

Siblings, contact and the law: an overlooked relationship?

Summary Report

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“ 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 this is against their wishes and feelings. ”

(United Nations General Assembly, Resolution: 64/142.
Guidelines for the Alternative Care of Children, 2010, para 17)

“ When you think about it, the courts always try to keep the routine or not disturb the child’s life and all that, try to keep it as normal as possible, but they’re separating the siblings from each other. How’s that keeping it as normal as possible when in reality, in the most perfect home, you get to see your siblings? ”

(Research participant, aged 16, 2018)



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OVERVIEW

Routine decision making in the Family Courts can have a significant impact on children and young people's sibling relationships. The impact is most profound in care and adoption proceedings in public law, as they can result in siblings being separated with limited or no effective provision for contact. This exploratory socio-legal research, funded by the Nuffield Foundation, is the first in England and Wales to foreground siblings. Based on an analysis of statutes, case law and interviews with practitioners, and informed by the views of young people, it highlights the impact on practice of underlying professional assumptions and the shifting legal and procedural framework. The findings speak only from this data; our approach enabled us to examine issues in depth, but we do not make claims about the sector as a whole. While eschewing the possibility of finding easy solutions to a complex issue, we hope this research will offer insights into current thinking about siblings and open up a dialogue between law and emerging research in social work and other disciplines, contributing to reflective and informed decision making where siblings are concerned.

KEY MESSAGES

1 Siblings matter, but...

There is strong recognition of the importance of sibling relationships: that they are 'the most enduring' or 'longest-lasting' relationships in most people's lives. They are increasingly considered a relevant factor in care and adoption proceedings, but the significance attached to them is easily and routinely outweighed by other considerations. The resulting tension is such that decisions which impact on siblings are sometimes described as 'the hardest', 'the most difficult', and 'heartbreaking'.

2 Who is a sibling?

There is a lack of clarity and consistency in the terminology used to describe siblings in statutes. Professionals are keen to define siblinghood in ways inclusive of biogenetic, social and emotional meanings, however, in statutory definitions and in practice, strong recognition is given only to relationships between full and half siblings. Relationships between step siblings, and especially foster siblings, are rarely given weight in legal decision making. These limitations give rise to concerns that children's views of 'who matters to them' are not always fully engaged.

3 Sibling relationship assessments

There is a lack of clarity in law and practice about when and how sibling relationships should be formally assessed. While 'sibling assessments' appear to be more common, there is no standard format. Concerns exist about the impact of time and resource limitations and that sometimes assessments function as *evidence of* decision making rather than a *tool for* better decision making.

4 Assumptions in assessments

Assessing the *qualities* of sibling relationships is subject to contestations over knowledge and expertise, in particular concerning the application of assumptions based on the psychological concepts of 'attachment' and 'parentification'. Although psychologised language is used, in legal decision making it appears that the simple fact of the age of children tends to carry greater weight.

5 Placement planning and contact

Contact arrangements between separated siblings are heavily determined by placement type. There is a strong assumption that direct contact is appropriate for children in placements other than adoption, but facilitating contact for children in care and those subject to special guardianship orders raises challenges in practice. Guardians can play a crucial role in ensuring contact arrangements in care plans are detailed and specific to the sibling group. The role of the Independent Reviewing Officer (IRO) is critical for ensuring that contact is maintained. Questions exist about the capacity of both to fulfill these roles.

6 'Closed' adoption is the norm

When siblings are not placed together, adoption is the most serious risk to the continuity of their relationship. Three powerful assumptions may outweigh the promotion of anything other than indirect contact: that expectations of direct contact will deter potential adopters; that post-adoption contact should and can only take place with the agreement of adopters; and, that the security and stability of placements will be undermined by contact with siblings living with or in contact with birth relatives.

7 Adoption practice and the effects of *Re B-S*

Practitioners thought that the Court of Appeal judgment in *Re B-S* in 2013 was about parents and not siblings, despite the challenge it posed to adoption generally. However, two possible indirect consequences were suggested: any subsequent reduction in adoptions is likely to have resulted in some siblings remaining more closely connected and a re-energised focus on privileging birth family placements may give rise to tensions if adopters *and* birth relatives are keen to take on the sibling of a previously adopted child. Some practitioners find it hard to reconcile 'nothing else will do' as a prerequisite for adoption with attempts to ensure that siblings are placed together or, if separated, have direct contact with one another.

8 Considering older siblings

There is concern that insufficient weight is placed on the interests of older siblings, especially in adoption proceedings. A lack of clarity exists about the analysis required, particularly where some siblings are not subjects of the proceedings, and there is ambivalence about the use of the right to respect for family and private life under Article 8 of the European Convention on Human Rights. Assumptions about age, and distinctions between 'actual' and 'potential' relationships, can inform decisions about separation and contact but may disfavour the interests and wishes of an older sibling.

9 Sibling contact orders

It is exceptionally rare for sibling contact orders to be made in care and adoption proceedings and there is a lack of understanding about the circumstances in which they should be used. A preference exists for alternatives to orders such as 'time-limited' searches, recitals and other judicial recommendations about contact, but their efficacy is subject to question.

10 Siblings and parental responsibility

Decisions which impact on siblings are hard to separate from broader issues of parental responsibility. Half, step and foster sibling relationships are often dependent on parental and other adult choices and relationships, and parental neglect may be seen as the cause of 'parentified' relations between siblings. Concerns about siblings are sometimes perceived as being utilised by birth parents, and adoptive parents' concerns about birth parents often shape the prospect of sibling contact. As a result of the overarching focus on resolving issues of parental responsibility, children's own views about their siblings may be overlooked.

