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## Knowledge Exchange Seminar Series (KESS)

### **Dr Alice Diver (Ulster) - The child's right to genetic ancestry as a key element of the best interests principle in adoption, donor and surrogacy contexts: reforming adoption law in Northern Ireland**

*'Definitions of kinship and attitudes toward adoption in society at large have never ceased to emphasize the blood relation.'*<sup>1</sup>

Northern Ireland is ostensibly an open records jurisdiction in respect of adoption.<sup>2</sup> In some ways it provides an exemplar for other regions that may be struggling to achieve meaningful change, for example in relation to providing original birth certificates to adoptees or banning donor anonymity.<sup>3</sup> That said, the issue of post-adoption contact seems to remain fairly contentious,<sup>4</sup> and a variety of factors can still serve to diminish ties of kinship between genetic relatives.<sup>5</sup> Court-ordered bars on kin contact,<sup>6</sup> separation of siblings through adoption or fostering,<sup>7</sup> and wide degrees of parental

<sup>1</sup> K Wegar 'Adoption, Identity And Kinship: The Debate Over Sealed Birth Records' (1997) Yale University Press, New Haven p 43

<sup>2</sup> Original birth certificates are not generally subject to permanent closure in N Ireland and within the rest of the UK. See for example The Adoption Act 1976 (as amended by S 60 of the Adoption and Children Act 2002, enacted 30 December 2005, in respect of England and Wales) and Northern Ireland's equivalent legislation, Article 54 of The Adoption (NI) Order 1987. Note however the power of veto which still vests in the inherent jurisdiction of the High Court, in respect of ordering non-release of identifying information (*R v Registrar-General ex p Smith* [1991] 2 QB 393)

<sup>3</sup> On closed records see for example CL Baldassi 'The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change' *Canadian Journal of Family Law* (2004-2005) 21 pp 212-265

<sup>4</sup> There has been a clear move away from the argument that 'post-adoption contact of any kind may have a limited value.' in *Re A* [2001] NIFam 23 per Gillen LJ.

<sup>5</sup> See for example *SEHST v LS* [2009] NIFam 14; and *Re JJ* [2009] NIFam 2

<sup>6</sup> See for example *Re K* [2002] NIFam 13; *Re H* [1981] 3 FLR 386

<sup>7</sup> See *Webster (The Parents) v Norfolk County Council & Ors* (Rev 1) [2009] EWCA Civ 59

discretion (for example over issues such as contact or information release<sup>8</sup>) have all featured in court proceedings involving the child's right to identity and family life, both here and in other regions that permit adoption and surrogacy.<sup>9</sup> Recent case law from neighbouring jurisdictions (England and Wales, and the Republic of Ireland) should therefore be of particular interest to Northern Ireland legislators seeking to achieve reform of adoption law.

Several cases on surrogacy note the importance of having a 'legal reality which matches the day to day reality'<sup>10</sup> of biological parentage. Domestic disputes over parentage or parenthood now mainly focus however on the statutory rules on 'consented-to' parenthood for clarification and settlement.<sup>11</sup> Arguably, the notion of a right to genetic connection has been strengthened by the English case *Re G* (2013) where the High Court granted a sperm donor the right to seek leave to apply for ongoing direct contact with the child that he had fathered.<sup>12</sup> Conversely, the Irish Supreme Court, in a case involving egg donation and altruistic surrogacy between sisters, has recently limited the significance of the blood-tie, overturning the High Court's earlier granting of legal maternity to the child's genetic mother (who had provided the eggs and was in fact raising the child) on the basis that the commissioned, gestational surrogate had been the one to give birth, and was therefore the legal parent.<sup>13</sup> Despite these differing outcomes, adult-centric issues seemed quite key to both cases. The need for example to redefine or 'contractually protect' the status of legal parenthood (particularly motherhood, in the wake of technological advances in the field of assisted reproduction) or to rectify omissions in informal agreements made between donors, surrogates and commissioning parents, was more fully discussed than the identity or family life rights of the child so conceived.

