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A functional approach to defining family in the High Court

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The President of the Family Division’s judgment in *Re H (Step-Parent Adoption: Human Rights)* [2023] EWHC 3186 (Fam) involves the court using the Human Rights Act 1998 to read down additional words to the Adoption and Children Act 2002 to allow a stepfather to adopt his stepson, following the mother’s death. But the importance of this decision extends beyond adoption law. The decision is of wider significance for family law because it is an example of a court adopting a functional approach towards defining family which demonstrates the practical and symbolic benefits that can be associated with recognising functioning family relationships in a formal sense.

Re H involved a stepfather’s application under section 51(2) of the Adoption and Children Act 2002 to adopt his then 17-year-old stepson, ‘H’. The stepfather had lived with H for 15 years, having married H’s mother when H was 2 years old. A child arrangements order and a guardianship order were in place in favour of the stepfather at the time of the application. As Sir Andrew McFarlane recognised, this case should have been ‘a straightforward application’ [1], but H’s mother death in early 2020 complicated matters.

The issue at hand was the way in which s51(2) is phrased. The section reads:

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 section has been written in the present tense. This suggests that the court ought to be satisfied that the applicant is currently a ‘partner of a parent of the person to be adopted’, but given H’s mother’s untimely death, the stepfather could not demonstrate that he was currently a partner of H’s mother. The court heard submissions from counsel on behalf of the applicant, counsel on behalf of H, and a solicitor from Cafcass. All three requested that the court use its jurisdiction under section 3 of the Human Rights Act 1998 to read the following additional words into s51(2): ‘or was the partner until the time of the parent’s death’ [3], [16]. The effect of this reading in would be that the court could grant the adoption order. As the President explained, while the stepfather could have initiated proceedings under s51(1) of the 2002 Act to apply for a single adoption order, the effect of this order would be detrimental to H because this order would end all legal ties between H and his mother and her family [12]. Pursuing an order under s51(2) would be

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preferable because this means that H would be adopted by his stepfather, while at the same time retaining a legal tie to his mother and her family.

The court accepted that H and his stepfather 'have the fullest possible family life relationship sufficient to engage Article 8 of the ECHR' and that they have 'private life rights with respect to each other' [24]. So, the question was whether it was possible to use s3 of the Human Rights Act to read s51(2) in a way that was compatible with Convention rights. Following consideration of the approach the court ought to take to s3 in previous authorities, the President concluded that the court should have regard to the underlying purpose of the legislation and that 'it is necessary to construe the provision in a "purposive way" [27]. The court heard evidence that the purpose of the 2002 Act and the provision for stepparent adoption was to allow a child to benefit from a legal tie with a partner of their parent, without having to break legal ties with their natural parents [28], [45]. As such, allowing the application under s51(2) had the effect of giving H the benefit of a permanent legal tie with his stepfather, while also maintaining legal ties with his maternal family [31] and should be allowed to protect the parties' Convention Rights.

While the case was successfully argued on human rights grounds, in essence the arguments and the court's approach centre on adopting a functional approach towards the issue of defining family. A functional approach towards defining family looks beyond blood ties or legal relationships, that is, it looks beyond any formal relationship between the parties, and instead focuses on the functions that the relationship performs. As Millbank (2008) succinctly explains it:

Functional family claims rest on a performative aspect, that is, the parties are granted legal rights because of what they do in relation to one another, not because of the status of who they are or what manner of legal formality they have undertaken.

A functional approach to defining family could be seen as a practical application of David Morgan's 'family practices' approach (2011), whereby family is defined by reference to its functions. The issue in *Re H* was created by the narrow construction of section 51(2), which due to its framing in the present tense, suggests that a stepparent's relationship with their partner's child is dependent on the partner, and as such will end upon the partner's death. But the reality of the situation was that H and his stepfather had a strong connection which was created while the mother was alive, and continued to function after her death. In this way, the human rights arguments were being used as a vehicle to allow for the functioning family relationship to be recognised in a formal sense, even though the drafting of the statute as enacted prohibited this.

Much of the judgment focused on the lived reality between H and his stepfather and considering how their relationship functioned and how valuable it was to both parties due to the functions that the relationship exhibited. It is noted at the outset that H's natural father had never been involved in H's life and did not have parental responsibility [6], and that H had lived with his mother and stepfather as a family unit from the age of 2 [7]. H also wrote a letter to the court in support of his stepfather's application, whom he refers to as 'my dad', and while he described that their relationship had been difficult following his mother's death, a telling part of his letter is where he explains that his stepfather 'was simply always there' [13]; the 'dynamics' of the relationships continued despite the mother's death [43]. Granting the order meant that H maintained

legal ties with his mother's family, which would be extinguished should the court make an order under s51(1), as well as formalising his relationship with his stepfather. As such, in granting the order, H's legal family relationships now align with the functioning family relationships that are important to him. The 'reality of the emotional, psychological and lived experience' of H and his stepfather have been recognised and formalised by the adoption order [31].

The significance of the decision is that it illustrates the benefits of recognising families based on the functions they perform. The adoption order is not 'just a piece of paper' [44]. The benefits to the parties are not merely practical in ensuring H had a legal parent before he turned 18. There is also symbolic significance in that H's relationship with both his stepfather and his maternal family can be maintained not only as a matter of fact, given these relationships were already functional and thought of as valued family relationships by all involved, but are placed on a formal footing via the order. The decision should not be thought of as radical, given that the stepfather was married to H's mother, and so could be thought of as a way of formalising the status of this once nuclear family following the mother's death. But the decision is still significant in that it shows that family relationships are often valued because of the functions they perform, and formal recognition of this functional reality offers practical and symbolic benefits. The decision not only respects the parties' Convention Rights, but also aligns the formal position with the reality of H's family life.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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