BACKGROUND

There are no statistics which identify precisely how many children in the care system, including those subsequently adopted, are placed with their siblings nor, when they are separated, the extent or forms of contact between them. The Department for Education does not collect information about siblings, however, it is clear from a number of reports and surveys that a substantial proportion of children in care are separated from their siblings and that there are considerable variations in the provisions made to sustain contact between them.¹ Disquiet about this has been expressed by parliamentarians, the UN Committee on the Rights of the Child, and members of the judiciary.² A growing body of social work research has examined the causes and consequences of separation, and the practical challenges encountered in sustaining contact.³ Across a number of academic disciplines, scholars have highlighted the importance of being attentive to the effects of 'common sense' assumptions and how these can mask the complexities of 'siblinghood' or 'sibship'.⁴ By foregrounding sibling relationships, their work presents a challenge to legal decision making that is concerned primarily with parenting and placements.

1 Children's Rights Director, *Children's Care Monitor 2013/14* (OFSTED, 2014); Neil E, 'Rethinking adoption and birth family contact: is there a role for the law?' [2018] *Fam Law* 1178; FRG (2015) *What happens to siblings in the care system?*

2 United Nations Committee on the Rights of the Child, *Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland* (3 June 2016); Minutes of the All-Party Parliamentary Group for Looked After Children and Care Leavers (28 October 2015); *Re P-M (A Child)* [2013] EWHC 1838; *LB Haringey and MUSA* [2014] EWHC 1341 (Fam); *A, B, C, D and E (Children: Placement Orders: Separating Siblings)* [2018] EWHC B11.

3 Cossar J and E Neil (2013) 'Making sense of siblings: connections and severances in post-adoption contact' *Child & Family Social Work* 67; Jones C (2015) 'Sibling Relationships in Adoptive and Fostering Families: A Review of the International Research Literature', *Children & Society* doi: 10.1111/chso.12146; Hollows C A and P Nelson (2006) 'Equity and pragmatism in judgment-making about the placement of sibling groups' *Child and Family Social Work* 307.

4 Davidoff L (2012) *Thicker than Water: Siblings and their Relations 1780-1920*; Edwards R, L Hadfield, H Lucey and M Mautner (2006) *Sibling Identities and Relationships: Sisters and Brothers*; Mitchell J (2003) *Siblings*.

THE LEGAL BACKGROUND

Sibling relationships are a factor that, in accordance with the paramountcy principle in both child and adoption law proceedings, the courts can and should take into account in determining a child's 'best interests'. A number of other statutory materials make explicit reference to siblings, or are applicable to them.

THE KEY RELEVANT PROVISIONS UNDER THE CHILDREN ACT 1989:

- Where reasonably practical, a local authority is required to accommodate 'looked after' siblings together (s 22C(8)(c)).
- Before making a care order the courts are required to consider contact arrangements and invite comments on them from the parties (s 34(11)).
- The courts have the power to make contact orders between children in care and their siblings. However, unlike parents, siblings must seek prior permission (referred to in law as 'leave') from the court to apply for such an order (ss 10(8), 34(3)(b)).

THE KEY RELEVANT PROVISIONS UNDER THE ADOPTION AND CHILDREN ACT 2002:

- In coming to a decision relating to the adoption of a child the court must take into account the likely effect on the child (throughout his life) of having ceased to be a member of the original family and become an adopted person...and...the relationship which the child has with relatives...including: the likelihood of any such relationship continuing and the value to the child of its doing so and... the wishes and feelings of any of the child's relatives... regarding the child (s 1(4)(c), (f)(i), (iii)).
- Before making an adoption order, the court must consider whether there should be arrangements for allowing any person contact with the child; and for that purpose the court must consider any existing or proposed arrangements and obtain any views of the parties to the proceedings (s 46(6)).
- The court also has the power to make a contact order between siblings both at the time of making a placement for adoption order and when making an adoption order, or at any time afterwards (ss 26, 51A).

Sibling relationships can be a relevant factor at every stage of public law proceedings. Consequently, foregrounding concerns about siblings inevitably requires an engagement with a host of legal, policy and political debates. The use of adoption, the role of the courts, the distinctive responsibilities and efficacy of the professions, and the crisis in the care system are all issues that emerged in the research. We aim to identify how these complex, and often politicised, debates impact on sibling relationships. In order to explore rather than resolve them, we take an analytical not an advocacy approach. We hope this enables us to observe how attention to siblings can emphasise or legitimise different standpoints.

RESEARCH METHODS

Our methods were designed to explore the multiple layers of law in action with the aim of mapping in public law proceedings, when and how sibling relationships come to the fore, and where they might be obscured. They are explained in detail in the full report but are outlined briefly below.

- A mapping review of where siblings appear in legislative materials in England and Wales, identifying terminology, definitions and changes over time.
- A review of case law from the coming into force of the Children Act 1989 in 1991 onwards, identifying terminology, key legal moments when sibling relationships are brought to the fore in proceedings, and the distinctive doctrinal arguments applied to decisions about them.
- A Young People's Participation Group comprised of members of the Family Justice Young People's Board acted as advisers to the project, but their views and opinions were also analysed as part of the data.
- Interviews were conducted with 69 children's guardians, judges, social workers, IROs, barristers and solicitors across the North, Midlands and South of England.

RESEARCH FINDINGS

'Legal siblinghood'

Siblings are referred to in over 100 statutes across all categories of law, from family, medical and social welfare, to taxation, agriculture and mental health. Rarely treated as a distinct or biogenetic relationship, siblings are more often included within broader categories such as 'relative', 'connected person', 'dependant', 'non-qualifying individual' or 'associates'. While the status of *being* a sibling gives rise to limited claims, for example in the intestacy rules in inheritance law, inclusion is more often based on idealised or conventional assumptions about intersibling *behaviour*, premised on norms and expectations of emotional care and wellbeing arising from the relationship.

