**Case No: LS169/18 & LS170/18**

**IN THE FAMILY COURT SITTING AT LEEDS**

**Coverdale House**
**East Parade**
**Leeds**

**Before:**
**HIS HONOUR JUDGE HAYES QC**

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**Between:**

**Mr & Mrs N** — **Applicants**

**- and -**

**(1) A Local Authority**

**(2) Mrs X**

**(3) Mr X**

**(4) Child H**

**(5) Child E** — **Respondents**

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**Nigel Priestley (Solicitor) for the Applicants**
**Debra Brown (Solicitor) for the 1 st Respondent Local Authority**
**The 2 nd and 3 rd Respondents were not present or represented.**
**Joanne Coen (Solicitor) for the 4 th and 5 th Respondent Children acting by their Children's Guardian.**

**Hearing Date: 18 May 2018**

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**Re H & E (Statute Barred Application by Foster Carers - Section 9(3) of the Children Act 1989)**

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**JUDGMENT**

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1. These applications concern two children:
Child H (aged 3); and
Child E (aged 2).

2. The applications are made by Mr and Mrs N. They are local authority foster carers. Mr and Mrs N seek:
(a) leave to apply for Child Arrangement Orders in respect of H and E; and
(b) leave to apply revoke the Placement Orders that were made in respect of H and E on 25 August 2017. I was the Judge who conducted those earlier proceedings.

3. H and E are the younger two of four children who were removed into foster care in November 2016. They have an older half sibling A (aged 8) and an older full sibling B (aged 6). A is a half sibling as she has a different mother. All four children share the same father.

4. The previous public law proceedings commenced after A suffered a very serious assault by strangulation inflicted by her step-mother, Mrs X. As the case developed there were other matters that featured including neglect of E and expert psychiatric and psychological evidence relating to Mr and Mrs X. I need say no more about this, save to say that the state of the evidence was such as to present a formidable body of evidence to the court that to return any of the children to the care of Mr and Mrs X would be to expose them to an unacceptable risk of significant harm. A's mother did not participate in the proceedings relating to her daughter nor challenge the plan for her.

5. On 29th May 2017, a further sibling, C, was born and she too became the subject of proceedings and was placed in interim care after her birth. Care and Placement orders were made (by consent) regarding C on 27 July 2017.

6. The final hearing in respect of A, B, H and E came before me in August 2017. In a Judgment handed down on 25 August 2017, I approved the making of final care orders in respect of all four children. The Care Plans for A and B provided for those children to remain in long-term foster care in separate placements. For H and E, the care plans approved by the court provided for them to be placed for adoption and Placement Orders were granted giving the LA permission to take that course. In its first Skeleton Argument prepared in relation to today's hearing, the LA has reminded the Court of the evidence before the Court in August 2017 which explained why it was not proposed to place H and E permanently with their older sibling B. Their Care Plans, approved by the Court, provided for a joint adoptive placement to be sought for H and E and the LA has planned on that basis.

7. The LA's planning to place H and E for adoption is now at the stage where prospective adopters have been identified for both boys. The prospective adopters have met with the boys on 2nd May 2018 and they have met with the boys' regular foster carers. On 3rd May 2018, the prospective adopters attended a meeting with the professionals involved in the children's lives. A matching panel is to be held on 21st May 2018 and, if the adoptive match is approved, then it is hoped that introductions can start between the boys and their prospective adopters on 30th May 2018 with a view to them moving to live with their prospective

adopters in the second week in June 2018. Given that the planning of the LA is at this stage, when these applications first came before me on 15th May 2018, I directed that an urgent hearing was required on the legal issue raised in relation to section 9(3) of the Children Act 1989. I had already received some written submissions by both parties but I directed further Skeleton Arguments by 4.00pm on 17th May 2018 and listed the matter back before me on 18th May 2018.

