143, summarised the limitations of justified State intervention in family life thus:

> We are all frail human beings, with our fair share of unattractive character traits, which sometimes manifest themselves in bad behaviours which may be copied by our children. But the State does not and cannot take away the children of all the people who commit crimes, who abuse alcohol or drugs, who suffer from physical or mental illnesses or disabilities, or who espouse antisocial political or religious beliefs.

Whatever disaffected parents may perceive to be the case, Judges are not entitled to make moral judgments in scrutinising parental capacity, and still less are they permitted to remove children simply because more socially-acceptable carers may be found for them. This was emphasised by Munby P in the case of *Re A (Application for Care and Placement Orders)* [2015] EWFC 11, a case in which the local authority had placed great emphasis upon perceived immoral behaviour by the father, with the Judge holding at paragraph 96:

> I can accept that the father may not be the best of parents, he may be a less than suitable role model, but that is not enough to justify a care order let alone adoption. We must guard against the risk of social engineering, and that, in my judgment is what, in truth, I would be doing if I was to remove A permanently from his father's care.

Family judges are required to make decisions which strike at the heart of the integrity of the family unit and which may well provoke a strong reaction from those involved, depending upon perspective. Delahunty (2017, p.1) summarises the dilemma for the family judge thus:

> How do I do my job? Can I sleep at night? Am I an 'enemy of the people' when I remove a child and place it for adoption against the wishes of its birth family because I have found that the child has been abused within its family home? Or am I, in stepping in to protect a child, giving it a chance to grow up free from physical pain and neglect so as to reach its full potential in a 'forever' family who have positively chosen to adopt him or her? What of the children who can neither live with their birth family nor with adopters because it is not safe for them to live with a parent or family member

> but they are too old to be able to embrace adoptive parents: that means foster care for most, a children's home for some?

Delahunty, a practising barrister and Recorder as well as an academic, poses the question from a moral perspective, but in reality, and however apparently intractable the problem, the family judge relies upon a mixture of evidence, established jurisprudence, forensic skills and, to a degree, judicial instinct in reaching a decision in each case. The sections which follow will explore this in more detail, whilst its application will become apparent within Chapter 7 of this study.

3.4 Managing the Process

The stakes in the conduct of public law proceedings could scarcely be higher. As a former President of the Family Division (Munby P) observed in the case of *Re L (Care Assessment: Fair Trial)* [2002] EWHC 1379 (Fam), para 150:

> With the State's abandonment of the right to impose capital sentences, orders of the kind which judges of this Division are typically invited to make in public law proceedings are

> amongst the most drastic that any judge in any jurisdiction is ever empowered to make. It is a terrible thing to say to any parent … that he or she will lose their child for ever.

Although Munby P was commenting specifically on the challenges facing judges sitting in the Family Division of the High Court, judges throughout the jurisdiction confront on a daily basis the reality of having to make orders which are likely to result in the permanent severance of children from their family of origin. The day-to-day work of family judges was thoroughly surveyed by Eekelar and Maclean (2013) who noted that the activities of family judges included adjudication, management and facilitation/assistance – so not confined simply to taking the decisions which the parties were unable to make for themselves. The authors also referred to judges as scrutinisers, adjudicators/umpires and authoritative administrators. In summarising the work of family judges, Eekelar and Maclean say this (p.98):

> The judges also operate within the legal framework. We have seen how they maintain the requirement of the Children Act 1989 that the children's interests must be placed first as

> the standard against which claims must be evaluated in cases involving children. We have also seen how the judges endeavour to hold local authorities to the procedures prescribed by law.

As will be explained within Chapter 5, the law which judges must apply is gleaned from a number of sources, including statute, delegated legislation and case law, the relevant parts of all of which must be taken into account in any judicial determination.

In considering statute law, it might be considered reasonable for a judge to assume that statutes, setting out as they do primary legislation, should be clear as to their meaning – but even Parliamentary draughtsmen occasionally fail to offer absolute clarity, or alternatively the instructions which they receive to convert the will of Parliament into statutory form may lack clarity. This dilemma has produced an accepted set of rules of statutory interpretation for judges to apply as required. These rules are helpfully summarised by Razak (2009, p.21) as being the literal rule, which is self-explanatory, the golden rule – which may be employed if the ordinary meaning of language within its textual context gives a clear indication of a permissible meaning which avoids absurdity, and finally the mischief rule, in which a purposive

approach is taken – ie consideration of why a particular law was passed. Occasionally, entirely innocent-sounding terminology generates much judicial scrutiny before a settled view is taken as to its meaning, one example being the interpretation of 'ordinary residence' within the context of which local authority should take responsibility for a Care Order. Such interpretative decisions are technical in nature, whereas decisions to grant or refuse care and placement orders combine both respect for the technical aspects of the law – such as whether the court has jurisdiction at all – with a significant measure of discretion, for example whether, in its discretion, the court finds that the local authority has discharged the burden of proving that the threshold criteria set out in s31 Children Act 1989 have been fulfilled, paving the way to the making of protective orders. If that threshold is crossed, further discretion is called into play in determining the appropriate order to be made in order to promote the welfare of the child. Chapter 7 of this study will address how, as gleaned from a selection of reported cases since the inception of the Family Court in 2014, judges have exercised their discretion in cases where the welfare outcomes touch and concern the potential separation of siblings.

Judges of the Family Court are required to use all their case management powers to conduct proceedings efficiently, effectively and, above all, justly. There is a fine line between the robust disposal of cases and procedural unfairness. Judges are obliged to do their utmost to assist litigants to give their best evidence – which clearly cannot be achieved if the judge permits (or even creates) an oppressive atmosphere within the court room. In the case of *Re G (Children: Fair Hearing)* [2019] EWCA Civ 126, Peter Jackson LJ, in the context of warnings having been given to a mother by the trial judge that contesting an interim care order would result in serious findings against her and a report to the Police, said this:

> This material amply substantiates the appellant's case that her consent or non-opposition to the interim care order was not freely given, but was secured by oppressive behaviour on the part of the judge in the form of inappropriate warnings and inducements. Regardless of the fact that the mother was legally represented, she did not get a fair hearing. There has been a serious procedural irregularity.

Trustman (2018), writing of her experiences as a barrister appearing in the Family Court, notes that Judges do not always stay on the right side of the line where robustness melds into bullying:

> There have been cases where the inappropriateness of the language used by the judge is one of the grounds for appeal, most recently the case of *A (Children)* [2015] EWCA Civ 133, in which King LJ said 'the unrestrained and immoderate language used by the judge must, I am afraid, be deplored and is wholly unacceptable. Such bombast can only leave advocates seeking to present, on instructions, their cases to the court feeling browbeaten and impotent and, rightly, as though their lay clients have been denied a fair hearing.

Judges are entrusted with the power and obligation to make decisions which may shape and change the lives of litigants – and the manner in which Judges conduct themselves in making those decisions inevitably has the potential to impact upon all those within the court room. It is therefore unsurprising that Judges are bound by the principles set out in the Guide to Judicial Conduct (2016) which in turn evolved from the Bangalore Principles of Judicial Conduct (initiated in 2001) which succinctly cites six 'values' with the stated intention:

> To establish standards for ethical conduct of judges. They are designed to provide guidance to judges and to afford the

> judiciary a framework for regulating judicial conduct. They are also intended to assist members of the Executive and Legislature, and lawyers and the public in general, to better understand and support the judiciary.

The principles enshrined are judicial independence, impartiality, integrity, propriety, ensuring equality of treatment to all before the courts and competence and diligence. Judges who fall short in this connection may find their decisions challenged in the Court of Appeal as being the product of a procedurally-unfair hearing (as in the case of *Re A*, supra), or may risk the attention of the Judicial Conduct Investigations Office, which investigates allegations of judicial misconduct rather than complaints about judicial decisions. It must be acknowledged that judges are human, and can be affected by all manner of personal difficulties not apparent to the litigants, but nevertheless are expected at all times to uphold the high standards of judicial office. The case of *Re C (a Child) (Judicial Conduct)* [2019] EWFC B53 provides a recent example of robust judicial conduct being held to be on the wrong side of the line: in that case, an appeal judge commented that '*he had not found it easy to scrutinise critically a colleague's approach to a difficult case such as this'*, but proceeded to hold that by intervening

repeatedly within proceedings, the trial judge had distracted everyone from the proper focus of the proceedings; he also found that the judge's exchanges with one of the barristers in the case were sharp, substantially inhibiting counsel from doing her job. The judge was also criticised for asking questions of the Guardian which went '*far beyond clarification or amplification and descended into the heart of the arena'*, leading the appellate judge to conclude that the Guardian was inhibited by the trial judge's apparent hostility from fully explaining her position. The appellate judge noted that (para 41):

> Family proceedings should not be unnecessarily adversarial. One important function of a judge, in a quasi-inquisitorial jurisdiction, is to help the witnesses give their evidence in a clear and unflustered fashion.

He added that '*it is a fundamental tenet of fairness to listen carefully to the competing arguments before coming to a firm decision'*, finding that the Judge's conduct of the proceedings crossed the line, amounting to serious procedural irregularity.

I have already noted the obligation upon judges not to be swayed by their own history and pre-conceptions. However, Judges must also withstand external pressures, being required faithfully to apply the law in accordance with the evidence. They are not permitted to decide cases in a particular way in order to meet the demands of public policy, nor even to stem the tide of public outrage – a good example of which was the outcry when it was made known that the father of a child conceived of rape had been made aware by Rotherham Council of proceedings relating to that child and had been invited to participate in those proceedings. It would appear that the local authority had not considered whether it should make an application for permission not to serve notice of the proceedings on the putative father. Norfolk, writing in the Times on 27 November 2018, denounced the perceived legal position under the sensationalist (and essentially inaccurate) headline '*Jailed rapist given chance to see his victim's child'.* A rather more measured approach to the question of a father's right to participate in proceedings relating to his child appears within the judgment of His Honour Judge Bellamy in the case of *Re X (A Child) (Care Proceedings: Notice to Father without Parental Responsibility)* [2017] EWFC 34. In that case, the judge held that if the father's Article 8 rights (to respect for family life) were not engaged, an

analysis of his rights under Article 6 (to a fair trial) was not required. Even where the father's rights under the European Convention on Human Rights are engaged, the Court can still decide to dispense with the requirement to give notice of proceedings if there are 'strong countervailing factors' against such notice being given. It is very probable that 'strong countervailing factors' would have prevailed if Rotherham Council had made an application not to give notice to the father, and thus the case was capable of being determined by conscientious legal analysis, as Judge Bellamy's careful judgment amply demonstrates, without regard to the distraction of outraged opinion, inflamed by ill-informed sensationalist journalism.

The potential tyranny of 'public policy' was colourfully exposed by Burrough J in the case of *Richardson v Mellish* (1824) 2 Bing 229 at 242:

> I, for one, protest … against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from sound law. It is never argued at all but when other points fail.

It must also be acknowledged that all professionals involved in the family justice system are under significant pressure, not least as a result of the constraints of austerity, and this may sometimes be reflected in both the timeliness and the quality of work done to assemble the evidence upon which decisions will be made. Munby P made some attempt to address in admonitory fashion the absence of compliance with directions within the case of *Re W (A Child) (Adoption Order: Leave to Oppose)* [2013] EWCA Civ. 1177, saying at paragraphs 50 to 54:

> That the parents and their representatives should have been put in this position is quite deplorable. It is, unhappily, symptomatic of a deeply rooted culture in the family courts which, however long established, will no longer be tolerated. It is something of which I complained almost thirteen years ago: see *Re S (Ex Parte Orders) [2001] 1 FLR 308* . Perhaps what I say as President will carry more weight than what I said when the junior puisne. I refer to the slapdash, lackadaisical and on occasions almost contumelious attitude which still far too frequently characterises the response to orders made by family courts. There is simply no excuse for this. Orders, including interlocutory orders, must be obeyed

> and complied with *to the letter* and *on time.* Too often they are not. They are not preferences, requests or mere indications; they are orders.

His successor President, Sir Andrew McFarlane, expresses himself rather more benignly in his first View from the President's Chambers (2019, p.2) as follows:

> … every professional engaged in work in the Family Courts must, I fear, continue to experience the adverse impact of the high volume of cases. I have, on every occasion that I have spoken about these issues, stressed my concern for the well-being of social workers, lawyers, judges and court staff who are conscientiously continuing to deliver a professional service in a timely manner despite the increase in workload.

Such concern finds its way from time to time into the decisions of the Court of Appeal – for example, Lord Justice Peter Jackson opens his judgment in the case of *Re S (Adequacy of Reasoning)* [2019] EWCA Civ.1845 with the words:

> This appeal is a reminder of the pressure under which judges of the family court are working … Over three days (the judge) heard ten witnesses, the hearing being interspersed with short hearings in other cases. On 23 May, she received

> submissions from three represented parties and an unrepresented intervenor. It was not possible for the court to sit on the following day and at 4.30 pm the judge, no doubt anxious to give the parties a decision, delivered an oral judgment that lasted until 6.45 pm. It is an unhappily familiar situation.

The pitfalls associated with that identified pressure are exemplified in the case of *Re R-B (a Child)* [2019] EWCA Civ. 1560, in which the judge made final care and placement orders in respect of a young baby at an issues resolution hearing, but, having been informed after various exchanges with counsel for the mother that neither parent actively sought to oppose the making of those orders, did not provide a full judgment. Lord Justice Baker reminded the court (paragraph 24) of the leading authority on the issue of the need for a reasoned judgment in making care and placement orders:

> The rationale for the need for reasoned judgments in these cases was expressed by McFarlane LJ (as he then was) in *Re G (A Child) (Care Proceedings: Welfare Evaluation)* [2013] EWCA CIV 965 at paragraph 53, quoted with approval by Sir James Munby, P in *Re B-S* at paragraph 45:
>
> "a process which acknowledges that long-term public care, and in particular adoption contrary to the will of a parent, is 'the most draconian option', yet does not engage with the

> very detail of that option which renders it 'draconian', cannot be a full or effective process of evaluation…"

At paragraph 25 of the judgment, Lord Justice Baker also noted that:

> The family court is of course required to carry out robust case management in proceedings involving children, and that involves taking appropriate steps to identify and narrow the issues in the case and to resolve those issues expeditiously. It is however axiomatic that robustness cannot trump fairness.

In holding that, unfortunately, that particular case fell on the wrong side of the robustness/fairness line, His Lordship joined his senior colleagues cited above in acknowledging (paragraph 35|) that '*I recognise of course the very considerable pressures that family court judges are under, dealing with an enormous caseload, particularly in public law proceedings. In such circumstances, robust and vigorous case management is essential.'*

It may be wondered why, in the light of so many pressures, any rational individual would sign up to work within the family justice system. Delahunty (2016, unpaginated) proffers the explanation that for judges, it is a matter of vocation:

> The common thread that unites all the decisions made in a family court is the welfare of the child. It is the court's paramount consideration. Anyone that does this type of work does it as a vocation. It exposes you to graphic images and tales of abuse that you would not dream any person was capable of inflicting upon a vulnerable child.

Whatever motivates a judge to undertake this work, the authorities are very clear about the obligations entailed insofar as the exercise of judgment is concerned. Such obligations are pithily summarised by Lord Justice Peter Jackson in the case of *Re DAM Children* [2018] EWCA Civ. 386 as follows:

> It is in the judgment that the judge's reasoning is found. There is no one correct form of judgment. Every judge has his or her own means of expression. Different cases may call for different types of judgment. Some judgments will be given at the time and others will be reserved. What is necessary in every case is that the judgment should be adequately reasoned: *Re B-S* [2013] EWCA Civ 1146 at

> [46]. That is a matter of substance, not of structure or form: *Re R* [2014] EWCA Civ 1625 at [18]. The judgment must enable the reader, and above all the family itself, to know that the judge asked and answered the right questions.

In asking and answering the 'right questions', the judge must remain mindful of the legal framework within which decisions must be made, and must apply the evidence adduced to the relevant law in order to reach a proper and securely-based decision.

3.5 Interpretation v. Innovation.

Whilst, as noted, the judges who hear the majority of child protection cases (Circuit Judges, District Judges and lay justices) are bound by the precedents set by the higher courts, nevertheless those precedents are based upon the interpretation of the law as set down by Parliament, and do not – and cannot – represent newly-created law. As alluded to within Chapter 5, addressing the legal framework, the fate of 'starred care plans' provides a clear example of this. That concept was ventilated within the conjoined appeals of *Re S (Children) (Care Order: Implementation of Care Plan)*

[2001] EWCA Civ. 757, where the Court of Appeal decided that where there was a risk of a breach of the Convention on Human Rights arising from the failure of the local authority to implement its proposed care plan properly or at all, it was justifiable to read into the Children Act 1989 a duty on the local authority to report the failure to the guardian or to the court in order to secure a system of care that was compatible with the parties' Convention rights. Hale LJ (as she then was) explained her thinking thus:

> 79. Where elements of the care plan are so fundamental that there is a real risk of a breach of Convention rights if they are not fulfilled, and where there is some reason to fear that they may not be fulfilled, it must be justifiable to read into the Children Act a power in the court to require a report on progress. In effect, such vital elements in the care plan would be 'starred' and the court would require a report, either to the court or to the guardian ad litem (in future to CAFCASS), who could then decide whether it was appropriate to return the case to court in the way discussed earlier. This would only be appropriate if there was good reason to believe that Convention rights had been or were at real risk of being breached.
>
> 80. There is nothing in the Children Act 1989 to prohibit this. Simply, there is nothing there to allow it. The courts have so

> far been true to the division of responsibility underlying the 1989 Act and declined to introduce it. But when making a care order, the court is being asked to interfere in family life. If it perceives that the consequence of doing so will be to put at risk the Convention rights of either the parents or the child, the court should be able to impose this very limited requirement as a condition of its own interference.

The House of Lords (since replaced as a final appellate tribunal by the Supreme Court) begged to differ: in a decision of the same name (reported at [2002] UKHL 10), the Law Lords made it clear that constitutional boundaries circumscribe the interpretative role of the judiciary, and that it is a fundamental principle of Children Act 1989 that the courts do not have the power to intervene in the discharge of a local authority's parental responsibilities under a final care order. The 1989 Act does not contain any provision capable of being interpreted in such a way as to confer the supervisory function proposed by the Court of Appeal, and thus it was held that the judicial innovation apparent from that court's decision trespassed beyond the boundaries of interpretation. In giving the first and the substantive judgment of the court, Lord Nicholls, holding that the proposed 'starring' system would amount

to statutory amendment rather than interpretation, noted (at paragraph 40):

> The greater the latitude with which courts construe documents, the less readily defined is the boundary. What one person regards as sensible, if robust, interpretation, another regards as impermissibly creative. For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment.

As Hale (2021, p159) subsequently put it herself, rather more succinctly, '*We couldn't use the Human Rights Act to put something into the Children Act which deliberately wasn't there'.*

Perhaps ironically, Fouzder (2018) reports that Baroness Hale, in an address to the conference of Resolution (the pre-eminent organisation for family solicitors), made it absolutely clear that the task of the Supreme Court is to interpret the law and not to create it: '*what the current law is and what the law ought to be are separate matters'.* That said, in giving judgment in a rare contested divorce case reported as *Owens v Owens* [2018] UKSC 41, Baroness Hale was clearly troubled by the decision which the court felt constrained by the law to make, indicating at paragraph 41:

> it is not for us to change the law laid down by Parliament - our role is only to interpret and apply the law that Parliament has given us.

It is thus clear that whatever a judge's thoughts about a particular legislative provision, the duty of the judge is faithfully to apply that law in accordance with the oath taken on appointment, and, however tempting, it is impermissible for a judge to take a political decision by substituting personal preference as to what the law ought to say. This was debated by Sedley (2011, p.647) within his review of Robertson's (2010) book entitled 'The Judge as Political Theorist'. Sedley expresses the matter thus:

> A book about judges as political theorists would be quite something: marrying judicial realism with critical legal studies, it would deconstruct judgment and expose ideology.

In fact, the treatise in question was not about judges as political theorists, despite its title, but rather about how courts determine the constitutionality of parliamentary legislation: nevertheless, Sedley offers this further colourful insight (p.650) into the extent to which judges are necessary to the functioning of society as a whole:

> … the refusal of the French Conseil d'Etat to allow dwarfs to be fired from cannons as public entertainment on the

> ground that it compromised their dignity despite their own desire to do it, is a reminder that the complications of real life will keep judges in business even in states with the best and clearest constitutional prescriptions. Whether this makes them political theorists is more doubtful.

The nearest the court should approach to questioning legislation properly passed arises within the context of the Human Rights Act 1998 s.4: the Court of Appeal's attempts to invoke that legislation to create starred care plans foundered, but the 1998 Act does permit a higher court to make declarations that specific primary legislation is incompatible with a right conferred by the European Convention on Human Rights. If such a declaration is made, the consequences may well be limited, as s.4(6) of the 1998 Act makes clear:

> A declaration under this section ("a declaration of incompatibility")—
>
> (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
>
> (b) is not binding on the parties to the proceedings in which it is made.

Thus judges are bound to interpret and apply the law, but not to seek to create it anew – and any perception that the law constrains judges from acting in the best interests of children must, ultimately, be a matter for Parliament. The existence or otherwise of such constraints will be further considered within Chapters 8 and 9.

3.6 The Impact of Transparency in the Family Court

Within my methodology chapter (Chapter 4), I allude to the impact of the drive for transparency upon the availability of first instance judgments: there is little doubt that the increased number of reported decisions by Circuit and District Judges has been of great assistance in the production of this research. The significance of transparency for this chapter lies in the extent, if any, to which the drive for greater openness within the Family Court has impacted upon judicial decision-making.

Depending upon perspective, the Family Court may be regarded as a safe place where intimate and deeply-distressing details of family life may discreetly be aired without fear of further promulgation; alternatively, it may be regarded as a secret court, intent on fulfilling a malign State agenda to remove children from the lives of their innocent but allegedly-undeserving parents in the name of

social engineering. Examples of the latter claim are readily gleaned from the popular Press. Prendergast (2017), says this:

> We all know why family courts are shielded from media or public scrutiny. But that lack of transparency can often lead to abuse of power. Judges in family courts can withhold information not just for the good of the individuals concerned, but also to conceal their own verdict. As such, family courts can be sinister places where cruel decisions are made. An obviously unfair decision will not necessarily generate a public outcry, because often the public cannot know.

It is fair to say that there has long been a lack of consistency within the family justice system as to quite how much information is allowed to escape into the public domain. Until the fourth quarter of the last century, petitioners for divorce had to endure the unedifying process of proving their petitions in open court – thus exposing deeply personal and often embarrassing details of their marital relationship to the gaze of any person who happened to be in court, whether as fellow-litigants, lawyers, journalists or the simply curious. That ended only when the so-called 'Special Procedure' was introduced, initially permitting undefended divorces based on the fact of two years separation and consent, and thereafter all undefended divorces, to be dealt with in the absence

of a formal hearing, with initially a Registrar (now known as a District Judge) granting a certificate of entitlement to decree nisi.

In contrast, the Family Procedure Rules 2010 set out strict provisions governing disclosure of documentation, to whom, and for what purpose, and the default provision in respect of all cases concerning children is that they take place in private. Inevitably, in an age when so many are ostensibly content to expose the most mundane details of their lives to the unremitting and often unforgiving gaze of social media, there is an area of conflict between what the law requires and what the general public deems to be acceptable. The task of the judge is made more complicated by the need to negotiate, within the bounds of the law, the aspirations of society towards greater openness in the field of family justice.

One major dilemma for judges arises from the need to avoid 'jigsaw' identification of children involved in family proceedings. The judge might permit the publication of an anonymised version of his judgment, only to discover that subtle but nevertheless vital clues remained as to the child's identity. An obvious example of this phenomenon is to be found in the case of *Re H and A (Children)* [2002] EWCA Civ. 383 – a case on appeal from a judge sitting at a

remote Court centre, thus easily identifying the general geographical area from which it emanates. The report sets out the family structure – a son, followed nearly 22 years later by the birth of twin girls, whose initials appear within a quotation from the husband's evidence. In a rural community, that information without more would readily lead to identification of the children. However, the report gave the additional information that the mother's husband was the children's full-time carer, at a period of time and in a community where that would have been regarded as unusual; it further set out the correct initials in place of the parties' surnames, and the age of the putative father. All of these details combined to make it very easy indeed for the identity of the children to be readily discovered by curious members of the children's local community, with self-evident implications for their privacy in respect of the very sensitive issue of the circumstances of their conception and their paternity. The London-based judges who determined that particular case may not have fully appreciated the case's rural and cultural context and the many clues supplied as to the identity of the children, and this case would suggest that judges who sit in larger metropolitan areas may feel less constrained by the perils of jigsaw identification than their provincial colleagues. It is reasonable to conclude that the high risk of jigsaw

identification may lead to a greater reluctance on the part of judges who sit in smaller communities to cause their judgments to be made publicly available.

The attendance of journalists at hearings of the Family Court is a relatively recent development. The position as set out in (undated) guidance issued by Her Majesty's Court and Tribunal Service is as follows:

> Journalists have a "presumptive right" to attend family court proceedings, and family proceedings in the High Court. Although judges may refuse the media permission to attend in specific circumstances, the intention is that journalists should be able to attend most cases if they wish. This does not, however, entitle a journalist attending proceedings to report more than limited details about the case, if the proceedings are in private.

The guidance stipulates that placement order and adoption proceedings are specifically excluded from that 'presumptive right' and thus journalists would be present only very exceptionally, and at the discretion of the judge, at any hearing at which such orders are under consideration. In practice, it is very rare indeed for journalists to seek to attend any hearing of the Family Court, absent some prior intelligence that the case may involve a high-profile

litigant or other newsworthy content, and thus it is reasonable to conclude that the potential for journalistic presence has little impact upon how family judges undertake their work.

The work of family judges is undertaken within a context which inevitably and indeed properly gives rise to high emotion: parents are fully entitled to feel passionately about their children. That said, there are many reported instances of family judges receiving unwelcome attention from disappointed litigants or their family members: an example of this was set out by journalist Emma James in the Manchester Evening News (2016) who ran a story under the headline *'Surrogate mum who lost legal fight to keep child made judge 'fear for her safety' with stalking and harassment campaign'.* The article referred to criminal proceedings in the local Magistrates Court which resulted in the defendant (the 'surrogate mum' referred to in the headline) being made the subject of a permanent restraining order preventing her from contacting the unfortunate judge. The defendant was said previously to have posted a photograph of herself on social media, taken outside the judge's home and displaying a banner announcing '*Family courts corrupt to the core – complicit with child abuse'.*

It is deeply troubling that the Family Court, whose very reason for existence is to protect the vulnerable, continues to attract criticism such as that of Prendergast (2017), as follows:

> Because of the strict secrecy surrounding family courts, it is often only when these cases arrive in a criminal court that we get a glimpse of how badly some children are let down.

The evidence giving rise to Prendergast's article was, as she properly recognises, no more than the untested parental account of three separate cases: it is worrying, therefore, that such emotive language is employed, although it is equally worrying that the Family Court lays itself open to the use of such language. Whilst there will always be members of the public who choose to vilify the system (and those employed within it) as a reaction to disappointment at the outcome of litigation, and likewise there will always be sensationalist press coverage, not always troubled by the imperative of impeccable accuracy, it is common sense to conclude that there could be nothing but a positive outcome from responsible reporting of the anxious care with which family judges discharge their obligations towards the children and families who come to their attention on a daily basis. For that reason, many if not most judges welcome increased transparency within the family court, subject to the major caveat that this must not be used as a means of

identifying the children who are the subject of proceedings and whose privacy should remain closely guarded.

There is little to be said by way of sensible argument against any process which permits the public at large to have a clearer appreciation both of the processes by which family decisions are reached, and in particular the efforts made by the family judiciary to provide fair and reasoned decisions which protect the welfare of the children who have the misfortune to be the subject of court proceedings, whilst respecting the Article 6 rights of the adults to a fair and proper hearing – provided always that the family's right to privacy is not thereby compromised. The President (McFarlane, 2021(c), p.2) notes that:

> Many of the decisions made in Family cases involve judges and magistrates exercising a degree of discretion and, in doing so, they are representing the social and other value judgments of society as to what is a fair and proper outcome in a dispute about family finances, or whether the State should remove a child into care, or what is the future course that best meets the welfare needs of a child. Again, it is legitimate for the public to know of those judgments, to provide a basis for trust in the soundness of the court's approach and its decisions, or to establish a

> ground for concern in that regard ... there is significant and important public interest in our society having and maintaining confidence in the work of the Family Court.

In conclusion, the theory of the exercise of judgment within the family court may fairly be summarised as the application of the relevant law to the evidence received in order to inform the exercise of discretion which should enable the judge to arrive at a decision which meets the imperative of affording paramount consideration to the welfare of the child concerned. Unfortunately, that theory does not assist the family judge in reconciling competing welfare considerations in respect of two or more children within a sibling group.

Within Chapters 6 and 7, I will explore in more detail how the theory underpinning judicial decision-making and the administration of family justice translates into practice, including when addressing the needs of individual children within a sibling group, drawing upon both the data gleaned from responses to a questionnaire directly addressing the focus of this study and by the reported decisions of the family judiciary. This exploration will

include reference to the evidence, such as it is, as to the impact of the increasing imperative of transparency upon judicial decision-making and will focus in particular upon the identified dilemma when dealing with two or more siblings whose welfare interests may not necessarily coincide.

CHAPTER 4

METHODOLOGY

4.1 Preliminary observations and assumptions

> The resolution of doctrinal issues … employs a rather unsystematic combination of analysis, doctrinal synthesis, policy argument and commonsense judgment to support scholarly recommendations to lawyers and courts about how practical legal issues should be resolved - Kissam (1988, p.235)

As my introductory chapter makes clear, this study is rooted primarily in an exploration of doctrinal legal principle and its judicial application within a specific social context, with appropriate reference to the broader sociological and psychological issues raised. Having set the scene with an outline of the issues identified for exploration and a review of the relevant literature, the study proceeds with an examination of the theory underpinning judicial decision-making. This is followed by a comprehensive evaluation of the legal framework underpinning the process of non-

consensual adoption, and in particular the legal principles involved when considering the permanent severance of a sibling relationship. It considers the judicial approach to the application of those principles, with a view to analysing, and potentially to challenging, the appropriateness of the existing statutory scheme. The task therefore requires all the elements identified by Kissam, as set out in the quotation above, but without losing sight of the very real and frequently tragic human dimension which provides the inspiration for this project.

In essence, the raw material which forms an essential component of this study consists of people: not of the average man or woman (historically commonly referred to within legal circles as the man – or woman – 'on the Clapham Omnibus'), but a very specific group of people who, by virtue of their life experiences, are likely to have elements of vulnerability. I am concerned with highly-personal, private, emotive aspects of life which are seldom the subject of public scrutiny. The need to approach this work in a respectful, non-judgmental and non-intrusive manner has underpinned the methodology employed.

Within this chapter, I propose not only to explain and describe the choice of methodology, but also to explore why alternative

methodologies were not pursued. The study was informed by some elementary assumptions as follows:

a) The interests of children are paramount, as very clearly enshrined within Children Act 1989 s.1(1) and Adoption and Children Act 2002 s. 1(2) – although that absolutely begs the question as to how the courts should reconcile potentially competing interests within a sibling group;

b) Where possible, children should be brought up within their natural family;

c) Promoting secure attachments should be regarded as having the same status as securing physical protection – in other words, the emotional dimension in safeguarding children is no less important than safeguarding against physical abuse.

This study involves both qualitative and quantitative paradigms, relying upon a mixture of library-based exploration, combined with analysis of specific data generated by enquiry – both directly and indirectly – of those responsible for making the life-changing decisions upon which this study is focused. It follows that the

research also involved non-doctrinal elements: the intended end-product – establishing whether the current English legal framework is sufficiently flexible to promote the welfare of all members of a sibling group – is firmly within the realms of doctrinal law, but the route to achieving that end product depends equally firmly upon non-doctrinal socio-legal exploration.

Razak (2009, p.19), citing Rubin (1988) notes that the difference between research within legal and non-legal fields is that in non-legal fields (as for example in social research), the researcher has to demonstrate the relationship between his or her research and prior research within the same area, whereas within the legal field, all that is required is to show that the researcher is saying something new – although given the very large body of case law, much of which – at least at appellate level – furnishes new interpretation of legal principles, that is a taller order than Razak's proposition implies. That said, within the realms of English law, as discussed in the preceding Chapter (Chapter 3), the role of the judge is, strictly-speaking, confined to that task of interpretation, and not to the creation of new legal concepts – as summarised in 1625 by Bacon (cited from the Everyman edition, 1973):

> Judges apply the law made by parliament – their task is to 'interpret law, and not to make, or give law'.

This wisdom has not always operated to inhibit senior judges from seeking to develop the law in a manner which may stray beyond the strict confines of interpretation – an obvious example being the previously-noted ill-fated attempt by Lady Justice Hale (as she then was) to import into the Children Act 1989 the notion of 'starred care plans', effectively introducing court oversight of the implementation of aspects of children's care plans after the making of final care orders – rejected by Lord Nicholls within the judgment given on appeal to the House of Lords as constituting '*judicial innovation* (which) *passes well beyond the boundary of interpretation'.* However, this clear message as to demarcation falls to be considered in the context of apparently contrary views within the reported cases – notably by Lord Nicholls himself in the case of *In re Spectrum Plus Ltd* [2005] 2 AC 680, para 32 in which he observed:

> The common law is judge-made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations.

> That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary.

In other words, interpretation of the law, but not the law itself, may change in the light of developing societal conditions. Within the context of considering the methodology for this research, I have remained mindful that whilst judges are not permitted to usurp the role of parliament in creating law, the law relating to children is designed to promote the interests of each child with whom the court is concerned and must be considered and applied with that overriding principle at the forefront of the judicial mind. As will be further explored within Chapter 5, the law confers of necessity a wide ambit of discretionary interpretation upon the judge to apply the law in a manner which best meets the welfare needs of the child who is the subject of the litigation. This approach is far removed from the formalism approach to law which holds that every legal problem has one correct solution: it fits more readily with the approach of legal realism. Dagan (2005, p.6) cites Pildes (1999) in describing the formalist view of law as a system composed of concepts and rules, and one in which right answers are '*derived*

from the autonomous, logical working out of the system'. In contrast, Dagan (p.59) notes that legal realists are not so constrained:

> Legal Realists always begin with the existing doctrinal landscape because it may (and often does) incorporate valuable – although implicit and sometimes imperfectly executed – normative choices. They assume, in other words, that because the adjudicatory process uniquely combines … craft and science, its past yield represents an accumulated judicial experience and judgment worthy of respect.

Having acknowledged the importance of respecting past wisdom, legal realists also recognise the inherent dynamism of the law, described by Llewellyn (2016, p.222) as the '*constant questing for better and best law'* requiring judges to be forward-looking and creative in the interpretation of the parliamentary-ordained statutory framework.

The doctrine of legal realism fits well with any area of jurisprudence which embraces a significant and ever-changing sociological context. The approach of an American jurist and

exponent of legal realism, Oliver Wendell Holmes Jnr, is summarised (Watson, 2011 – no pagination) thus:

> For Holmes, law and society are always in flux, and the courts adjudicate with an eye to law's practical effects. Morality has nothing to do with law; it amounts to little more than a state of mind. There are no objective standards for determining right and wrong and therefore no simply just answers to legal questions. Legal adjudication has no natural or even constitutional basis; instead it comes down to weighing questions of social advantage according to the exigencies of the age.

One obvious example of the impact of the '*exigencies of the age'* upon the development of thought within the child protection context is the move away from the acceptance of a level of physical chastisement as part of boundary-setting: the smacking of children was outlawed in Scotland on 7 November 2020 (The Children (Equal Protection from Assault) (Scotland) Act 2019) and in Wales on 21 March 2022 (Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020); it remains theoretically lawful in England but nevertheless is generally deprecated and will frequently form part of the document upon

which a local authority relies to establish that the threshold to the making of protective orders has been crossed.

In tackling this project, and indeed in selecting the most appropriate methodological approach, I have remained mindful that my views and choices will, inevitably, be shaped and coloured by in excess of forty years' professional experience as a child-protection lawyer, in one capacity or another. As alluded to within my introduction, I have over many years represented children who are the subject of care and placement proceedings, usually taking instructions from the court-appointed Children's Guardian, although occasionally directly from a child or young person deemed competent to give instructions. Additionally, since 2007 I have had the privilege and responsibility of being a Judge charged with making the anxious decisions which such cases require. To that extent, my analysis may be considered interpretative and subjective, but it is tempered by the recognition that is implicit within legal and judicial training that all cases require careful and objective analysis, mindful of, but uninfluenced by, personal proclivities. I have also heeded the warning by Hammersley and Atkinson (1995), encouraging empirical researchers to go into the field with a hypothesis or '*foreshadowed problems'*, but nevertheless to be responsive to the

results of research and the need to re-visit hypotheses and theories in the light of the assembled data. This underscores the importance of reflexivity in undertaking qualitative research, and that reflexivity provides a key link to validity.

In any event, this project is not simply a reporting of the views and findings of others, but rather involves detailed consideration of the extent to which such views and findings challenge or support the data gleaned from my own research and inform my response to the questions which gave rise to this study. I have factored into that detailed consideration the disadvantage inherent in the inescapable fact of my being a lawyer, noting the view expressed by Cownie and Bradney (2013, p.37) that

> engaging in socio-legal or inter-disciplinary work is a significant challenge for academic lawyers trained in the British tradition, since doctrinal law does not engage with other disciplines.

That said, the authors then proceed (p. 51) to acknowledge that socio-legal research is rapidly becoming the dominant mode of legal scholarship, and whilst I, in common with many of my

generation who read law at a traditional university, had no opportunity to stray into subsidiary subjects or joint honours studies, the importance of law students engaging with other disciplines at undergraduate level is now much more widely recognised, thus paving the way to a broader appreciation of the context within which doctrinal law requires to be considered. Moreover, it is necessary and inevitable that all lawyers immersed in the field of child protection are acutely aware of the social context within which they work: although a thorough grasp of legal principle is an essential skill, much more is required effectively to advocate on behalf of children involved within the care system. This is evidenced by the requirements for membership of the Law Society's Children Panel (the gold standard for child protection lawyers) which include thorough training not only in the substantive law but also in the wider welfare and sociological context.

All Judges in England and Wales are required to undertake ongoing continuation training, and for those judges engaged in public law children work, the course design places significant emphasis upon the sociological and psychological contexts within which the legal framework falls to be considered and judicial decision-making is

undertaken. My own appreciation of the wider canvas has been greatly assisted by having completed the Keele University MA in Child Care Law and Practice, enabling me further to explore the areas of multi-disciplinary practice which underpin and inform decision-making in matters of child protection.

In planning this project, I have been very clear that the methodology adopted must meet the needs not only of the legal aspects of the project (doctrinal and otherwise), but also its inescapable socio-legal context.

4.2 Planning the Research Questions

To an extent, this question more properly follows the section within this chapter addressing the exploration of the literature, because some preliminary consideration of the body of available literature was an essential precursor to identifying research gaps and thus formulating the proposed questions. That said, my practical experience within the field of family justice – coupled with a significant level of academic interest in the topic – guided me into what I considered to be the appropriate direction of travel, thereafter refined by consideration of how best to approach the

topic in a manner which would yield helpful and convincing data; the literature search complemented this approach by providing an overview of what was already known about the topic as a result of research undertaken by others.

I was clear from the outset that the focus of my research would be the impact and incidence of sibling separation by adoption, and how the law might best be adapted to mitigate the risks to all members of the sibling group – howsoever the term 'sibling' is defined – of inappropriate severance of the sibling bond. The project was predominantly inspired, as noted in the introductory chapter, by hearing a number of young people at a conference organised by the Cafcass-sponsored Family Justice and Young People's Board speaking of their experiences of being separated from brothers and sisters; it was also borne of my concern about the regularity with which, in my professional capacity, I encounter local authority plans which, if endorsed, would result in sibling separation. Whilst some such plans appear well thought-out and evidenced, others are couched in trite, formulaic language and appear almost indifferent to the life-long repercussions for the children of the plans proposed.

As the project took shape, my vision was of a largely qualitative research study in which words – whether from literature, law reports, or survey – would form the data from which theories would be generated, but with a quantitative element derived from the survey responses. Inevitably, and as already identified, this is a research area which lends itself to a degree of subjectivity, and the phrasing of the research questions was designed to promote, as far as possible, a degree of objectivity in analysing the data derived from all aspects of the research project, and in reaching conclusions.

The research questions formulated are as follows:

1. Do the courts sufficiently consider the potentially-competing welfare interests of sibling children in making placement decisions which may result in the permanent severance of the sibling relationship?

2. Even if separate placements are inevitable, is sufficient attention given to preserving sibling relationships by direct and indirect contact?

3. Is it possible for law and practice to reconcile differing and competing welfare implications for individual siblings, and especially for siblings who are left behind whilst other siblings are received into adoptive families? Should the law be modified specifically to recognise the significance of the sibling bond?

The research questions are deliberately broadly-based, but allow for very specific attention to the approach of the courts to the issue of sibling separation; they also provide a vehicle for assessing and analysing whether the underpinning legal framework remains fit for purpose, and, if not, what amendment might be appropriate. I will re-visit the research questions both within the chapters addressing my findings flowing from the questionnaire and the exploration of reported cases, and also within the concluding chapter.

4.3 Exploring the Literature

> I quote others only in order the better to express myself.
>
> (Montaigne, 1580)

The literature is considered in depth within Chapter 2, and what follows is therefore a summary of the approach taken in dealing with this important aspect of the work as a whole. The project critiques both law and policy. Useful starting points for policy matters are the bibliographies provided by Shaw (ed.) (1994) and Sudbery et al. (2005), although much has been produced since those publications. The authors of the latter publication quote (p.123) Howe's (1998b) pertinent observation that

> …while research has increased our understanding of children's needs, social practices are irredeemably moral, and political practices … though heavily informed by science have, in their final analysis, to be conducted using the art of sound judgment.

It must be acknowledged that any research which seeks to promote that sound judgment and to identify the best outcomes for children is likely to be the more convincing if supported by hard evidence

derived from actual histories – for example, the work of Selwyn et al. (2006), examined outcomes for 130 children adopted beyond infancy – and I have addressed that imperative not by the direct involvement of those adopted, but, as I shall explain, by gathering evidence and opinion from judges responsible for the decision-making which sanctioned (or refused to sanction) the adoption and the separation of sibling groups. This meets the proposition advanced by Martens and Scott (albeit in a rather different context from this study) (2004, p.21), who suggest that:

> Empirically grounded understanding rather than uninformed conjecture should enlighten debates.

The object of the comprehensive literature review was to provide a clear foundation for that understanding. In order to provide the most secure foundation, the review addresses law and policy not just within England and Wales, but also, to a limited extent, further afield, and utilises a wide review of the literature progressively to narrow the focus upon the questions raised. The literature was selected by the combination of methods summarised within this chapter and addressed in detail within the chapter devoted to the

literature review. It provides the context in which to locate this study, as well as informing and sometimes challenging it.

In analysing the literature, it has been helpful to consider the background and approach of the various authors. Howe (1998, p.25) identifies two groups of adoption researchers: child-welfare specialists who seek to improve policy and practice, and nature/nurture debaters, whose focus is upon the psychological aspects associated with children raised by those without a genetic connection. Inevitably, these two distinct groups will produce work from a very different perspective. In critiquing the literature, it is also necessary to factor in known positions adopted by particular scholars: for example, Norrie (2005, p.10) proposes abolishing adoption in favour of protected fostering – something akin to Special Guardianship (s.14 Children Act 1989). That said, the focus of this study is not upon adoption in general but upon the very specific issue of sibling separation – an aspect hitherto little explored, at least until ground-breaking research undertaken by Monk and Macvarish (2018) raised awareness of the paucity of attention hitherto given to this significant issue.

Quinton and Selwyn (2006, p.462) comment that research into policy and practice of adoption is in short supply and difficult to undertake. However, the political emphasis in the last decade upon adoption has resulted in a proliferation of material of relevance to adoption generally, adding to the pre-existing body of policy documentation, case law, scholarly research, and statutory and non-statutory guidance available for analysis and comment. In particular, the Department for Education continues to produce a great deal of documentation detailing policy and practice initiatives, and journals such as Adoption and Fostering and Community Care have been quick to respond, commenting upon and analysing not just the initiatives propounded, but also the political context in which many such policies are advanced.

It is particularly important to consider Government-generated material objectively, not rejecting proposals simply because they are (or may be) advanced in pursuit of a political ideology or agenda, or even for economic reasons, but considering to what extent, regardless of motivation, such proposals may advance the welfare of the children with whom such policies are concerned. An obvious example of this is the drive to expedite adoption by the use of 'Scorecards' as an incentive to local authorities to progress plans

of adoption: clearly there are advantages to a child in shortening the wait for a permanent family, but disadvantages if quality of placement becomes a casualty of expedition. As Kellett (2010, p.128) notes, Government policy derives from a combination of research evidence and 'think tank stimuli', making it difficult to separate policy from politics and creating cynical concern that policy is driven as much by vote-winning initiatives and by the media as by research: whilst the idea of rescuing children by placing them in nurturing homes plays well to the popular imagination, the issues of separation and loss associated with adoption rarely achieve prominence.

Articles, textbooks, and other materials pertinent to issues associated with sibling separation, especially within the adoption context, have been located through University library catalogues and through a number of databases, including Academic Search Complete (via EBSCO publishing), Web of Knowledge, Google Scholar, ProQuest and Westlaw. Search terms in respect of both law and practice have included multiple permutations of words such as 'siblings' and 'adoption' and associated concepts such as 'sibling separation.' It is fair to observe that many of the studies considered are modest in scale, and others are of some antiquity –

a reflection upon the relative paucity of research within this area. Coram BAAF (successor to the British Association for Fostering and Adoption) provides much useful material in addition to its key journal, Adoption and Fostering, mentioned above, and more information is available or signposted on websites of relevant bodies such as the Centre for Adoption and Foster Care Studies at the University of Bristol (Hadley Centre) and the Nuffield Foundation, as well as the Adoption Reform Update provided regularly by the Department for Education, at least in the earlier stages of this project, with useful material also located on the website of the Adoption Research Initiative, found at (www.adoptionresearchinitiative.org.uk). Hansard has been thoroughly explored (largely electronically) to provide background to political thought. In addition, consideration has been given to many relevant reports and papers, including Narey (2011), Norgrove's Family Justice Review (FJR) (2011a and 2011b), and the Government's FJR Response (2012).

I have registered with the Department for Education to receive alerts to anything of relevance to this project. Until the recent abolition of the service, I received daily Lawtel alerts as to relevant cases (usually cases heard in the Court of Appeal or Supreme

Court), but in any event regularly check BAILII and the judicial intranet for reported cases relevant not only to this study but to my daily employment; I have gleaned some of the statistics mentioned in the course of this study from the Office for National Statistics (ONS) and websites of Government departments. The need for a degree of circumspection in considering statistics derived from local or national governmental sources arises from their political context: as Denscombe (2017) notes in the local authority context, an organisation may '*stand to gain or lose on the basis of what the figures reveal'.*

4.4 Exploring judicial decision-making

a) Documentation within the public domain

A very important aspect of the library-based aspect of my research has been the exploration of case-law to distil as far as possible the judicial approach the treatment of sibling groups, insofar as this may be gleaned from law reports which are, inevitably, a summary of a lengthy process of evidence and evaluation, and which may focus primarily on issues other than those which are central to this study. For example, whilst a given law report may illuminate

judicial thinking as to why adoption is the outcome of choice for a particular child, it will not necessarily dwell on the impact of that outcome upon the child's siblings, especially if those siblings are not themselves the subject of proceedings.

That said, law reports are an essential part of the armoury in critiquing any aspect of a legal system which, as in England, is rooted very much in common law, and the process of trawling law reports has been greatly assisted by the more widespread use of www.bailii.org to publish judgments given by Circuit and District Judges, rather than, as hitherto, reporting being largely confined to the High Court, Court of Appeal and Supreme Court. Wider reporting has been greatly encouraged – and indeed required – by the President of the Family Division's Guidance (Munby, 2014), issued in the furtherance of the Transparency Project, which, as alluded to within Chapter 3, was in turn designed to de-mystify family justice and to render intelligible to that man on the Clapham Omnibus the reason for State interference in the private lives of families:

> there is a need for greater transparency in order to improve public understanding of the court process and confidence in the

> court system. At present too few judgments are made available to the public, which has a legitimate interest in being able to read what is being done by the judges in its name.

The Transparency Project has been the subject of thorough evaluation by Doughty et al. (2017) in a Nuffield Foundation study – followed by a book on the subject (Doughty et al, (2018)). Essentially, Doughty and her fellow-researchers identified limited compliance with the President's Guidance, with Circuit Judges in particular lacking the time and the clerical resources to undertake the volume of work required to prepare a judgment for publication – especially the time required to undertake editing and redaction to guard against 'jigsaw identification' of the family concerned. Nevertheless, contested applications for orders authorising a local authority to place a child for adoption fall within the category of judgments where publication should ordinarily follow. The nature of the guidance was explored by the Court of Appeal in the case of *Re C (A Child) (Publication of Judgment*) [2015] EWCA Civ 500 (a case involving an appeal against a decision relating to paragraph 18 of the Guidance - ie an application for publication of a judgment which fell outside the categories in which publication would ordinarily be expected). Within his judgment (paragraph 21 et

seq.), McFarlane LJ made a number of observations about the guidance:

> First of all, having set the context [of the guidance], it is right to draw from that that the move within the family justice system from circumstances in which it was unusual or exceptional for judgments to be published and for the public to know what occurred in family proceedings to a more open process there is a process of transition. The President is plain that what is sought to be achieved is a culture change. It is "work in progress"…
>
> Secondly, it is important, in my view, to understand that those cases which fall into paragraph 18 territory within the Guidance are expressly left to the discretion of the judge. All the other cases fall into a category where the President through the Guidance expects that publication will take place. The discretionary nature of paragraph 18 material is one that this court should understand and respect. These are case management decisions given by judges, albeit at the end of the case, looking at whether or not the judgment should be published…
>
> The third observation I make is that the process that the President is currently engaged in is very much one which

> is organic and developing. It is not apt, in my view, for the Court of Appeal to intervene and to offer its own guidance … unless it is plain to this court that a judge in a particular case has fallen into an error of principle or is otherwise plainly wrong in the decision that has been given.

It is clearly a limitation of this research that whilst many more judgments than hitherto are now available for scrutiny, this is, as indicated by Lord Justice McFarlane, a '*work in progress'*, and it must be acknowledged that many judgments given by judges up and down the land remain unreported and thus inaccessible. Doughty et al. (2017, p.6), commenting upon the President's 2014 Guidance, report as follows:

> We found 837 cases that had been published on BAILII in accordance with the guidance. These provide a great deal of public information about family courts that was not previously available. However, this forms only a minority of judgments, given that between 11,000 and 12,000 children are involved in care proceedings each year. There were wide variations between courts and between judges as to whether judgments were sent to BAILII. Some courts appear to publish regularly and

> others never at all … High Court judges, who are accustomed to having their judgments reported and who may have some clerical assistance are more likely to send their cases to BAILII than circuit judges.

Doughty et al. (2017, p.42) note that the rate of publication of judgments began to slow as early as 2015, and that publication has become increasingly exceptional. Bellamy (2020, p.99) refers to his survey of a pool of judges who have never published a judgment, noting that the main reason advanced for non-publication was lack of time caused by workload pressure – an explanation which resonates with the findings of Doughty (2017, supra, p71) who identified the primary obstacles to be the time-consuming nature of the process of ensuring anonymity and the imperative of avoiding jigsaw identification. Put simply, many judges consider that they are just too busy to provide the exceptionally-detailed attention required to ensure respect for the privacy of the family, and particularly of the children. As another former President, the late Lord Justice Wall, put it:

> Nobody who works in the Family Justice System regards it as perfect: most of us see it as under-resourced and struggling to deal with the workloads thrust upon it – *P v Nottingham City*

Council & Anor [2008] EWCA Civ. 462 at paragraph 127.

Having said that, Bellamy (supra, pp.97-98) records that 114 Circuit Judges have published one or more judgments on BAILII, and that at the relevant time, 196 Circuit Judges were authorised to hear family cases. It follows that the cases reported represent a cross-section of 58% of Circuit Judges and may therefore be assumed to be broadly representative of judicial decision-making across the spectrum. It is also fair to say that publication of judgments by a District Judge remains relatively unusual, with very few such cases appearing within the time-frame of scrutiny.

The judgments of judges at a level below that of the High Court do not create binding precedent (ie judgments by 'junior' judges are not required to be followed by other judges), but nevertheless can be of great assistance to serving judges in informing how fellow-judges approach a given issue, and in any event contribute to a body of evidence and knowledge which, by addressing judicial decision-making, is directly relevant to this study. A striking example of the publication of a judgment by a Deputy District Judge (and thus one of the most junior members of the judiciary) can be seen in the case of *Jack (A Child : Care and Placement Orders)* [2018] EWFC

B12 - a care and placement order case which attracted much (largely positive) media attention because it was written in very simple language with a view it being readily understood by the child's parents. Deputy District Judge Reed (incidentally a co-author of Doughty et al (2018) mentioned above, and thus a judge with a keen interest in the Transparency Project) said this:

> When I made my decision about Jack I was asked if I would publish my judgment. Junior judges like me don't usually publish their judgments but I agreed, because I don't see any reason not to publish the judgment and everybody agrees I should. Everybody agrees that I should take out the names of the parents, children and social workers to make sure that private things stay private for Jack and his siblings. I had already typed my judgment so that D can have it read and explained to him, so it hasn't taken very much extra time to get it ready to publish. I've taken out some details that might identify Jack or his siblings.

This judgment provides a good example of the breadth of reporting now in existence, even if reports are not as numerous as envisaged when the President's Guidance was first issued, and which may, despite good intentions, diminish yet further, as I explain within the section addressing transparency in Chapter 7, where I analyse

relevant judgments. It is however pertinent to note that I chose to begin my examination of cases from April 2014, to coincide with the inception of the Family Court as a single, unified entity, but that timing happily coincides with the promulgation in the same year (albeit three months earlier) of the guidance by the former President exhorting such publication (supra). The identified limitation to the number of reports available has been significantly mitigated by the enthusiastic responses from family judges up and down the land to a questionnaire sent out to them as an important component of this project – as I will describe later in this chapter. Inevitably, many cases were discarded as being irrelevant to this research, but synopses of those cases found to be of relevance appear as Appendix 4A to this study. An alphabetical list appears, for ease of reference, as Appendix 4B, with a key providing the number for each case referred to in Appendix 4A.

In determining the policy of inclusion or exclusion, I have considered each case published within the specified time frame to ascertain whether the subject child (or children) formed part of a sibling group, whether or not with an established relationship, and if so, whether there was any risk of separation. Cases involving singletons were excluded automatically, unless of course that

singleton has an identified quasi-sibling relationship with an un-related child from whom he or she was at risk of separation. As already noted, both in the introduction and within the chapter exploring the literature, the concept of 'sibling' extends, from a child's perspective, well beyond children who are biologically full brother or sister: children make little or no distinction between siblings of the full and half- blood, and may have firm bonds with non-related children with whom they share a home, either as step-siblings or as foster-siblings or 'fictive kin'. That said, there is very little mention within the cases considered of important non-familial quasi-sibling relationships, and thus the cases considered are predominantly confined to a biological sibling relationship, whether of half or full blood.

In some of the reported cases it was impossible to deduce from the judgment what weight, if any, had been placed upon the sibling relationship: those cases are nevertheless included, because the absence of emphasis on the sibling relationship if of itself information pertinent to this study. However, judgments vary considerably in length and scope, and it is a limitation of the study that, in some judgments, it is impossible to discern to what extent judicial thinking was directed (or self-directed) to the significance

of the sibling relationship. It follows that any criticism of the apparent absence of such consideration must be tempered by acknowledgment that it may very well have been addressed within the case, but may not have been explicitly recorded within the judgment: the imperative of brevity may have restricted the articulation of matters which were well within the contemplation of the judge. I have already made reference to the significant pressures under which the family justice system operates (and see further below): one casualty of that pressure is that judges, at least in the lower courts, are likely to have limited time at their disposal in which to craft their judgments, although my personal experience is that my judgments would be shorter if I had more time to make them so without the risk of sacrificing essential detail.

A further limitation of this analysis is the inescapable fact that many judges do not place their judgments on BAILII, despite hitherto clear encouragement from the senior judiciary. It is also worthy of note that the study by Brophy et al (2021), focusing upon protecting the privacy of children by reducing the risks of identification, is highly likely to have the effect of reducing yet further the publication of judgments. Hard-pressed judges who might otherwise have been willing to publish their judgments on

the BAILII website are highly-likely to be deterred by the yet further work required to meet the entirely-understandable recommendations emerging from that research. An additional pressure and source of time-constraint is the frequently-acknowledged implications of the pandemic and its impact upon the workloads of all family judges and indeed of all those working within the family justice system. The President of the Family Division (McFarlane, 2021, p.1) expresses those implications thus:

> The experience of court staff, lawyers, social workers, CAFCASS officers, magistrates and judges is, I suspect, the same across the board. An unremitting burden of cases, long working hours, many emails, regular frustration when one or other aspect of the working arrangements fails, and extensive hours spent on multiple screens in a way that is more tiring than is the case with ordinary court work.

It follows therefore that the timing of my research is particularly opportune, although in so saying I acknowledge that the President has initiated further work on the issue of transparency (McFarlane, 2021 (c)), including in particular the creation of the Family Transparency Implementation Group, which may in due course reverse the current downward publication trend.

In addition to regular and systematic attention to BAILII, other cases of relevance to this thesis (for example, when setting out the legal framework in Chapter 5) have been identified through databases such as Westlaw, and by hand-searching Family Law Reports. It has been helpful to consider not only the dedicated family law series, but also the reports of the European Court of Human Rights and the wide-ranging reports available in the All England Law Reports and Weekly Law Reports of relevance to this study – for example, reports from the Administrative Court.

This research is by no means unique in drawing data from published decisions – for example, Barnett (2020) examined 54 judgments to inform her research on the subject of parental alienation (PA). At p.19 she noted that

> The reported cases cannot provide a representative sample of all such cases. Nevertheless, they provide us with some insight into the way in which some trial judges respond to PA and into the attitudes and responses of the higher courts

I entirely endorse that observation: whilst I believe that the large number of cases considered for the purposes of this research may be considered broadly representative of the approach taken by family judges, it is inescapable that only a proportion of such decisions are published and it is therefore safer to proceed on the basis that the decisions considered provide insight rather than definitive answers to the issues under consideration.

b) <u>Data derived from my questionnaire to serving judges</u>

A key component of this study is the data generated by an interactive questionnaire submitted to all the judges within England and Wales who determine family public law matters. A copy of the questionnaire appears at Appendix 1.

The questionnaire was devised in its first draft from personal experience of the issues of relevance to this study which arise very commonly in proceedings relating to care and placement orders; that first draft was then discussed with two interested colleagues – a very experienced District Judge and a (now former) Lord Justice of Appeal – before forwarding the final draft to the then-President of the Family Division, Sir James Munby for his formal approval,

which happily was readily given, subject only to the caveat that it must be made clear to each potential respondent that co-operation was entirely voluntary. This was indeed made explicit within the information supplied to each prospective participant. The questionnaire was then submitted to, and in due course approved by, the University's Ethics Committee (Appendix 1B) before receiving the final blessing of Sir James Munby's successor as President, Sir Andrew McFarlane.

The significance of the results of the questionnaire requires to be considered within the organisational context of the Family Court. Whilst it is now a single entity, it sits at courts throughout England and Wales which are divided between six Circuits: North Eastern, Northern, Midland, Wales, South Eastern and Western, each with a High Court Family Division Liaison Judge with ultimate responsibility for the administration of family justice throughout that Circuit. Each Circuit is then further divided into Designated Family Judge (DFJ) areas, with each DFJ having front-line responsibility for the administration of family justice by the judges and lay justices within his or her area. There are forty-three DFJ areas in England and Wales, each of which is responsible for hearing the cases issued by the local authorities within its area.

Having completed the approval process described above, the questionnaire was distributed to each of the forty-three DFJs by the Office of the President of the Family Division with the request that each DFJ circulate it to the Circuit and District Judges for whom he or she is responsible. The only condition attached, and as already noted, was that participation must be entirely voluntary. A total of fifty-five completed questionnaires were returned directly to me, covering a broad spectrum of judicial experience. Of the forty-three DFJ areas, at least one response was received from each of those areas, thus reflecting views across the jurisdiction. Only three were returned anonymously. I considered the response to be very good within the context of the pressures on the family justice system.

It is pertinent to note that there are significant demographic variations between DFJ areas, some of which are located in large metropolitan areas, including London, Birmingham and the major Northern cities; others are based in smaller urban areas and may include significant rurality. By way of example, the writer's DFJ area includes one local authority based in a medium-sized city, three are located in post-industrial towns which include pockets of significant urban deprivation; there is one mixed new-town

urban/rural local authority area and one predominantly rural local authority area. A further example of the diversity of DFJ areas is illustrated by the composition of the North Wales DFJ area, consisting of six local authorities, the majority of which are based in predominantly very rural areas, but with a number of small towns and two very modestly-sized cities. Despite those two examples, the majority of DFJ areas cover no more than two or three local authorities. Some are almost exclusively urban in character – such as Reading and Slough – whilst others, for example, Devon, are primarily rural in nature. The impact of demographics will be considered where relevant to my analysis of the responses received.

I did consider whether post-survey qualitative interviews would provide an opportunity to delve more deeply into the questionnaire responses, and thus gain more detailed information about the perceptions of the respondents – as proposed by Genn (1999, p.18). However, I am very mindful of the extreme time pressures confronting every family judge, particularly when much of this research has been conducted within the context of the Covid-19 pandemic, and moreover the information provided within the questionnaires yielded significant quantities of data. It seemed unlikely that the burden upon my colleagues of further discussing

those responses would have been justified by a very significant addition to the data already gleaned. In targeting the questionnaire, I had also considered whether to invite responses from the Chairs of Family Panels (ie the Chair in each Magistrates' area of the panels of lay justices who are authorised to hear family cases) but decided against this because although the lay justices determine factual matters, they do so with legal advice and input from a Justices' Clerk/Legal Adviser and since the questions pose a mixture of factual and legal matters, it was unlikely that lay justices would be well-placed to provide a comprehensive response. Furthermore, I would expect any case where a local authority was contemplating divergent care plans for siblings to be transferred away from the lay justices – as I shall explain when considering Allocation Criteria within the chapter addressing the legal framework.

A statistical breakdown of the data obtained from the responses to the various questions– to the extent that the data is capable of being reduced to statistical form – appears in Chapter 6 of this study.

4.5 Additional Methodologies Considered

A. Computer-based analysis of data:

At an early stage of the project, I undertook NVivo training, in order to investigate whether qualitative data analysis by software would assist in achieving the aims identified. The obvious strengths associated with such programmes are consistency and increased rigour in the analysis of data; on the other hand, given the relatively small-scale of this project, analysis without computer assistance provided a sense of greater control over the material and avoided the risk of focusing on quantity rather than quality. As demonstrated by completion of this project, the task was not of such a scale as to be impossible of performance in the absence of computer-generated assistance. I was also very mindful of the limitations of my own technical knowledge, and the risk that seeking to use a computer program to facilitate analysis would be a major distraction, potentially associated with what Lu and Sherman (2008, p.108) pertinently describe as a risk of '*usability frustration, even despair and hopelessness'.*

B. Targeting additional respondent groups:

I thought carefully about the possibility of directing questionnaires to (and possibly thereafter holding interviews with) additional child protection professionals. The possibilities included Cafcass Guardians, social workers and lawyers practising within the child protection field. The advantage of so doing would have been the production of a rounded account from representatives of the entire body of those professionals engaged in this area of law; more extensive enquiries would have provided opportunities for triangulation of the data gleaned, not least to see whether different categories of child-protection professionals view matters very differently. Ultimately, I rejected this approach: the focus of the project is very much upon the judicial approach to sibling separation (as set out in particular within my first research question) and whether those charged with the ultimate decision-making responsibilities are satisfied that the legal framework is adequate for the task in hand. By not adding to the categories of respondent, I have maintained the focus firmly on the target group, and have been able to explore the issue in greater depth than would have been possible with the substantially-increased number of respondents which would have been the result of my extending my

enquiries to different categories of professionals. I am also very much aware of the difference between inviting judges to express opinions to a fellow-judge, and inviting other professionals to express their opinions to that same judge: as a matter of common sense, it is more likely that authentic views will be offered on a peer-to-peer basis.

C. Coding:

I considered two types of coding in connection with the questionnaire responses – selective, or complete. Within the latter form of coding, I also considered whether I should employ coding to reflect semantic content of the responses, or more theoretical interpretations of those responses. Consistently with my distinctly and unashamedly low-tech approach to this project, I rejected complete coding, largely because the variations in responses to the questionnaires made it very likely that trying to code everything would result in some important insights slipping through the net. However, I found some selective coding during the first trawl of the responses to be very helpful in identifying key themes within those responses – for example, I used a form of coding to identify the number of occasions on which respondents expressed that local

authorities rarely or never provided the court with good-quality 'Together or Apart' assessments in respect of sibling groups. That coding was used to assist me at the pre-analysis stage, rather than being a formal part of my eventual analysis and thus of this thesis.

D. Focus groups:

I considered whether I should set up one or more focus groups of judicial colleagues to discuss issues relevant to the research questions. I decided against this, partly because of logistical difficulties – whilst it would have been very easy to set up a focus group amongst my own colleagues or those within neighbouring courts, it would have been challenging in terms of time commitment to arrange a focus group involving judges at more distant courts – but more pertinently because I was anxious to obtain the views of individual judges, uninfluenced by what peers were saying or might be perceived to be thinking.

4.6 Analysis and Synthesis

Analysis and comment in respect of the material garnered in the course of this project has been undertaken primarily from the

perspective of the rights of the child, both legal and moral, but with acknowledgment of the rights of all involved within the adoption process. This study is emphatically non-political, but rather an attempt to analyse how the State – through its legislative and regulatory framework and through the interpretative actions of His Majesty's Judges – approaches cases which compromise existing and potential sibling bonds, with a view to seeking conclusions as to whether improvement is required, and, if so, how such improvement might be achieved.

One of the challenges of this study has been the interplay between quantitative and qualitative research methods. Inevitably, the use of statistical analysis implies a quantitative focus, and there will, in addition, be cautious reliance upon national statistics, as promulgated through the Office of National Statistics and the Department for Education, as well as those derived from the survey undertaken within the course of this research. However, the interpretation of those statistics – in other words, the human flesh on the dry statistical bones – involves essentially qualitative research and is entirely consistent with the legal realist approach which informs and underpins this study.

In considering how to interpret and analyse the data yielded both by exploration of case reports and by the questionnaires, I undertook, as explained above, some limited preliminary coding, followed by identification of the themes emerging from the research. In terms of themes, I looked for recurring issues and patterns, as well as responses which appeared out of kilter with the majority, trying to establish whether there were any obvious reasons for such discrepancies. Having considered those themes, I was able to collate the data relating to each theme – some of which overlapped between themes – in order to develop an analysis by reference to the research questions. This process is considered in more detail within the chapter addressing the outcome of the surveys undertaken.

Having summarised and assimilated the data generated both by survey and by consideration of reported cases, the final stage was to consider this data within the context of the literature as a whole, leading ultimately to a response to the research questions identified at the inception of this study, and recommendations as to how the law might usefully be developed and improved in the interests of children who have the misfortune to become embroiled in care and placement proceedings, and whose welfare is paramount. The

conclusions thus drawn are set out and explained in the final chapter of this study.

CONCLUSION

In summary, the methodology employed for this project was to begin with the provision of a clear context for the study by careful consideration of the body of relevant literature. Having thus set the scene, I proceed to explore the theory of judicial decision-making, followed by a critical analysis of the legal framework – to include case law, statute and regulations. These two chapters, taken together, provide the context for consideration of the practical application of judicial decision-making, both by reference to the questionnaire responses and also to decisions reported since the inception of the Family Court in 2014. As noted, I chose to begin my study of reported cases in 2014 primarily because that was the year of creation of the unified Family Court, but the timing also coincides with the year of promulgation of the President's Transparency Guidance, and thus a greater range of reports became available to consideration, albeit, as demonstrated, not as many numerically as had been hoped.

The trawl of reported cases was undertaken in tandem with the dissemination of a questionnaire directed to all family-ticketed judges in England and Wales, inviting information pertinent to the separation of siblings by adoption. The employment of the questionnaire to some extent alleviated the identified shortcoming in the number of published judgments, enabling a clear picture to emerge of the consistency or otherwise inherent in the exercise of what remains essentially a discretionary jurisdiction. It also provided an opportunity to compare and contrast the responses to the questionnaire with the approaches discernible from the case reports. I have remained very much aware in undertaking the judicial survey that I am a 'privileged access interviewer' by virtue of the respondents being my judicial peers, and I have carefully considered to what extent the replies given might be influenced by the respondents' knowledge of the dual role of this researcher as both one of the body of professionals whose decision-making is being explored, as well as the explorer. However, for reasons explained above, I had concluded that there was a positive advantage to my being able to put questions on a judge-to-judge basis.

The information gleaned was critically and reflexively analysed to produce both statistical and discursive data, before arriving at the final stage of the project, which was of course to endeavour to answer the identified research questions. This process involved re-consideration of the legal framework in the light of the information and insights gained both from the literature and from the judicial responses, thus not only enabling me to identify perceived lacunae within the current the law, and a corresponding need to consider change, but also to evidence why such changes may be considered appropriate. In the course of undertaking this project I have identified a number of areas which may properly be described as research gaps, and yet others where further research would be of value. I summarise the perceived gaps within Chapter 9 of the thesis.

In reaching my conclusions, I have remained mindful of the interplay between social, moral, legal and political issues, all of which provide a fascinating backdrop to all aspects of the adoption debate in general, but in particular to the issues which relate to the preservation or destruction of the sibling group. Adoption has been observed to have a significance extending beyond the families directly affected: for example, Ryburn (1998, p.53) speaks of

adoption going to the heart of issues which are critical in determining the kind of society in which we live or wish to live, and Lewis (2004, p.236) suggests that adoption is a 'litmus test' in respect of larger issues, including what 'the family' should look like, and the role of the state in transferring a child from one family to another. Lewis does not specifically single out the impact of sibling separation but she does quote with the approval the comments of Stevenson (1998), who, in writing the foreword to Howe (1998, supra) describes adoption as being '*packed with emotional dynamite'*. As I anticipated that my study would demonstrate, that dynamite extends well beyond the issue of severing a child from his parents, but also embraces the very significant, life-long and life-changing losses associated with sibling separation.

It is clearly important to society as a whole and, in particular, to all those affected by extreme State intervention in the form of non-consensual adoption, that the implications of sibling separation are thoroughly considered within the context of each family, and are not allowed to be lost within a formulaic approach which takes no account of the needs and circumstances of individuals. As indicated within the Abstract, the title of this study reflects the plight of

siblings as the missing ‘fourth side’ of what is frequently referred to as the ‘adoption triangle’, consisting in common parlance of the child, the birth parents and the adoptive parents, and omitting all reference to siblings. I hope that the recommendations which follow from my project will assist in highlighting the importance of the sibling relationship and in guarding against ill-advised and inappropriate sibling separation.

In undertaking this study, I acknowledge the wisdom of Kissam (1988, p.228) who cautions thus:

> Any valuable scholarship must be factually accurate, written in a comprehensible manner, and be based on appropriate methods, be they research, analytical, interpretive, or narrative, which are designed to achieve the scholar’s purpose.

In seeking to achieve the purpose of this scholarship, I have not only heeded Kissam’s advice, but have also striven to reflect upon all that I have learned both subjectively as a judge dealing with the very issues which form the subject-matter of this research and objectively as a researcher, albeit a privileged researcher with very direct experience of the decision-making which forms an essential component of the data informing the conclusions reached.

CHAPTER 5

THE LEGAL FRAMEWORK: DOES JURISPRUDENCE RESPECT THE SIBLING BOND?

> In this country we take the removal of children from their families extremely seriously … it is not enough that the social workers, the experts or the court think that a child would be better off living in another family. That would be social engineering of a kind which is not permitted in a democratic society. The jurisprudence … requires that there be a "pressing social need" for intervention and that the intervention is proportionate to that need - *Re S-B Children* [2009] UKSC 17, per Lady Hale.

5.1 The Scope and Purpose of the Chapter

No one truly doubts that an adoption order is one of the most, if not the most, significant and, in human terms, far-reaching of all orders available to a judge in any jurisdiction in England and

Wales - *Re J (Adoption Appeal)* [2018] EWFC 8 – per Cobb J.