We found no consistency or coherence in the statutory *language* used to describe siblings. The word 'sibling' is used for the first time in the Children Act 1989, but no significance can be attributed to this and 'brother and sister', the alternative earlier expression, is used in the Adoption and Children Act 2002 and other subsequent statutes. The word 'blood' is used in some statutes but not in others. While never used in the Children Act 1989, in the Adoption and Children Act 2002, birth family relatives of an adopted person, including siblings, are defined as persons who '(but for his adoption) would be related to him by blood (including half blood) or marriage' (ss 51A(3)(a), 81(2)). Such language is difficult to reconcile with a commitment to recognising the benefits of sustaining birth family and

sibling relationships. We note that the Law Commission of New Zealand considered this language to be 'a repugnant and unnecessary distortion of reality'.⁵

We also found no consistency in the statutory *definitions* of 'siblings' or 'brother or sister'. Most include full and half siblings and, with rare exceptions, make no distinction between them. Explicit references to step siblings appear only in the Equality Act 2010 and the Mental Health Capacity Act 2005. In child and adoption law, there is a lack of clarity about the recognition of step siblings: it is a question of interpretation of the statutory expression 'by marriage'. There are no official references to foster siblings or other wider 'kin' and sibling-like relations. In the context of post-adoption contact orders, these connections may be included in references to 'any person with whom the child has lived for a period of at least one year' (Adoption and Children Act 2002 s 51A(e)).

Who is a sibling?

The professionals and young people shared an ethical concern to make the category 'sibling' inclusive of biogenetic, social and emotional meanings, reflecting changes in family life and acknowledging subjective, experience-based notions of siblinghood. They also felt that full and half siblings should be accorded equal value.

I think practitioners – you know, legal practitioners, social work practitioners and judges – are more creative than just looking at the blood link. (Barrister 4)

There's no such thing as a half sibling in my mind, that's a full sibling. That is a brother or a sister, even though on paper it will say 'half sibling'. (Barrister 5)

Some members of our Young People's Participation Group said they found it devaluing and divisive when professionals emphasised the half/full distinction in their sibling relationships.

It's really annoying and it makes you feel really upset and like angry inside because it doesn't really matter whether it's half or full, they're still your sisters at the end of the day. (Young People's Participation Group)

In the case law, an implicit weight was sometimes attached to whether a child was a full or half sibling, usually without reference to evidence concerning the *qualities* of their sibling relationships.

While separation from siblings is usually undesirable and to be avoided, the children in fact have different fathers. (Re N (A Minor) [2014] EWHC 749 (Fam), para 9)

The half/full distinction was a more decisive factor in cases where the attitudes of birth relatives towards a child's half sibling, with whom they did not share a genetic connection, was critical to placement or contact options.

Relationships formed solely through experience, usually through living in the same household, varied in the weight they were attributed. Step siblings were given markedly greater recognition than foster siblings, but the lack of legal clarity was evident.

⁵ Law Commission of New Zealand (2000) *Adoption and its Alternatives: A Different Approach and a New Framework*, paras 43–44.

I would still class them as siblings in my mind. Now, they probably wouldn't with regard to a legal test. I've never had the argument. But they would be important people that I would take into account. (Judge 2)

There were no examples in the case law of foster siblings being accorded 'sibling-like' status. However, our young advisers, some of whom were in foster care, were clear that children in a foster placement could *'end up being like a brother and sister'*. This view was supported by social workers who had personal and professional experience of fostering.

Assessing sibling relationships

Sibling relationships are acknowledged to be a relevant factor in legal decision making, but although recommended in official and practice guidance, there is no statutory underpinning for formal assessments of them. Practitioners often referred to sibling assessments as 'the Together and Apart' or 'the BAAF', indicating that Lord and Borthwick's good practice guide, *Together or Apart? Assessing Siblings for Permanent Placement* (BAAF, 2001, 2008), has achieved a degree of embeddedness. A substantially revised edition, by Shelagh Beckett, has recently been published: *Beyond Together or Apart: Planning For, Assessing and Placing Sibling Groups* (CoramBAAF, 2018). However, from the practitioners' descriptions of sibling assessments, there did not seem to be a universal model for practice; different local authorities were reported as using adapted versions of 'the BAAF' or various other procedures.

There was concern, especially from judges, that sibling assessments are often hastily commissioned after separation has been determined as the likely outcome. As a consequence they may lack the rigour to 'pull apart' and interrogate assumptions. This suggests that assessments are more often viewed as necessary evidence to support a prior decision to separate siblings, than as open-ended investigations to inform decision making. An inadequate sibling assessment, or the lack of one, was considered by some judges to constitute grounds for delaying proceedings beyond 26 weeks, but there was a perception that judicial attitudes varied considerably.

There were also differing views about the kind of expertise required to perform an assessment. Although usually described as a job for social workers, some professionals, including social workers themselves, thought that child psychologists were under-used, with some citing the restrictions on the commissioning of experts introduced by the 2014 Public Law Outline as a factor.

The assessment of the *qualities* of sibling relationships is the subject of contestations over knowledge and expertise, in particular over the legitimate application of psychological concepts. Empirical research about siblings was referred to only rarely in the cases or the interviews, but psychological theories were invoked, sometimes explicitly, but more often implicitly. Attachment theory was referred to most frequently; practitioners from across the professions spoke of 'sibling attachment' and this was also a feature in the case law.

The local authority and the guardian accept – and, indeed, both aver – that there is a very good, natural, healthy and enriching relationship and two-way attachment between C and his sisters. They naturally play together and interrelate as siblings (*Kirklees Council v LS, TL [2018] EWFC 12, para 36*)

However, practitioners also expressed concern that attachment is a concept for describing parent-child relationships which is misapplied to siblings. There was, therefore, considerable confusion over whether it is correct to talk about siblings being 'attached' to one another.