Such cases highlight the difficulties associated with this area of law and policy and also indicate just how fragile a child's right to 'biological truth'<sup>14</sup> might be. Protection of such a right will often depend almost entirely upon the willingness of decision-makers (jurists, social workers, and parents) to acknowledge and reveal the realities of a child's origins, and to then actively enable access to information or contact with their birth relatives. It is generally accepted that children conceived via donated genetic material or surrogacy may face similar challenges to those experienced by adoptees.<sup>15</sup> To some extent, the darker aspects of adoption's history have served to inform changes to other areas of child protection law.<sup>16</sup> If for example post-adoption contact must be pre-agreed

<sup>8</sup> See for example *Re P (A Child)* [2008] EWCA Civ 499; *Re H & A (Children)* [2002] EWCA Civ 383

<sup>9</sup> See *Re NI and NS* [2001] NIFam 7 (24 March 2001). Contact may take the form of indirect methods such as 'letter-box' contact; it may also be restricted to a few instances per year, conditional upon natal kin not having a disruptive effect upon the placement. See *Re EFB* [2009] NIFam 7. Although the courts now tend increasingly to require that prospective adoptive parents should pre-agree to the enablement of some level of post-adoption contact, in the absence of a court order for contact being made, no legal duty on the part of adoptive parents to facilitate it will actually arise.

<sup>10</sup> *A v P* [2011] EWHC 1738 (Fam) para 26

<sup>11</sup> See the HFEA Code of Practice (as amended October 2014) available at [http://www.hfea.gov.uk/docs/06\\_Legal\\_Parenthood\\_-\\_HFEA\\_Code\\_of\\_Practice.pdf](http://www.hfea.gov.uk/docs/06_Legal_Parenthood_-_HFEA_Code_of_Practice.pdf) (accessed 09.02.15); see further P Braude, M Johnson and R Aiken 'The Human Fertilisation And Embryology Bill Goes To Report Stage' (1990) *British Medical Journal* 300 pp 1410-1412;

<sup>12</sup> *Re G* [2013] EWHC 134 (Fam).

<sup>13</sup> *M.R. & Anor -v- An tArd Chlaraitheoir & Ors* [2013] IEHC 91

<sup>14</sup> On 'biological truth' see S Franklin 'Re-Thinking Nature-Culture: Anthropology and the New Genetics' *Anthropological Theory* (2003) 3 65-85; On the 'legal truth' of parentage see also J Eekelaar 'Family Law and Personal Life' (2006) Oxford pp 54-77

<sup>15</sup> See further Nuffield Council on Bio-Ethics '*Donor Conception: Ethical Aspects of Information Sharing*' (April 2013) available [http://www.nuffieldbioethics.org/sites/default/files/Donor\\_conception\\_report\\_2013.pdf](http://www.nuffieldbioethics.org/sites/default/files/Donor_conception_report_2013.pdf) (accessed 28.04.13) See also comments on the Nuffield Report by E Blyth available

[http://www.bionews.org.uk/page\\_290373.asp?dinfo=7qYLvnCXFa3JsxzobhayPv5J&PPID=290513](http://www.bionews.org.uk/page_290373.asp?dinfo=7qYLvnCXFa3JsxzobhayPv5J&PPID=290513) (accessed 29.04.13) and a differing perspective offered by C Smart available

[http://www.bionews.org.uk/page\\_290058.asp?dinfo=7qYLvnCXFa3JsxzobhayPv5J&PPID=290513](http://www.bionews.org.uk/page_290058.asp?dinfo=7qYLvnCXFa3JsxzobhayPv5J&PPID=290513) (accessed 29.04.13)

<sup>16</sup> See further H White 'The Value of Narrativity in the Representation of Reality' in Mitchell W J J (ed) '*On Narrative*' (1980) Chicago, University of Chicago Press, p 1-23. M Strathern '*Kinship, Law and the Unexpected: Relatives are Always a Surprise*'

between triad adults before proceedings commence,<sup>17</sup> on the basis that the rights of the child are engaged in such a context, then this suggests that wider social consensus exists in relation to the need for greater openness generally in proceedings affecting children. The loss or denial of genetic ancestry can cause harm: numerous studies involving orphaned or abandoned children,<sup>18</sup> including various ‘attachment’ experiments (based on situations that were essentially cruel) have highlighted the potentially prolonged nature of such harm.<sup>19</sup> In respect of the rights of ‘origin-deprived’ children, scandals in care homes<sup>20</sup> and high profile, formal state apologies<sup>21</sup> have further revealed how adoption and surrogacy may exist as lucrative ‘industries.’ They also highlight how some of the institutions tasked with protecting parentless children might easily fail them and other members of the triad. By creating and sanctioning (or perhaps ignoring) systems that relied upon falsified records, permanent secrecy and legal fiction, law and policy-makers did much to perpetuate inequality, stigma and injustice.