……

> Family law, those rules defining and regulating the most intimate sphere of our lives, has traditionally occupied a unique and rather ambiguous position within the greater ideological system of the law … it has an unruly character, emotional, irrational and mundane, but somehow dangerous - Boshoff (2007, p.41)

This chapter will examine the jurisprudence underpinning the process for establishing whether there is a '*pressing social need'* to make that most far-reaching of orders which permanently removes a child from her family – thereby risking the severance of familial bonds, with particular reference in the context of this research to the implications for the sibling relationship. In so doing, I will consider whether the legal principles leading to that serious intervention in family life reflect both necessity and proportionality in the quest to protect and promote the welfare of that child in its widest sense, and are capable of being applied objectively, notwithstanding the pitfalls identified by Boshoff (albeit writing within the South African context) and the very emotive context in

which the jurisdiction is exercised. In terms of this study, it is particularly apposite to explore the extent to which, if at all, the current legal framework permits or requires a court to balance the competing needs of siblings within the family – whether or not those siblings are themselves subject of proceedings. Monk (2018, p.120) contends that '*The legal framework does enable concerns about sibling relationships to be expressed, but they are outweighed by other factors.'* That proposition encapsulates much of the impetus behind this research, and it will be explored within this chapter and within the concluding chapter, with particular emphasis upon the extent to which the current legal framework facilitates and encourages a delicate balancing of positive and negative factors to ensure that the holistic welfare of the children concerned, both individually and as part of a sibling group, is both promoted and protected.

5.2 The Precursor: Local Authority Intervention

A child may enter the care of a local authority for many reasons: a parent might be unwell, or might be temporarily overwhelmed by difficulties which prevent the care of the child, or the child might

be perceived to have suffered significant harm or to be at risk of suffering such harm. Some children are received into care in a planned fashion after long, but ultimately unsuccessful, attempts by a local authority to support the child's parents in offering good-enough care: others reach the care system as a result of emergency which may take many forms, such as serious injury suspected to be non-accidental, or parents being arrested as a result of allegations of neglect or sexual abuse. Once a child has been accommodated, for whatever reason, the hierarchy of placement choice is prescribed by statute (s.22C Children Act 1989), with reunification the first consideration. Herring (1997, p.95) notes that there is a presumption that children should, where possible, be brought up by their own parents, as explained by Lord Templeman (*Re KD (a Minor)* [1988] 1 All ER 577 HL) in a passage oft-quoted as ammunition of last resort by parents' advocates, and described by Herring (ibid.) as a form of covert recognition of parents' rights by using the welfare principle:

> The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and

> physical health are not endangered. Public authorities cannot improve on nature.

Lord Donaldson echoed this (*Re H (a Minor)* [1991] 2 FLR 109):

> … there is a strong supposition that, other things being equal, it is in the interests of the child that it remains with its natural parents.

Baron J observed in *EH v X London Borough* [2010] EWCA Civ. 344 at 14 that it is '*obvious*' that domestic and human rights legislation requires children to remain within their birth families, absent any contra-indication attributable to issues of harm – a point emphasised by Lady Hale in the case referred to within the quotation at the outset of this chapter. It follows that the preservation of the family unit will, for the most part, entail the protection not only of the parent/child relationship, but also of the inter-sibling bonds.

Preservation of the integrity of the family unit is undoubtedly the starting point, but, where that '*pressing social need'* dictates, the

local authority is obliged to consider safeguarding the child by alternative care arrangements. Children who cannot safely remain with their birth parents require a robust and efficient mechanism to achieve permanence elsewhere. The judgment within the case of *W v UK (1987) 10 EHRR 20* confirms that permanent removal must occur within a procedural framework which respects the rights of all family members, including children. That said, McFarlane LJ (as he then was) in the case of *Re W (a Child)* [2016] EWCA Civ 793 drew attention to the commonly-held but fallacious presumption that a child has a right to be brought up within her natural family (paragraph 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.

5.3 The Legal Framework: its Sources

The legal framework underpinning adoption is derived from a mixture of statute (primarily Children Act 1989 and Adoption and Children Act 2002), precedent (ie decisions at High Court level and above), regulations, Practice Directions and Guidance – as further discussed in chapter 3, addressing the theory of judicial decision-making. Lord Justice Gross (2018, p.8), in addressing an international judicial conference, explained our legal system thus:

> In our common law system, the Judiciary has a central role in developing the law, as does Parliament – subject of course to Parliament's constitutional right to amend, revise or correct the common law system through statute. This is the traditional role of the Judiciary, developing the common law by the 'fourfold method': evolution, experiment, history and distillation. Here lies the genius of the common law; its ability to adapt to changed circumstances, so maintaining its relevance.

That final sentence is worthy of significant further research in its own right, but for the purposes of this study it is necessary to sound

the note of caution that it is the judges of the higher Courts – High Court level and above – who 'interpret' and thus evolve the law by creating precedents binding on the lower courts. The judges whose work is considered for the purposes of this research are District and Circuit judges whose decisions, whilst arguably persuasive, are not binding upon their peers.

The law relating to child protection is an area of law where, by reason of the Government of Wales Act 1998 (as amended by the Government of Wales Act 2006), the law as it applies in England diverges in some respects from its counterpart within the Principality; unless otherwise indicated, I have confined my discussion to English law.

I propose to examine, from the perspective primarily of the implications for sibling children, the law relating to local authority intervention in the lives of children at three distinct stages, all of which ultimately feed into decision-making for the children concerned: pre-proceedings, within proceedings, and, separately, the mechanism pertinent to the consideration of applications for

adoption orders, together with the legal protections available to secure the sibling relationship in the event that such orders are granted. I will also consider the checks and balances provided by law and practice, with particular emphasis upon the role of the Independent Reviewing Officer (IRO) throughout each child's journey through the care system.

Although what follows is addressed primarily to those cases where adoption is the non-consensual outcome of protective proceedings, it is worthy of separate note that a small minority of children are voluntarily relinquished each year for adoption. Some such children are placed in the care of a local authority with a view to placement with a family selected by the authority in its capacity as an adoption agency: technically, the term 'relinquished baby' applies to a child who is less than six weeks old. Some children, are, in effect, 'gifted' to childless family members, proceeding as a notified (privately-arranged) adoption, rather than as a result of placement for adoption by the local authority**.** The 'gifting' of children between family members involves the same legal process as for any other voluntarily-relinquished child, although the wider implications may be complicated in terms of the re-arrangement

and re-ordering of family relationships, with siblings, for example, becoming cousins in the eyes of the law. This is a complex situation worthy of further research in its own right, perhaps especially from a psychological and sociological perspective, but it is outside the scope of this study.

Although relinquishing a child other than through the mechanism of 'gifting' might be thought to be a straightforward procedure, many such children form part of a wider family context – such as in the case of *Re TJ (Relinquished for Adoption: Sibling Contact*) [2017] EWFC 6, where Cobb J was required to determine whether contact should take place between baby TJ and his half-brother. In that case, the local authority had sought a declaration that it was permitted not to disclose the child's existence to family members. Family Procedure Rules 2010 PD 14 Part 2 envisage that the local authority will include within its adoption reports the views of family members, but no party appeared actively to engage with the issue of ongoing contact between the siblings: the prospective adopters (referred to as Xs) were prepared to commit at most to indirect contact. In granting the declarations sought, Cobb J concluded (paragraph 31):

> I attach considerable significance to the value of the current placement, and the Xs fear of disruption if contact of any kind were ordered. The limited benefit to TJ of infrequent indirect contact for identity purposes does not outweigh these significant considerations.

Mr Justice Cobb gave further guidance in the case of *Re A (Relinquished Baby: Risk of Domestic Violence)* [2018] EWHC 198, summarising the cardinal principle as being exceptionality; each case is fact-sensitive, with the child's welfare being the paramount consideration, whilst acknowledging the significant but not decisive weight to be given to the wishes of the mother.

5.4 The Legal Framework: Pre-Proceedings

Many children are exposed to a large number of interventions before the stage is reached, if at all, whereby the child requires to be accommodated by the local authority. These include low-level early help, where practical assistance may be provided by a local authority or a charitable organisation; more formal, but still voluntary, assistance via a Child in Need plan, or more decisive intervention under the auspices of a Child Protection Plan with a

clear expectation of parental co-operation. Under all such interventions, the child remains within the family and thus further exploration of these aspects of pre-proceedings work is outside the scope of this study, save to say that omissions of vital elements of evidence-gathering and assessment may well become the subject of scrutiny in the course of subsequent contested proceedings relating to the future arrangements for the children. As Isaacs and Shepherd (2012, p.426) put it:

> A thorough analysis of social work assessments is often a fundamental and critical issue for lawyers seeking to challenge or protect the local authority's case.

Once a child is accommodated, whether temporarily, for example as a result of parental illness, or for an indeterminate period as a result of concerns for the child's welfare, and whether voluntarily pursuant to s.20 Children Act 1989 or as a result of a Court order, the Care Planning, Placement and Case Review (England) Regulations 2010 should provide a robust mechanism for preventing children from drifting in care. The Care Proceedings Programme Best Practice Guide (2009) (now likely to be modified and expanded in the light of the recommendations of the Public Law Working Group, (Keehan, 2019 and 2021)) prescribes a care

plan setting out a comprehensive assessment of each child's needs and how the local authority intends to establish legally-secure arrangements for the child. It also requires regular reviews, firstly within four weeks, then within three months, and thereafter (with exceptions in the case of changes of placement) at six monthly intervals. As with all systems dependent upon human frailty, arrangements for looked after children may sometimes go awry, as I will shortly illustrate. However, children who do not reside with their parents but are nevertheless not considered by the local authority to be looked-after children may be placed in an even more invidious position, as demonstrated by a line of troubling cases, including the case of *Northamptonshire CC v M* [2017] EWHC Fam 997, in which Mr Justice Francis deprecated what he described as an egregious breach by the local authority of its duties to mother, father and child alike. The family had been known to the local authority since 2012; in 2013, the local authority had placed the child with his grandmother, but it was not until 2016 that the local authority issued care proceedings, triggering the scrutiny of the court and the children's guardian. Because, prior to the issue of proceedings, the authority had deemed the placement with grandmother to be a 'private family arrangement', no Independent Reviewing Officer was appointed and no assessments of the parents

undertaken. The judge described the legality of the placement as being in serious doubt, and had no qualms in holding that the local authority had acted in breach of the family's human rights.

The problems and pitfalls associated with the inappropriate use of s.20 were vividly expounded by His Honour Judge Wildblood in a preamble to the case of *Bristol CC v S* [2015] EWFC B64 as follows:

> On 26th November 2014 I issued a notice as Designated Family Judge for this area. It read as follows: "*There have been several recent cases in this area where it is quite apparent that accommodation of children under Section 20 of the Children Act 1989 has continued in an unstructured way for excessive periods of time and in circumstances where proceedings are either inevitable or otherwise highly likely to be issued. I regard such accommodation in those circumstances to be unprincipled and wrong. Further, where this occurs it leads to unjustifiable delays in the completion of arrangements for the child concerned. I refer in particular to the decision of Hedley J, in Re: CA. (A baby) [2012] EWHC Fam 2190 in which guidance is given about the use of accommodation under that section. It includes guidance that the local authority should consider: 'would it*

> *be fairer in this case for this matter to be the subject of a court order rather than an agreement'? In my respectful opinion that question should be read as if the word 'fairer' were to be expanded so that the question reads; 'Would it be fairer and in the better interests of the child in this case for this matter to be the subject of a court order rather than an agreement? It is not in the interests of a child for accommodation to be used in the unstructured way that I have described.*

The case of *Northamptonshire CC v M* (supra) illustrates a scenario familiar to every family judge where family members, very frequently grandparents, are placed under pressure – whether by the child's parents or by a social worker – to assume care of a child in order to prevent that child from being placed in stranger foster-care. The proposed family carer is often encouraged to seek a Child Arrangements Order or Special Guardianship Order as a litigant in person, and the local authority then happily closes the case, sometimes without further contribution, financial or otherwise – until something goes wrong. Problems may arise because the placement lacks a solid foundation to withstand, for example, the pressures associated with adolescence, or interference by the birth

parents – whereupon the child may be received into care in an even more damaged state than would have been the case had proper plans been put in place once it became apparent that his parents were unable safely to care for him.

There is a line of judicial review cases within the Administrative Court addressing the distinction between a true 'family arrangement' and an arrangement made at the behest of the local authority and thus resulting in the child being considered a 'looked after' child: for example, in the case of *R(D) v Southwark London Borough Council* [2007] EWCA Civ. 182, the court emphasised that it was a question of fact in each case whether or not the local authority undertook a peripheral or major role in making arrangements for a child to be cared for by a family member. In other words, the key question was whether it genuinely was a private family arrangement, or in reality, an arrangement brokered by the local authority in the furtherance of its statutory powers and duties and under threat of statutory intervention if the family member declined to assist. In the case of *Re PC, R v Hertfordshire County Council and Derby City Council* [2015] EWHC 1936 (Admin.), the court found for the local authority in determining

whether, where a grandmother had assumed the care of a child whilst his mother was incarcerated, the local authority had acted unlawfully in concluding that it did not appear that child was in need of accommodation. The opposite decision was reached in the case of *R (Collins) v Knowsley Metropolitan Borough Council* [2008] EWHC 2551. Whilst that jurisprudence per se is of limited relevance to this study, the problem of such unstructured arrangements from the perspective of sibling children is that there is no mechanism in the face of carer resistance, short of a private law application to the court, for promoting contact between siblings who are not placed together.

Despite the requirements of the regulations, children may remain in s.20 accommodation for long periods with little sustained effort either to secure rehabilitation to the birth family or to achieve permanency elsewhere. Anecdotal evidence as to the care population is underpinned by statistics published by Department for Education (2020a) showing that, as at 31 March 2019, 78,150 children were looked after by local authorities, of whom 58% were in local authority placements, whilst 13% were fostered by a kinship carer; of that population, 18% were accommodated

pursuant to s.20, which is referred to by the Department of Education (2020, p.6) as allowing a local authority to provide accommodation '*where there's parental consent, or when no-one with parental responsibility is in place'.* The statute goes further than that in s.20 (1) in expressing the circumstances in which a local authority shall provide accommodation for a child in need within their area as follows:

> (a) there being no person who has parental responsibility for him;
> (b) his being lost or having been abandoned; or
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.

Whilst acknowledging that s.20 may be perfectly properly used in some circumstances – such as short-term parental illness, or sometimes for unaccompanied asylum-seeking children, there are many reported cases where inappropriate and ill-planned extensive use of s.20 accommodation has resulted in the inappropriate separation of a sibling group. However, the issue of proceedings is not a panacea: even where proceedings have been taken and thus the protection of the statutory framework should be in place, the

statistics from the Department for Education (2020a) disclose that 10% of children and young people experienced three or more placement disruptions in the course of the year, whilst 68% had one consistent placement. The statistics reflect the arrangements for each child as a single child, without reference to whether or not the child forms part of a sibling group. The definition of a long-term foster placement is set out as from 1 April 2015 in The Care Planning and Fostering (Miscellaneous Amendments) (England) Regulations 2015 and is defined as:

> A "long term foster placement" means an arrangement made by the responsible authority for the child to be placed with a foster carer where: (a) the child's plan for permanence is foster care, (b) the foster carer has agreed to act as child's foster parent until the child ceases to be looked after, and (c) the responsible authority has confirmed the nature of the arrangement to the foster carer, parents and the child.

29,460 children ceased to be looked after by the local authority within the same time frame, whilst 31,680 began their journeys within the care system, leaving an increasing population of children within impermanent care arrangements, and thus at risk of drifting within the system rather than being made the subject of timely permanency plans. This may be attributed in part to parental vested

interest in not encouraging the local authority to consider permanency away from the family, and in part to loss of focus, once a child is safe from immediate fear of harm. A robust Independent Reviewing Officer (IRO) (whose role is to scrutinise local authority care plans to ensure that they promote each child's welfare) should prevent such drift, but this mechanism frequently represents aspiration rather than reality, as I shall discuss later in this chapter. The significance of the prolonged and inappropriate use of s.20 accommodation for the purposes of this study is the risk of poor or non-existent planning for a sibling group, with the potential for ill-considered separation – or, conversely, of maintaining sibling children in a single placement where this is, for sound welfare reasons, contra-indicated.

5.5 The Legal Framework: Care Proceedings

Although in theory it is possible for a local authority to make an application for a placement order in respect of a child who is not the subject of a care order (for example, in respect of an orphan child – Adoption and Children Act 2002 s.21(2)(c)), the overwhelming majority of placement order applications arise within care proceedings (or occasionally after the conclusion of

care proceedings, for example when a proposed long-term family placement fails to fulfil its initial promise). It is thus pertinent to reflect upon the implications for this study of the legal framework underpinning both care and adoption proceedings.

A cardinal principle in all child protection proceedings is the imperative of timeliness, with all judges being very well aware of the need to avoid delay in achieving permanent outcomes for children. The mischief of delay was recognised at the inception of the Children Act 1989, with s.1(2) proclaiming:

> In any proceedings in which any question with respect of the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.

The Children and Families Act 2014 enshrined in primary legislation (Children Act 1989 s.32) the Family Justice Review proposal (Norgrove, 2011b, p.33) that care proceedings should normally conclude within twenty-six weeks. The obverse of the enactment of this generally laudable and well-intentioned provision was concern that Local Authorities would seek to prevent the

statutory clock from ticking by delay in commencing such proceedings, thus leaving more children unprotected by court scrutiny, as well as delaying permanent placement (and conceivably permitting a status quo to develop in which siblings were inappropriately separated, as occurred in the case of *Herefordshire v A,B,C* [2018] EWFC 72, which will be discussed later in this chapter).

The mischief of strategic delay could be addressed by an amendment to s.20 of the 1989 Act to require Local Authorities either to commence proceedings within a specified period of first accommodation or to serve a full report upon the IRO explaining why proceedings were not considered to be appropriate. That would in turn require a corresponding duty upon the IRO to react appropriately to such information. In so saying, it should be noted that the problems associated with the IRO service are considered later in this chapter and in the concluding chapter: it remains to be seen whether trenchant judicial observations on the issue of IRO effectiveness will inspire improvement. It is also right to record that the Public Law Working Group (Keehan, 2021, p.83) specifically rejected as '*counterproductive*' the imposition of time limits on s.20 accommodation, although it does recommend that the purpose

and duration of such accommodation should, where possible, be agreed at the outset and thereafter regularly reviewed.

Reunification of the family remains the starting point, but if children cannot reside with a parent, the local authority must explore the possibility of placement with friends or extended family to provide the advantages of growing up in a placement which (usually) provides a good cultural match and the prospect of life-long commitment. Harwin (2003, p.212) suggests that placement within the family circle is the best option in default of parental rehabilitation; Waterhouse (2001, p.45) concurs:

> Children … in kinship care have significantly better levels of functioning compared with those placed in stranger foster care and … it seems crucial to maximise for children their opportunity to be placed at an early stage ... within their extended family if they cannot live with a birth parent.

However, an acceptable standard of kinship care is not always available, and where '*pressing social need'* dictates, the local authority is obliged to safeguard the child elsewhere. Clearly the longer it takes for that pressing social need to be identified and

acted upon, the greater the delay for the child, and a major weakness of the present legal framework, pre-proceedings, remains reliance upon the fallible IRO system, or parental challenge, to guard against local authority delay in formulating and progressing plans at a pace appropriate to the needs of the child. That said, once proceedings are issued, the primary responsibility to guard against delay falls upon the court.

Within proceedings, whether issued in a timely fashion or otherwise, the role of the judge is to apply the law, no more and no less, having considered all the evidence and taking into account the body of statute, case law and regulation within which each decision falls to be considered. Hedley (2016, p.82), by popular consensus one of the wisest judges of his generation (as previously noted), acknowledges the complexities thus:

> The essential judgment between a child remaining in the natural family or going to an adoptive family … involves complex value judgments which, whilst they are presented as 'welfare' or 'best interests' evaluations, are in fact a nuanced, complex, and profound distillation and balancing of values where … no one answer may emerge as the only reasonable outcome.

The nature and performance of the 'profound distillation and balancing of values' which makes up the judicial task, both in theory and in practice, is addressed within chapters 3, 6 and 7 of this study, although it should be noted that the term 'values' is self-evidently nuanced and its application in the context of judge craft has been discussed within Chapter 3. What follows sets out the legal context and framework within which that task falls to be discharged.

5.7 The Legal Framework: Efficacy and Proportionality in Addressing Welfare Issues

By way of starting point, it is pertinent to highlight the comments of Katz (1991, p.146) who reminds courts of their obligation to determine what '*custodial disposition'* will provide a child with a secure '*parent-child relationship'*, within or without the birth family. However, and to state the obvious, courts cannot be in a position to determine a child's future until legal proceedings commence.

Shortly before taking up the office of President of the Family Division, Sir Andrew McFarlane noted in a speech launching the Care Crisis Review (2018) as follows:

> There may be a danger of the system slipping into the exercise of a broad benevolent discretion with courts accepting the need to help children who are generally in need, rather than strictly questioning whether the state of affairs for the particular child has indeed reached the level, which the architects of the Children Act clearly considered was required, sufficient to justify statutory orders.
>
> It may properly be said that we have reached a stage where the threshold for obtaining a public law court order is noticeably low, whereas, no doubt as a result of the current financial climate, the threshold for a family being able to access specialist support services in the community is conversely, very high.

Many judges at the coalface might join issue with the suggestion that the threshold for proceedings is indeed '*noticeably low'*: inevitably, the willingness of local authorities to embark upon care proceedings appears to be governed to some degree by

demographics and resources, with the catalysts for intervention not being entirely consistent – as anecdotally illustrated by cases where a family moves to a different area and immediately becomes the subject of care proceedings, despite the family's less well-resourced previous local authority having tried various successive interventions, short of proceedings, over a number of years, with limited progress in addressing the parenting deficits. The impact of the Covid-19 pandemic has yet to be formally evaluated in the context of child protection, but experience points to an unsurprising, temporary dip in applications resulting from long-term neglect in the course of 2020 – no doubt attributable in part to the loss of surveillance opportunities inherent in school closures – with, conversely, many more applications resulting from really serious harm, either giving rise to children being received into police protection pursuant to s.46 Children Act 1989, or to admission to hospital after serious injury.

Once care proceedings are issued, the child will (unless, very exceptionally, it is considered not to be necessary) have the benefit of a Children's Guardian (an officer of the Children and Family Court Advisory and Support Service, commonly referred to in its abbreviate form as 'Cafcass') with a statutory duty to safeguard the

child's interests (s.41 Children Act 1989). The Guardian will in turn appoint a solicitor to represent the child, although a child may instruct his own solicitor if he has sufficient understanding and wishes to do so (s.41(4) (b)). In most cases, the same Guardian will be appointed for each member of the sibling group, the most common exception being where one sibling is alleged to have be the perpetrator of abuse of another sibling, in which case the clear conflict of interest requires the appointment of a second Guardian. The Guardian will advise the court at every stage in the proceedings, although responsibility for decision-making rests firmly on the judicial shoulders. Case law makes it clear that a court is entitled to depart from a Guardian's advice, although must explain the reasons for so doing: this proposition was set out by Connell J in the case of *S v Oxfordshire County Council* [1993] 1 WLUK 389V, emphasising the expectation and requirement that the trial court – in that case, lay justices – will set out its reasons for departing from the Guardian's recommendations. The recognition of this requirement was starkly illustrated by Keehan J in the case of *Leicestershire City Council v AB and Ors* [2018] EWFC 58 at paragraph 75 et seq. where, in declining to adopt the Guardian's advice, the judge said this:

I very much regret to find that:

i) the guardian's written report was inadequate;

ii) the reason for her request for an adjournment and the request for an expert report was unfathomable and totally without merit;

iii) an expert report is wholly unnecessary;

iv) the adjournment would have caused unconscionable delay;

v) the decision to stand by her original recommendation having identified 'a gap in the evidence' was irrational; and

vi) the guardian's oral evidence was woeful.

76. In light of these findings I have put the report of the guardian and her evidence to one side. I attach no weight to either.

77. This guardian has 25 years' experience as a social worker but just 14 months experience as a guardian. She had never previously seen a case through to final hearing. Why local Cafcass managers thought it appropriate to appoint so inexperienced a guardian to such a complex case, I do not know.

……

At the first hearing, the judge must consider whether the threshold has been crossed for the making of protective orders. The relevant statutory provision is s.38(2) Children Act 1989

> A court shall not make an interim care order or interim supervision order under this section unless it is satisfied that there are reasonable grounds for believing that the circumstances with respect to the child are as mentioned in s.31(2).

Section 31(2) of the 1989 Act provides that a court may make a care or supervision order only if satisfied that the child is suffering, or is likely to suffer, significant harm and that that harm or likelihood of harm is attributable to the care given to the child, or likely to be given to him, not being what it is reasonable to expect a parent to give the child, or being beyond parental control. It follows that at an interim stage, the court need not be satisfied that the threshold **is** crossed, but only that it is satisfied that there are **reasonable grounds for believing** that the threshold criteria are made out.

Having satisfied itself that the door is open for the making of protective orders, the court must, in considering what order, if any,

is required, hold the child's welfare as its paramount consideration and have regard to the matters set out within the welfare checklist at s.1(3) Children Act 1989. Whilst the checklist matters within s.1(3) are not ranked in order of importance, the first of the seven items set out within the checklist requires the court to have regard to the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding) – giving rise inevitably to a potential clash of such wishes and feelings when the court is concerned with two or more siblings. The difficulties for the judge in reaching the right decision for every child within a sibling group are further compounded by the need to consider the remaining checklist factors, including each individual child's physical, emotional and educational needs; the impact of any change of circumstances; each child's age, sex, background and any relevant characteristics; any harm which each child has suffered or is at risk of suffering, and the capability of the parents or any other relevant person of meeting each child's needs.

Any decision at an interim stage of proceedings must be limited to that which is strictly necessary to protect the child or children until final decisions are made: a leading authority on the point is the case

of *Re C (Child) (Interim Separation)* [2019] EWCA Civ. 1998, where Lord Justice Peter Jackson distilled the applicable principles thus:

> The ability to make interim care orders under s.38 Children Act 1989 is one of the family court's most significant powers and it is not surprising that it has been considered by this court on many occasions. A consistent series of propositions can be found in these decisions:
>
> - (1) An interim order is inevitably made at a stage when the evidence is incomplete. It should therefore only be made in order to regulate matters that cannot await the final hearing and it is not intended to place any party to the proceedings at an advantage or a disadvantage.
> - (2) The removal of a child from a parent is an interference with their right to respect for family life under Art. 8. Removal at an interim stage is a particularly sharp interference, which is compounded in the case of a baby when removal will affect the formation and development of the parent-child bond.
> - (3) Accordingly, in all cases an order for separation under an interim care order will only be justified where it is both necessary and proportionate. The lower ('reasonable grounds') threshold for an interim care order is not an

invitation to make an order that does not satisfy these exacting criteria.

- (4) A plan for immediate separation is therefore only to be sanctioned by the court where the child's physical safety or psychological or emotional welfare demands it and where the length and likely consequences of the separation are a proportionate response to the risks that would arise if it did not occur.
- (5) The high standard of justification that must be shown by a local authority seeking an order for separation requires it to inform the court of all available resources that might remove the need for separation.

Self-evidently, in applying those principles, the court must have at the forefront of its thinking the welfare checklist and the paramountcy of the welfare of the child. It is not difficult to envisage a case in which, when applying Peter Jackson LJ's formulation, siblings might be at risk of separation at an early stage of proceedings because, for example, a parent could for the duration of proceedings meet the relatively straightforward needs of a baby, but not the more complex needs of an older child. Although the burden of His Lordship's judgment addresses the separation of a child from his parents, it is inescapable that the reference to the child's psychological or emotional welfare requires

the court to have regard not just to the implications of separation from parents, but also the consequences for each subject child of sibling separation. That said, and despite the imperative of considering each subject child's holistic welfare, the court is not required by statute, in reaching its decision, to have regard specifically to the implications of sibling separation, but it is required by the welfare checklist to consider the impact of any change of circumstances.

In practice, it is relatively unusual to see some children in a sibling group remaining at home in the course of proceedings whilst others are placed elsewhere, the most obvious exception being older – usually teenage – children who may have been removed from home to safeguard against engagement in risky behaviour (such as involvement in sexual exploitation or County Lines), or who are considered to be beyond parental control. Furthermore, in some cases, allegations of abusive behaviour by one sibling to another may result in the removal of the allegedly-abusing child whilst other children remain in parental care.

One of the key tasks of the local authority in the course of care proceedings is to formulate its final care plans for the children in accordance with the statutory guidance (Department for Education, 2021, p29 et seq.) The care plans should be based upon a rigorous assessment of all realistic options for the child or children, including the possibility of reunification with one or both parents, placement with a kinship carer, or permanency either by long-term fostering or by adoption. If children have been placed separately in the course of proceedings, it is incumbent upon the local authority to analyse the impact of that enforced separation and to consider whether, balancing the potentially-competing needs of each child, such continuing separation remains justified. Separation at any stage of the proceedings may arise from a myriad of reasons: there may be purely practical difficulties, such as the paucity of placements available for larger sibling groups; it may arise because a child (perhaps a half-sibling, with a different maternal or paternal family) may be offered an acceptable level of care by a family member; or it may arise because one or more children requires a specialist placement to address particularly severe difficulties.

In some cases, independent expert reports are commissioned (for example, a psychological report) to assist the court in determining the issues in the case. The test for instructing an expert is set out within Family Procedure Rules 2010 r 25.4(3) which provides that permission so to instruct may be given only if '*the expert evidence is necessary to assist the court to resolve the proceedings'.* This rule reflects s.13(6) Children and Families Act 2014, and in determining the issue of necessity, the court is obliged to consider the factors set out in s.13(7) of the 2014 Act. It is mandatory for the court to apply both the statute and the rules governing such applications: the President has since issued a Memorandum seeking to explain the principles to be applied (McFarlane, (2021(b)). As with all such guidance, it does not create binding precedent, although a Judge ignores it at peril of appeal.

Once the local authority has formulated its care plans and filed final evidence (including potentially an application for a placement order in respect of one or more of the children), the parents then have an opportunity to respond, followed by a detailed analysis by the Children's Guardian. If the case involves a sibling group, it is to be hoped that both the local authority evidence and the

Guardian's analysis will engage in detail with the welfare of each child, and how this may best be promoted by separation or otherwise. Mr Justice Keehan (2018, p.1523) noted, in an extra-judicial comment, that he is '*increasingly concerned at care plans which provide for the permanent separation of siblings. I accept there are cases where the welfare interests of the* individual *children demand and require that they are placed separately.'* It is the duty of the local authority fully to explain the rationale for its decision-making, whether for separation, maintenance or reunification of the sibling group, and for ongoing contact in the event that separation is considered to be inevitable.

As alluded to within my first chapter, the Court of Appeal with the case of *Re S-C (Children)* [2012] EWCA Civ. 1800 declined to give general guidance as to the proper approach to sibling separation, holding instead that each child requires a bespoke solution. In giving the leading judgment, and addressing the issue of whether appellate court guidance should be given on the issue of sibling separation, Mrs Justice Baron indicated thus:

> The grounds of appeal also contemplate that this court should lay down general principles in relation to the way that sibling groups should be dealt with in the context of care proceedings. Speaking for myself, I would decline to make any pronouncements of a general nature because each case is unique and different on its facts. The court will always be required to provide bespoke solutions targeted on the needs of each particular child. Accordingly general guidance in this field would not be in point. '

The issue of sibling separation was also grappled with in the case of *Re T and E (Proceedings: Conflicting Interests)* [1995] 1 FLR 581 where the court was faced with an application relating to two half-sisters (who were also paternal cousins). The local authority had made an application under the pre-2002 legislation for an order in respect of each child of freeing for adoption. The father of the elder child sought to have the care order in respect of that child revoked, but was not able to offer a home to the younger child. The court granted the father's application and made an order freeing the younger child for adoption, holding that where two children are the subject of the same application under Children Act 1989, it was not possible to treat either child's welfare as paramount, but their

interests must be balanced to produce the outcome of least detriment to both children. However, in considering an application for a freeing order, the welfare of the child concerned was the first, but not the paramount consideration, and thus it was only in respect of the elder child that the principle of welfare paramountcy applied, and therefore no balancing exercise was required. That case, and the jurisprudential gymnastics apparent from the case report, is pertinent where the welfare of each child concerned is of relevance, but does not of course extend its assistance to care and placement applications – in the latter, as seen, the welfare throughout the child's life is the paramount consideration, begging the question as to how the balancing exercise should play out where another child's welfare is also paramount, but because there is no placement/adoption application in respect of that child, it is his immediate welfare, rather than welfare throughout that child's life, which falls to be placed in the balance.

In evaluating a care plan which involves also an application for a placement order, the court is not obliged to work indiscriminately through the welfare checklists within both the Children Act 1989 and Adoption and Children Act 2002, but rather to ensure that the

factors of relevance to the particular case are appropriately identified and analysed: this principle was set out by King LJ in the case of *Re M (A Child: Care Proceedings)* [2018] EWCA Civ. 240, where at paragraph 63, Her Ladyship noted as follows:

> I repeat that it is well-established … that it is neither necessary nor appropriate for a judge slavishly to rehearse every factor set out in the checklists. What is necessary is that important, critical (or even decisive) factors within those checklists are adequately identified and analysed so that it can be seen what part they have played in the overall decision-making process. That is of particular importance … in cases that are difficult or finely-balanced.

Despite those appellate words of comfort, case law renders it very clear that the court's duty, when considering applications for placement orders, is to undertake meticulous scrutiny of all realistic options before settling upon the most draconian order now known to our legal system.

5.7 The legal framework: placement proceedings

> The state bears a heavy responsibility when it seeks to place looked-after children for adoption (Harris-Short, 2008, p.28)

Whether or not the permanent separation of siblings is involved, a local authority, in discharging that heavy burden of responsibility on behalf of the State and in seeking to be granted authority to place a child for adoption, must surmount one of two hurdles. The first option is to secure the consent of all those with parental responsibility; the second, alternative, gateway is to persuade the court to dispense with the consent of those with parental responsibility on the grounds that the welfare of the child so requires, thus enabling the court to make a Placement Order authorising the local authority to place the child for adoption with any adoptive family selected by the local authority.

Placement orders are a creation of the Adoption and Children Act 2002, the statutory successor to the Adoption Act 1975 and the

product of the first substantive revision of adoption law for over a quarter of a century. The 2002 Act was hailed by Cullen (2003, p.235) as a statute which promotes increased use of adoption; provides for improvements within the adoption service, and, importantly (p.238), recognises the changes in society's expectations and aspirations by expanding the pool of prospective adopters to included same-sex and cohabiting couples.

An interesting feature of the statutory scheme relating to placement orders is the imperative wording of s.22 (1) of the 2002 Act:

> A local authority **must** (*emphasis added*) apply to the court for a placement order in respect of a child if –
>
> (a) the child is placed for adoption by them or being provided with accommodation by them,
>
> (b) no adoption agency is authorised to place the child for adoption,
>
> (c) the child has no parent or guardian or the authority consider that the conditions in section 31 (2) of the 1989 Act are met, and
>
> (d) the authority is satisfied that the child OUGHT (*emphasis added)* to be placed for adoption.

In determining whether to grant or refuse an application for a placement order, Section 1 of the 2002 Act sets out the considerations applicable to such applications, foremost of which is the requirement of s.1 (2) that '*the paramount consideration of the court or adoption agency must be the child's welfare throughout his life.'*

As alluded to earlier in this chapter, the crucial distinction between that requirement and the ostensibly-similar Children Act 1989 provision is the addition of the words '*throughout his life'* — a clear acknowledgment of the life-long, life-changing nature of adoption orders. As noted above, in common with the Children Act 1989, the 2002 Act contains a checklist of welfare factors which, amongst others, the court is obliged to consider. These factors include the child's ascertainable wishes and feelings; her needs; the likely effect of ceasing to be a member of the birth family and becoming an adopted person; and her relationship with 'relatives', together with the likelihood and value of such relationship continuing. Siblings and the maintenance of the sibling relationship are not singled out for specific mention, and there is no acknowledgment

within the statute that that sibling relationship may have any special significance or importance for the child, although of course siblings fall within the statutory definition of 'relatives' (Children Act 1989 s.105(1) and Adoption and Children Act 2002 s.144(1)) and thus fall within the generality of relationships which require to be considered.

It is noteworthy, as mentioned earlier, that placement proceedings very commonly take place in tandem with care proceedings; if the court is addressing the needs of a sibling group, with differing care plans, then the arrangements for those children who are the subject of an application for a care but not a placement order must be considered within the context of the welfare checklist set out at s.1 (3) Children Act 1989 – a checklist which is silent on the question of any implications of the proposed care plan for family members. I consider the implications of this statutory silence in Chapters 3, 6 and 7, where I explore judicial decision-making both in theory and in practice.

The Children and Social Work Act 2017 amends s.1(4) (f) of the

2002 Act to include prospective adopters within the definition of those whose relationship with the child requires to be considered. That amendment will be of particular relevance to sibling relationships if the prospective adopters have already adopted one or more siblings of the child in question, and forms part of the wider canvas which the court is required to survey in addressing any application, post-placement order, by a parent for permission to oppose the making of an adoption order – an issue which will be more thoroughly explored later in this chapter and considered further in chapters 7 and 8.

The statutory framework governing adoption proceedings has been the subject of much judicial scrutiny, with the leading case being the Supreme Court decision of *Re B (a Child)* [2013] UKSC 33. At paragraph 215, the extreme nature of an order of placement for adoption was emphasised thus*:*

> We all agree that an order compulsorily severing the ties between a child and her parents can only be made if "justified by an overriding requirement pertaining to the child's best interests". In other words, the test is one of

> necessity. Nothing else will do.

Mr Justice Mostyn encapsulated that extreme nature even more forcefully (although without specific reference to the sibling context) within his judgment in the case of *Re EK (A Child)* [2020] EWFC 20:

> Severing the bond between parent and child is a momentous thing. It has been said that with the abolition of capital punishment it is arguably the most serious order that a judge in this country can make. The child will grow to adulthood in a completely different family to that which nature had intended. The child will grow up with a completely different set of values and experiences to that originally anticipated.

It is obligatory in all cases where the court is considering placement for adoption to consider the impact upon the rights of the family members to enjoy family life: this is enshrined within Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, agreed by the Council of Europe at Rome on 4 November 1950 and given legislative effect within this

jurisdiction by the enactment of the Human Rights Act 1998. By virtue of s.3 of the 1998 Act, primary and subordinate legislation within England and Wales is required to be read and put into effect in a way which is compatible with the Convention rights, so far as it is possible to so. The approach adopted by the European Court of Human Rights was illustrated by the case of *YC v United Kingdom* [2012] 55 EHRR 33, in which it was said (paragraph 134):

> The Court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where

> the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained.

Whilst siblings are not specifically mentioned, it is self-evident that the reference to ties with the child's family must extend to all members of that family, and not simply to the child's parents. Thus, to the extent that the familial bonds will be prejudiced by adoption, thereby compromising the Article 8 rights of all the relevant family members to the enjoyment of family life, that interference and prejudice must be necessary and proportionate in the furtherance of the welfare of the subject child. Furthermore, as Lord Neuberger identified in *Re B* (supra),

> It also appears to me that the 2002 Act must be construed and applied bearing in mind the provisions of the UN Convention on the Rights of the Child 1989 ("UNCRC").

The entire family does receive some attention within the reports to the court prescribed by Part 14 of the Family Procedure Rules 2010 and its supporting Practice Directions. Annex A reports (required

when a child is the subject of an adoption application) and Annex B reports (submitted as part of placement application documentation) both require full details identifying a child's siblings and half-siblings, although there is no requirement for analysis of the impact upon each non-subject sibling of the adoption plan. That said, there should be a rigorous analysis of the value to the subject child of continuing contact with birth family members. Additionally, Macaskill (2002, p.74) proposes that

> Where contact is not safe or beneficial, consideration should be given to what other information the child needs about his or her biological siblings. The reasons for decisions need to be clearly recorded by professionals, sensitively addressed with children and re-visited as necessary as the child develops.

Adoption reports assume particular importance as a comprehensive source of information which may be made available, with the permission of the court, to the child in later life. For that reason, it is considered good practice for courts to insist upon high-quality reports with as much information as possible as to the arrangements

for each sibling – both to assist the adopted child in making sense of his particular life journey, and to facilitate tracing birth family members in later life, if required. However, whilst later tracing may assist all the siblings in seeking to make sense of their particular life-stories, it is of little consolation to siblings traumatised in childhood by enforced separation, and of course the Family Procedure Rules do not envisage that the children left behind will receive the attention which Part 14 requires to be focused upon the child subject of the adoption application.

In the course of 2013/4, the British Agency for Adoption and Fostering (BAAF, now embodied within its successor organisation, Coram BAAF) piloted a project to align the Child Permanence Report (the document prepared by social workers to assist the local authority's Agency Decision-Maker in determining whether adoption is the appropriate plan for the child) with the Annex B report, the objective being to save social worker time within the course of care proceedings. The organisation's Guidance (2014, p.11) advises that the dual-purpose report should

> include the outcome of sibling assessments, and where a decision has been made to place children separately, give clear reasons for the decision so that the adopters and the child can understand why the decision was made.

Again, compliance with that guidance does not avail the non-subject child, although in the event of sibling relationships being maintained or re-kindled, the information thus available to the adopted child may be of assistance to her un-adopted siblings.

The question of consent (or otherwise) to the making of a placement order is governed by a combination of s.21 and s.52 Adoption and Children Act 2002. It is recorded within s21 that a placement order requires either parental consent ('parent' being specifically defined as a parent with parental responsibility – s.52 (6)), or for the court to be satisfied that it should dispense with such consent. Section 21 is subject to s.52 of the Act, which prevents a court from dispensing with parental consent unless each relevant parent cannot be found or lacks capacity to consent, or alternatively the court is satisfied that the welfare of the child requires it to dispense with parental consent.

There are numerous case reports addressing the requirements for the making of a placement order and the circumstances in which it may be appropriate to dispense with the consent of the reluctant parent, but the case most frequently cited is that of *Re B-S* (*Adoption: Application of s.47(5))* [2013] EWCA Civ.1146 (ironically a case concerned not with an application for a placement order, but rather an appeal against an order made in an application for permission to oppose the making of an adoption order). In essence, the burden of *Re B-S* was that the court must have proper evidence, thoroughly analysed, upon which to make its difficult and life-changing decision, and a judge should not shy away from adjourning cases for further evidence where this is necessary justly to resolve the proceedings, notwithstanding the imperative of avoiding delay. Examples of just such an approach appear within the cases analysed, as set out in Appendix 4 – notably in the decisions of HHJ Bellamy within the cases of *Re K, D (Children: Care Proceedings: Separation of Siblings)* [2014] EWFC B104 and of *Re A, B, C, D and E (Children: Care Plans*) [2017] EWFC B56.

5.8 The legal framework: checks and balances

The making of care and placement orders will, in the majority of cases, conclude the contentious aspect of the arrangements for the child. This is therefore a convenient point to address the checks and balances within the system which are designed to ensure that the welfare of the child remains at the forefront of decision-making from the moment a child is looked after by a local authority, throughout any legal proceedings and thereafter in the implementation of the approved care plan for that child.

As noted above, the issue of proceedings triggers the appointment of a Children's Guardian to act as the independent voice of the child, but from first becoming looked after, and as already described, the child should also have had the benefit of an Independent Reviewing Officer (IRO). By a quirk of bureaucracy which mirrors the historical arrangements for Guardians (then known as Guardians ad litem) before the creation of CAFCASS (Children and Family Court Advisory and Support Service), IROs are employed by local authorities but are expected to function independently of those authorities and to be able robustly to challenge the local authority on the child's behalf.

The difficulties of reliance upon the IRO were painfully illustrated in the case of *A and S (Children) v Lancashire County Council* [2012] EWHC 1689 (Fam.), recounting the sorry tale of two brothers who had entered the care system at the ages of two years and six months respectively, had been made the subject of freeing orders under legislation preceding the 2002 Act, and had drifted in and out of multiple placements, notwithstanding no fewer than thirty-five IRO-chaired statutory reviews. Peter Jackson J (as he then was), in making declarations of Human Rights violations against both the Local Authority and the IRO, quoted remarkably frank evidence of the IRO describing the obstacles to doing the job properly – including a '*tick-box system, driven by mandatory performance indicators, creating the illusion of action without any evidence of the quality of the achievement'.* This reflects Munro's (2011a) concern that performance and inspection systems do not assure quality of work, and should give pause to those who, by implication at least, promote quantity before quality in the placement of children for adoption.

Six years later, and despite the crystal-clear message delivered by Peter Jackson J in *A and S,* Mr Justice Keehan was obliged to address stark failures both of local authority corporate parenting and of the actions of the IRO in the disturbing case of *County of Herefordshire District Council v A, B and C* (supra). That case concerned two female half-siblings, A and B, who were initially placed together in foster-care, with interim care orders having been made in the course of 2003. At that stage the children were some four and three years old respectively. For reasons which are not apparent from the case report (and which were also not apparent to the trial judge) final orders were not made until 5 February 2008, when final care and placement orders were made in respect of each child with a plan of adoption together by an identified carer. The children began to live with that carer, but, somewhat inexplicably, the local authority changed its care plan in March 2009 to long-term fostering with that same carer, although it took the local authority nearly eight years thereafter to apply for revocation of the placement orders. In December 2013, a decision was taken to separate the girls, and in the same month the elder child left the placement, with the younger remaining there until June 2014. Thereafter, some two years passed before the girls had any face-to-face contact. The trial judge, in making declarations as to the serial

breaches of the girls' human rights, inevitably wished to understand not only the failings of the local authority, but also those of the independent reviewing officer. The Head of the County's IRO service (Ms.T) made the following statement within the proceedings (reported at paragraph 36):

> It is very clear that the issue of revoking [B]'s placement order continued without resolution for a significantly long period of time, both prior to and since the data error was realised in early 2016. This length of delay is absolutely unacceptable and I apologise unreservedly to [B] and her sister. The IRO service failed to fulfil its statutory responsibilities to [B]. I failed to robustly challenge the views of my assistant director at the time, which I recognise I should have done and as head of service I take full responsibility for these failings and apologise unreservedly to the court.

However, and very worryingly, the author of that statement continued as follows (paragraph 38):

> in an unrelated case an IRO had concerns about a child's case and wished to obtain independent legal advice and/or

> refer the matter to Cafcass. She said she raised this issue with the then senior lawyer and the then assistant director in January 2017. The response from the assistant director to Ms T was that she was not to seek independent legal advice nor to refer the matter to Cafcass. She was further told that if she did not comply with this 'advice', disciplinary procedures would be invoked. Ms T asserted that this assistant director did not recognise the independent nature of the IRO service.

Ms T did however contend that new and more robust procedures had since been put into place, including enabling members of the IRO service to seek independent legal advice without obstruction, and a dispute resolution process. In addressing this unfortunate state of affairs, and without reaching any settled view as to whether the IRO had effectively been prevented by local authority bullying from the proper discharge of IRO functions, Mr Justice Keehan observed (paragraph 45) that

> The IRO appointed to the case of any looked after child performs a vital role to ensure the local authority is a good corporate parent, that appropriate care plans are in place and that these are effectively implemented in a timeous fashion.

The Judge proceeded to set out the responsibilities of the Independent Reviewing Officer by reference to Children Act 1989 s.25A and s.25B as supplemented by the Care Planning, Placement and Case Review Regulations 2010 regulations 36, 37, 45 and 46, and the Guidance set out in the IRO Handbook. Amongst the duties recorded within the Handbook, His Lordship highlighted the following:

> The primary task of the IRO is to ensure that the care plan for the child fully reflects the child's current needs and that the actions set out in the plan are consistent with the local authority's legal responsibilities towards the child. As corporate parents each local authority should act for the children they look after as a responsible and conscientious parent would act.
>
> The role of the IRO is a specialist one which stands alone in the local authority. It is a role that may involve challenging senior managers and may require the IRO to seek legal remedies if the local authority fails in its duties.
>
> The independence of the IRO is essential to enable him/her to effectively challenge poor practice. The Regulations do not prescribe the position of the IRO within the local authority but do prescribe minimum levels of independence.

> The IRO is responsible for setting any remedial timescales if actions have not been taken and there is a risk of drift in the delivery of a plan that will meet the child's needs and planned outcomes within the child's timescale.

Despite clearly being sympathetic about the straitened resources suffered by so many public authorities, the judge concluded that the local authority had, as it had accepted, failed both girls in the errors made by its social workers and their managers over a very prolonged period of time – he described the care planning over a period of 10 years as '*woeful*' – adding, moreover, that the girls had been failed by their IROs on a serious and serial basis.

Each of the two pivotal cases mentioned addresses issues relating to children who had been the subject of proceedings; nevertheless, the obligations upon the Independent Reviewing Officer to prevent drift and delay and to monitor care planning apply with equal force to those children who are looked after by a local authority without the benefit of any statutory order. This latter point was well-illustrated within another decision by Keehan J in the case of *Northamptonshire County Council v AS* [2015] EWHC 199 (Fam.),

in the course of which the judge was very critical of the local authority's inappropriate use of s.20 accommodation, noting (paragraphs 36 and 37) that it should rarely, if ever, be used as a basis for accommodating a young baby, and summarising the mischief thereby generated:

> The use of the provisions of s.20 Children Act 1989 to accommodate was, in my judgment, seriously abused by the local authority in this case. I cannot conceive of circumstances where it would be appropriate to use those provisions to remove a very young baby from the care of its mother, save in the most exceptional of circumstances and where the removal is intended to be for a matter of days at most.
>
> The accommodation of DS under a s.20 agreement deprived him of the benefit of having an independent children's guardian to represent and safeguard his interests. Further, it deprived the court of the ability to control the planning for the child and to prevent or reduce unnecessary and avoidable delay in securing a permanent placement for the child at the earliest possible time.

It should be noted that the absence of proceedings should not, as previously indicated, have prevented the baby in that case from having the benefit of an IRO – but clearly that facility was not considered by the judge sufficient to ensure adequate and appropriate care-planning.

Peter Jackson J sets out with the *Lancashire* case many suggestions for improvement of the IRO service, including rigorous OFSTED inspection, and notes the conclusions set out within the Family Justice Review that the work of the IROs and their impact needs to be more clearly seen and understood. In reality, the cases mentioned do little to foster any confidence that an IRO will make a robust contribution to expediting a child's journey to permanency, absent a wholesale reform of IRO functioning, with especial emphasis upon total independence from local authority paymasters. It should be noted that a multi-agency consultation began in 2020 with a view to enhancing the effectiveness of the IRO service: it is intended that the result of that consultation will enable the National Association of Independent Reviewing Officers to feed into proposed review of care proceedings trailed within the Conservative Party's manifesto (Johnson, 2019, p.14) in advance of the December 2019 General Election – '*We will review*

the care system to make sure that all care placements and settings are providing children and young adults with the support they need.'

It is to be hoped that full attention will be given to the checks and balances required to ensure a system which puts the welfare of the all children firmly at the heart of all decision making. The cases cited provide little confidence that the system is working as it should for the benefit of children and young people requiring the intervention of the state to promote their welfare.

5.9 The Legal Framework: Adoption Orders

The application for an adoption order begins in exactly the same way, and by way of the same application form, whatever the circumstances surrounding the adoption. The child must have lived with the prospective adopters for at least 10 weeks before the application is made (Adoption and Children Act 2002 s.42(2)), with longer periods applying where the child has not been placed by an adoption agency or pursuant to an order of the High Court; in addition, unless the child has been placed with the prospective adopters pursuant to a placement order, the applicant must have

given notice to the relevant local authority at least 3 months and no more than 2 years before making the application (2002 Act s.44(3)). In a non-placement order situation, depending upon how long the child has lived with the applicant, the prospective adopter may require the permission of the court to make the application - although a full exposition of that latter point is of no more than tangential relevance to this study.

It follows that the child must be in placement with his prospective adoptive parents before any application may be made. However, despite the best intentions of all the agencies, the process of placing for adoption may sometimes go spectacularly wrong. There is no more pertinent illustration of this than the cases of *Prospective Adopters for BT, Prospective Adopter for GT v County of Herefordshire District Council* and *BT and GT (Children represented through their Children's Guardian) v Local Authority A, GT's Adoption Agency, F and E (through their litigation friend the Official Solicitor)* [2018] EWFC 76, where Mr Justice Keehan was faced with applications to adopt separated twin children. His critical comments included the following:

> It is almost impossible to imagine the circumstances in which it would be considered appropriate to separate twins and place them for adoption by different prospective adopters … As I shall set out in some detail, I am satisfied and find that the court is in the position of considering applications to adopt the twins in two separate homes because of the incompetence and serial failings of the local authority, Herefordshire Council, and the egregious behaviour of some of its former staff.

Unusually, two out of the three older siblings of the twins applied to intervene within the adoption proceedings, and were granted permission to do so in the teeth of opposition from the parties. Whilst the judge found himself constrained by the passage of time to endorse the continuing placement of the twins with separate families (albeit with ongoing contact – which was the more important in view of the interruption to sibling contact at various stages of the process), he included within his depressing litany of failures by the various professionals (paragraph 57) the following indictment:

> the complete and utter failure of the IRO service to satisfy <u>any</u> of its statutory duties in respect of BT and GT.

> The IROs and the IRO service did absolutely nothing to protect and promote the welfare best interests of the children and did nothing to challenge the local authority's dreadful and, at times, irrational decision making and care planning.

Those observations sadly echo the comments made by the same judge in the case of *Herefordshire v A, B and C*, as set out in the section of this chapter relating to checks and balances.

Happily, placement is less controversial in the majority of cases, and after effluxion of the necessary time period, the prospective adopters present the application to the court of their choice – they are not bound to issue the application in the court which made the placement order. The automatic respondents to any application for adoption are the child's mother and anyone else with parental responsibility for the child. Siblings are not automatic respondents, although as illustrated by the case cited in the preceding paragraphs, they may (rarely) seek to intervene.

On receipt of the application, an adoption judge will give directions as to the next steps – to include the filing of the local authority's Annex A report, if not filed with the application, and notice to the parents. If the child is placed pursuant to a placement order, the court will have addressed the issue of parental consent in making that order, and it does not automatically require further consideration. However, the parents (with parental responsibility) must be told of their right pursuant to s.47 (5) Adoption and Children Act 2002 to seek the court's permission to oppose the making of an adoption order: if permission is obtained, the court must then consider afresh whether the welfare of the child requires dispensation with parental consent to the making of an adoption order.

5.10 Permission to Oppose the Making of Adoption Orders.

It is fair to say that s.47(5) is widely regarded by the judiciary as an unfortunate provision. As will be seen in Chapter 6, when the judges who took part in this research were given a free rein to make suggestions as to appropriate amendments to adoption legislation,

s.47(5) was the sub-section most frequently, and entirely spontaneously, targeted. The statute reads as follows:

> A parent may or guardian may not oppose the making of an adoption order under the second condition (*placement with parental consent or pursuant to a placement order*) without the court's leave.

It is then explained within s.47(7) that the court cannot give such leave unless satisfied that there has been a change of circumstances since the giving of consent or the making of the placement order, as appropriate.

The case law, and notably the case of *Re P (Adoption: Leave Provisions)* [2007] EWCA Civ. 616 makes it very clear that the court must adopt a two-stage test to such applications: in the first instance, the court must consider whether there has been a change of circumstances of sufficient nature and degree to require the court to proceed to the second stage of the test. If no such change is identified, then that is the end of the matter. However, it need not be a change in the circumstances of a parent: it may be a change relating to the child, and it could conceivably be a change relating to a sibling, if that directly impacts upon the child. The second stage

of the test is an evaluation as to whether the child's welfare is most appropriately served by the application proceeding as a contested, rather than an unopposed, application. The child's welfare throughout his life is the court's paramount consideration in the exercise of its discretion whether to grant permission to a parent to challenge the making of an adoption order. The Court of Appeal (most notably in both *Re P* and in *Re B-S* (supra)) has emphasised that the statute is intended to be a real remedy, and that courts should give anxious consideration to such applications. In *Re P*, Wall LJ noted as follows at paragraph 32 of the judgment

> We do, however, take the view that the test should not be set too high, because … parents … should not be discouraged from bettering themselves or from seeking to prevent the adoption of their child by a test which is unachievable.

In the case of *Re B-S,* Munby LJ recorded that Parliament had intended s.47(5) to provide a real remedy, and that '*unthinking reliance'* upon the concept of it being exceptionally rare to grant permission to oppose ran a real and wholly unacceptable risk of rendering s.47(5) nugatory and its protections illusory. His

Lordship further noted that, in undertaking its second-stage evaluation, the court must have regard to the parent's ultimate prospects of success in opposing the grant of an adoption order, indicating that such prospects must be more than fanciful – they must be solid. It is clear from that judgment (paragraph 74) that the issue for the court's determination is not the parent's prospect of having the child returned to his or her care, but the prospect of successfully resisting the adoption application.

The guiding principles in considering an application of this nature are fully but succinctly summarised by Peter Jackson LJ at paragraph 40 in the case of *Re W (A Child: Leave to Oppose Adoption)* [2020] EWCA Civ. 16 as follows:

> The essence of the court's task when considering an application for leave to oppose is to decide whether in all the circumstances it is in the child's interests for fresh and up-to-date consideration to be given to the question of whether parental consent to adoption should be dispensed with … The statutory scheme is designed to ensure that when the court hears an adoption application it does not have to return to issues that were determined when the placement order was

> made, thereby causing delay and hindering the finalisation of plans for the child's future. Leave to oppose can therefore only be granted on welfare grounds if two hurdles have been cleared: change of circumstances and prospects of success. Where there has been no sufficient change, the statutory answer to the welfare question is a clear 'no'. Where there is no solid prospect of anything other than an adoption order being made, the answer will similarly be 'no'. There may then be other reasons connected to the child's welfare that might lead the court to refuse leave: for example, where the existence of contested proceedings would have a harmfully de-stabilising effect upon the child or the placement. However, there will be cases where there has been sufficient positive change, where there are solid grounds for opposing adoption, and where there are no overriding welfare considerations to prevent leave being granted. It is for those cases, however few, that s.47 (5) exists.

As appellate decisions, the cases cited are of course binding upon the grass-roots Family Court judges hearing such cases on a daily basis, but it is interesting to note the implicit acknowledgement by Lord Justice Peter Jackson ('*however few'*) that there will be only a minority of cases in which it is appropriate to grant permission to oppose; it is also fair to say that the cases which come to the

attention of the very senior judiciary, and especially to the Lords and Lady Justices of Appeal, are likely to be those where there is a real issue to determine, and very frequently those in which the parents are represented. The experience of most Family Court judges, as discussed in Chapter 6 of this study, is likely to be very different. The reality is that most parents consider that their child is lost to them once a placement order has been made. Very frequently, the making of such orders is accompanied by a contact reduction plan which provides ultimately for a farewell (sometimes referred to as a '*goodbye for now'*) contact. The child is then placed for adoption, and, as indicated, at least 10 weeks must then elapse before any application is made for an adoption order. By the time matching, introductions and settlement in placement has taken place, it is unusual to see an application to adopt made less than six months after the making of the placement order, and many take considerably longer, either because of difficulty in securing a placement, or because the adopters themselves prefer to wait until satisfied that the child is really settled before taking matters further. It may then take some time to track down the birth parents, some of whom lead very transient and unsettled lives, and thus after a period of time the birth parent is surprised to be told that he or she

has a further opportunity to challenge the adoption of a child already regarded as lost to parental care.

Public funding is rarely available to parents seeking to exercise their s.47(5) right to seek permission to oppose the making of an adoption order, and thus courts are very frequently faced with an unrepresented parent who may be beset by all manner of problems, ranging from learning difficulties to mental health problems to homelessness and everything in between. Many applications in the writer's personal experience are based upon a contention that the placement order should never have been made at all, and thus it is considered by the parent to be unnecessary to advance any change of circumstances – such applications are straightforward to refuse. However, some parents genuinely believe that something has changed for the better. The saddest application which the writer personally recollects concerned a lady with severe mental health difficulties who believed that the reason she had lost her child was because the local authority thought that she was not eating properly. She produced to the court the wrapper from a pack of butter in order to evidence that there had been a change of circumstances in that she was now taking proper care of herself. That case poignantly

illustrates what many judges regard as the cruelty of s.47(5) in giving renewed but ill-founded hope to parents who have already faced the desperate loss of a child, and whose attempts to come to terms with such loss are likely to be further set back by that false renewal of hope.

The identified mischief of s.47 (5) is further compounded by the fact that it avails only a parent with parental responsibility, as McFarlane LJ made clear in the case of *Re G (Adoption: Leave to Oppose)* [2014] EWCA Civ.432. Nor does the subsection avail the disaffected grandparent or other family member – including of course any sibling wishing to seek to challenge the making of an adoption order.

5.11 Post-adoption contact

Post-adoption contact provides an obvious mechanism for preserving to a greater or lesser degree the sibling relationship, whether such contact is direct in form or indirect by the exchange of letters, cards, and sometimes photographs. Before making an

adoption order, the court is required by virtue of s.46 (6) of the 2002 Act to consider whether there should be any arrangements for allowing any person contact with the child: in evaluating whether such an order should be made, the court must consider existing or proposed arrangements and seek the views of the parties to the proceedings. Again, there is no specific mention of siblings, although had that provision applied at the care and placement application stage, and if the care and placement proceedings had been consolidated (in practice, they tend to run in tandem rather than be consolidated) the siblings may well have been parties to the proceedings and the court would then have had a statutory obligation to consider their views on the issue of continuing contact with the sibling who is proposed to be the subject of an adoption application.

It is perhaps an anomaly that a sibling has no automatic right to pursue an application for contact with a sibling in the care of the local authority. Norgrove (2011, p.32) recommended that the Government should consult on whether s.34 Children Act 1989 should be amended to require the promotion of reasonable contact between siblings and to allow siblings to apply for such contact

without firstly having to secure the permission of the court; Monk (2018 p.122) includes a recommendation encompassing each of those two issues. If a sibling has the benefit of a s.34 order at the conclusion of the care proceedings, he would also have the benefit of s.46(6) of the 2002 Act, requiring the court to take those existing arrangements into account in reaching its decision as to post-adoption contact: this would to some degree mitigate the risk that the voice of the left-behind sibling remains unheard.

There is further provision in respect of post-adoption contact within s.51A of the 2002 Act which permits a court to make a contact order either when making the adoption order or at any time thereafter. Such an order may require the adoptive parent to allow the child to visit or stay with another person named in the order; the category of those who may be named in the order includes any relative (as defined by s.144(1) of the 2002 Act, which includes but does not single out siblings whether of full- or half-blood). An application may be made for such order by the adoptive parent, by the child, or, with the court's permission, by any other person. Section 51A(5) sets out the factors which the court is required to consider before granting permission, including the risk of harmful disruption

to the child, the applicant's connection with the child, and any representations made by the child or his adoptive parent. This latter statutory provision was not incorporated within the Act as originally conceived but was inserted by Children and Families Act 2014 s.9(1).

In the Herefordshire twins case, the children's respective adoptive parents were fully committed to ongoing direct contact between the twins and to indirect contact with the elder siblings, but the judge nevertheless made a contact order, noting (para 126):

> The high importance, indeed the imperative need, for regular direct and frequent indirect contact to take place is such that I will make a contact order in the terms sought. I do not make a contact order because I entertain the slightest doubt about the dedication of these prospective adopters to ensure this contact takes place, indeed, I am satisfied that the prospective adopters are committed to this contact and recognise that it is in the welfare best interests of BT and GT. I make a contact order (i) to mark for the twins the importance this court places on their ongoing relationship notwithstanding they are adopted separately and (ii) to

> fortify the adopters in the event that one or other twin is reluctant to the attend contact in the future.

The ability to make contact orders is an important component of the judicial armoury when the court finds it necessary to sanction placement for adoption but nevertheless is anxious to avoid total severance of the sibling bond. The importance of the availability of such orders is reflected within the final chapter of this study.

Conclusions

Adoption orders are of '*peculiar finality'*, as emphasised by Hedley J in *Re G* [2012] EWHC 1979 (Fam.). They can give rise to irremediable injustice, as starkly demonstrated within the case of *Webster v Norfolk County Council* [2009] 1 All ER 106, in which post-adoption exoneration of the birth parents as perpetrators of significant harm was held not to be grounds for setting aside adoption orders. Although, as Lord Bingham indicated in the case of *Re B (Adoption: Jurisdiction to Set Aside)* [1995] 2 FLR 1, an adoption order is not immune from challenge, successful

applications to set aside adoption orders are very few in number, for good and obvious reasons of public policy. It is thus all the more vital that the law permits and requires the welfare of the potentially-adopted child to be considered holistically, and that that consideration extends to the implications of severing or at least limiting the child's relationship with birth siblings. There is no room for doubt that the leading cases on the interpretation of the 2002 Act – and in particular the Supreme Court authority of *Re B* (supra) ─ emphasise the very serious and exceptional nature of an order which effects the non-consensual severance of a child from his family of origin. It is clear that the legal framework permits, facilitates and requires consideration of the impact upon the prospectively-adopted child of severing familial bonds and requires courts to take a proportionate approach, but does not give specific and special attention to the sibling relationship. It is equally clear that the law does not currently require that consideration to extend to the impact of adoption upon the children left behind.

In examining Monk's contention that '*the legal framework does enable concerns about sibling relationships to be expressed, but they are outweighed by other factors'* it is easy to concur with the

first part. For example, the need within s.1(4) (c) of the 2002 Act to consider the likely effect upon the child throughout his life of ceasing to be a member of his original family and becoming adopted, together with the provision within s.1(4) (f) requiring consideration of the child's relationship with relatives, combine to permit and facilitate consideration of the impact upon sibling relationships. However, these subsections form only two parts of the welfare checklist, no one part of which has prominence over any other, and in any event do not privilege the sibling relationship above those with other relatives, thus supporting Monk's concern that the sibling relationship may be outweighed by other factors. One obvious such factor is concern that a parent may seek to de-stabilise an adoptive placement, outweighing what would otherwise be perceived as the advantage of ongoing contact between an adopted child and a sibling who has not been adopted and who has ongoing parental contact. It may also be concluded that the legal framework does not spell out and thus demand consideration of the impact of discontinuing the sibling relationship, although it is difficult to envisage how a court could discharge its duty to evaluate the options before it, affording paramount consideration to the child's welfare throughout her life, without giving anxious consideration to the losses as well as the

gains associated with placement for adoption. The case of *Re A & C (Children)* [2014] EWFC B54 (Appendix 4, case 7) provides an example of the court specifically refusing contact between an older child, the parents and the eldest two of the younger three siblings, expressly to facilitate direct ongoing contact between those all three members of the sibling group, the youngest of whom had been adopted.

An obvious risk inherent in the law not singling out the sibling relationship for special attention lies in the possibility of its importance being overlooked by hard-pressed lay and professional judiciary and indeed by the social workers who prepare care plans proposing sibling separation, Independent Reviewing Officers who endorse such plans, and the Guardians charged with their scrutiny. Furthermore, there can be no dispute that the law pays limited attention to the impact of the making of an adoption order upon siblings who are not the subject of the relevant proceedings – although whether as a matter of principle it should have regard to the welfare of children who are not the subject of proceedings provides a fascinating philosophical and jurisprudential debate in its own right. Within Chapter 6 analysing the questionnaire

responses and within Chapters 8 and 9, I will consider the perceived inadequacies of the current legal framework and whether the welfare checklist set out within the Adoption and Children Act 2002 requires amendment to include specific reference to the welfare not only of the subject child, but also of siblings for whom the plan does not extend to adoption.

CHAPTER 6

JUDICIAL DECISION-MAKING: TRANSLATING THEORY INTO PRACTICE, PART 1: ANALYSIS OF THE SURVEY RESULTS

> The function of the family judge in a child case transcends the need to decide issues of fact … In a child case the judge develops a face-to-face, bench-to-witness box, acquaintanceship with each of the candidates for the care of the child. Throughout their evidence his function is to ask himself not just 'is this true?' or 'is this sincere?' but 'what does this evidence tell me about any future parenting of the child by this witness?' and in a public law case, when always hoping to be able to ask the question negatively, to ask 'are the local authority's concerns about the future parenting of the child by the witness justified?' The function demands a high degree of wisdom on the part of the family judge; focussed training; and the allowance by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision
>
> - *Re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33, per Lord Wilson.

6.1 The Scope of the Chapter

This chapter, together with Chapter 7, lies at the heart of this study. Having considered both the theory of judicial decision-making and the legal framework within which such decisions are made, these two chapters will consider what happens in practice. The two chapters will explore how, in judgments up and down the land, judges seek to discharge their duties to all parties in all cases, and above all to give effect to the paramountcy of each child's welfare, sometimes within the context of potentially-conflicting plans for sibling children.

The utility and application of the legal framework described within the preceding chapter will be considered by two, inter-related, methods. Firstly, within this chapter, by analysis and critique of the responses from the family judiciary to my questionnaire, and secondly, within chapter 7, by exploration of practical judicial decision-making as gleaned from reported cases over a period of nearly seven years from the inception of the Family Court in April 2014 to December 2020. Within Chapter 7, I will also consider the extent to which the findings from the questionnaire responses resonate with the approach taken by judges, as demonstrated from

their reported cases, and bearing in mind always the nature of the judicial task as articulated by Lord Wilson in the quotation with which this chapter commences.

The concluding questions within the questionnaire, as seen in Appendix 1, invited comment upon constructive amendment to the legal framework. Whilst I will summarise within this chapter the proposals received and provide a degree of legal context for those proposals, the correlation between the proposals, the research literature and the data disclosed by this research will be more fully explored within Chapters 8 and 9: those chapters contain my analysis of the data and conclusions as to the way ahead.

6.2 The Questionnaire: Analysis of Judicial Responses

The questionnaire was compiled, authorised and distributed as described within Chapter 4, addressing my methodology. Its intention was to illustrate and inform how, in decisions with implications for sibling separation, judges discharge their primary duty to '*interpret and apply the law that Parliament has given us*', as explained by Baroness Hale in the case of *Owens* [2018]. The questionnaire responses were analysed and coded as shown

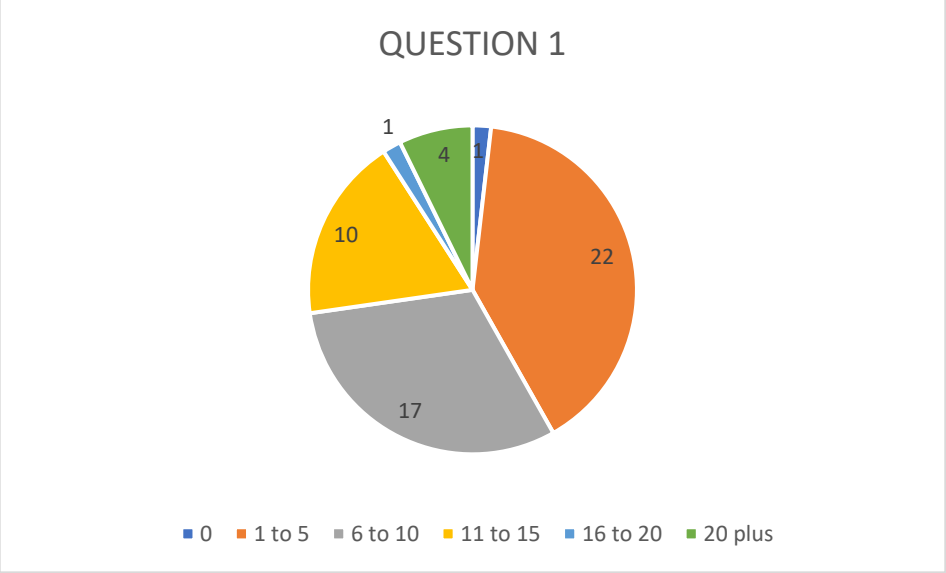
hereunder.

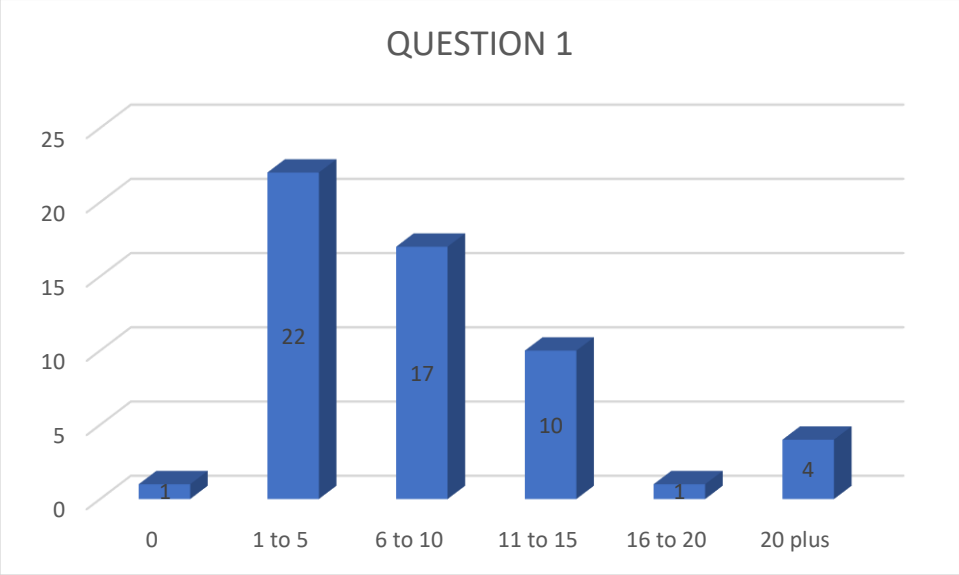
The responses to the questionnaires were as follows:

QUESTION 1

Please give an estimate of the number of cases in the last twelve months in which you have been asked to consider separating siblings as part of the final care plan.