I'm probably misusing that word because I don't know whether siblings have attachments to each other. They have attachments to parents. (Judge 2)

Oh, attachment is one of these words that's bandied around quite a lot and I'm not sure that it's always bandied around by people who know what they're talking about either...I think it's one of those sort of technical terms that's escaped into the wild...you will hear about it in connection with siblings as well as parents. (Judge 5)

'Parentification' is another psychological concept which informs decision making about siblings. Like attachment, it has its origins in descriptions of parent-child relationships; of families in which there has been a reversal in the expected parent-child dynamics. Its meaning has expanded over time, and in the cases and interviews, it tended to refer to children taking on the practical care of siblings. According to some practitioners, 'parentification' can be an evidential issue in child care proceedings when understood as *'symptomatic of the fact of the parents being...neglectful'* (Solicitor 5). However, difficulties were reported with the application of the concept, particularly where it informed arguments for separating siblings.

I've come across cases where it's advanced as a positive argument for separating siblings...and I struggle with that personally because you then...I would have thought it's better to keep the kids together but just help the older one be a sister rather than a mother, rather than take away a child that they've been really, really caring for and have all that loss to deal with. (Solicitor 7)

Considerable empathy for the older child was expressed in concerns that assumptions about the 'parentified' child being dysfunctional, or posing a threat to the stability of a shared placement, could act as a counterweight to taking seriously the loss they would face on separation from younger siblings. Some of our young participants had experienced being described as 'parentified'.

So when my little sister was born...I was 12 and from when she was about four months old I brought her up like a lot more than my mum did, so I like did everything, like bed, nappies...they kept saying to me, 'oh you realise you're not her parent' and things like that...they were on about adoption and stuff, it's literally all about the baby. Like, 'oh well, she needs to grow up stable' and all of this like and it was never like, I was in school, how was it affecting me. Like what if I wanted to see her? (Young People's Participation Group)

A small number of practitioners questioned whether it is helpful to assess a child as 'parentified' when such a label might reflect assumptions about acceptable levels of responsibility informed by culturally specific notions of what constitutes an 'appropriate childhood'.

I think in certain cultures...there may be an expectation that children assume more capability in terms of sharing parental chores. In an ordinary English situation, a culturally white English situation where children wouldn't be expected to do that...It's very middle class really. I mean I don't know. I'd have to look at how damaging it was for the individual children concerned. (Judge 2)

Interestingly, no practitioners referred to the new statutory concept of 'young carers',⁶ suggesting that they did not draw parallels between children caring for siblings and children caring for parents.

Although psychologised language was often used to describe the quality of sibling relationships, some professionals were concerned that, in practice, assumptions based on age are more likely to determine placement outcomes, potentially obscuring the specific dynamics and needs of individual children in particular sibling groups.

I think social workers often automatically look at the closest siblings in age as opposed to the closest relationship. (IRO North Focus Group)

Interestingly, characteristics based on gender and ethnicity raised little explicit discussion in the interviews.

Allocation and gatekeeping

Certainly anything which involved any complicated issues relating to siblings I would hope would not be before the lay justices, although I couldn't guarantee that...my recollection is that anything to do with siblings is not actually referred to anywhere in the guidance... maybe it should be. (Judge 1)

Determining the level of the Family Court to which a case should be allocated is a key question in practice. In the current guidance, the only explicit reference to siblings is the advice to consider existing proceedings 'relating to the child or sibling in order to provide continuity'.⁷ The relevant general factor in the guidance is 'complexity'. There was wide agreement that the existence of siblings per se did not, and should not, warrant a case being allocated automatically to District Judges rather than Magistrates, but there was a lack of clarity about what exactly might deem it necessary. The separation of siblings was not considered to be necessarily 'complex', although one judge suggested that 'maybe it ought to' (Judges Focus Group). That it currently is not, reinforces the routine nature of the separation of siblings. By way of contrast, judges expressed much stronger views about how private law cases about relocation should be allocated. In cases involving siblings, the early timing of the decision to allocate, and the infrequency of the issue being revisited, were mentioned by all the judges as being problematic.

6 Children Act 1989 ss17ZA – 17ZC (the Children and Families Act 2014).

7 President's Guidance on Allocation and Gatekeeping for Care, Supervision and other Proceedings under Part IV of the Children Act 1989 (Public Law) Sch, Col 1 (G)(16).

Placement planning and contact

I think courts are much happier about...being directive in relation to looked after children...it's not the same sort of no-go area as adoption. (Barrister 2)

You wouldn't really have contact with your birth family any more if you got adopted. But then fostered is where you kind of like still have contact with your birth family. (Young People's Participation Group)

Analysis of the cases and interviews suggests that plans for sibling contact are dictated largely by assumptions relating to the type of placement. In particular, there appears to be a strong presumption of direct contact for separated siblings unless a child is adopted, despite the fact that the duty on local authorities in Section 34(1) of the Children Act 1989 to allow all 'looked after' children 'reasonable contact' with their parents, does not extend to siblings.

While the courts are required to consider contact arrangements and invite comments on them from the parties, practitioners were concerned that contact details are often too minimal, overly formulaic, can conflate sibling with parental contact, and sometimes fail to consider how contact will work in practice. The contribution by guardians who take a proactive role in questioning plans was identified as crucial, in particular by the judges. As one noted, when guardians are 'very keen and hot on sibling relationships...you get better care plans because you've got proper assessments on which to plan' (Judges Focus Group).

Practitioners reported that while the provision of direct contact in placements other than adoption is accepted in theory, in practice it is not necessarily straightforward. Where a looked after child is accommodated under Section 20, intersibling contact is a matter for the parents, and tensions can arise where parents are reluctant to agree to contact taking place. Separate foster placements were assumed to be less problematic as foster carers were said to be good at 'sorting things out amongst themselves', although practical barriers could still arise, especially pressures of time, distance and resources. In the context of Special Guardianship Orders, contact is more complex and intrafamilial conflict can impinge on sibling contact.