In terms of achieving reform, law and policy-makers should also be mindful of how conflicting rights issues may be dealt with by the courts. Parental autonomy or family privacy rights may be said to have frequently ‘outweighed’<sup>22</sup> the child’s right to access identity via accurate information or some form of familial contact.<sup>23</sup> A focus on achieving ‘permanency’ via adoption, should not mean that access to genetic truths and the maintenance of original family ties become highly exceptional events rather than normative features of ‘created’ or social kinship.<sup>24</sup> While absolute vetoes on birth information or kin contact may sometimes be utterly necessary in the interests of child protection, these should not be framed as inevitable or automatic aspects of the processes surrounding new family creation. Decisions to permanently separate children from their birth relatives must be clearly grounded in child-centric, rights-led practice rather than in a need to reassure commissioning or adopting adults that their acquired status of legal parent is exclusive to them and free from outside challenge.<sup>25</sup> The need for placement stability has often been cited during hearings aimed at

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(2005) Cambridge University Press, New York p 3 on how modern dilemmas created by the new reproductive technologies represent a ‘recent version of a long-standing preoccupation with knowledge.’ See also S Howell ‘Kinning: The Creation of Life Trajectories in Transnational Adoptive Families’ *Journal of the Royal Anthropological Institute* (2003) (9) pp 465-484; On parental privacy interests see however the arguments of I Walker and P Broderick ‘The Psychology of Assisted Reproduction-or Psychology Assisting its Reproduction?’ *Aust Psych* (1999) 34 pp 38-44

<sup>17</sup> The triad refers here to the ‘triangle of relationships’ that exists or arises in respect of social kinship: genetic parents, social parents and adoptee or donor-gamete child. On the issue of using the term ‘triad’ see also:

<http://motherhooddeleted.blogspot.com/2009/08/myth> (accessed 01.02.12); <http://bastardette.blogspot.com/2007/10/ethics> (accessed 17.03.12); on ‘Respectful Adoption Language’ see further <http://www.originscanada.org> (accessed 02.02.11)

<sup>18</sup> J Bowlby ‘Attachment and Loss’ (Volume 3) *Loss, Sadness and Depression* (1980) London: Hogarth

<sup>19</sup> M D S Ainsworth, *et al* ‘Patterns of Attachment: A Psychological Study of the Strange Situation’ (1978) NJ: Hillsdale

<sup>20</sup> On Ireland’s ‘Magdalene Laundries’ see The Department of Justice and Equality Report

<http://www.justice.ie/en/JELR/Pages/MagdalenRpt2013> (accessed 21.04.13); see further <http://www.magdalenelaundries.com/> (accessed 22.04.13)

<sup>21</sup> See for example Australia <http://www.guardian.co.uk/world/2013/mar/21/julia-gillard-apologises-forced-adoptions> (accessed 31.03.13)

<sup>22</sup> On the balancing exercise see further J Herring ‘Connecting Contact: Contact in a Private Law Context’ in A Bainham, B Lindley, M Richards and L Trinder (eds) ‘*Children and Their Families: Contact, Rights and Welfare*’ (2003) Hart: London

<sup>23</sup> See further M Freeman ‘The New Birth Right? Identity and the Child of the Reproduction Revolution’ *The International Journal of Children’s Rights* (1996) (4) pp 273-297 p 297; A Bainham ‘Removing Babies at Birth: A More than Questionable Practice’ *Cambridge Law Journal* (2008) 67 (2) pp 260-262

<sup>24</sup> The term ‘social kinship’ refers here to the non-genetic forms of relatedness, as created by law (e.g. adoption, Special Guardianship, marriage to a child’s mother) or via custom (de facto ‘indigenous’ adoption, *kafalah*) or through assisted reproductive technologies (gamete donation or surrogacy).