The raw responses may be represented as follows:





In numerical terms, this translates as follows:

a) One Judge had yet to try a case involving consideration of separating siblings. However, that judge was a new judicial appointment in the first week of sitting: the questionnaire was nevertheless completed by that individual because, having been a specialist Child Protection lawyer immediately prior to full-time appointment, the judge had useful insights to contribute to other aspects of the questionnaire.

b) Twenty-two Judges indicated that they had been invited to consider care plans involving sibling separation on five or fewer occasions: this was marginally the largest group.

c) Seventeen Judges indicated that they had been invited to consider sibling separation on between six and ten occasions; if the figures for the preceding two groups are amalgamated, it accounts for 70.1% of all responses.

d) Ten judges had been invited to separate siblings on between eleven and fifteen occasions.

e) One judge indicated that a plan of separating siblings had been proposed on between sixteen and twenty occasions.

f) Four judges responded that they had been invited to consider such a plan on more than twenty occasions.

If the figures are grouped together, the percentage of judges invited to consider sibling separation in five or fewer cases was 41.81%, whereas the percentage invited to consider on six or more occasions in the preceding year care plans involving sibling separation amounted to 58.19%.

One limitation of the value of this data is that it is based on judicial

estimate, not hard facts: whilst greater precision would have been helpful, it is undoubtedly the case that if asked to trawl through all cases heard in the preceding year in order to provide an accurate figure, the response rate to the questionnaire would have reduced considerably. Despite that limitation, it is safe to draw the conclusion that it is very common for judges to be asked to consider divergent care plans within sibling groups.

With just three questionnaires returned anonymously, the vast majority indicated the name and level of the responding judge – Designated Family Judge, Circuit Judge or District Judge, as well as the geographical location.

From this information, the following points emerge:

a) The four judges who indicated that they had been asked to consider sibling separation in twenty or more cases are all Circuit Judges sitting in ethnically-diverse urban areas where there are many families with numerous children; inevitably the larger the sibling group, the greater the difficulties in maintaining the children in one placement, in the event that they cannot safely remain in the care of one or more of their parents;

b) It is reasonable to conclude, bearing in mind the Family Court (Composition and Distribution of Business) Rules 2014, together with President's Guidance on Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law), issued by authority of the 2014 Rules, that the most straightforward of cases will have been allocated to the lay justices; somewhat more complicated cases will have been allocated to District Judges; complex cases to Circuit Judges and the most complex of all, save for those with so many attendant difficulties that the attention of a High Court judge is required, will have been heard by the Designated Family Judge for the area in question.

The Schedule to the President's Guidance does not include the number of children as a factor indicative of complexity, but does make reference to the likely length of trial as a feature of relevance to allocation – and the more complex the family dynamics, the longer the trial is likely to take, leading to a reasonable assumption that cases involving larger sibling groups are more likely to be allocated at least to Circuit Judge level. Against that background, it

is instructive to note that District Judges and Circuit Judges report exactly the same numbers when indicating that they have considered between one and five cases (although one of the Circuit Judges had been recently appointed), but a substantially greater number of Circuit Judges rather than District Judges report considering larger numbers of sibling group cases - as the following table shows:

Case numbers	District Judge	Circuit Judge (inc. DFJs)	Level not stated
0	1	0	0
1 to 5	11	11	0
6 to 10	5	11	1
11 to15	1	8	1
16 to 20	0	1	0
20 plus	0	4	0

c) The four Circuit Judges who indicated that twenty or more such cases had been heard are all, or have been, DFJs.

d) Demographics clearly play a part in determining how many cases a judge may encounter involving very large sibling groups, with more such families appearing to feature in courts based in the large, ethnically-diverse metropolitan areas. However, and unsurprisingly, sibling groups generally feature across the board, without any obvious regional or local variations save as to size.

This particular question was confined to securing an estimate of the proportion of cases featuring the issue of sibling separation; it did not seek to elicit any indication as to the approach taken to such cases, and was thus purely quantitative in nature.

QUESTION 2

'*Local Authorities always pay sufficient attention, in formulating final care plans, to an assessment of strengths and weaknesses of sibling bonds': please indicate whether you*

a) strongly agree;

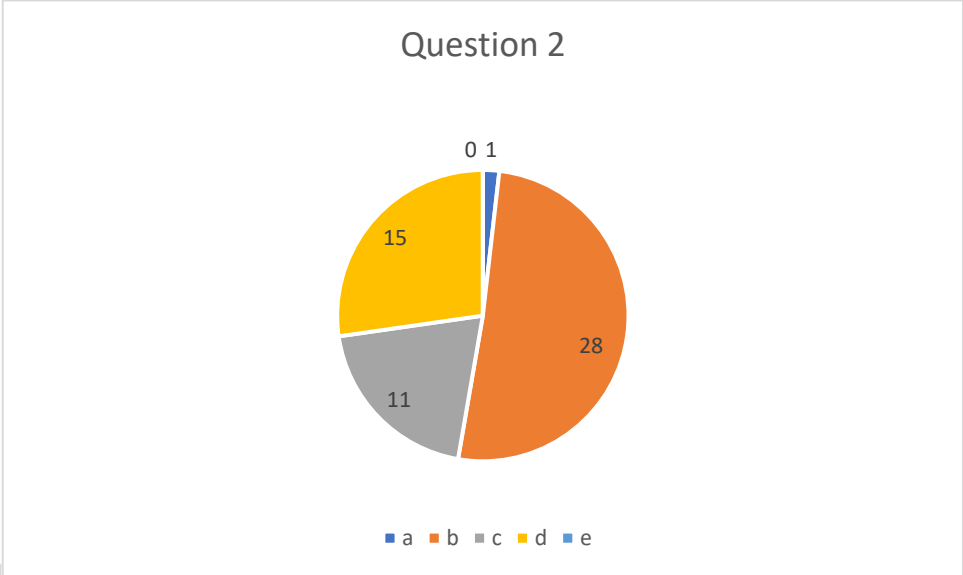
b) agree in most cases;

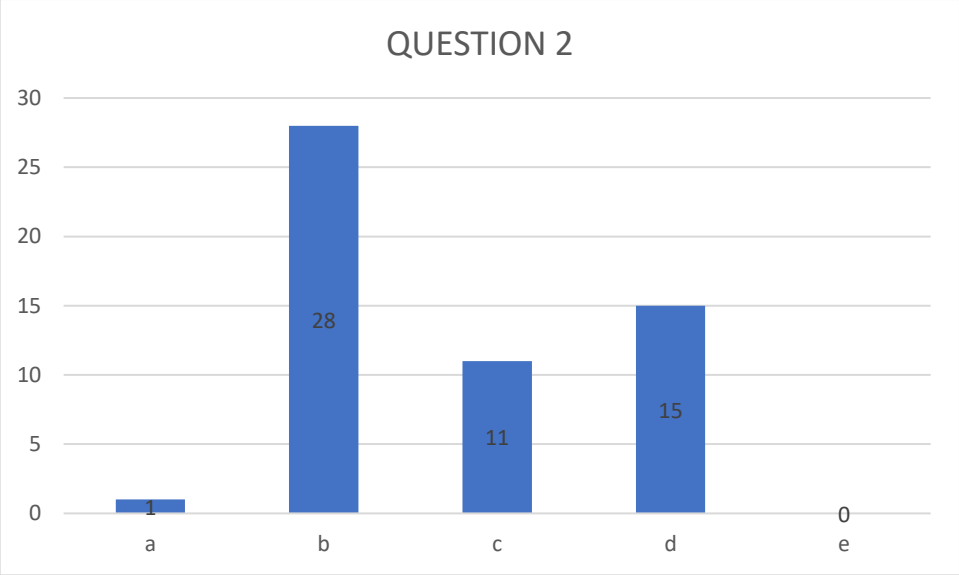
c) neither agree nor disagree;

d) disagree in most cases;

e) strongly disagree.

The raw responses were as follows:





In numerical terms, the responses were as follows:

a) One respondent strongly agreed: that judge sits in a small coastal town with relatively little ethnic diversity;

b) Twenty-eight agreed that, in most cases, local authorities do pay sufficient attention to an analysis of the sibling bond;

c) Eleven neither agreed nor disagreed;

d) Fifteen disagreed in the majority of cases; one of the respondents was anonymous, but ten of those so responding sit in predominantly urban areas with a multi-ethnic profile;

e) No respondent strongly disagreed.

From an analysis of that data, the following points emerge:

a) It is interesting – and heartening - to see that over 50% of respondents either strongly (only one, sadly) agreed or at least agreed with the proposition in most cases – those two responses combined amounted to 52.73% of the total.

b) This is balanced against the less happy total of 27.27% who disagree with the proposition, clearly taking the view that local authorities do not pay sufficient attention, in formulating final care plans, to an assessment of the strengths and weaknesses of sibling bonds.

c) A striking 20% of respondents were neutral on the issue, neither agreeing nor disagreeing with the proposition. This could mean that the judges in question had not particularly applied their minds to the issue. It could also mean that, if the judge sits in a court which deals with cases for more than one local authority, some local

authorities do pay appropriate attention, and some do not. As mentioned, the writer's own experience involves dealing with cases from six local authorities, and experience shows that the two better-resourced and generally more competent of those authorities generally do give proper consideration to the issue of sibling bonds, whereas the struggling authorities cannot always be relied upon to do so.

d) As already noted, some DFJ areas deal with only one or two local authorities, whilst others may deal with several authorities. The breakdown of response from a demographic perspective shows that the majority of those who strongly disagreed with the proposition that sufficient attention is paid to an assessment of the strengths and weaknesses of the sibling bond sit within larger urban conurbations, where anecdotally it is reasonable to assume that there are greater numbers of families with three or more children.

e) The question deliberately refers to strengths and weaknesses, implying that in some circumstances, separation may be the appropriate outcome. This is the succinct message of the young people and children who form the Family Justice Young People's Board within their document 'Top Tips for Professionals when

Working with Brothers and Sisters', where they include the following message as their 11th Tip:

> Remember that a child or young person may not always have a healthy or safe relationship with their brother or sister. Consider both individual and combined needs.

Again, the question was designed to be quantitative in nature, to gain some understanding of whether local authorities put their minds to the issue of the appropriateness or otherwise of sibling separation (giving '*sufficient attention'*), rather than considering the nature or quality of the analysis applied to the issue, beyond the issue of sufficiency

QUESTION 3

'Local authority social workers invariably produce good-quality 'Together or Apart' assessments.' Please indicate whether you

a) strongly agree;

b) agree in most cases;

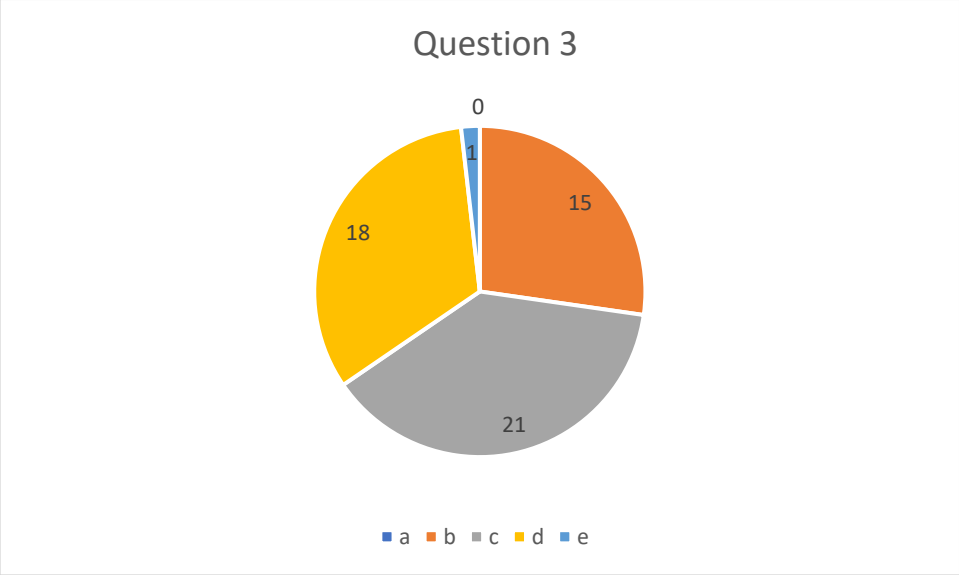
c) neither agree nor disagree;

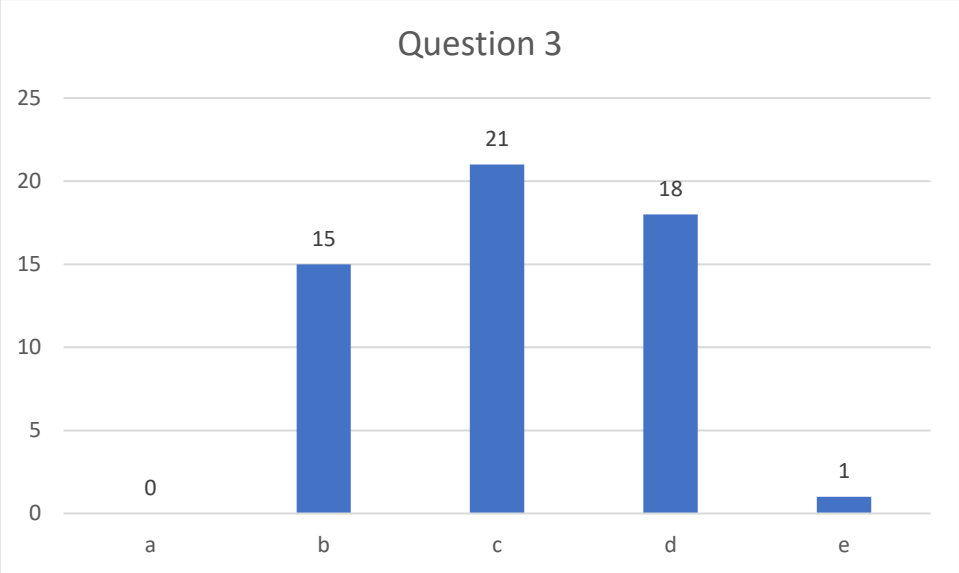
d) disagree in most cases;

e) strongly disagree.

The genesis and significance of the Together or Apart assessment has already been mentioned, but, briefly and for ease of reference, the assessment has its origins in the work of Lord and Borthwick (2001, with numerous re-prints thereafter) who produced the first Good Practice Guide to assessing siblings for permanent placement; this Guide has been superseded by the work of Beckett (2018) who produced the standard updated guide to planning for, assessing, and placing sibling groups. It is now the expectation that when a court directs an assessment of the sibling relationship, it will be based upon the framework and guidance set out by Beckett in her updated Good Practice Guide, 'Beyond Together or Apart'.

The raw data gleaned from the responses to this question may be represented as follows:





In numerical terms, the responses disclosed the following:

a) No respondent strongly agreed;

b) Fifteen agreed in most cases;

c) Twenty-one neither agreed nor disagreed;

d) Eighteen disagreed in most cases;

e) One respondent strongly disagreed.

This question seeks to build on the previous question by eliciting not just whether local authorities play lip-service to the issue of sibling separation, but whether the key document – the Together or Apart assessment – is of good quality. It is very disappointing to note that only 27% considered that good quality work is produced in this area, whereas 34.55% either disagree or strongly disagree with the proposition, with an even larger percentage – 38.18% neither agreeing nor disagreeing. Of those who neither agreed nor disagreed, two were not aware of ever having seen a Together or Apart assessment – that latter point is arguably a judicial training issue, as well as a reflection upon the advocates in the case, who should be expected to flag up the need for such an assessment in any but the most straightforward case involving a sibling group. Five respondents noted that such assessments are very variable in quality, with one suggesting that responses tend to be formulaic in nature.

The following conclusions may be drawn from this data:

a) A majority of judges are not positively assisted in making crucial decisions by good-quality, and thus reliable, assessment by the local authority.

b) The formulation of the Together or Apart assessment requires the synthesis and analysis of a great deal of information. As Beckett (2018, p.7) expresses it, '*we should be rigorous in making plans that not only recognise the current state of the children's sibling relationships but also their capacity to change during childhood and beyond'*. The key elements of such assessment (Beckett, 2018 p. 53) envisage an in-depth knowledge of the children both as individuals and as a sibling group: it follows that the children's allocated social worker is likely to be in a far better position to undertake the detailed work required than an independent expert who might otherwise fall to be instructed – quite apart from the imperative of not exposing the children to any more unknown professionals than absolutely necessary. This means that the allocated social worker is the first port of call for the provision of a Together or Apart assessment, and the patchy judicial experience

of such assessments is a matter of considerable concern.

c) Beckett (2018, p.67) further notes that '*an assessment needs to go beyond citing information and being descriptive to being analytical'*: this important task requires the social worker to go beyond evidence-gathering, and to have the time and space to reflect upon that evidence before formulating conclusions and recommendations. As Holland (2011, p.70) notes (in the context of social work assessments generally):

> Of most importance appears to be the goal of avoiding premature and ill-judged conclusions whilst making decisions quickly enough for children.

The need for time for reflection resonates with the plea made by Lord Wilson in the opening quotation for '*the allowance by the justice system of time to reflect and to choose the optimum expression of the reasons for his decision'*. Sadly, even before the disruption engendered by the 2020/2021 Covid-19 pandemic, many social workers reported significant problems in managing their workloads (Turner, 2020). If social workers cannot be supported by their Team Managers to manage their workloads in a manner

which permits them to devote the necessary time to prepare a thoughtful and perceptive Together or Apart assessment, then it may be necessary to balance the disadvantages of involving another professional in the lives of the children against the advantages of instructing an independent social worker who may be less impeded by excessive workloads. In general terms, it is for the local authority to decide whether to source work internally or to commission an independent social worker to undertake tasks on its behalf: an exception arises if the court sanctions a jointly-instructed independent assessment upon the application of one or more party.

d) As described within the legal framework chapter, the test for the appointment of an independent expert is that the assessment proposed is necessary '*to assist the court to resolve the proceedings justly'*: Children and Families Act 2014 s.13(6). To meet that test, the court would need to be persuaded not only that the Together or Apart assessment is necessary – that should not be difficult – but also that the local authority cannot or will not make available its in-house resources to complete the assessment. In practice, judges know their areas and know their local authority resources, and it is reasonable to conclude that most judges would take a pragmatic rather than strictly legalistic approach in order to ensure that such

a vital assessment is properly undertaken.

e) Whilst it is encouraging to see that 27.27% of respondents considered that a good-quality report is produced in most cases, this percentage clearly requires significant enhancement before it could be concluded that judges have an optimum level of assistance available to them in making complex decisions as to whether to endorse a plan of sibling separation. It is worthy of note in this connection that research undertaken by Butcher and Upright (2018, p20) records that local authority social workers report low confidence in completing the sibling assessment and in knowing how to approach it (although it is a limitation of that study that it is confined to a specific geographical area).

QUESTION 4

Part 1

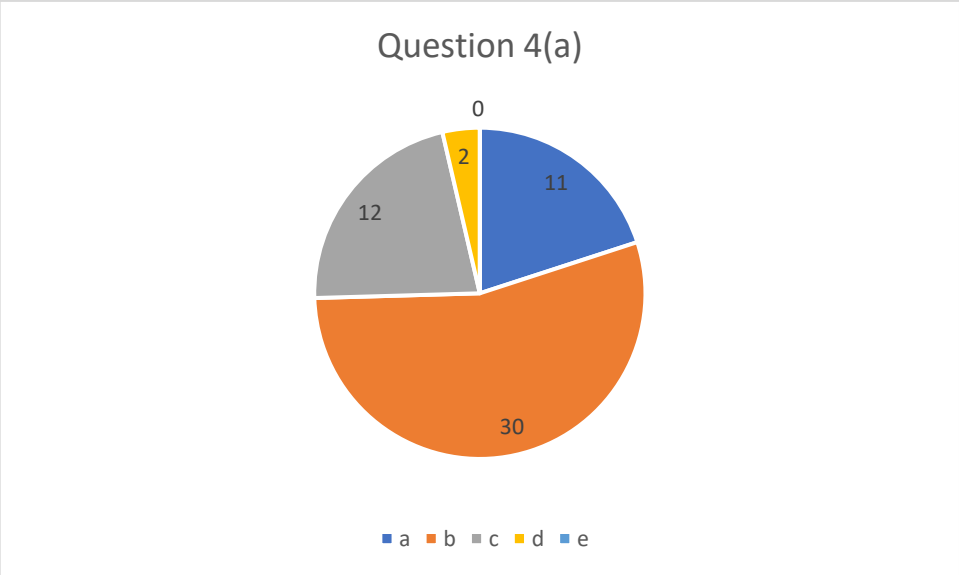
a) *'Parties frequently seek to persuade the court to permit the instruction of an independent expert to undertake a 'Together or Apart' assessment'. Do you receive such applications*

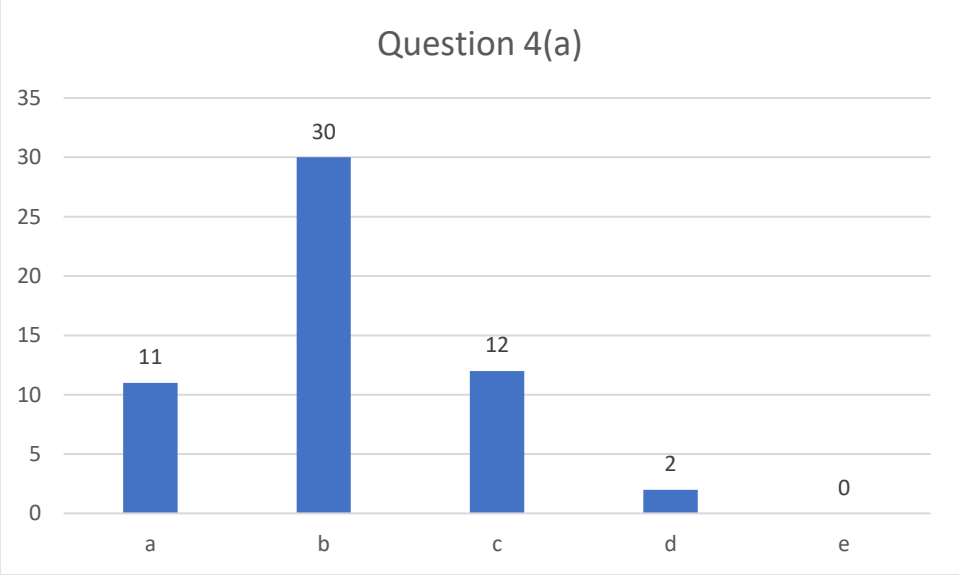
a) frequently,

b) rarely, or

c) never?

Even though there were only three formal options by way of response to this data, the visual representation of the raw data elicited by this question contains a fourth option because two respondents failed to answer the question. The data is therefore represented as follows:





Expressed in numerical terms, the data shows the following:

a) Twelve respondents frequently received such applications;

b) Thirty rarely did so;

c) Eleven had never done so;

d) Two did not specifically answer this part of the question.

This question clearly very much follows on from the preceding question.

Against a background of 34.55% of respondent disagreeing (or, in one case, strongly disagreeing) with the proposition that social workers invariably produce good-quality 'Together or Apart' assessments, and a further 31.88% responding neutrally, it is at first sight surprising that 74.54% of respondents addressing this part of the question had rarely or never received such an application. It is reasonable to assume that this is in part attributable to the belief that the onus is upon the local authority to produce such a report; in part to a reluctance to involve yet further professionals in the life of the children, and perhaps in part because the utility of such an assessment is under-valued. It may also be the case that advocates are concerned as to whether such an application will meet the test of necessity – which ties in with a further possibility that although there is no discrete and bespoke Together or Apart assessment, the sibling dynamic may have been thoroughly explored within the social worker's statements of evidence. This latter theory would correlate with the majority response to Question 2, with over 50% of respondents agreeing that, in the words of the question posed, Local Authorities always pay sufficient attention, in formulating final care plans, to an assessment of strengths and weaknesses of sibling bonds.

Part 2:

b) *Of those applications received, have you granted the applications*

a) in the majority of cases;

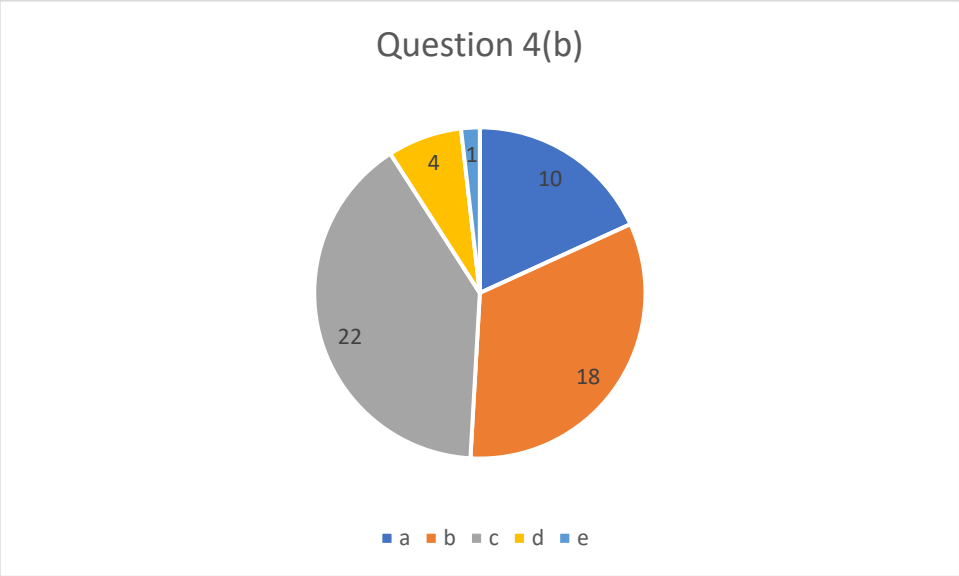
b) in the minority of cases (because the LA assessment is good enough);

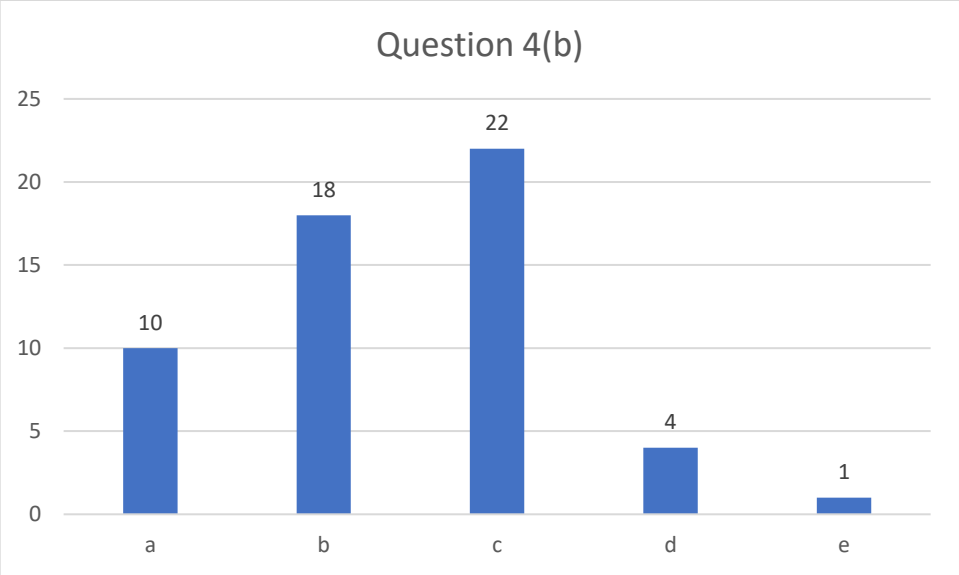
c) in the minority of cases (because it is not necessary);

d) never (because the LA assessment is good enough) or

e) never (because it is not necessary)?

The raw data derived from the response to this part of the question may be illustrated as follows:





This part of the question seeks to drill down into the reasons why applications are made for Together or Apart assessments to be undertaken by independent social workers, rather than by a local authority employee. Numerically, the responses show as follows:

a) Ten judges would grant such applications in the majority of cases;

b) Eighteen would accede to the application only in a minority of cases, with the rationale that the local authority Together or Apart assessment is good enough;

c) Twenty-two would allow the application only in a minority of

cases, deeming the assessment not necessary;

d) Four would never allow such applications, because the local authority assessments are considered good enough;

e) One respondent would always refuse such applications, considering the assessment to be unnecessary.

The data clearly illustrates a reluctance to sanction such assessments – only 18.18% indicated that the application would be granted on the majority of occasions, with a relatively-heartening 32.73% of respondents inclined to refuse the application in all but a minority of cases because the local authority's own Together or Apart assessment was considered good enough.

It is interesting to note that 40% of respondents permitted only a minority of such applications because the assessment was not considered to be necessary. It is convenient to repeat the test set out in Children and Families Act 2014 s.13 (6), as echoed in Family Procedure Rules 2010 r.25.3: a court may give permission for expert evidence only if the court is of the opinion that the expert

evidence is **necessary** (*my emphasis*) to assist the court justly to resolve the proceedings. In evaluating the crucial test of necessity, the court must have regard to the factors set out in s.13(7) of the 2014 Act. These factors include the impact of giving permission upon the welfare of the children concerned; the issues to which the expert evidence would relate; what other expert evidence is available, including whether any other person could give evidence on the matters which it was proposed the expert would address; the impact upon the timetable, and cost. The questions were not sufficiently detailed to explore whether refusal was based on factors such as delay or cost, but it is reasonable to conclude that few judges would refuse an application for a necessary assessment purely on the grounds of delay or expense.

One major advantage of a jointly-instructed independent expert is that all parties have input into the choice of expert and the letter of instruction, and the court is required to approve both the expert instructed and the content of those instructions. Case number 178 in Appendix 4 provides a salutary reminder of what can go wrong if the local authority is solely responsible for selecting and instructing an independent expert: in that case, Her Honour Judge Matthews QC, in deprecating the actions of a local authority in

separating siblings just eight months after approval of a care plan which provided for them to stay together, noted that the questions put to the local authority-selected expert were not balanced and were weighted towards separation.

In considering in tandem the responses to the two inter-linked questions, the following data emerged:

a) Three Judges indicated that such applications were frequently received and were granted in the majority of cases;

b) Five indicated that they were frequently received, but acceded to only in the minority of cases, the local authority assessment being deemed ‘good enough’;

c) Three respondents acknowledged frequently receiving such applications, but would grant them in the minority of cases because the assessment was not considered necessary;

d) Seven judges rarely received such applications, but would be inclined to grant them in the majority of cases;

e) Eleven judges who rarely received such applications would also rarely grant them, considering that the local authority assessment is good enough;

f) Ten respondents rarely received such applications but would permit the applications to succeed only in a minority of cases, finding the assessment not to be necessary;

g) One respondent rarely received such applications but had never granted one, considering that the local authority assessment is good enough;

h) One respondent rarely received such applications but had never granted one, indicating that it was not necessary;

i) One judge indicated that such applications were rarely received, but did not indicate whether such applications were granted or refused;

j) Nine judges responded to the effect that they had never received an application for an independent Together or Apart assessment;

k) One respondent indicated that such applications were never

received, but suggested that they had been (or perhaps would have been) granted in only a minority of cases because the local authority assessment was good enough;

l) Two respondents indicated, perhaps curiously, that they had never been presented with an application for an independent social worker to undertake a Together or Apart Assessment, but then went on to respond to the effect that such application would never be granted because the local authority assessment was good enough – presumably those two responses were based upon hypothesis rather than experience;

m) One judge indicated that applications would never be granted because the local authority assessment was good enough, but declined to respond to the first part of the question.

It is noteworthy that only one respondent indicated that such an application would always be refused as being unnecessary: the respondent in question is a very experienced District Judge whose response may in part be explained by the response to the preceding question to the effect that applications for an independent expert to conduct such assessments were rarely received. A Circuit Judge

sitting at the same court indicated that such applications would be allowed only in a minority of cases, so there appears to be some consistency of local practice.

Drilling further down into the data, all three of the judges who both frequently received and frequently granted such applications are circuit judges, with two of the three also being Designated Family Judges, and thus likely to be dealing with the most complex work. Conversely, of the nine judges who responded simply to the effect that they had never been asked to consider an application for an independent social worker Together or Apart assessment, five were District Judges, three were Circuit Judges, and one was anonymous, with no indication as to whether the respondent was a District Judge or Circuit Judge. It is reasonable to conclude that the District Judge respondents would not be dealing with the most complex cases.

Having conducted the appropriate Together or Apart and all other necessary assessments, the local authority's next task is to formulate its final evidence and care plans. If those plans propose sibling separation, then it should be clear on the face of the documents how and why that plan has been formulated. The next

question engages directly with that issue.

QUESTION 5

'Where the local authority proposes that one or more of a sibling group should be placed for adoption, whilst other siblings remain in foster-care or placed within the birth family, in the majority of such cases, the reasons for the disparity in care plans are well-evidenced by the local authority'. Do you:

a) strongly agree;

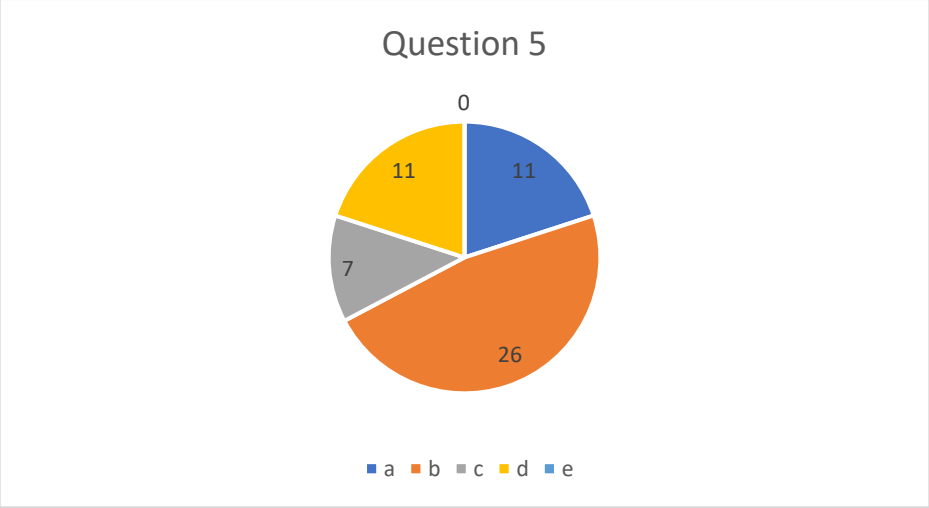
b) agree in some cases;

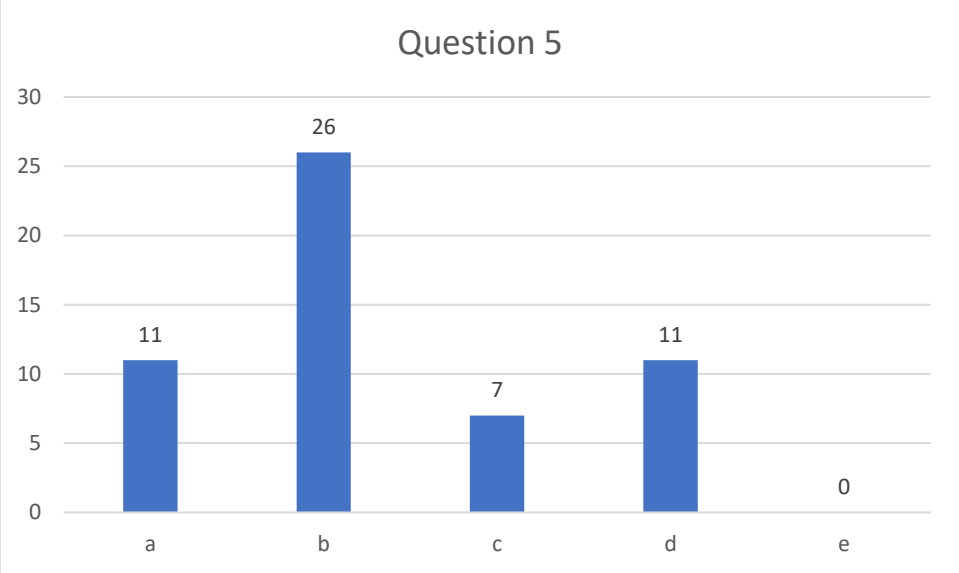
c) neither agree nor disagree;

d) disagree in some cases; or

e) strongly disagree?

The raw data emerging from the responses to this question may be represented thus:





Expressed in numerical terms, the responses to this question were as follows:

a) A heartening 20% – eleven respondents – strongly agreed that in most cases, the reasons for disparity in the plans for siblings were well-evidenced;

b) A further 47.7% – twenty-six respondents – agreed that in some cases any disparity was well-evidenced;

c) 12.73% of respondents – seven in number – neither agreed nor disagreed;

d) No respondent strongly disagreed with the proposition, but 20% - eleven respondents, reflecting the exact number of those who strongly agreed – disagreed in some cases.

The following is readily apparent from this data:

a) It is encouraging to note that the majority of respondents – 67.7% – agreed or strongly agreed that the local authority's evidence and care plans spell out the reasons why the local authority proposes that siblings should have differing plans. This is very important in terms of life-story work for children, so that they can understand precisely why certain decisions were made, even if ultimately those children reject the rationale for those decisions. Children may request to see their files in later life, and moreover if a child is placed for adoption, it is likely that the analysis undertaken will be

reflected to a greater or lesser extent in the child's adoption reports – documents which should be readily accessible in later life. As mentioned in the Chapter 5, Family Procedure Rules 2010 PD14F provide that an adopted person over the age of 18 years has the right to request a copy of the application form, any orders made, and the reports to the court of the local authority, adoption agency and children's guardian. Furthermore, the local authority evidence tells only part of the story: the local authority must formulate care plans, but ultimately the judge is the decision-maker, and his or her judgment should reflect whether or not the care plans are approved, and why, in order that parents and children alike are able to understand the reasons why a particular plan is endorsed, even if they disagree with the conclusions reached.

b) Whilst the positive responses to this question are very welcome, it is regrettable that a fifth of judges did not consider that local authorities performed well in this crucial task. If a local authority does not provide evidence in support of its care planning, and/or does not analyse that evidence in order to justify its conclusions, the court is left with the options of either requiring the local authority to remedy its deficiencies – despite the delay which this will inevitably entail for the children concerned – or pressing on

and doing its best with the evidence available. As referred to within Chapter 5, Munby P (as he then was) was absolutely clear, within the context of an adoption case, but equally applicable to all children cases, that the court must insist on proper evidence: in the case of *Re B-S (Children)* [2013] EWCA Civ 1146, he said this:

> We have real concerns, shared by other judges, about the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption, both in the materials put before the court by local authorities and guardians and also in too many judgments …This is nothing new. But it is time to call a halt.

c) It is inescapable that life-changing decisions must be based upon a solid evidential foundation. In some cases, whilst the analysis itself may be limited or even non-existent, the evidence is there to be gleaned in a painstaking fashion from a number of sources – eg witness statements from social workers, health professionals and school or nursery teachers – and it becomes a judgment call for the individual judge as to whether there is sufficient evidence not only to provide a firm basis for decision-making, but also to enable the parents to understand the case which they have to meet – an elementary component of fairness. Judicial instinct and judgecraft,

as discussed in Chapter 3, combine to assist the judge in sorting the evidential wheat from the chaff, but the burden of proof rests firmly upon the applicant local authority and it is in theory open to a court to take the view that if the local authority cannot get its house in order and present its evidence in a coherent and accessible manner, then the application should simply be dismissed. However, that robust approach would ignore the reality that the case is about the protection of a child, and few courts would lightly dismiss such an application because of perceived local authority failings in presenting its case, if the net result is likely to be the continued or renewed exposure of a child to significant harm. In other words, pragmatism may well prevail, even though this may result in delay whilst further evidence is directed or commissioned, or deficiencies of analysis remedied.

Before the case comes to final hearing, the court will have received a report and final analysis from the Children's Guardian. This is generally the last document to be filed, with the only exception to this being where the Official Solicitor is representing one or both parents, in which event the convention is that the Official Solicitor must consider all the evidence, including the Guardian's report, before formulating her final statement to the court. The Guardian's

final analysis will take into account not only the Guardian's own independent enquiries, but also the content of the local authority evidence and care plans and the response of the parents to those plans (subject to the exception mentioned in the preceding sentence). The Guardian has a statutory right of access to the local authority's records relating to the child or children concerned (s42(1) Children Act 1989) but the Guardian is entirely independent of the local authority and is uniquely placed to provide a critique of the plans for the children and to assist the court with recommendations based on a thorough analysis of all the evidence. The next question addresses the contribution of the Guardian to decision-making when sibling plans diverge.

QUESTION 6

'*Where the care plans for siblings differ, the reasons for disparity are appropriately scrutinised by the Children's Guardian'. Please indicate whether you:*

a) strongly agree,

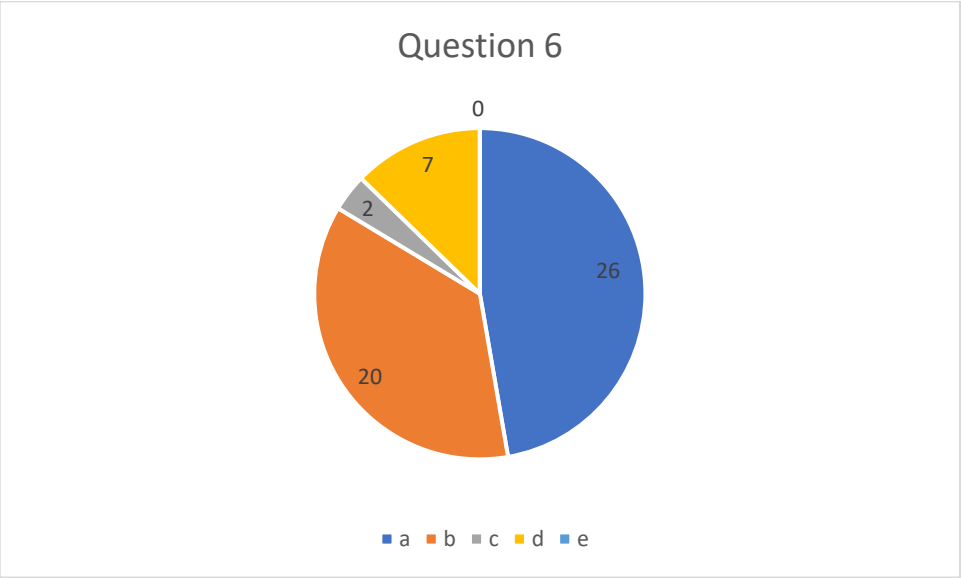
b) agree in some cases,

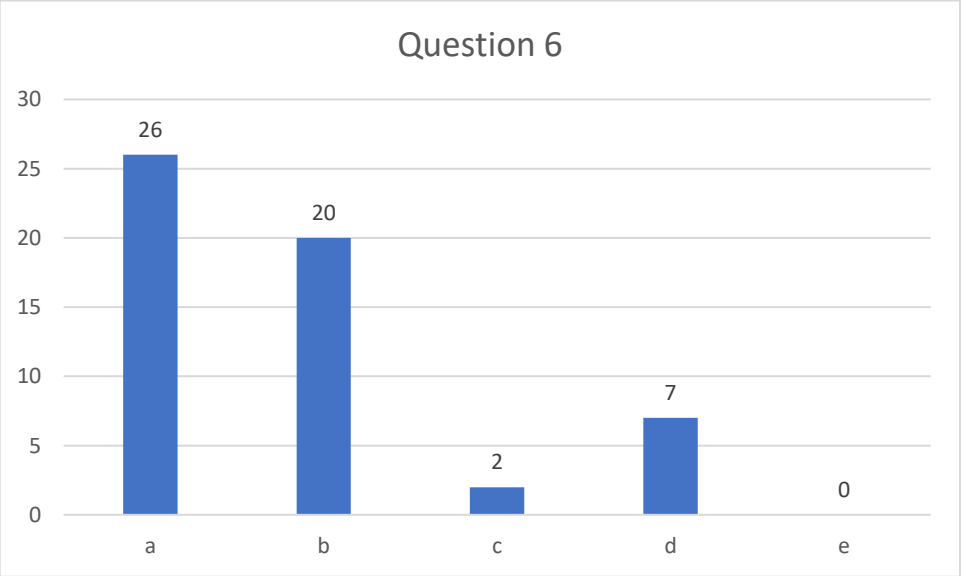
c) neither agree nor disagree,

d) disagree in some cases, or

e) strongly disagree.

The responses provide the following data:





Guardians are, for the most part, highly-respected professionals, drawn as they are from the ranks of successful and relatively senior social workers. It is therefore no great surprise that the responses to this question tended very much to the positive as follows:

a) Twenty-six respondents, or 47.27%, strongly agreed that disparity in care plans was appropriately scrutinised by Children's Guardians;

b) A further twenty respondents, amounting to 36.36%, agreed with the proposition;

c) Two respondents – 3.64% of the total – were essentially neutral, neither agreeing nor disagreeing;

d) Seven respondents, or 12.73% of the total, disagreed in some cases; no respondent strongly disagreed.

In summary, an impressive 83.63% of respondents either agreed or strongly agreed that the Guardian appropriately scrutinised the care plans, with only a small minority left either to disagree or to remain neutral on the issue. This finding is supported by objective evidence

of the contributions made by Guardians within care proceedings gleaned from an OFSTED report of an inspection of Cafcass (OFSTED, 2018, p.2) which notes as follows:

> Cafcass practitioners' effective and authoritative practice adds value and leads to better outcomes for the majority of children. In the vast majority of cases, family court advisers (FCAs) and children's guardians provide the courts with cogent, well-balanced and analytical risk assessments. These help the courts to make child-centred and safe decisions.

And at p.10:

> Reports are evaluative, succinct and well balanced, with strong child impact analysis. They rigorously evaluate the evidence and analysis in weighing the pros and cons of each option for a child's future, particularly when adoption is planned.

The evidence derived from this study very much reflects that positive commentary, and provides reason for optimism that whatever shortcomings may be perceived in local authority analysis, the Guardian can for the most part be relied upon to make

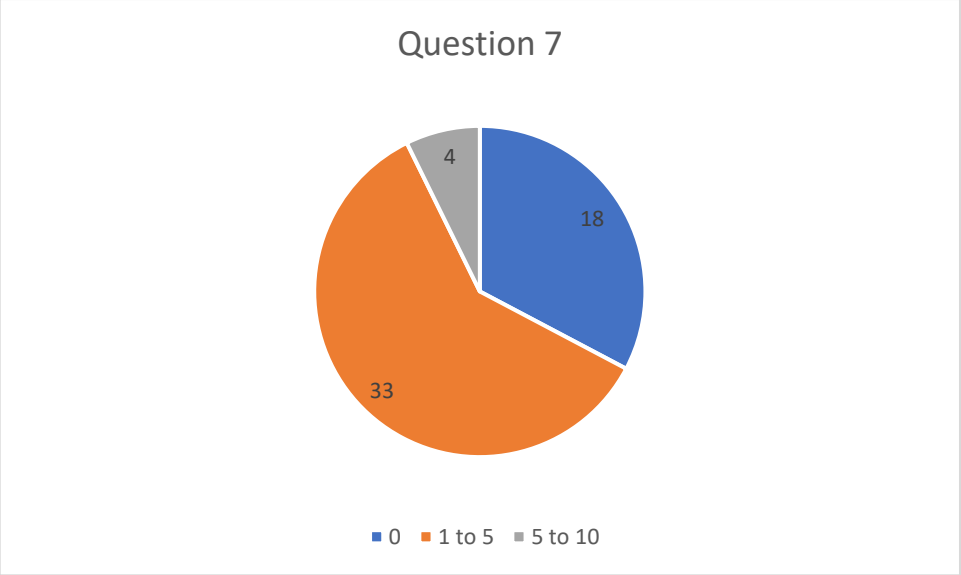
a child-focused contribution to the totality of the evidential canvas which the court must survey in seeking to reach its decision as to the most appropriate outcome for the children concerned.

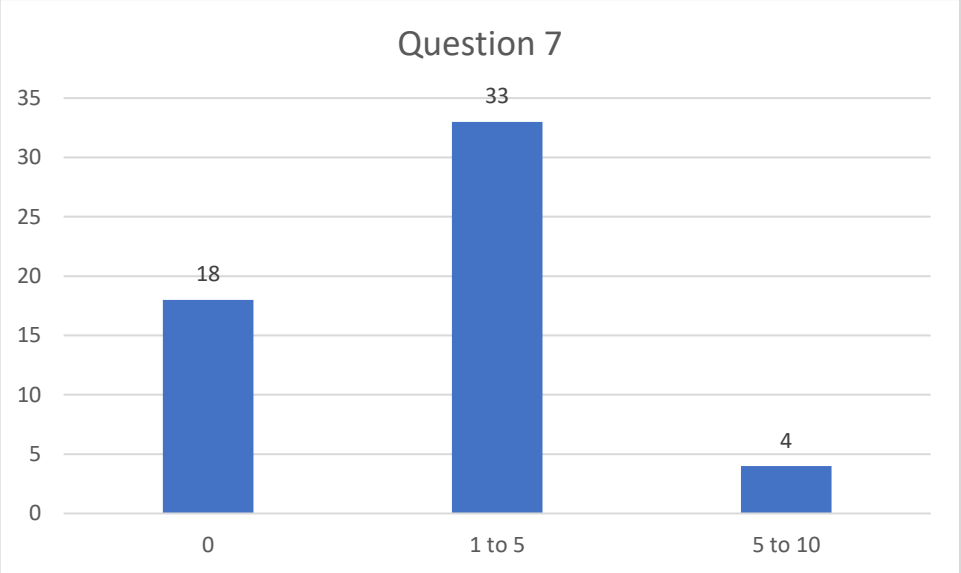
Gathering all the preceding threads together, the two following questions address the approach taken by the judge in cases where separation of siblings is proposed.

QUESTION 7

'Have you ever refused to make a placement order for one sibling because it would result in the severance of that child's relationship with other siblings?' If yes, please provide your best estimate of how many times this has occurred.

The responses to this question yielded the following raw data:





This question directly engages with a key element of this study: are judges willing, having considered the totality of the evidence, to refuse to endorse a plan which would lead to sibling separation?

The results, expressed numerically, show as follows:

a) Thirty-seven respondents, or 67.27%, had refused to make a placement order, as against eighteen (32.73%) who had never refused to endorse a plan which would lead to sibling separation.

b) Of those who had so refused, thirty-three respondents (89.19%) had refused on five occasions or fewer, with four (10.81%) estimating that a refusal had been the outcome in between five and ten cases.

It is very striking that some two-thirds of judges have refused to sanction sibling separation by the making of a placement order: clearly this finding requires some context in terms of the level of judiciary at which such decisions are taken. The four respondents who had refused a placement order in between 5 and 10 cases are all DFJs or former DFJs, and all are based in multi-ethnic areas with pockets of significant urban deprivation: this finding builds upon the demographic issues referred to in the analysis of the responses to the first question. The breakdown of the remaining responses shows the following:

No of refusals	District Judge	Circuit Judge	Anon
1-5	7	24	3
Never	12	5	

The preponderance of Circuit Judges within the cohort of judges refusing to make placement orders is likely to signify a combination of greater robustness in making difficult decisions (it is sometimes tempting for less experienced judges to accede to an application of dubious merit rather than run the risk of an appeal) and also the probability (as discussed supra) that the greater complexities associated with sibling groups with differing needs may point to allocation of the case to a Circuit Judge rather than to a District Judge.

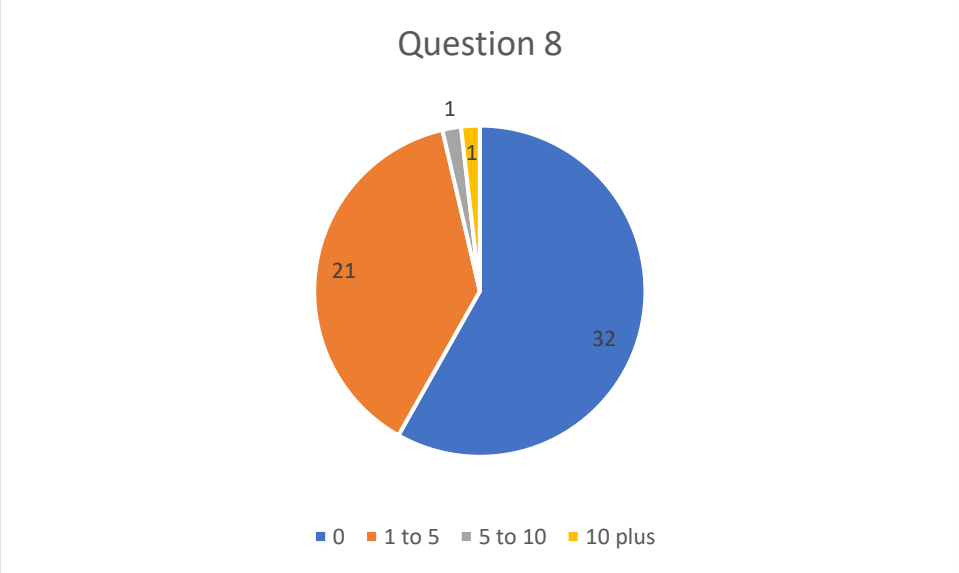
The questionnaire did not include specific reference to geographical location (in order to facilitate anonymous completion of the questionnaire) and it is therefore difficult comprehensively to establish the extent to which the responses are influenced by demographic factors – although, as indicated, many respondents did indicate their location. The impact of demographics upon the

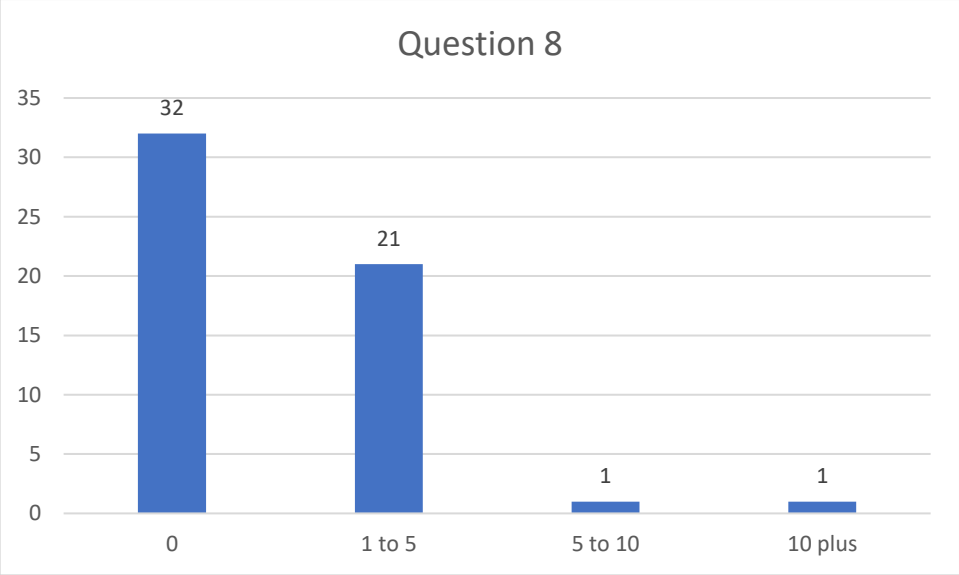
judicial approach and case outcomes is an area ripe for further research in the future.

QUESTION 8

'Have you ever made an order for direct ongoing contact between siblings at the same time as making a placement or adoption order?' If yes, please provide your best estimate of the number of occasions when this has occurred.

This question produced the following data:





This question is of key importance in terms of its implications for the severance of the sibling bond. In numerical terms, the following data was gleaned from the responses:

a) Twenty-three respondents (41.82% of the total) had made a contact order when making either a placement or an adoption order;

b) Thirty-two respondents (58.18%) had not made such an order.

c) Of those who had made contact orders, twenty-one (91.30% of the total) had made such an order on fewer than five occasions; one respondent (4.35%) had done so on between five and ten occasions, and one further respondent on more than ten occasions.

The results confirm the general perception that orders of this nature are relatively unusual, although it is important to record that the absence of an order does not necessarily equate to the absence of all contact. One of the paragraphs prescribed for adoption reports (Family Procedure Rules 2010 PD14C part 2) requires an account of the extent of the child's contact with his mother and father (not siblings) but also requires confirmation of the relationship enjoyed with relatives and '*any other person considered relevant'* , and the likelihood and value of such relationship continuing; Section C Part 3 (E) requires the local authority's recommendations as to whether there should be future contact arrangements (or not). If the adoptive family is willing to maintain contact with family members, then an order is unlikely to be sought.

In practice, the recommendation most commonly seen is for two-way 'letterbox' contact, usually not containing photographs of the child or children, with perhaps direct contact between siblings adopted into different families. It is relatively unusual for adopters to agree to contact between their adopted child and an unadopted sibling, in case that unadopted sibling's ongoing contact with parents leads to discovery of the location of the adopted child. The

obvious exception to this concerns children adopted by their foster-carers, where the identity of the adopters and the location of their placement is likely in any event to be known to the birth parents. The issue of post-adoption contact is further explored both within Chapter 2 (literature review) and Chapter 5 (in the context of the legal framework).

…….

The remaining three questions were added to provide an opportunity to gauge judicial opinion as to the appropriateness of the statutory framework. The intention was not to invite political comment, but rather a straightforward assessment of the utility of certain statutory provisions in determining complex issues relating to the separation of sibling children.

QUESTION 9

'The Adoption and Children Act 2002 is defective in that the welfare checklist makes no specific reference within s.1(4)(f)(i) to

the loss of a sibling relationship'. Please indicate whether you:

a) strongly agree;

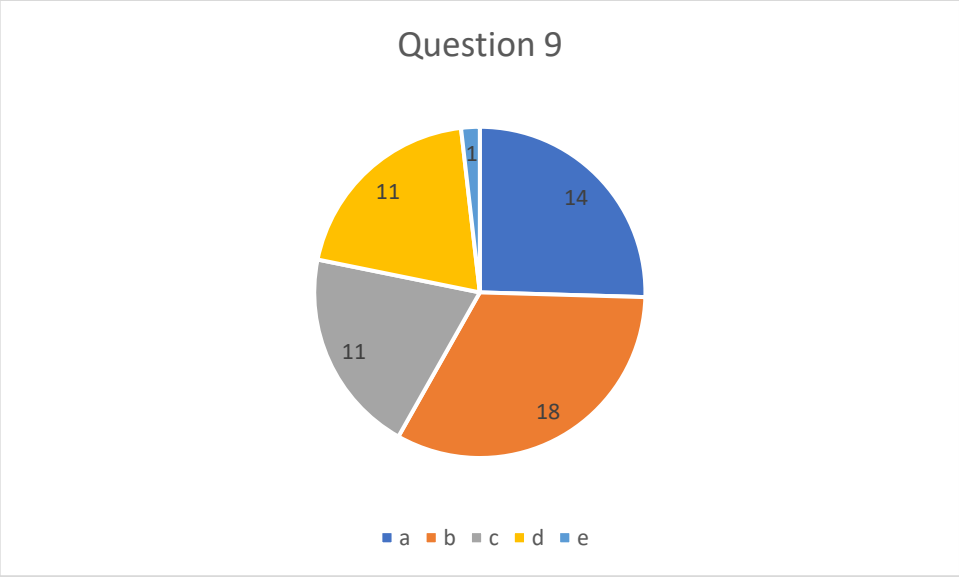
b) agree;

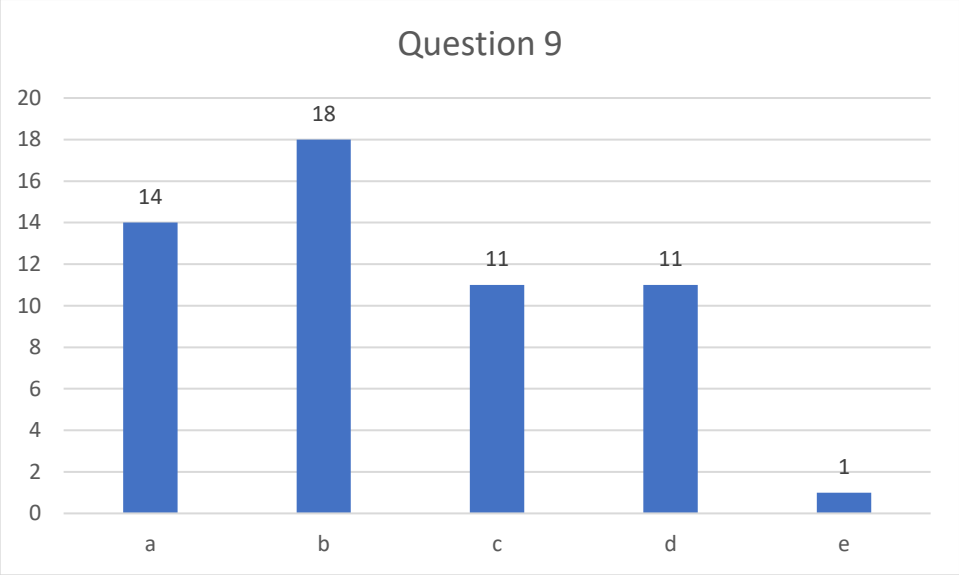
c) neither agree nor disagree;

d) disagree; or

e) strongly disagree

The responses to this question produced the following data:





The subsection of the Adoption and Children Act 2002 to which this question relates is a part of the welfare checklist to which all judges are required to have regard in making any decision in which the welfare of a child is engaged, as set out in the chapter addressing the legal framework. For ease of reference, the subsection reads as follows:

> (f) the relationship which the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant, including –
>
> i) the likelihood of such relationship continuing and the value to the child of its doing so.

Expressed numerically, a total of thirty-two respondents – or 58.18% – agreed or strongly agreed that the absence of specific reference to siblings renders this provision defective. Eleven adopted a position of neutrality, and a total of twelve respondents or 21.81% disagreed, one strongly. Those who disagreed with the proposition pointed to the inescapable fact that the wording is wide enough to encompass siblings in any event.

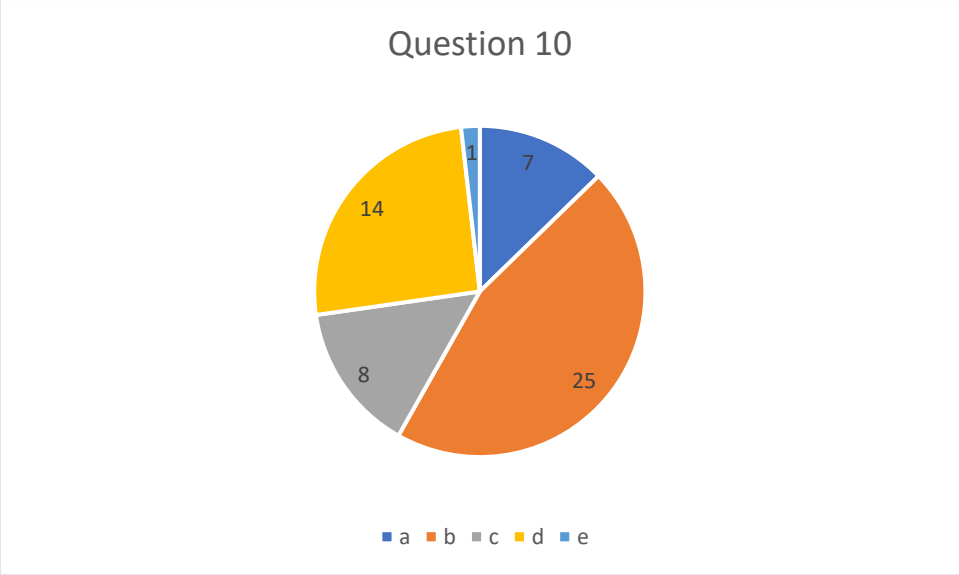
It is reasonable to infer that the majority who regard the subsection as defective are concerned about the lack of emphasis upon the sibling relationship as distinct and important in its own right. It is also fair to observe that it is not just the court which is required to conduct a 'welfare checklist' analysis: the same is expected both of the social worker completing final evidence and of the Children's Guardian. It is well-established – as alluded to in particular in the preceding chapter – that child protection and family justice professionals operate under significant time and resource constraints, paving the way for matters which are not specifically highlighted to be overlooked. There can be no doubt, as a matter of semantics, that siblings are caught within the collective 'relatives' referred to in the sub-section, and moreover the definition section

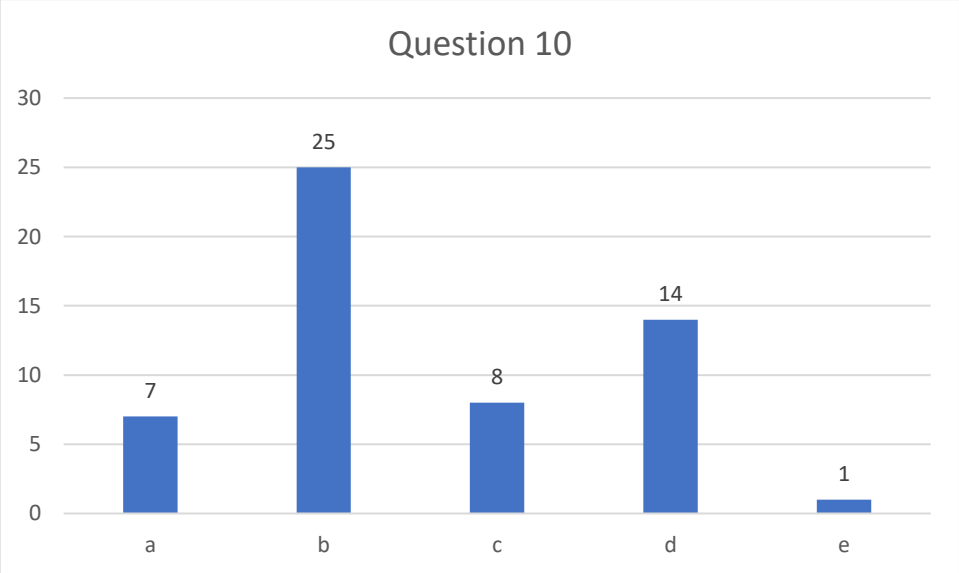
of the 2002 Act (s.144(1)) includes 'brother' and 'sister', whether of full or half-blood); however, there is obvious attraction in drawing specific attention to that relationship, and it will be noted that the statutory definition does not assist with less formal relationships, such as children who have shared a home by virtue of their respective parents' cohabitation, or fictive kin. Within the concluding chapter, I will set out my proposals for addressing this issue.

QUESTION 10

'The Adoption and Children Act 2002 requires amendment to s.21(1) to permit the court to require, in appropriate cases, that siblings be placed together (with a mechanism for restoring the matter to court where necessary)'. Please indicate whether you a) strongly agree; b) agree; c) neither agree nor disagree; d) disagree; or e) strongly disagree.

The responses to this question may be represented as follows:





As explained within Chapter 5, the making of a placement order pursuant to s.21 Adoption and Children Act 2002 authorises the local authority to place a child for adoption with any prospective adopters chosen by the local authority. The statute provides no scope whatsoever for the court to prescribe with whom the child

should be placed pursuant to a placement order, or to impose conditions such as a requirement that the child must be placed together with a sibling. As Munby P (as he then was) expressed the matter in *Re W (Children)* [2015] EWCA Civ.403 (a case in which the judge purported to impose a condition that an adoption order would not take effect until the child had been circumcised), '*No adoption order can be made expressed to be subject to satisfaction of a condition precedent.'* I have not been able to locate any case in which any party sought by reference to Article 8 principles (as invoked in the 'starred care plans' case referred to in Chapter 5) to persuade a court that a local authority must be required to place siblings together, and this is no doubt because such an argument would be countered by the claim that the interference in the siblings' right to family life was necessary and proportionate in order to promote the welfare of the child concerned – even though that would ignore the welfare of a left-behind sibling who was not the subject of proceedings and whose welfare therefore, as a matter of law, was not paramount.

Against that background, it is striking that a number of respondents – thirty-two, or 58.18%, either agreed or strongly agreed with the proposition that a court should be permitted to insist upon siblings

being placed together; eight were neutral, fourteen disagreed with the proposal and just one respondent strongly disagreed. The total percentage of dissenting voices thus amounted to 27.27%.

The questionnaire included some provision for free narrative in respect of this question, and whilst not all respondents took advantage of the invitation to add additional comments, the observations of those not in support of any amendments included:

a) A District Judge commented that she did not consider that there was a dispute that sibling children should stay together in every case, and the obstacles to achieving this are practical ones, including the prejudice to younger, readily-adoptable siblings if they have to wait to secure a placement for all the siblings together. She noted that there is often irreconcilable tension between the competing welfare interests of individual siblings, adding that whether or not there was a specific statutory requirement to place siblings together, it should always form part of the holistic 'balancing act' performed in every case.

b) Another District Judge respondent noted that the court does not control resources and adoption options.

c) A third District Judge queried whether this might be a step too far, potentially permitting the court to make a placement order in respect of a child for whom no placement order had been made, in order to keep the siblings together (although I would observe in parenthesis that there is currently no statutory power to make a placement order of the court's own motion, and thus further statutory modification would be required to achieve that inherently improbable eventuality).

d) One DFJ commented that no local authority separates siblings lightly, suggesting that the problem is quite the opposite, with local authorities trying too long to find a sibling placement, sometimes resulting in the loss of the chance of any adoptive placement. She suggests that there is no reason to believe that the court will be any better than the local authority in making these impossible decisions.

e) Another former DFJ suggested that any amendment is unnecessary and would smack of the ill-fated 'starred care plans' discussed within Chapter 5; the same reference to 'starred care plans' appeared in the response of one of the District Judges and in the response of another Circuit Judge who further commented that

what is required is a Family Solutions Court.

f) Another DFJ suggested that this could be dealt with by amendments to the care plan – although, having expressed dissent, he indicated that it could be a useful power, and could be extended to include power to order contact between siblings (although that latter power already exists, at least in theory). The issue of care plan provision was addressed within the response of a Circuit Judge who supported amendment, commenting that compromise care plans with provision for time-limited search are sometimes put forward at final hearings where there is an identified welfare need to keep siblings together, but there is no oversight as to any re-evaluation of the welfare needs of individual children at the end of that period of time.

g) One Circuit Judge, now a DFJ, indicated that she preferred the current wide discretion under existing legislation, but indicated that it would be helpful for research to be disseminated as to the outcomes for children if the sibling relationship is or is not maintained, and how there could be more creative thought about contact between separated siblings.

h) Another Circuit Judge warned fiercely that the amendment under discussion would amount to an interference by the court not supported by case law, suggesting that it smacks of wardship. The answer to that comment is of course that it would be interference authorised by statute in the event of amendment to the 2002 Act.

i) The sole strong dissenter, a DFJ, was concerned that such a provision would fetter rather than augment judicial discretion. There was no elaboration of that note of caution, and thus it is not readily apparent why that judge holds such a perception.

One of the supporters of the proposal suggested that there should be an obligation upon the Independent Reviewing Officer to restore the matter to the court if the local authority had been required, pursuant to its own care plan, to place siblings together but had not achieved that. Inevitably, restoration to the court – with a view to considering alternative care plans – is not without its pitfalls. It would add to the burden upon all professionals involved within care proceedings – the social workers, Guardians, advocates and the court itself; it may introduce further delay and uncertainty for the children; there is no guarantee that public funding would be available for the parents and thus the parents may be at the great

disadvantage of having to deal with proceedings as litigants in person. On the positive side of the equation, such a power, used sparingly, would assist in keeping the local authority firmly on task in seeking to identify a placement for siblings together, rather than succumbing to the temptation of too readily acceding to separation in order to achieve early finality for perhaps the youngest members of the sibling group, at the expense of maintaining the sibling relationship. This will be further discussed within the concluding chapter.