I had an SGO where the children were split and the kinship carer would only have that child with no contact because of the difficulties with the carer and the extended family, so they took the younger child and there would be no extended contact. (Judges Focus Group)

According to one of our young advisers, 'bonds can drift apart' when siblings are separated, whatever their placements.

I have seen cases where contact hasn't taken place...And it's not for a terrible reason other than there are other things that perhaps have taken priority that maybe shouldn't...once children haven't seen each other for six months or a year, well...it's quite difficult then to pick up that relationship. (Solicitor 3)

A recurring theme from legal practitioners is that *their* involvement ceased at the end of care proceedings. Linked to this was a wide recognition of the crucial importance of the role of the IRO in keeping plans for sibling contact under review, but their capacity to fulfill it in practice was questioned.

Children in care and contact orders

I can't imagine that there aren't a lot of children in the care system who don't have gripes about the level of contact they have, but should we necessarily be encouraging them to make applications and...are those children being given the option? (Solicitor 1)

A key finding from both the review of the cases and the interviews is that intersibling contact orders for children in care under Section 8 or Section 34 of the Children Act 1989 are highly exceptional. The explanations provided by practitioners were varied and sometimes contradictory. The most frequent was optimistic: that 'it's not usually necessary' (Judge 1) because contact is addressed in the care plan and facilitated by reviews and the IROs.

What we have is a commitment...the social workers/local authority are always quite keen to promote those relationships. (Solicitor 1)

You'd have to really mistrust the local authority to impose a contact order on them...I've never come across it, not with a care order. (Guardian 1)

That's usually when they're exasperated with the local authority for failing to set up proper contact arrangements. (Judge 3)

While orders were generally perceived as inflexible, and alternative methods of resolving disputes preferred, arrangements for contact in care plans were also described by some practitioners as being potentially too rigid. But the existence of the power to make contact orders was considered useful as a negotiating tool, both in reviewing arrangements in care plans and as a threat if they were subsequently not adhered to.

It tends to be talked out and agreed as opposed to ever being pursued. So the threat might be made to make a Section 34 application...It's usually as part of the horse trading...to the care plan. (Judges Focus Group)

We just sent the letter to the local authority and they set it up again. (Solicitor 5).

Concerns were expressed about the reluctance of IROs to refer cases back to court. However, IROs emphasised their ability to resolve conflicts about contact without recourse to the courts: 'I don't think it's done very often because usually you can work with families' (IRO South Focus Group).

An important finding is that the lack of access to legal advice was consistently described as a greater barrier to young people making an application for a contact order than the legal requirement of prior permission ('leave').

If you were to apply, the court would undoubtedly think that there was merit in it being considered so...I don't think that necessarily the niceties of technical legal arguments about leave are what stop you...you don't know you can and even if you want to, you're not given the tools to make it easy for you. (Barrister 1)

I think it's more about children having the information and the wherewithal to see someone to advise, be it an advocate, a lawyer, whoever...I'm not sure that leave ought to trouble them too much. (Solicitor 2)

In addition, access to professional support and legal advice was thought to be contingent on the type of placement.

Actually a child that remains in care would probably be better off, because they would have professionals like an IRO and a social worker to speak to...if a child was in a kinship placement...or remained with a parent and not seeing siblings, that's where it would be difficult because they wouldn't have any professional working with them...And if it was their carer that was reluctant to facilitate them seeing their siblings, then they certainly wouldn't be advocating helping that young person. (Guardian 4)

Some practitioners suggested that the prior permission requirement served a legitimate purpose by preventing applications for sibling contact by a child being utilised by birth parents as 'a backdoor method to getting the case back into court' (Guardian 3). One judge considered in a case she had observed that the children had been 'put up to it...they're the Trojan horse of the parent' (Judge 3). But this concern was countered by the view that:

If you removed the bar, judges have robust case management powers anyway, so if they thought it was a crazy application they could always nip it in the bud then. (Solicitor 7)

It is clear that although there is some support for the permission ('leave') requirement, it is coupled with a view that it should not be a barrier to applications.

Adoption, siblings and Re B-S

A key question for the research concerned the implications for siblings of the high profile Court of Appeal judgment in *Re B-S* [2013] EWCA Civ 1146. Although the judgement emphasised the profound consequences of adoption, a recurring response from across the professions, but most notably the judges, was that the case 'doesn't have anything to say about siblings' (Judge 1). In the case review, explicit references to *Re B-S* in determining decisions about siblings were exceptional. In the interviews, professionals suggested that where, or if, there had been a reduction in placement orders as a result of the judgment, this might have resulted indirectly in some siblings remaining more closely connected.

I don't think there's any correlation between saying well, actually we won't go for adoption because we've got four siblings...what people will say is...If there is another option – particularly SGO – then we will go with that and indirectly, that will then impact on contact because there's more chance that they'll have contact if you do. (Solicitor 3).

However, it was also noted that a stronger focus on alternatives to adoption could also have resulted in siblings being separated, for example, in cases where birth relatives are favoured in taking on a new child, whose older siblings have been adopted by non-relatives.

Practitioners noted that the main impact of *Re B-S* has been on the general evaluation of placement options and, of particular relevance here, on the analysis of 'the likely effect on the child (throughout his life) of having ceased to be a member of the original family' (Adoption and Children Act 2002 s 1(4)(f)). Case law provides some examples where a failure to demonstrate such an analysis was the basis of a decision to delay proceedings. A key finding across all the data is that the loss of a relationship with a sibling can be readily outweighed by deeply held assumptions about the advantages of adoption.

