

# Legal Spotlight

## Concealed Pregnancies: Should Fathers or Family be told?

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Court of Appeal case of *Re A, B and C (Adoption: Notification of Fathers and Relatives)* [2020] [2020] EWCA Civ 41, [2020] 1 FLR 1157 is now a key authority on concealed pregnancies and the duty of disclosure in care proceedings. Three consolidated appeals were heard together on the issue of whether fathers or wider family should be informed in secret pregnancy cases where adoption is a realistic option for the court. The Court of Appeal provided guidance as to the principles that govern decisions by both local authorities as adoption agencies and courts as to whether a putative father or relative should be informed of a child and/or proceedings. Notably the court decided that the core principles (welfare paramountcy, welfare checklist and prejudicial effect of delay) are not directly engaged in a decision to notify a father or relative about a child's existence or proceedings.

### The background

I was trial counsel in the case in Appeal Case B. A summary of the facts of all three cases is set out below. The children from each of the three cases are referred to as A, B and C.

Case A – this concerned a young student. She wanted A adopted. She wanted A's birth to be kept secret from the father and the wider family. The trial judge decided there was no obligation to inform the family; A's guardian then appealed. The appeal was allowed by the Court of Appeal.

Case B – B's mother wanted to care for B but the local authority had significant

concerns. Adoption was a realistic option before the court. The local authority wanted to explore all family options before advancing a plan of adoption. B's mother argued there was a risk of abuse from her family and from the putative father; she was also scared of her family's reaction to her having a child out of wedlock and with someone of a different race and cultural heritage. mother appealed a decision by the trial judge to inform her relatives of B's existence. The appeal was dismissed by the Court of Appeal.

Case C – C was a baby who was relinquished at birth. C's parents were married and had other children. C's mother said C was conceived as a result of rape. mother appealed a decision by the court to notify the father and wider family. The appeal was dismissed by the Court of Appeal.

The Court of Appeal had to decide whether, irrespective of the mother being the only person whose formal consent is required for adoption (this was the situation in two of the conjoined appeal cases), the father and/or relatives should be notified of the birth and the proceedings relating to the child.

### The court's decision

The Court of Appeal considered the statutory material that underlined the importance of engaging the wider family in the adoption process. They looked at whether the concepts of the 'no delay' principle, the paramountcy principle and welfare checklists applied when local authorities considered whether to notify fathers or family members of a child's birth or proceedings.

The court reviewed European case law in the context of Arts 6 and 8 and also undertook a comprehensive review of domestic case law.

The Court of Appeal concluded that in domestic law there was a consistent approach taken by family judges that identifies arguments for and against disclosure to putative fathers and relatives. The Lord Justices summarized the authorities withholding information in confidential adoption reports and the authorities on notification of father and relatives, both where disclosure was directed and cases where disclosure was withheld.

Ultimately in domestic law there is authority, both at first instance and on appeal, that clarifies the local authorities and courts have a discretion as to whether fathers and families are informed (para [59]). The discretion requires identifying and balancing all relevant factors. Case law makes clear a mother's right to confidentiality is not absolute and the presence / absence of family life is important but not decisive; where it exists there needs to be strong countervailing factors to justify withholding information as to the child's birth and proceedings.

The theme of the body of domestic authorities appears to be, although ultimately each case is determined on the particular facts of its case, that in most cases disclosure will be appropriate and absence of notification is the exception. Welfare of the child is important but there is no suggestion the paramountcy principle applies to the discretion to notify family.

A summary of what the court decided is set out below.

- (1) The core principles (welfare paramountcy, welfare checklist and prejudicial effect of delay) do not directly to a decision about notifying a father or relative about a child's existence or proceedings (para [83]). The principles are 'central' to the notification decision but the principles are not directly engaged (para [84]).
- (2) Consistency applies: there is no difference in how the law applies to decision-makers whether they are the courts or social workers. Similarly there is no hierarchy between relatives, eg

father and grandparents (para [85]): it depends on the facts of the case.

- (3) The court underlined the need to decide at a 'very early stage' whether an application to court should be made to determine whether family should be informed and consulted. In some cases the local authority can make the decision whether to proceed on the basis of mother's consent; in other 'less clear-cut' cases the Lord Justices state an application should be issued. Applications in relation to a putative father should be under Part 19 unless there are issues of significant harm which make it necessary to apply for care and placement orders. The court suggests an equivalent application under the inherent jurisdiction can be made where a local authority has doubts about notification to a close relative.
- (4) At para [88] the court set out practical guidance for applications.
- (5) At para [89] there is – for the first time despite the considerable case-law – a helpful summary of principles governing decisions (by local authorities as adoption agencies or court) as to whether a putative father or relative should be informed of a child / proceedings.

Unusually in this case all counsel for the three appeals were invited by the Court of Appeal to contribute to a protocol for local authorities in concealed pregnancy cases. This is referred to in para [87] of the judgment and should hopefully be approved for wider circulation in due course.

### The effect of *Re A*

*Re A* and others is now a key authority in all cases where the existence of a child is concealed from family and adoption (and potentially foster care) is a realistic option.

The court considers what the duties of local authorities to notify and / or assess fathers and relatives are. It makes clear there is no statutory obligation on a local authority to make enquiries in every case and the issue of notification is a matter of discretionary judgment on the facts of each case.

However for the first time the Court of Appeal set out guiding principles and practical steps that should be followed by decision-makers – namely local authorities as agency decision-makers and courts – in such circumstances.

The same constituted Court of Appeal decided another case this year citing the case of *Re A* and others. The case of *Re L (Adoption Order: Identification of; Possible Father)* [2020] EWCA Civ 577, [2020] 2 FLR 225 raised two related questions namely, to what extent does the same approach apply where there is uncertainty about the child's paternity and how should a court respond to a proposal that paternity should be investigated by carrying out DNA testing on other children of the mother without reference to the possible father. The facts of *L* were unusual. The mother had two other children with a person who she originally named as the baby's father. Her

account changed later and she said the baby was conceived after a drunken encounter with a third party and she feared the consequences if her partner was told of the baby's birth. She proposed sibling testing to establish the baby's paternity. The mother's appeal was dismissed; on the facts of that case the Court of Appeal considered that the approach of the trial judge to refuse sibling testing was correct.

It remains to be seen whether the legacy of *Re A* and others will be refined further in appeals to come.

For further reading on this topic, see articles by Dr Andrew Bainham in the September Family Law ) [2020] Fam Law 1180) and Malvika Jaganmohan and Madeleine Whelan in the August Family Law ([2020] Fam Law 1084). A case report of this was at [2020] Fam Law 423).