QUESTION 11

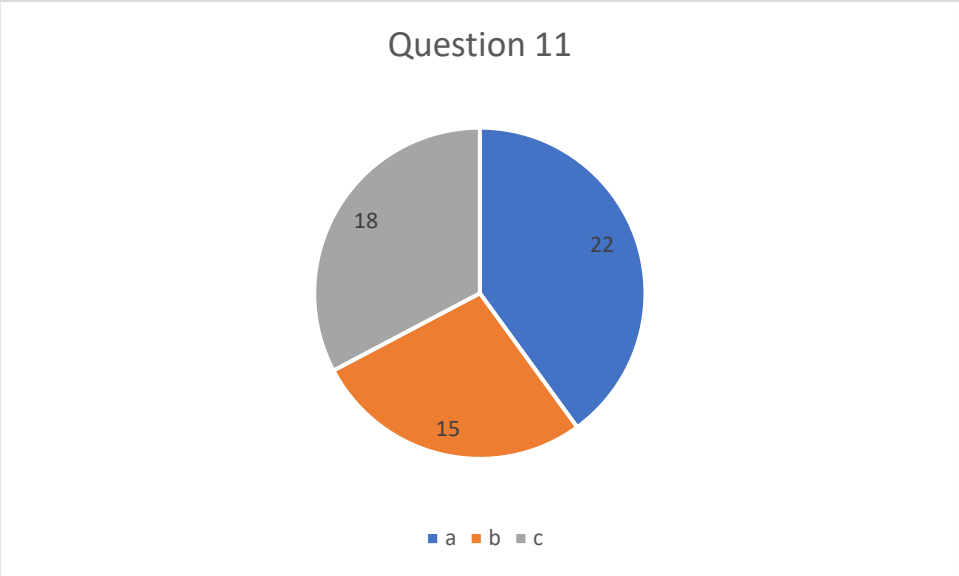
'Please indicate whether you consider that any other aspects of the Adoption and Children Act 2002 require amendment':

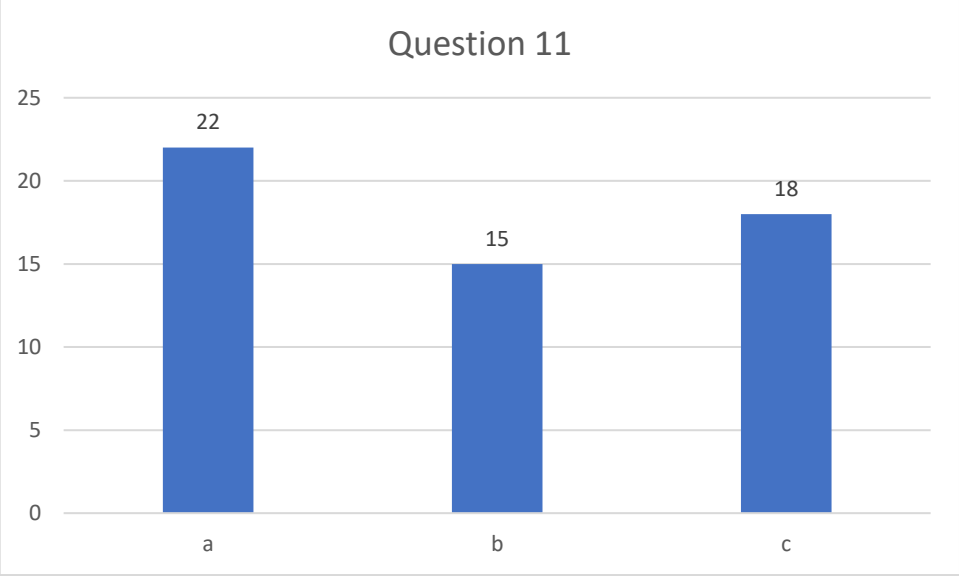
a) yes;

b) no or

c) don't know.

The data in response to this question shows as follows:





Twenty-two respondents (40%) wished to propose some

amendments (some more than one); fifteen (27.27%) did not wish to do so, and eighteen (32.73%) were uncertain.

The following areas were identified for amendment:

a) Fourteen respondents proposed amending s47(5) Adoption and Children Act 2002 (applications by birth parents for permission to oppose the making of an adoption order);

b) Five respondents mentioned concerns about post-adoption contact;

c) One was concerned about the law as it applied to orphan children;

d) Another proposed that placement orders should lapse automatically after a period of time;

e) The same judge who proposed provision for the lapse of placement orders also sought to reform the legal position relating to access to adoption files;

f) A further judge proposed a general power for cases to be referred

back to court where the care plan has not been implemented;

g) Another proposed specific attention be given to the grandparental relationship;

h) One judge proposed that a transcript of the judgment given when a placement order is made should invariably be made available to the adoptive parents;

i) A further judge wished there to be some (unspecified) reform of local authority processes;

j) The final proposal for reform was to ensure that the voice of the child was adequately heard.

I will briefly consider each of the proposals from the perspective of the potential contribution to the issues surrounding sibling separation, but the conclusions drawn in respect of each proposal, as informed by the totality of this project, with be set out within Chapters 8 and 9.

a) Adoption and Children Act 2002 s.47(5):

I have addressed the meaning and application of this sub-section within Chapter 5, but for ease of reference it is convenient to repeat the essential features of the sub-section here. An application for adoption triggers notice to the birth parents: an application may then be made by either parent (with parental responsibility) for permission to oppose the making of an adoption order. If the application succeeds, the adoption will proceed as a contested application and the court will be required to consider afresh whether it should dispense with the consent of any parent with parental responsibility to the making of an adoption order on the grounds that the welfare of the child so requires. In order to succeed in such an application, the parent must firstly demonstrate a change of circumstances since the order was made; if no such change is demonstrated, then that is the end of the matter, but if that first hurdle is surmounted, the court must then consider whether it is in the welfare interests of the child to permit the application to proceed as an opposed, rather than unopposed, application.

This sub-section is of significant relevance to this study not least because it is commonplace for such applications to be triggered

within the context of a parent having been permitted to care for a subsequent child or children. There may be many reasons why a parent succeeds in retaining care of a younger child, despite being found unable to care for that child's older sibling: the parent may have terminated a violent relationship; addressed substance addiction; acquired a protective partner, or may just simply have grown up. However, a parent's ability to provide 'good enough' care for a new baby does not necessarily correlate with that parent's ability to meet the needs of an elder child who may well have a background of developmental trauma and attachment disorders, leading to a need for reparative parenting. It is by no means a simple issue, but parents understandably struggle to accept that, just because they have been assessed as able to meet the relatively uncomplicated needs of a new baby, they cannot automatically meet the needs of his elder, troubled sibling. It is also difficult for a parent to comprehend that, if the older child was restored to their care, their attempts to meet the needs of that older sibling may compromise their fledgling ability to care for the younger child.

In the writer's experience, few parents appreciate that the s.47(5) mechanism simply provides for an adoption application to be opposed: success in obtaining permission to oppose the application

does not automatically equate with the child being restored to the care of the parent or parents. It is not uncommon for parents to tell the court that, having discovered that they have the opportunity to make an application, they have decorated the child's bedroom in readiness for his return, or have enrolled the child at a local school in confident expectation that he will be restored to the parents' care. The cruelty of raising such false, but understandable, expectations does not require further comment.

In response to question 11, which gave judges a free hand to propose any additional amendments to legislation which went beyond the specific questions posed in Questions 9 and 10, thirteen of the twenty-two respondents who sought to suggest amendments proposed re-consideration or abolition of s.47(5) – a clear indication of the depth of feeling which this subsection produces amongst those charged with hearing these difficult and frequently distressing applications on a daily basis.

The comments made by those proposing amendments to s.47(5) include uncompromising observations by a very experienced DFJ as follows:

> The 'leave to oppose' provisions at s.47 are positively cruel to birth parents. Lawyers and judges know that such applications are almost never granted yet parental hopes are raised quite unrealistically. The provisions should be abolished.

This clear condemnation of the provisions was echoed by others, with one noting that permission is very rarely given, but the fact that such applications must be listed for a contested hearing gives the parent the impression that he or she may have a chance of succeeding: the respondent described that is both misleading and cruel, with a parent who has already suffered the misery of a placement order being made having to engage in another bout of unsuccessful and distressing litigation. However, rather than the summary abolition proposed by the DFJ quoted supra, that respondent proposes that such applications should, in appropriate cases, be dealt with on a summary basis, and should be prohibited within two years of making the placement order. A further respondent condemned the provisions as almost invariably causing '*heartache, delay and … hugely wasteful of resources.'*

A further respondent emphasised the vulnerability of the parent and

the difficulty in securing public funding for such applications; the cruelty is compounded by the fact that once an application has been refused, the parents must still receive notice of the final hearing of the adoption application even though they are no longer entitled to be heard as to whether an adoption order should be made (Family Procedure Rules 2010 r14.16(2)); this provision simply adds to the parent's distress. Another respondent simply characterised the provision as '*inappropriate and, in the majority of cases, cruel'.*

One DFJ suggested that the refusal of permission should trigger re-consideration of the issue of contact; another respondent took up the issue of the implications of timing, suggesting that an application should not be possible once a prescribed period post-placement order had elapsed, the logic being that the longer a child has been placed with prospective adopters, the more likely it becomes that the parents would be unable to get past the welfare stage of the two-part test. That proposal would in effect amount to a back-door abolition of the test in all but name, because once a child is placed for adoption, the parents' sole remaining remedy is to make an application for a s.47(5) order, but there is no duty upon prospective adopters to make their application for an adoption order within any particular time-frame. It is not difficult to anticipate that

if the parents' right to make an application under s.47(5) became time-limited, the prospective adopters may well be advised by the Adoption Agency not to make their application until after any application by the parents had been barred by effluxion of time.

Further concerns included the unfairness of expecting parents to address complex legal issues without (in most cases) the benefit of public funding, suggesting that the provision of proper legal advice at the outset may well resolve matters sooner – primarily by deterring hopeless applications. That said, in the writer's experience some firms of solicitors seem to have greater success than others in securing public funding for such applications but those solicitors are not necessarily the most scrupulous in providing clear advice to a client to deter the making of a hopeless application. It is difficult to provide any definitive statistics as to the success of parents in securing public funding: under the provisions of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, applications for orders under Chapter 3 of Part 1 of the Adoption and Children Act 2002 are within the scope of public funding, but are both means and merits-tested; those applications include placement applications, applications for adoption orders and applications for permission to oppose the

making of adoption orders. Statistics published by the Legal Aid Agency (April to June 2019) (Ministry of Justice and Legal Aid Agency, 2019) do not differentiate between specific types of applications under the Adoption and Children Act 2002, but it is safe to say from the writer's own experience and those of the judicial respondents that public funding is very much the exception in applications of this nature, and does not necessarily correlate with the merits of the individual application, notwithstanding that its grant is subject to a merits test.

One Circuit Judge also highlighted the confusion which arises when grandparents, for example, seek to prevent an adoption and are bemused to be told that s.47(5) (which permits applications only by parents with parental responsibility) does not provide them with a possible remedy; a further Circuit judge pointed to the issue of stress not only for the parents but also for the prospective adopters, as well as the delay which this provision creates.

b) Post-adoption contact.

This topic engendered various comments. One DFJ proposed a power to make conditional contact orders when making placement

orders in respect of siblings, to take effect only if the siblings are placed in separate adoptive placements – although she stopped short of proposing contact in respect of an adopted and a non-adopted sibling.

A District Judge proposed a presumption of contact between separated siblings – although not mentioned, the use of the word 'presumption' implies the possibility of rebuttal which may be appropriate, for example, in the case of an abusive sibling relationship. In a related comment, a Circuit Judge proposed that the court should always consider making a contact order under s.26 Adoption and Children Act 2002 when making a placement order, with a statutory presumption that such order would continue post adoption, absent a prohibition pursuant to s.51(A) (2) (b).

Another Circuit Judge emphasised the importance of considering contact when addressing an application under s.47(5) of the 2002 Act, although did not propose a change in the law to require such consideration.

A further DFJ expressed concern about the sufficiency of encouragement of post-adoption contact, proposing that there

should be provision for the making of post-adoption contact orders with a mechanism for set-aside in the event that the existence of such an order deterred adopters from proceeding with an otherwise appropriate placement.

c) Orphaned children

The judge raising concern about the plight of orphaned children simply indicated that this group is not well served by the statute, with no specific proposals for addressing the perceived gap. It should be noted in this connection that s.22 (1) of the 2002 Act includes within the circumstances requiring a local authority to seek a placement order the fact of a child having no parent or guardian, if the local authority is satisfied that the child ought to be placed for adoption. Whilst the welfare checklist provisions will apply, there is no specific duty to consider the child's place within a sibling group or the impact upon any siblings in the event of a placement order being made, let alone any mandatory consideration of the implications of the death of the child's parents.

d) Automatic lapse of placement orders.

The proponent of automatic lapse of placement orders by effluxion of time proposes a period of 12 months to prevent children from being in limbo for an extended period without any return to court. It could be argued that an alternative approach to this issue would be an amendment to the statute requiring a local authority to return the matter to court if the child has not been placed within a prescribed period. It could also be argued that the requirement to review that plans for looked-after children at least once every six months (Care Planning and Case Review (England) Regulations 2010 reg 33(2)) should prevent drift – although as every family judge well knows, and as demonstrated within Chapter 5, this is not always the case.

……

In summary, the data gleaned from the analysis of the questionnaires reveals the following:

a) It is common for siblings to have diverging care plans;

b) A modest majority of respondents indicated that local authorities pay sufficient attention, in formulating their care plans, to the significance of the sibling bond;

c) Only a minority of judges are assisted by good-quality Together or Apart assessments, but an even smaller minority would be inclined to authorise independent assessment;

d) A majority of judges consider that local authority plans for sibling separation are well-evidenced;

e) A substantial majority expressed confidence in the Guardian's scrutiny of care plans;

f) A majority of judges had refused, on occasion, to endorse care plans which would have resulted in sibling separation;

g) It is rare for judges to make sibling contact orders when making placement or adoption orders;

h) A majority of judges considered that the welfare checklist within the Adoption and Children Act 2002 should be amended to make specific reference to the impact of loss of the sibling relationship;

i) A majority would welcome to the power to insist on sibling children being placed together; and

j) Several respondents took advantage of the free hand given by the final question to advance areas of law and practice which may benefit from amendment.

The next chapter will consider the evidence from reported cases of the process and content of judicial decision-making, including the extent to which that evidence resonates (or not) with the responses given to the questionnaire and validates the data thereby gleaned. The suggestions for amendment to the statutory framework will be considered in greater depth in Chapter 9, and specifically within the sub-section of that chapter addressing the case for statutory modification.

CHAPTER 7

JUDICIAL DECISION-MAKING: TRANSLATING THEORY INTO PRACTICE, PART 2: ANALYSIS OF PUBLISHED JUDGMENTS

> Studies make findings that the separation of siblings is not a minor issue and can inflict pain, sadness and feelings of injustice which may remain throughout life – Miss Recorder Henley, *Re K, C and D (Care Order)* [2017] EWFC B110

7.1 The Scope of this Chapter

This chapter sets out the second stage of analysis of the judicial approach to cases where there is potential for sibling separation: as its title suggests, the data informing the analysis is gleaned from published judicial decisions. There is significant overlap in the issues of relevance to the outcomes for siblings, howsoever their separation is brought about, and consequently I have not confined my survey of published cases just to those in which the plan for at least one member of a sibling group is permanent placement for

adoption away from the family of birth: I have also considered all relevant cases in which the potential for sibling separation arises, sometimes by virtue of a plan for separate foster-placements, and sometimes where it is proposed that at least one of a cohort of siblings should be placed in kinship care. I have also taken into account applications such as discharge of care orders or for permission to oppose the making of an adoption order where the individual case raises issues of relevance to the questions underpinning this study, bearing in mind throughout the words of caution set out within the quotation which begins this chapter.

The table below sets out the number of cases in each year identified as being of relevance to this study. It is necessary to sound two notes of caution: the figures for 2014 cover only a 9-month period, the Family Court having, as noted, come into being on 1 April 2014, and the figures for 2020 fall to be considered within the context of the global Covid-19 pandemic which resulted in many final hearings having to be postponed for several months until proper arrangements could be made safely to accommodate attended hearings. It follows that far fewer than usual final hearings were completed in 2020. With those caveats, the figures are as follows:

2014	2015	2016	2017	2018	2019	2020
43	50	26	24	20	19	6

It will be seen that in total, 188 cases were found to be of relevance to this study. Save for the limitations imposed by the pandemic upon the number final hearings (and thus the publication of judgments) in 2020, the discrepancy in the numbers of relevant cases from one year to the next could be attributed to coincidence, but is much more likely to reflect a decline in judicial enthusiasm for the publication of cases as noted by Doughty et al (2017), as discussed in Chapter 4.4, supra.

One finding made by Brophy (2021 p.56) is of particular relevance to this study:

> Explicit attention by judges to the importance of maintaining sibling relationships was liked by young people: a focus on placing children together, and on maintaining sibling contact where that was not possible was deemed important. Young people stated how important siblings are for most children removed from birth parents. They highlighted many judgments concerned sibling groups and argued that where children faced

> different care pathways, judges should address how sibling groups should be fostered.

This chapter has been written with that exhortation very much at the forefront of my mind.

My twin objectives in considering the reported cases comprised exploration of the approach taken by diverse judges to the issue of sibling separation and consideration of the extent to which the reported cases reinforce or depart from the conclusions derived from the analysis set out in the preceding chapter. In other words, to consider whether or not judicial words and judicial deeds appear to be in harmony. Whilst within Chapter 8 I will focus on the interplay between the data gleaned from this and from the preceding chapter and the research questions, for the purposes of this chapter I have largely tied my analysis to specific key aspects of the questionnaire, using that analysis to begin to draw conclusions in respect of the research questions.

As an essential component of addressing the research questions, I have paid particular attention to those cases where the judge has firmly indicated that children should <u>not</u> be separated, and will

address the various judicial strategies employed in a bid to prevent separation, ranging from a requirement for specific assurances to be set out on the face of the final order to outright refusal to grant a placement application. This is clearly a key issue for this study, as is the quality of the evidence available to the judge charged with making often excruciatingly difficult decisions.

There are three important areas where it is possible directly to compare the data gleaned from questionnaire responses to the information generated by consideration of reported cases: the sufficiency of the evidence provided to enable judges to deal with placement applications; the willingness or otherwise of judges to endorse care plans which will result in sibling separation, and judicial attitudes to the making of post-adoption contact orders. I will consider each of these in turn, noting that these areas of analysis have been selected because the data elicited from the questionnaires renders the issues susceptible of direct comparison in a manner not readily achievable in respect of the remaining aspects of the questionnaire responses.

7.2 Sufficiency of Evidence

It is striking that very few of the reported cases involving potential sibling separation featured an adjournment in order to seek out further expert evidence, whether in the form of an updated Together or Apart assessment or of any other kind. This paucity of evidence does not of itself confirm that judges rarely adjourn cases for further reports or assessments: it is more likely that even amongst those judges who regularly cause reports of their cases to appear on BAILLI, many refrain from doing so until the final hearing of the matter – this theory is certainly borne out by the fact that only a tiny minority of the cases reported are concerned with interim decisions of any kind. Where such adjournments occur, the most frequently-cited explanation is the need to test out rehabilitation either to a parent or to an extended family member.

One of a minority of reported cases involving an adjournment for further evidence was that of *Re KD (Children: Care Proceedings*) [2014] EWFC B104 in which His Honour Judge Bellamy was concerned with an application for a placement order in respect of a young boy of 18 months old. The plan for the boy's 7-year-old sister was long-term foster-care. The dilemma created by the case

(and which very much encapsulates the imperative driving this study) was expressed by the judge as follows:

> The decision to separate siblings is not a decision that should be taken lightly. In a case such as this, that decision is excruciatingly difficult. Should D be placed for adoption if to do so would cause emotional harm to his sister? Or to put it the other way around, should D be denied the opportunity to be planted in a new family in which he can put down deep roots in order to avoid the risk that separation from his sister may cause her harm?

The judge was concerned about the approach of the local authority to the issue of direct inter-sibling post-adoption contact, describing it at best as a '*work in progress'*; he decided that he required additional evidence to assist him in determining whether, even if it could be arranged, direct contact would '*fill the void left by separating siblings'*.

A similar requirement for expert evidence was identified by the same judge within the case of *Re A, B, C, D and E (Children: Care Plans)* [2017] EWFC B56, which, as its title implies, concerned a sibling group of five children, ranging in age from a baby of 5

months to a 10-year-old child. The eldest four children were placed in one placement, with the baby having been removed at birth to a separate foster-placement. The youngest four were full siblings and the eldest child was a maternal half-sibling. Having ruled out all family placements, the local authority proposed that the eldest child should remain in long-term foster-care; the next three children should be placed for adoption together, and the baby separately; its contingency plan was to place the second and the third child together, with the fourth child placed with the baby. This led to the further complication that the baby would be obliged to await the outcome of plans for the elder siblings because it would be unusual for an older sibling to join a younger child's adoptive placement. Judge Bellamy decided that in order to resolve the complex issues surrounding these five children, he would require expert evidence as to the impact of the various permutations upon the emotional well-being of each individual child:

> Cases involving large sibling groups present significant challenges to local authorities in terms of care planning. They also present a significant challenge to the court. The fact that a sibling group involves more than one father, that there is a relatively wide age gap between the oldest and

> younger four half-siblings, that the children are all of dual-heritage adds to the complexity.

Beckett (2018, p.65) makes clear the need to consider, as part of a Together or Apart assessment, the individual needs (including emotional needs) of each child, referring specifically to the mandatory use of the Strengths and Difficulties Questionnaire (Goodman, 1997), in order to assemble information about the emotional and behavioural health of each of the children concerned. Clearly Judge Bellamy did not consider that the evidence at that stage before him addressed the issues for the specific children with the requisite depth, and hence the decision to bespeak further assessment.

An example of adjournment to consider rehabilitation (and further evidence as to progress or otherwise) was provided by the case of *Refusal of Final Orders: Evidence of Change, Re S Applied* [2016] EWFC B86. Her Honour Judge Cameron adjourned the final hearing in respect of a sibling group of three children, the youngest of whom was 20 months old, in order to facilitate further assessment of the mother, whom the judge considered should have the opportunity to consolidate her newly-found sobriety and to

engage in further parenting and domestic abuse work. In making that decision, the judge expressed herself to be influenced inter alia by the absence of any guarantee that an adoptive placement would be found for the three children together, and the potential risk of disruption inherent in any application for permission to oppose the making of an adoption order. However, her decision was not apparently influenced by any perceived need for further assessment of the sibling dynamic.

As was noted in the preceding chapter, an overwhelming majority of respondents (almost 75%) had rarely or never been asked to consider granting an application for an independent Together or Apart assessment: as previously discussed, any such application must meet the test of necessity. The relative paucity of such applications recorded by the respondents to the questionnaire correlates with the finding that there is very limited reference to a requirement for additional expert evidence within the cases considered. That said, it is necessary to be cautious in seeking to draw any conclusions based upon the limited reference to adjournments for further evidence, given the very small number of interim judgments within the reports considered.

7.3 Separating Siblings: the Judicial Approach to Placement Order Applications.

Analysis of the 183 relevant reported cases shows that a large majority – 158 – included one or more applications for a placement order. This is unsurprising, given that an important criterion for inclusion was that the case dealt with issues surrounding the separation of siblings. Broken down by year of reporting, the numbers of applications for placement orders were as follows:

2014	2015	2016	2017	2018	2019	2020
35	44	25	18	17	13	6

In the preceding chapter, I noted that 67.27% of the respondents to the questionnaire indicated that they had refused on one or more occasion to grant an application for a placement order where this would result in the separation of siblings. Of the 158 reported cases which included an application for a placement order in respect of one or more children, such applications were refused in only 28 cases– in other words, just 17.72%. It is necessary to approach with a considerable degree of caution the striking inconsistency between

what judges say in response to the questionnaire and what these cases demonstrate in practice, not least because it is impossible to be clear, without risking a breach of the promise of confidentiality to the respondents to my questionnaire, what percentage of those responding to my questionnaire also publish their judgments on BAILII. On reflection, the willingness to publish on BAILII would have been a useful question to include within my survey, and certainly it is pointer to the value of further research, building upon the work already undertaken by Bellamy (2020, supra). There must also be factored in the possibility of coincidental variations in figures: each case is fact-specific, and a formulaic approach is neither helpful nor acceptable.

Despite the relatively low judicial refusal rate, the reported cases demonstrate a clear willingness to grapple with the appropriateness of making placement orders: there is no room for suggestion that the judiciary act as a 'rubber stamp' for local authority plans, although such anecdotal allegations are not difficult to find. The reported cases also refute another common misconception that judges invariably follow the recommendations of the Guardian, resulting in the Guardian, not the judge, becoming the de facto decision-maker. I referred within Chapter 5 (p.224, supra) to the

excoriating critique by Mr Justice Keehan of the Guardian's contribution in the case of *Leicestershire City Council v AB and Ors* [2018] EWFC 58; judicial independence of the Guardian was further strikingly demonstrated by His Honour Judge Jones in the case of *Re A (A Child)* [2016] EWFC B 101 in which he said this:

> At times, the Guardian's evidence appeared (I am afraid) to be a rudderless vessel on the high seas blown hither and thither and I was uncertain whether (in fact) this vessel would be blown into any particular harbour or whether indeed it would be blown into any harbour at all.

7.4 Refusal to Sanction Sibling Separation

The reasons for dismissing placement applications are as varied as the facts of the cases themselves, but one theme which emerges very clearly is concern about the commitment of the local authority to promoting the sibling relationship. This was strongly evidenced by His Honour Judge Wildblood in the case of *Re EF (Flawed Placement Application)* [2015] EWFC B21 (paras 130/135) where his refusal to make a placement order hinged largely on his finding that:

> EF also needs to maintain her family relationships if possible especially with her brothers. I think it highly unlikely that the Local Authority would promote this. Like the guardian I think that it is highly likely that, if they did find adopters it would lead to an ending of all familial contact … I think it highly unlikely that the Local Authority would twin track the case between fostering and adoption if a placement order were to be made. I think that such an order would be highly likely to result in all contact between this girl and her family ending. I do not consider such an order to be necessary or proportionate and I do not consider that the making of such an order would place her welfare as the paramount consideration throughout her life.

In other cases, the good faith of the local authority was not impugned as overtly, but nevertheless the court expressed a clear view that the advantages of an ongoing sibling relationship outweighed the perceived benefits of placement for adoption. His Honour Judge Perry, in the case of *Re J (Placement Order Application)* [2015] EWFC B82, declined to grant placement orders, emphasising the importance which he attached to the sibling group of three children remaining together, and acknowledging that it was unrealistic to expect it to be possible to identify an adoptive

placement willing to care for all the children.

The reported cases reveal that some judges, in granting placement orders, employ creative solutions to reduce the risk of sibling separation. In the case of *Re A (Final Hearing – Care and Placement Order)* [2014] EWFC B201, His Honour Judge Jones was invited to make care and placement orders in respect of two sibling toddlers. Whilst the applications were granted, the Order contained a recital setting out the agreement of the local authority that if it contemplated separating the children, notice would be given to the parents prior to such placement in order to give the parents the opportunity to apply for leave to revoke the placement orders. This was significant because applications for permission to seek the revocation of an order cannot, as a matter of law, be made once a child has been placed for adoption (Adoption and Children Act 2002, s.24(2)(b)), and thus the provision of timely notice to the parents is particularly important. The local authority could not have been compelled to agree to such a recital, but it would be unusual to refuse to follow a clear judicial steer in that direction – especially as such refusal may well have caused the court to reflect upon the wisdom of granting the application.

An application for permission to seek revocation of the placement order will usually lead to the re-appointment of a Children's Guardian and will certainly result in renewed judicial scrutiny. In order to obtain permission to apply for revocation of a placement order, the applicant must demonstrate a change of circumstances since the placement order was made (2002 Act, s.24(3)). The phrase 'change of circumstances' is not defined in the interpretation section of the Act (s144(1)), but in the context of an application under the similarly-phrased provisions of s.47(5) of the 2002 Act, the Court of Appeal held in the case of *Re P (Adoption: Leave Provisions)* [2007] 2 FLR 1069 that a change of circumstances must be of a nature and degree sufficient to re-open consideration of the issue. It is implicit within Judge Jones' judgment that he regarded any proposal to separate the two children as likely to provide such change of circumstances sufficient to open the door for consideration of the grant of permission.

The Adoption Agencies Regulations 2005 (Regulation 33(3)) require the local authority to notify those with parental responsibility when a decision has been made to place the child in an adoptive placement, but the obligation to notify is triggered after a placement has been located, the child has been matched, and the

proposed match has been referred to the Agency's Adoption Panel for its recommendation, and thus the notification duty arises well down the path towards placement. Although it is not explicitly stated within the judgment, it would seem that the Judge in *Re A* envisaged that the parents would be informed at a much earlier stage, as soon as it became apparent that the local authority was considering separate placements for the children. The recital would also have been of benefit in making it clear to the parents the steps which they would be required to take in order the challenge any separation proposal, as well as underscoring the importance which the judge attached to avoiding sibling separation.

A robust approach to the problem of avoiding severance of the sibling relationship was also demonstrated by Her Honour Judge Owens in the case of *BFC v R&P* [2015] EWFC B42. The judge was concerned with the welfare of two half-siblings who had never lived together: the younger child, who was 17 months old, had been accommodated at birth in a foster-placement separate from her elder brother. The elder child, who was 6 years old, had two paternal half-siblings who lived with a grandparent in Latvia. The local authority sought care and placement orders with a primary plan of placing the children together and a contingency plan of

separate placements. Their respective foster-parents were very committed to the children and had gone to great lengths to promote the sibling relationship. The elder child's age was likely to render it challenging to find an adoptive placement for that child, or for both children together. The judge took the unusual course of adjourning the placement applications to enable the children's respective foster-parents to make an application in each case to adopt the child in their care, clearly considering that that would be the safest way of ensuring that the sibling relationship would be properly promoted. Although this outcome meant that the children lost the chance of being brought up in the same adoptive household, they had never lived together and their foster-parents were determined to ensure the best possible relationship between the children, to include holidays together and sleepovers in each home. Had the judge not taken that approach, there was a strong possibility that the children would not only remain separately placed, but would be placed with carers who may not have been committed to the promotion of the sibling relationship – especially if the elder child, as was quite possible in view of her age, remained accommodated rather than adopted. The solution crafted by the judge (hopefully) achieved the local authority's aim of adoptive placements (we do not know the sequel) whilst at the same time

providing as much certainty as could be achieved as to continuing respect for the sibling bond. It also provided the enormous benefit to the younger child of remaining with her first and only carers, who were thus her primary attachment figures.

The same judge took a much more benign approach to the local authority's application in the case of *RBWM v H&O* [2015] EWFC B170 in which she was concerned with an application for a placement order in respect of the fifth child in a sibling group: two resided in the care of an adult sibling and two had been placed for adoption. In making care and placement orders, judge indicated that *'I share the Guardian's concerns about the need to try to locate prospective adopters willing to consider sibling contact but am reassured by the local authority indication that this will be pursued'*.

There are cases which are clearly finely-balanced, causing the judge to give very anxious thought to the best (or least detrimental) option and how most appropriately to preserve the sibling bond. A clear example of this is provided by the case of *London Borough of Haringey v LM and Ors* [2014] EWFC B172 which concerned full siblings of Eastern European origin who were respectively 7 and 3

years old. A Consultant Psychiatrist strikingly advised that in the face of a conflictual and chaotic parental relationship, the relationship between the two siblings provided each with their most secure attachment figure, and it would be '*particularly dangerous'* to break that relationship. His Honour Judge Mitchell was extremely concerned about the risk of separate placement, noting as follows:

> They must not be separated even if it means that either of them will forgo the chance of being adopted. There is a risk that this advice and my judgment will be overlooked in the future especially if the children's social workers change. I regard the issue as so important that I shall not approve the final care plans unless either the authority accepts this and inserts it into the care plans or amends the plans to make their position clear and unambiguous and includes this paragraph of the judgment so that the Court's views are not overlooked.

With that caveat, the judge proceeded to grant care and placement orders. It is important to note that the caveat does not provide an absolute guarantee that the local authority will not attempt to separate the children: as previously noted, s.21 Adoption and Children Act 2002 confers upon the local authority the right to

place a child for adoption with any prospective adopters chosen by the local authority, and there is no statutory provision which permits the judge to interfere with that broad discretion by insisting upon the placement of siblings together. That said, it is reasonable to expect the local authority (and the Independent Reviewing Officer) to be very cautious about departing from its own care plan, and furthermore, as discussed in the context of *Re A* [2014] (supra), the very clear indication given by the judge could be utilised to very persuasive effect by any parent seeking revocation of the placement orders in the event that the local authority sought to place the children separately.

Unfortunately, however, there are examples within the reports of egregious behaviour by the local authority – as exemplified by the judgment of Her Honour Judge Matthews in the case of *Re G* [2019] EWFC B70, referred to earlier in the context of expert instruction, in which the local authority evinced no scruple in departing from its own care plan, resulting in what the judge described as '*untold damage'* to the two subject children. The judge indicated that she intended to publish the judgment

> because it will hopefully serve as a cautionary tale to other

> childcare professionals, as to how even well-meaning workers can fall into serious error if they fail to adhere to the care plan approved by the court, fail to consult with experienced third parties such as CAFCASS and lose a sense of fairness and responsibility to the families into whose lives they have intervened.

The judge noted that the local authority's own evidence within the care proceedings had been that the children shared '*a very close reciprocal bond'* and should not be separated; the approved care plan was for a shared adoptive placement, with a contingency plan of remaining together in foster-care. In the event, the children were peremptorily separated as a direct result of the advice of a psychologist, later discredited, with the younger child eventually being placed for adoption and the elder in a residential unit, leading the judge to comment that

> (The family) … believed that the children had been taken away for a better life together and instead, nearly a year later, neither had a permanent home and a separation had been enforced, when the LA had promised to keep them together. This reflects very poor social work practice, in my judgment.

The judge further noted that the prospective adopters of the younger child had had ' *a world of trouble brought to their door by the Local Authority's handling of this matter'*.

The judge concluded her judgment by highlighting the lacunae in the court's powers to control or scrutinise the local authority's implementation of the approved care plans in default of any further application being made – which very much resonates with the issues explored within this research.

Various of the cases demonstrate the careful balancing of known unknowns and unknown knowns: a good example of this is derived from the case of *London Borough of Haringey v AB (Rev 1)* [2015] EWFC B154 in which the judge was concerned with the welfare of four Congolese children who had presented at the offices of Social Services, having allegedly been found in a distressed state in the street. The children handed over a note requesting assistance to find their sister: it transpired that the 'sister' was the 20-year-old mother of the youngest child, who was then 5 years old and had been conceived of rape by the mother's father, rendering that child both the half-sibling of the elder children and also their uncle. It was determined that the 'sister' would be unable to care for the four

children, all of whom were assessed as having a very close relationship with each other: the local authority proposed adoption for the 5-year-old and long-term fostering for his elder siblings. In refusing to sanction the placement application, Her Honour Judge Karp found that the slim but unknown chance of finding a successful adoptive placement was outweighed by the known advantages of the child's current placement with his siblings. The judge observed that:

> the value of ongoing contact with his sisters weighs heavily in the balance with CD's difficult history, which he shares with them … His sibling relationships are likely to endure into adulthood and be a source of strength to him throughout that adulthood and I find that these relationships will provide him with significant pleasure and strength and will reduce the risks of breakdown of a foster placement.

Another example of refusal to make placement orders was provided by the case of *Re A (Adoption)* [2016] EWFC B108, where District Judge Hale was concerned with the welfare of three sisters, the oldest of whom was 11 years old and highly resistant to adoption. The judge was very concerned that it would not be possible in any event to place the girls together, thus potentially leading to the

children experiencing feelings of rejection: in dismissing the placement applications, the judge referred to the local authority's plan of adoption as owing more '*to hope than to expectation'* and as being unrealistic; he determined that long-term fostering, although imperfect, offered the best option for permanency for these particular children.

The case of *OCC v P* [2020] EWFC B47 provides a further illustration of circumstances in which applications for placement orders were refused. Her Honour Judge Owens was concerned with another sibling group of three children and had been invited to make care and placement orders in respect of the youngest two. All three children had complex needs. Although the judge noted the implications of severing the relationship between those children and their parents, she added that:

> far more significant for them both now and later, in my view, is what might happen both now and throughout their lives if the sibling bond between B and C were to be severed considering all the evidence about the strength of this bond.

The family-finder evidence was that it would be far easier to place

the youngest child alone rather than the two children together. In dismissing the placement applications, the judge specifically found that '*perhaps most significantly for these particular children*', foster-care provided greater certainty that they would remain together as siblings. She also noted that it would facilitate ongoing contact with their eldest sibling, although the evidence of their bond with their older sister was less compelling than the evidence of the bond between the youngest two. The judge also expressed concern about the evidence given by the author of the Child Permanency Reports as follows:

> Her evidence that adoption has not yet been ruled out for (*the eldest child)* despite the final care plan, her age, complex needs and all the local authority evidence stating that the best permanency outcome for her was long term foster care was worrying to say the least. She also told me that for (*the youngest two children*) it *"is accepted that adoption for children of these ages is absolutely the best".* It is hard to disagree with the submission of Dr Gatland that the overall tenor of her evidence pointed to a conclusion that she had started from the perspective that adoption is the 'gold standard', ie the ideal permanence option unless the child is not adoptable in which case a less favourable option would be

> considered. That is wholly against the law as it currently stands and perhaps explains the absence of analysis of the respective positives and negatives of long-term foster care in the child permanency reports.

The Judge was very clear that the Together or Apart assessment strongly demonstrated that the sibling bond between the younger children required to be preserved and that there would be a risk of harm to the children if that did not occur: ultimately, she concluded that long-term foster-care would provide greater certainty that they would remain together as siblings.

Judge Owens' concerns about the mindset which regards adoption as the '*gold standard'* were very much reflected within the case which produced one of the quotations in the introductory chapter to this thesis, *Re A (A Child: Flawed Placement Application)* [2020] EWFC B2. That case well demonstrated the limits to judicial tolerance of essentially opportunistic placement applications. The local authority had sought care and placement orders in respect of a 4-year-old child with complex physical and developmental needs, five older un-adopted siblings, and a large family drawn from a rich minority-ethnic European heritage. In

dismissing the placement application, Her Honour Judge Lazarus was highly critical of the local authority's failure adequately to analyse the benefits and detriments of adoption, asking rhetorically, as earlier (partially) quoted:

> How is it that adoption appears to have become a kind of orthodoxy that requires inconvenient matters to be ignored and others to be twisted to its support? Is there an endemic automatic approach to a younger child's age which results in a simplistic tick-box response instead of a careful analysis of her particular welfare interests? What sort of positive qualities would a birth family need to offer to be able to dislodge this approach to adoption and trigger a more balanced analysis and a preparedness to consider and address the full range of options?

The last sentence provides a pointed invitation to further socio-legal research, but the words quoted, taken as a whole, give the clearest possible signal that the courts will not blindly rubber-stamp an approach which is formulaic rather than driven by a bespoke analysis of how best to promote the welfare interests of the particular child or children with whom the court is concerned.

7.5 Approval of Separation

Whilst, as indicated, there are a number of examples of the refusal of placement orders in order to preserve sibling relationships, there are, conversely, cases where the placement of siblings together was specifically contra-indicated. One example of this appears in the case of *Re G & Ors (Children)* [2015] EWFC B144, where the judge was concerned with the welfare of a sibling group of five children ranging in age from 17 years down to just 2 years old. The children had additional maternal half-siblings, respectively 10 and 9 years of age, who lived with the father of those two children. The local authority acknowledged that the eldest child was too old for any statutory order (a care order may not be made in the case of a child who has attained her 17th birthday – Children Act 1989 s.31(3)). It proposed long-term fostering for the next two children in descending order of age, with a plan of placement together for adoption of the full-sibling youngest two children. Those two youngest children were reported by their nursery to engage in '*vicious*' behaviour towards each other; both children were regarded as developmentally delayed. The father of those two children, who had an acknowledged capacity for violence as well as mental health challenges, had made credible threats to track the

children down in the event of their adoption. The judge made care orders in respect of the four younger children and placement orders for the youngest two, noting the fractured, non-cohesive nature of the family unit and in particular that the second and third-eldest children would require separate, specialist placements to meet their needs – so there was simply no chance of maintaining the siblings in one placement. The judgment is silent on the issue of ongoing sibling contact, but it is reasonable to conclude that, in the light of the threats made by the father of the youngest two, any form of direct contact with their non-adopted siblings would be likely to involve unacceptable risks. It is not recorded whether an adoptive placement could realistically be anticipated for the two youngest children, together or separately, given their extreme behaviour, but the judge clearly considered that they were in a condition to be adopted and decided to give the children that opportunity in principle, notwithstanding its implications for permanent severance of relationships within the sibling group as a whole.

A further example of a positive decision to separate children is provided by the case of *Re X, Y & Z (Care and Placement Orders)* [2015] EWFC B115. This case concerned 3 full siblings who were respectively 5, 3 and almost 2 years old. The children had been

exposed to very significant inter-parent domestic violence and were noted to be aggressive towards each other and to exhibit sibling rivalry to an abnormal degree, with an assessment recording that '*The inter-sibling aggression was so extreme that it meant their individual needs could not be met and no level of support could be identified to keep the children together'* although the local authority nonetheless proposed that the youngest two be placed together. The judge acceded to the application for placement orders in respect of the youngest two, acknowledging the significant disadvantage of sibling separation but noting that it was simply not possible for the children to be cared for together as a sibling group.

Whilst in many of cases it was held that maintenance of the sibling group had been sabotaged by the impact of exposure to domestic abuse, inter-familial sexual abuse may also provide a contra-indication to the placement of children together. This was the case in *Re W (a Judgement)* [2015] EWFC B207, where the court was concerned with three young children who were respectively 12, 10 and 7 years of age, and the youngest members of a sibling group of eight children. There had been a long history of social work involvement, not least because of an entrenched pattern of sexual abuse, and one of the older brothers had been convicted of rape of

two of his sisters. In approving plans which provided for each child to be separately and individually placed in foster-care, the judge noted that '*they each need individual attention as the sole sibling in the household rather than competing for attention and being forgotten and neglected'.* Although in each of the cases cited, separation was deemed inevitable, the judge was very clear that this was not so much a positive choice as the least-worst option, required as a result of the impact of dreadful early life experiences upon each of the children concerned.

7.6 The Left-Behind Sibling

The reported cases also contain examples of the court acknowledging the disadvantages to a 'left behind' sibling but prioritising the welfare of children for whom a plan of adoption is proposed. One such example is contained within the report of the case of *Re J, K and L* [2016] EWFC B17 which concerned three brothers: J (9), K (7) and L (5). The children had two older full siblings already adopted (although one had since died), together with two older maternal half-siblings. The three children had initially been placed in a single foster-placement, but the local authority then removed J from the placement, at least in part as a

result of his aggression towards K. It was assessed that the relationship between J and his younger siblings was dysfunctional and it was highly unlikely that the needs of the three boys could be met in a single placement. The local authority plan was for a joint adoptive placement for K and L, whose relationship was described to be '*mainly good'*, and it was considered that their separation would cause further emotional trauma – although the initial contingency plan had been for separate placements in the event of an unsuccessful three-month search for a joint placement, with the plan subsequently amended to provide for long-term foster-care together if a joint adoptive placement failed to materialise. In approving the plan, the judge noted that there was '*no evidence that the children's relationships with any of their older siblings are important to them or that there is a benefit in having contact with them beyond promoting a sense of identity'.* In particular, the judge accepted the Guardian's evidence that the younger boys' relationship with J was not of such strength and quality as to outweigh the advantages of adoption. He noted that he could not ignore the impact upon J of his younger brothers being placed for adoption but held that '*the decision has to be based on the best interests of K and L'.* That observation falls to be considered within the context of the Judge also being required to make welfare

decisions for J in which that child's welfare was required by statute to be his paramount consideration. The case thus provides a very clear illustration of the paradox entailed in giving paramount consideration to the welfare of each child within a sibling group, when that welfare may be compromised for one or more children in order to promote the welfare of other members of the sibling group.

Although, numerically, the reported cases do not correlate with the findings of the questionnaire, there is a clear pattern discernible within the reports of the care and attention given to the question of whether or not children should be separated, including identifying when such separation is, if not a positive choice, the least-worst option for the individual children with whom the court is concerned. There is rather less clarity about how the court fulfils its statutory obligation to afford paramount consideration to the welfare of each of the children with whom the court is concerned in circumstances in which the solution which best promotes the welfare of one or more children is inimical to the welfare of another child within the sibling group – an issue which goes right to the heart of this study, and to which I will return in my concluding chapter.

7.7 Post-Adoption Contact – or Not.

As referred to within Chapter 5, the court's task when dealing with any application for a care order includes consideration of contact between the children, their parents and other significant family members (Children Act 1989 s.34(11)). However, sibling relationships are not specifically mentioned, and any person seeking contact with his or her sibling in care is in the same position as all but those with parental responsibility in requiring the permission of the court to make an application for contact with that sibling. In other words, the sibling relationship is not accorded any statutory priority within care proceedings and is thus in grave danger of being overlooked because its distinctive significance lacks formal recognition.

Furthermore, before granting a placement order, the court is required by virtue of s27(4) Adoption and Children Act 2002 to consider the arrangements which the adoption agency has made, or proposes to make, for allowing **any** person (emphasis added) contact with the child; pursuant to s.26(2)(b) of the 2002 Act, the court may make an order for contact between the child and a named

individual, but again there is no separate and specific reference to sibling contact in either of these statutory provisions. By virtue of s.26(1) (a) and (b) of the 2002 Act, any order requiring a child to made available to spend time with a named individual (whether through an order under s.8 or s.34 Children Act 1989) ceases to have effect once an adoption agency is authorised to place a child for adoption. Whilst it is possible to make an application for contact with a child who is the subject of a placement order, siblings are again consigned to the category of the generality of relatives by being required to obtain the permission of the court to seek such contact, with the very limited exception that no leave is required for a sibling who held a Child Arrangements Order in respect of the subject child prior to the grant of the placement order.

On any application for an adoption order, or after an adoption order is made, **any** person seeking contact with the child (other than the applicants for the adoption order, or the child herself) requires the permission of the court to make that application. The Adoption and Children Act 2002 s.51A(3) provides that the court may name in a contact order, inter alia, any person who, but for the making of an adoption order, would be related to the child by blood, half-blood, marriage or civil partnership. Siblings are again not singled out for

special mention, although whilst the interpretation section of the 2002 Act (s144 (1)) defines ‘relative’ quite restrictively, it does acknowledge the significance of blood-related siblings by their inclusion within that definition. It should also be noted that many placement applications are conducted in tandem with care proceedings; in such cases the children will have the benefit of a Cafcass Guardian as well as automatic entitlement to legal aid, but any application for public funding for legal representation to seek contact within or after free-standing placement or adoption proceedings is subject to both means and merits testing, thus providing a further possible barrier for any sibling in pursuit of a contact order.

The responses to the questionnaire revealed that 41.82% of the respondents had made a contact order when making a placement or an adoption order, although the overwhelming majority of respondents (91.30%) had made such an order on five or fewer occasions. As noted within the preceding chapter, the absence of an order does not equate with the absence of contact, because frequently contact is determined consensually (although typically confined to indirect, ‘letter box’ contact). It follows that those cases where an order is deemed to be necessary are likely to be those in

which some resistance to contact is envisaged, or perhaps the needs of the children for contact are so overwhelmingly great that it is thought necessary to formalise and promote this by the making of a contact order. The incidence within the studied cases of making (or declining to make) contact orders is strikingly demonstrated by the following chart which builds on the previous chart identifying the numbers of placement applications in each of the relevant years:

Year	2014	2015	2016	2017	2018	2019	2020
Place-ment Appns	35	44	25	18	17	13	6
Conta-ct orders made	0	0	0	0	1	0	0
Conta-ct encour-aged.	7	9	5	6	6	4	0

It may be regarded as quite extraordinary that amidst all the cases considered, there is but one example of the court deciding to make a formal contact order: this finding is clearly entirely out of step with the data gleaned from the survey. Although any conclusions as to the reasons for the discrepancy must be regarded as speculative, the most obvious explanation lies in the relative frequency with which the issue of contact is considered but not set out in an order, generally to avoid hampering the search for adoptive placements or restricting the potential pool of prospective adoptive parents. It must also be noted that many of the reported cases engage only briefly, if at all, with the issue of sibling contact – possibly because it was not a contentious issue and therefore was not considered to require adjudication.

Before exploring the cases in which the judge stopped short of making any formal order, it is appropriate to consider the decision in the sole case in which an order was made, namely *Re A,B,C,D and E (Children: Placement Orders: Separating Siblings)* [2018] EWFC B11. As discussed, the case had earlier been adjourned by His Honour Judge Bellamy for the filing of expert evidence as to the impact of separation upon the four eldest of a sibling group of

five children. The eldest child within the sibling group was 11 years old; the younger three children were respectively 4, 3, and 2 years old, and the baby was 1year old. The local authority proposed that the four youngest children should be adopted in two separate placements of two children each, but with ongoing post-adoption contact between those four children: the expert evidence was that the maintenance of inter-sibling contact would be particularly important if the children ended up in four separate adoptive placements. It seems that all agreed that it was appropriate to underpin that recognition with an order for contact pursuant to s.26 Adoption and Children Act 2002, and the judge duly made that order. However, the eldest child, A, was to remain in long-term foster-care, and the local authority proposed that his contact with his siblings, after their adoption, should be indirect only, on the basis that he would continue to have direct contact with his mother and grandmother. The judge initially considered that this should be reversed, to the intent that A would have direct contact with his siblings and indirect contact with the adult family members; he acknowledged that the decision was '*acutely difficult and very finely balanced'* but ultimately concluded that there should be continuing direct contact between A and his mother and grandmother, with the express proviso that if such contact should

break down, the local authority should consider the potential for restoring direct contact between A and his younger siblings. The judge declined to make a contingent order to underpin that proviso, but did specifically invite the Independent Reviewing Officer to keep the matter under review.

In addition to that sole example of a s.26 order, it should also be recognised that there are examples of orders being made under s.34 Children Act 1989 to permit the local authority to refuse contact between a child in care and adult family members, in order to facilitate direct contact between that child and an adopted sibling. This was the position, as previously described, in the case of *Re A & C (Children)* [2014] EWFC B54 – so in other words, contact between an adopted and an un-adopted sibling was facilitated by the pragmatic use of a different statutory route.

The cases considered contain 37 examples of the court emphasising an expectation of ongoing sibling contact (some direct, some indirect) but stopping short of making formal contact orders. The case of *Re A, B, C and D (Children: Learning Disabled Parents)* [2018] EWFC B96 provides a clear example of anxious judicial care being applied to this important issue. His Honour Judge

Willans was concerned with a group of four sibling children: two were of secondary school age, and the third and fourth children were respectively 8 and 3 years old. There was noted to be a particularly firm emotional bond between the second oldest and the youngest child (D), and a strong bond across the entire sibling group. The local authority proposed long-term fostering with ongoing parental contact for the eldest three children, and placement for adoption for the youngest child. The children's father had a significant capacity for threatening behaviour which was considered to provide an obvious obstacle to any post-adoption parental contact, but on the subject of post-adoption sibling contact the judge made the following observations:

> I agree that contact would have the potential benefit of alleviating the very real emotional stresses that would flow from the making of a placement order in that it would continue to permit D the sense of her family identity and the continuing bond with her siblings … But … It would in doing so be a real challenge to her ability to find a permanent home with a new family. It would have the potential to stage periods of real stress twice each year when emotions would significantly rise … I agree that it is appropriate for adopters to have brought to their attention the positives of contact and a clear understanding of

> the dynamics of the sibling relationship so they can properly consider the benefits which might flow from contact. But ultimately I would not wish to tie their hands.

The concern about the impact of a contact requirement upon the timely identification of prospective adopters provides a recurring theme in judgments which extol the advantages of contact but stop short of making a formal contact order. One such example is provided by the case of *A Local Authority v B, H and I (Sibling as Carer or Adoption) (Rev. 1)* [2019] EWFC B1 in which the judge was concerned with three children from a sibling group of nine, the children in question being 17 years old, 4 years old and 22 months. In making placement orders in respect of the youngest two children, the judge endorsed the plan to seek an open adoption enabling ongoing sibling contact, but emphasised that this should not be at the expense of delay if an otherwise-suitable placement became available.

A further example is seen within the case of *Re FP (A Child: Care and Placement Order)* [2014] EWFC B137 in which His Honour Judge Hernandez was concerned with a baby boy who was part of a large sibling group, with two full siblings who had already been

placed for adoption, as well as two maternal and five paternal half-siblings. It was considered unlikely that the adopters of the full siblings would be able in addition to take the baby, and it is unclear from the judgment whether there was any scope for placement with a half-sibling. In making care and placement orders, the judge stopped short of directing contact between the baby and his full siblings, but made it clear that every effort should be made to ensure that such contact took place. It is not obvious from the report why contact between the baby and his adopted siblings should have been contentious, but contact between an adopted child and un-adopted family members presents different challenges, as articulated by His Honour Judge Wood in the case of *Re A (a Child) – Inability of Mother to Prioritise* [2016] EWFC B116 in which the court noted:

> It is the experience of adoption agencies that children who are effectively offered for adoption, subject to conditions of ongoing contact with members of the birth family, suffer a particularly hard fate in that very few adopters come forward, if any, to consider taking on such a child.

That quotation encapsulates what would appear from the case reports to be the single greatest obstacle to prescribing contact

arrangements between adopted and unadopted siblings by way of court order, and points inescapably to the need for further research to understand and address, where appropriate, the barriers to post-adoption contact.

There is little doubt that the case law reveals significant judicial challenges in balancing competing sibling interests. Within the next chapter, I will consider in the round the data derived from the questionnaire together with the information gleaned from an exploration of the reported cases, through the prism of the research questions. I will build on this exploration in Chapter 9 in order to reach conclusions as to the ability of the current statutory framework to accommodate and promote competing welfare imperatives. I will also consider the proposals advanced by my judicial colleagues for statutory modification and draw all the threads of the research together in order to reach final and definitive responses to the three research questions.

CHAPTER 8

JUDICIAL DECISION-MAKING: DISCUSSION AND ANALYSIS

> Siblings with existing bonds should in principle not be separated by placements in alternative care unless there is a clear risk of abuse or other justification in the best interests of the child. In any case, every effort should be made to enable siblings to maintain contact with each other, unless that is against their wishes and feelings -
>
> **United Nations Resolution 64/142, Guidelines for the Alternative Care of Children 2010, para.17.**

This chapter will begin with discussion and analysis of the extent to which the findings from the survey, indicating what judges say that they do, resonate with the information gleaned from reported cases as to what judges are seen to do in practice; it will also explore whether judicial decision-making appears to be consistent with the imperative set out within this chapter's opening quotation. I will then place that analysis within the context of the research questions, before proceeding to locate those findings within the themes identified within the literature exploration described in Chapter 2 of this study.

8.1 Words v Deeds: the Questionnaire Findings Compared and Contrasted with Reported Cases

The data revealed by the questionnaire responses is extensively reviewed in Chapter 6, with a detailed discussion of the cases reported appearing in Chapter 7. The first eight questions were crafted with the intention of eliciting quantitative data which would cast light upon the judicial approach to cases where there is potential for sibling separation. The remaining three questions invited comment and narrative as to the robustness of the statutory framework. It is convenient to deal with the data produced in response the quantitative questions within this chapter, undertaking a comparison with the data emerging from the exploration of reported cases, and leaving the issues as to the robustness of the statutory framework to be addressed within my concluding chapter.

The first question enquired how frequently judges had been asked within final care plans to consider separating siblings. The responses ranged from five or fewer to in excess of twenty occasions: the only respondent who had not been asked to consider such a plan was in his first week of appointment and had yet to hold his first final hearing.

The exploration of reported cases between April 2014 and December 2020 found 188 cases of relevance to the issue of sibling separation: this finding supports the conclusions drawn from the responses to the questionnaire that sibling separation is a real and frequently-encountered issue, although a mere numerical answer does not of itself cast any light upon the extent to which the separation of siblings is perceived by judges to be a momentous and serious issue, meriting anxious consideration.

The second question seeks views as to whether local authorities always pay sufficient attention, in formulating final care plans, to the strengths and weaknesses of the sibling bond. This resulted in a small but heartening majority supporting the proposition that sufficient such attention is indeed paid; 20% of respondents were neutral, but, less happily, 27.27% disagreed with the contented majority – although no-one strongly disagreed. When comparing this outcome with the exploration of reported cases, and whilst it is difficult to produce a direct numerical comparison, it is noteworthy that in no fewer than ninety of the one hundred and eighty-eight cases reviewed, the court made the final order sought by the local authority, accepting without explicit amendment the care plans proffered – implying that the judge was satisfied that the local authority had indeed appropriately

considered the issue of sibling bonds. However, a necessary caveat is that whilst it is clear from those ninety cases that the care plans were accepted, it is not always possible to glean from concise judgments whether the plan approved was in the form as originally submitted to the court, or whether it had evolved in the course of pre-hearing discussions or within the hearing itself, thus leading to the court approving an amended (and hopefully improved) version. It should be noted that approval in ninety cases does not automatically mean disapproval in the remaining cases: in a number of cases the applications were dismissed, but in others, the explanation for non-approval may lie elsewhere – for example, adjournment for further evidence or to test out a family placement, or an agreed alternative outcome such as rehabilitation. Whilst the combined data supports an inference of respect for the imperative enshrined within the quoted United Nations' Guidelines, there is little hard evidence conclusively to demonstrate such respect.

The third question sought to establish levels of judicial satisfaction with local authorities' 'Together or Apart' assessments – such assessments being intended to provide explicit evidence as to the strengths and weaknesses of the sibling bond. Despite the responses to the questionnaire indicating that only 27% of the respondents were

assisted by good-quality assessments, it is striking that the analysis of case reports revealed very few adjournments for further evidence. However, this requires to be considered within the context of how care proceedings are conducted as they progress through the courts. Most issues relating to the directing of further evidence are dealt with during the various case management hearings which precede the final trial and thus such applications will rarely find their way into any court reports; for the most part, published judgments are confined to the decisions made at final hearings (which may sometimes include an adjournment of the final hearing) rather than reporting case management hearings. Clearly, there are some exceptions to this, notably, for example, *Re K, D (Children: Care Proceedings: Separation of Siblings)* [2014] EWFC B104 where His Honour Judge Bellamy adjourned the final hearing to seek expert evidence as to whether direct contact between two siblings could fill the void created by their separate living arrangements. The question of directing further evidence must also be considered in conjunction with the next question, but it is fair to conclude that the evidence of the case reports neither confirms nor refutes the data elicited from the questionnaires.

In response to Question 4, addressing the frequency with which courts are invited to permit the instruction of an independent expert to

complete a ‘Together or Apart’ assessment, the data demonstrated clear reservations about such instructions, with approximately one-third of respondents considering that the local authority’s efforts were good enough. At first sight, this is at odds with the findings disclosed by respondents to the preceding question, although this fourth question also deals with the situation where an application for independent assessment was refused as being unnecessary, rather than because the local authority’s assessment was good enough. In other words, it may have been determined that it was not necessary in the particular case to have any such assessment at all. It must also be recognised that whilst applications are sometimes made for assessments which replicate previous assessments because those previous assessments are considered either to be out-of-date or to be of insufficient quality, an independent assessment may be proposed because the local authority does not have the resources to undertake such assessments in-house. If the local authority is simply commissioning an outside agency to stand in the shoes of the local authority and undertake an assessment, then the sanction of the court is not required, but the parties frequently prefer a jointly-instructed assessment where all parties and the judge have input into the choice of expert and the letter of instruction (and the cost is often shared between the local authority and the parties’ public funding

certificates). Whilst the parties will need the court's approval of such instruction, it is likely to be given well in advance of any final hearing, and possibly dealt with ex parte – ie upon consideration of the written application, with no hearing being necessary. It follows that the fact of such instruction is unlikely to feature within the reported cases, and indeed there is nothing within the reported cases which provides either corroboration or contradiction of the questionnaire results, save by reference to the limited extent that the reported cases resulted in adjournment in order to bespeak further evidence.

The fifth question sought to elicit responses to the proposition that where there is disparity of placement plan resulting in one or more of sibling group being placed for adoption whilst others are not, the reasons for that disparity are well-evidenced. Only a minority – 20% of respondents – positively disagreed with the proposition, and this correlates to a degree with the relatively small – but still significant – number of reported cases in which the court has refused to accede to placement applications. Some of those refusals were firmly grounded in concern about sibling separation, as cited in Chapter 7, whilst others were determined by the court's preference for an alternative form of placement, possibly by way of rehabilitation to a parent or extended family placement. However, it follows that in those cases

where a judge determined that the risk of sibling separation was more compelling than the disadvantages of long-term foster-care, and thus refused to grant placement orders, it may be inferred that the judge was not satisfied that the local authority had satisfactorily evidenced the need for disparity of care plan within the sibling group.

The sixth question sought to explore the contribution of the Children's Guardian, and the results of the survey were overwhelmingly positive about that contribution, with only 12.73% of responses indicating that in some cases, the reasons for disparity of sibling care plan were not appropriately scrutinised by the Guardian. This resonates with the information gleaned from the exploration of reported cases: whilst within the reported cases there was evidence that the court did not blindly accede to the Guardian's viewpoint (most notably in the case of *Re A (A Child)* [2016] EWFC B 101, supra), in the majority of cases it is clear from the judgment that the court accepted the recommendations of the Guardian. However, there are also examples where the court has rejected the advice of the Guardian– such as in the case of *Kent County Council v B, W and S (Combined Judgment: Delay: Refusal to Split Siblings* [2017] EWFC B5 where the Guardian had aligned with the local authority in proposing that the youngest child should leave her placement with her elder siblings in order to be

placed at some distance with her father, but the Judge refused to approve the arrangement, insisting that the sibling group remain intact. That reported case serves as a valuable reminder that whilst adoption may provide the ultimate mechanism for severance of the sibling relationship, such severance may also be the practical result of divergent care plans as to fostering or other care arrangements, and furthermore may occur within the context of private law disputes between separating parents. In that latter context, whilst it is not unknown for full siblings to be separated, the risks are inevitably greater for half-siblings where children may not remain in the care of the parent held in common. Although the information gleaned from the decided cases in relation to this question does not readily lend itself to be presented in mathematical form, it is reasonable to conclude that the information yielded from the published cases is broadly consonant with the results of the survey, with the case reports revealing limited criticism of work undertaken by Guardians, although with one or two striking and startling exceptions.

The seventh question sought to establish whether respondents had ever refused to make a placement order which would result in sibling separation. As indicated above, such refusal would imply that the judge is unhappy with the local authority's care plans, although there

are rare instances within the cases considered of the local authority inviting the court to dismiss the placement application because a different disposal was, by the time of the final hearing, the preferred outcome. The responses to the survey indicated that slightly over two-thirds of respondents had refused an application for a placement order because it would result in the severance of that child's relationship with his siblings. A little over 10% of those who had refused a placement application had done so in between five and ten cases: as indicated within Chapter 6, all of the serial refusers were current or former DFJs, and thus likely to be dealing with the most serious and challenging cases within their area. The reported cases disclosed twenty-five outright refusals to make placement orders, with an additional number of adjournments for the various reasons discussed in the preceding chapter. In considering this statistic, it is significant that although one hundred and eighty-eight cases were considered, not all such cases were the result of final hearings of placement applications. Some of the cases, as previously explained, arise from applications such as discharge of a care order or an application seeking the permission of the court to oppose the making of an adoption order. In total, one hundred and sixty of the cases considered addressed applications for placement orders in respect of some or all of the sibling group, and thus a little over 15% of reported placement

applications resulted in dismissal. In some cases, the dismissal was firmly rooted in judicial determination to preserve the sibling group – one explanation of this was provided in clear terms in the case of *Re L, J, K and E* [2016] EWFC by His Honour Judge Jones (although in that case the outcome was adjournment rather than dismissal) thus:

> If the provision of direct inter-sibling contact is so **fundamental** and central to these children's future welfare, and if this is to be provided at a **meaningful** frequency, and not at a tokenistic frequency, this is at odds with a plan for adoption, despite the possibility of post-adoptive contact Orders.

The judge in that case was dealing with a group of four children, with long-term foster-care proposed for the elder two and placement for adoption for the youngest two children. Although the judge goes on to refer specifically to the emotional tie between the youngest two and the eldest two children as separate pairs, rather than the ties between all the children, it is clear from his judgment that he was seeking to balance the welfare considerations relevant to all four children.

Not all dismissals are expressed to stem from fear of severing the sibling relationship: in some, the judge preferred a placement with a

family member, where the possibility of an ongoing sibling relationship was likely to be a happy consequence of the decision, rather than its driving force.

It follows from the statistics that there would appear on the surface to be limited correlation between the information derived from the questionnaire as to the number of applications dismissed, and the numbers disclosed by the case reports, but this must be seen in the context of the survey asking for numbers over an indefinite period of time – effectively the judicial career of the respondent – whereas the reported cases evidence a snapshot in time. With the benefit of hindsight, it might have been more appropriate to phrase the questionnaire in such a way as to limit responses to a time period which correlated more precisely with the time frame in which the reported cases were considered, but that further refinement may well have entailed more detailed consideration by the respondents which might in turn have deterred some judges from completing the questionnaire, and would thus have been counter-productive.

The eighth question invited judges to indicate whether, in concluding proceedings with placement or adoption orders, they had ever made orders for direct contact between siblings, and, if so, their best

estimate of such numbers. The results indicated that as many as 41.82% had made a contact order in such circumstances although a substantial majority had made such an order on five or fewer occasions. As discussed within the preceding chapter, it is striking that the cases considered revealed only one order made pursuant to s.26 Adoption and Children Act 2002, leading to speculation as to whether judicial words and deeds are entirely ad idem. That said, it must be acknowledged, as set out in connection with the preceding question, that the answers to the questionnaire cover an extended and indefinite period, whilst the cases considered were all heard within a six-year period; moreover, and again as previously discussed, the absence of a contact order does not necessarily equate with an absence of contact, with an order not always being necessary in the presence of consensus. That consensus may have been present at the start of the final hearing, or may have emerged in the course of the hearing and as the evidence unfolded – and possibly after significant judicial encouragement.

As indicated, the final three questions within the survey, inviting comment as to improvements in law and procedure, will be further considered within the next chapter.

8.2 Analysis of the Questionnaire Responses and Reported Cases by Reference to the Research Questions

The first research question:

To what extent the material considered evidences (or fails to evidence) that the court sufficiently considers the potentially-competing welfare interests of sibling children in considering placement decisions which may result in the permanent severance of the sibling relationship?

It should be acknowledged that whilst a child's welfare is paramount both in reaching a decision either to make a care order or to make an order permitting placement for adoption, there is an important legal distinction in that, in considering placement applications, the judge is obliged not only to hold the subject child's welfare at the present time as the paramount consideration, but must so hold it throughout the child's life. It may thus be argued, although perhaps not very persuasively, that the welfare considerations in respect of the potentially-adopted child are somehow elevated and should therefore trump the welfare

considerations appertaining to his unadopted sibling. Interestingly, when the Adoption and Children Bill was debated in Parliament, Alan Milburn (Hansard, 2001) in leading the debate as Secretary of State for Health, displayed no awareness of any distinction between the two statutes, and specifically that the reference to 'later life' was not to be found within the 1989 Act:

> Clause 1 makes the welfare of the child, in childhood and later life, the paramount consideration for the court or adoption agency in making any decision relating to adoption. That brings the law on adoption for the first time into line with the law in the Children Acts.

That pronouncement does not foreshadow any statutory priority within a sibling group to the welfare of any child in respect of whom a placement order is sought, and it has not been possible to locate any authority within case law for the proposition that the welfare of the potentially-adopted sibling should trump the welfare of other members of the sibling group who are also the subject of proceedings. Given the need for a bespoke welfare decision in respect of each child, it would be surprising if the higher courts had ordained an immutable policy in this respect, but it leaves the trial

judge having to balance the benefits and detriments for each member of the sibling group, sometimes arriving at a decision which inevitably leaves one or more children at a comparative disadvantage. A clear example of the anxious care taken in such circumstances is provided by Judge Bellamy's decision in the case of *Re KD (Children: Care Proceedings*) [2014] (supra) to seek further expert evidence to assist him in the very difficult but absolutely crucial balancing act required in order to determine how best to promote the conflicting welfare of two siblings of disparate ages.

The cases considered contain a number of examples of the scrupulous balancing of competing sibling interests. The case of *Re A (Family Placements or Foster Care)* [2017] EWFC B111 is unusual in that the interests of the younger, potentially-adoptable child having been weighed in the balance against the interests of that child's 9-year-old sibling, and the interests of the elder child prevailed, the court deciding that the children must not be separated, even though that decision would mean that the younger child must sacrifice the chance of securing permanency via adoption. It is more usual for the balance to tip in favour of permanency for a younger child or children, even though such an

arrangement will create distress for the left-behind child: for example, in the case of *Re WW, XX, YY and ZZ (Children*) [2018] EWFC B94, the judge acknowledged the wishes of the eldest two children that their two younger siblings, with whom they shared a strong bond, should not be adopted, but considered that the balance came down firmly in favour of adoptive placement. He approved the plan for twice-yearly direct sibling contact, although there is no indication of a formal contact order. The priority accorded to the interests of the younger child or children is further exemplified by the case of *Re J, K and L* [2016] (supra).

Attempts at damage-limitation in the form of exhortation as to contact appear in several of the cases examined, although as discussed below, there is very little inclination positively to order contact in order to mitigate the effects of separation.

In some cases, there is no obvious weighing of competing interests because the court seems simply to have taken at face value the assurances of the local authority that the children will not be separated: for example, in the case of *Re X and Y Children* [2018] EWFC B31, the judge recited that the children need to live together and will be placed together. In the case of *Re PQR (Children)*

[2017] EWFC B86, the court unquestioningly accepted a plan for a time-limited search to enable three sisters, the youngest of whom was one year old and thus likely to be very easy to place as a single child, to be placed for adoption together, with a contingency of long-term fostering. It must be acknowledged that judges are likely to know their local authorities and are likely therefore to be aware of the extent to which any given local authority can be trusted to adhere to its care plans. Some judges are less accepting of a general intention, requiring firm written commitment within the care plans – for example, His Honour Judge Mitchell in the case of *London Borough of Haringey v LM and Ors* [2014] EWFC B172) refused to approve final care plans in respect of two sibling children unless the local authority agreed to insert within its care plans that the children must not be separated even if it meant that either of them would thus forgo the chance of adoption. The cases examined revealed five examples of the court insisting upon formal amendments to the care plans proscribing sibling separation. At the other end of the spectrum, in a number of cases, as shown, the court was sufficiently troubled by the risk of prejudice to the sibling relationship that applications for placement orders were refused: in such cases it is clear that the court did weigh in the balance the respective interests of the siblings, albeit some such applications

were refused because the court was not satisfied that the high test for adoption was met. One such case was that of *Re N (A Minor Child)* [2015] EWFC B106 where the judge preferred a placement with grandparents; in other cases, the clear reason for refusal was the risk (or inevitability) of sibling separation. In some such cases, the local authority advanced differing plans for siblings, with only one or more of a sibling group singled out to be the subject of a placement application. If granted, and if successful placement follows, then separation would be inevitable. That was the situation in the case of *Re J (Placement Order Application)* [2015] EWFC B82 where His Honour Judge Perry refused a placement order in respect of the youngest of a group of three children, holding that the welfare of that child was best promoted by remaining with his older siblings, and that the welfare of the elder siblings, and thus also of the youngest child, was best served in long-term foster-care.

In other cases, the local authority's plan was for a sibling group to be placed together for adoption, but the court was not satisfied that this plan would be fulfilled – for example, in the case of *Re X, Y and Z Children v Southend-on-Sea Borough Council and Ors* [2014] EWFC B123 the judge dismissed as not remotely reasonable the proposal to seek an adoptive placement for a group

of three children ranging in age from 5 to 13 years old. A similar approach was taken in the case of *Re A (Adoption)* [2016] EWFC B19 in which the court refused to countenance a plan of adoption for three sisters, the eldest of whom was 11 years old and firmly opposed to adoption. It may be thought that those decisions owe as much to common sense as to legal analysis, given the age of the eldest child in each case and the inherent improbability of successful identification of a shared adoptive placement: the situation was rather more nuanced in the case of *Re A, B, C and D (Children)* [2019] EWFC B32 in which the court declined to make placement orders in respect of the three oldest children of a sibling group of four, where their younger sibling was to remain in an extended family placement and the court found that the loss of contact with that younger child (and with their parents) would be '*devastating to them throughout their life'* and the order which the judge proposed to make would preserve the sibling bond.

It must be said that in many of the reported cases, there is little or no reference to any disadvantage accruing to the non-adopted sibling when his (usually) younger sibling is made the subject of a placement order. However, given the absolute requirement for a full, global analysis of all competing options – as explained within

the chapter setting out the legal framework – it is unwise to assume that the absence of any reference to the issue equates to an absence of any consideration of its significance: it may simply be that the brevity of the judgment does not lend itself to a full articulation of every issue raised within the hearing. Having said all that, the court is required in all cases to consider the relevant welfare checklists, and an important component of the checklist within the 2002 Act is consideration of the child's relationship with relatives (s.1(4)(f)) – so the absence of any overt consideration of the impact upon the sibling relationship is perhaps rather surprising, albeit that that subsection does not single out siblings for especial mention, and requires consideration of the relationship from the perspective of the potentially-adopted child, not from that of his un-adopted sibling.