It's almost a cliché...because it is quite powerful, you know, the security and stability of adoption is evidentially supposed to be a much...well give a chance of a much more successful outcome than continued foster care. (Barrister 4)

Case law and the interviews indicated the use of 'contingent care plans'. These are plans for time-limited searches for joint adoption which, if unsuccessful, become a plan for long-term fostering. But as one judge noted, 'I've got no power to do that' (Judge 3). One concern about such plans is that judges do not necessarily know what happens after they have been ordered.

When you talk about these time limited searches, it's a backdoor way of splitting the little ones off. (Judges Focus Group)

Moreover, another judge commented that where a local authority was not willing to agree to such a plan, they could, justifiably in his view, cite *Re B-S* in response:

The argument that local authorities can then run on the basis of Re B-S is that if you have decided that nothing else but adoption will do, how can you then approve long term foster care because you couldn't find an adoptive placement? Fair point. (Judge 4)

The case law and the interviews reveal judges at times expressing a degree of frustration at the limits to their powers. This was most acute in situations where judges considered that adoption was acceptable, that 'nothing else will do', but only if the siblings were kept together. This view was shared by other practitioners.

So you don't even have that flexibility of being able to sort of...combine the best of both worlds. So you end up knowing what you really want, and then go well, we don't have that to offer to these children, instead we have to offer them what there is, which would be adoption and no contact or together as foster placement. (Guardian 4)

While many professionals expressed discomfort with age-driven decision making, in cases involving babies or young children the assumptions about the benefits of adoption were deemed almost insurmountable.

Exposing a tiny baby to the vagaries of foster care is going to be a killer point in terms of the preferential balance between the other child's relationship. (Judge 1).

I think if you're talking about a baby, if I made that decision [to reject adoption], honestly, I'd be appealed and I'd be overturned...And I know that. I think the law would be against me. (Judge 4)

There appears to be a lack of clarity about the analysis required when considering decisions that affect a sibling group, especially when the siblings are not all subjects in the proceedings. There was ambivalence about the use of the right to respect for family and private life under Article 8 of the European Convention on Human Rights. Assumptions about age, and distinctions between 'actual' and 'potential' relationships, can inform decisions about separation and contact but may disfavour the interests and wishes of an older sibling.

You know, making a decision that nothing else but adoption will do for one child but not for another, not for a sibling, is a difficult call to make sometimes. (Judge 4)

...at the end of the day, the older sibling knows that the younger sibling is still there, even though they don't know where the younger sibling is...even though the little one wouldn't remember her. (Young People's Participation Group)

Across all the professions there was concern that assumptions about the benefits of adoption are based on questions of policy, not simply on an analysis of children's 'best interests'.

It is political isn't it...a negative slant towards long term fostering. (Social Worker North Focus Group).

Well it's easy to point out the negatives of fostering...And it is, from the judicial perspective. We're encouraged to believe that it is quite unstable compared with adoption. I'm not sure it necessarily is. (Judge 4)

Practitioners also emphasised that the weight placed on arguments about siblings can reflect judicial views about adoption more widely.

It's another avenue they can use...to legitimise opposing a plan for a placement order because they will say, 'I think sibling contact is so important that I'm not prepared to...' Not that they've got an agenda necessarily, but that they're far more...willing to stand by the importance of it, perhaps sort of driven by the fact they're not overly keen on adoption. (Barrister 5)

The perception that arguments about the importance of sibling relationships may have a strategic value, can give rise to concerns that they are 'utilised' by parents. Practitioners said that when arguments about siblings are made by guardians, they carry more weight than when made by lawyers acting for birth parents.

Adoption and contact

You work on pretty much an assumption and a general principle that when children are adopted, they don't have any direct contact with their birth relatives. (Guardian 5)

Contact has got to be sacrificed at the altar of the placement. (Barrister 3)

We found clear evidence of a shift in attitudes away from the traditional view concerning adoption that 'in normal circumstances it is *desirable* that there should be a complete break'.⁸ Many practitioners emphasised the importance of finding adopters willing to consider direct contact and providing training and support to enable it. But at the same time, our findings suggest that while *indirect* contact post adoption is widely accepted, professional and ethical support for *direct* contact is routinely outweighed by other factors. One key assumption is that post-adoption contact arrangements are always subject to the agreement of adopters.

There's still a sense that, well, it's got to be the adopters who decide. (Solicitor 2)

While there was recognition that not all adoptive parents are opposed to direct contact, it was also acknowledged that adopters' fears about contact may be reasonable and child-centred. However, it was also felt that concerns about direct contact were often '*led by the interests of the adopters rather than the interests of the children*' (Barrister 3). Another deeply embedded assumption is that direct contact with siblings who are living with, or are in contact with, birth relatives will undermine the placement.

So a child who is being placed for adoption...cannot have contact with an older sibling who is being placed in foster care because the child in foster care is going to be having an ongoing relationship probably with birth family...that's a common argument that's run by local authorities...raised in a knee jerk way rather than on the facts of the case necessarily. (Judge 4)

It was this fear that informed the view that social media presents a particular risk: as one judge commented, '*it's a bit toxic, to put it mildly*' (Judge 1). Other practitioners saw social media as representing a fundamental challenge to current understandings of adoption. One local authority solicitor conveyed the ambivalence about adoption, social media and siblings:

These siblings are going to find each other and that's brilliant, that's good I think in some ways...I mean with my adoption hat on I'm really worried about it, but I think in terms of siblings, I think it's got great possibility of keeping them together. (Solicitor 3)

There was also general uncertainty, including amongst the young participants, about how different forms of social media should be categorised in terms of direct or indirect contact.

When you think about it, like indirect without face-to-face, so like technically it is indirect, but then the message is going straight to that person, so technically it is direct. (Young People's Participation Group)

8 *Re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1, para 18 (emphasis added).