8. At the hearing on 15th May 2018, the LA submitted that section 9(3) of the Children Act 1989 applied and that, therefore, there was a statutory bar to Mr and Mrs N making an application for leave to apply for a section 8 order (absent the LA's consent). Therefore, the LA submitted, the Court should dismiss this application (and the corresponding application for leave to apply to revoke the Placement Orders) as – to put it simply – the effect of section 9(3) was to erect a statutory hurdle that Mr and Mrs N are unable to cross. On behalf of Mr and Mrs N, it was argued that they did not fall within the scope of section 9(3) as they are not the day-to-day foster carers for the children. Rather, they are foster carers who have only had the children stay with them from time to time during holiday periods, albeit for some weeks at a time. It was therefore argued that section 9(3) did not operate to prevent a leave application being made and that the Court should proceed to address this application with reference to the criteria in section 10(9) of the Children Act 1989 and grant leave under that section.

**Section 9(3) of the Children Act 1989**

9. Section 9(3) of the Children Act 1989 provides:

"A person who is, or who was at any time within the last six months, a local authority foster carer of a child may not apply for leave to apply for a section 8 order with respect to the child unless-

(a) he has the consent of the local authority;

(b) he is a relative of the child; or

(c) the child has lived with him for at least one year preceding the application".

10. It is readily apparent that Mr and Mrs N do not satisfy any of the three conditions that are stipulated in (a), (b) and (c) above in that:

(a) They do not have the consent of the LA;

(b) They are not related to H and E; and

(c) Neither H nor E have lived with them for at least one year preceding their application.

11. The question that I have to resolve is whether Mr and Mrs N do not, in fact, fall within the scope of section 9(3) at all. This raises the question whether their status as holiday foster carers for the boys rather than their day-to-day foster carers brings them within or takes them outside the scope of section 9(3).

12. I observe at this juncture that section 9(3), originally enacted, was worded differently. Section 9(3)(c) previously stipulated a longer period of three years (rather than the one year period now prescribed by the statute in its amended form). In addition, section 9(3)(c) used to be qualified by wording in what was section 9(4) which provided that, "The period of three years mentioned in subsection (3)(c) need not be continuous but must have begun more than five years before the making of the application". However, section 9(4) has been repealed.

13. I mention the former law as it used to be the case that unless a child had lived with foster carers for three years, the statutory bar to foster carers making a leave application took effect. There was some (limited) qualification to that stringent test by the wording in section 9(4) which allowed for the three years not to be a continuous period but it had to have commenced within 5 years of the application.

14. Parliament changed the law in 2002 by bringing in the wording of section 9(3) that now applies and repealing section 9(4) – see section 113 of the Adoption and Children Act 2002.

15. It is the natural inference to be drawn from the legislative change that was made that Parliament concluded that a three year qualifying period for foster carers was too long, in particular where (unless one of the other conditions in section 9(3) applies) section 9(3)(c) operates as an absolute bar to the making of a leave application. At the same time, Parliament stipulated the period of one year and removed the flexibility in how that minimum qualifying period is calculated by repealing rather than amending the wording of section 9(4).

16. The legal effect of section 9(3) is thus clear. A foster carer for a child who is neither a relative nor has the consent of the LA cannot apply for leave to apply for a section 8 order unless that child has been living with the foster carer for at least one year preceding the application.

17. In the present case, the application has been made by Mr and Mrs N who are the regular foster carers for the older sibling B. They refer within their application to the fact that H and E have spent holiday periods with them when they have acted as temporary foster carer for the boys. The LA has identified those periods of time. They fall on the following dates:

(a) 23rd May 2017 to 8 th June 2017;

(b) 10 th September 2017 to 25 th September 2017; and

(c) 9 th April 2018 to 30 th April 2018.

18. In its first Skeleton Argument prepared for the hearing on 15 th May 2018, the LA submitted that:

> "These occasions add up to a total of some seven weeks, and are far from the 52 weeks the statute provides for. Three of those weeks are within the last 6 months which bars them from making such an application".