The questionnaire responses of most obvious and direct relevance to this research question were elicited by the seventh question, addressing instances of refusal to make a placement order which would result in sibling separation. It is noteworthy that over two-thirds of respondents had dismissed such applications, lending credence to the proposition that the court does indeed sufficiently – or at least in a majority of cases – consider potentially-competing

welfare interests within members of a sibling group. This proposition is further supported by the indication that a majority of judges consider that the reasons for disparity of sibling care plan are well-evidenced, although of course a minority of judges did not accept that to be the case. That response also falls to be considered within the context of limited judicial satisfaction with Together or Apart assessments.

Taking the body of evidence as a whole, it is clear that whilst some judges are furnished with good-quality evidence to facilitate consideration of potentially-competing sibling welfare interests, it cannot be concluded that this is universally the case, and this remains an area in which further work is indicated.

The second research question:

If separate placements are inevitable, do the case reports evidence sufficient attention to the preservation of sibling relationships by direct or by indirect contact?

As noted, specific contact orders are vanishingly rare within the cases considered; in contrast, there is an almost universal acceptance of the value of some form of contact, even if it is confined to indirect contact by means of letters through the Adoption Support Service. To that extent, there is recognition of the importance of promoting the connection between siblings, albeit frequently within the significant constraints of annual or twice-yearly letterbox contact. It is also clear, as indicated in Chapters 6 and 7, that the judicial respondents to the questionnaire reported the making of significant numbers of contact orders; the reasons for the disconnect between that data and the conclusions driven by exploration of reported cases are discussed within Chapter 7 and do not require repetition.

Direct contact between adopted and unadopted siblings brings with it the fear of disclosure of the identity of the adopters or location of the placement. As observed above, in *Re A & C (Children)* [2014] EWFC, Judge Hudson approved care plans which would facilitate direct contact between adopted and unadopted siblings by the expedient of permitting the local authority to withhold contact between the looked-after child and her parents. However, that is not a perfect solution, not least at a time when social media is widely

implicated in unplanned contact with family members, and it is impossible to guarantee that the fostered child will not at some point come under considerable pressure to disclose information which may lead directly to the door of her adopted siblings.

Further examples of the judicial approach to contact are commented upon within the preceding sections of this chapter, but it is pertinent to consider additional cases by way of further examination of this question. As recorded above, in many of the cases considered, the judge gave positive encouragement to the promotion of inter-sibling contact, approving the care plans in this respect, but in a number of cases declined to make a contact order, with the most frequently-cited reason being concern about inhibiting the search for an adoptive placement. In the case of *Re H (Care and Placement Application)* [2018] EWFC B36, Her Honour Judge Vincent declined to make a sibling contact order because she was satisfied that the local authority was committed to searching for adoptive parents who would be willing to facilitate sibling contact, but also noted that:

> There is a significant risk that a contact order made at this stage of the proceedings is likely to impede the search for an adoptive

> placement; it is one thing for a prospective adopter to be open to the idea of contact in principle, it is another thing to agree to it when you will have no say over its terms.

Arguably, the judge's reservations could have been addressed by an order for 'reasonable contact' which would have had the virtue of laying down a marker as to the necessity for contact whilst leaving the specifics to be determined at a time when the adopters were able to participate in the negotiations.

In the case of *Re F (Care and Placement Orders)* [2018] EWFC B43, Miss Recorder Henley advanced a different rationale for declining to make contact orders in relation to a sibling group of four children where the plan was for the eldest child to remain in long-term foster care and for each of the three younger children to be placed in individual adoptive placements, the trauma which the children had suffered having resulted in each needing to be the youngest child in their respective families. The judge expressed the view that the potential emotional harm of separation could be ameliorated by ongoing contact, and that any prospective carer for any of the three younger children must be willing to facilitate contact. The judge did not accept that this would unduly restrict the

pool of potential carers available but stopped short of making a contact order, clearly expecting the local authority to make willingness to promote contact a pre-condition of placement. The judge also expressed that contact should not be promoted unless all the children were adopted or all were fostered, on the basis that contact between an adopted child and one who was still in contact with the birth parents could threaten the security of the adoptive placement.

A further variation of approach was shown by Her Honour Judge Laura Harris in the case of *Re ER (Placement Order)* [2014] EWFC B146 where the judge found that contact between a prospectively-adopted baby and her elder two siblings (in foster-care) would be of enormous benefit to the baby, but declined to make any order, simply indicating that any adopters '*worth their salt'* would consider the prospects of contact '*further down the road'*. It is sometimes the case that the court's judgment is released to adoptive parents: it would clearly have been very helpful in that case for the adoptive parents to have been made aware, in advance of placement, of the court's exhortation.

Simmonds (2020, p.29) proposes that the 'clean break' view of adoption has become unhelpful and misleading, and that, at its best, adoption results in '*an integrated narrative for the child/adult, the adoptive and birth parents, and their wider families'*, the better to address the needs of the adopted child (and his unadopted sibling) to understand their roots, identity and life-story. However, it is one thing for adoptive parents to assist their adopted child to explore her history in a planned and structured manner: it is quite another to have that exploration forced upon them in an uncontrolled fashion as a result of the unplanned disclosure of their identity and location. That said, it should be noted that Selwyn et al (2014), in their seminal investigation into adoption disruption, did not single out birth family interference as a significant driver for such disruption: the natural family feature primarily within the context of disaffected adolescents seeking out a birth parent after a series of difficulties within the adoptive family, rather than the birth family being of itself a source of such difficulties – so arguably the concerns surrounding the risks of disclosure are more apparent than real, and yet another fruitful topic for further research, building on the work already undertaken by Fursland (2010a and 2010b) in this important area. In the meantime, analysis of the case reports, considered in conjunction with the slightly more encouraging data

revealed within the questionnaire responses, suggests that addressing the issue of optimal contact arrangements between separated siblings remains, at best, a work in progress.

The third research question:

Do the case reports demonstrate that the law is flexible enough to reconcile differing and competing welfare implications for individual siblings, especially those siblings left behind whilst other siblings are received into adoptive families?

The extent to which this question is capable of being illuminated by the data gleaned from published reports builds on the first question and seeks to explore the degree to which it is possible to evidence that the law is flexible enough to reconcile differing and competing welfare implications for individual siblings, especially those siblings left behind whilst other siblings are received into adoptive families. With its emphasis upon the welfare of the individual child, there is no doubt that the wording of both the Children Act 1989 and the Adoption and Children Act 2002 is capable of facilitating and encouraging a bespoke welfare package

for each child – but that does not necessarily assist in the event that the optimum welfare arrangements for one child may be secured to the detriment of another member of the same sibling group.

The obligation to afford paramount consideration to the welfare of the child applies only to the child who is the subject of proceedings – so in strict legal principle, the court is not obliged to consider the welfare of sibling children who were the subject of earlier and now concluded proceedings, or possibly not the subject of proceedings at all. That said, it is difficult to see how holistic analysis of a child's welfare can avoid considering the interplay of the interests of siblings, and it is also difficult to undertake the necessary balancing exercise when more than one member of a sibling group is the subject of the same legal proceedings, but their apparent welfare interests diverge. An example of this was provided by the case of *Re B (Judgment)* [2014] EWFC B179 in which Judge Jones was concerned with the welfare of four full-sibling children and their maternal half-sibling baby brother. The eldest four children were placed with their father under a care order and a placement order was made in respect of the baby, the judge noting that the impact upon inter-sibling contact was of greater significance to the four older children, and it was the welfare of the baby which was

his paramount consideration. It is impossible to glean from the judgment to what extent the judge took into account the adverse impact upon the eldest four children of the loss of their baby brother to adoption, but Judge Jones was very clear that, from the baby's perspective, the loss of the future inter-sibling relationship required to be balanced against the potential gain of a safe and secure adoptive placement.

The case of *Re K, C and D (Care Order)* [2017] EWFC B110 provides an example of a challenging case involving the fine balance of competing sibling interests, although the proposals for separating three sibling children stopped short of seeking a placement order in respect of any of the children. In that case, the placement of the elder two children (11 and 6 respectively) had foundered apparently because the elder child, who was desperate to return to her mother's care, attacked the younger in order to make him cry and thus to say that he wanted to go home; the youngest child (22 months) had a life-limiting condition with a very uncertain prognosis and required to be an only child in a two-carer placement to enable his particular needs to be met. The advice of the Guardian was that it would be in the best interests of the oldest child to be placed with middle child, but in the best interests of the

middle child to be placed separately from his older sister – so a very direct conflict of welfare interests for those two children, compounded by the uncertain future of the youngest sibling. After careful weighing of the competing factors, the judge resolved the matter in favour of individual foster-placements, but with a plan of a relatively high level of sibling contact on a fortnightly basis, with the baby to join as and when his health permitted. However, in that case the same welfare checklist applied to each child and specifically there was no requirement to have regard to the welfare of any child throughout his life – so whilst it was undoubtedly a complex matter to resolve, it may have been less challenging than a case with potential for the permanent and total severance of the direct sibling relationship.

One use of the welfare checklist to underpin the balancing of conflicting sibling interests was demonstrated by His Honour Judge Jones in the case of *Re L, J, K and E* [2016] EWFC B9. The elder two children were accommodated in one foster-placement and their care plan was long-term foster-care; the younger two were in a separate foster-placement with a proposed plan of placement for adoption. The judge noted that the two older children were protective of their younger siblings and anxious about them; the

four children had twice-weekly contact, and the Guardian proposed that fortnightly sibling contact should continue in the event of the younger two being placed for adoption. Ultimately the judge adjourned the final hearing to enable the local authority to consider its position in relation to the placement applications, noting that the elder two children would be very unhappy about separation from their siblings. However, the judge indicated his approach to the welfare checklist analysis as follows:

> While ultimately it is the welfare interests of the subject children in the Placement application which are paramount with regards to those applications, the court can take into account the impact upon non-subject siblings, because the "welfare checklist" under s.1(4) Adoption and Children Act 2002 indicates that the court must have regard to the specified matters "among others" ie. the listed considerations are not exhaustive.

Whilst it is always open to the court to use the words of a statute creatively and imaginatively (provided that it does not stray beyond the bounds of statutory interpretation), it may be considered unfortunate that an issue as important as the impact of separation upon non-subject siblings is considered capable of being addressed

as part of a welfare checklist analysis only by consigning it to be considered as being '*amongst others'* of the matters to which the court must have regard. Whilst it may be argued that s.1(4)(f), requiring the court to consider the relationship which the subject child has with relatives, impacts also upon the non-subject children by way of consideration of the subject sibling's relationship with them, that sub-section is triggered only by reference to the welfare of the subject child and does not give rise to separate consideration of the plight of the potentially left-behind sibling. Potential remedies to this dilemma emerge from discussion of the responses to the final three questions within the questionnaire; these are discussed in detail within Chapter 9.

8.3 The Literature Review and Research Context – to what extent does the data resonate with identified themes?

The first aspect to consider is the matter of sibling definition. As Isaacs (2022, p.444) puts it, '*in order to benefit from legal protections, siblings first have to be identified as such'.* Within Chapter 2, I explored in some detail how the term 'sibling' is defined, concluding that the multiplicity of relationship-variations demands an approach which is more nuanced than the cited

dictionary definitions imply. The questionnaire did not specifically address less traditional formulations of the sibling relationship, but the very clear message from the reported cases underscores that the significance of siblings extends well beyond that of relationships of the full blood. None of the reports features issues relating to step-siblings or indeed fictive kin, but a common thread is the complexity and multi-faceted nature of contemporary family relationships – highlighted nowhere more poignantly than in the case of *London Borough of Haringey v AB (Rev 1)* [2015] EWFC B154, in which five ostensible siblings transpired to be a group in which the youngest sibling was the child of the eldest sibling, but all shared the same father – rendering the youngest child simultaneously the uncle and half-brother of the three middle children, and the son and half-sibling of the eldest child. The judgment navigated the choppy waters of complicated relationships with significant care and skill, ultimately refusing to make a placement order in respect of the youngest child, finding that the known advantages of maintaining that child's relationship with his siblings and his mother/sibling outweighed the benefits of adoption. Another example of complex sibling and sibling-like relationships appears in the case of *Re C & Ors (Children)* [2016] EWFC B119, where a group of five children were thought to be

variously both maternal half-siblings and paternal cousins. The plan for the oldest child was placement with her father; the sibling assessment proposed that the four youngest should remain together, and ultimately, despite the real risk that this would result in separation of the four into separate groupings or even individual placements, and would inevitably distress the eldest child, the court endorsed care and placement orders. It is unclear from the judgment to what extent the court was exercised by the convoluted nature of the children's relationships.

The next area of the literature review for further exploration addresses psychological and developmental studies, and the extent to which the data extracted in the course of this project demonstrates acknowledgement of the issues which emerge from those studies.

Within Chapter 2, I allude to the research indications that the sibling relationship is one of the most neglected in psychological research, with Bowlby and Ainsworth noting (2009, p.72) (albeit now more than a decade ago) that sibling attachment has been tackled by few researchers, and much more needs to be done to study attachment in '*the micro-system of family relationships.'* The

judicial responses to the questionnaire very much reflect that the courts attach importance to the sibling relationship with its protective potential for all members of a sibling group, and it was disappointing that the majority of respondents to Question 3 of the survey had not been assisted by good-quality evidence to assist in making decisions on the crucial issue of potential sibling separation. That finding must of course be balanced by the responses to the question following, where 40% of the judicial respondents indicated that they had not granted applications for independent 'Together or Apart' assessment because such assessment was not to be considered necessary – implying that overall, the judge was satisfied that there was sufficient evidence to make the momentous decision required. As previously indicated, the reported cases revealed very few adjournments to allow for the commission of expert evidence in relation to the impact of sibling separation – an obvious exception to this being the decision of His Honour Judge Bellamy in *Re K,D (Children: Care Proceedings: Separation of Siblings)* [2014] EWFC B104, where the final hearing was adjourned specifically to obtain additional evidence upon the question of whether direct contact between two siblings could fill the void created by being brought up in separate households. However, it is not possible to elicit from the case

reports what proportion of cases had been adjourned at an earlier stage to permit the gathering of further evidence – as indicated, such decisions rarely feature within the law reports.

The case reports do reveal a number of examples of judges displaying conspicuous care in weighing up the risk of emotional harm in the event of sibling separation. In the case of *Kent County Council v B, W & S (Combined Judgment: Delay; Refusal to Split Siblings)* [2017] EWFC B5, Her Honour Judge Cameron refused to sanction a plan (supported by the Guardian) which would leave two young children in foster-care in Kent whilst their younger half-sibling moved to live with her father in Plymouth. In deciding that all three children must remain together, even though that would deny the youngest child a family placement, the judge was clear that the division proposed would cause emotional harm to all of the children, determining that '*this tight sibling group will stay together in the longest lifelong relationship that siblings enjoy'*. This decision contrasts with others in which the importance of the sibling relationship was explicitly articulated, but nevertheless did not trump the need for security of placement – as for example in the case of *Bath and North-East Somerset Council v The Mother and Others* [2017] EWFC B10, in which His Honour Judge

Wildblood acknowledged the distress to older, non-adopted half-siblings and the particular relationship which the subject children have with family members, including siblings, but nevertheless determined that permanency within a family trumped those considerations, and that the benefits of adoption, if achievable, outweighed the detriments. In contrast, Her Honour Judge Vincent, in considering the case of *Re A (Kinship Carer Welfare Determination)* [2017] EWFC B36 refused an application for a placement order in respect of the youngest child (A) of a sibling group of four children, the elder three of whom were in family placements. The judge was very troubled by the emotional impact upon A when he came to appreciate that he alone of his siblings had been placed away from his family, leading him to question whether there was something about him which prevented him from growing up within the family unit, or otherwise to feel rejected and hurt. She was also concerned about the shorter-term impact upon him, finding that adoption would create feelings of abandonment and grief. That decision was doubtless made the easier by the availability of a viable foster-placement: A was only three years old, and arguably the decision would have been more challenging had the options been limited to long-term fostering or adoption. As Lady Justice Black put it in the case of *Re V (Children)* [2013]

EWCA 913, '*I do not think that fostering and adoption can, in fact, be equated in terms of what they offer by way of security'.* It is obvious from the judgment that the Judge undertook an holistic analysis of the varying options for A before reaching her decision, and that the preservation of the sibling relationship featured prominently in undertaking the required balancing exercise. It is also obvious that the decision is consistent with the observations of Place (2003, p.262) of the importance of recognising a child's sense of identity and the significance for this of the acknowledgement of biological roots and heritage. As identified within Chapter 2, the themes emerging from the psychiatric and psychological literature relating to the sibling bond underscore the importance of seeking to promote such bonds and their protective potential. Those themes are implicitly acknowledged in much of the decision-making evidenced within the reported cases, albeit that in some cases, the security of an adoptive placement is permitted to outweigh other considerations. One of the difficulties in exploring the basis of such decision-making lies in the brevity of many of the case reports, leading in some cases to limited exploration of the factors underlying the judge's welfare determination.

Turning next to social work and social policy studies, the comments

of Ward (1984, p.322) very much reflect the dilemma posed for the courts by the need to balance conflicting considerations: '*the loss of siblings must be weighed for each child against the benefit of a permanent home'.* Much of the social policy literature emphasises the importance of the sibling bond – eg Wedge and Mantle (1991, p.83) who propose that whenever practicable, sibling relationships should be enabled to take their course – although of course that proposition still leaves the court to wrestle with the limitation of what is 'practicable' for any given child or children.

It is inevitably the case that there are some circumstances in which placement of siblings together is positively contra-indicated. That situation is recognised inter alia in the studies of Buisst (2015), Herrick and Piccus (2005) and Khan and Cooke (2008) and is acknowledged within some of the judgments considered. In some circumstances, separation is the consequence of abusive inter-sibling behaviour, but in other instances, the difficulty lies with the adults. One such example was provided by the case of *NAA (a Child)* [2019] EWFC B55, where the father had committed suicide whilst awaiting trial for the murder of the mother. The elder two of a sibling group of three had been placed in the care of paternal relatives (apparently having never been in the care of their parents),

and the judge found that the youngest child should not join them: it was considered that the elder siblings would have been '*steeped in the paternal family narrative'* about the parental family history, and it was not in the interests of their young sibling to be placed in the same situation.

Sometimes, the issue precipitating separation is not inter-sibling abuse as such, but behavioural problems associated with one or more of the children. This was the situation confronting His Honour Judge Wood in the case of *B (Children)* [2014] EWFC B155, where the behaviour of the elder child (who was three and a half years old) was of such concern that the local authority anxiously considered whether she should be placed separately from her toddler sister. However, the elder child's progress in foster-care, attributed both to the good care received and the cessation of contact with her birth mother, enabled the local authority to contemplate the girls remaining together – a plan endorsed by the judge, notwithstanding the earlier anxieties about the feasibility of joint placement. In a case the following year (*Re T (a Child)* [2015] EWFC B156, the same judge was dealing with care and placement proceedings relating to a baby boy. That child's older siblings were reported to have required to be placed separately from one another

as a result of the eldest child's significant emotional and behavioural difficulties. Although the judge was not charged with making any decisions in respect of those older children, they were clearly of relevance in determining plans for the baby – but there is no mention within the judgment of any consideration of the baby being placed with either sibling, or even of the possibility of contact. It is possible that the thinking about joint placement or contact was apparent from the care plan, and simply not referred to in the judgment, but it is also possible that the problems associated with the oldest child overshadowed all prospects of encouraging the sibling relationship. As Barratt (2015, p.192) noted, the decision as to which siblings to place together is often a pragmatic one, but the experience of caring for a sibling group can be very challenging. That proposition is reflected within the judgments mentioned, and in that context it is encouraging to see that a very significant majority (over two-thirds) of the respondents to the questionnaire agreed or strongly agreed that local authority care plans well-evidenced the reasons for proposed sibling separation.

Whilst it is clearly acknowledged both in law and practice that there may be valid reasons, ranging from the pragmatic to the compelling, for separating siblings, such separation should not

automatically chart a course of destruction for the sibling relationship – which throws the issue of post-separation contact into sharp relief. Dayan et al. (2011, p.334) note that where children are not placed together, it is the life in common, rather than the sibling bond per se, which is fractured, and Neil and Cossar (2013, p.69) report that the children within their study did not feel it necessary to live with their siblings, but regarded contact as important – although that must of course be considered with the obvious caveat that in some instances, such contact could risk generating further trauma for children with particularly abusive histories. This reservation was highlighted by Macaskill (2002, p.77) who cautions that very careful planning and boundary-setting is required when children have deeply abusive histories, and it is essential for there to be appropriate monitoring and support – although the same study highlighted that a small number of children were deeply traumatised by the loss of sibling contact, pointing once more to the need for the local authority, and thereafter the court, to undertake a very careful balancing exercise in deciding whether such contact is appropriate, and the parameters of any such contact.

Against the background of required caution, it is interesting to note

that 41.82% of the survey respondents had made an order for post-adoption contact between siblings, although the majority of those respondents had done so on fewer than five occasions. That said, the rarity of such orders is highlighted by the fact, reported in the preceding chapter, that the reported cases explored include only one instance of an order being made, although it is necessary to repeat the note of caution that the absence of an order does not equate with an absence of contact: in many cases, provision for ongoing contact is set out within the care plans or recited on the face of the order without the need for the court formally to order such contact.

Within Chapter 2, attention is drawn to the policy implicitly proposed by Narey (2012b, p2) in favour of a reduction in contact between an adopted child and his birth family: this is in sharp contrast with the views expressed in the same year by Neil et al (2012, p13) which advocated against any presumption in favour of restricting contact, but instead proposed a clear rationale for contact in each case, with clarity about the needs of the individual child – a proposition with which it is difficult to disagree. The importance of such contact features in many of the cases considered – one example being the decision of Her Honour Judge Laura Harris in

the case of *ER (Placement Order)* [2014] EWFC B146, where the judge was concerned with a full sibling group of three children, but invited to make a placement order in respect only of the youngest child, her sisters remaining in long-term foster-care. The judge was very clear within her judgment about the enormous benefit to the baby of ongoing contact with her sibling, adding her hope that any adopters '*worth their salt'* will be encouraged to consider such contact as the child becomes older. In another example (*Buckinghamshire County Council v KM & Ors* [2014] EWFC B105), His Honour Judge Hughes stressed the importance of the local authority and any adoptive parents striving to maintain a relationship between a baby boy, his siblings and wider family members, noting with approval the suggestion of the Guardian that sibling contact could be promoted by the imaginative use of video contact which would enable the children to grow up with knowledge of one another without compromising the security of the baby's prospective adoptive placement.

Just as there are circumstances in which the placement of children together is contra-indicated on welfare grounds, it must also be acknowledged that inter-sibling contact is not always positive or beneficial. One such case is reported as *Re C (a Child)* [2015]

EWFC B210, involving the youngest of a sibling group of eight: there were two full siblings who were already the subject of care and placement orders, and five adult paternal half-siblings, the father in the case being more than 30 years older than the mother. The order made gave reason for optimism that the child would be placed with his next-oldest sibling, with a possibility of contact with the remaining full sibling, but was silent on the issue of contact with the half-siblings, the clear indication within the judgment being that those siblings were associated with varying degrees of dysfunction which rendered contact an unattractive proposition. This decision contrasted with that of His Honour Judge Jones in the case of *Re L, J, K and E* [2016] EWFC B9, cited earlier in this Chapter, where the judge noted the Guardian's advice that contact was so fundamental and central to the children's welfare that post-adoption sibling contact should continue on a fortnightly basis, and indicated that such provision was at odds with a plan for adoption, despite the possibility of post-adoptive contact. The judge then proceeded to adjourn the final hearing, and thus the eventual outcome is not known.

Whilst Chapter 2 demonstrates that much of the literature encompassing adoption focuses upon the parent-child dynamic and

the impact upon that of adoption, the implications for siblings were firmly acknowledged a quarter of a century ago within the work of Mullender and Kearne (1997, p.143) who concluded that there is a case for focusing upon the viewpoint of the siblings of adopted children as a '*separate and unique group of birth relatives with their own interests and feelings which require to be addressed';* the authors refer poignantly to a non-adopted sibling describing the impact of his sibling's adoption as akin to living with a '*ghost'.* There is a considerable tension between that child-specific focus and the firm emphasis upon securing adoptive placements as quickly and as frequently as possible as propounded by Narey (2011), where the severance of the sibling relationship, insofar as considered at all, appears to be dismissed effectively as collateral damage. Between those extremes, the literature explored, and the practical examples set out within the reported cases, reinforces that whilst there may be exceptions, in most cases it is in the best interests of siblings to respect, promote and preserve that unique bond which distinguishes the sibling relationship from all others. It became clear in the course of my literature review that there is limited research into the plight of children left behind whilst their (usually) younger siblings are settled into adoptive placements. This is perhaps surprising, given the clear inference to be drawn

from studies from both psychological and sociological perspectives that the sibling relationship is one of profound and lasting importance. It follows that its severance requires significant justification, with careful attention paid to mitigations such as ongoing contact between separated siblings. It was to be hoped that the Government-sponsored Review into Children's Social Care, under the leadership of Josh MacAlister, (Macalister, 2022) would have engaged with this issue, given its clear importance as summed up within the emotive plea of Emma Lewell-Buck MP within the House of Commons (Hansard, 2022) as follows:

> Thousands of children removed from their families, alone and scared, are denied 'relationships' with their siblings, despite all the evidence showing that this relationship and bond is one of the most significant and enduring. Why do this Government stubbornly refuse to make changes to the Children Act1989 and give sibling contact for children in care?

Although the reference to the Children Act 1989 rather than the Adoption and Children Act 2002 implies that the focus of that question was upon children separated in foster-care, it is self-evident that the risk of denial of an ongoing sibling relationship is significantly greater within the context of adoptive placements.

However, whilst acknowledging the significance of the sibling relationship – in tandem with other family relationships – there is nothing within the MacAlister report which directly engages with the acute difficulties associated with sibling separation and the importance of mitigations such as ongoing contact. The closest the report comes to highlighting the issue is a reference within the introduction to the value of kinship placements in the preservation of '*important sibling relationships.'* Whilst it is acknowledged that the purpose of the report was to provide a whole-system review of children's social care, this was perhaps a missed opportunity to shine a light on one very important issue for children within the social care system.

8.3 Discrepancies of Approach?

As is apparent from analysis of the questionnaire responses and reported cases, there are clear discrepancies between the judicial approach, as articulated in the survey responses, and the evidence of that approach as gleaned from the case reports. I have alluded

already to some obvious practical reasons which may go some way to explain those discrepancies, but at the heart of the matter is the need for each case – and each child – to have a bespoke decision with an appropriate exercise of judicial discretion in order to reach what is considered the right outcome for that child. There are areas of family law which are more formulaic, an obvious example of which is to be found in the Child Support legislation, beginning with the Child Support Act 1991, since significantly amended. That legislation, in all its various iterations, adopts a broad-brush, formula-driven approach which has undoubtedly created significant injustice for some families. Clearly, that non-discretionary approach would be entirely inapt in dealing with the many, various and infinitely evolving situations which troubled families present, and whenever discretion arises, there is scope for variation of outcome.

As discussed and demonstrated within Chapter 3, judging is not an exact science, and indeed may more fairly be described as an art. Within that chapter, I noted the comments of Hall (2013, p.xiv) that judging is not just the mechanical application of clear rules to known facts. That is self-evidently very much the case where the outcome depends so much on human frailty. One of the particular

challenges within child protection law lies in the requirement for predicting the future, to the extent that that can be achieved. For example, will a parent remain abstinent from illegal drugs, or has a toxic relationship genuinely run its course? It is not unusual in dealing with cases in which domestic abuse strongly features for one of the parties to go to ground and take little part in the proceedings. The judge has to determine whether it is the case that that party has simply lost interest, or whether he or she is waiting in the wings, to return the moment the judge decides that the child or children will be safe in the care of the other parent. In cases of doubt, the court can rely on the principle which renders a parent a compellable witness in care proceedings, and can if necessary issue a witness summons to require the absent parent to attend. This is not always effective, as demonstrated in the case of *L-R (Children) [2013] EWCA Civ. 1129*, where a father unsuccessfully appealed against a sentence of 18 months' imprisonment for contempt of court arising from his refusal to give evidence in a finding of fact hearing required as the result of the death of a child in his care. Lord Justice McFarlane (paragraph 13) noted as follows:

> … parents in proceedings of this sort are compellable witnesses. Authority, if authority is needed, is to be found in

> obiter observations of Hale LJ in the case of *Y and K (Children)* [2003] EWCA Civ 669, but also in the judgment of Holman J in the case of *Re U (Care Proceedings: Criminal Conviction: Refusal to Give Evidence)* [2006] 2 FLR 690, where that judge made it plain that the father's failure in those proceedings to give evidence amounted to contempt of court.

Notwithstanding the intransigence demonstrated by the father in *L-R*, my anecdotal but informed experience is that most parents, when faced with a court order to attend and give evidence, will comply, and the process not infrequently leads to the discovery of an ongoing, concealed relationship. In other cases, the papers may indicate that a mother is doing really well, setting the stage for rehabilitation of the child to her care. However, the mother then arrives at court clad in a baggy coat or sweater, regardless of the weather, and eventually it emerges that she is carrying the child of the man with whom she allegedly parted company many months ago.

Quite apart from unexpected twists and turns such as alluded to within the preceding paragraph, it must be acknowledged that the facts of child protection cases are infinitely variable – as well-demonstrated by the case reports set out in Appendix 4A of this

study. This means that although a judge may indicate a particular approach to issues when responding to a questionnaire, the approach to those same issues when they arise in specific cases is likely to be rather more nuanced. Although adversarial in strict terms, His Honour Judge Rogers, in the case of *Re C (a Child) (Judicial Conduct)* [2019] EWFC B53 referred to in Chapter 3, describes care proceedings as a '*quasi-inquisitorial jurisdiction'*, where part of the role of the judge is to assist the witnesses in giving their evidence to the court. This approach is reflected within the findings of Eekelaar and Maclean (2013, p.99) who described the distinctive quality of the family courts thus:

> The judges we observed frequently spoke directly to the parties. To that extent we could describe the process as 'inquisitorial', though such labels are not always helpful, because in some matters, in particular the finding of fact hearing in public law cases, the judge's role would follow more closely that of the 'umpire' in an adversarial setting. In this matter too, then, the family judges are reconciling, or integrating, judicial roles.

As set out in Chapter 3, judges must listen to the evidence and faithfully apply the relevant legal principles, but that process of listening and application does not lead inexorably to only one

conclusion, and the judge must utilise his or her own experience and expertise in an endeavour to reach the most appropriate welfare decision for the child or children at the heart of the proceedings and whose welfare is required to be the court's paramount consideration. As discussed within Chapter 5, one of the dilemmas which a judge must always confront in dealing with one or more members of the sibling group is how to reconcile conflicting and competing welfare interests – as clearly enunciated by His Honour Judge Bellamy in the case of *Re K, D (Children: Care Proceedings: Separation of Siblings)* [2014] EWFC B104 when he posed the question (para. 174):

> Should D be placed for adoption if to do so would cause emotional harm to his sister? Or to put it the other way around, should D be denied the opportunity to be planted in a new family in which he can put down deep roots in order to avoid the risk that separation from his sister may cause her harm?

Within this chapter, I have endeavoured to highlight why the evidence as to how judges approach family cases may not always appear to be consistent, given the complexity of the subject-matter, the competing interests, and the nature of the delicate, discretionary balancing which

such cases require. In the next chapter, I will draw the threads of the project together and focus on proposals which may, ultimately, assist in ensuring a proper focus not just on the child immediately before the court as an individual, but also upon the sibling cohort as a whole, the child's place within that cohort, and how the law can adapt to afford greater respect to the significance of the sibling bond.

CHAPTER 9

CONCLUSIONS : A NEW CHARTER FOR SIBLINGS?

> A price must be paid for the creation of this new adoptive family – and that price is paid by the birth family … put simply, in legal terms, the child is lost to them forever – Harris-Short (2011, p.889).
>
> ……..
>
> It goes without saying, and here I do think that there has been a change, that the need for continuing contact between siblings should be prioritised – McFarlane (2017, p.10).

I began this research with the express intention of exploring whether the needs and rights of children to preserve sibling relationships are at risk of being sacrificed in order to expedite and cement adoptive placements. The stark message conveyed (supra) by Harris-Short highlights the devastating loss which adoption of a child may impose upon all birth family members: this must include the child's siblings (howsoever the term 'sibling' is defined, as explored in Chapter 2). In contrast (or, more aptly, as mitigation), McFarlane paints a more optimistic picture about the prospects of ongoing sibling contact. A central component of this study requires

consideration of the extent to which the law permits and facilitates the striking of an appropriate balance between, on the one hand, the security for one child of an adoptive placement whilst, on the other hand, that potential mutually-grave loss of the child to his family, and specifically, in the context of this research, the loss of the sibling relationship both for the adopted and the left-behind child.

The purpose of this chapter is to consider the extent to which this research project has assisted in suggesting answers to the dilemmas posed by the need to promote the welfare of all children within a sibling group; it will also consider what future steps may be appropriate in order to promote the welfare of such sibling children, and will set out any perceived gaps in research, or where research may provide further illumination in respect of the issues raised in this study. In other words, where more effort could be directed to ensure appropriate respect for the sibling bond. To that end, although they are set out in the preceding chapter, it is convenient to re-state here the research questions as follows:

1. To what extent the material considered evidences (or fails to evidence) that the court sufficiently considers the potentially-competing welfare interests of sibling children in considering

placement decisions which may result in the permanent severance of the sibling relationship?

2. If separate placements are inevitable, do the case reports evidence sufficient attention to the preservation of sibling relationships by direct or by indirect contact?

3. Is it possible for law and practice to reconcile differing and competing welfare implications for individual siblings, and especially for siblings who are left behind whilst other siblings are received into adoptive families? Should the law be modified specifically to recognise the significance of the sibling bond?

9.1 THE LAW PERTINENT TO THE RESEARCH QUESTIONS: A BRIEF SUMMARY

The three research questions fall to be considered within the context of the legal framework within which all judicial decision-making takes place. That framework is explored in detail within Chapter 5 of this study, but for the purposes of this concluding chapter, it is sufficient to distil the salient key points as follows:

1. Whenever a court determines any question relating to the upbringing of a child, that child's welfare is the court's paramount consideration (Children Act 1989 s.1 (1)).

2. In making any decision relating to the adoption of a child, the paramount consideration of the court (and the adoption agency) is the welfare of that child throughout his life (Adoption and Children Act 2002, s.1(2).

3. There is nothing within either statute which assists the court in reconciling conflicting welfare interests between two or more members of a sibling group, and case law is of limited assistance in this connection.

4. The law does not privilege the sibling relationship in its provisions for regulating contact (1989 Act s.34; 2002 Act ss.26, 51A and 51B); in particular, a sibling requires the permission of the court to make an application for contact with another sibling.

5. The law does not permit siblings to seek permission to oppose the making of an adoption order: 2002 Act s.47(5) provides a

mechanism only for a parent with parental responsibility to seek such permission.

6. The welfare checklist set out in the 2002 Act (s.1(4)) requires the court to consider the prospectively-adopted child's relationship with relatives, but does not single out the sibling relationship for special consideration.

7. Whilst applications for Care, Placement and Adoption orders all engage the Article 8 right of family members to respect for private and family life, any attempt to circumvent statute by invoking the Human Rights Act 1998 risks suffering the same fate as Lady Hale's 'starred care plans' (a fate explained in Chapter 5).

8. The higher courts interpret, but cannot change, statute – and the lower courts are bound by the precedents created by the higher courts, from High Court level and above.

The questions which this research seeks to address have been approached primarily from the perspective of how judges determine issues of potential sibling separation, and what additions

(if any) to the judicial armoury would assist in achieving the best possible outcome for the children concerned. As such, a chapter addressing the theory of judicial decision-making (Chapter 3) has been included in order to provide over-arching context, before progressively narrowing the focus to concentrate upon the approach taken by judges in making the decisions required to produce the optimum (or sometimes least-worst) decisions for children. Chapter 3 seeks to explain the pressures upon the family justice system, and the implications of such pressures for all who work within it. It also sets out to explain the judicial task, and how decisions are made, the better to inform the data revealed within Chapters 6 and 7, which discuss respectively the judicial responses to my questionnaire and practical decision-making as set out within reported cases.

9.2 The Case for Statutory Modificiation

The final three questions within my survey provided an opportunity for judges to comment upon whether aspects of the statutory framework assist or hinder consideration of the impact of sibling separation. The first of these (Question 9 in the survey) addresses the welfare checklist within the Adoption and Children Act 2002,

enquiring whether it is perceived to be defective because it does not single out the sibling relationship for special mention. Only 21.81% of the respondents did not consider the checklist to be defective. It is not disputed that the wording of the subsection *(relationship the child has with relatives, and with any other person in relation to whom the court or agency considers the relationship to be relevant)* is wide enough to cover the sibling relationship, howsoever the term 'sibling' is defined, and could thus embrace less formal, quasi-sibling, relationships. However, the mischief perceived by some respondents was the apparent statutory consignment of the sibling relationship to one of no greater importance than all other relationships. As one very experienced judge put it within his questionnaire response:

> As it currently stands the sibling relationship is put on a par with other family relationships yet the sibling relationship is widely recognised as being the most enduring of relationships. In my view it does not reflect the significance or importance of the sibling relationship.

Whilst it is open to social workers and to the court to consider the sibling relationship within the current statutory framework (and indeed there is

an obligation to do so), the failure to single out the sibling relationship for special mention flies in the face of research confirmation of the significance of that relationship. It could lead to legal arguments that where the court has to choose between ongoing contact with siblings or with another extended family member, there is no statutory basis for privileging the sibling relationship. Above all, the absence of specific statutory recognition could result in hard-pressed child protection professionals – social workers, Guardians or indeed judges – failing to accord the sibling relationship the priority which it deserves.

Whilst the ninth question postulated only the most minor of statutory amendments in order to highlight the need specifically to consider the sibling relationship, the tenth question is significantly more radical in that it seeks views upon the appropriateness of the introduction of a power for the court to require siblings to be placed together, coupled with a mechanism for restoring the matter to court if necessary. This potential amendment should be considered within the context of a reduction in the powers of the court to scrutinise care plans as set out in s31A Children Act 1989 (inserted by Adoption and Children Act 2002, s.121), limiting the court's consideration to the 'permanency provisions' of the care plan – eg where the child will reside, rather than examining every aspect of the proposed arrangements for the child. This points

towards a policy whose roots may be traced to the Family Justice Review (Norgrove, 2011, p.103) of reducing rather than increasing court oversight of care plans. Norgrove and his colleagues placed much emphasis upon the need to '*restore the respective responsibilities of courts and local authorities'.* The President of the Family Division (who was also the judicial member of Norgrove's Family Justice Review) firmly reiterated that message within the context of addressing the legacy of difficulties associated with the global pandemic (McFarlane, 2022, p.2):

> There is a compelling case for reconnecting with the core principles behind the 2014 public law 'PLO' reforms that arose from the 2011 Family Justice Review which recommended [paragraph 3.44]: "Courts should refocus on the core issues of whether the child is to live with parents, other family or friends, or be removed to the care of the local authority. When determining whether a care order is in a child's best interests the court will not normally need to scrutinise the full detail of a local authority care plan for a child. Instead the court should consider only the core or essential components of a child's plan. We propose that these are: - planned return of the child to their family; - a plan to place (or explore placing) a child with family or friends; - alternative care arrangements; and - contact with birth family to the extent of deciding whether that should be

> regular, limited or none."

Notwithstanding the reference within the President's Guidance to the issue of birth family contact, I am not aware of any case in which a brave advocate has argued that the Court's power of scrutiny includes a power to dictate that the child must live with one or more siblings, and, unsurprisingly, nor could I find a judicial decision to that effect, although of course the court has the power to require that contact is arranged between siblings in appropriate cases.

Whilst the House of Lords dismissed the attempts of Lady Justice Hale to introduce the concept of 'starred care plans' (vid. supra) as a mechanism for holding the local authority to account in its execution of the approved care plan, the office of Independent Reviewing Officer (IRO) was created to supply some checks and balances, with a requirement that in the event of conflict with the local authority, the IRO should bring the matter to the attention of Cafcass. In turn, Cafcass should then, if necessary, refer the matter back to the court. Dickens (2017, p.2) notes that:

> There have been twenty formal referrals to Cafcass between 2004 and March 2017 (up from ten in February 2015). None of

> these had actually been taken to court by Cafcass, but most had been resolved through correspondence and discussion with the local authority involved. The Cafcass officer did not always agree with the IRO (three cases) (information supplied by Cafcass).

Although that indication was given now some six years ago, scrutiny of the annual report of Cafcass for 2020/21 (Cafcass, 2021) discloses no occasion upon which this power was exercised, and it is reasonable to conclude that the provision provides a remedy to which resort is rarely, if ever, made. However, it is arguable that the powers and duties of the IRO could be specifically extended by regulation (rather than requiring statutory amendment) to ensure that in any case where the local authority reneges upon its commitment to place siblings together (or to promote sibling contact – although the latter could in theory be the subject of a free-standing contact application), the IRO is **obliged** to refer the matter to Cafcass, and that Cafcass in turn would be **obliged** to refer the matter back to court unless the issue proves susceptible of negotiated resolution.

A clear majority of the respondent judges expressed approval of the

proposition that judges should be entitled to insist upon siblings being placed together: as explained within Chapter 6, one of the respondents foreshadowed the amendment postulated in the preceding paragraph, favouring an obligation upon the IRO to restore the matter to court in the event that the local authority failed to achieve or promote joint sibling placement. One judge suggested that within her court, attempts are made to '*police*' the fulfilment of sibling placement commitments by ensuring judicial continuity in dealing with subsequent adoption proceedings – but she acknowledged that by then, it is usually too late to retrieve the situation. Another suggested that judges would be '*emboldened*' by a change in the statutory framework which enabled the court to require siblings to be placed together. However, some judges were concerned about any increase in judicial power in this manner, with one calling for further research as to outcomes for separated and non-separated siblings and more creative thought about contact.

The conclusion which may safely be drawn from this study is that judges are very alive to the issue of sibling separation and for the most part would welcome the opportunity to require local authorities to continue to place siblings together. Whilst a statutory power to require siblings to be placed together would be useful,

possibly as a weapon of last resort, it is arguable (as shown in many of the reported cases) that there is limited difficulty in persuading local authorities to amend their care plans to include at least a time-limited search for joint placement: the greater challenge lies in monitoring the sequel, and it is in that context that there is clear evidence for a much stronger focus upon the role of the IRO and the extent to which there can be confidence that an IRO will refer any fundamental deviation from the care plan to Cafcass. In tandem with this, it is vital that Cafcass is willing, in appropriate cases, to refer the matter back to court, and that when that occurs there is appropriate provision for all parties, including the children, to have the benefit of legal representation, which in turn requires that public funding be made available for that purpose.

The eleventh question provided the greatest encouragement for free judicial expression, enabling respondents to identify any other aspects of the Adoption and Children Act 2002 which were considered to require amendment. Although all proposals are briefly described within Chapter 6, this final chapter will address any conclusions to be drawn only from those proposals of relevance to this study, as follows.

a) Leave to oppose the making of an adoption order

By far the largest response identified the difficulties associated with s.47(5) Adoption and Children Act 2002 – the provision which gives a parent (and only a parent) an opportunity to seek the permission of the court to oppose the making of an adoption order, the child having been placed with prospective adopters pursuant to the making of a placement order and an adoption application having been filed. The provision was characterised by a number of respondents as '*cruel'* in that it gives false hopes to parents who had long thought that their child was already lost to them. Although judges differed as to the how to improve upon s.47(5), the clear message is the need for further research and consideration as to whether there is indeed a better way of addressing a highly-contentious issue, but one which might, in some rare circumstances, open a door to joint sibling placement which had hitherto been firmly closed. One proposal was that such applications should trigger a re-consideration of contact: is difficult to argue against that, particularly in those cases where the parent's case rests upon the fact of a later-born sibling remaining in that parent's care – which should, even if joint placement is not a viable

option, engender thought as to how, if at all, it is possible to promote a relationship between the prospectively-adopted child and the younger sibling. Given that the first hurdle which a parent must surmount requires the parent to demonstrate a change of circumstances since the placement order was made, there would, as a matter of common sense, be a case for imposing a minimum period of time which must have elapsed before any application pursuant to s.47(5) could be entertained: any application within the first year after the making of a placement order is likely to face substantial obstacles in demonstrating a change in circumstances – for example, any new-found parental sobriety is unlikely to have sufficiently deep roots to provide confidence for the future. That said, there may be rare examples where a change would not depend upon effluxion of time: for example, if the child had been diagnosed with a terminal illness, it is possible that a parent may succeed in persuading a court that that was sufficient change of circumstances. There are also cases where a parent is not identified until after the conclusion of care and placement proceedings, possibly in the context of a disappointed mother reviewing her previously-held determination not to identify the father in the hope that this would provide a final opportunity of preventing the loss of that child to adoption. More pertinently for the purposes of this

study, a court may consider that a radical departure from an approved care plan of keeping children together amounted to sufficient change of circumstances – and indeed it could be argued, although perhaps not very persuasively, that the section would benefit from amendment to incorporate a statutory (rebuttable) presumption that a radical departure from the agreed placement arrangements for the children would amount to such change of circumstances. However, whilst this would satisfy the first limb of the test, the court would still be required to proceed to the second stage and to evaluate whether it was in the welfare interests of the child to permit the application to proceed as an opposed application. This stage presents the parents with formidable hurdles. Although, self-evidently, the mere fact of placement does not of itself cause the parent to fail in his application (if the child had not been placed for adoption, no adoption application would have been made and thus the s.47(5) application would not arise), the longer the child has been in placement, and the more embedded within the adoptive family, the less likely the court will be to find that the child's welfare interests would be best served by permitting the application for adoption to be opposed. In so saying, I accept that Munby LJ, in *Re B-S* (paragraph 74 (iii), said this:

> Once he or she has got to the point of concluding that there has been a change of circumstances and that the parent has solid grounds for seeking leave, the judge must consider very carefully indeed whether the child's welfare really does necessitate the refusal of leave.

Although there is judicial guidance on the point, and in particular the need to focus upon considerations beyond the short-term and to consider whether the parent has a real prospect of successfully opposing the adoption application (not to be confused with a real prospect of the child being returned to the care of that parent), it might be argued that greater statutory clarity would be of assistance both in managing parents' expectations and in providing a clear steer for the judge dealing with the application. However, this was not proposed by any of the judicial respondents and the obvious disadvantage of a statutory steer is that it may inhibit the exercise of the wide judicial discretion which such applications attract. Applications under s.47(5) of the 2002 Act have been the subject of recent consideration by a Working Group addressing issues surrounding adoption and which has been set up in the wake of the Public Law Working Group (Keehan, 2021). Unfortunately, the report will not be available in time to inform this research, but it is

understood to focus on process and practice rather than venturing any substantive reform of the provision itself.

b) Fixed-term placement orders?

A further proposal was that placement orders should lapse by effluxion of time in the event that the child had not been placed for adoption. The first and obvious problem with such a provision would be the danger of local authorities hastening sub-optimal adoptive matches through the system in order to beat the ticking clock. The second problem is that the reasons for delay may be infinitely varied, but could include waiting for proceedings relating to a younger child to catch up with the proceedings in respect of an older sibling in order to maximise the likelihood of joint placement – and thus delay could be a positive factor in terms of maintaining the sibling bond. Again, this could be addressed by the introduction of a rebuttable presumption of automatic expiration, but arguably the better course would be to strengthen IROs in their required vigilance to ensure that consideration is given as to whether it is in the best interests of the child to remain the subject of a placement order, or whether an application for revocation is required.

The possible introduction of a fixed-term placement order with provision for extension requires to be considered in the context of the parallel which may be drawn in respect of supervision orders made under s.31 Children Act 1989. Such orders are made in the first instance for a period of up to 12 months (1989 Act Schedule 3, paragraph 6(1)); they may be extended for such period as the court may determine, up to a maximum of 3 years beginning with the date upon which the supervision order was first made. Such applications for extension are vanishingly rare. In the case of *A Local Authority v D* [2016] EWHC 1438 (Fam), Mr Justice Mostyn surprised the legal community by announcing that it was possible to apply to extend a supervision order which had already expired by effluxion of time. It is difficult to reconcile that ruling with the wording of the statute (Schedule 3, paragraph 6(3)) which permits the court to extend the order – which on any ordinary construction of the words, implies that the order remains alive in order to be susceptible of extension. There was no appeal of the decision, and it seems from a Westlaw search that the case has yet to attract any scrutiny in the context of any other litigation, so that authority remains binding on the lower courts. However, it should be noted that the time lapse between expiry and issue of the application to extend in Mr Justice Mostyn's case was de minimis – the

application was dated on the day of the expiration of the supervision order and it was issued the following day, the judge holding (paragraph 2) that '*supervision orders were entirely child-focused and would only be extended if it was in the child's best interests.'* Although supervision orders engage the Article 8 rights of family members, placement orders inevitably constitute a far greater interference in such Article 8 rights and thus a similar argument in an application to extend a placement order might well attract rather more robust opposition and scrutiny.

c) Provision of judgments to adoptive parents.

One of the respondent judges proposed a requirement that adoptive parents receive a transcript of the judgment when their adopted child was made the subject of a placement order. From the perspective of sibling children, this would have the clear advantage that the adoptive parents would have the opportunity to receive a very direct message as to the trial judge's expectations as to ongoing contact between separated siblings, which may assist in focusing minds and possibly in dispelling any concerns which the judge may have been able to anticipate and to address within the judgment. It is difficult to argue against this proposal from the

perspective of the child or children, although those representing the parents may have concerns about the wholesale disclosure of what may be very sensitive information of no immediate relevance to the parenting of the child. This could be addressed by offering the parents the opportunity to propose appropriate redaction to the judgment before its release to the adopters. It is also fair to add that litigation arising in the sad context of adoption breakdown (frequently in the child's teenage years) not infrequently features indications from the adoptive parents that they were simply not made aware of the extent of their cherished adoptive child's pre-adoption lived experiences, and the implications of such lived experiences for the child's future development. The tragedy thus set in motion is vividly described by His Honour Judge Bellamy in the case of *Re K (Post-Adoption Placement Breakdown)* [2013] 1FLR 1, in which the placement of a child adopted at the age of 6 broke down, the local authority not having fully disclosed to her prospective adopters prior to placement the extent of the physical and sexual abuse to which the child had been subjected prior to her placement. The child was later found to be suffering from an attachment disorder attributable to the extreme damage suffered from her early parenting experiences. A psychologist instructed within the case explained that avoidant children find close

relationships stressful, and the young girl in question was offered a loving family but inevitably found this very stressful, despite also desperately wanting that closeness, care and security. In making a care order when the child was 15 years old, approving a plan for her to remain in residential care, the judge said this (para 158):

> The message from research evidence, such as it is, is that the later a child is placed for adoption, the greater the risk of the placement disrupting… for these parents, what began with high hopes, borne out of a desire to provide a loving home to a disadvantaged child, has ended in tears.

In that particular case, it was clear that the adoption agency had been very selective in sharing of information with the prospective adopters, and the whole family paid a high price for that concealment. The provision of the judgment when the child had first been made the subject of a care order and, in her case, a freeing order under the regime which preceded placement orders, would have done much to mitigate the deficiencies of information sharing which this case starkly illustrates. With more specific reference to this study, it is likely that the judgment would also have contained valuable information about the child's siblings which would have

assisted her understanding of their situation and potentially assisted with any search in respect of those siblings, had the child wished to re-kindle the sibling relationship.

d) Presumption of sibling contact

There was support for a presumption in favour of sibling contact orders in tandem with placement orders, with the potential for such an order to be re-visited (as it must be in any event) when the adoption order is made. The question of contact is discussed in detail both within Chapter 8 and elsewhere in this chapter, but this suggestion would chime with the sentiments expressed by the President of the Family Division within the second quotation opening this Chapter.

9.3 Findings and Proposals

The evidence gleaned in response to the questions, considered in parallel with the evidence obtained from the reported cases, enables the following conclusions safely to be drawn:

a) The potential for sibling separation is a real and pervasive concern within public law proceedings, underscoring the need for further research into the implications of such separation and whether, in cases where separation is necessary, the impact of that separation is capable of mitigation by meaningful, reliable, direct or indirect contact. It would also be interesting to undertake further research to ascertain whether there are regional variations in judicial willingness to sanction sibling separation, and the extent to which this may be linked to the demographics of the area in question – but that it outside the scope of this study, and a much larger-scale project would be required.

b) A modest majority of judges indicated that local authorities are alive to the significance of the sibling bond and produce care plans which reflect contact arrangements which the court considers suitable for endorsement. This is borne out by the case reports, with the caveat that it is not always possible to be sure to what extent the court required amendments to the care plans before granting the local authority's applications for care and placement orders: the necessity for amendment is clearly stated in some cases, but the absence of such reference does not mean that the contents of the care plans were approved in their first

iteration without modification, significant or otherwise. The important conclusion to be drawn from the evidence is that there are a number of cases in which local authorities are perceived to fail to pay sufficient attention to an assessment of the strengths and weaknesses of sibling bonds, pointing in the first instance to a training issue for local authority social workers, and also to a research gap with a view to establishing the extent of the problem and what steps could be taken to encourage and improve such assessments – which research would in turn feed into the identified training requirement.

c) Flowing inexorably from the previous point, it is worrying that the question about the quality of Together or Apart assessments met with such a mixed judicial response. A thorough assessment which follows the Beyond Together or Apart (Beckett, 2018) framework would do much to mitigate the concerns of parties and judges alike about the significance which the local authority attaches to the preservation of the sibling bond. The combination of the responses to question 3 and the more limited evidence derived from the review of published cases points again to a significant training issue for local authority social workers. It is clear that this issue may not be sufficiently addressed by the

appointment of an independent social worker to undertake (or sometimes repeat) this task. The court will inevitably be anxious to limit the children's exposure to yet another professional, and moreover there is a clear disadvantage associated with such instruction: it is recognised, as alluded to within Chapter 6, that there is a need for an in-depth knowledge of the children as individuals and of the dynamics of the sibling group, with the result that the allocated social worker is generally by far best placed to undertake the work, assuming that that social worker has the necessary skills, time and space to work on this very important assessment. This highlights local authority management issues, with a need for the social worker's team manager to be aware of the time required for the social worker to undertake a detailed, perceptive assessment and for the social worker's caseload to be managed accordingly.

Whilst the literature demonstrates that in some cases, sibling separation may be the only (or least-worst) option, it is concerning that 20% of judges considered that care plans did not appropriately evidence the need for disparity of plan between siblings – although it is encouraging that over two-thirds agreed or strongly agreed that such evidence was provided in some

cases. The rate of refusal of placement orders, as disclosed by the exploration of reported cases, lends credence to the clear evidence that local authorities do not consistently justify and explain the need for sibling separation, although of course there may be other reasons for dismissing a placement application. This point goes to the heart of the first research question, highlighting significant but not universal deficits in ensuring that there is appropriate evidence adduced in support of care plans which may redound to the disadvantage of one or more members of a sibling group and may result in permanent severance of the sibling relationship. Again, the absence of appropriate evidence is a training issue, and it would also be fascinating to undertake further research to ascertain the impact (if any) of demographics in considering whether local authority social workers adequately evidence the rationale for their proposals. It is reasonable to speculate that there may be a link with an appreciation of diversity and cultural issues – as evidenced by the case of *A (A Child: Flawed Placement Application)* [2020] EWFC B2, where the judge noted that the child concerned (who had complex physical and developmental needs) was part of a very large, family-centred, tight-knit and active European family group, including siblings, and found that it would be highly-detrimental

to the child to cause her to drift '*too far from being able to create and maintain those relationships, and some familiarity with their traditions … and the prospects of a future richly populated with loving relatives and their shared heritage'.* If further research does indeed demonstrate such a link, this would highlight the need for additional diversity training for social workers. It is pertinent to record that diversity issues feature prominently in judicial training, with very regular updating of the comprehensive Equal Treatment Bench Book, readily available to all Judges, including lay justices, and thus judges have considerable assistance in identifying cultural and other diversity features in the cases before them.

It should also be noted that local authorities have been criticised by the appellate courts – most notably in the case of *Re B-S (Children)* [2013] EWCA Civ. 1146 – for what, in that case, a former President of the Family Division, Lord Justice Munby, described as '*the recurrent inadequacy of the analysis and reasoning put forward in support of the case for adoption' –* although in fairness, Guardians and judges were not immune from criticism in that case, with judges castigated for inadequacy of analysis within their judgments. Although *Re B-S* created no

new law and was simply a magisterial reminder of how such cases should be conducted, its impact was profound, both in leading to a reduction in placement applications, and upon the morale of child protection professionals. Munby LJ sought to turn back the tide of unintended consequences by utilising the case of *Re R (A Child)* [2014] EWCA Civ. 1625 to clarify his earlier pronouncements and to reverse the deluge of such unintended consequences as follows:

> There appears to be an impression in some quarters that an adoption application now has to surmount 'a much higher hurdle', or even that 'adoption is over', that 'adoption is a thing of the past.' There is a feeling that 'adoption is a last resort' and 'nothing else will do' have become slogans too often taken to extremes, so that there is now 'a shying away from permanency if at all possible' and a 'bending over backwards' to keep the child in the family if at all possible….There is concern that *Re B-S* is being used as an opportunity to criticise local authorities and social workers inappropriately … we are in no position to evaluate either the presence or the validity of such concerns in terms of actual practice 'on the ground', but they plainly need to be

> addressed, for they are all founded upon myths and misconceptions which need to be run to the ground and laid to rest.

Those perceived '*myths and misconceptions'* and their impact upon the willingness of local authorities to seek placement orders resulted in the National Adoption Leadership Board (Narey, 2014b) publishing a document in response to the judgment in *Re B-S* popularly referred to as the 'Re B-S Myth Buster'. Munby LJ took the opportunity in delivering his judgment in *Re R* (supra) to emphasise that the content of the 'Myth Buster' was not endorsed by the judiciary and that it was aimed primarily at social workers, not judges. In the Press Release announcing the 'Myth Buster', Narey contended that:

> After two years of significant progress in finding more adoptive homes for the thousands of children waiting – transforming their lives along the way – we have seen a sudden and significant fall off in the number of children being put forward for adoption.

Although it is reasonably clear from *Re R* that Munby J either had not anticipated, or perhaps regretted, the impact of his earlier

strident criticisms, his judgment in *Re B-S* should in any event have served as a salutary reminder that both cogent evidence and clear analysis are essential in any placement or adoption application. Masson (2017, p.3) categorised the judgment in *Re B-S* as '*disruptive'* noting that:

> Disruptive judgments are 'game-changing'; they interrupt existing expectations and practice, disorient practitioners and result in decisions or outcomes which are not predicted. Nevertheless, they may be welcomed - the decision is Re B-S has the support of practitioners and academics who favour the restriction of adoption.

That indication of the welcome (in some quarters) impact of *Re B-S* provides a counterpoint to the concern expressed by Her Honour Judge Lazarus within the case of *Re A (A Child): Flawed Placement Application)* [2020] EWFC B2, quoted in the introductory chapter to this study, querying why adoption has become '*a kind of orthodoxy that requires inconvenient matters to be ignored and others twisted in its support'.* In terms of social work practice, the variability of which has been highlighted by this research, the judgment in *Re B-S* points to the need for

further training not just in terms of ensuring that social workers are fully-equipped to provide the necessary evidence and analysis in support of their applications, but also that they are assisted to understand the implications of the decisions of the higher courts and not over-react to them. The reduction in placement applications in the wake of *Re B-S* as identified by Narey (supra) suggests that the case severely impacted upon the confidence of social workers – a training issue which extends beyond social workers to encompass Local Authority lawyers, who should have been able to reassure their client departments that Re *B-S* does no more than set out in stringent terms what is required in placement applications, whilst the underlying law remains unchanged.

d) The research confirms the high, but not blindly uncritical, esteem accorded to Cafcass Guardians for the way in which they fulfil their independent role within care proceedings in representing and promoting the interests of the child. Interestingly, this contrasts with some perceptions of the role of officers of Cafcass within private law proceedings (typically disputes between parents about post-separation arrangements for their children).

In a report (Ministry of Justice, 2020, p.186), one finding was that:

> The evidence set out in this report suggests that there is a significant weakness in the knowledge and skills of social workers who are undertaking risk assessments and other related direct work with children and their families where domestic abuse is alleged, suspected or known.

Within the context of that report, it is implicit that the term 'social workers' refers primarily (but not exclusively) to officers of Cafcass. It should also be noted that Cafcass is far from immune from the pressures upon all public services, leading to concerns about its ability to fulfil its core functions. A House of Commons Select Committee (2011, paragraph 199) said this: '*The entire family justice system should be focused on the best interests of the child. Cafcass as an organisation is not*.' The context of that condemnation was the move by Cafcass towards what was described as 'proportionate working' and its impact upon the time which practitioners are expected to be able to spend in forming relationships with the children and young people whose interests they were charged with representing and

promoting. Happily, that criticism is largely not borne out by the results of this research, even though the pressures upon public services have not noticeably abated in the intervening years since that excoriating criticism by Parliamentarians. That said, there may well be scope for further research to explore why Cafcass officers within private law proceedings appear to be viewed more negatively than their counterparts working in public law proceedings, and whether the impact of austerity upon funding for public services is a potential ticking time-bomb in its implications for the ability of Guardians to continue to promote the welfare of children within public law proceedings.

e) Both the survey and the exploration of case reports clearly evidence that Judges do not shy away, in appropriate cases, from refusing applications for orders which would result in the severance of the sibling relationship. However, it is not possible to evidence a uniformity of approach: this begs the question as to whether more specific signposting within the statutory framework would, by concentrating judicial minds (and the minds of those responsible for preparing the care plans which the court is invited to endorse), result in greater consistency, whilst still preserving essential judicial discretion in the search for the

most appropriate welfare disposal of each case. This was further explored within my discussion of the responses to the questionnaire on the issue of potential for statutory amendment.

f) The responses to the questionnaire and, to a much more limited extent, examination of reported cases, demonstrate that judges are willing to contemplate the regulation of post-adoption contact by court order, but it would seem that this is a rarely-used facility, with repeated expression within the reported cases of anxiety about the prospect of such an order hindering the search for an adoptive placement. This points to several possible lines of further research. Firstly, whilst it is important to consider each case individually, it would be helpful to establish whether the concern about deterring potential adopters is more apparent than real. Secondly, it would be of assistance to ascertain in more detail the prevalence of the granting of such orders: a greater understanding of the reasons for both the grant and refusal of such orders would inform judicial training, especially at the induction stage when judges receive their first formal training in dealing with public law issues. Thirdly, it would be pertinent to have more information about the short, medium and long-term outcomes when contact orders are made, and in particular the

level of compliance and the impact upon the child or children concerned.

g) There is significant judicial support for a re-consideration of the welfare checklist within the Adoption and Children Act 2002 with a view to making explicit a requirement to consider the potential loss of the sibling relationship. It is difficult to formulate any persuasive arguments against such a recommendation: it should concentrate the judicial mind, but not bind it in any way. It should also assist in ensuring that the subject was at the forefront of the minds of the authors of the children's care plans and indeed of Children's Guardians. Those judges who considered such amendment inappropriate, insofar as they explained their dissent, expressed that they regarded the amendment to be otiose – the statute is already wide enough to encompass the sibling relationship. Whilst undoubtedly that is an accurate reflection of the legal position, it overlooks the pressures under which social workers, Cafcass and judges alike are working, and the advantages therefore of an aide memoire in respect of such an important issue.

h) The provisions of s.47(5) are expressed by a number of respondents to be unhelpful and indeed cruel. In the case of *Re B-S* (supra) (paragraph 71, Munby LJ explained that '*Parliament intended section 47(5) to provide a real remedy'.* Judges cannot directly challenge, much less disregard, a statutory provision but it is legitimate to flag up the unintended adverse consequences and to suggest where and how such consequences may be ameliorated. Subject to the outcome of the work being undertaken under the direction of Mr Justice Keehan (supra), there may be the need for further research both to evaluate the efficacy of this statutory provision and to consider alternative provisions which strike an appropriate balance between the rights of all concerned within the adoption process.

i) The case reports demonstrate a range of judicial anxiety about whether local authorities will faithfully implement care plans which provide for siblings to be placed together. It is very clear from some judgments – notably *London Borough of Haringey v LM and Ors.* [2014] EWFC B172 – that the imperative of avoiding sibling separation is at the forefront of the judge's mind. It will be recollected that only 27.27% of the judicial respondents disagreed with the suggestion that the courts should

be permitted, in appropriate cases, to require that siblings be placed together, with a mechanism for restoring the matter to court where necessary. However, it must be acknowledged that, within a policy climate which favours a lighter judicial touch (as exemplified by the reduction in scrutiny of some parts of the care plan, discussed supra), there is unlikely to be any legislative appetite for enhancing judicial powers to enable the court to insist on joint placement of a sibling group. As an alternative, the concern about local authority failure to heed its own care plans could be abated by strengthening the role and real independence of the IRO, coupled with an increasing willingness by Cafcass reliably to return matters to court in appropriate cases.

j) Another area which attracted much attention within the questionnaire responses was that of post-adoption contact, with a clear steer towards a need for greater consideration of this important topic. As discussed within the preceding chapter, a recurring theme within the examined judgments was concern that the existence of a formal contact order would prejudice the search for an adoptive placement. McFarlane (2017, p11) asks

rhetorically whether it is right that so much emphasis should be placed on the views of adopters:

> Why, if face to face contact would benefit a child, not necessarily now but in some time after she has settled down, should the adopter have an effective veto?

However, it is clearly essential that prospective adopters have a clear and honest picture from the outset of the expectations as to contact, and if those expectations deter prospective adopters, then the suitability of those adopters may require further exploration. In an area with so many possible variables in terms of what contact, and with whom, is appropriate and whether contact is absolutely essential or simply desirable, it is very difficult to be prescriptive as to any potential changes to the statutory regime. A presumption in favour of ongoing sibling contact might assist in concentrating the minds of all professionals upon the need carefully to weigh the merits of ongoing contact; although it was not raised by any judicial respondent, the removal of the leave filter in applications for sibling contact (within both Children Act 1989 and Adoption and Children Act 2002) could go some way to underscoring the

special significance of the sibling bond. It is important to recognise that this latter is not an original point: as long ago as 2012, Norgrove's Family Justice Review (p.30) included the following recommendation:

> Government should consult on whether section 34 of the Children Act 1989 should be amended to promote reasonable contact with siblings, and to allow siblings to apply for contact orders without leave of the court.

The removal of the permission filter in s.34 applications was also one of the recommendations made by Monk and Macvarish (2018, p.122).

The necessity to consider post-adoption contact with family members (not just siblings) is underscored by the imperative language of Adoption and Children Act 2002 s.27(4):

> Before making a placement order the court **must** *(my emphasis)*
>
> a) Consider the arrangements which the adoption agency has made, or proposes to make, for allowing any person contact with the child; and

b) Invite the parties to the proceedings to comment on those arrangements.

This provision is echoed by s.46(6) of the 2002 Act, requiring the court to consider, before making an adoption order, whether there should be any arrangements for allowing any person contact with the child. This is then supplemented by s.51A of the 2002 Act which empowers a court, on making an adoption order, or at any time thereafter, to prescribe or prohibit contact with named individuals. It is striking that these provisions are phrased in very general terms with no specific reference to the question of sibling contact. As indicated above, it is proposed as a result of this research that consideration be given to addressing the welfare checklist to highlight the unique significance of the sibling relationship: if that is accepted, then it would be a logical next step to amend each of the cited sections to single out for special mention the sibling relationship.

There is a clear pattern discernible within the case reports of the court acknowledging the importance of sibling contact, but rarely making any order requiring such contact, for fear of deterring prospective adopters. Amendments to the legislation to emphasise

the need to consider sibling contact would focus attention on the significance of the sibling bond, rather than substantively extend the law, given that self-evidently the reference to '*any person'* is wide enough to embrace all manner of sibling and quasi-sibling relationships; such amendments would, however, provide a powerful reminder of the need to consider and respect the unique importance of that relationship to each member of the sibling group. It is clear (in response to the second research question) that currently it cannot be said with confidence that when separate placements are inevitable, sufficient attention is paid to the preservation of the sibling relationship by means of direct or indirect contact, but it is submitted that the modest statutory amendments proposed would go some way to remedying that deficit.

k) The final research question addresses whether it is possible for law and practice to reconcile differing and competing welfare implications for individual siblings, and especially for siblings who are left behind whilst other siblings are received into adoptive families, and whether the law should be modified specifically to recognise the significance of the sibling bond. On that latter point, some recognition of that special significance of could be achieved

by modest statutory amendments to separate out siblings from references to the generality of family members (as discussed in paragraphs (g) and (j), supra) and to remove the permission filter for sibling applications.

The cases examined demonstrated a number of creative approaches to the maintenance of the sibling bond but do not provide a definitive response to the challenge of reconciling competing sibling interests, no doubt not least because each case is fact-specific. That challenge is, in one way, particularly acute when more than one child is the subject of proceedings, and thus the court is required to afford paramount consideration to the welfare of each child, but the welfare needs of the children within the sibling group are in conflict. However, that dilemma is mitigated to a degree by the fact that each child is likely to have the benefit of a Children's Guardian, tasked with making recommendations as to how best to promote the welfare of each child. In contrast, when the court is dealing with a child whose siblings are not the subject of ongoing proceedings, those non-subject siblings will very rarely have a voice within the proceedings (one such rare example is provided by the case of *Prospective Adopters for BT, Prospective Adopter for GT v County of Herefordshire District Council* and *BT and GT*

(Children represented through their Children's Guardian) v Local Authority A, GT's Adoption Agency, F and E (through their litigation friend the Official Solicitor) [2018] EWFC 76, discussed in detail within Chapter 5). However, as noted by Her Honour Judge Newton in the case of *Re N & Ors* [2014] EWFC B220, the court cannot simply ignore the plight of the non-subject child: it must perform a detailed and delicate balancing act to determine how to reconcile the irreconcilable. Whilst the court must loyally apply the paramountcy principle as required by statute, it is at least arguable that this requires the court to have regard to the interests of all members of the sibling group in order best to promote the interests of each individual members of that group, including the child who is the subject of proceedings. There is simply no easy answer to this question, but it is very clear that there is no place for the promotion of any '*orthodoxy*' as referred to in the opening Chapter of this study which privileges placement for adoption above all other considerations, including the loss of important birth family relationships, without a very careful assessment and analysis of the benefits and detriments of such placement.

The case law demonstrates that judges do consider carefully whether the local authority has met the high test of '*nothing else*

will do' for placement for adoption, but it is not possible to evidence that all judges are sufficiently robust in their insistence upon preservation, by contact or otherwise, of the sibling relationship, and nor is it currently possible to evidence that when plans go astray, the Independent Reviewing Officer can safely be relied upon to guide that plan back on course – as dramatically and worryingly demonstrated by, inter alia, the case of *Re G* [2019] EWFC B70 (supra).

None of the judicial respondents made any suggestions within their responses to Question 11 of the questionnaire as to any mechanism for balancing the competing needs of members of a sibling group. The case of *Re X (A Child: Profound Needs)* [2016] EWFC B36, provides an unusual example of the court expressing, in making a placement order, welfare-based concerns about the position of the 'left-behind' sibling in the event that a placement order was <u>not</u> made. In that case, the subject child was a 5-year-old boy with very and complex difficulties, including global developmental delay, ASD and Spina Bifida. His 21-year-old maternal half-brother lived with their mother and was reported to be very attached to his younger sibling and to take great pride in him. However, the elder brother was about to embark upon a professional career, and one of

the factors which the judge weighed in the balance in deciding to make a placement order was the risk, if the child was not placed for adoption, of the elder sibling sacrificing his career in order to meet the extensive needs of his brother. However, by far the more common approach is to focus (as indeed the court is obliged to do) upon the subject child or children, however much the judge is clearly mindful of the impact of the decision upon the remainder of the sibling group. It seems highly improbable that there would be any appetite for amending the paramountcy principle enshrined in Children Act 1989 s.1(1) and Adoption and Children Act 2002 s.1(2) to include any imperative to afford such consideration to non-subject siblings and in any event there is little obvious mechanism for ensuring that comprehensive evidence about those siblings is placed before the court to assist in making an informed decision.