Orders for contact at placement: Adoption and Children Act 2002, Section 26

I think Section 26 is virtually never used. Perhaps we should use it more often...People have taken on board the old case law about 'don't interfere with adopters' discretion'. (Judge 2)

In the case of *Re P* in 2008, Wall LJ raised the possibility that the statutory reforms introduced in the Adoption and Children Act 2002 might herald a 'sea change' towards birth relative contact, including siblings.⁹ Our findings, from both the case review and the interviews, confirm the views of others that there is no evidence that the judgment led to a new approach.¹⁰ Non-legal practitioners were either silent about Section 26 or unaware of it. A typical response was, '*You can't make a contact order at that point, can you?*' (Social Worker South Focus Group).

Determining contact provision in placement proceedings, when adopters have not yet been identified, was considered by some to be inappropriate and unrealistic.

You don't have adopters, you've only got imaginary figures so you can't make any kind of meaningful order. (Judges Focus Group)

However the most overarching explanation for not making Section 26 orders was the concern that they would '*constrain the search for adopters*' (Judge 1).

We shy away from them because we're always advised that if you make an order that adopters have got to facilitate some contact, you won't find a placement. (Judges Focus Group)

It just never comes up. You wouldn't want to put anything that would be a bar to finding a placement. (Guardian 2)

I do accept that to make a Section 26 order is going to make it more difficult to find an adoptive placement for that child...Sometimes it's a price that has to be paid. That's where I part company with the local authority. (Judge 4)

As the making of a Section 26 order is considered to be exceptional, it is understood to be applicable only in cases where direct contact is an *essential* factor in the plan for adoption. This results in a tension for legal practitioners because in such cases, it can be argued that adoption is *not* the *only* possible option, this is all the more persuasive after the judgment in *Re B-S*.¹¹ Because Section 26 orders are perceived as potentially tying the hands of local authorities in the search for adopters, it is not clear how such orders, which courts undoubtedly have the power to make, differ *in practice* from placement orders made conditional on contact provision, which the courts do not have the power to make.¹²

9 *Re P (Placement Orders: Parental Consent)* [2008] EWCA Civ 535.

10 Bainham A 'Swimming against the tide: challenging contact arrangements in the public law' [2015] *Fam Law* 1356; Pepper J 'Maintaining sibling relationships in care and adoption' [2017] *Fam Law* 1112.

11 *X County Council v AJBM and others* No. WX15C00302 [2016] WL 00826273

12 *Re A (Children)* [2013] EWCA Civ 1611.

There isn't a great deal of appellate guidance on the exercise of our discretion on Section 26. In fact I feel pretty ignorant about it, whereas I've got a lot of guidance on other things...so maybe I'd like some more guidance as to how to implement Section 26 and how to look at it, more judicial awareness of it. Because I think Parliament intended us to be much more open about looking at adoptive placements with the birth family having more access, which will of course include siblings. (Judge 2)

Alternatives to contact orders

One of the older siblings...wanted reassurance that there would be an order for her direct contact to continue...the judge wasn't that keen on the idea of that so we ended up...it was recorded on the [care] order so...you couldn't apply to court to enforce that...if there was to be any court proceedings in the future, you'd have to show good reason why you departed from what was an agreed position at that time. (Solicitor 9).

The cases and the interviews revealed a preference for ways of emphasising support for contact which avoid the use of Section 26 orders. These take the form of 'recitals', 'recommendations' or statements 'on the order' or 'in the plan' and their aim is to 'build in the expectation' (Barrister 5), note 'a very strong encouragement' (Judge 1), or 'put pressure on the local authority' (Solicitor 5) to find adopters willing to agree to direct contact. Despite the widespread use of such alternatives to orders, some practitioners, while not explicitly opposed to them, were highly sceptical about whether they had any effect. They were described as, 'a nice sop...but it doesn't do much more than the care plan anyway' (Judge 2) and as, 'written more in hope than expectation...nothing short of an order is going to ensure that that contact takes place' (Judge 4).

Post-adoption contact

I think there is still a kind of red line...you don't force adopters to do anything. (Barrister 4)

The idea of making an adoption order with a contact order just doesn't happen. It's pie in the sky. (Judge 3)

While one explanation for not making contact orders at the placement stage was that adopters have yet to be identified, there was even less evidence of contact orders being made alongside, or after, the making of adoption orders under Section 51A of the Adoption and Children Act 2002. However, concern was expressed by many practitioners that even if a local authority does find adopters open to direct contact, in practice there is nothing to prevent them changing their mind at a later date, as once the adoption order is made, 'it's entirely up to them' (Solicitor 1) and 'they're the people who've got to live it' (Solicitor 2). Only one practitioner suggested that an adopter could or should be asked 'to show good reason why you departed from what was an agreed position at that time' (Solicitor 9). There is limited case law on this point. The possibility of questioning the reasonableness of a change of mind by adopters exists, and leave to apply to make such a challenge might be

granted.¹³ However, on the substantive issue, the guidance and statutory reforms support the practitioner perception that the matter should be left to adopters.¹⁴ We found no awareness of the 2013 judgment in which Ryder LJ held that:

All too often adoption orders are made with all the best intentions for continuing sibling contact which are then thwarted for no particularly good reason...Perhaps more often than hitherto, courts faced with agreed contact post adoption might consider whether an order can give reassurance to the child by keeping an enduring relationship that is important and for some children critical to their welfare throughout their lives.¹⁵

So ingrained are views about the right of adopters to determine contact, that it is sometimes described in terms that suggest that it is an *absolute* legal right.

