Reading down rights: step-parent adoption

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In Re H (Step-parent adoption) *the High Court commendably used the Human Rights Act to stretch adoption law humanely*

Thank goodness for sensible High Court Family Division judges using the Human Rights Act 1998 to good effect. Though often publicly discussed in the context of immigration, the Human Rights Act is also of key significance to family law, enabling the court to safeguard the welfare of children who would otherwise be unfairly prejudiced by the law. The latest case to demonstrate this is *Re H (Step-parent adoption: Human rights)* [2023] EWHC 3186 (Fam), a step-parent adoption case heard by the President of the Family Division.

The case involved a young man aged 17 (H) who had been raised since the age of two by his natural mother and stepfather. H's natural father had separated from his mother before he was born and had played absolutely no role in his life (H had never even met him). Tragically H's mother died when he was just 14 and as H approached the legal cut-off age, H's stepfather applied to adopt him, seeking to legally consolidate their longstanding father-son relationship. There was no dispute. H wanted the adoption to be granted. The right moral and welfare outcome was uncontroversial.

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But the law got in the way. The provisions of the Adoption and Children Act 2002 (ACA 2002) create two different ways for a single applicant to apply for an adoption order, and which of those applies determines the effect of the adoption order which is made.

An application under s51(1) ACA 2002 is an application by a single person who is not married or in a civil partnership. H's stepfather could have applied under this subsection, being a widower. However, the effect of such an adoption order is to extinguish the legal parenthood of every other natural parent. In this case, a section 51(1) adoption would have permanently severed H's legal ties with his mother and so, by extension, with his whole maternal family. Understandably H did not want that.

The other type of single application which can be made is under s51(2). This is an application by the partner of a parent, commonly referred to as a step-parent adoption. This form of adoption was first introduced by the ACA 2002, in order to address the fact that, until then, a step-parent could only become a legal parent if they applied jointly for adoption with their partner, something which meant that the child's natural parent was forced to surrender their natural parenthood and become an adoptive parent instead. The whole purpose of s51(2) was to avoid that scenario, enabling a step-parent to become an adoptive parent while also preserving the natural parenthood of their partner.

A section 51(2) order was clearly the appropriate order for H, but the difficulty was that H's mother had died. Section 51(2) says:

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

The second "is" was what created the problem. H's stepfather was not his mother's partner at the time of the application for the order, making it seemingly impossible for the court to make a section 51(2) order on a strict reading of the legislation, and leaving a section 51(1) adoption as the only option.

That is where the Human Rights Act 1998 (HRA 1998) came to the rescue. Section 3 requires the court to

interpret law to give effect to the European Convention on Human Rights. It says:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

What is important to understand is that, within some limits, this enables (indeed requires) the court to alter the wording of the law. In the leading case of *Ghaidan v Godin-Mendoza* [2004] UKHL 30, the House of Lords made clear that the court was not limited to interpreting ambiguity in the legislation, and that it could give legislation a different meaning to what it plainly said. This is the legal power the court refers to as "reading down".

In some ways it may seem an extraordinary power: the court can add words to legislation, or amend them, without any Parliamentary process. However, the court's power to read down is not unlimited:

- Firstly, it can only be exercised where one of the human rights protected by the European Convention is being disproportionately interfered with (in this case, as in most family law cases, the relevant right was article 8, the right to family life).
- Secondly, the court can only read down where it is "possible" to do so, and that means that its interpretation must be compatible with the "underlying thrust of" and "go with the grain of" the existing legislation.

In this case, the President found that reading down was necessary and possible. H and his stepfather fell within the underlying thrust of what s51(2) was designed to achieve: enabling the preservation of a natural parent's status while also granting adoptive parenthood to a step-parent, and their application "went with the grain" of the legislation. McFarlane P therefore read down s51(2) as if it said:

> "An adoption order may be made on the application of one person who has attained the age of 21 years if the court is satisfied that the person is the partner of a parent of the person to be adopted (or was the partner until the time of the parent's death)."

He described step-parent adoptions as being made in "the context of a family re-arranging the legal status of its family members", and that it would be an interference with H's article 8 rights to extinguish his legal connection with his maternal family. He highlighted the significance of the order for H and his stepfather, taking a lifelong perspective and saying:

> "Far more important is to cement the reality of the emotional, psychological and lived experience of these two in a legal structure and afford legal status to the applicant. It simply matches how life is being lived by the two of them and by both sides of H's family, now and for the future."

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Finally, he commented that the order would have been entirely uncontroversial had H's mother survived, and yet it was arguably now even more important because H has no other legal parent.

This is not the first case in which the court has used the HRA 1998 to bend the law in order to award secure legal parentage to children. McFarlane P considered in his judgment the trio of surrogacy cases (*A v P* [2011] EWHC 1738, *Re X* [2014] EWHC 3135 and *Re X* [2020] EWFC 39) in which the court has previously read down the law in a similar way. Two of those cases also involved scenarios in which one of the intended parents had died.

Anyone interested in the application of the HRA 1998 in family law should also read the twin cases of *Re Z* (2015) EWFC 72 (Fam) and *Re Z (No. 2)* [2016] EWHC 1191 (Fam). Also surrogacy cases, they involved a legal challenge to exclusion of single parents from parental orders. What is interesting about these cases is that they demonstrate the limit on how far the court can go in rewriting the law without Parliamentary involvement.

In *Re Z* the court initially ruled that reading down the existing legislation was not possible because it went against the grain of the legislation, but it went on to make a declaration of incompatibility under s4 HRA 1998, thereby referring the issue back to Parliament for further consideration (Parliament then later amended the legislation). These cases show that the court's powers to rewrite the law are not unlimited, even where human rights are engaged.

For H and his stepfather, though, the power to read down in s3 HRA 1998 made an obvious and sensible outcome possible. It shows how the Act works as a crucial safety valve, enabling family law to keep pace with modern family realities, and giving judges flexibility to safeguard children's welfare in situations which the law does not – quite – cater for.

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