The position is rather different when the siblings are the subject of the same proceedings, and although there are examples within the reported cases of judges making care orders in respect of older siblings before then turning to a placement application in respect of a younger child and announcing that that child's welfare is then paramount, it is respectfully submitted that this is an artificial

approach and that the judge should conduct a thorough balancing exercise as between all members of the sibling group in order to determine the optimum disposition of the case designed to meet their various welfare needs – which may, for example, require very careful attention to contact if sibling separation is the eventual outcome of that analytical exercise. The brevity of some of the explored judgments does make it difficult to examine the extent of the court's analysis in resolving these issues, but the approach taken in the case of *Re P (a Child)* [2015] EWFC B88 provides one example of the welfare of the younger, potentially-adoptable sibling apparently being privileged over the welfare of an older child: '*I have been told that there will be a severe impact on O if P is adopted and that she is not without significant vulnerability. However his welfare interests cannot be allowed to be subsumed by her interests.'*

This research confirms that there are simply no easy answers to that dilemma.

……..

9.4 Research Gaps

This study has identified a number of areas in which there are either

research gaps or at very least, further research would be helpful and/or interesting in order fully to explore how best to promote the sibling bond, in cases where such promotion is appropriate. The potential areas for further research may be tabulated as follows:

The benefits and detriments of adoptive children retaining their birth-names in the context of social media challenges.	p.73
The ability of the common-law legal system in England and Wales to evolve and adapt to changing circumstances.	p.202
The 'gifting' of children between family members and its implications for re-ordering familial relationships.	p.205
The impact of demographics upon judicial decision-making, including willingness to sanction sibling separation.	p.323
Comparative outcomes for children when the sibling relationship is or is not maintained.	p.335 & p. 464
The factors impacting upon judicial willingness to publish family judgments.	p.357

The short, medium and long-term outcomes when direct contact is ordered, and the prevalence of compliance.	p.487
Evaluation of the efficacy of s.47(5) Adoption and Children Act 2002 and consideration of alternatives.	p.489

9.5 Proposals prompted by the research findings.

1. Consideration be given to amending s.1(4)(f) Adoption and Children Act 2002 by the including reference to the sibling relationship as follows: '*the relationship with the child has with siblings, any other relatives etc.'* An alternative would be a separate sub-section addressing the sibling relationship: this would have the advantage that reference could also be made to quasi-sibling relationships without the subsection cited becoming totally unwieldy. The mischief of confining consideration only to formal sibling relationships could alternatively be addressed by amending the interpretation section of the statute (s.144) where siblings are not specifically defined, but in which reference to relatives is expressed to embrace those of the full or half-blood or created by marriage. *Quaere* whether that is sufficient to recognise step-siblings, but in any event it would not assist those who have resided

in the same household by virtue of their respective parents cohabiting in circumstances which did not extend to marriage or civil partnership: despite the 2002 Act (s.144(7)) referring to a person being the partner of a child's parent by virtue of that person and the parent being 'a couple', it is clear from Children Act 1989 s.4A that a 'step-parent' is a person married to, or in a civil partnership with, a parent of the relevant child. The term 'step-parent' is not further defined within the interpretation section (s.105) of the 1989 Act. It follows that a simple amendment to incorporate reference to 'siblings' would not assist in the promotion of non-biological quasi-sibling relationships.

2. It is proposed that Adoption and Children Act 2002 s.47(5) requires significant attention in order to devise a method of providing an appropriate remedy for the birth parents without cruelly raising false expectations for the birth parents and creating unnecessary anxiety for the prospective adopters (and potentially for any child old enough to be aware of the situation). There may be situations in which a means of challenge to the making of an adoption order opens the door to the possibility of developing sibling relationships, particularly when one or more of the sibling cohort remains in the care of a birth parent, but the responses to the questionnaire

highlight the unfortunate consequences of this provision as currently drafted. That said, consideration could be given to utilising any challenge to the making of an adoption order to re-visit the issue of sibling contact, wherever the children are placed: this would be one positive effect of a provision which is generally regarded as unhelpful and indeed cruel to disappointed birth parents.

3. It is suggested that permission filters be removed in respect of applications by a sibling for contact with another sibling, whether in care proceedings, at the time of making a placement order, when an application is made for an adoption order, or at any time thereafter. Public funding should be readily available to assist, in particular, applicants under the age of 18 years to pursue such applications. This proposal pre-supposes that the application is made by a sibling and not by a parent on the sibling's behalf: it is not unknown for parents who have exhausted their own remedies in challenging care plans or placement orders to seek to mount an application on behalf of a member of the sibling group. Such applications do require careful scrutiny to ensure that they really do reflect the wishes and welfare interests of the child 'applicant' rather than operating as a disruptive vehicle for a disappointed parent. It is

suggested that the leave filter should remain in place for applications made by a parent on behalf of a child for sibling contact, in order to guard against potential abuse of the process, but this should be balanced by consideration of the inclusion within the statute of a rebuttable presumption in favour of sibling contact.

4. Significant attention should be given to the role, culture and true independence of the Independent Reviewing Officer to ensure that IROs are properly equipped to challenge any departure from court-endorsed care plans. IROs are in the same anomalous position which obtained before the creation of Cafcass on 1 April 2001 when Court Welfare Officers (the predecessors of Cafcass Officers) operated as independent experts within the courts and yet were paid by the local authority. In saying this, I acknowledge that the research of Jelicic et al (2014) found that the challenges to the fulfilment of the IRO's role extend beyond where the service is located. I am also aware that further exploration into the role and functions of IROs is ongoing and the conclusions of that project will require to be carefully examined before any further steps are taken.

9.6 Concluding Comments

It seems unlikely, in the light of everything considered within this study, that all siblings will avoid the '*long and unnatural estrangement'* deprecated by Jane Austen in the quotation which opened this thesis. However, it is to be hoped that there is some prospect of research, including this research, persuading social and legal policy-makers to focus increasingly upon the unique value of the sibling bond and upon the corresponding need to ensure that the legal framework supports, permits and facilitates appropriate decision-making in order to preserve and prioritise sibling relationships, save in that minority of cases where the promotion of that relationship is positively contra-indicated. It is only when the sibling bond is afforded at least as much respect as that of the parent/child dyad that the Adoption Triangle will have been well and truly squared.

APPENDIX 1A

QUESTIONNAIRE TO FAMILY JUDGES

Title of Study

SQUARING THE ADOPTION TRIANGLE:

RECONCILING THE COMPETING NEEDS OF SIBLING CHILDREN

You are invited to take part in the above research study. Before you decide whether you wish to participate, please take time to read the following information and feel free to ask for further information or clarification of any aspect of the research. Contact details are included at the end of this information sheet.

Purpose of the study

The purpose of the study is to fill a perceived gap in existing research by exploring whether the needs and rights of children to preserve sibling relationships are at risk of being sacrificed in order to secure and cement adoption placements. The study will also consider the appropriate balance between offering the security of an adoptive placement on the one hand, whilst not, on the other hand, neglecting the long-term consequences for sibling relationships.

The research questions

1. Do the courts sufficiently consider the potentially-competing welfare interests of sibling children in making placement decisions which may result in the permanent severance of the sibling relationship?

2. Even if separate placements are inevitable, is sufficient attention given to preserving sibling relationships by direct and indirect contact?

3. Is it possible for law and practice to reconcile differing and competing welfare implications for individual siblings, and especially for siblings who are left behind whilst other siblings are

received into adoptive families? Should the law be modified specifically to recognise the significance of the sibling bond?

Methodology

An essential component of the methodology of the study is to draw upon the experience and wisdom of judges who deal with care and placement proceedings. In the first instance, you are invited to respond to the questions set out below. The majority are phrased as propositions requiring an indication of assent or dissent, and should not take a great deal of your time, but any additional information which you are able to offer will be gratefully received. You are free to withdraw from the study at any time or to request that your response is destroyed. In the absence of such request, you will be deemed to consent to your response being utilised within the project, but all information provided will be treated in the strictest confidence, and any quotations will be made anonymously and in non-attributable form. If you are willing to discuss the matter a later stage (either in person or by telephone), please indicate your willingness in response to the question at the end of the questionnaire. Your response to the questionnaire will be equally valued whether or not you are willing to be further interviewed.

Thank you for taking the time to consider the questionnaire and for taking part.

Question 1	
Please give an estimate of how many cases in the past 12 months you have been asked to consider separating siblings as part of the final care plan	Choose a number

Add additional comments below:

Question 2	
"Local authorities always pay sufficient attention, in formulating final care plans, to an assessment of strengths and weaknesses of sibling bonds" Do you:	a) Strongly agree ☐ b) Agree in most cases ☐ c) Neither agree nor disagree ☐ d) Disagree in most cases ☐ e) Strongly disagree? ☐
Add additional comments below:	

Question 3	
"Local authority social workers invariably provide good-quality 'Together or Apart' assessments". Do you:	a) Strongly agree ☐ b) Agree in most cases ☐ c) Neither agree nor disagree ☐ d) Disagree in most cases ☐

	e) Strongly disagree? ☐
Add additional comments:	

Question 4	
a) "Parties frequently seek to persuade the court to permit the instruction of an independent expert to undertake a 'Together or Apart' assessment?" Do you receive such applications:	a) Frequently ☐ b) Rarely ☐ c) Never ☐
b) Of those applications received, have you granted the applications:	a) In the majority of cases ☐ b) In the minority of cases ☐ (because the LA assessment is good enough) c) In the minority of cases ☐ (because it is not necessary) d) Never (because the LA ☐ assessment is good enough) e) Never (because it is not ☐ necessary)

Add additional comments:

Question 5	
"Where a local authority proposes that one or more of a sibling group should be placed for adoption, whilst other siblings remain in foster-care or placed within the birth family, in the majority of such cases, the reasons for the disparity in care plans are well-evidenced by the local authority" Do you:	a) Strongly agree ☐ b) Agree in some cases ☐ c) Neither agree nor disagree ☐ d) Disagree in some cases ☐ e) Strongly disagree? ☐
Add additional comments:	

Question 6	
"Where the care plans for siblings differ, the reasons for the disparity are appropriately scrutinised by the Children's Guardian" Do you:	a) Strongly Agree ☐

	b) Agree in some cases ☐ c) Neither agree or disagree ☐ d) Disagree in some cases ☐ e) Strongly disagree? ☐

Add additional comments:

Question 7	
Have you ever refused to make a placement order for one sibling because it would result in the severance of that child's relationship with other siblings? If Yes, please provide your best estimate of how many times this has occurred	Yes ☐ No ☐ Choose a number

Question 8	

Have you ever made an order for direct ongoing contact between siblings at the same time as making a placement or adoption order? If yes, please provide you best estimate of the number of occasions on which this has occurred.	Yes ☐ No ☐ Choose a number

Question 9	
"The Adoption and Children Act 2002 is defective in that the welfare checklist makes no specific reference within s.1(4) (f) (i) to the impact of loss of a sibling relationship". Do you:	a) Strongly agree ☐ b) Agree ☐ c) Neither agree nor disagree ☐ d) Disagree ☐ e) Strongly disagree? ☐
Add additional comments:	

Question 10	
"The Adoption and Children Act 2002 requires amendment to s.21 (1) to permit the court to require, in appropriate cases, that siblings be placed together (with a mechanism for restoring the matter to court where necessary)." Do you:	a) Strongly agree ☐ b) Agree ☐ c) Neither agree not disagree ☐ d) Disagree ☐ e) Strongly disagree? ☐
Add additional comments:	

Question 11	
Please set out any other aspects of the Adoption and Children Act 2002 which you consider require amendment.	Yes ☐ No ☐ Don't know ☐
If yes what amendments are required:	

Are you willing to be interviewed to discuss your responses?	Yes ☐ No ☐
If so, please provide your name and an email address or telephone number.	

APPENDIX 1B

ETHICS REVIEW PANEL APPROVAL

Keele UNIVERSITY

02/08/2018

Dear Sally

PI: Sally Dowding
Title: Squaring the Triangle: Reconciling the Competing Needs of Sibling Children Ref: ERP3141

Thank you for submitting your application for review. The proposal was reviewed by the Panel Chair. I am pleased to inform you that your application has been approved by the Ethics Review Panel.

If the fieldwork goes beyond the date stated in your application, or there are any amendments to your study you must submit an 'application to amend study' form to the ERP administrator at research.governance@keele.ac.uk. This form is available via https://www.keele.ac.uk/raise/researchsupport/projectassurance/researchethics/

If you have any queries please do not hesitate to contact me, in writing, via the ERP administrator, at research.governance@keele.ac.uk stating **ERP3141** in the subject line of the e-mail.

Yours sincerely
PP.

Dr Valerie Ball
Chair – Ethical Review Panel

APPENDIX 2

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APPENDIX 3B

CASES CITED FROM REPORTS CONSIDERED IN APPENDIX 4A

APPENDIX 4A

SYNOPSES OF REPORTS OF CASES WITH A SIBLING ELEMENT – APRIL 2014 TO DECEMBER 2020

2014

1. The first case of (limited) relevance in 2014 was *Re C (Children)* [2014] EWFC B130, in which the special guardians of two brothers sought inter alia permission to remove the children permanently from the jurisdiction and to re-locate to Australia. The case report does not reveal whether the children had any birth siblings or half-siblings, but part of the judge's reasoning in refusing permission was the adverse impact upon contact between the boys and their birth family – although it was the Special Guardians' case that their daughter, a sister figure for the boys, intended to live permanently in Australia.

2. The next case of relevance to this study was *Re FP (A Child: Care and Placement Order)* [2014] EWFC B137. In that case, a 9-month old baby boy had two full siblings, respectively 2 and 3 years old, who had been adopted together; two (significantly older – a teenager and a young adult) maternal half-siblings and five paternal half-siblings, two of whom were the subject of care orders. The local authority sought a care and placement order, but it was thought unlikely that the adoptive family of the two full siblings would be willing to add this child to their family. The child's mother was in prison, although nevertheless sought to care for the child in due course, and his father played no significant role within the proceedings. There is no mention of any possibility of placement of the child with any of his half-siblings. In making care and placement orders, His Honour Judge Hernandez stopped short of making any contact orders, but held (paragraph 74):

> I endorse the guardian's comments that in the event that (the baby) cannot be placed with his siblings … every effort should be made to ensure that sibling contact can take place.

3. *Re A (Final Hearing – Care and Placement Order)* [2014] EWFC B201 concerned two full siblings who, at the time of the hearing, were 2 ½ years old and 15 months old respectively. A non-subject maternal half-sibling was placed in the care of that child's father. The local authority sought to place the two children together for adoption, with a plan of indirect contact with their half-sibling, subject to securing the co-operation of that child's rather reluctant father. The order of HHJ Jones making care and placement orders recited the agreement of the local authority that if it proved impossible to place the two children together in a single placement, notice would be given to the parents prior to any separation of the children in order that the parents might have an opportunity to apply for permission to revoke the placement orders – thus triggering the re-appointment of the Children's Guardian and facilitating a thorough re-evaluation of the local authority's plans. This particular case concerned a Welsh local authority, but whilst there is no reason in principle why English local authorities

could not be invited to take a similarly-constructive approach, there is no power, as the law stands, to attach conditions to placement orders requiring a local authority to take the steps which this particular authority volunteered as part of its proposals to discharge its obligation to promote the welfare of these two young children. That said, many local authorities, if pressed by the Judge, will agree to almost any sensible recital on the face of an order permitting it to fulfil its care plan.

4. The case noted above was rapidly followed by the case of *Baby C (Care and Placement Orders)* [2014] EWFC B78. The child's parents were both very vulnerable adults, with the father having one other child with whom he was not in contact. Care and placement orders were granted, but no mention was made within the brief judgment of any exploration of the possibility of the baby being placed with his half-sibling, nor indeed of any possibility of contact, direct or indirect.

5. In the case of *Wiltshire Council v R and Ors.* [2014] EWFC B67, the court made care and placement orders in respect of two little girls who were respectively 2 ½ and 19 months old. The endorsed plan was for adoption together: there is no mention in the judgment of any possibility that the local authority might not be able to place the children together, and in particular no mention of the innovative approach referred to in case 3 above.

6. The next case of relevance is the case of *Re X, Y and Z Children v Southend-on-Sea Borough Council and Ors.* [2014] EWFC B123. This case concerned three girls who were respectively 13, 7 and 5 years old. The children are of African heritage, which is relevant in terms of the local authority's application for placement orders in respect of each child. The children were part of a much larger sibling group, originally of six girls, of whom two had tragically died in Africa, leaving one elder full sibling surviving. It is an extraordinary feature of the case that despite the local authority presumably appreciating the likely difficulties, statistically, of finding an adoptive placement for children of the ages in question, especially from a minority ethnic background, the children had already been told that they were to be adopted – to the great distress of at least the eldest child. At paragraph 19, Her Honour Judge Roberts roundly criticised the proposals in the following terms:

> All three children wanted to come home and all three want to be together. The proposition that it was either in their interests to be adopted or that it would be possible to find an adoptive family for these three girls together – and there has been no

> sibling attachment work undertaken … — is not remotely reasonable.

In the event, the case concluded with the children returning home to their mother under the auspices of a supervision order.

7. The issue of sibling contact featured in the background to the case reported as *Re A & C (Children)* [2014] EWFC B54, where Her Honour Judge Hudson was concerned with an application by the parents of two young children for permission to oppose the making of adoption orders. The decision reported was one of a number of decisions concerning this family of four full siblings, born of the father's extra-marital relationship with the mother. The eldest child, then 15 years old, has resided with the father and his wife since she was a toddler; the youngest three children had all been removed from the care of their mother and made the subject of care and placement orders. Ultimately, it was not possible to find an adoptive placement for all three children together, leading to the revocation of the placement order in respect of the eldest of the three, who thus remained in long-term foster-care, whilst the youngest two were duly placed for adoption. However, the Court made an order under s.34(4) Children Act 1989 permitting the local authority to refuse contact between the eldest child, the parents, and the eldest two of the three youngest siblings, expressly to facilitate direct ongoing contact between the youngest three members of the sibling group. This decision, although creative, could not prevent the eldest of the four children from seeking to contact her siblings via social media and thus could not provide any guarantee that the confidentiality of the adoptive placement would be preserved.

8. In *Barnsley MBC v KP & Ors*, [2014] EWFC B69, Her Honour Judge Carr QC, in dismissing an application for a placement order, noted that one consequence of the child remaining in long-term foster-care was the availability of ongoing contact with her siblings and parents. However, that appears to have been a happy consequence as opposed to a fundamental reason for the decision.

9. The case of *Re D Children* [2014] EWFC B114 concerned four half-sibling children with diverging care plans. In particular, further assessment was in progress to ascertain whether the third child could join her half-sibling, a boy who was in the care of his father; failing that, the plan for child 3 was placement for adoption, but separately from child 4, whose sole plan was placement for adoption, with a contingency plan of long-term fostering. Having considered the evidence, and in particular the Together or Apart assessment, Judge Bellamy found that children 3 and 4 would be

better placed separately than together: the burden of the evidence was that the children were not close (despite having always lived together) and that permanent placement together would impede the progress of child 4 (who was a 2-year old). The judge noted that foster-care would have some advantages for child 4, and in particular he would be able to maintain some direct contact with some if not all of his half-siblings: '*Whilst a continuation of contact may be helpful (and I am aware of research evidence that the relationship between siblings is normally the longest lasting relationship most people have) it is clear in this case inter-sibling contact is not the driving factor in determining outcome'.*

This case provides a clear example of the court exercising very great care in assessing whether it is in the interests of siblings to sanction separation, directing specific evidence to facilitate decision-making. However, as explained within the chapter discussing the legal framework, the court must always be mindful in directing further evidence of the statutory timetable of 26 weeks as the maximum length of time for concluding care proceedings, absent good reason for extending that timetable; it must also be clear that such evidence is necessary in order to resolve the issues in the case. Clearly, Judge Bellamy was so satisfied, and there is no suggestion of any dissension from his decision to require that additional evidence to be filed.

10. The absence of any judicial power to prevent separation was implicitly acknowledged by District Judge Hickman in the case of *Milton Keynes Council v A, B,X and Y (Muslim Children, Special Guardianship* [2014] EWFC B102 in which he invited (although could not compel) the local authority to amend its care plans in relation to two full brothers as follows: '*I would ask the Local Authority specifically to amend their care plans … to make it explicit that the boys will not be separated from one another …'.*

11. His Honour Judge Wright, within the case of *A, B and C Final (Welfare) Hearing* [2014] EWFC B205, declined to make a placement order in respect of a 4-year-old girl who was the youngest of a sibling group of four maternal half-siblings, holding that she

> is old enough and developed enough to retain her memories of her experiences with her family which have resulted in expressing a very positive wish to be with them. She will also want to be in contact with her siblings and family, including of course her father and that extended family.

12. In a brief judgment, His Honour Judge Jack, in the matter of *North East Lincolnshire Council v G & L* [2014] EWFC B192, declined to make

a placement order and placed a 3-year-old boy with grandparents who already had the care of an older sibling – although it is not possible to glean from the judgment whether the presence of the sibling added to the attractions of the proposed placement.

13. His Honour Judge Greene, in giving judgment in the case of *Peterborough City Council v SU and others* [2014] EWFC B92, noted that the respondent mother had previously had seven children removed from her care, but in determining the application for care and placement orders, did not address at all the implications for potential sibling contact in the event of the subject child being reunited with his parents. That said, his decision was that the child should indeed be rehabilitated – a decision reached on the basis of the progress made by the mother, without any apparent necessity to add the issue of sibling contact into the balance of factors to be considered.

14. In the case of *R (Mother) v Milton Keynes BC* [2014) EWHC B66, an application was made by mother to discharge care orders in respect of three children from a family group of five children, and to revoke placement orders in respect of the youngest two. The guardian supported placement for adoption of the youngest child, Z (who had been removed from the care of her mother at a very young age). Her Honour Judge Brown concluded that it was appropriate for Z to be placed for adoption, noting that:

> I am concerned that Z will be the only member of her family to be adopted out of her family ... The reality is that Z has been separated from her family since the age of 1 year old although had time in placement with F and K *(siblings also the subject of proceedings).* She has never experienced a settled permanent family life … If placed with the prospective adopters, she will be placed in a culturally appropriate placement … I have set out that Z has knowledge of and has had ongoing contact with her birth family but as set out above, the child care professionals do not consider that there is a particularly strong bond between Z with her siblings at this stage compared to other sibling relationships within the group.
>
> I would ask *(the prospective adopters*) to reconsider with the local authority their views in respect of direct inter sibling contact and what if any are the real risks to the placement of such contact taking place.

It is noteworthy that despite clearly appreciating the advantages to the sibling group of ongoing contact, the Judge stopped short of making any

order for direct contact – which might, it may be speculated, have caused the prospective adopters to withdraw.

15. In *B v Ors. (Fact Finding)* [2014] EWHC B84, Her Honour Judge Brown made a placement order in respect of each of three children, and, whilst not making sibling contact orders (it is not clear from the report whether she was invited to do so), acknowledged the significance of the sibling relationship and encouraged ongoing respect for it in the following terms:

> I cannot deny these children the chance of a permanent and stable family life. They need to be placed as soon as possible (and I fully expect them to be placed together) in an adoptive placement where all their needs can be met for the rest of their minority and they will feel part of a family unit for the rest of their lives. Neither of their parents is going to be in a position to care for them safely for the foreseeable future. Given the risks both of these parents pose to their children, I do not consider it to be in their best interests to have continuing contact with their parents post adoption. In respect of B, I accept that there will be a delay in finding an adoptive placement for her. She is a damaged and extremely vulnerable little girl. She needs a great deal of care and attention and reparative parenting. In my judgment her current foster carer has started providing her with that care and I commend her for her work. I sincerely hope that B can be placed for adoption as she too needs and deserves a permanent family placement as soon as possible. I am not prepared to deny her the chance of finding such a placement at this stage … In my judgment there should be contact between B and her sisters after placement and I strongly encourage the adopters of O and E and (if placed of B) to promote that contact.

16. Her Honour Judge Laura Harris was invited in the case of *ER (Placement Order)* [2014] EWFC B146 to make care and placement orders in respect of a young baby, even though this would jeopardise her relationship with her two full siblings, both of whom are in long-term foster-care. In granting the applications, the judge indicated her decision as follows:

> So far as contact is concerned, both parental and sibling, I approve the local authority contact plan for reduction in contact ... So far as sibling contact is concerned, it would be of enormous benefit to (*the baby*), as the only child in her family to be adopted, to have contact with her full siblings. I can see the very real difficulties which are present in the current

> circumstances in terms of confidentiality of any placement and I consider that any adopters worth their salt will be encouraged and I am sure will consider the prospects of such contact further down the road, when *(the baby*) is considerably older, and therefore I cannot make any form of contact order to the siblings, and again, I approve the local authority plan for a gradual winding down of contact with the siblings. I approve the plan, which is for indirect contact between the parents and the siblings and *(the baby*).

17. In the case of *JJD (Care & Placement Orders)* [2014] EWFC B109, His Honour Judge Iain Hamilton – then Designated Family Judge for Manchester – made care and placement orders in respect of a baby boy whose mother had declined to end her relationship with the child's violent father. The child had three elder maternal half-siblings who, as a result of the mother's relationship with the baby's father, had in turn moved to live with their respective fathers. In giving judgment, a passing reference was made to the baby having no relationship with any of his half-siblings: no mention is made, one way or the other, of any prospect of developing any such relationship in the future and it is not possible to glean from the report what weight, if any, was afforded to the impact of adoption upon the future of any inter-sibling contact.

18. In the tragic case of *Birmingham City Council v AB* [2014] EWHC 3090 (Fam), His Honour Judge Martin Cardinal, sitting as a Deputy High Court Judge, considered a particularly harrowing case involving a sibling group of three children whose father was serving a life sentence in prison, having murdered the children's mother. The children had initially resided with the maternal grandmother – a woman with many difficulties of her own, as a well as the care of her own young family – and were in danger of being caught in the cross-fire of demonstrable animosity between their maternal and paternal extended families. The judge considered that the three potential options were return to the care of the grandmother, long-term foster-care, or placement for adoption. There was unanimity amongst all the professionals that the three children should not be separated, and the judge was thus concerned to note the evidence of the family finding social worker (who had subsequently left the employment of the local authority) that it might prove necessary to look for a placement for the youngest two separately from the oldest child. In making placement orders, and in acknowledging that as a matter of law he could not attach any conditions to such orders, the Judge observed:

> there remains the risk of those dealing with the placement of the children ignoring the clear signal from this court and the social worker that the children need to be together, though I accept the local authority is going to do what it can to avoid that.

19. The next-reported relevant case was that of *JV (Final Care and Placement Order)* [2014] EWFC B112. This case concerned another baby boy who, as Her Honour Judge Staite found, could not be cared for within his birth family. In that case, the child had four paternal half-siblings, but there was no ongoing contact between the father and his older children, and the possibility of the child forming a relationship with those older children did not arise and therefore was not a feature of the judgment.

20. In the case of *A and B (Children)* [2014] EWFC B218, Her Honour Judge Corbett considered the case of 7-month old baby twins. The mother's older children had been adopted, and the judge noted that the local authority's plan, in the event that placement orders were made, was to consider, before looking at a wider pool of adopters, whether the adoptive parents of one of the older siblings could care for these children. In the event, the Judge decided that at that stage it was premature to make placement orders, and adjourned the proceedings. It is unclear to what extent, in taking that decision, she weighed in the balance the possibility of prejudicing the potential placement with the siblings – it is clear that her primary focus was upon exploring whether the parents could care for their children.

21. The next relevant case was *Buckinghamshire County Council v KM & Ors* [2014] EWFC B105. In that case, it was proposed that two primary school age brothers should be the subject of a special guardianship orders in a joint family placement, but the baby half-sibling should be placed for adoption. His Honour Judge Hughes said of the Guardian's evidence

> I was interested in her evidence to the extent which she put the view forward that inter-sibling contact, which I have to say I think is very important, could be promoted by the imaginative use of some media now available in terms of the use of videos and the like, which would not compromise (*the baby's*) security of placement, but would nevertheless give the boys the opportunity of growing up in the knowledge of one another.

In making care and placement orders in respect of the baby, the Judge held:

> I make a number of observations about (*the baby*). He was born a particularly needy child with withdrawal symptoms. He has been a fractious baby in his early months and the extent to which his development will be affected is still unknown. Central to the consideration of that checklist is the loss to him of natural family and by that I include not only his mother, his father but also his half siblings and (*the baby*) risks certainly not only the loss of that relationship and also that of his maternal grandparents. There are material losses in relation to any child, any human being, as a consequence of losing natural family … Keeping the checklist firmly in mind, (*the baby*) has the need for stability throughout his childhood. I have already spent a great deal of time in this judgment identifying the risk of harm. He has no relatives that can care for him. Of course, I am alive to the risk of emotional difficulties later in life when he may struggle with a sense of identity. I am fully persuaded that the present and future risks outweigh that consideration after having balanced appropriately and the risks are just too great in (*the baby)* returning to his mother. I am hopeful and this is why I am at pains to set it out in this judgment that he will with the good offices of adopters maintain a relationship with his siblings and the maternal grandparents. I urge the local authority to carefully consider how this can be done in an imaginative way.

22. In *E (A Child)* [2014] EWFC B140, His Honour Judge Hughes was concerned with an application for care and placement orders in respect of a young baby who had a maternal half-sibling and two paternal half-siblings. The baby's mother positively consented to the orders sought and the father neither consented to nor opposed them. Whilst the court made the orders sought, it is impossible to glean from the case report whether any consideration was given to the possibility of placement with, or contact with, all or any of the half-siblings.

23. The case of *Re F (Care)* [2014] EWFC B150 involved two sibling girls, aged 3 and 2 respectively. In making care and placement orders, it was implicit that Her Honour Judge Vincent envisaged that they would be placed together, but nowhere was that explicitly stated, and there is no mention of any recitals to the placement order specifically envisaging that the children would remain together. I accept of course that the final order may very well have contained recitals to that effect.

24. In the case of *Re K, D (Children: Care Proceedings: Separation of Siblings)* [2014] EWFC B104. His Honour Judge Bellamy, in considering

a plan that a little boy of 18 months be placed for adoption whilst his 7-year-old sister remained in foster care, says this:

> 174. The relationship between siblings is the longest lasting relationship most people have. It is longer than that of the parent/carer/child or husband/wife/partner relationship. The decision to separate siblings is not a decision that should be taken lightly. In a case such as this, that decision is excruciatingly difficult. Should D be placed for adoption if to do so would cause until emotional harm to his sister? Or to put that the other way around, should D be denied the opportunity to be planted into a new family in which he can put down deep roots in order to avoid the risk that separation from his sister may cause her harm?
>
> ……..
>
> 187... Even if ongoing direct contact can take place, that is not the same as being brought up alongside one's sibling. Direct contact may not fill the void left by separating these siblings. On this issue there is at present no professional evidence to assist the court.

The judge took careful note of the potential for his decision to impact differently upon each of the children, undertaking a thorough assessment of the realistic options for each of the children, and noting in connection with the placement application as follows:

> 186 … The greater problem is the consequences of separation from his sister. Whilst the local authority appears to accept the need to try to find an adoptive placement that would be open to ongoing direct inter-sibling contact the care plan does not commit to searching for such a placement ... The best that can be said is that it is a work in progress. The court cannot take for granted that it will be possible to find an adoptive placement with carers who are open to ongoing contact. In this case, the lack of evidence from the local authority's adoption team is highly regrettable.
>
> 187. There is, though, a more profound concern about the plan for adoption. Even if ongoing direct contact can take place, that is not the same as being brought up alongside one's sibling. Direct contact may not fill the void left by separating these siblings. On this issue there is at present no professional evidence to assist the court.

Having balanced the impact of delay against the need for further evidence, and noting a number of deficiencies in the local authority's presentation of its case, the judge was constrained to adjourn the matter for further

evidence to be gathered. Against the ever-present impetus to conclude proceedings in a timely fashion, that decision demonstrates very clearly the importance which this judge attached to the issue of the sibling relationship.

25. The case of *Leicester CC v D [2014] EWFC B114* (vid. no. 9 supra, referred to as *D (Children)*) returned to court in August 2014. The arrangements for two of the sibling group of four had been resolved; decisions in respect of the third child had to be postponed as a result of the very later emergence of the possibility of that child being cared for by the father who cared for one of her elder half-siblings, but Judge Bellamy was able to make a final decision in respect of the youngest child, making care and placement orders. In conducting his thorough welfare evaluation, he made the following observation as to sibling contact:

> Although adoption may have the effect of ending direct contact between Ben and his siblings, it is clear from the recent sibling assessment that Ben's relationships with his siblings are not strong. Whilst there may be some potential benefit in preserving those relationships, the benefits are not of any great weight when compared with the welfare advantages of permanency in a new family.

26. The next relevant case was *Re R (A Child) (Inadequate Welfare Evidence)* [2014] EWFC B101. The case concerned a 3-year old child in respect of whom the local authority sought care and placement orders. The child has four elder maternal half-siblings, two of whom are now young adults, with the two younger children placed out of their mother's care. His Honour Judge Wildblood expressed dissatisfaction with the adequacy of the evidence and adjourned the matter for further evidence to be filed. He made reference to the possibility of direct ongoing contact between mother and child, in the event of the local authority ultimately persuading him to make the placement order, but the potential loss of opportunity for a relationship with the half-siblings was nowhere explored. It remained a possibility that the issue of sibling contact would be explored once the judge was satisfied that all necessary evidence had been collated and that the matter was trial-ready.

27. Her Honour Judge Laura Harris was concerned within the case of *Re A & Ors (Care Proceedings)* [2014] EWFC B147 with the future arrangements for a full-sibling group of seven children, ranging in age from 16 to 5 years of age. Although it was common ground that placement orders

would be inappropriate, the local authority plan involved the continuing separation of the children in long-term foster-placements. The judge devoted one section of her detailed judgment to the issue of contact, but this was primarily with a focus on contact between the child and parent. Sibling contact was mentioned only to confirm that the judge approved the proposals, noting that this was not least because the children would see each other at school and there was already an indication of informal contact between the elder girls within the sibling group.

28. The next relevant case was that of *B (Children)* [2014] EWFC B155, in which His Honour Judge Wood was invited to make care and placement orders in respect of two toddler half-sisters, respectively $3^{1/2}$ and 22 months old. The judge noted that the behaviour of the elder child caused so much concern that the local authority was seriously considering whether the siblings should be separated – such course being strenuously opposed by the birth family. However, the elder child's behaviour improved during a period when there was no contact with her birth mother, leading to renewed confidence that the girls could indeed remain together. By this time, a new baby half-sibling had arrived, although the proceedings related solely to the older children. The judge noted with approval that whilst the issue was under consideration, the local authority indicated that it would facilitate contact between the two girls and the new baby, in order to assist life-story work. In the meantime, counsel for the mother submitted that the decision to separate the girls (if that was indeed the decision) should be taken by the court and not by the local authority, and thus she argued that the plan was inchoate – leading her to propose that the court should not make a placement order until it was clear that the girls would remain together. Judge Wood, however, expressed himself satisfied that the local authority wanted to keep the children together – a position reinforced by the Independent Reviewing Officer and by the children's foster-carers, who strongly advocated placement together. He said this:

> I endorse the view of the Local Authority and the guardian that these children ought to remain together unless, exceptionally, their welfare demands separation, something which seems improbable at this stage, but notwithstanding the uncertainty as to that, I am satisfied that the court should make a placement order now.

A significant aspect of that case is the recognition that the only potential method of restraining a local authority from separating children in its care is to delay the making of a placement order until the local authority

commits to a shared placement – which could of itself generate much delay in achieving permanency for children and in any event is difficult to police.

29. In the case of *Re MP (Care and Placement Orders)* [2014] EWFC B117 His Honour Judge Hamilton heard an application for care and placement orders in respect of a baby boy with four elder maternal half-siblings. The eldest three of that group were in long-term foster-care, whilst the youngest, 3 years old, had been adopted. In the course of the proceedings, the subject child had been moved from his first foster-placement to a foster-to-adopt placement. The only reference within the judgment to any contact between the sibling group is a reference to approving the (unspecified) contact proposals within the care plan. It is implicit from that comment that the baby has not been placed with his 3-year old half-sibling, but there is nothing to explain this, nor to assist the reader in understanding what contact was proposed. The only safe conclusion to be drawn from the absence of such information is that it was not high on the list of judicial priorities.

30. The next case meeting the criteria for this study was that of *Re W (Children : Application for Permission to Oppose)* [2014] EWFC B120, again an application by birth parents for permission to oppose the making of adoption orders. The children concerned were full brothers, respectively 2 years and 4 years old. They have a full sister who is some seven years older than the elder boy and is in long-term foster-care, together with two paternal half-siblings and one maternal half-sibling in respect of whom we are given no information, but who might well have achieved their respective majorities, given that the mother is reported to be 46 years old and the father aged 55. It would appear from Her Honour Judge Hudson's judgment that the parents relied, in pursuing their application, upon an unshakeable belief that placement orders should never have been made: it is therefore unsurprising that the applications were refused, and it is not possible to glean whether the issue of contact in particular with the full sibling had been a factor within the original care and placement proceedings, let alone within the reported decision.

31. His Honour Judge Jones, then Designated Family Judge for North Wales, heard the case of *Re B (Judgment)* [2014] EWFC B179 – an application for care orders in respect of four full siblings ranging in age from four to nine years old, and a maternal half-sibling baby boy, who had suffered grievous injuries in the care of parents. Care orders were granted in respect of all five children, with the four eldest being placed with their birth father under a care order, and a placement order being made in respect of the baby. In giving judgment, the court noted the proposals for letter-

box contact between the parents and the baby: no reference is made to sibling contact. However, in applying the relevant sections of the welfare checklist (Adoption and Children Act 2002, s.1(4), the Judge noted as follows:

> 176 (iii) Inter-sibling relationships would of course be maintained if there were no adoption, but currently this is of greater significance to the other siblings rather than to K himself, and of course it is the welfare of the subject child which is paramount. The loss of the future inter-sibling relationship and the parental relationship has to be balanced with the potential gain of a legally secure, safe and hopefully stable adoptive placement.

It is respectfully observed that all five children were subject children within the hearing, albeit the older children were not themselves the subject of placement applications and thus the court was not obliged to apply to them the principle enshrined within Adoption and Children Act 2002 s.1(2), namely that the court's paramount consideration is the welfare of the child throughout his life, Nevertheless, it seems artificial apparently to discount the paramountcy of the welfare of the half-siblings on the grounds that their cases had been the subject of a final care order a few minutes earlier, leaving just the baby whose future was still to be determined. The judgment does not assist the reader to understand the strength of the relationship between the half-siblings (noting that the youngest of the group was only some three years older than the baby), and nor does it address the willingness of the father of the sibling group to contemplate any future contact between his four children and their younger half-brother. As with so many case reports, it may be that the issue was discussed but did not feature within the judgment.

32. In the case of *Re H & M* [2014] EWFC B177, Her Honour Judge Hudson was concerned with the welfare of two sisters who were respectively 6 and 2 years old. The girls were known to have two older maternal half-siblings, then 19 and 18 years old. HHJ Hudson found that there was no possibility of a safe family placement for the children. Placement with the 18-year old sibling had been considered and discounted. The judge went on to make care and placement orders. It is impossible to be clear from the judgment whether there had been any significant sibling relationship between the two pairs of sisters, but clearly the existence of any relationship with the older pair did not deter the making of care and placement orders. However, the judge recorded and approved that the local authority, supported by the Guardian, contended

that the relationship between the two little girls must be prioritised, and if a six-month search for an adoptive placement together did not yield a match for the children, then the plan would revert to one of long-term foster-care together.

33. In the case of *Leeds City Council v X and Anor* [2014] EWFC B135, HHJ Lynch was invited to make care and placement orders in respect of the second child of two very young parents. The proceedings in respect of the elder child had concluded with care and placement orders a matter of some three weeks before the birth of the younger sister. In acceding to the applications of the local authority, the judge noted that (para 34):

> A plan of adoption means that hopefully she will be able to have contact with her big sister assuming they are both adopted. B's particular emotional needs mean that the professionals do not think attempts should be made to place the girls together. This is very sad as one would always want siblings to grow up together but given my knowledge of B's situation I accept this is the right decision here. It is good to know that B will hopefully soon be matched with adopters and given J's age I am sure she will be quickly placed. I very much hope then the girls can grow up having the best possible relationship as we know that sibling relationships are the most long lasting.

34. His Honour Judge Jones presided over the case of *Re L (Judgment)* [2014] EWFC B168 concerning a young baby, referred to within the judgment as D. That child had an elder maternal sibling, K, who has been adopted, and a somewhat older paternal half-sibling, L, with whom D's father had only recently succeeded in securing contact via private law proceedings. In making care and placement orders, the judge noted that there was a possibility but not a certainty that D may be able to join K in his adoptive placement. The judge added:

> So far as inter-sibling relationships are concerned, potentially of course if D and K were placed together these might be successfully promoted within a common adoptive placement. That I accept however, would not be the case as between D and L. However, so far as D's future placement is concerned the possibility of such a placement with K is not of course a certainty at this juncture. However, the loss of the parental and the sibling relationships have to be balanced with

> the potential gain of a legally secure and hopefully stable adoptive placement with adopters who would view D as their own and be able to commit to him fully, providing him with appropriate care and buttressed by the legal security of an Adoption Order.

The judge declined to make any order pursuant to s.26 Adoption and Children Act 2002, and his judgment is silent as to whether he would envisage direct contact between D and K in the event that they could not be placed together.

35. The case of *Re N & Ors* [2014] EWFC B220 concerned a full sibling group of three children: a teenage boy (C) and much two younger children (A and B) who at the time of concluding the proceedings were 4 $^{1/2}$ years and 20 months respectively. Although all three were full siblings, they had had very different life experiences, with the eldest child having been born of a brief relationship between his parents in Zimbabwe and being brought up until December 2010 in the care of his maternal grandmother in Zimbabwe. The parents re-kindled their relationship in the United Kingdom, and the eldest child joined them shortly after the birth of the next child. Up to that point, C had never met his father, had not seen his mother for some 7 years, spoke no English and had no understanding of British culture. Proceedings began as a result of allegations that C had been very seriously assaulted by his parents, resulting ultimately in criminal proceedings. The plan for A and B was adoption. In making care and placement orders, Her Honour Judge Newton said this:

> 71. Although my focus must be on the welfare of A and B, I cannot ignore the consequences for C. If his siblings are adopted, that can only add to his misplaced sense of guilt and misery that it was his original complaint to the police which has led to the disintegration of his family. It will also increase his sense of isolation; he will miss them.
>
> 72. Adoption is no panacea and adopters face all the vicissitudes of life faced by ordinary parents with the added complication that the children they are bringing up are not their birth children A is towards the upper end of the age bracket where adoption research suggests only a minimal risk of breakdown, but the children do have the advantage of being placed together.

There is no indication within the judgment of any expectation of ongoing contact with C.

36. The next case of relevance reported was that of *Re B (Placement Order)* [2014] EWFC B180. The case concerned a baby girl, GB, whose older half-sister, R, then 15 years of age, was already in the care of the local authority. It is noted within the case report that the mother described R as '*an animal'* and both parents opposed any contact between R and GB, expressing the view that R is spiteful and might deliberately harm the baby. In making care and placement orders, Judge Harris approved the care plan of indirect contact between GB, her parents and R. It is not clear on the face of the judgment to what extent, if at all, contact between the two girls had been promoted in the course of proceedings.

37. The case of *Cornwall Council v M and Anor* [2014] EWFC B184, concerned two small children, K and J, who were respectively 2 and 4 years of age. Three older maternal half-siblings had already been placed for adoption, and the local authority sought care and placement orders in respect of K and J. Whilst it was clear from the judgment that all agreed that K and J should remain together, there is little reference to the half-siblings, save at paragraph 50, when HHJ Vincent says this:

> They have some half-siblings, this was a point made by Miss Davey on behalf of their mother, with whom it would perhaps be helpful, albeit not a current priority, for them to have the opportunity of some form of relationship, but their age is the critical factor. Time is going on for them. This case involves an element of urgency about it and also important, the fact that they are siblings, they need to be together. There is nothing in the case that would indicate that that is not the right outcome for them.

It is impossible to glean from the judgment whether the local authority was committed to pursuing the possibility of contact between the two sets of siblings, and nor is it possible to deduce whether, in the event of a failure to find a sibling placement, the local authority would then consider separating K and J, on the basis that it may be easier to secure a placement for a 2-year old than a 4-year old, especially when, as the Judge put it, they probably have 'enhanced needs', with K in particular showing behavioural difficulties. The court has no power to require a local authority to place siblings together, and the best achievable may be a recital on the face of the order of the local authority's intentions and commitment to a sibling placement.

38. The case of *Re EM (A Child)* [2014] EWFC B216 concerned the seventh child, EM, born to a mother with significant difficulties. As HHJ Jones put it, '*she has a very strong desire for motherhood; a desire unfortunately not matched by her capability'.* Three of the older children (including one who was just 2 years older than EM) had been the subject of placement orders; two were in foster-care and having ongoing contact with their mother, and one lived with his father. In making a placement order, the judge made the following comments about the impact upon the sibling relationship:

> 56. So far as inter-sibling relationships are concerned, the position there of course is a somewhat confused one. Two of the mother's children are with Local Authority foster carers, one child is with the birth family. Other children have been adopted. There is the possibility perhaps of E being placed with the adopters of some of E's siblings, but the position remains an uncertain one. If that were, however, to be the case, there would be the prospect that E would have a common upbringing with at least some of her siblings. If that were not the position, there would still be the possibility perhaps of contact between siblings who are themselves subject of Adoption Orders.
>
> 57. So far as the siblings who are not placed outside the birth family are concerned, the Local Authority have proposed indirect contact; so in that manner at least there would be the preservation of some link. But so far as the future loss of sibling links as a whole are concerned, the position in this case is a somewhat uncertain one, at least at this juncture.
>
> 58. If, however, there were to be the total loss of that inter-sibling relationship (in the sense that siblings are brought up together), that, I am afraid, is a position which historically has emerged as a result of the mother's poor childcare.

39. The case of *Re G and C* [2014] EWFC B206 concerned a baby girl with a 7-year-old paternal half-brother who lived with his mother. The realistic options for the baby were found to be placement with her paternal grandmother or placement for adoption. His Honour Judge Wildblood rejected the placement with grandmother and proceeded to grant care and placement orders. There is nothing to be gleaned from the judgment as to the significance, if any, attached to the possibility of a future relationship

between the half-siblings, although the report does mention that the half-brother is now himself the subject of proceedings and it may be that there had been some expectation that contact would be explored within those proceedings.

40. In the case of *Local Authority v TQ and J B-W* [2014] EWFC B178, the court was concerned with two full brothers who were 6 and 7 respectively. There is no mention within the short report of any other siblings. In making placement orders, Her Honour Judge Watson observed as follows:

> In those circumstances the boys, in the words of Dr Wass, concentrate on the most significant and important relationship to them, which is their sibling relationship. Because the Local Authority's plan is for an adoptive placement together, that significant relationship will continue

This case provides another example of a court endorsing a plan in the expectation that siblings will be placed together, but with there being no obligation on the part of the local authority to guard against separation.

41. The case of *London Borough of Haringey v LM and Ors.* [2014] EWFC B172 concerned two full siblings, G and B, who were respectively nearly 7 years old and $3^{1/2}$. The parents each originated from the same Eastern European country and the father had a son born in that jurisdiction and remaining there. The father was said to have annual contact with that child, but there is no indication within the judgment of any relationship between the half-siblings. In determining the future arrangements for G and B, who had always resided together and who had clearly been exposed to much domestic abuse between their parents, the judge considered the issue of potential sibling separation. He recorded evidence from a Consultant Psychiatrist and from a Family Therapist as follows:

> 103. … Clearly very close to each other, each asking about the other's whereabouts when they are not present, saving snacks for their sibling and so on. It is likely that in the context of a chaotic and conflictual parental relationship the siblings have functioned as the most secure attachment figures for each other…If at all possible we would recommend that they be placed together by virtue of their close relationship.'

Noting the psychiatrist's opinion that it would be '*particularly dangerous'* to break the sibling relationship, HHJ Mitchell commented that the local authority's final care plans did not explicitly recognise the acceptance clarified within the final hearing that the children must remain together. He went on to say:

> I am satisfied that separating the children would be likely to cause significant harm to the emotional development of each child. In addition it would be likely to make a carer's task of looking after G much more difficult and increase the risk of the placement breaking it down. Being together will provide them with continuity, unique emotional support and a continuing relationship with someone who shares their cultural heritage. It will continue a relationship, which hopefully will provide mutual support throughout their lives. Living apart, even with regular contact, will be much less effective in providing these benefits and safeguards … They must not be separated even if this means that either of them will forgo the chance of being adopted. There is a risk that this advice and my judgment may be overlooked in the future especially if the children's social workers change. I regard the issue as so important that I shall not approve the final care plans unless either the authority accepts this and inserts it into the care plans or amends the plans to make their position clear and unambiguous and includes this paragraph of the judgment so that the Court's views are not overlooked.

With that (unenforceable) caveat, the judge made care and placement orders.

42. In the case of *Re P, Q, R and S (Children)* [2014] EWFC B166, Her Honour Judge Lynch was concerned initially with five full siblings, with an elder pair of 16 and 14 and three much younger children who were respectively 4, 3 and 18 months old. The 16-year old was discharged as a party in the course of proceedings and the 14-year old was in a specialist placement designed to meet his particular needs. Of the younger group, the baby, S, was in one foster-placement and Q and R were placed together in a separate foster-placement. The judge found that none of the children could return to the care of either parent. A psychologist instructed to assess

the children commented upon the local authority's then-proposal of separate adoptive placement for each of the youngest three as follows:

> He acknowledged that there were arguments for the joint placement of children, as it would reduce the scope for uncertainty and fantasy later in life and would preserve some connectedness in their lives.

The psychologist also noted the limited attachment between the three youngest children and their older siblings, and advised that placement of any of the three youngest with one or more of the older siblings would compromise the needs of the youngest children. The judge further records that the Guardian addressed within her report the impact upon the children of separation and concluded that adoption was the best outcome for the youngest three, with the baby placed separately and the two slightly older children remaining together. In making placement orders, the judge acknowledged the risk of separation and that each child may grow up without the birth parents or any siblings: '*a very real loss'.* The judge added:

> 118. … And adoption is not a panacea for correcting harm children have already suffered. Q and R I am satisfied already have developmental delay as the result of the parenting they have experienced and whilst they have made great improvements whilst in foster care much more is needed. Adopters, however good, may not be able to overcome the damaging start in life these children have had. S too has potential issues around attachment as a result of the number of changes of carer in her early life. I have to acknowledge that adoption, whilst aiming for forever families that these children, potentially may not achieve that.

Later adding:

> 120. If more than one of the children are ultimately placed for adoption the possibility of direct sibling contact may well be

> much more likely and that would be significant, given that sibling relationships are the longest lasting.

43. The next and final relevant case reported in 2014 was *Re T & H (Children)* [2014] EWFC B181 and which also involved a sibling group of four: two girls, A and B, aged 10 and 8, for whom the plan was that they should be the subject of Special Guardianship orders in favour of a connected carer, and boys of 5 and 3 (C and D), for whom the local authority proposed adoption. Judge Moir made the orders proposed, but it is not possible to glean from the brief judgment whether or not there was any expectation of ongoing contact between the two sets of siblings. It was clear, however, that the proposal was a 12-month search for a joint placement for the boys, with a back-up plan of long-term fostering in the event that no such placement came to light.

2015

44. The first reported case of relevance in 2015 was the case of *Re I (a child)* [2015] EWFC B8 in which a 2-year-old child, the youngest of a sibling group of three, was the subject of an application for permission to seek revocation of placement order. His Honour Judge Simon Wood refused the application but made no mention made within the judgment of the implications for the sibling relationship, although this may well have been addressed within the care and placement proceedings. The child had been placed separately from his siblings at the age of 7 months when all three had been removed from care of parents against a background of alleged domestic violence between the parents and the physical abuse of the elder children.

45. The next case which touches and concerns the issues relevant to this study was the case of *Re H* [2015] EWFC B30, concerning a child of nearly 11, A, in respect of whom the local authority sought a placement order with a view to her adoption by her long-term foster-carer. A is reported to be the second of a maternal sibling group of six children, the four youngest of whom were already the subject of placement orders. It is noted within the judgment that A continued to have contact with her older sibling, B and limited direct contact with the extended maternal family (excluding mother, in respect of whom there was no contact) and the plan was that such contact would continue in the event that an adoption order was granted. Whilst Judge Hudson made the order sought, it is not possible to determine from the report whether any question arose in relation to contact with the youngest four children. However, the judge clearly regarded the ongoing contact with the eldest sibling as a positive feature of the plan for A, adding (para.34):

> In addition to the significant emotional harm suffered by A as a result of the wide-ranging shortcomings in the care she received, A has also experienced the significant loss of her four younger siblings from her life. She has been helped to understand that they have been provided with permanency through adoption, with placements in 'forever families'.

46. The next case of relevance was the case of *Re A Child* [2015] EWFC B34 in which HHJ Lynch was concerned with a 7-month old baby girl with two older half-siblings: a paternal half-brother and a maternal half-sister, J, who was 12 years old at the time of the proceedings. J had lived with her mother and the baby (who had never been given a forename, being registered just with a surname) but J had been placed in her own father's care as a result of findings that the baby's father had sexually abused her. Parents refused to acknowledge the validity of local authority processes or the right of the court to intervene, and the local authority sought a placement order in respect of the baby. The judge noted:

> 55: I accept that if I approve the plan of adoption there is the potential for the child suffering emotional harm by way of separation from her parents. Her mother in particular is a very familiar figure to her as a result of the regular contact sessions and that relationship will ultimately be lost to her, as well as the relationship with her father and the potential of a relationship with her older half-sister and other members of the extended family. That is a real loss to a child and could have an impact on her identity in the future if not addressed by adoptive parents. That is a risk I take into account when considering the options for the child.
>
> 60: I also acknowledge that making an adoption order will of course end the relationship which the child has with her parents and wider family, as well as the potential relationship she might have with her older half sister and brother. Were she to stay with her parents clearly she would have a relationship with them and with their families. The mother does not currently have contact with her elder daughter and I suspect that would not be a meaningful relationship for the child if she stays in the care of her mother. As J is living with her father there is the possibility of some contact between the child and her sister in the future but at this point in time that could only be speculation. What I do know is that there would be a real loss of the relationship with her birth family. I have to offset that against the clear risk of harm if that relationship continues.

47. The case of *Re J, K&S (Care and Placement Orders and Special Guardianship Orders)* [2015] EWFC B77 concerned two full brothers, J (7) and K (4), with a maternal half-sister, S (nearly 2). The plan for the children was a time-limited search for an adoptive placement for the boys and a Special Guardianship order in respect of S in favour of her paternal grandmother. All three children were in foster-care, with the boys together and S in a separate placement. Regular sibling contact took place. By the time of the final hearing, the boys' foster-carers had expressed a wish to offer them long-term placement. In conducting her welfare evaluation, Judge Venables indicated that:

> 30. When considering the relative merits of adoption against long-term foster care for these boys, the court must consider the lifetime consequences and the loss of their relationships with their father, their mother and their reduced connection with their sibling. Their self-esteem and identity would necessarily be affected by the severance of those links.

The judge recorded the view of the Guardian that the boys' need for permanence and security outweighed the benefits of maintaining contact with the parents but is silent as to the Guardian's advice as to sibling contact. In considering the appropriate order for S, the judge does not raise the issue of her ongoing contact with her brothers, and it is impossible to glean from the judgment the extent to which the issue featured in the judge's consideration of the appropriate orders to make. Given that all three children had lived together prior to their reception into care, and the fact that there was the possibility of maintaining a settled placement for the boys, it is perhaps surprising that the issue of contact was not afforded greater prominence, even if simply to explain why it was trumped by other factors.

48. In the case of *Lancashire CC v G (Separating Siblings)* [2015] EWFC B68, HHJ Duggan addressed the needs of three maternal half-siblings who had always lived together with their mother, prior to the local authority's involvement. Two of the children (then respectively aged 10 and 4) were quite quickly placed with their respective fathers; the middle child, age 8, remained in foster care with a plan of eventual placement with his father. The three fathers were committed to sibling contact, albeit such contact would be limited by constraints of geography. It was not proposed that the three children should be placed in foster-care, and therefore the only route

by which the children could be placed together would be placement with their mother. On the issue of separation, the judge noted:

> 30. The alternative to placement with the mother, the proposal favoured by the other parties, has advantages; the needs of the children will be met; the children will be protected from harm. However, it does have the disadvantage of separating the siblings and of course, given the geographical facts of this case, the separation is a quite dramatic one. The children miss one another but the carers are committed to sibling contact which has already been successfully established. It is important for me that the separation of the siblings has actually occurred. This is not a case with a theoretical assessment of what the impact on the children might be. We know, and the social workers and guardian alike have seen, that the children miss one another although the impact has not been seriously detrimental for them. The interim placement of A. and M. with their respective fathers has created an assessment opportunity and it is clear that the fathers have done well and that the children have succeeded in their care.
>
> 31. In relation then to the separation of the siblings it is common ground that reunification could not justify placing these three children together in foster care so my task must be to consider the reunification of the children in the mother's care. It is clear in that context that the disadvantages of placement with mother far outweigh the advantages of reuniting the children in her care. For A. and M. removal from their successful placements with their fathers could not be justified. L. is in foster care but he is doing well in foster care. Neither L.'s father nor mother are in a position to offer care for him at this point in time and so it is necessary and proportionate that he stays in foster care.

That case differs from many of the preceding cases in that separation having already occurred, assessment was based on the impact of the status quo rather than upon speculation as to the impact of future separation.

49. The case of *Re P and A* [2015] EWFC B24 concerned two very young children in respect of whom the local authority sought, and was granted, care and placement orders. It is mentioned within the judgment that the father had an older child – the relationship which produced that child having ended in 2002 – but no other mention is made of the whereabouts of that child nor any consideration of any potential or actual sibling relationship. It is impossible to deduce from the judgment whether the

existence of the paternal half-sibling was considered a relevant factor at all.

50. The next case of relevance in 2015 was *Re C (A Child)* [2015] EWFC B210, involving the third child born to a young woman who was then 23 years old. C's father was more than three decades older than the mother. The father has five older children, then ranging in age from 26 to 34. He also had significant involvement with his grandchildren. C's older siblings, A and B, were made the subject of care and placement orders after B had sustained serious injuries found to be inflicted whilst A and B were the care of their mother. It came to light in the course of the hearing relating to C that her parents were in a concealed relationship at the time of B's injuries. The judge found that C could not safely be placed in the care of either parent. The adult paternal half-siblings were variously deemed unsuitable to care for C or did not put themselves forward to do so. A and B had, sadly, been separated after the conclusion of their proceedings. The judge made general observations about the loss of family relationships being a disadvantage of placement for adoption but also noted with approval that C would have the opportunity to be placed with B '*so to that extent will continue to enjoy a degree of family life that would be permanent and life-long'*, adding that she may '*even*' have a chance of ongoing contact with A. No mention is made of any ongoing relationship with the paternal half-siblings, although equally there is sufficient indication within the judgment of various levels of dysfunction amongst some of those siblings which would inevitably raise the necessity of a degree of caution.

51. His Honour Judge Wildblood QC, giving judgment in the case of *Re EF (Flawed Placement Application)* [2015] EWFC B21, delivered a scathing critique of the problems which beset proceedings relating to a 4-year-old girl, EF, in respect of whom a care order had already been made (in common with her two older brothers) and who was then the subject of a placement application. The three children were accommodated in separate foster-placements. At paragraph 20, the judge noted:

> The care plan is non-specific about contact between the three siblings; at C179 the social worker says: '*direct contact would be promoted* [between the three siblings] ***if*** *this was assessed as being in EF's best interests and risks associated with their ongoing contacts with the wider birth family could be mitigated. Adopters open to promotion of direct contact would be recruited by the agency'.* The guardian said this about inter sibling contact in her oral evidence: '*The contact between EF and one of her brothers has included an overnight stay. There*

> *has been inter sibling contact three times a year with all three children together but there is also separate monthly contact between EF and one of her brothers and less frequent contact between EF and her other brother. Ideally, if EF is placed for adoption, an adopter would have to accept inter sibling contact although this will not be easy because the parents will continue to have contact with the boys and adopters might find that difficult'*. Having considered matters overnight, and after a period of adjournment for reflection, the guardian through her solicitor and in her presence said that one could not have any confidence that the Local Authority would deal with this issue of inter sibling contact appropriately and there was a very risk that it would not press for or find adopters who would tolerate inter sibling contact. Thus there was a very real risk that a placement order would result in this child losing all contact with all of her family members.

The judge further recorded that the care plan made reference to indirect (written) inter-sibling contact twice a year. He also noted that each of the three siblings has complex needs, requiring specialist carers, and had been found by an earlier judge to require separate placement to enable those complex needs to be met. He recorded the opinion of the instructed Consultant Psychologist who emphasised the importance of skilled life story work, if EF was to be placed for adoption, and of maintaining contact with her two brothers. Having carefully weighed up the alternatives of long-term fostering as against the making of a placement order – a decision found to be so finely-balanced by the Guardian that she could not make a recommendation – the judge proceeded to dismiss the application for a placement order, noting that EF needed to maintain her family relationships if possible, especially with her brothers, and the Judge thought it highly unlikely that the local authority would promote that post-adoption.

52. The case of *Re HJW (Care and Placement Orders)* [2015] EWFC B35 concerned a baby whose 6-year-old maternal half-sibling had been placed for adoption some years previously. In making care and placement orders, the only reference made to the adopted half-sibling is to note that '*he has no relationship with his half-sibling with whom he has never had any contact'* (para 94): it is not possible to deduce from the judgment whether placement with the elder sibling's adoptive parents would be explored, nor whether, if a joint placement could not be achieved, the possibility of contact would be considered.

53. The next reported case of relevance to this study is the case of *Re H and Ors* (Children) [2015] EWFC B38 which concerned two full siblings, C1 and C2, who were 6 and 3 in age, and a maternal half-sister, D, who was 7 months old at the time judgment was given. The unopposed plan for the elder two children was placement with their father and his partner; the local authority, supported by the Guardian, sought care and placement orders in respect of the baby – a child who has some additional needs associated, inter alia, with her premature birth, and who was described by the judge as a '*fragile baby'*. The judge made care and placement orders in respect of D, making no reference to the issue of ongoing contact with her half-siblings.

54. The subject child in the case of *Re J (A Child)* [2015] EWFC B55 was his mother's ninth child, and the fourth born to the two parents together. The older children had all been the subject of proceedings: most were placed for adoption, but the parents had ongoing contact with the two of the nine children who had not been adopted. In making care and placement orders, the judge made no reference either to placement with one of the older adopted siblings or to contact – but it was acknowledged to be a brief judgment because the parents had taken the decision not to oppose the orders sought.

55. The rather unusual case of *Leeds City Council v LZ & Ors* [2015] EWFC B28 concerned a 6-month-old boy, I, whose two full siblings, J and S, at the time of the judgment respectively 10 and 11 years old, had been placed for adoption after findings that J had suffered serious physical injuries caused either by the mother or by the father. The father of all three children, AZ, was a failed asylum seeker who, having been deported whilst mother was pregnant with the elder of the two children, found the means of returning illegally to this country. Given his precarious position, the father did not engage with the care proceedings relating to the elder children. In the course of proceedings relating to I, the mother admitted having caused J's injuries, and father acquired insight into the risks which she posed, leading ultimately to the placement of I with his father under a Supervision Order. AZ accepted that even though he had now been exonerated from injuring his elder son, the adoption orders would not reversed, and that any contact with those children would be at the discretion of their adoptive parents. Mr Recorder Howe QC demonstrated his appreciation of the significance of the contact issue by adding this:

> Given that it is proposed that I will have regular direct contact with his mother, it may be the case, that S and J's adoptive parents are reluctant for there to be any direct contact with I.

> However, following careful thought and assessment, some direct contact might be possible and I grant permission for this judgment to be disclosed to S and J's adoptive parents so that they can consider for themselves what would be in the best interests of their children.

56. In the case of *A Local Authority v T and F* [2015] EWFC B69, Her Honour Judge Hudson was concerned with five children born to the same mother. The first two children were 11 and 10 respectively and shared the same father; the next two, 9 and 5, shared a different father, and a baby boy, L, now 16 months old, has a father whose identity is unknown, allegedly even to the mother. Proceedings began as a result of L having sustained non-accidental head injury on two occasions, causing subdural haemorrhaging: despite a fact-find hearing, the cause remained unknown. L was placed in foster-care and has very significant additional needs; the older children remained in the family home, but in the care of relatives rather than their mother. The local authority sought care orders with a view to placing the older four children in 2 separate foster-placements, with a time-limited search for adoptive carers for L and a contingency plan of long-term fostering. The judge found that it was appropriate to give the mother one final attempt to address the parenting deficits in respect of the older four children, but made a placement order in respect of L, notwithstanding the evidence that the older siblings missed their brother and wanted him to return home. In respect of L, the judge said this (para 126):

> I have concluded that L's care needs can only be met by his placement outside the family. The local authority's plan is for his placement for adoption. If that can be achieved, it would provide L with the permanence and security he is not likely to achieve through long term foster care. L should be, if he can be, part of a family throughout his life. The disadvantage of a placement for adoption is clear: the loss for L of his relationships with his birth family. This is a disadvantage for L, as for any child. For L, that is, in my judgment, outweighed by the advantages of such a placement. For L, I have concluded that the local authority's plan is the only plan that will meet his welfare. I have concluded that nothing else will do.

Whilst not specifically articulated, the judge clearly found that the need for the security of an adoptive placement outweighed considerations of sibling contact: her awareness of the importance of the issue was highlighted by her comments in relation to the four older children (para 128):

> Placement of the older four children in foster care would provide them with care from professionally trained caregivers,

> assessed to provide care at a consistently high level. There are also, however, risks inherent in the local authority's plan: the impact of the children's removal from the birth family; the separation of the children, at least in the short term, with no certainty that they will be placed together in the longer term.

57. The case of *Re A* [2015] EWFC B134 involved a sibling group of five Muslim children. The sibling cohort also included one non-subject maternal half-sibling who lived with the mother of the five older children and her current partner, and two non-subject paternal half-siblings born of the father's re-marriage. The subject children ranged in age from 2 to 9 and were full siblings. By the conclusion of the proceedings, the mother did not oppose the local authority plan for adoption for the three youngest children and long-term fostering for the eldest two, but their father sought to care for all five children. Each parent expressed concern about the proposed contact arrangements. The plan endorsed by the judge, in making care orders for all five children and placement orders in respect of the youngest three, was for the elder two children to remain in the long-term foster-care of their current carers, one of whom was Muslim, and for the youngest three to be adopted by the couple who had cared for the youngest child from birth. Those carers were open to ongoing contact between all the children and with their parents: as Her Honour Judge Moir explained:

> The acceptance and support of the parents of these children in this placement is a key factor when the local authority consider contact and therefore it depends largely upon the acceptance, or otherwise, by the parents of the court's decision, whether or not continuing contact to the younger children can be beneficial or appropriate

Contact with the half-siblings was not mentioned within the judgment, but it is reasonable to suppose that this could flow from contact with the parents, if indeed those children remain in their care.

58. In the case of *BFC v R & P* [2015] EWFC B42, Her Honour Judge Owens was concerned with two half-siblings, AR (6) and AP (17 months). AR has two older paternal half-siblings who lived in Latvia with a grandparent. AP had been received into foster-care immediately after her birth, but did not share her foster-placement with her half-brother, so the two children had never lived together. The local authority sought care and placement orders with the intention that the children should reside together, with a contingency plan that they remain in their current (separate) placements. The judge noted that:

> Essentially the crux of this matter is the risk of any disruption to the existing placements by (*mother*) and how likely the existing foster carers are to promote a sibling relationship between AR and AP. The Local Authority accepts that moving AR, and AP, will cause them emotional harm but argue that this is likely to be short term and far outweighed by the risk of harm in relation to potential disruption and the sibling bond not being maintained. The Guardian is not of the same opinion and believes that the harm which AR and AP will suffer by being moved is greater and may be more long term, than the potential risk of harm in relation to disruption and the sibling bond not being maintained as closely as it could be in a single placement. The Guardian and the Local Authority accept that this is a finely balanced case.

The judge goes on to record

> … the foster carers had been trying themselves to set up sibling contact, with two siblings who have never lived together and had no real relationship. There is also a significant age gap between them and AP and AR cannot currently talk properly to each other. Despite this, the foster carers have actually not only tried to facilitate sibling contact but also clearly thought about how they might promote it in future if the children stay with them. At C292 in the viability assessment of DW, paragraph 8.1, it is noted that the foster carers have talked about the children having sleepovers and holidays together which they hope would build the relationships between the two children.

Ultimately, the judge rejected the local authority plans to move the children from their current carers, and took the rather unusual course of adjourning the placement application whilst the foster-parents applied to adopt the child severally in their respective care. It is clear from the judgment that the judge accepted that those carers would promote the sibling relationship but that stability of placement outweighed the potential benefits of the two children being placed together. In the course of her judgment, she noted the significant age disparity and that the children had never lived together.

59. The next case of relevance to this study is the case of *Re G & Ors (Children)* [2015] EWFC B144. This case directly concerned five children, A, B, C, D and E with an age range of 17 to 2 years of age. In addition, their mother had two children not the subject of proceedings who were respectively 10 and 9 and lived with their father under a private law order. The two youngest children, D and E, shared the same father and the local authority's plan for those two children was placement for adoption. The local authority proposed no order in respect of A, (who was in any event

too old for a care order to be made) and for B and C to be placed in foster-care.

The case was based on long-standing concerns about home conditions, lack of supervision, anti-social behaviour and exposure of the children to domestic violence, specifically as a result of the volatile relationship between the mother and the father of the youngest two children. D and E were said by their nursery to engage in 'vicious' behaviour towards each other, to use bad language (especially the youngest child) and to be developmentally delayed. The social worker, referring to D and E, described witnessing at a home visit '*the most appalling behaviours I have ever witnessed in children so young. The boys were kicking and fighting each other. The kicking and hitting was so severe that I had to remind myself how old the children actually were'*.

The judge noted that the family was not a cohesive unit, with B and C moving between their family home and the home of their grandmother; it was also recorded that the father of the youngest two children had made threats that in the event of their adoption, he would track the children down, wherever that might be. Given the father's identified mental health difficulties and capacity for violence, this threat was clearly a serious concern to the local authority and to the Guardian. In making care orders in respect of B and C, the judge noted that separate, specialist placements would be required for each of those young people. The judge went on to make placement orders in respect of D and E, but the judgment is silent on the question of whether the plan was to place the children together (which on the facts may well be contra-indicated) and also silent as to the issue of ongoing sibling contact. It is however reasonable to infer from the security concerns associated with the father of the youngest two children that it is very unlikely that any direct contact with non-adopted siblings would have been in contemplation.

60. In the case of *Re M, R and MF (Children)* [2015] EWFC B90, His Honour Judge Jones was concerned with the welfare of a sibling group of three children: M (4), R (2) and MF (1). The case featured cross-applications by mother for the discharge of the Care Orders previously made in respect of R and MF, the local authority's application for Placement Orders in respect of R and MF, and the application by M's father for a Child Arrangements Order, together with applications by the mother for declaratory/injunctive relief pursuant to ss.7 and 8 Human Rights Act 1998.

Whilst acknowledging that M would stay with her father, the judge noted that it was an essential pre-requisite of the local authority's plan to seek an adoptive placement for the two younger children that they would remain together. The guardian also raised the possibility of post-adoption sibling contact and also contact between the two younger girls and their mother, although was clear that placement must be the priority. In giving judgment, the Judge noted that the mother's extreme, dysregulated behaviour at intervals in the course of the hearing gave rise to the question of '*how on earth the mother could manage the emotional demands of post-adoption contact'* (para 145). The judge declined to make any defined order for ongoing contact under s.26 Adoption and Children Act 2002, holding that that issue would require further evaluation when the adopters' position became known. In explaining his decision, he commented as follows:

> 167. When looking at the longer-term consequences throughout life, I have to assume that R and MF will acquire an accurate account of why they were removed from parental/foster care as part of their life history as they grow into adulthood. Any adopted child might of course, emerge into adulthood resentful of being removed from her birth family of origin and losing a sibling connection. I accept that in these circumstances this decision could destabilise, disable and disadvantage a child thereafter as an adult during his or her life. Much will depend upon R and MF's actual experience of adoption.
>
> 168. However, in this case my decision is prompted by an overwhelming imperative to promote R and MF's stability, security and safety during their childhood, and if the children have this knowledge available to them in due course, and applying their mature judgment, they are on balance I believe, more likely to accept my decision and emerge hopefully as secure and grounded adults themselves, who may well wish to re-establish birth familial links in due course in the future.

61. In the case of *Re AB* [2015] EWFC B58, Her Honour Judge Pemberton considered cross-applications in respect of a 2-year-old boy who was the subject of a care order, with a failed plan for rehabilitation to the care of his parents. The local authority pursued a placement order; the parents sought to persuade the court to discharge the care order with a view to a further rehabilitation attempt. The child has both a maternal and a paternal half-sibling, and an elder full sibling. In granting the placement order, the judge made no reference to the possibility – or otherwise – of sibling contact, and indeed the care arrangements for the elder three children are not described. It is therefore impossible to deduce from the

judgment whether it was influenced in any way by considerations relating to the impact upon any sibling bond, whether actual or potential.