There's no jurisdiction over you...once a child's adopted you can't do anything. (Guardian 1)

The judge might say, 'Look, it's desirable', but basically what can he or she do? Nothing. (Solicitor 4)

However, some of our young participants questioned this:

So why should that stop her from having a relationship with her brother just because they gave them their official parental rights? (Young People's Participation Group)

DISCUSSION: Court orders and the role of law

Ending up in court, that would feel like a defeat really in terms of trying to do what's best for certainly the subject child but also the other siblings. (Solicitor 2)

I suppose for me, if you put a court order on something it's seen as being quite punitive. (Social Worker North Focus Group)

In care cases, you know, children will see siblings and see parents once a month, four times a year, yet if it was a private law case, it'll be once a fortnight...I can't figure out what the difference is...You ask that question of a social worker in a witness box, or a guardian, they look at you as if you are mad and they chuck out stability, security, undermining placement. (Judge 3)

Well the courts are involved in loads of different parts of people's lives so it really doesn't make no changes in being part of siblings' lives as well...they make orders for kids to see parents...to see grandparents...so why not just throw in siblings as well? (Young People's Participation Group)

Obviously a parent and a sibling's different but they should have kind of like near enough similar rights... Because no matter what, a sibling will have that special connection that a parent doesn't have. (Young People's Participation Group)

A key finding throughout the research has been the rarity of contact orders between siblings. Judicial awareness of

¹³ *In R (A Child)* [2005] EWCA Civ 1128, para 4.

¹⁴ Adoption and Children Act 2002 s 51A(a),(c). Sloan B 'Post-Adoption Contact Reform: Compounding the state-ordered termination of parenthood (2014) *The Cambridge Law Journal*, 73(2): 378.

¹⁵ *MF v London Borough of Brent and Others* [2013] EWHC 1838, para [35].

the possibility of making orders is not in doubt, but there appears to be a lack of clarity about when, in practice, it might be appropriate for them to be made. We found that in addition to the factors noted above, the reluctance was explained by three assumptions: first, that court orders are inflexible; secondly that courts are not a ‘child-friendly’ or appropriate environment for the resolution of these disputes, and thirdly, that they are unenforceable. We note that these assumptions mirror concerns about contact orders in private law disputes. Such orders are also infrequent, but ‘agreements’ to contact are made in the context of an awareness that in private law the courts are willing to make them, and to support them with ‘therapeutic’ and other measures. Whereas politicised concerns about fathers’ rights and a perceived need to increase public confidence in the courts have been key motivations for judicial and political action in the private law context,¹⁶ our findings suggest that assumptions about, and support for, the rights of adopters have led to the opposite in the public law context. It is important to emphasise that while practitioners sometimes considered resistance to direct contact from adopters (and special guardians) to be ‘unreasonable’ and not in the ‘best interests’ of the child, we are not suggesting that the private

law responses to contact should be applied to public law; the contexts are substantially different and siblings are not parents. But the contrast between private and public law responses reveals how investments in, and assumptions about, parental responsibility can take priority over other aspects of children’s well being.¹⁷

If more weight in legal proceedings is to be attached to a child’s relationship with his or her brothers and sisters, reform of the law and possibly an enhanced role for the courts might have a part to play.¹⁸ However, our findings suggest that substantive change will only be possible if there is a reflexive engagement with the assumptions currently underpinning the significance attributed to sibling relationships, which in turn inform understandings of a child’s ‘best interests’.

16 Kaganas F R ‘Parental Involvement – A Discretionary Presumption’ (2018) *Legal Studies* (<https://doi.org/10.1017/lst.2018.16>).

17 Piper C (2000) Assumptions about children’s best interests (2000) *Journal of Social Welfare and Family Law* 22(3): 261, at 271.

18 For comparative rights based initiatives see: Hasday J E ‘Siblings in Law’ (2012) 65 *Vanderbilt Law Review* 897; Jones F and C Jones (2018) ‘Prioritising Sibling Relationships for Looked After Children’.

RECOMMENDATIONS

- To consider the inconsistency and lack of coherence in references to siblings, we recommend a review of primary and secondary statutory material by the Department of Education and Parliamentary Counsel. In particular to:
 1. Clarify references to step siblings in child and adoption law.
 2. Remove references to ‘blood’ in definitions of siblings in the context of adoption.
 3. Consider developing internal drafting guidance about siblings.
- To be attentive to children and young people’s own understandings of their sibling relationships, we recommend that professionals recognise that the word ‘sibling’, along with distinctions such as half, full, step and foster, can make children fearful that relationships with their brothers and sisters are not fully appreciated. We recommend wide dissemination of the Family Justice Young People’s Board’s *Top Tips for professionals when working with brothers and sisters*.
- To ensure consistency in practice, we recommend further research about allocation and gatekeeping practices in the Family Courts in cases involving sibling groups.
- To strengthen the existing presumptions about contact between ‘looked after’ siblings, we recommend extending to siblings the existing duty on local authorities in Section 34(1) of the Children Act 1989 to allow all ‘looked after’ children reasonable contact with their parents.
- To ensure that children and young people are aware of, and more able to exercise, their rights to make applications for contact orders with their siblings, we recommend:
 1. The removal of the requirement in Sections 10 and 34 of the Children Act 1989 that siblings must first apply for permission to make an application.
 2. That at the end of care proceedings, children’s solicitors provide advice about the possibility of applying for contact orders, particularly where contact arrangements are stipulated in care plans or recitals.
- To clarify the circumstances in which it is appropriate to make contact orders under Sections 26 and 51A of the Adoption and Children Act 2002, we recommend the provision of judicial guidance.
- To enhance rigour in the assessment of sibling relationships, and to emphasise the importance of reflexiveness in the application of assumptions, in particular about age, ‘attachment’ and ‘parentification’, we recommend:
 1. Wide dissemination of *Beyond Together or Apart: Planning For, Assessing and Placing Sibling Groups* (Beckett, CoramBAAF, 2018).
 2. A review of the existing provision of professional training about sibling relationships for social work and legal practitioners.

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