<sup>25</sup> See the United Nations Convention on the Rights of the Child (1989) Article 3 (1) which states that: ‘In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’ available at <http://www2.ohchr.org/English/law/crc.html>

precluding or limiting contact with natal kin and, in some cases, to over-rule the recommendations of expert witnesses.<sup>26</sup> Cases involving non-consensual, birth-parental relinquishment are also relevant with the dicta perhaps most significant in respect of the insights that they provide into the attitudes of the affected mothers.<sup>27</sup>

As The European Court of Human Rights observed in *Anayo v Germany*, contact with, and information about, absent genetic relatives may constitute a significant aspect of the child's right to identity and cultural heritage, given the remit not only of the best interests of the child principle, but of the right to respect for family life under Article 8 of the European Convention.<sup>28</sup> As earlier Strasbourg case law has also suggested,<sup>29</sup> identity and heritage rights cannot simply be overlooked in cases involving the child's best interests.<sup>30</sup> This is so despite the fairly wide margin of appreciation that generally attaches to issues of family and private life, especially where the main question is whether or not a positive obligation exists on the part of the state to actively preserve genetic connections. As such, the keeping of accurate birth records, domestic regulation of surrogacy arrangements or gamete donation, and parental discretion over information release are particularly difficult areas. A number of dissenting Opinions clearly also stress the child's need for some degree of 'identity dignity' however.<sup>31</sup> They also offer some level of useful guidance as to how domestic laws and policies might be improved upon, to prevent (or at least minimise) the wide range of harms that might arise through the loss of genetic connection.<sup>32</sup> In terms of procedural matters, fuller involvement of birth family members in court proceedings and pre-hearing meetings (e.g. to agree post-adoption contact) has also become increasingly significant, as has the need for timely assessments of parenting skills and the right to have legal representation present during such meetings.<sup>33</sup> The 'fair hearing' rights of Article 6 of the European Convention have also been considered in such contexts. Equally, any meaningful 'right' to receive support in maintaining relationships with kinship carers, estranged siblings or grandparents, should not be completely dependent upon finite state resources, or the good will of parents and the charitable sector.

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(accessed 21.07.11). Domestic provisions (such as Article 1(4) of Adoption and Children Act 2002 in England and Wales) frame the best interests of the child as 'paramount' rather than 'primary' however. [http://www.opsi.gov.uk/acts2002/ukpagea\\_20020038](http://www.opsi.gov.uk/acts2002/ukpagea_20020038) (accessed 29.07.11); See also S Choudry 'The Adoption and Children Act 2002: The Welfare Principle and The Human Rights Act 1998-A Missed Opportunity?' *C Fam* (June 2003) 15.2 p 119

<sup>26</sup> See for example *Re P (A Child)* [2008] EWCA Civ 499

<sup>27</sup> See in particular *Down Lisburn Health and Social Services Trust v H* [2006] UKHL 36 where the use of 'Freeing Orders' and the lack of kin contact pending adoptive placement in N Ireland was particularly criticized. See for example *Re J and S* (2001) NIFam 13 (23 May 2001); *Re CBCHSST v JKF* [2000] NIFam 76

<sup>28</sup> *Anayo v Germany* [2010] ECHR 2083 (21 December). See further 'The Best Interests Of The Child In The Recent Case-Law Of The European Court Of Human Rights' Franco-British-Irish Colloque on Family Law (May 2011) available [http://www.echr.coe.int/NR/rdonlyres/E6F5D437-C49A-47C5-9772-578F54FB5C86/0/20110514\\_COLLOQUE\\_Dublin\\_FR.pdf](http://www.echr.coe.int/NR/rdonlyres/E6F5D437-C49A-47C5-9772-578F54FB5C86/0/20110514_COLLOQUE_Dublin_FR.pdf) (accessed 02.03.13)

<sup>29</sup> See for example *Neulinger and Shuruk v. Switzerland* (2010) [GC], no. 41615/07 ECHR; *Y C v United Kingdom* (2012) (App 4547/10) ECHRR; *R and H v United Kingdom* (2011) 54 EHRR 28; See for example *Marckx v Belgium* (1979) (application no 6833/74) (1979); *P C and S v United Kingdom* (2002) 35 EHRR 1075

<sup>30</sup> See for example *Frette v France* [2004] 38 EHRR 21 (42); *Kearns v France* ECHR 10 January 2008 (Application no 35991/04); *S.H. And Others v. Austria - 57813/00* [2011] ECHR 1878 (3 November 2011); *Ahrens v Germany* (App 45071/09) ECHRR (22 March 2012)

<sup>31</sup> See *Odièvre v France* [2003] 1 FLR 621 App no 6833/74 Dissenting Opinion at para 7, per Judges Wildhaber, Sir Nicolas Bratza, Bonello, Loucaides, Cabral Bonetto, Tulknes and Pellonpää

<sup>32</sup> See for example *Neulinger and Shuruk v Switzerland op cit* at n 28

<sup>33</sup> See for example *R and H v United Kingdom* (2011) 35348/06 ECHR 844; *Y C v United Kingdom* (2012) (App 4547/10) ECHRR