62. The next case of relevance is the case of *Re J & E (Care, Placement)* [2015] EWFC B50. J (12) and his maternal half-sister E (5) had been removed from the care of their mother as a result of an accumulation of evidence about domestic violence, alcohol and drug misuse and abandonment. The children were in separate foster-placements with no direct contact because J was considered to be aggressive towards E, but the social worker's plan was to seek to re-build the sibling relationship. Nevertheless, the local authority proposed long-term foster care for J and sought a placement order in respect of E. In evaluating the various possible options for E, Her Honour Judge Wright said this:

> I accept that E will miss her mother. I do note however that the Local authority will consider very carefully if direct contact with J is in E's interests and will discuss that possibility with any potential adopters. From everything I have read and heard about E I share the Local Authority's optimism that a placement, and indeed a very suitable placement that meets her needs, will be found for her.

The Judge went on to consider whether it was appropriate to make any order for contact between E, her parents or her brother, but in the event specified that she was confident that if the Local Authority consider direct contact with J is appropriate and in E's interests and if prospective adopters would promote such contact then it will be implemented, adding that she did not want to tie the Local Authority's hands in any way as the decision as to contact must be as to what is in E's best interests at the time.

63. In the case of *L and C (Placement Application – Parents not attending hearing)* [2015] EWFC B49, Her Honour Judge Wright was concerned with the welfare of twin baby girls. Their mother had already given birth to five older children, including male twins. The eldest two children lived with their paternal grandmother; the youngest three, including the twins, had been placed for adoption. In making care and placement orders, the judge acknowledged and approved the local authority plan to place the girls for adoption together, but made no mention of any potential contact with their five elder half-siblings.

64. The case of *Re P (a Child)* [2015] EWFC B88 threw into sharp relief the legal imperative to give paramount consideration to the welfare of the child who is the subject of the proceedings, notwithstanding the competing

welfare needs of a non-subject sibling. The case concerned a 2-year-old boy, P, with three older siblings. The first two of those siblings had been adopted; the third child, O was somewhat older than P (although her age is not mentioned) and was herself included in the application for a care order, although it would appear that the proceedings relating to O concluded before the final hearing in relation to P. A sibling assessment confirmed that P would go to O to have his needs met, and that O had crossed from being a sibling to being P's carer. The judge noted as follows:

> (*The assessor*) was of the view that despite the closeness of the siblings and the needs they share as common factors, they each had their own individual needs which were very different due to the difference in their ages, the very different stages they were at in their respective lives and O's own unique needs. As such their needs in terms of parenting were very different. (*The assessor*) concluded whilst the relationship between O and P was important, their own differing needs were such that when considering what is best for P in the long term, his best interest would be the sole focus.

In making care and placement orders, His Honour Judge Hughes noted that the local authority contact plan was limited to indirect contact between P, his parents and O; noted that the plan would mean P losing his relationship not only with his parents but also, importantly, O, adding:

> These of course are material losses of relationship for any child and any human being. I have been told that there will be a severe impact on O if P is adopted and that she is not without significant vulnerability. However his welfare interests cannot be allowed to be subsumed by her interests.

65. The next relevant case was that of *RBC v W & N* [2015] EWFC B61 in which Her Honour Judge Owens was concerned with maternal half-sisters, KN (9) and CN (2). The realistic options identified in the case was return to the care of the mother (or the putative father of one of the children, although he was incarcerated at the time of the final hearing); separate placements with family members, or foster-care for KN and placement for adoption for CN. In reaching her decision, the judge noted:

> The next issue I have considered is the question of separation of the two girls. As I have noted, the family view is that separation could be borne if they were in family placements and Dr Schnack *(clinical psychologist*) also said that family placements would to some extent ameliorate the impact.

> However, I have now analysed the option for family placements and ruled them out.

In deciding to endorse a plan for CN to be placed for adoption, the judge recorded the evidence of the expert as follows:

> As was noted by Dr Schnack in her evidence to me, the two girls in this case are at very different developmental stages. CN is still in the crucial first three years of life when fundamental attachments are formed so she has a much better chance of recovery than the much more damaged KN. Despite the importance of a sibling bond, as she conceded in evidence to me, she has carefully considered the needs of each child as I must. Whilst KN will undoubtedly miss CN if they are placed separately, she is deeply damaged as a result of her early life. Dr Schnack was of the clear opinion that the relationship between the siblings is also a trauma relationship and which therefore will be bound to create difficulties with a risk of a profoundly negative impact upon them both in future. Additionally, she was of the view that KN's particular needs would be very likely to get in the way of CN's needs being met if they were placed together, and vice versa. Coupled with this, both girls need permanence but that permanence can best be met in differing ways, I find.

The judge indicated that there should be annual ongoing direct contact between the girls and indirect post-adoption contact but she declined to specify (even if she had been entitled to do so) that the local authority must seek out adopters who would agree to an open adoption, holding that it was not in CN's welfare interests to restrict the potential pool of adopters.

66. The next relevant case was that of *Re R (Children)* [2015] EWFC B113. This case concerned three full-sibling children: a girl, S, (7), a boy, C (5) and a second girl, P (3). In the course of the proceedings the children resided in two separate foster-placements, with C (who has a number of special needs) placed separately from his two sisters. The local authority proposed three separate adoptive placements for the children, later modifying its care plan to long-term foster-care for the elder two children. By the time of the final hearing, the children's mother was again pregnant, and her expected child would be a half-sibling to the children. The three children also have an older brother who had been the subject of care and placement orders in 2006. The judge recorded that S had been observed to be punitive and physically aggressive towards P, to the extent that the local authority had considered whether separate foster-placements should be found. In approving the plans, Her Honour Judge Hudson noted at paragraph 31 as follows:

> … P has a pressing need for permanence and security in a family that will provide for her not only throughout her childhood but beyond. She is likely to have particular difficulties over her future years, which will require the commitment of a family who have claimed her as their own. I am satisfied that, in P's case, the plan of adoption is the plan which will meet her welfare interests not only throughout her childhood but also throughout her life. In reaching this conclusion, I have taken account of the impact upon her of the loss of her relationships with her birth family if she is adopted.

It was of course too early to know whether proceedings were likely to be instituted in respect of the new baby, and if so, whether there would be any prospect of that child being placed with P.

67. The next case of relevance was that of *Re X, Y & Z (Care and Placement Orders)* [2015] EWFC B115. This case also concerned three full siblings: X (5), Y (3) and Z (almost 2). The local authority sought care and placement orders in respect of Y and Z but applied to adjourn the proceedings relating to the eldest child whilst a family placement was tested out. The parents opposed the plans, citing the importance of the sibling relationship. The children had been exposed to very significant inter-parent domestic violence, and were noted to be aggressive and violent towards each other, displaying sibling rivalry far beyond the norm: '*The inter-sibling aggression was so extreme that it meant their individual needs could not be met and no level of support could be identified to keep the children together'* , although the local authority still proposed that Y and Z be placed together. In making care and placement orders in respect of the younger two children, Her Honour Judge Marson acknowledged the significant disadvantage of permanent separation of the three siblings but concluded that their need for stability and permanence could be met only through an adoptive placement. The judge also noted the psychological evidence that '*it was unusual for a child being received into care to require immediate separation from their siblings due to unmanageable behaviour, if it happens at all it is usually some time down the line',* sadly concluding that the girls could not be cared for by anyone as a sibling group.

68. The next relevant case was the second concerning the rather unusual situation within *A Local Authority v T & F* [2015] EWFC B71 which concerned a sibling group of 5 children. The youngest child had sustained injuries when 4 months old, but the judge was not satisfied that the injuries were non-accidental. Ultimately she had approved a plan of adoption for the youngest child on the basis of his '*very particular needs'* (it is not clear

from the judgment whether those needs were in any way related to the injuries) but endorsed a plan of the mother resuming the care of the four eldest children. Consideration of the sibling relationship was addressed within an earlier judgment (case 56 *supra*), and clearly formed part of the judge's thought process in determining the outcome for the children.

69. In the case of *Derbyshire Council v SH* [2015] EWFC B102, His Honour Judge Lea made a Special Guardianship order in respect of two girls, A (4) and B (2) in favour of a woman who had believed herself to be the paternal grandmother of A until DNA testing disproved this. He did so in the teeth of opposition by the local authority, which, with the support of the Guardian, proposed care and placement orders for the children. Since the local authority proposed to place the children together, it is not possible to conclude that the judge's thinking was in any way influenced by the consideration that the grandmother's proposals would maintain the sibling bond per se, although he acknowledged the importance of giving the children the opportunity to be raised, as he put it, within their family – even though it would not have been within the birth family of one of the children.

70. In the case of *Re J (Placement Order Application)* [2015] EWFC B82, the court was concerned with the welfare of three young full siblings born to Latvian parents; the children were referred to as Mk (6); V (4) and I (3). The local authority proposed long-term foster-care for Mk and V, and a placement of I for adoption. His Honour Judge Perry records the following evidence from the author of the sibling assessment (para 132):

> (1) Ideally the LA would rather not separate siblings; Ms Higgins was herself very much against the initial plan to separate all of them. Sibling relationships were the most enduring throughout life and placement together also helped with such matters as socialisation skills, overcoming the trauma of separation from parents, and maintaining family links. In this case the siblings were close in age and with a particular cultural connection.
>
> (2) She understood that the current foster carers were willing to continue the care of all three children, were committed to them and were meeting the needs of all three children.
>
> (3) Ideally the children would remain together in this placement but the foster carers needed support, in particular respite care.
>
> (3) Also ideally all three children should be placed together but in the context of adoption realistically this was not possible because

> - not many adopters would countenance a sibling group of three children with high level needs
> - V and I would be most likely to be adoptable but it would be very difficult to separate Mk from V
> - I's young age was a relevant factor in recommending adoption for him; he was a very young child to remain in foster care and also has suffered bullying and aggression from Mk who appears to have taken on this learnt behaviour from his parenting within the family.
>
> (4) There was nothing in the Sibling Assessment that she carried out that would prevent the children being placed together, and their needs could be met by one family.
>
> (5) Information provided at the recent LAC review on 7 April 2015 had identified that Mk's behaviour had greatly improved and that there had been real progress in terms of his behaviour. Also I was making good progress, learning to play and developing a better bond with his siblings

In declining to make the placement order, the Judge said this (para 214):

> On balance I am not persuaded that the welfare of I requires his parent's consent to the making of a placement order to be dispensed with. This is not a case where nothing else will do. I take the view that I's welfare throughout his life is best served by him remaining with his siblings, and the welfare of Mk, V and I is best served by them being placed in long term foster care.

It is clear from the judgment that the judge weighed in the balance the advantages of a secure, permanent placement against the loss of the relationship between the siblings, and the potential difficulty of promoting the child's cultural heritage.

71. The next case of relevance to this study is *London Borough of Haringey v AB (Rev 1)* [2015] EWFC B154. The case concerned a group of Congolese children: CD (5) who, together with three older children, GH, IJ and KL, was presented at the offices of the local authority in a very distressed state by an apparent stranger, allegedly having been found on the street. They were accompanied by a note asking that the children be assisted to find their 'sister', AB, who was at that point 20 years old. It later transpired that AB was CD's mother, the child having been conceived of rape by AB's father, and thus CD was both the half-sibling and the uncle of the three older children. The children were in due course placed together

in foster-care. Although the four children were assessed as having a very close relationship, the local authority proposed long-term foster-care for the eldest three children, and that CD should be placed for adoption. The Guardian gave evidence that whilst in principle, placement for adoption would be an appropriate option for CD, she was not satisfied that the local authority had adequately considered whether this should be preferred to the plan of remaining with his sisters in a long-term foster-placement. Her Honour Judge Karp acknowledged AB's tragic background, but found that she would not be able to care for CD. She went on to find:

> Adoption might provide him with a forever family, with a statistically lower chance of a failed placement. However, I find that the value of ongoing contact with his sisters and his mother weighs more heavily in the balance with CD's difficult history, which he shares with them. I have to consider his welfare throughout his life. His sibling relationships are also likely to endure into adulthood and be a source of strength to him through that adulthood and I find that these relationships will provide for him significant pleasure and strength and will reduce the risks of the breakdown of a foster placement.

In refusing to make a placement order, the judge found that the slim chance of a successful adoptive placement was outweighed by the known advantages of the current placement with CD's siblings, notwithstanding the less secure legal framework of fostering. It is clear from the case report that the result may have been different, had CD been a significantly younger child.

72. In the case of *Re W (Children)* [2015] EWFC B67, His Honour Judge Bond made care and placement orders in respect of two very young half-sibling children, noting that one of the factors in favour of the plan was the intention that the children would be placed together. He acknowledged that they would thereby lose their relationships with birth family members, but did not single out in this context the children's significantly older maternal half-siblings, who appear, so far as can be deduced from the report, to have played no part in the lives of the younger two children.

73. This was followed by the case of *Re Z (a Child)* [2015] EWFC B94 concerning a baby who had been removed from her mother at birth. She was her mother's first child but has five paternal half-siblings. It is clear from the judgment that the father has no ongoing relationship with those half-siblings, and it is perhaps therefore unsurprising that in making care

and placement orders, His Honour Judge Wood made no reference to the potential loss of any sibling relationship.

74. Her Honour Judge Lynch considered in *Re J (a Child) (Placement Order)* [2015] EWFC B103 the arrangements for a very young baby. Mother is described simply as '*coming from another country'*; the father's identity was unknown. J was mother's fifth child, the elder three apparently being placed either with paternal family members or in public care in her country of origin as a result of mother's struggles with drugs and alcohol, and the fourth having sadly died. In making care and placement orders, the judge made no comment about the possibility of promoting inter-sibling contact, but acknowledged the importance of J developing an understanding of her family history as follows:

> I think it is hugely important for children who are adopted that they have information available to them, through their adoptive parents, so they can make sense of their early life. This judgment, in setting out what I have read and the analysis I have conducted, gives at least a summary of that start. Whilst it will be placed in an anonymised form in the public domain it is important that it is easily available to those who will be bringing J up. I propose therefore to make a direction that this judgment must be released by the Local Authority to J's adopters so that it is available to her in future life. It is very important that it is passed on to the Adoption Team to give to them.

That direction should at least have ensured that J had some information upon which to base a search for her siblings in later life, should she wish to do so.

75. Her Honour Judge Lynch repeated the point about adopted children having information as to their birth family, as emphasised in the preceding case, when she considered the case of *Re J, K, and L (Children) (Placement Order)* [2015] EWFC B105. That case concerned three very young children who do not appear from the case report to have any further siblings and in respect of whom the plan was of placement of adoption together. The case is thus of only tangential relevance to this study, but does underscore judicial recognition of the importance of children being enabled to make sense of their early, pre-adoption lives.

76. Within the case *Re N (a Minor Child)* [2015] EWFC B106, His Honour Judge Bond refused an application by a local authority (supported by the Guardian) for a placement order in respect of a 4-year-old boy, making instead a Special Guardianship order in favour of the child's paternal

grandparents. Two older sisters lived with a maternal aunt. In addressing the positives and negatives of the competing applications, His Honour made limited reference to the potential for an ongoing sibling relationship in the event that the adoption application was refused, although the submissions on behalf of the mother drew attention to the good relationship between the three siblings, at that stage meeting up once per fortnight, and the risk of breaking that link. The judge's observations on the point were limited to noting that living with grandparents would maintain the child's identity, his place in the family, and his relationships with grandparents, parents and siblings – so a generic acknowledgment of the value of familial ties, rather than a specific recognition of the uniqueness of the sibling bond.

77. Her Honour Judge Owens considered the profoundly sad case of *Oxford CC v B and P* [2015] EWFC B109 which concerned a baby girl, AP. The baby has two elder maternal half-siblings, one paternal half-sibling (about whom little seemed to be known, save that his father had no contact with him), and two full siblings. It is clear from the judgment that two of the mother's four elder children have been placed for adoption and two are in kinship care – although it is not absolutely clear from the judgment which pair had been adopted. Ultimately the decision was that AP should be placed in the long-term care of a family member (not the same carer as the elder two children). The judgment is silent on the question of sibling contact, although it is reasonable to assume that there was scope for some contact with the non-adopted maternal siblings. It was not in any event a case in which the local authority was pursuing any application for a placement order, and thus there was no balancing within the decision-making process of the implications of potentially-irreversible sibling separation.

78. In the case of *Re R (a Child)* [2015] EWFC B138, Her Honour Judge Moir made a care and placement order in respect of 12-month-old girl, A, who at that stage was the only child of the mother. There is no mention of any paternal half-siblings. At the time judgment was given, the mother was shortly to give birth to A's full sibling. It is (perhaps unsurprisingly) not clear within the concise ex tempore judgment (although highly likely, given the facts) whether the local authority intended to issue proceedings in respect of the new sibling, and whether there would be any proposal to place the children together.

79. His Honour Judge Hughes was concerned in *Re T (a Child)* [2015] EWFC B123 with the younger of two full siblings, the elder of whom was in long-term foster care, inter alia as a result of findings of sexually-inappropriate behaviour by the children's father, who remained in a

relationship with their mother. Both children have additional needs as a result of developmental delay arising from a chromosomal duplication. In making care and placement orders, His Honour commented:

> 152.I would urge the local authority to look very very carefully at the willingness of Mr and Mrs Knight (C's foster parents) to care for T as well. There are many advantages in placing these boys together but of course the central issue for those whose task it is to assess that option is the ability of Mr and Mrs Knight to meet both boys' needs which are complex and which will become increasingly complex.
> 153.I have considered the placement order application together with the relevant consideration of the Checklist under the Adoption & Children Act. I had in mind particularly the loss of natural family and any effect that that will have on T in the future and the potential for loss of a relationship with his parents and brother but I am entirely persuaded that only adoption, in the first instance, would meet T's welfare interests identifying as I do his need for stability and permanence throughout childhood and indeed in his case, into adulthood. There is an overriding welfare need for a permanent substitute family for T and a decision is required to be made now.

80. Within the same month, the case of *Re T (A Child)* [2015] EWCA B156 was heard by His Honour Judge Simon Wood. The local authority sought care and placement orders in respect of a 23-week-old baby boy, A, of Nigerian heritage. The child has two maternal half-siblings and an elder full sibling, B: each of those children had been made the subject of care and placement orders, the last only three months earlier. The elder two children each had significant emotional and behavioural difficulties, resulting in it being impossible to secure either adoptive placements, or a joint foster-placement. The judge found that neither parent could care for A and that in the absence of any family members having been put forward, he was satisfied that it was necessary to make care and placement orders. The judgment is silent as to whether the plan was to place A for adoption with his full sibling or even whether there was any prospect of contact, but it may well have been so specified within the care plan and simply not referred to within the judgment.

81. The next case of relevance to this study concerned at little girl, EN in the case reported as *Re EN (No2)* [2015] EWFC B196. EN has no full siblings, in so far as may be deduced from the judgment, but does have a number of maternal and paternal half-siblings. It is indicated that of the father's seven children, two had been placed for adoption, and at least two are adults, living locally to the father and in regular contact with him. HHJ

Pemberton is silent within her judgment as to any consideration of sibling contact, and, in making care and placement orders, her only comments pertinent to the issue were as follows:

> The disadvantage of making a placement order is that EN will be deprived of an upbringing within her natural family. She will not be brought up by a mother who is obviously able to demonstrate emotional warmth and affection for her child. It may be that in future EN will need some professional assistance so as to deal with issues of loss and identity if she is not to be brought up within her natural family.

It cannot be assumed that the issue of sibling contact was not canvassed at all – it may for example have been accepted that contact would be attempted at least with those half-siblings who had been adopted – but it is safe to assume that the issue was not considered sufficiently significant to warrant consideration within the judgment.

82. In the case of *Re P (Sexual Abuse)* [2015] EWFC B120, Her Honour Judge Penna was concerned with a sibling group of four children: SP (12), DP (10). AP (6) and BP (4). The local authority proposed long-term foster-care for the elder three children and that BP should be placed for adoption. The evidence of a psychologist instructed within the proceedings included the following:

> In an ideal world continuing direct contact between BP and her siblings would help. However on balance she would support the Local Authority plan for adoption although this is a finely balanced decision. The separation of siblings is a contributory factor to a breakdown in placement and there is a higher probability of breakdown with a child who has been sexually abused. Nonetheless an adoptive placement would give BP the best chance.

The clear evidence of the Guardian was that his recommendation in favour of a placement order was finely-balanced (the 'least-worst' outcome), but that ongoing contact between the siblings would compromise any adoptive placement.

In making care orders and a placement order in respect of BP, Judge Penna noted:

> I considered particularly the likely effect on BP if an order is made of having ceased to be a member of her original family and becoming an adopted person. I also consider the effect that adoption would have upon BP's relationship not only with her

> parents but also with her siblings. BP knows who she is and who her parents and siblings are. In this context I need to consider the ability and willingness of BP's relatives to provide her a secure environment in which she can develop and otherwise meet her needs. Sadly, given the damage which both the parents and BP's siblings have suffered, I do not have confidence in their ability to make a positive contribution to a secure environment in which she is to grow. I know that their wishes and feelings are otherwise. I do not doubt that if BP were old enough to express a coherent view she would want to remain in contact with her birth family. However, all of her birth family needs reparative work as does BP herself. That work will demand energy which needs not to be diluted by the effort involved in combating the repercussions of the original damage.

83. Her Honour Judge Lynch was concerned in the case of *Re A (a Child)* [2015] EWFC B163 with X, who at that stage was not yet 2 years old. X has two older maternal half-siblings in long-term foster care, it not having proved possible to identify an adoptive placement for those children. X's mother was pregnant at the time of the final hearing. In making care and placement orders, the Judge acknowledged the loss for X of a potential relationship with this extended family and half-siblings, save for such as may be achieved by indirect contact, but balanced this loss against the risks of the child being placed with his parents, stressing that X's safety was the most important thing, and dismissing the option of long-term fostering (which no-one proposed) because X is so young.

84. In the case of *Re C (A Child)* [2015] EWFC B146, Her Honour Judge Black made care and placement orders in respect of a baby boy, C – unusually, with the consent of both parents, C's mother recognising that a risk assessment in respect of C's father would prevent them from caring for the child together, but deciding to prioritise her relationship with the father. The judgment mentions an older full sibling who was the subject of care and placement orders, but is silent on the issue of any proposed contact between the children. It is possible – but unclear from the brief judgment – that the plan was to explore C joining his elder sibling in placement.

85. Although not a case involving placement for adoption, the subject children in the case of *Re W (a judgement)* [2015] EWFC B207 provide an example of a case where sibling separation was deemed to be in the best interests of three young children. J (12), Ad (10) and K (7) were the youngest of a sibling group of eight, the next eldest sibling being 15 and remaining in the care of the father under a supervision order, and four older

non-subject children. There was a long history of local authority involvement with the family, not least as a result of inter-familial sexual abuse, resulting in one of the older brothers receiving a custodial sentence as a result of convictions for rape of, inter alia, two of the sisters. In making final care orders with a plan of long-term fostering for each child, His Honour Judge Jones said:

> … they need individual attention as the sole sibling in a household rather than competing for attention and being forgotten and neglected.

86. The next relevant case was that of *Cambridgeshire County Council v P&R (Rejection of Care Plan)* [2015] EWFC B228. That case concerned a young baby, T, who has three elder half-siblings – one living with his father, and two having been placed for adoption. T was fostered by her siblings' adoptive parents in what was clearly a foster-to-adopt placement. The local authority, supported by the Guardian, sought a care and placement order in respect of T; the judge dismissed the application, determining instead that T should be placed in her mother's care under the auspices of a Child Arrangements order with a Supervision Order in addition, and very limited contact with T's exceptionally violent, alcoholic father. The judgment does not engage with the detriment for T is losing her relationship with her two siblings, and does not recount if there is any scope for ongoing contact with the adopted children. The only passage referring to the siblings is as follows:

> It is, therefore, not appropriate for me to give any thought to whether T's life might be safer and more secure with her brother and sister in their adoptive family where she is currently a foster child. The only consideration at this stage is whether mother, despite all the changes that she has made, poses such a high and unmanageable level of risk that her care will inevitably fall below good enough, even with appropriate support, supervision and monitoring. On the evidence I have heard I am not satisfied that that is the case. I have, therefore, reached the conclusion that I cannot approve the care plan for adoption.

On the basis of the limited information provided, it is not entirely clear why the judge reached that decision: whilst recognising that the assessment of risk is the province of the trial judge, who has the inestimable benefit of hearing the evidence at first-hand, the judgment itself gives no indication of a non-linear analysis of realistic options for T. However, there is no indication of any reported appeal against the decision, and it should be noted that the hearing of an application for care and placement orders is not the forum for considering the merits of a specific adoptive placement,

but rather for analysing the competing options of a placement order, a care order or some other form of order. For the purposes of this study, the relevant point is that the judge did not appear to factor into the balance the benefit of an ongoing relationship with the siblings in the event of the placement order having been granted.

87. In the profoundly sad case of *RBWM v H & O* [2015] EWFC B170 Her Honour Judge Owens was concerned with a little boy, K, who was 16 months old. K was the fifth child of his two parents. The eldest was an adult and the next two children in age were placed in her care. The fourth and fifth child had each been placed for adoption. Initially it had been hoped that the parents would maintain a separation and that K could remain with his mother, but that plan faltered when the parents' separation was placed in doubt (not least by the conception of a further child) and thus further proceedings were taken. In making care and placement orders in respect of K, the Judge noted with approval the local authority's proposal to facilitate ongoing sibling contact in the event of K's adoption: '*I share the Guardian's concerns about the need to try to locate prospective adopters willing to consider direct sibling contact but am reassured by the Local Authority indication that this will be pursued'.*

88. In the case of *Gloucester CC v CW* [2015] EWFC B238, District Judge Howell was invited to make care orders in respect of a sibling group of five children ranging in age from 1 year old to 11 years of age, with a plan of placement for adoption in respect of the youngest child, L. The eldest four are full siblings who had been left in the care of their father at the outset of the proceedings; L is their paternal half-sibling. In the event, L was placed with her mother under a care order – this appears to have been an agreed outcome, and the judgment is devoid of any explanation for that decision. The other four children remained in long-term foster-care. The judge concludes by noting the importance of promoting contact between the children: '*it is important for them to develop their inter-sibling relationships'.*

89. Mr Justice Newton was the judge concerned in the case of *Re H (Children)* [2016] EWFC B232 which was reported on 20 November 2015, and therefore apparently cited in error as a 2016 case; it was presumably heard, at least in its earlier stages, prior to the judge's elevation to the High Court bench on 9 May 2014. The subjects of the proceedings were two small children, F (5) and G (4). They are the youngest children of a maternal half-sibling cohort of seven children, only the eldest of whom

lived with the mother, with the remainder in an assortment of family placements. The realistic options identified for F and G were placement with an almost-unknown family member who lives in France, or remaining within their foster-placement with the intention that it would convert in due course to an adoptive placement. The local authority favoured the family placement: the Guardian took the opposite view. In making orders which would preserve the children's placement with their foster-carers, the judge noted that placement in France would not only involve the loss of the boys' primary attachment to their foster-carers, but would also mean that they lost much of their sibling relationship. Although clearly the judge was mindful of the significance of the sibling relationship, it is very clear from his judgment that the primary reason for his decision was the '*very strong and compelling factor of their real relationship with their carers and family*. This decision provides something of a counterpoint to decision 7, supra, where the child's relationship with his carers and siblings does not appear to have placed in the balance to assist the judge in determining whether placement with his mother was the appropriate outcome.

90. In the case of *Leeds City Council v the Mother & Ors* [2015] EWFC B 185, Her Honour Judge Lynch was concerned with a 4-month-old baby, A, who was born after a concealed pregnancy and whose parents had declined to register her birth, resulting in the birth certificate recording only a family name and not a given name. A has an older sister together with a maternal half-sister and a paternal half-brother. The local authority's plan was that A should be placed for adoption, with the hope that she could be placed with her sister. In making care and placement orders, the judge noted the potential both for placement with the child's full sister and for contact with her half-sister: she acknowledged the loss of the child's relationship with her parents, but held that the prospect of a significant relationship with her sister would be a hugely positive factor in terms of her identity, and found that the advantages of adoption outweighed the disadvantages.

91. Her Honour Judge Atkinson dealt with a case concerning a 3-year-old boy, B and his 2-year old sister, E, reported as *Re B and E (children)* [2015] EWFC B203. The children were part of a large sibling group, being their mother's seventh and eighth children and their father's fourth and fifth children. The competing options for their future care were rehabilitation to their parents, placement with a paternal aunt in Belgium, or remaining in the care of their current carer, who put herself forward as a long-term carer via adoption or Special Guardianship, having cared for B since he was 7 weeks old and E since she was 1 day old. The mother's sixth child, who is two years older than B, has been adopted: the older children, so far as can be gleaned from the report, are in foster-care. When the case first came to

trial, a different judge had ruled in favour of placement with the Aunt – that decision was overturned on appeal (reported as *Re M'P-P (Children)* [2015] EWCA Civ. 584) and the case remitted for re-hearing. Judge Atkinson found the foster-carer to be very impressive and very supportive of preserving family connections; the judge indicated that she attached great significance to the efforts made to promote contact with the birth family, and particularly with the children's siblings. The judge described the arrangements as being as close to growing up beside them as can be achieved without sharing a home – placement with the Aunt in Belgium would reduce the level of contact:

> 128. The children will suffer a loss if they are adopted, in that they will cease to legally belong to their birth family. I do not underestimate the importance of family. However, in this case the severance of those ties will not be so brutal because I am quite satisfied that the actual relationships with parents, aunt and siblings will continue post-adoption as direct contact is supported by Y. This goes a long way to ameliorating the loss of legal links. What matters is the actual relationship they have with their birth family and this will continue.
> 129. In the case of the siblings, there will be far more frequent and close contact if the children stay with Y which is likely to promote lifelong closeness between the sibling group.

It was accepted by all parties that the two children should remain together: the Judge found that neither the parents nor the Aunt could meet their needs: she found that '*the disadvantages of separation from the birth family are lesser here than usual because of the Herculean efforts of Y to continue the children's relationship with their natural siblings and her genuine commitment to ongoing face to face contact with the birth parents and the aunt.'*

92. The case of *Re J (A Child)* [2015] EWFC B197 was heard by Her Honour Judge Lynch when the subject child, J, was 5 months old. J has four older siblings, none of whom resided in the care of their parents. She also has two adult paternal half-siblings. The youngest two of her four full siblings had been adopted. In making care and placement orders, the judge noted that this would entail the loss of any meaningful relationship with J's parents and her elder sister, who was in long-term foster-care. She noted that J's elder brother, who was also in foster-care, has '*significant difficulties',* such that contact was not considered to be in the interests of either child; the judge also recorded the hope that there would in future be direct contact with the adopted siblings. There is no mention of consideration of J joining her siblings' adoptive placement, but that may

be because her current carer has expressed the wish to adopt J. In acknowledging the potential losses, Judge Lynch recorded that direct contact, save with the adopted siblings, was not likely to be in J's interests because it risked undermining her placement.

93. The last case of relevance in 2015 is that of *Re J, Y and others (Children: Care and Placement)* [2015] EWFC B205, in which His Honour Judge Greene was concerned with the arrangements for a sibling group of five children: J (12), Y (9), K (7), H (2) and P (1). Y and K share one father, and H and P are also full siblings. J is the elder maternal half-sibling to the younger children. The local authority sought care orders in respect of all five children and placement orders for H and P. A sibling attachment assessment recommended that J be placed separately: he is a child with extensive additional needs and had been placed in the position of parenting his younger siblings, who had occasionally expressed fear of him. In making the orders sought, the judge was silent within his fairly concise judgment on the issue of sibling contact or the significance for the youngest two children in losing (in all probability) direct contact with their elder siblings, simply noting that '*Long term foster care is not a reasonable alternative for such young children, with all of the disadvantages of a life in care without a family to call their own'.*

2016

94. In the first relevant case of 2016, His Honour Judge Gareth Jones was concerned with a sibling group of four children in the case reported as *Re L, J, K and E* [2016] EWFC B9. In the case, the two older children, L and J, were respectively 13 and 10; their younger siblings, K and E, were respectively 5 and nearly 4 years old. The local authority proposed long-term fostering for L and J and placement for adoption for K and E. The four children have two older maternal half-siblings who are young adults. The children were separated in foster-care throughout the proceedings, with the elder two in one placement and the younger two in another, with twice-weekly sibling contact coinciding with parental contact, the judge noting that (para 40) '*There is an intra-sibling relationship and co-dependence, with the two older children being anxious for and protective of their younger siblings'.* Whilst the Guardian supported the application for a placement order for K and E, he suggested that sibling contact should continue at fortnightly intervals, supported by an order under s.26 Adoption and Children Act 2002 – an unusual recommendation in terms both of formality and frequency. The judge noted that the elder two children would be very unhappy about separation from their siblings, recording at para 63 as follows: '*While ultimately it is the welfare interests*

of the subject children in the Placement Application which are paramount with regard to those applications, the Court can take into account the impact upon other non-subject siblings, because the "welfare checklist" under section 1(4) Adoption and Children Act 2002, indicates that the Court must have regard to the specified matters "among others", i.e. the listed considerations are not exhaustive'. The judge further noted that, save for the evidence of one witness, the local authority and the Guardian had identified the importance of the inter-sibling relationship as being essential for the welfare of all the children, although the allocated social worker had highlighted what she described as a '*co-dependent and confused attachment style'* between the siblings. The judge quoted from the Guardian's report as follows:

> It is my view that the sibling relationship is the most enduring in this case given their shared experiences that has formed a unique bond which they do not have with anyone else. It is my view that direct sibling contact between these children would promote stability in any future placement. It is my view that the emotional impact of ceasing direct contact between either sibling group in this family, at a time of uncertainty and change, would have an adverse effect upon them. It is my view that the Local Authority should maintain direct contact between the siblings, and actively seek prospective adopters who would promote this, should Placement Orders be granted in respect of the younger siblings

In adjourning the final hearing and inviting the local authority to re-consider its care plan of placement for adoption, Judge Jones said this:

> If the provision of direct inter-sibling contact is **so fundamental** and central to these children's future welfare, and if this is to be provided at a **meaningful** frequency, and not at a tokenistic frequency, that is at odds with a Plan for adoption, despite the possibility of post-adoptive contact Orders. If K and E have an emotional legacy/tie with their siblings which merits proper and real recognition, then should not that be respected as an important requirement?

This case provides an unusually clear example of a judge anxiously considering the impact of separating siblings and acknowledging the importance of the issue to all the sibling children, not just the children who were the subject of placement applications.

95. The next relevant case was that of *A Local Authority v X and Ors* [2016] EWFC B24 before Her Honour Judge Lynch. The court was concerned with B, a little girl who was then 3 months old. The same judge had made

care and placement orders some six months earlier in respect of B's full sibling C, and there were also two older maternal half-siblings placed in foster-care, adoptive placements not having been identified for them. In making care and placement orders, the judge acknowledged the loss to B of the opportunity of a direct relationship with her half-siblings. No mention was made of contact with C – that may be because the children were to be placed together (this is not clear from the judgment) or it may have been taken as a given that direct contact was likely to be arranged via the adoptive families.

96. In *Re B/W* [2016] EWFC B47, His Honour Judge Simon Wood was concerned with the welfare of A, who at that time was 6 months old. A has two maternal half-siblings: X (15) and Y (14), both placed in long-term foster-care. In making care and placement orders, the judge acknowledged the disadvantage for A of loss of potential relationship with extended family members, but did not single out the sibling relationship for separate mention.

97. The case of *Re J, K and L* [2016] EWFC B17 concerned three brothers, J (9), K (7) and L (5). The local authority sought care orders and also sought placement orders in respect of K and L. The children had two older full siblings who had been adopted, although one had since sadly died. There are also two older maternal half-siblings. The children were initially placed together in foster-care, but were then separated, at least in part because of J's aggression towards K. The younger boys remained together. Mr Recorder Jacklin QC noted that the social worker carefully assessed the sibling relationship, starting from the position that the local authority had a legal obligation to place siblings together, but ultimately noting that the relationship between J and his younger brothers was dysfunctional and that it was highly unlikely that the needs of the three children could be met in one placement. The local authority plan was for indirect sibling contact in the event of K and L being placed for adoption. It was asserted that K and L have a '*mainly good'* sibling relationship and separation would cause further emotional trauma; the initial care plans nevertheless proposed separation if a three-month search for a joint adoptive placement proved unsuccessful, although with ongoing direct contact. The plan then changed to the younger boys remaining together even if an adoptive placement could not be identified. The court noted that there was '*no evidence that the children's relationships with any of their older siblings are important to them or that there is a benefit in having contact with them beyond promoting a sense of identity'.* The judge indicated that he agreed with the Guardian's analysis that K and L's relationship with J was not of such strength and quality as to outweigh the benefits of adoption; in making the

placement orders sought, he recorded that he could not ignore the effect upon J if his younger brothers are placed for adoption, but '*the decision has to be based on the best interests of K and L'.*

98. In the case of *Cambridgeshire County Council v D* [2016] EWFC B48, His Honour Judge Greene was concerned with three children: two full siblings, E and F, respectively 6 and 4 years old, and a baby half-sibling, G. In concluding the proceedings in respect of E and F, the judge said within his brief judgment (Para 16*): 'E and F should, if at all possible, be placed together, but that the need for them to have an appropriate placement was the overriding need; overriding even the need to be together if that could not be achieved as well'.* The proceedings in respect of G were not concluded at that hearing, and it is unclear what thought had been given to her future relationship with her brothers. It is also not possible to deduce from the judgment what weight was afforded to the sibling relationship between all three children.

99. In *Re J* [2016] EWFC B38, Her Honour Judge Lynch was invited a to make a care and placement order in respect of J, then nearly 2 years old. J has two maternal half-siblings, Z (18) who lives with her mother, and Y (12), residing with another relative. A paternal half-sibling had been adopted and is not further mentioned in the judgment. In making the orders sought, the judge balanced the competing options of return to the mother or placement for adoption, noting that (para 64) '*She would lose the potential for any meaningful relationship with her birth family, including her mother and siblings, but would have knowledge of them through annual indirect contact'.* It is unclear whether any efforts were proposed either to place with her adopted brother or to promote any direct contact with that child.

100. The next-reported relevant case was the very sad case of *Re X (a Child: Profound Needs)* [2016] EWFC B36, concerning a 5-year-old boy with very and complex difficulties, including global developmental delay, ASD and Spina Bifida. X has a 21-year old maternal half-brother, B, who lives with the mother, and a paternal half-brother who receives only passing mention. B is described in glowing terms by the judge who noted that he was about to embark on a career in engineering and was very committed to his brother. The judge noted that B's pride in X was palpable, and that X is described as delighting in seeing B, although X's difficulties are so profound that he has no real sense of his identity. In deciding to make care and placement orders, His Honour Judge Wood weighed the positives and the negatives, the latter including the likelihood of loss of X's relationship with his mother, brother and wider family members. However,

he found that the child could not be cared for within the family, noting in particular that B should not have to sacrifice his career opportunities to care for his brother; he also found that the '*stand out disadvantage'* of adoption relates to contact, quoting the independent social worker in the case (para 118):

The judge was clear that the local authority should invite any prospective adopters to consider contact, recognising the heartache which his decision would create for X's mother, brother and all the family.

101. In May 2016, District Judge Hale was concerned in the case of *Re A (Adoption)* [2016] EWFC B108 with applications for placement orders in respect of three sisters, A, L, and M, ranging in age from 4 to 11. The local authority proposed an open adoption with twice-yearly birth family contact. The Guardian's support for the plan was contingent upon ongoing contact. The judge acknowledged the need for the girls to remain together, although open adoption has long been mooted by professionals at large the reality of it happening is something else. The very strong view expressed by all professionals was that however desirable in X's case it should not be a pre-requisite for potential adopters as it would reduce the potential pool even further. But that said, it was agreed that because of the very positive features already identified regarding the mother and maternal family in particular it was something that could and should be the subject of active discussion with any prospective adopter identified.

102. the evidence being that it would be harmful to their emotional well-being for their '*close and loving bond'* to be severed, but also noted the obvious difficulties associated in finding a placement for three children of that age range, and the varying needs and personalities of the children. The eldest child was very resistant to adoption. In declining to make the placement orders, not least because of concern that a placement would not materialise, leading to further feelings of rejection, the judge described long-term fostering as '*inevitably an imperfect outcome but still the best option for permanency'.* He pointed to many deficiencies in the local authority evidence, although interestingly made no reference to his judgment having been in any way influenced by the risk that, post-placement orders, the local authority might have decided to separate the children after all, despite the insistence within the care plans that they should all remain together. As the judge put it, '*the children as individuals undoubtedly have more to lose than to gain by being separated from each other'.*

103. In the case of *Re A Child* [2016] EWFC B41, Her Honour Judge Lynch heard an application for care and placement orders in respect of a baby girl, Z, who has a maternal half-sibling placed in paternal care. The father of the half-sibling offered to be assessed to care for Z, but in the event did not engage with the assessment. It would appear that little was undertaken in the course of proceedings to promote a sibling relationship. In making the orders sought, the judge noted the plan for indirect contact post-adoption, weighing the impact upon Z of the legal severance of her relationship with her birth family, but noting that in reality she had no meaningful relationship with her birth family in any event.

104. In the case of *Cambridgeshire County Council v P* [2016] EWFC B39, His Honour Judge Greene heard a second application for care and placement orders in respect of T, then 13 months old. An earlier application had been dismissed by the same judge, finding that T could be adequately safeguarded if placed in her mother's care under the auspices of a supervision order. T has four older maternal half-siblings, two of whom live with their respective fathers and two of whom have been adopted. Ultimately the judge dismissed the application, deciding on the evidence that the local authority had not established that the threshold criteria had been fulfilled, although noting that even if so satisfied, he would have been minded in any event to make a further supervision order. At no point does the judgment convey any sense of what steps, if any, were being taken to promote T's relationship with any of her half-siblings, although there is reference to T's mother having an angry conversation with the father of one of those children because he proposed to facilitate contact between his child and the other child who remained in the care of her father and who was living in Malta. It may be extrapolated from that the T's mother did not regard sibling contact as a priority.

105. A baby boy, FJ, at the heart of the case of *Re FJ (A Child)* [2016] EWFC B28 was the first child born to his 17-year-old mother, but has a paternal half-sibling who resides with that child's mother, proceedings between that child's parents having resulted in a refusal of contact for the father. In those circumstances, it was perhaps unsurprising that there had been no sibling contact, and that the judge did not mention the potential loss of sibling relationship in making care and placement orders in respect of FJ.

106. The next case of marginal relevance is *Re P (A Child)* [2016] EWFC B42 in which the court was concerned with a baby girl whose three older siblings had previously been the subject of care and placement orders. In making care and placement orders, the court found that neither parent was

able to care for P and there were no appropriate kinship carers: the decision to grant care and placement orders was based very much on those factors, without the need for the court to weigh in the balance the additional benefit of placement for adoption in that it may open the door to sibling contact in the future.

107. The case of *RBC v I and G* [2016] EWFC B32 concerned a little boy, PI, who was then 12 months old. PI has one maternal half-sibling, LR, who was 11 years old and lives with the maternal grandmother pursuant to a Special Guardianship order. The local authority sought care and placement orders for PI; the parents opposed such orders, and sought for the child to be placed with maternal grandmother, who was also a party to the proceedings. Her Honour Judge Owens noted the grandmother's very close bond with LR and her warm interactions with PI during contact; she also recorded significant concerns about the grandmother's care of LR, including lengthy absences from school and her reluctance to implement the advice of professionals. In evaluating the options, the judge said this:

> LR has been able to remain in the care of her grandmother and has spent the majority of her childhood now in that placement. PI will therefore undergo not just the loss of his relationship with his birth family, a form of bereavement in itself when he becomes old enough to understand, but will also in particular lose the opportunity of a sibling bond. It is now universally accepted that sibling bonds can be the most enduring of birth relationships because they will persist long after the death of a parent. However, in this case I have to balance the impact upon PI of placement with his grandmother where there are ongoing concerns about her ability to care for LR adequately as well as current concerns about her ability to care for PI as well.

Ultimately, the judge decided that placement with grandmother carried the risk of exposing PI to the chaotic lifestyle experienced to some degree by his sister, and also by his mother before that, and the grandmother lacked the ability consistently to meet his needs in the long term. She therefore made care and placement orders, but whilst stopping short of making any orders as to post-adoption contact, invited the local authority not to rule out the possibility of direct contact in the future.

108. Her Honour Judge Cameron decided in the case of *Refusal of Final Orders: Evidence of Change, Re S Applied* [2016] EWFC B86 to allow for further assessment in a case concerning a sibling group of three children ranging in age from 7 years to 20 months. The local authority sought care and placement orders, but the court considered that the mother should have further opportunity to demonstrate and consolidate new-found sobriety and

to undertake further parenting and domestic abuse work, the judge noting that '*I find it to be in the children's best interests to allow this final opportunity to be explored, aware that there are risks and that of course nothing in life is guaranteed, including an adoptive placement being available to take all three children together as a sibling unit … a sibling group of three, with a child of seven plus, may or may not be capable of placement together.* Another factor which influenced the Judge's decision was perhaps more unusual: '*I also bear in mind that had I made the Final Care and Placement Orders sought today that there could well be a situation some months down the line when the parents could seek the leave of the Court to oppose an Adoption Application. That would lead to real confusion and delay at that time'.*

109. Miss Recorder Campbell considered in the case of *Re A (Children)* [2016] EWFC B73 an application for care and placement orders in respect of four siblings: D (7), S (6), L (3) and BR (21 months). L was placed with maternal grandparents, who had been made party to the proceedings and sought to continue that arrangement with the support of each parent. His siblings were placed in foster-care. A sibling assessment recommended that D and S should be placed together and the youngest two should each be placed alone, it being recorded that L's poor childhood experiences and additional behavioural needs indicated a requirement for '*parenting beyond the norm'*, and that BR had the capacity to require such parenting. The judge found that all four children would need a high enough standard of parenting to address their harmful background, but decided on balance that L should remain with his grandparents under a Supervision order, coupled with a Child Arrangements order, with care and placement orders for the remaining three siblings. The Recorder acknowledged that the children, if adopted, will lose direct contact with their family, and that L will suffer the loss of contact with his siblings; the judgment is silent on the possibility of ongoing inter-sibling contact and upon the impact upon each of the children, other than in the most general of terms.

110. The next case of relevance to this study is the case of *Re P (A Child: Special Guardianship)* [2016] EWFC B54 in which Her Honour Judge Harris was concerned with an application for care and placement orders in respect of L (10 months). L has two full siblings, R (4) and D (3). R had been placed with paternal grandparents in Poland; D was born in Poland and for a period of time mother and D resided with the paternal grandparents before moving to separate accommodation in the near vicinity. Whilst in Poland, the mother appeared to be abstinent from illegal substances, but having brought both children to England in circumstances which are not entirely clear, and despite her pregnancy with L, mother

resumed her previous drug abuse and the child was born so seriously affected by maternal drug use that she remained in hospital for the first six weeks of her life. She was then discharged to a foster-to-adopt placement. In the meantime the parents had effectively abandoned R and D, whom the paternal grandfather collected and returned to Poland. The parents had very limited engagement with the care proceedings, and the options requiring judicial evaluation for L were care and placement orders or a Special Guardianship order in favour of the paternal grandparents. In determining the matter, the judge acknowledged the need to ensure that, inter alia, her decision fully respects the right to family life of L, her siblings and grandparents. The judge also noted, in deciding in favour of the grandparents, that '*If L is placed permanently with adopters outside her family, albeit with an open adoption, she is going to lose the incalculable benefit of growing up within her paternal family with all that means in terms of identity, commitment and enhancement of self-esteem. She will lose the opportunity of forging a significant lifelong relationship with two full siblings who are similar in age.'* The judge's decision was made in the face of opposition by the local authority and the guardian, and despite cogent evidence of L's attachment difficulties which appeared to stem from her early life history, leading to her showing an extreme stress reaction to separation from her foster-mother/potential adopter. It is clear that the primary driver for this perhaps-surprising decision was reluctance permanently to sever the connection between L and her birth family, including her siblings.

111. In the case of *Re Z & Ors. (Children)* [2016] EWFC B76, His Honour Judge Simon Wood was concerned with a sibling group of five children, ranging in age from 17 years of age to 6. Although this was not a case where adoption was the proposed outcome for any of the children, its relevance to this study lies in the proposal of the local authority that the five youngest should each reside long-term in their own separate placements. The local authority relied upon serial exposure of the children by their mother to her domestically-abusive relationships, and very serious neglect, extending to the absence of food, beds and bedding. The children's behaviour including significant inter-sibling physical abuse and aggression, which was then directed towards the foster-carers when challenged. The judge notes that the effect of separation of two of the boys, then 8 and 6, who had initially been placed together with experienced carers, was transformative, with an astonishing improvement in the behaviour of each child. Each child was said to present with complex difficulties arising from their pre-care experiences of neglect, with two of the children presenting with foetal alcohol spectrum disorder. In making care orders in respect of the youngest five (the eldest having reached an

age where it was inappropriate to make an order) and approving the continuation of separate, individual placements, the judge emphasised the requirement for ongoing sibling contact, describing it as extremely important to the children. He concluded his judgment by describing the arrangements for the children as '*the best that can be devised to give these sadly harmed children the best prospects belatedly of repairing some of the harm that they have suffered'.*

112. In the case of *A Local Authority v H & W* [2016] EWFC B56, His Honour Judge Cleary made care and placement orders in respect of a sibling group of three children: two girls, each referred to as CW, (5) and (4) and a 2-year old full sibling, all of whom had remained in the care of their mother until the final hearing of the case. The Judge acknowledged that it may not be possible to place all three children together, but stopped short of proposing any mitigation such as ongoing sibling contact in the event of enforced separation. It is therefore not possible to conclude from the judgment whether sibling contact played any part in the judge's decision-making.

113. Her Honour Judge Cameron considered the case of *Kent County Council v M (Parents' Inability to Change)* [2016] EWFC B99 concerning four 4 young boys: L (12); his maternal half-sibling, T (8), and two younger maternal half-siblings who are themselves full siblings, namely R (4) and O (2). L's father played no part in his life, and the father of T is deceased. The children also have two older maternal half-siblings (one of whom withdrew from assessment as a potential carer) and the two youngest boys have three adult paternal half-siblings with whom neither they nor their father appear to have any relationship. At the final hearing, L was living with a family friend; T was in one foster-placement whilst R and O had been placed together in another foster-placement. The local authority sought to place T with L, initially under care orders but with a view to the carers being granted Special Guardianship orders in the future; the plan for R and O was placement for adoption, but with the hope of twice-yearly direct contact with their older siblings, the judge noting (para 16) '*the important caveat that the younger boys' placement and stability must not be jeopardised or undermined by that arrangement'.* The mother and the father of the two youngest children were described as having a violent, conflictual, destructive and enmeshed co-dependent relationship, exposing the boys to drug and alcohol use and domestic violence. In making care and placement orders in respect of R and O, the judge endorsed the proposed sibling contact plans and approved ongoing indirect contact with the parents, but did not comment further on the issue of sibling contact,

save to note that the children appeared to have little relationship with their adult half-siblings.

114. In the case of *Peterborough City Council v A Child* [2016] EWFC B68, District Judge Matthews made care and placement orders in respect of a baby. The judge mentions older maternal half-siblings who are not in the care of their mother, but it is impossible to deduce from the brief judgment whether any consideration had been given in the course of the case to future contact between the subject child and those half-siblings.

115. In the only relevant case reported in October 2016, Her Honour Judge Moir was concerned in the case of *Re C (A Child)* [2016] EWFC B122 with a care and placement application in respect of A, then 6 months old. A has two older full siblings who are placed with extended family members pursuant to Special Guardianship orders. A also has a paternal half-sibling, D, very close in age to him, apparently conceived as a result of his father engaging in a relationship with D's mother contemporaneously with his relationship with the mother of A. The Special Guardians for the elder siblings were not able to offer a home to A, and the judge found that only placement for adoption would meet his welfare needs, acknowledging as she did so that adoption would result in the loss of contact with his full and half-siblings, although also noting that he had no experience of being brought up alongside any of those children, and that is it was important to secure his future as soon as possible. The judge approved a plan for indirect contact – it is unclear from the judgment whether that indirect contact would extend to the siblings or was confined instead upon parental contact.

116. Her Honour Judge Lynch dealt with proceedings relating to B, a 3-month-old baby, in a case reported as *Re B (a Child: Placement Order)* [2016] EWFC B95. B is reported to have two older full siblings who have been adopted together, a maternal half-sister, J, who had also been removed from her mother's care, and a paternal half-brother, about whom no information is provided save for his existence. The proceedings in relation to the three older girls were based on findings within family proceedings that the father had sexually abused J and that the mother had failed to protect her. The father was acquitted of criminal charges in respect of that abuse, and although the parents were reluctant to engage in the care and placement proceedings, they made various attempts either to re-open or to appeal orders – for example, applying for permission to seek revocation of the placement order relating to the second full sibling. In making care and placement orders, the judge noted that local authority proposed to seek a

placement where the adopters would promote direct contact between B and her full siblings, and indirect contact with J.

117. In the case of *Gloucestershire County Council v M & Ors* [2016] EWFC B87, His Honour Judge Wildblood was concerned with the future arrangements for a baby boy, B, whose elder maternal half-sister was the subject of a Special Guardianship order in favour of a distant relative. The child's mother had significant mental health difficulties and the father played a limited role in the proceedings. In deciding that the only viable outcome for B was his placement for adoption, the judge expressly recognised that the loss of B's family life with his mother and possible contact with his half-sibling was outweighed by the benefits of a permanent adoptive placement.

118. The next relevant case, reported as *A (a Child) – Inability of Mother to Prioritise* [2016] EWFC B116, concerned a little girl, A, who was 2 years old. A has an elder maternal half-sibling, B (6) who had been removed from the care of her mother and of A's father as a result of physical and emotional abuse. B now lives with her birth father, the mother apparently acknowledging that A's father had inflicted serious injuries upon B, but nevertheless having maintained her relationship with him. No family member had been assessed as able to care for A, and the court was therefore invited to make care and placement orders. His Honour Judge Wood noted that a disadvantage of that course of action was the loss of family relationships: '*Of greatest concern to the court is the relationship that she has with her half-sibling, B, a matter of importance to her mother particularly.'* Having made the orders sought, the Judge added:

> 37. I will just deal, for the record, with the question of contact. It is very much to be hoped by all parties that the relationship between the half-siblings can, if it all possible, be maintained. It is the experience of the adoption agencies that children who are effectively offered for adoption, subject to conditions of ongoing contact with members of the birth family, suffer a particularly hard fate in that very few adopters come forward, if any, to consider taking on such a child.
>
> 38. That said, it is equally the experience of adoption agencies that in appropriate cases, once introductions have been effected, the placement prioritised for a particular child, with a proper understanding of what might be involved, prospective adopters may consider a form of direct contact.

> It is hoped that that approach, in this case, will be pursued, obviously with no guarantee as to the outcome.
>
> 39. I am satisfied that that approach is the proper one rather than the approach of offering A subject to contact which would have serious consequences in terms of placement finding for her. She is, as I say, somewhat older than ideally would be the case, albeit having just had her second birthday, she is plainly a child who is capable of being adopted. The priority has to be to find a placement for her and, whilst it is entirely desirable that the relationship with B be maintained, I am satisfied that the finding of a placement for her has to take priority over that.

119. A further decision of His Honour Judge Wood was reported in the case of *Re C & Ors. (Children)* [2016] EWFC B119. The court was concerned with five children: G (14), H (10), J (7). K (5) and L (nearly 2). The plan was for G to live with her father, with adoption sought in respect of the youngest four children. G's father was referred to as F1; the father of H, J and L was referred to as F2, and the father of K had not been identified, although may have been F2's brother, in which event the four youngest children would have been first cousins as well as maternal half-siblings. In the course of proceedings, K and L were placed together in one foster-placement and H and J together in another. A sibling assessment concluded that the four children should ideally be placed together. The judge noted that G was distressed by her mother's decision not to contest a plan of adoption for her younger half-siblings, and wished to have ongoing contact with them, particularly around their birthdays. In making care and placement orders, the judge acknowledged the potential loss of the relationship between G and her half-siblings, but did not address the real risk that the local authority might not be able to secure an adoptive placement which would keep the four youngest children together, and nor did he give any guidance on the issue of future contact. It is therefore difficult to discern from the judgment how the judge balanced the potentially-conflicting welfare demands of the various children.

120. The final relevant case in 2016 was reported as *ISH (Care and Placement Orders) (Rev 1)* [2016] EWFC B93. The case concerned a 7-month-old baby girl who has three maternal half-siblings, each of whom has been made the subject of care and placement orders, and two paternal half-siblings who reside in the care of their mother but have some degree of contact with the father. ISH had been placed in a foster-to-adopt placement when 12 days old. In making a care and placement order, Deputy Circuit Judge Hamilton approved the plan of indirect contact with

the paternal half-siblings and direct contact with the adopted half-siblings, describing that as '*the right approach'*.

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121. In the case of *Kent County Council v B, W & S (Combined Judgment: Delay: Refusal to Split Siblings* [2017] EWFC B5, Her Honour Judge Cameron was invited by the local authority (supported by the Guardian) to consider orders which would leave B (10) and H (5) in foster care within Kent, whilst their half-sibling, D (22 months) would move to Plymouth to live with her father, a Royal Marine with whom at that stage she had had only a very limited relationship. All three children had been cared for in the same foster-placement during the care proceedings. Although there was no suggestion that any of the children should be placed for adoption, the Judge was very mindful of the impact upon the children of the proposed care plans: '*I am very clear that to split these children now at this stage of their prospective lives would be irrevocable, do them emotional harm and lead to D having a completely different lifestyle and experience to her brothers in what are often said to be the most formative years of a child's life, between two and five. The Court has decided to leave the children in their excellent foster carer's care under Final Care Orders … That will give stability, certainty and finality and hopefully allow B to relax and understand that this tight sibling group will stay together in the longest lifelong relationship that siblings enjoy.'* It follows that the judge rejected the proposal to place D with her father, although envisaged that extensive contact would take place between father and daughter.

122. In February 2017, His Honour Judge Wildblood was concerned in the case of *Bath and North East Somerset Council v The Mother & Others* [2017] EWFC B10 with four maternal half-siblings, each of whom has a different father. The children are A (described as being in her early teens), B (9), C (6) and D (3). A was in foster-care alone; B and C were placed together, and D was in a separate placement. The local authority proposed long-term foster-care for A and care and placement orders for the youngest three children, with the plan that there should be a six-month search for an adoptive placement suitable to take both B and C, and if unsuccessful, thereafter the local authority would seek a long-term foster-placement for both children together. D's father, who has a significant criminal history, both for offences of violence and in respect of the supply of drugs, proposed that his sister, who lives in close proximity to him, should care for the child. The judge noted that D's adult paternal half-brother had written to the court expressing his love for D and his fear of losing him to

adoption: '*this has affected me worse than a death in the family, this is my only brother and I have always taken it upon myself to spend time with him and ensure that we have a close, loving and lasting relationship'*. At a meeting with the Judge, A had expressed a wish to have ongoing monthly contact with her younger half-siblings. In the event of adoption, the local authority proposed indirect contact with A. The Guardian supported the local authority's proposals. In. making care and placement orders in respect of B and C, the Judge noted: '*B and C have particular relationships with the mother, their siblings and their maternal grandparents. The wishes and feelings of their relatives is to maintain contact with them but none of their relatives could offer them a secure environment. Although those relationships are important to them the more important feature for B and C is that they should have a secure childhood within a family where they have a permanent place.'* No further mention is made of the significance of the sibling relationship, save for the need to keep B and C together, and, in approving care and placement orders in respect of D, no indication was given as to any future expectations of sibling contact. The contact issue may have been addressed within the care plans, but it is not possible to glean that information from the judgment itself

123. Her Honour Judge Vincent was concerned in the case of *Re A (Kinship Carer Welfare Determination)* [2017] EWFC B36 with determining the future arrangements for a little boy, A, who was 3 years of age. The child was the youngest in a sibling group of four children – 1 full sibling, Z (nearly 4) and two maternal half-siblings, G and H. G lives with his father and has no contact with his mother; H lives with his maternal grandmother but has no contact with his paternal family or his brothers. The proceedings had initially involved Z, but in the course of proceedings, the court had made a Special Guardianship order in favour of his paternal grandmother, MM. The local authority, supported by the Guardian, sought care and placement orders in respect of A: the alternative identified options were placement with MM or with MM's sister, RR. The judge was very troubled by the prospect of the loss of sibling relationship between A and Z, although A was considered to be a demanding child and there were concerns that placement of both boys with their grandmother could destabilise the placement of both. The judge noted that the children enjoy and derive huge benefit from their contact sessions. The judgment also reflects that adoption would have a devastating effect upon A, indicating (para 140) that *'the effect of an adoption order would be all the more severe for A when he learned that of his three other brothers, he was the only one that was placed away from his family. As he grows up, he is bound to question whether there was something about him that meant he could not grow up within the same family unit or feel rejected and hurt.'* In

determining that the appropriate outcome for A was a Child Arrangements Order in favour of RR supported by a Supervision Order, the judge recorded that:

> A is a happy, healthy toddler who is aware that he is part of a family and has a brother, a grandmother and other relatives. The potential harm to him of removing him from that family and placing him in a new family of complete strangers, and preventing him from seeing his parents, brother and wider family while he remains a child should not be under-estimated … He is likely to suffer feelings of abandonment and grief in the short term, and throughout his whole life, at being separated from his birth family. That may further be exacerbated by the later knowledge that three of his brothers were able to remain in the family, but not him.

It is very clear from the judgment that the court was not satisfied that a placement order was proportionate when a viable family placement was available; it was considered that the objections advanced by the local authority and/or Guardian were either not as great as suggested, or counter-balanced by the positive aspects of the care which the Great Aunt could provide, and that significant emphasis was placed upon the impact upon A of being the only child adopted away from his family, with the consequential impact upon family (including sibling) relationships.

124. His Honour Judge Perry considered the arrangements for three young children, R (9), J (18 months) and T (4 months) in the case of *Re D & Ors. (Children)* [2017] EWFC B87. J and T are full siblings; R is their maternal half-sibling. Sadly, a fourth child of the family, C, had lost his life at the age of 5 in a drowning accident during the preceding year. The local authority proposed that R would remain with J and T's paternal grandmother and her husband – R and J having been placed in their care after the drowning tragedy - under a private law order, and that J and T should be placed for adoption. To inform his decisions, the judge had the benefit of a sibling assessment which recorded that there were no concerns highlighted in the relationship between R and J which would indicate the need for sibling separation, but by virtue of the significant age gap, T may require a different plan. In considering the options, Judge Perry noted that:

> All are agreed that moving either R or J from the care of … will be extremely upsetting for both of them because of the close bond they have as sisters and their very settled roles as part of that family. The amount of distress it will cause did cause me

> to wonder whether such separation might itself amount to inflicting emotional harm, but on reflection it perhaps does not seem likely that it would go as far as impairing the health or development of either of them. The professionals are confident that J could transfer those attachments and that with help and support R can be nurtured through a further loss. Nevertheless, the likely effect on them of the change in their circumstances is detrimental. Changing the family circumstances would effectively mean another loss for R, who has already lost her brother C and her life with her mum and the person she sees as her dad.

The Judge recorded that the situation relating to T was more straightforward: he had been in foster-care since birth, and thus the issue of disrupting family attachments did not arise. He also noted the benefits for J and T of growing up together in the same adoptive placement, including shielding the children to some degree from the tragedy of the loss of their half-brother. The judge, in acknowledging the benefit to J of acquiring a life-long family via adoption and being placed with her brother, went on to refuse to make a placement order in respect of J, preferring instead to secure her placement with R in the care of the grandparents via Special Guardianship orders. He observed that this would deprive T of being brought up with his sibling, but qualified that by indicating that that relationship was not currently being developed in any way. This case represents a very careful judicial balancing of the competing interests of siblings with differing needs and differing life experiences.

124. Her Honour Judge Lynch heard the case of *Re X (a Child)* [2017] EWFC B21 in which the local authority sought care and placement orders in respect of a 5-month old baby girl who has five elder maternal half-siblings, the eldest of whom lived with her father; the next eldest was the subject of a care order; the two next in age have been adopted, and the youngest of the five is the subject of care and placement orders and also placed for adoption. The child's father was in prison, and whilst the position of the mother was neither to oppose nor to consent to the making of care and placement orders, the father wished to challenge the local authority plan in the hope that upon his release, the child – his first – could live with the parents. That position changed in the course of the hearing with the discovery that the mother had a new partner and was expecting that partner's child, with the mother choosing not to challenge the evidence but nevertheless expressing a wish to care for the baby, and the father seeking to persuade the court that the baby should await his release in order that he could then be assessed to care for her. The father was at that stage

on remand, but had spent most of his adolescence and adulthood in prison. In making care and placement orders, the judge commented '*I entirely accept that adoption is the most serious outcome possible in a case of this nature, ending a child's relationship with its birth family in any meaningful way and here that includes X's older half-siblings, although there is the potential for a relationship of some kind with those who have been adopted.'* It is perhaps surprising that there is no reference within the judgment to any encouragement to explore placement of X with any of her adopted half-siblings, nor any more determined encouragement of the local authority to promote contact between the adopted half-siblings – that may very well have been addressed, but it is not possible to glean as much from the judgment itself.

125. In the case of *Re C (A Child: Care Order: Placement Order)* [2017] EWFC B60, His Honour Judge Wood was concerned with a baby boy, C (10 months). C has an older brother, B (5) who suffered serious inflicted injuries in early infancy and had been placed with his paternal grandparents under a Special Guardianship Order. The judge concluded that, in the absence of any available safe placement within the birth family, the only appropriate outcome for C was care and placement orders; within his short judgment it is impossible to discern whether he placed any weight at all upon the possibility of a relationship between the siblings.

126. Her Honour Judge Vincent was concerned in the case of *Re A, B, C and D (Fact-Finding and Welfare)* [2017] EWFC B33 with the welfare of four sisters, referred to as the case name implies as A (11), B (nearly 9), C (nearly 6) and D (2). At the time of the final hearing the eldest and youngest child were placed together in one foster-placement, and the second and third child together in another placement. A, B and D were full siblings whereas C was believed to have a different father. The local authority, supported by the Guardian, sought a care order for each child and placement orders in respect of C and D. In considering the differing plans, the judge commented:

> 145. The local authority's proposal to separate A from D and B from C would have life-long consequences for all the girls. Having grown up and identified themselves as a group of four siblings, two of them would then be separated to live with a new family, a new name, a new life. While it is proposed that sibling contact might be arranged, ultimately that is likely to be down to the adoptive parents to encourage and facilitate. If the adopters felt unable to support this, it is not very likely to happen.

> 146. A and B would I imagine, be devastated to lose their younger siblings to adoption. They would miss them, they would worry about them and they may feel angry, upset and bereft at a decision to separate them in this way.

The Together or Apart assessment identified that placing A and B or B and C together would give rise to a significant risk that their combined needs would overwhelm a placement, increasing the risk of placement breakdown. Whilst recognising the detriments of separating the group by sanctioning the placement for adoption of C and D, the Judge nevertheless made the orders sought by the local authority, approving a plan for A and B to be placed in two separate foster-placements. The Judge also approved '*in theory'* the plan for all four girls to have ongoing contact even in the event of C and D being adopted, but added that she would essentially take a '*pragmatic view'*:

> I would hope and expect the adoptive parents to be helping the girls to understand their life story and the part that A and B play in it, but given that they may be in very different places physically and emotionally over the next few years, contact may not necessarily be a positive experience for all of them all of the time. There is also the potential difficulty of the older girls having direct contact with their birth parents but the younger siblings not. Ultimately it will be a matter to trust to the judgment of the adoptive parents. While I would hope that sibling contact was something prospective adopters would be open to considering, I would not be supportive of making this an essential requirement of any search for adoptive parents for C and D.

127. In the case of *Lancashire County Council v Y (Domestic Violence: Adoption)* [2017] EWFC B70, His Honour Judge Duggan was concerned with the arrangements for a little boy, Y, then 7 or 8 months old. The child has a number of older maternal half-siblings, none of whom were in the care of their mother, with two having been placed for adoption. A full sibling to Y had been abandoned by the mother at a mother and baby placement, and now lives with a paternal aunt. There is also a paternal half-sibling who also resides with an aunt. The parents, who had separated, each contended that Y should be placed in his mother's care: the local authority sought care and placement orders, with the intention that Y would be placed with his adopted half-siblings. In granting the local authority's applications, it was clear that the judge rejected the possibility of safe rehabilitation to the mother's care and regarded the prospect of placement with the child's two half-siblings as, in effect, a consolation rather than a

positive motivation for supporting placement for adoption – having rejected the idea of a family placement, and found that long-term foster-care was inappropriate for a child of this young age, the judge ruled that placement for adoption was the only option which would meet the child's welfare needs –'*the only viable outcome'.* – in other words, the judge weighed the competing options of return to the mother, foster-care or placement for adoption, not placement within a specific placement. This reflects the legal position which is that a placement order does not tie a local authority to any particular choice of adoptive placement.

128. In July 2017, Her Honour Judge Rowe QC was concerned in the case of *Re AB (Adoption or Rehabilitation)* [2017] EWFC B44 with the welfare of AB (2), who was the subject of an application for an adoption order. It is clear from the judgement that AB had been placed pursuant to a placement order, and that the parents had been granted permission pursuant to s.47(5) Adoption and Children Act 2002 to oppose the making of an adoption order. AB's brother, CD (18 months) was in the care of the father, and the mother sought the return of both children to her care, whilst the father wished AB to join his brother in his care. However, each parent supported a placement of AB with the other in preference to adoption. AB has three older maternal half-siblings who were not in the care of their mother. It is relatively unusual for a parent to be granted permission to oppose the making of an adoption order, and in deciding that such was appropriate in this case, Judge Rowe noted that:

> 43.The evidence at a full contested adoption hearing may or may not be that one of the parents can care for AB, and it may or may not be that to move AB now would cause him lifelong emotional and psychological harm. But I conclude that the most difficult thing for AB would be to learn, as he grows into adolescence and adulthood, that his parents both wished to care for him, that both had improved their lives and the factors that led to his removal from them, that his father had just been approved to care for his little brother, but that the court did not even sanction the gathering of the necessary evidence and the forum for the necessary hearing.
>
> 44. I conclude that it is in AB's interests that his parents are given leave to oppose the adoption application. I emphasise that this decision is not in any way determinative of the substantive application."

The judge authorised the instruction of a Child Psychiatrist to assess AB's attachment to his prospective adopters and the likely impact of removal from their care. The advice of the expert was stark: '*The suggestion is AB be placed back within a family system with a great deal of vulnerability, from a situation where he is secure, is loved, and is making progress.'* In balancing the competing positions of the parties, and finding that an adoption order should be made, the judge found that '*there is a very high probability of immediate and significant levels of trauma and a high likelihood that placement of AB with either of his parents would break down. If that were to happen there is a high likelihood of emotional and psychological catastrophe for AB in the short, medium and long term'.* It is clear from the judgment that the court was very much alive to the benefits of placement of AB with CD, but noted that AB would struggle with becoming an older sibling, having been used to being the youngest child of the family, and that meeting AB's extensive needs would impact upon the father's ability to continue to meet CD's needs. The prospective adopters had offered the possibility of sibling contact when the dust settled: it is unclear to what extent, if at all, that influenced the judge's thinking, although she was clear that both boys, and especially AB, would need a very clear narrative in the future to explain why they could not be brought up together. There is no information within the judgment as to the arrangements for the maternal half-siblings and it is therefore not clear whether there was any prospect of AB having any relationship with them in the future.

129. In the case of *Re E & N (No3)* [2017] EWFC B57, His Honour Judge Moradifar gave his third judgment in a case involving two multi-heritage sibling children, E (16 months) and N (10 months). In making care and placement orders in respect of the children, he expressly approved the plan that the children remain together, the judge noted '*I have come to a settled view that it is not in the interests of these children to be separated. Their relationship will be an enduring, important relationship that will, I hope, continue into adulthood.*'

130. The next case of relevance in July 2017 is *Re Five Children* [2017] EWFC B52 in which Her Honour Judge Williscroft heard an application by a local authority for care and placement orders in respect of a sibling group of five children, with the intention that the eldest two should reside in one placement and the youngest three in another placement. The parents, who remained in a relationship, sought to have the children returned to their care. In finding that there was no prospect of the children being able

to return to their parents, and no appropriate kinship placement, the judge determined that placement orders were required, but added (para 61) : '*I consider the care plans should be altered for concurrent searches for homes for them all together and also if separated it should be essential that potential carers clearly understand and will promote sibling contact, since this family group plainly have a close and important bond. I am today pleased to be told this has been agreed and also that adoptive parents will be sought, if separation is necessary, who will ensure sibling contact takes place at least twice a year'.*

131. In the case of *Re K, C and D (Care Order)* [2017] EWFC B110, Miss Recorder Henley was concerned with three children, K (11), C (6) and D (22 months). Each child has a different father. D had a life-limiting condition with a very uncertain prognosis. The local authority's care plan, supported by the Guardian, was a separate foster-placement for each child, even though the eldest child was acutely distressed by the prospect of separation from her mother. The court noted that a placement with the mother was the only route to a placement of all the sibling children together, the judge reminding herself that sibling relationships are lifelong and often the longest relationships any person can have. The judge quoted from the Guardian's report: '*K, C and D's relationship with each other has been fragmented through the Local Authority case management of their care. When sibling groups are separated in this way it invariably leads to the severing of sibling ties becoming permanent, without any real consideration of how this will impact upon the children's long term emotional needs."* The judge added: '*In her report dated 12.05.17 the Guardian goes on to observe, "Studies make findings that the separation of siblings is not a minor issue and can inflict pain, sadness and feelings of injustice which may remain throughout life*".' The evidence was that an earlier placement of K and C together had foundered because K attacked C, possibly in an attempt to make him cry so that he would say he wanted to go home, and that D's overwhelming needs required a two-carer placement where he would be the only child in placement and could receive better than good-enough care. The Guardian's advice was that it was better for K to be placed with C, but, conversely, better for C to be placed without K. The court found that if placed together, K would attempt to parent C, which would be in the interests of neither child. In making care orders, the court approved both the separate placements and a plan of fortnightly sibling contact, subject in the case of D to any health considerations which prevented participation in contact sessions. Because the children were not placed for adoption, there was absolutely no reason for contact not to continue for the future. The judge underscored her acceptance of the

importance of sibling contact by addressing that issue first in her discussion of the contact arrangements with the various family members, approving the proposals for fortnightly sibling contact, with D to attend as and when his health permitted.

132. In the case of *Re T (a Child: Early Permanence or Kinship Carers)* [2017] EWFC B43, Her Honour Judge Vincent was concerned with the future arrangements for T (11 months) whose older brother, H (4) lived with a paternal aunt, E. Another paternal aunt, C, proposed herself as a carer for T, who had been discharged from hospital to a foster-to-adopt placement. The local authority sought a placement order; the Guardian advocated a Special Guardianship order in favour of C and her partner. The foster-carers/prospective adopters were prepared to consider an open adoption, and whilst the independent social worker in the case was impressed by C, she considered that it would be too damaging to contemplate removing T from his current carers. In the event, the Judge refused the placement application, finding that it was not a case of '*nothing else will do'*. She noted that his current carers were committed to sibling and other contact in the event that they were able to adopt him, but noted that if adopted, '*T would grow up aware that by birth he belonged to a different family and has parents, a brother, cousins, aunts, uncles and other relatives. He may well suffer feelings of abandonment and grief throughout his whole life, at being separated from his birth family. That may further be exacerbated by the later knowledge that his brother H was able to remain in the family, but not him. Even though it is proposed to mitigate these difficulties by maintaining regular contact between T and H and other members of his birth family, that contact is not going to get close to what he might experience as a full member of the family, growing up at its heart.'*

133. His Honour Judge Bellamy heard the case of *Re A, B, C, D and E (Children: Care Plans*) [2017] EWFC B56. The case concerned A (10), B (4), C (nearly 3), D (2) and E (5 months). The eldest four children were in one foster placement: the baby had been removed at birth and placed in a separate foster-placement. The children shared the same mother; the youngest four are full siblings, with E having been born after the commencement of proceedings, and A having a different father. The children are dual-heritage, with their mother being white British and each of the two fathers being of Pakistani British heritage. The family dynamic was further confused by the father of the four youngest children being also the father of a baby born to the mother's sister within 2 weeks of the birth of E: that baby is of course simultaneously a half-sibling and cousin to the

four youngest children, but this was not an issue which assumed any significance in the course of the judgment.

All kinship care options having been discarded, the local authority sought for A to remain in long-term foster-care; for there to be an initial search for an adoptive placement which would keep B, C and D together, with E to be placed for adoption separately; if that failed, the local authority proposed seeking one adoptive placement for B and C and a second placement for D and E. This led to the additional difficulty that no progress could be made in placing E until the issues relating to his siblings had been resolved because whilst it was not unusual for a later-born younger child to join a sibling in an adoptive placement, it would be far more unusual and complex scenario to introduce an older sibling into a younger sibling's adoptive home.

After a meticulous analysis of the evidence, the Judge concluded that there remained significant gaps, and in particular that he required the evidence of an experienced child psychologist to address, in respect of the four oldest children, the likely impact on their emotional wellbeing of separation from their siblings and of contact between A and the siblings being restricted to letterbox contact (the local authority being concerned that because A was also having contact with his parents and grandmother, direct contact would risk disclosure of the younger children's whereabouts). Judge Bellamy noted (para 130):

> Cases involving large sibling groups present significant challenges to local authorities in terms of care planning. They also present a significant challenge to the court. The fact that a sibling group involves more than one father, that there is a relatively wide age gap between the oldest and the younger four half-siblings, that the children are all of dual-heritage adds to the complexity.

134. The next relevant case is that of *Re FR (a Child: Care and Placement Order)* [2017] EWFC B64, in which His Honour Iain Hamilton CBE was concerned with the welfare of FR (12 months), the only child of his parents' relationship and of the father, but the third child born to her mother. Her older half-siblings, JU (7) and CU (5) had been adopted. Despite the child's parents and paternal grandmother all aspiring to care for her, the judge found that care and placement orders were required. It is impossible to discern from the judgment whether any thought had been given to the possibility of contact with the child's adopted half-siblings, and thus it may be deduced that it was not an issue which contributed to the judicial balancing exercise.

135. In the case of *Lancashire CC v A (Adoption)* [2017] EWFC B55, His Honour Judge Duggan was concerned with six children: three boys who ranged in age from 6 to 13, two girls respectively 7 and 5, and finally a little boy who was not yet 1 year old. The issue for the judge to determine was whether the youngest child, alone of the sibling group, should be placed for adoption. It was proposed and agreed that the five elder children would remain in a long-term foster-placement. Up until the final hearing, the baby had been placed in a foster-placement with his two sisters. In considering the application, Judge Duggan noted that the baby was an important figure for his siblings, and the older children are familiar figures for the baby. He recorded that the girls would be very upset to lose their baby brother, but that the sibling relationship was less important to the baby than to his older siblings. In making care and placement orders, the judge noted that:

> The local authority's plan is an entirely conventional plan for indirect contact involving both parents and siblings. The guardian has in her written report speculated whether indirect contact was enough so far as the siblings are concerned, but in her concluding remarks she told me that she had come to the conclusion that indirect contact it would have to be. The reality is that any more than indirect contact, whether it be parents or whether it be the siblings (who will see the parents), would place difficult hurdles in the task of searching for an appropriate placement, and even if a placement was found it would make the success of that placement more difficult. It must not be overlooked that the important relationships for the child going forward are going to be the new relationships rather than the old ones.

It is clear from the judgment, although not explicitly stated, that the court found that the advantages of adoption for the baby outweighed the distress created for his older siblings in losing direct contact with him.

136. The next relevant case is that of *A Local Authority v The Mother & Anor* [2017] EWFC B59, in which His Honour Judge Wildblood was concerned with the welfare of a 5-month old girl whose 3-year old brother had been made the subject of care and placement orders four months earlier. The children were placed together in foster-care and the local authority intended that they should be adopted together. The judge found that the mother's own significant difficulties would prevent her from caring for her daughter: whilst noting the advantage for baby of growing up with her brother, that consideration did not influence the decision, which was based firmly upon the mother's inability to care for the child.

137. In the case of *London Borough of Tower Hamlets v H & Anor* [2017] EWFC B65, Her Honour Judge Atkinson dealt with an application by the parents of PJ, a baby girl who had been made the subject of care and placement orders when 12 weeks old, and now, some 10 months later, was the subject of an adoption application. PJ's seven older half-siblings were all the subject of care orders. The application for an adoption order coincided with the parents making an application to discharge the care orders in respect of six of the eight children, including PJ (although as a matter of law an application for discharge of the care order cannot be made in respect of a child who is the subject of a placement order, and an application to revoke the placement order cannot be made in respect of a child who has been placed for adoption – the only course of action open to the parent is to apply for permission to oppose the making of an adoption order.). The parents challenged the local authority's assertion that they had been given proper notice of the proposed placement for adoption, the significance of this being that that was the point at which the parents lost the opportunity to seek revocation of the placement order. The judgment concludes with the judge affording the parents a time-limited opportunity to challenge by judicial review the local authority's decision-making in placing the child for adoption. Although the significance of the child being part of a large sibling group was not specifically mentioned, an obvious conclusion would be that a successful challenge to the adoption process would provide an opportunity of preserving the baby's relationship with her numerous half-siblings.

138. Her Honour Judge Vincent considered, in the case of *Re C (Long-Term Foster-Care or Adoption)* [2017] EWFC B74, an application for a placement order in respect of a 6-year old boy, C. The child has an older half-brother, D (9) and the catalyst for the proceedings was allegations of sexual abuse of C by D. The boys have an older half-brother, E, who was 18 years old. The boys were accommodated in separate foster-placements, and initially the court had made care orders in the expectation that C would remain long-term within his then-current foster-placement. Once it became clear that the foster-placement could not be long-term, the local authority reverted to its earlier plan of adoption. C was by then having regular contact with D, although the social worker expressed serious reservations about the benefit of continuing contact between the children, against a background of significant family dysfunction and inappropriate sexual boundaries. The author of the Child Permanence Report considered that contact was of greater benefit to D than to C, who was said to find D overwhelming because D wants to cuddle C, and C does not like that. The judge noted that because D would remain in foster-care, C may question

whether his adoption was the result of something being wrong with him; she also noted that C is very clear about his identity and his place within the family unit: on the other hand, he may benefit hugely from a move to a permanent family, and could be assisted safely to maintain his family links with life-story work and indirect contact. The judge noted that D very much values his relationship with C, and might be more likely than the parents to have ongoing contact in the event of C's adoption, commenting that '*sibling contact, even where one child is adopted and the other is on foster-care, is not uncommon'*. She also noted that there is some risk of harm associated with ongoing contact, ultimately determining that a placement order should be made. However, the judge also approved the Guardian's recommendation whilst contact between C and D should not be a condition attached to any adoptive placement, the idea should be raised with any prospective adopters. It is not clear from the judgment whether this recommendation was endorsed because it was considered to meet primarily the welfare needs of C, or whether it was to meet the needs and wishes of D.

139. The next case of relevance is that of *Re PQR (Children)* [2017] EWFC B86 in which Her Honour Judge Williscroft was concerned to determine applications for care and placement orders in respect of P (4), Q (2) and R (1). The plan was that all three girls should all be placed together, and if an adoptive placement could not be identified within a time-limited period, the children would remain in long-term foster-care together. In making the orders sought, the judge approved the plan for the children to remain together, accepting the local authority's assurances that they would not be separated.

140. The case of *Re X (a Child: Care Order)* [2017] EWFC B83 concerned a baby girl, X, who was 5 months old at the time of the judgment. X has two full siblings, Y and Z, who had been removed from the care of the parents and placed for adoption, Y having suffered very serious non-accidental injuries at 3 months old. There is a paternal half-sibling who also suffered significant injuries and who resided with his mother, with no contact with his father. X was placed in a foster-to-adopt placement. In making care and placement orders, Her Honour Judge Lynch emphasised the importance of contact taking place between X and her two adopted brothers, acknowledging that sibling relationships are the longest-lasting and expressing the hope that although the children will grow up in different homes, they will be able to see each other as brothers and sister. However, it is clear from the judgment that the availability of sibling contact did not impact upon the judicial balancing-exercise as to the appropriate outcome for X – that was based very much upon the conceded

inability of the parents safely to care for her, and the inappropriateness of long-term foster-care for such a young child.

141. In a case reported as *H (a Child: Placement Order)* [2017] EWFC B105, Miss Recorder Henley was invited by a local authority to make a placement order in respect of H (14 months) who had been made the subject of a care order two months previously, a plan of rehabilitation to the care of her parents thereafter having failed. The local authority had not at that stage issued the placement application. When the matter first came before the court, it transpired that although the local authority had purported to issue the placement application, there was no ADM decision and therefore the local authority could not satisfy itself within the meaning of s.22 Adoption and Children Act 2002 that the child 'ought' to be placed for adoption, and it had not parallel-planned by considering alternative kinship placements. Ultimately, matters were rectified and the judge made a placement order, expressing the hope that H would be placed with her older sibling, J, who had been adopted some four years previously. As with the preceding case, that intended outcome was a happy consequence of the making of a placement order, rather than a factor bearing upon the court's balancing exercise.

142. Her Honour Judge Harris heard the case of *Re A (Family Placements or Foster-care)* [2017] EWFC B111 concerning C (9) and D (3). The children have a complex, highly-disrupted family background with various relatives contending for their care, but the relevance for this study is that when the judge queried the plan of long-term foster-care, on the basis that D was only 3 years old, suggesting that D's interests risked being sacrificed to those of C, the local authority made it clear that the very close sibling relationship had driven its decision-making and was considered a protective factor, should the children not be able live within their family. In concluding that the children could not be placed with any family member, and making final care orders, the judge specifically found that the sibling relationship is of key importance to each child and that it would be harmful for the children to be separated, even if that mean's sacrificing D's chances of securing permanency via adoption.

143. The final relevant reported case in 2017 was that of *A Local Authority v G (Parent with Learning Disability) (Rev 1)* [2017] EWFC B94 which concerned A (12) and her maternal half-siblings, K (nearly 3) and T (19 months). The parents of K and T are married to each other; A's father is deceased. The youngest two children have two adult paternal half-siblings. The local authority, supported by the Guardian, sought to persuade the court to make a Special Guardianship order in favour of a

connected carer in respect of A, and care and placement orders in respect of the younger two children. His Honour Judge Dancey referred in his judgment to receiving a letter from A in which she made clear that her preference was not to return home, and in particular not to have to resume responsibility for caring for K and T. The judge found that whilst A missed her younger siblings, she was happy in foster-care. The local authority proposed placement for adoption of K and T with indirect contact with A. The judge noted that K and T have a healthy sibling relationship and that it was likely that they could be placed together. He considered that the sadness of their separation from their parents and half-sister must give way to the need for them to be able to grow up in a safe, nurturing environment.

2018

144. The report of the first relevant case in 2018 included a text-book example of consideration of the competing needs of siblings. In the case of *Re L, D and J (Application for Care and Placement Orders)* [2018] EWFC B17, Miss Recorder Henley addresses the competing needs of three full sibling children: girls aged 6 and 5, and a boy who was almost 4 years of age. The children had always lived together: after removal from the care of their mother, they were placed in foster-care together and remained in the same placement at the time of the final hearing. The elder girl and the boy share a chromosomal disorder, and all three children suffer from developmental delay and have complex emotional and behavioural needs. The threshold for making protective orders was conceded: the issue in the case is whether the children should remain together in foster-care or whether the court should approve the plan of adoption, with the proposal that the girls be placed together and the boy separately. There was no guarantee that the children would remain together even if fostered: the current placement was unlikely to be approved long-term, and the boy's challenging behaviour may in any event render a separate placement inevitable. The judge observed:

> 71: I am extremely reluctant to split this sibling group, particularly in circumstances in which they have always been placed together, and in circumstances in which their needs are currently being met, and met to a high standard, by them all being placed together. However, I have to consider the children's individual needs, not just at the current time, but throughout their childhood and indeed throughout their lives. This is a very difficult decision.

72: The family, for perfectly natural and understandable reasons, wish for them to be kept together. I consider that sibling relationships are very significant. They are potentially the longest and most enduring relationships available to any of us and in circumstances in which L and J share the same chromosomal disorder I can see force in the argument that they should remain placed together to permit each of them to have a greater understanding of their own difficulties and to give them reassurance that they do not face these challenges alone.

73: However, having carefully considered the now unanimous opinions of the professionals involved in this case, I am satisfied that, sadly, it is necessary for J to be placed separately to his sisters for the following reasons:

74: Firstly, it will give J, and indeed L and D together, the best prospect of suitable long-term placements being found which can meet their needs successfully through to adulthood. The prospect of finding a suitable long-term foster care placement or adoptive placement for all three children together which will meet their needs for the rest of their childhood is a bleak one, on the evidence that I have heard. I am satisfied that if any of the children are to be given the opportunity to be placed for adoption they will need to be separated in this way.

75 … secondly … on the basis of the evidence I have heard I am not reassured or confident that (*the current carers*) would be considered suitable as long-term carers for any of the children and I cannot proceed with confidence that they would be. Thirdly, I am satisfied on the basis of the evidence I have read and heard that it is likely that J will continue to be a child who presents any carer with considerable challenges and that he will need an exceptionally high level of care throughout his childhood and potentially additional support into adulthood. I consider that it is not in his best interests, or indeed in the best interests of his sisters, that his carers should attempt to meet his needs alongside those of L and D. I consider that to attempt to do so presents a high risk of placement breakdown for one or more of the children in the future. I am satisfied that it is likely that J's needs will eclipse those of his sisters in placement, which will be very much to the detriment of the girls.

80. Fourthly, I have come to the conclusion that for these children their placements must take priority above their need to continue to be brought up as a sibling group together. I am persuaded that each of them require, first and foremost, to have carers who are capable of meeting their individual needs throughout their childhood and, sadly, that that could only be properly achieved if they are to be separated in the way proposed by the Local Authority and supported by the children's guardian …

> 81.For those reasons, I am satisfied that the complex needs of these children demand that they are separated and that J will need to placed separately to his sisters.

Although the judge referred to J's prospective adoption as being a further loss for the girls, she did not suggest that there should be any form of direct post-adoption contact.

145. The next relevant case was *Re A and K (Children: Placement Orders)* [2018] EWFC B3 which concerned to two maternal half-sibling girls, aged 6 and 4. No viable family placement available, and the issue for the court was long-term fostering or adoption. In making placement orders, Her Honour Judge Owens did not contemplate the possibility of separation:

> … as noted by the allocated social worker in her sibling assessment at E29, "research also indicates that siblings placed together do experience better outcomes that if they were placed in separate placements". This would therefore also ameliorate any risk of adoptive placement breakdown …
>
> That sibling assessment has quite rightly led to the plan for the girls to be placed together. I am therefore confident that it is not beyond the bounds of possibility that a suitable adoptive placement could be found fairly swiftly for both girls together.

146. Miss Recorder Henley heard the case of *Northumberland County Council v LW* [2018] EWFC B21. This concerned three children: MM (14), KP (13) and LR (10). MM was placed in a mother and baby placement with her own baby; KP, a boy, had had significant involvement with the criminal justice system and was resistant to attending school; LR, a girl, was compliant and engaging with education. The judge approved the local authority's proposal to place LR in a separate long-term foster placement, noting that '*The court is always reluctant to separate siblings; however, in this case the plan to separate all three is driven by their individual needs.'*

147. In the case of *Oxford CC v L* [2018] EWFC B13, Her Honour Judge Owens considered the proposed arrangements for two sibling children aged 14 and 9 with a plan of separate placements in long-term foster-care. The judge accepting expert evidence of a range of concerns in relation to each child's behaviours and that both children have a heightened level of need from their caregivers. She accepted the professional assessments that the children should be placed separately but stipulated that there should be ongoing sibling contact.

148. In March 2018, His Honour Judge Bellamy gave judgment in the case of *Re A,B,C,D and E (Children: Placement Orders: Separating Siblings)* [2018] EWFC B11 , which concerned a group of five children then aged 1,2, 3, 4 and 11. The children shared the same mother; the identity of the father of the eldest child had not been disclosed and the younger four children shared same father. The youngest child had been born in course of proceedings and was separately placed, and the eldest four were placed together. At an earlier hearing (case 133, vid. supra), the Judge had said:

> I am satisfied that before the court can properly evaluate the local authority's plans to separate the oldest four children there needs to be an expert assessment of the children by an appropriately experienced child psychologist. The areas for assessment are, with respect to each of the oldest four children, the likely impact on their emotional wellbeing of separation from their siblings and of contact between Child A and his siblings being restricted to annual letterbox contact.

At this later hearing, His Honour Judge Bellamy said:

> 74. LA is seeking to have the youngest four placed for adoption, in two separate placements, each with two children but ongoing contact between the four potentially-adopted siblings. The guardian supports the proposals for direct contact between the four (potentially) adopted siblings. Contrary to his position at the hearing in August he no longer agrees with the local authority that that contact should be left to the discretion of the adopters. In his opinion the court should exercise its powers to make orders for post-placement contact pursuant to the provisions of s.26 of the Adoption and Children Act 2002 with direct contact between them. Separating siblings is not a step that is ever taken lightly by the court. Separation of siblings may make the local authority's task of identifying suitable placements somewhat easier but the starting point, as Dr I'Anson rightly emphasises, is that 'Generally, siblings being placed together, if at all possible, is preferable'. I am in complete agreement with Dr I'Anson on that general approach.
>
> 75. However, every case is different. Every family is different. In any particular case there may be factors that make the objective of keeping a sibling group together unrealistic or inappropriate. These factors may include, for example, the size of the sibling group, the wide age range of the sibling group, the ethnic diversity of the sibling group, the fact that children in the sibling group have different fathers, the special needs of a child who is part of the sibling group or a professional assessment that

> it is in the welfare interests of the children concerned that they should be separated. These are illustrations. The list is not intended to be exhaustive. The court must focus on the needs and welfare of the individual children whose future it is determining.

In approving the plan, the judge added:

> 81. Although the need for high quality placements is an overriding need, there are other protective factors that are important and which should be weighed in the balance. The separation of siblings can have negative consequences. In contrast, being placed with another sibling is a protective factor. Where separation occurs, maintaining contact, both direct and indirect contact, with other siblings is another protective factor. Dr I'Anson made it clear that for these four children establishing and maintaining inter-sibling contact would be particularly important if the children were to be placed in four separate adoptive placements…
>
> 111. Notwithstanding my decision to make placement orders, I remain profoundly concerned about the possibility that the local authority may at some future point decide to change the care plans for these children to seek separate adoptive placements for each of them. If I had the power to order that that could not happen without the approval of the court I would unhesitatingly make that order. I do not believe I have that power.
>
> 140. The most recently amended final care plans for the four younger children acknowledge that ideally these four children should continue to have direct contact with each other after they have been placed for adoption. It is now agreed by all parties, including the local authority, that direct post-placement inter-sibling contact between the four younger children should be underpinned by contact orders under s.26 of the Adoption and Children Act 2002. I shall make those orders.

This case provides a rare example of the court making orders to regulate post-placement order contact.

149. The case of *Re J (a Child : Care Order : Adoption)* [2018] EWFC B18 concerned a baby girl whose father had not been identified. Her two maternal half-siblings had been adopted together after one had been found

to have suffered serious non-accidental injury. Her Honour Judge Lynch noted as follows:

> So, I balance the options for J of living with her mother or being adopted. To live with her mother would maintain a relationship which is important to J, and give her the best possible understanding of her birth family. However, there would be the very real risk of her being harmed, physically and emotionally, because of her mother's difficulties, and this factor must be at the forefront of my mind. If J is adopted she will lose her relationship with her mother although has the real potential it seems of growing up with her older sister and brother. She would at an early point be living with people who would be her parents throughout her childhood, and I am conscious that delay in making such a decision for a child is harmful.

It was clear within the judgment that the placement with siblings formed part of the balancing exercise, as opposed to be a happy consequence of placement.

150. In the case of *Re Jack (A Child : Care and Placement Orders)* [2018] EWFC B12 (a case widely reported because the judgment had been written in language specifically geared to the needs and level of understanding of the child's parents), Deputy District Judge Reed was concerned with the welfare of a baby whose two older siblings were placed with members of the extended family. It would seem from the judgment that relatively limited attention was given to the issue of sibling contact in making a placement order in respect of the baby. However, it must be acknowledged that the very simple language in which the judgment was expressed may have given little scope for dealing with the nuances of the sibling relationship. Some judges prefer to give a more formal judgment, coupled with a brief summary in readily-comprehensible language so that the parents understand what order the judge has made and why he or she has made it. However, the judge did say this about contact:

> 49. … When the agency decision maker (a senior person at social services) approved the plan for adoption the report they had (child permanence report) said that direct contact between Jack, Joe and Oliver might put the placement at risk. At that time Joe and Oliver had only met Jack a couple of times. Now they are seeing him about once a month and contact is going well, so things are a bit different. The agency decision maker was also told that it would be difficult to organise direct contact between Jack and his parents because of worries about (*the father's*) behaviour. That is true, but I think the idea of an assessment if the parents make changes is a good one.

> 50. I have read the care plan for Jack. I think that if Jack is adopted social services will do their best to make sure some contact happens if it is appropriate, but I understand that they cannot make any promises about that. The most important thing for Jack is to have a family who can look after him until he is grown up and who can keep him safe.
>
> 51. If direct contact isn't possible Jack will have indirect contact with his family twice a year. Social services will need to think about whether (*the father*) needs any help with that because he isn't very good at reading and writing.

It would seem from the brief judgment that the contact proposals follow the very common path of sibling (and possibly parental) contact if the adopters are content for it to happen, but otherwise indirect contact, with priority given to assuring the security of the adoptive placement.

151. In the case of *Re H (Care and Placement Application)* [2018] EWFC B36, Her Honour Judge Vincent was concerned with a sibling group of four children, aged respectively 17, 16, 12 and 6. The case included allegations of inter-sibling and familial sexual abuse. All the children had been placed in foster-care, with the local authority seeking care and placement orders for the 6-year-old. In making a placement order in respect of the youngest child, and deciding that contact orders should not be made, the judge held:

> 85. If H were placed for adoption, once a placement is secured, the prospects of that placement providing security, stability and meeting all his needs are good. Nonetheless, to find prospective adopters who are able to meet all H's needs takes time. Even if the family finding process were not hindered by finding adopters willing to facilitate direct sibling contact, a significant further period of H's life will pass before he is moved to his new placement; based on the family finder's evidence it is perhaps unlikely to happen this calendar year. During that time H will be uncertain of his future and this is likely to be unsettling. The opportunities to spend time with his birth family will reduce during that time and this is likely to affect him. Moving to a new family and a whole new way of life will present significant challenges, however much support is in place. The ultimate severing of ties with his birth family would change the whole trajectory of his life. The impact is likely to be greater in circumstances where he is the only member of his sibling group to be adopted.
>
> …….
>
> 94. … The social worker is clearly alive to the relationships between the siblings. It cannot be said that she has not fully

appreciated the nature of the relationship. As well as the FASS assessment, she has independently formed a view that there is a need for the sibling relationship to be protected. She is alive to it, acknowledges its importance, but has come to the conclusion that it does not tip the balance away from adoption. It is for me to carry out my own analysis. I am not satisfied that there is in reality a gap in the evidence such that the Court is unable to consider the welfare checklist factors. I reject the application for an adjournment in order to revisit the FASS assessment. It is not necessary, nor would it be proportionate to delay further for this reason.

…….

109. While I accept that if possible the sibling bond must be promoted, protected and encouraged, this is not a case where the evidence leads me to conclude that H's need for sibling contact should be regarded as a 'red line', or a factor of such magnetic or fundamental importance that it should be determinative of the outcome in this case, by tipping the balance in favour of foster care. The circumstances in this case are different from the cases to which I have been referred, in which there was already a strongly established sibling bond, and it was judged to be absolutely fundamental that there must be the continuation of already regularly established contact, whatever the placement … In the circumstances, I am not persuaded that there is a particularly good prospect of H deriving benefit from direct sibling contact throughout his childhood. I am not persuaded that there is necessarily going to be better availability of sibling contact in foster care compared to in an adoptive placement.

…….

121**.** I am not persuaded that it would be appropriate to order a section 26 contact order at this stage …

(ii) … I am satisfied that this local authority is committed to searching for adoptive parents who will be willing to facilitate sibling contact. It is in the care plan … there is in my judgment no need to make an order for sibling contact as well;

(iii) There is a significant risk that a contact order made at this stage of proceedings is likely to impede the search for an adoptive placement; it is one thing as a prospective adopter to be open to the idea of contact in principle, it is another thing to agree to it where you will have no say over the terms, no input into the frequency of contact, how it is going to take place, and to agree to it before you have even met the child you hope to adopt;

> (iv) I do not consider it is in H's welfare interests to have the search for adopters significantly restricted by the presence of a contact order when there are so many variables and uncertainties around sibling contact at this stage;
>
> (v) … I am clear that so far as H is concerned, his need for continuing sibling contact, while an important part of the care plan is not so fundamental that it should be the driver for implementation of the care plan.

152. His Honour Judge Moradifar gave judgment in respect of four children, aged 4, 6, 7 and 15, in the case of *Re R-T (No. 2)* [2018] EWFC B22. His judgment in respect of the sibling relationship included the following balancing observations:

> 70. In my judgment the option that would best meet the individual and collective needs of P, R and L (*the three older children*) is for them to continue to be placed together. Their sibling relationship is an enduring relationship that is of particular importance to each of these children given their life experiences to date …
>
> 76. If adopted, MG's (*the youngest child)* important bonds with her birth family will be severed. This will be a great loss to her and may prove to be potentially damaging to her. The same concerns will also apply to the loss of her half-siblings that can only exacerbate these difficulties. The security of an adoptive placement will come at a high cost. However, it will provide her with an opportunity to receive appropriate parenting and to gain security through her membership of a permanent family. Her life will be free of professional involvement and ongoing local authority intervention or attendances at meetings. An adoptive placement is capable of providing her with much greater security that would last into her adult life and beyond.

Although the judge was clearly very mindful of the difficulties associated with sibling separation, it is not possible to glean from the reported judgment whether any consideration had been given to the impact upon the elder half-siblings of the youngest child's adoption, and there is no mention of any plans for ongoing contact.

153. In the case of *Re WW, XX, YY & ZZ (Children)* [2018] EWFC B94 HHJ Willans was also concerned with four children: two full siblings and two maternal half-siblings. The middle two children are the full siblings, but the children's respective ages are not specified. The local authority's plan was long-term fostering for child 1 and 2, and care and placement orders for child 3 and 4, with a plan that those two children be placed together. The elder two children were noted to have strong bond with their youngest two siblings. The judge said this:

> 68. … I have considered the placement options for the children and reached the conclusion that the children cannot be placed together as a single unit. The evidence tells me that the prospects of such a placement are low and certainly less than likely and no-one sought to challenge this proposition. As such I am bound to depart from (*the elder two children's*) wishes. I agree with the evidence that despite their issues (from time to time) it is very much best for (*the elder two children*) to continue to be placed together. They are closely bonded and benefit from their mutual support and affection … in my judgment the appropriate outcome is a plan for long-term foster care with continuing contact …
>
> 69. I turn to the younger children. Again, there are many obvious benefits to (*the two younger children*) being placed together. Whilst they are too young to be able to express clear views I have no doubt that they would want the chance to grow up together. Their parents share this wish and this is a further important consideration to be borne in mind. I have regard to their ages. Unlike (*the elder two children*) they have the option of a permanent adoptive placement. I have weighed up the benefits of long term care against adoption. I have reminded myself of the significant distinctions between the two identified by Lady Black in ***Re V***. In my judgment the balance comes down clearly in favour of placement (adoption). They deserve the benefits that will come with adoption; the emotional sense of place in the world and value that will come from a permanent family. In my judgment it is much better for them to grow up with a similar home life to their peer group: free from regular looked after reviews; the right to travel without permission; the right to enjoy sleepovers without needing a friend's parents to be DBS checked; the chance to avoid the stigma that comes with being a looked after child. It is fortunate (and important) that this will not mean the likely severance of all family life. The Local Authority are committed to a search for adopters with a willingness to foster sibling contact. I endorse this approach. It is forward looking in that it will tend to reduce the risks of instability within the placement if managed with care and sensitivity … In the event of separate adoptive placements then there should be a focus on looking for placements that will allow regular sibling contact. If (*child 3*) cannot be placed (on balance the most likely alternative to joint placement) then real effort should be had to

> see whether he can join his older siblings. However, on balance I expect this conditional planning to prove unnecessary.
>
> …….
>
> 72. I have been asked to consider the contact with (*the elder children)* post-placement. The plan is for 2 times per annum contact with their older siblings. I agree.

154. In June 2018, the case of *Re X and Y Children* [2018] EWFC B31 addressed concerns about two Polish half-brothers, each of whom was described as being under the age of 5. Her Honour Judge Lynch, in making care and placement orders, noted that:

> 8. The local authority's care plan for both children is permanence through adoption. The intention is that the children will be placed in a joint adoptive placement, everyone agreeing without a shadow of doubt these boys are closely attached and need to live together.

The risk of separation was not canvassed, and nor is there any reference to recitals on the face of the order indicating the local authority's intention to place the boys together.

155. The case of *Re F (Care and Placement Orders)* [2018] EWFC B43 again concerned a group of four children; a 12-year old girl and three younger children: a 6-year old boy and two little girls respectively 4 and 3 years old. The children share a mother and the three youngest children have the same father. Both fathers are nominally involved in their lives although the judge was somewhat scathing within her judgment about their commitment and conduct generally. There was no question of return to the care of the mother or kinship care: the local authority's plan was for long-term fostering for the eldest child and three separate adoptive placements of the youngest three. Miss Recorder Henley explained the unusual plan as follows:

> I am satisfied that each of these children need to be the youngest child within their long term placements and that for as long as they are placed together their conflictual and rivalrous behaviour is likely to continue … Again, the evidence is that these children do not interact in these negative ways with other children. It is the presence of other siblings that draws out these behaviours.

> … The need to separate these children is driven by their own individual needs and I am satisfied that it is not in their best interests to be placed together in the long term.
>
> I acknowledge that separating siblings in this way is unusual, is a decision that should not be taken lightly and that it has the potential to cause emotional harm to these children in the short, medium and long term. In my view the appropriate way to ameliorate the potential emotional harm caused by separating them is to ensure that they continue to have sibling contact with each other … Finding the right placements for these children is to find placements with carers who understand their needs and are capable of meeting them. I am satisfied that that requires their carers to positively embrace sibling contact and recognise that these children are old enough to have an understanding and recollection of their birth family and that they belong to a sibling group … These are older children with complex needs and any carer willing to commit to them long term needs to be able to recognise that one such need is the need to maintain a link to their siblings. That said, I agree that sibling contact can only safely be promoted if these three children are all adopted or are all fostered. To promote contact between an adopted child and a child who is still seeing its birth parents has the potential to threaten the security of the adoptive placement by revealing its whereabouts and the child's new identity. I do not consider that risk to be in any of these children's best interests.

156. A further decision of Miss Recorder Henley was reported in August 2018 as *Re E (Care Orders and Placement Orders)* [2018] EWFC B44. This case involved six full sibling children, ranging in age from 11 months to 8 years old. The children had been placed in three separate foster-placements, with the two eldest in one placement, the next two in another and the two youngest children in the third. The court ruled out rehabilitation to the mother and agreed that there were no other viable family placements. The local authority proposed that the eldest two remain in long-term foster-care, and that there be care and placement orders in respect of the youngest four, with a view to placement for adoption in their current placement pairs. The court said this:

> 134. The Court does not make a decision to separate children lightly. It is an extremely draconian step to take. … I have given anxious consideration to whether these

children should be separated and if so, into which sibling groups. In some ways, the children's current placements and divisions have assisted in this decision making as the children's current pairings are working well for them … I am satisfied based on the updated sibling assessment, the unanimous evidence of the professionals and the views of the Mother that these are the right proposals in terms of the division of the siblings in circumstances in which sadly they cannot all be cared for together. I am also satisfied that their respective and divergent needs in terms of the placements required for them mean that they must be separated.

……

174. In terms of the contact proposals … Monthly contact also represents a regular opportunity for sibling contact between all four of the oldest children, should O and H not be adopted. I am satisfied that if this contingency plan comes into effect that the additional inter sibling contact, to be organised between foster carers is appropriate … it is essential that goodbye contacts do not take place until and unless a match is found and that contact is promoted on a regular but reduced basis, as is proposed, until and unless a match is found to enable contact to continue, should the children remain in foster care. Any goodbye contact between the four youngest children needs to be very carefully managed and planned as is it anticipated that R and F will be matched with adopters relatively quickly and possibly before it is known whether a match will be found for O and H. As such it will not be clear at that stage whether they will see each other post adoption. I am satisfied the local authority has considered that this and that care will be taken to avoid the children becoming confused.

157. The case of *Re MV (Care and Placement Orders)* [2018] EWFC B48 - yet another decision by Miss Recorder Henley - concerned two

young, full-sibling children: a girl who was 5 years old at final hearing, and a little boy of 2 years old. They had always been placed together, and the local authority proposed care and placement orders with a plan that they should remain placed together. The Judge concluded that '*I am satisfied that nothing but adoption will do for the children and that given their close sibling relationship, that they should be placed for adoption together and should not be separated'.*

Again, it is not discernible from the judgment whether the order contained any recitals to the effect that the local authority would place the children together – which given that one of the children was 5 years old, and thus of an age where conventionally she may be more difficult than average to place for adoption, might have been a prudent step to take. Moreover, there is no mention within the judgment of the contingency plan in the event that an adoptive placement for either or both children should prove elusive, and no indication of contact proposals in the event that, for whatever reason, it should prove to be impossible to place the children together.

158. *Re T (Care and Placement Orders)* [2018] EWFC B49 concerned a baby boy, eight months old at final hearing, who was the youngest of a sibling group of three. His maternal half-sibling (then age 7) and full sibling (2 years old) had been made the subject of care and placement orders when T was in utero. The mother had very significant learning difficulties and neither parent was able to care for the child. In making care and placement orders in respect of the child, the judge (again Miss Recorder Henley) gave no indication that of any consideration having been given to placing the baby with the elder children, or of providing for contact between them – it is not possible to glean from the judgment whether either was proposed.

159. His Honour Judge Willans considered the arrangements for a sibling group of four in the case of *Re A, B, C & D (Children - Learning Disabled Parents)* [2018] EWFC B96 . The eldest child was a teenager (age unspecified); the younger three were respectively 12, 8 and 3 years old. The local authority proposed that the youngest child (a girl) should be placed for adoption with what was described as 'positive encouragement of sibling contact'. The judge noted in the course of this judgment that:

> It is also important to have regard to the strong sibling bond felt between these four children. I was particularly taken to the strong emotional bond between (*the 12-year old, female child*) and (*the youngest child*) but this was not exclusive.

> Separately I heard about the care demonstrated by (*the teenager to the 12-year old)* when seeking to help her cope when she became aware of the LA's planning for (*the youngest child*). The evidence suggested that for some of the children the intra-sibling attachment is as important as that with their parents.

The Guardian's advice to the court was that she was troubled by the proposal to separate the 12-year-old and the 3-year-old, and that it was a finely-balanced decision. She had originally advocated a contact order but no longer proposed that in the light of the local authority's averred commitment to promoting post-adoption sibling contact (although there was evidence that direct contact may make it more difficult to place the 3-year-old who has additional needs in any event).

In explaining his decision, the judge said:

> 10.7 I have reached the sad conclusion that placement is in (*the youngest child's*) welfare interests and that nothing else will do. I agree with the Guardian and CT that (*the youngest child)* requires a chance of permanence and that at 3 years of age (nearly 4) it would be wrong to plot a life for her within the care system with all the obvious disadvantages this brings. The placement option with her siblings goes some way to rebalancing this decision but I bear in mind (*the second eldest child*) is 12 and may in very short order chart a return to her parents (or one of them). I also bear in mind that the reality of a care order may not be placement together (particularly with (*the third child*)) given each child's likely significant needs and the difficulties in finding a placement which can properly meet the same. The reality (as recognised by the Guardian) is that consideration may need to be given to separation of (*the second and third children*). I fully recognise that (*the youngest child)* retains a sense of her identity and this will be an issue requiring of care but in my assessment it is not of itself a bar to the course I take.
>
> ……..
>
> 11.4 Plainly a balance has to be struck between obtaining a stable placement in which the children can settle against the emotional need of the children for contact, with the risk that insufficient contact may itself amount to a destabilising feature. In the case of D the additional issue is the risk of breakdown of the adoptive placement either because of too much or alternatively too little contact.

…….

> 11.6 Insofar as the sibling contact is concerned vis a vis D the position is no less challenging. I agree that contact would have the potential benefit of alleviating the very real emotional stresses that would flow from the making of a placement order in that it would continue to permit D the sense of her family identity and the continuing bond with her siblings. But this is not a one-way street. It would in doing so be a real challenge to her ability to find a permanent home with a new family. It would have the potential to stage periods of real stress twice each year when emotions would significantly rise. It is difficult to predict whether D and A/B/C would react positively overall to the opportunity to see their sibling or whether the limited nature of the contact and the subsequent periods before next contact would be more stabilising than beneficial. Further, it is almost impossible to predict what impact D would suffer from understanding (as she would likely do) that her siblings continue to see her parents whereas she does not. For these reasons I do not believe it is in D's welfare interests for there to be an order for contact. I agree it is appropriate for adopters to have brought to their attention the positives of contact and a clear understanding of the dynamics of the sibling relationship so that they can properly consider the benefits that might flow from contact. But ultimately I would not wish to tie their hands. In the event of contact arising then I would agree two occasions per year is most consistent with the D's welfare.

160. *Re Twins A and B* [2018] EWFC B80 concerned an application for care and placement orders in respect of baby twins. The judgment refers to an unspecified number of half-siblings, at least one of whom was adopted. In making care and placement orders, HHJ Williscroft refers in generic terms to the loss of family relationships, but does not single out any potential for the establishment of a sibling relationship, and nor does she make any reference to ascertaining whether the sibling's adoptive parents would be willing to be considered as carers for the twins (although the judgment is concise and it is not possible to deduce from the judgment whether these issues were considered).

161. District Judge Keating, in the case of *Re C (a child : Care and a Placement order)* [2018] EWFC B87, acceded to the application of the local authority to dismiss their application for a placement order and make a Special Guardianship Order (supported by a 6-month Supervision Order)

in favour of a friend of the mother – someone with whom the child had no current relationship. The paternal grandparents, who lived in an un-named EU country, opposed the application and wished to care for the child. The Judge noted:

> I agree with the social worker and the Guardian that (*the prospective Special Guardian),* who has successfully raised a daughter through those troubled teenage years, offers a unique possibility which enables (*the child*) to maintain a meaningful relationship with her mother and brothers; those sibling relationships can, and do, prove significant to children throughout their lives and are to be cherished.

162. The next relevant case was that of *R (a Child : Application under s51A of the Adoption and Children Act 2002)* [2018] EWFC B84: this unusual case was heard by Her Honour Judge Roberts, and concerned an application by a birth mother for permission to seek post-adoption contact with a 7-year-old girl. The application followed upon the dismissal (on the advice of Cafcass) of an earlier application brought by the mother allegedly on behalf of the child's teenage brother – a young man who was in the care of the local authority, but who may in due course return to the care of his mother. The present application was issued six months after the making of the adoption order. On any view the care, placement and adoption proceedings had had a troubled and convoluted history, and it was a feature of the case that the birth mother had attempted to abduct the child during what had been intended to be their farewell contact. Judge Roberts described the law governing applications of this nature as '*quite complicated and also to most people quite novel'.* In considering the relevant authorities, the Judge cited the following:

> There is the case of *Re: C* [1993] 1 FLR 832, the 1993 case which suggests that once an adoption order has been made the issue of contact should only be subsequently reopened if there some fundamental change in circumstances. Similarly, a more recent case but also one decided before section 51A was enacted is *Re: T* [2011*] contact* which says that in order to obtain leave to apply for contact a family member, in this case M:
>
> "Must satisfy the court that any decision of the adopters to oppose contact is sufficiently contrary to the best interests of the child or sufficiently unreasonable to warrant the court overriding the discretion concerning contact conferred on the adopters by the

> adoption order. Leave to apply is likely to be granted where adopter totally resile from an earlier agreement on contact"

The evidence in the case strongly pointed to a birth mother who had never accepted the fact of her daughter's adoption and was determined to pursue all possible avenues to maintain her relationship with her daughter. The application was dismissed. The decision clearly has implications for sibling contact, but those implications were not explored in the same depth as the consideration given to the challenges associated with direct maternal contact.

163. In the case of *Re X (A Child)* [2018] EWFC B82 , the local authority sought care and placement orders in respect of a baby boy who has two older full siblings and an elder half-sibling, all of whom had been placed for adoption in two separate placements, with the full siblings placed together. The parents did not oppose the orders sought, but neither did they consent. The local authority hoped to place the child with his two full siblings, an outcome which the judge described in the following terms: '*if he can be with his sisters that would be brilliant, a huge plus.'*

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164. The first relevant case reported in 2019 was in fact concluded in May 2018. The case of *NAA (a Child)* [2019] EWFC B55 concerned a little girl, nearly 3-years old, of Uzbek heritage who has been orphaned in the tragic circumstances of her father committing suicide in prison whilst on remand on a charge of murdering her mother. The competing care options for NAA were remaining with her current foster-carers, who wished to adopt her, or a return to the care of the maternal or paternal extended family in Uzbekistan. The paternal family had the care of NAA's two older sisters, Z (9) and S (7). In determining that the appropriate outcome was placement with a maternal aunt, Her Honour Judge Atkinson indicated that the one positive factor associated with a placement with the paternal family would be the possibility of her being brought up in the same home as her sisters. However, she added this about the sibling relationship (para94):

> NAA has never lived with her sisters and importantly her sisters were never brought up by their parents. Her sisters call

> their aunt 'mother'. They do not have the shared history that most siblings have. This is not limited to their history so far as their parents are concerned. It extends to the maternal family in respect of whom her sisters appear to have developed an anxiety – something that NAA does not share. Tragically, the older girls have lived steeped in the paternal family narrative regarding their parents. There is no way of knowing what they think has happened to their parents, but it is unlikely to be accurate in my assessment. On the evidence currently available to me it is not in NAA's interests to be placed with her siblings whilst Z and S are in the care of the paternal family.

This case represents a welfare decision being made against sibling placement: it seems highly unlikely, on the facts of the case, that inter-sibling contact would ever be promoted, although ironically it may have assisted all three girls in acquiring a more balanced understanding of their difficult life stories.

165. In the case of *A Local Authority v B, H and I (Sibling as Carer or Adoption) (rev 1)* [2019] EWFC B1, His Honour Judge Dancey was concerned with three children from a sibling group of nine: B (17), H (4) and I (22 months). The identified options for the younger two girls were placement in the care of B, with support from the wider family, or placement for adoption. The eldest of the nine children is now an adult; the remaining minor children are placed with various family members. All agreed that H and I should stay together, and the local authority indicated that it would seek to locate adopters who would facilitate sibling contact, although emphasised the primary importance of early permanent placement. The guardian acknowledged the positive bond between B and her sisters, but nevertheless supported the local authority's placement application.

The judge determined that placement of the children with B would be high risk *' ...given the combination of my conclusions about B's lack of insight into her own emotional needs and those of the girls, her comparative youth and immaturity, the difficulties for the girls of adjustment from sister to carer, the high likelihood of ongoing challenging behaviours and B's lack or resource and experience to deal with them',* further finding that those risks outweighed the disadvantages of placement outside the family. He approved the plan to seek an open adoption, although not at the expense of an otherwise suitable placement if it would cause delay. The judge

expressed within his judgment concern that B's own well-being would be impacted by the demands of two challenging children – a factor approached more from the perspective of its impact upon the younger girls rather than upon B herself.

166. In the case of *A and B (Children: Care Order)* [2019] EWFC B10, His Honour Judge Middleton-Roy was concerned with two half-sibling boys, A (8) and B (2). The local authority proposed care orders for each child and a placement order in respect of B. The parents conceded their inability to care, but vehemently opposed sibling separation. The children had been placed in foster-care together throughout the proceedings. The judge noted the following observations from the sibling assessment:

> 75 … The sibling assessment recorded the foster carers observation that there was no sibling jealousy, their observations that the siblings, "clearly love one another despite the significant age gap," and furthermore, noted that A calls B, "his best friend in the whole world and he tells him nearly every day how much he loves him." The foster carer is recorded as describing the sibling relationship as, "very close in a positive way," and that A is, "kind caring and loving towards his younger brother."

The judge continued:

> Applying the Lord and Borthwick indicators, the sibling assessment concluded that no evidence was witnessed of intense rivalry or jealousy nor of any sibling exploitation or chronic scapegoating, there was no evidence of maintaining unhelpful alliances nor of maintaining unhelpful hierarchical positions. Further, sexualised behaviour or triggering each other's traumatic material was not apparent.

The children's foster-carer wished to care for the boys long-term, expressing that it would be heart-breaking for A in particular if the children were to be separated. The psychologist instructed within the proceedings also found a strong, positive relationship between the children. The judge carefully analysed the welfare needs of each child by reference to the statutory welfare checklists, noting that the sibling relationship is of great significance, and adding (para 106):

> Decisions concerning sibling groups where there is a possibility of sibling separation upon adoption are never easy, this case being no exception. They call for the careful assessment of a range of often dissimilar factors emerging from findings about the past/present and forecasts about the future. All the while, a proper balance must be struck between short and medium-term considerations on the one hand and long-term and lifelong considerations on the other, so that the latter are not eclipsed by the former.

In making a care order in respect of each child, and refusing the application for a placement order in respect of B, the judge noted that (para 112):

> The benefits to B of adoption, notwithstanding that he is of an age at 2 years where adoption could always be considered to have potential benefits in respect of future permanency, are clearly outweighed by the clear evidence of the benefits to B individually and the benefits to B and A collectively, of maintaining their strong sibling bond, together with the clear evidence of the very negative effects that would result for both children in the event of that sibling relationship being severed.

This case provides a very striking example of the careful and thoughtful weighing-up the children's individual and collective needs, as well as reference to key relevant research.

167. The next case of relevance was that of *A Mother v Dorset County Council (Older Children: Long-term Fostering or Adoption)* [2019] EWFC B3. His Honour Judge Dancey was concerned with the welfare of C (8) and his sister D (5). The children's father is deceased but the children have two teenage paternal half-siblings, whom they meet from time to time. The matter came before the court as a result of the mother's application to discharge the care orders. The children, who are dual heritage, have a good relationship with their paternal grandmother. They had been in foster-care for about a year and during that time had had weekly contact with their mother. The local authority's counter-plan was placement orders, proposing a time-limited search for an adoptive placement of both children together. The judge dismissed the placement applications, holding that adoption would be risky for these children, even though the local authority had made clear their intention to keep the children together and to seek an open adoption. In his analysis of the

options, he specifically referred to the risk of sibling separation in the event that a joint adoptive placement disrupted, whereas he considered that breakdown of a foster-placement was more likely to extend to both children, although acknowledged the possibility that it might be considered that separation was in their interests at that stage. It is unclear how much emphasis was placed upon the potential loss of relationship with the paternal half-siblings, with the decision being based far more firmly upon concern about the risk of disruption of the relationship between the two subject children.

168. In the case of *Re L (Sexual Abuse: Applied)* [2019] EWFC B4, His Honour Judge Greensmith was invited to make care and placement orders in respect of a baby boy with four older siblings who were placed in foster-care together. The judge noted that there had been concern about the reaction of the elder children to learning of the new baby, and that, when they were told, the children had struggled to manage and regulate their emotions. Two of the older children had asked their foster-carer whether the baby could join them in placement, and it was considered likely that the children's reaction was prompted by fear that the baby would suffer the abuse which they had endured when in the care of their parents. In making care and placement orders, the judge found that the only realistic options were long-term foster-care or placement for adoption, and did not further refer within his brief judgment to the impact upon any of the five children of the loss of the potential sibling relationship, nor to the possibility of any form of contact in the future.

169. His Honour Judge Willans was concerned in the case of *Re A (a Child)* [2019] EWFC B16 with the future arrangements for A, a little boy with three older paternal half-siblings who were also his first cousins. The elder children had been made the subject of care and placement orders in the preceding year and were on the point of being placed in adoptive placements. In undertaking his evaluation of the options, the judge referred primarily to the loss of a relationship with parents as a negative aspect of adoption, and noted '*no tangible evidence to suggest the potential for half-sibling contact',* although he did not rule it out as a possibility. In the event, the judge determined that the appropriate plan was to return the child to the care of his parents under a supervision order. The implications for sibling contact were not further explored.

170. The next relevant case is that of *Re E (Care and Placement Orders)* [2019] EWFC B13 and concerned a baby girl, E, with an older

sister who had been placed in the care of an aunt after suffering serious injuries. The parents have significant cognitive limitations and Her Honour Judge Vincent began her judgment with a brief explanation of her decision in language designed to be comprehensible for each of the parents. Judge Vincent made a care order with a care plan that E would remain with her current foster-carers who were likely in due course to seek to adopt her. She also made a placement order. The judge noted that the carers acknowledged the bond between the parents and E, and were committed to contact with E's parents once a year and with her older sibling twice a year, but it is not possible to deduce from the judgment whether the likelihood of ongoing contact was a pivotal factor in the decision-making process.

171. In the case of *Re O Children* [2019] EWFC B33, HHJ Williscroft was concerned with the future arrangements for three sisters who have three elder maternal half-siblings, one of whom is an adult, the next eldest is placed in a residential establishment, and with the third child being in long-term foster-care. The oldest of the three subject girls is nearly 5, the middle child 4 years old, and the youngest is referred to as a baby. An earlier final decision by a Recorder refusing placement orders in respect of the youngest three had been overturned by the Court of Appeal, with that court further finding that a psychological report was required to address the issues of sibling attachment, the attachment of the children to their parents, and which placement would best meet their welfare needs throughout their lives. Judge Williscroft noted that the Recorder had concluded that it was an important part of the children's recovery from the neglect experienced that '*other constants in their lives remain in place'* – including contact with their parents and older siblings. At that point, the local authority's plan had been to look for a placement of the three young girls together, but if that was not possible, to seek separate placements. By the time of the hearing before Judge Williscroft, that had changed to a clear acceptance that the girls must remain together. The psychologist positively advised against any further contact with the birth parents, but recommended ongoing contact with the two older half-siblings who remained in the care of the local authority – twice a year post-adoption, but more if the girls remained in foster-care. In making the placement orders sought, the judge declined to make a contact order, noting that ongoing direct contact with their parents or siblings was unlikely, but nevertheless determining that the girls should have the opportunity of a permanent home with lifelong relationships.

172. The next reported case of relevance to this study was that of *Re A (A Child)* [2019] EWFC B27 in which His Honour Judge Wildblood

QC was concerned with the future plans for a little boy, A, who has seven older maternal-half siblings, all of whom had been removed from the mother's care, and a full sibling expected some 3 months later. A also has two paternal half-siblings, one of whom was adopted by a family member and one of whom lives with grandparents. Having been born prematurely, A had spent the first few months of life in hospital before discharge to foster-care, followed by four weeks in a residential assessment unit with his parents. The outcome of the assessment was entirely negative, and the judge made care and placement orders, noting but unswayed by the recognition that one of the disadvantages of adoption was the potential for A to lose his relationship with parents and the half-sibling placed with grandparents. The judgment implies, although does not expressly state, that contact with the remaining half-siblings might be a possibility. The judge noted that the local authority would endeavour to locate adopters who would permit direct parental contact once a year, but he made it clear that a contact order was not appropriate, and that the most important issue was finding an appropriate adoptive home.

173. In the case of *A, B, C and D (Children)* [2019] EWFC B 79, His Honour Judge Booth was concerned with four children: A (nearly 6), B (4) and C and D, twins (2). One of the twins, C, had suffered a catastrophic brain injury which has left her with significant, lifelong disabilities. The parents conceded in the course of the final hearing that they could not oppose the local authority's applications for care and placement orders. In making the orders sought, the judge approved a care plan which would see one adoptive placement sought for A, B and D, and a separate placement for C. He described the search for a placement for C as potentially challenging, although described her as both very attractive and very personable; he emphasised that every effort should be made to keep the remaining three children together. It is impossible to be clear from the judgment why the judge was persuaded to sanction the separation of twin siblings, but it is reasonable to infer that this was a pragmatic decision based upon the absence of likelihood of securing a placement for the twins together, and the very differing needs of the two children.

174. The next case of relevance was a further decision of His Honour Judge Booth, reported as *A, B and C (Children)* [2019] EWFC B74. The case concerned A (2), B (16 months) and C (7 weeks). Proceedings began as a result of B suffering several fractures at 13 weeks old. C was placed at birth in a foster-to-adopt placement. In making care and placement orders, the judge noted with approval that C's carers were

willing to be assessed to care for all three children, and commented that '*it is important for the future of all three of them that they are brought up as a sibling group. I cannot see how it would be in any of their best interests to be separated'.* The judge made it clear that it was on that basis that he approved the care plan.

175. In the next case of *Re A, B, C and D (Children)* [2019] EWFC B32, the court was concerned with three full siblings, placed together in one foster-placement, and a younger half-sibling, D, placed alone in foster-care. The parents accepted that they could not care for the children: the competing options were long-term care with their respective current carers (in the case of D, pursuant to Special Guardianship); placement for adoption for A, B and C, and placement with paternal uncle and aunt for D. The Guardian narrowly supported the children remaining in their current placements. In weighing up the options, Her Honour Judge Vincent noted that the children need their sibling relationships to be nurtured and their identity as family members to be respected. If A, B and C were to be placed for adoption, they would be unlikely to have contact with their parents and with D (although I note in parenthesis that if D remained in the care of her foster-carers/potential Special Guardians, then post-adoption contact should be feasible); the judge described such loss as '*devastating to them throughout their life',* and declined to make placement orders in respect of the three elder children. She approved a plan for D to be placed with her paternal uncle and aunt, finding that making a Special Guardianship order in favour of D's current foster-carers would interfere with D's right to family life by making her a part of her non-birth family, and finding that the impact of not growing up within her birth family would be life-long. The judge also acknowledged the strong sibling bond, but in approving the contact plans, made no separate mention of inter-sibling contact. That said, the proposed placement with the paternal uncle and aunt would initially be pursuant to a care order, requiring the local authority to promote reasonable contact between the separated siblings.

176. In the case of *A (A Child) (Rev 1)* [2019] EWFC B34, His Honour Judge Greensmith was concerned with applications for care and placement orders in respect of a 7-month old girl whose two elder full siblings reside with their paternal grandmother under a Special Guardianship order. In deciding to adjourn the proceedings to enable the local authority to produce an amended care plan designed to lead to parental rehabilitation, the judge identified that the perceived shortcomings in the local authority's and

guardian's evidence included the absence of analysis of the benefits and detriments of ongoing contact, either with the parents or with the older siblings.

177. The next relevant case is the highly-cautionary tale of *Re G* [2019] EWFC B70 in which the court was required to sort out the fall-out of a wholesale failure by a local authority to adhere to approved care plans. Her Honour Judge Matthews introduces the case by reference to the fact that it concerns two sisters described as '*having a strong attachment with one another despite a significant gap in their respective ages'.* The court had previously made care and placement orders on the basis that the local authority would conduct a 6-month search for an adoptive placement with a contingency plan of long-term foster-placement together. There was a very clear commitment to keeping the girls together, but when a prospective adoptive placement failed to progress, the local authority decided to commission what was described as a specialist sibling assessment to assist in determining the next steps. A chartered psychologist was instructed: the nature of the instructions was roundly criticised as being biased in favour of a conclusion that the girls should be separated, but in the event the psychologist formed the view that the girls should be separated as a matter of urgency as a result of '*clear safeguarding issues'*. The older child was then collected from school and placed, without warning, in an emergency foster-placement, with a view to sourcing a residential placement, leaving the younger child in the care of the original foster-parents.

The judge was very critical of the 6-month delay which then ensued before the local authority issued an application to revoke the placement order in respect of the older child, thus depriving the child of any court oversight of the drastic change of care plan. There was also a wholesale failure to inform the children's mother of the change of plan. In the meantime, that child had had what was described as one 'goodbye' visit with her younger sister, who was thereafter matched with prospective adopters. The court was presented with an application to revoke the placement order in respect of the older child as well as an application by the prospective adopters of the younger child for an adoption order. The maternal grandmother was granted party status and sought to be assessed to care for both children – she was already caring for the girls' elder brother. The mother also hoped to resume care, but by the time of final hearing, neither the mother nor the grandmother actively opposed the adoption application in respect of the younger girl. That child's adopters were clear about their willingness to promote contact between the sisters, although equally clear that at the time

of placement, they had been advised that contact with the birth family was not on the agenda. There was also a consensus that for the time being, the elder sibling should remain within her residential placement. An application had been issued on behalf of the elder sister for contact with the younger sister: the judge decided to adjourn that application in order to review when it would be in the elder child's interests for such contact to take place.

Within a restrained but ultimately excoriating judgment, the judge was critical of the local authority's failure to adhere to the court-approved care plan, failure to commission an appropriate expert, and failure to challenge or question the recommendations of that expert. She also found that the local authority had abrogated its exercise of parental responsibility to that inappropriate expert by complying with his telephonically-communicated recommendation for immediate separation as though it was a decision of the local authority, despite subsequently conceding that it was an extreme recommendation and that the potential damage to the elder child was '*astronomical'*. She dealt with the local authority's assertion that there was no mechanism for issuing urgent court proceedings by pointing out that it could have issued an application for revocation of placement order and sought urgent directions: '*this would have provided a mechanism to get the matter before the court, with representation of the child … That is what the court is here for.'* She added that the family could also have made applications, had they not been kept in the dark. The judge was clear that the local authority had failed to consider the impact of the elder child of her brutal separation from her sibling, and had failed to consider what steps could be taken to promote contact between the children post-separation. She found that the local authority had failed to promote the welfare interest of either child in maintaining their sibling relationship, noting that the older child remains anxious about the well-being of her younger sister. The judge also observed that this case highlights the lacunae in the court's powers to control or scrutinise the local authority's implementation of care plans in default of any further application being made. The case presents an object lesson about the perils of peremptory sibling separation without proper preparation or indeed justification, and indeed throws into sharp relief some of the difficulties which prompted this research project.

178. The case of *R (A Child)* [2019] EWFC B42 concerned another application by parents for permission to oppose the making of an adoption order. The child in question, R, was part of a sibling group. In making her application, the mother emphasised that a return of R to her care would

enable contact to take place with A, one of the older siblings: the social worker countered that suggestion by observing that A would have significant anxiety about R's safety if returned to the care of their mother. Conversely, adoption would facilitate contact with two other siblings who have been placed for adoption. Notwithstanding the competing contentions about the impact upon sibling contact, Miss Recorder Henley decided the issue by strict reference to the test set out in s.47(5) Adoption and Children Act 2002 and found that there had been no relevant of material change of circumstances. Whilst that finding was fatal to the parents' application, she nevertheless also evaluated the evidence pertinent to the second stage of the test, finding that the mother's case lacked any solidity. The father's case failed because he simply failed to pursue it, neither filing evidence as directed nor turning up for any hearing. It is of course arguable that if one of the parents had succeeded in the first stage of the test, the issues as to sibling contact may have been pivotal in determining whether the welfare interests of the child required the parent to be given permission to oppose the making of an adoption order.

179. In the case of *Re J* [2019] EWFC B58, the court was invited to make care and placement orders in respect of J, a little girl of Bulgarian parentage whose elder brother, P, was in the care of his grandmother in Bulgaria. The parents, but no other family members, sought to care for J. Her Honour Judge Lynch noted that adoption would result in J's loss of connection with her parents and with P, with whom she does not as yet have a relationship but where there is potential for a relationship in the future, if J remains within the family. Despite acknowledging the very real nature of the potential losses for J, the judge expressed herself satisfied that she could not safely be returned to the care of either parent, and that nothing short of adoption would meet her needs.

180. Her Honour Judge Lynch was also the presiding judge in the case of *Re X (a Child)* [2019] EWFC B62. The case concerned a young baby, X, with two older maternal half-siblings who had previously been removed from their mother's care. The proceedings concluded with a care plan that X should live with her paternal grandmother: beyond mention of the siblings' existence, it is impossible to derive from the judgment what relationship, if any, would be facilitated between X and those siblings, and nor is it clear what part, if any, the potential for that relationship played in the balancing exercise undertaken by the court.

181. The case of *AB (Contested Adoption)* [2019] EWFC B68 arose in the relatively unusual context of parents having been granted permission to oppose the making of an adoption order in respect of two boys, A (4) and B (3). The children have two older maternal half-siblings (D and E) who are placed in the care of their father, and three older paternal half-siblings. The parents have the care of a younger full sibling, C, who is 1 year 9 months old, but not of the paternal half-siblings. The parents sought to have A and B placed in their care or, failing that, to have direct contact with them. In a paragraph with the sub-heading 'The Human Misery', His Honour Judge Simmonds noted that as a judge sitting in the Family Court, he is used to seeing the pain and upset of parties, but in this case it was palpable, with the parents having turned their lives around and seeking the return of the boys, whereas the adopters thought '*we were having a happy ever after family'.* The parents accepted that they had failed their children in the past, with their ability to parent compromised by their drug addiction. They have taken steps to address the drug problem and are each engaged in long-term therapy, funded by the local authority. The mother accepted that she had not bonded with A and B and the evidence pointed to no ongoing attachment between those children and their parents. The boys were receiving reparative care from their prospective adopters. The judge acknowledged that A and B have a close sibling bond, but noted that the children are said to make no reference to their birth family or wider siblings. He also noted the importance of sibling relationships, and that A and B's siblings would want those children to be within the family. The judge found that the risks of returning to the parents were too high to contemplate that course of action, noting that the relationship between A and B was to them the most important sibling relationship, and if placed in an environment where their needs were not met, that very relationship would be at risk. He found that moving the boys would cause them to suffer emotionally, developmentally and educationally, and the harm that this would create throughout their lives outweighed the benefits of being with the birth family. The judge also declined to order direct contact, although noted the willingness of the prospective adopters to consider this in the future, once the dust has settled, with the children firstly needing life story work, and the parents needing to be able to see and accept their changing role in the children's lives.

182. A further decision by Her Honour Judge Lynch was reported as *Re J (a Child)* [2019] EWFC B67. This was the final decision of

relevance to this study in 2019. The 1-year-old child in question (J) has paternal half-siblings with whom her father has contact; the local authority contended that J's mother was unable to care for her and proposed to place the child with a paternal aunt under a care order. In endorsing the care plan, the possibility of contact with the paternal half-siblings was not specifically mentioned within the brief judgment, but would implicitly be a happy consequence of the plan.

2020

183. The first case reported in 2020 is of particular interest in demonstrating the inappropriateness of adoption in some contexts. In the case of *A (a Child: Flawed Placement Application)* [2020] EWFC B2, Her Honour Judge Lazarus was faced with an application for care and placement orders in respect of a little girl, A (4), whose complex physical and developmental needs were beyond the capacity of her parents to meet, resulting in her being placed in a specialist foster-placement. A has five siblings and belongs to a large family group of European heritage, speaking a language which is a particular dialect of their ethnic group. The local authority made two attempts to secure a placement order before seeking permission to withdraw the application. The judge recorded that a key element of A's background is the very large, family-centred, tight-knit active family group to which she belongs, holding out the prospect of meaningful relationships with at least 29 individuals in this country (including parents and siblings) and further dozens of extended family members. Judge Lazarus added: '*Drifting too far from being able to create and maintain those relationships, and some familiarity with their traditions, would be highly detrimental to A and the prospects of a future richly populated with loving relatives and their shared heritage'*. The judge was highly critical of the local authority's failure adequately to analyse both the benefits and the detriments of adoption for A, posing the question:

> How is it that adoption appears to have become a kind of orthodoxy that requires inconvenient matters to be ignored and others to be twisted to its support? Is there an endemic automatic approach to a younger child's age which results in a simplistic tick-box response instead of a careful analysis of her particular welfare interests? What sort of positive qualities

> would a birth family need to offer to be able to dislodge this approach to adoption and trigger a more balanced analysis and a preparedness to consider and address the full range of options?

Ultimately, it was agreed that A would remain in long-term foster-care but would continue to benefit from ongoing contact with her birth family. It is significant to note that A's disabilities rendered indirect contact extremely unhelpful as a means of maintaining A's relationships.

184. In February 2020, Her Honour Judge Lynch was concerned in the case of *A Local Authority v X (A Mother) and Ors)* [2020] EWFC B7 with the welfare of a baby girl, L, who is her mother's sixth child. The eldest two were removed from mother's care in her country of origin; the remaining three were removed in this country, with the eldest two of that group of three being placed for adoption together and the youngest placed on her own. The local authority sought care and placement orders with a view to L joining the brother currently placed alone. The parents scarcely participated in the proceedings. The judge noted that one real positive of the local authority's plan was the intention to place L with her elder brother, and that she would also have contact with the 2 other siblings who have been adopted in this jurisdiction, conferring the benefit of '*making her part of her birth family in the only way that is possible'.*

185. There were no relevant cases reported in March, April or May 2020 – no doubt as a result of the impact of the pandemic upon final hearings ─ and only one in June 2020. This was the case of *Oxford CC v P* [2020] EWFC B47 in which Her Honour Judge Owens was concerned with a sibling group of three children, A (7), B (5) and C (2), with care orders sought in respect of all three children and placement orders in respect of the youngest two. At the time of final hearing, A was in a specialist therapeutic foster-placement and B and C together in a second placement. All 3 children have complex needs associated with chromosomal abnormalities. The parents and the Guardian opposed the placement applications, with the parents seeking to resume the care of B and C. The judge found that the parents could not meet the complex needs of B and C, but also found that those two children would wish to stay together if possible. In her analysis of the impact upon the children of becoming adopted, the judge considered the implications of severing the parental relationship, but did not mention the loss of the relationship with A. She

determined that the risk of severing the sibling bond between B and C was far more significant than any other loss. The family-finder evidence was that it would be far easier to place C alone than the two children together. In dismissing the placement applications, the judge specifically found that '*perhaps most significantly for these particular children*', foster-care provided greater certainty that they would remain together as siblings. She also noted that it would facilitate ongoing contact with A, although the evidence of their bond with their older sister was less compelling than the evidence of the bond between B and C. The judge indicated that she considered that there was only a small possibility that B and C would be placed together in an adoptive placement, and furthermore that their complex needs increased the risk of adoptive placement breakdown, thus raising a further risk of separation even if they were initially placed together. She was very clear that the Together or Apart assessment clearly demonstrated that the sibling bond between B and C required to be preserved and that there would be a risk of harm to the children if that did not occur. The judge further recorded the need to prioritise sibling contact, noting with approval the Guardian's recommendation of contact six times per annum between A, B and C.

186. There were again no relevant cases in July 2020, but in August 2020, the reported case of *C and D (Children)* [2020] EWFC B42 concerned an application for care and placement orders in respect of C (2) and D (1). Although there was no suggestion that those children would be placed separately from each other, they have six half-siblings, and His Honour Judge Middleton-Roy noted that a '*patent disadvantage'* of acceding to the placement applications would be the loss to the children of direct ties with parents, half-siblings and wider family. In the event, the judge was not persuaded that the high test for making placement orders could be met, and he directed that the children should be returned to the care of their mother under a supervision order.

187. September likewise failed to produce any relevant cases, but in October 2020 Her Honour Judge Owens was concerned in the case of *Oxford CC v P* [2020] EWFC B48 with the welfare of a little boy, A (10 months), who has two older maternal half-siblings, B (10) who was cared for by the maternal grandmother, and C (2) who lives with her father. In considering the application for a placement order within the context of the effect of ceasing to be a member of his birth family, the judge noted that the impact may be mitigated by life-story work: she did not single out the

loss of potential sibling relationships for special mention, and it is difficult to discern from the judgment that this particular loss of relationship played any significant role in the judge's careful balancing exercise. Ultimately, care and placement orders were made.

188. The last case of relevance to this study was one heard by Her Honour Judge Pemberton: the case of 'Frank', reported as *Re F (a Care and Placement Order)* [2020] EWFC B61. The local authority sought care and placement orders. Frank has three older siblings, L, Z and S. All three children had been the subject of proceedings, with the elder two having initially been returned to their parents' care (their current whereabouts not being clear from the judgment) and the youngest child had been made the subject of care and placement orders four years earlier. Within her short judgment, and in making care and placement orders, the judge acknowledged the deprivation for Frank of not being brought up within his natural family, but did not single out the impact upon any potential sibling relationship – and nor was it possible to discern whether any thought had been given to placement of Frank with his older sibling, S.

APPENDIX 4B

ALPHABETICAL LIST OF CASE SYNOPSES REFERRED TO IN APPENDIX 4A WITH KEY IDENTIFYING THE CASE NUMBER.

	Case Number
A, Re [2015] EWFC B134	57
A (a Child) [2015] EWFC B34	46
A (a Child) [20 15] EWFC B163	83
A (a Child), Re [2019] EWFC B16	169
A (a Child), Re [2019] EWFC B27	172
A (a Child: Flawed Placement Application) [2020] EWFC B2	183
A (a Child) (Rev 1) [2019] EWFC B34	176
A (a Child) – Inability of Mother to Prioritise [2016] EWFC B116	117
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APPENDIX 5

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