The question of whether Special Guardianship Orders may be regarded as a more child-centric, 'halfway house' between adoption and long term fosterage is perhaps a key one.<sup>34</sup> Arguably, these 'new' Orders might help to prevent siblings from being permanently separated from each other, allow for genetic relatives to be afforded the support needed to raise an at-risk child, or preserve some degree of family contact for the looked after child. As with the development of informal policies on surrogacy (where for example hospitals, or immigration officers at entry points to the UK are being left to decide the fate of children so conceived) an *ad hoc* approach is seldom the best idea.<sup>35</sup> For 'socially constructed' family units<sup>36</sup> in particular, definitions of the child's best interests must include longer term psychological elements.<sup>37</sup> As Miller notes, 'secondary' welfare issues (e.g. opportunities for education, financial support, parental ill-health) may lead expert witness in court proceedings to find simply that '*the effects of poverty on a child are more damaging than the benefit of visitation.*'<sup>38</sup> Adoptive or commissioning families may hold a more powerful socio-cultural position than genetic relatives; their more secure financial position can enable the overcoming of infertility and the achievement of parenthood. Genetic relatives might then be regarded as able to provide only 'visitations' which carry no discernible material gain.

Ultimately, a positive obligation to protect child welfare should act as the main catalyst for reform of this area of law, with legislators and jurists accepting that the psycho-social significance of genetic connection merits greater recognition than it currently tends to receive in law and policy. If significant harms can flow from genetic kinlessness, or from a lack of accurate information, then it surely follows that the loss of natal kinship should be framed in law and policy as an exceptional rather than everyday occurrence.<sup>39</sup>

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<sup>34</sup> See A Bainham 'Permanence for Children: Special Guardianship or Adoption?' *Cambridge Law Journal* (2007) 66 (3) 520-523; C Talbot and P Kidd 'Special Guardianship Orders-Issues in Respect of Family Assessment' *Fam LJ* (34) 273 (April 2004)

<sup>35</sup> On the limitations of International law in this area see further ED Blyth and A Farrand 'Anonymity in Donor-assisted Conception and the UN Convention on the Rights of the Child' 12 *Int'l J Child Rts* 89 (2004) pp 89-104

<sup>36</sup> E Haines (1988) 'Secrecy: What can Artificial Reproduction Learn from Adoption?' *International Journal of Law, Policy and the Family* (1988) (2) 46- 61 p 47; See further K Hargreaves 'Constructing Families and Kinship Through Donor Insemination' *Sociology of Health and Illness* (2006) 28 (3) pp 261-283; G McGee, S V Brakman and A Gurmankin 'Gamete Donation and Anonymity: Disclosure To Children Conceived With Donor Gametes Should Not Be Optional' *Human Reproduction* (2001) 16 (10) pp 2033-2038

<sup>37</sup> G H Miller 'The Psychological Best Interest Of The Child Is Not The Legal Best Interest' *Journal of the American Academy of Psychiatry and the Law* (2002) 30 196-200 p 197. See further J Eekelaar 'The Interests Of The Child And The Child's Wishes: The Role Of Dynamic Self Determination' in Alston P (ed) *The Best Interests Of The Child: Reconciling Culture And Human Rights* (1994) 42-61 Oxford: Clarendon Press.

<sup>38</sup> *ibid*

<sup>39</sup> See G S Kim, K L Suyemoto, CB Turner 'Sense of Belonging, Sense of Exclusion, and Racial and Ethnic Identities in Korean Transracial Adoptees' *Cultural Diversity and Ethnic Minority Psychology* (April 2010) 16 (2) pp 179-190 on the perception of group meanings as to race and culture; C Hill and M Edwards 'Birth Family Health History' *Adoption and Fostering* (2009) 33 (2) pp 45-53 on the potentially adverse consequences of a lack of information on the child's health history and the ability of adopters to offer 'therapeutic parenting'. A significant number of origin-deprived persons will probably, at some stage in their life, attempt to seek out some level of basic information on their genetic ancestry. See B J Lifton 'The Formation of the Adopted Self' *Psychotherapy in Private Practice* (1990) (8) 85-92; E W Carp 'Family Matters: Secrecy and Disclosure in the History of Adoption' (1998) Harvard University Press, Cambridge; J Triseliotis 'Adoption with Contact' *Adoption and Fostering* (1985) 9 (4) 19-24