19. In fact, as I have observed, there is no provision within the 1989 Act (since the repeal of section 9(4)) to aggregate periods of time and calculate a total. What the Act in fact requires is something more straightforward, namely that the child has lived with the foster carer for *at least one year preceding the application.*

20. In this case, the children have lived with Mr and Mrs N as foster carers. Mr Priestley [the Solicitor for Mr and Mrs N] fairly and properly conceded during oral submissions that the documentation presented to the Court showing this could not be clearer. It shows that when H and E were living with Mr and Mrs N, they were formally approved as their foster carers and expressly referred to as such.

21. However, what is argued on behalf of Mr and Mrs N is that the purpose behind section 9(3) was not to debar persons who had performed that type of role from making a leave application. I quote how this point was put by Ms Sowden, Counsel who prepared the Skeleton Argument for today's hearing on behalf of Mr and Mrs N:

> "It is submitted that while on face value it may seem that s9(3) Children Act 1989 could apply in this case, in our submission it does not.
>
> The Court has to determine whether Mr and Mrs N are 'foster carers' for E and H, it is submitted that section 9(3) should be interpreted as referring to the predominant carer of the children.
>
> Mr and Mrs N are the predominant foster carers for B, the full sibling of E and H and to allow the foster carers of E and H to have a holiday and to enable the children to maintain their sibling bond, have facilitated E and H staying with them for holidays and for days out.
>
> During the periods of respite care, the children's primary carers have remained as Mr and Mrs Z [E and H's main foster carers]. They are the foster carers for these children, they are the ones who have determined the children's routines and made decisions about the children's care.
>
> Mr and Mrs N do not see themselves as foster carers for E and H, they seem themselves as family friends who provide support to the children's foster carers, and provide for the children's basic care needs while their primary carers are indisposed.
>
> It is Mr and Mrs Z who have been matched as the children's foster carers, which is different to Mr and Mrs N who have only ever been approved as short break / respite carers. It has never been the intention of the Local Authority for them to be any more than this, nor have they ever been treated as more than this.
>
> The intention of the statute should be seen as to prevent a dispute between the primary carer foster carer of a child and the Local Authority for whom they are caring. In this case the situation is entirely different, the applicants are the respite carers, who although [they] have provided some care to the children, they cannot on any interpretation be seen as their primary carers.
>
> It is further submitted that when interpreting this statute the Court should also have regard to the

overriding ethos of the Children Act 1989 as set out in s1(3) that being, the child's welfare as paramount. Mr and Mrs N intend to apply to adopt B, and wish to provide a safe, stable, long term care, preferably by way of adoption, to H and E, this will enable all three full siblings to be brought up together and maintain their sibling bond which has been nurtured and developed since the final Orders were made.

It is therefore submitted that Mr and Mrs N although [they] are foster carers, are not the foster carers for E and H and therefore it is s10(9) and not s9(3) Children Act 1989 which applies when the Court is considering leave for the Applicants to make their application".

22. I have considered these points carefully. However, I reject the submission that Mr and Mrs N's more limited role when acting as foster carers for the boys takes them outside the scope of section 9(3). I have come to this view for the following reasons:

(a) There is nothing in section 9(3) of the 1989 Act which draws the distinction that I am invited to draw. If Parliament had intended that those who care for children as only holiday foster carers (or some other similar temporary foster care arrangement) should escape the statutory bar in section 9(3), it was open to Parliament to have drafted the legislation so as to make that distinction clear. But Parliament did not do so. I have to construe and apply section 9(3) as it is worded.

(b) I am reinforced in this view by the fact that section 9(3) is drafted in such a way as to draw other important distinctions. In particular:

i. Section 9(3) distinguishes between foster carers who are relatives and foster carers who are not. Those who are relatives are not debarred from making a leave application by reason of section 9(3)(b).

ii. For non-relative foster carers who have looked after a child for less than a year, the Act distinguishes between those who have the consent of the LA to make the application and those who do not. This is the effect of section 9(3)(a).

iii. However, for non-relative foster carers who have looked after a child for more than a year, they escape the effect of section 9(3) altogether even if the LA does not consent. This is the effect of section 9(3)(c).

23. I consider that the purpose behind section 9(3) is clear as is its legal effect. It acts as a statutory bar to non-relative foster carers making a leave application unless they have the consent of the LA or they have cared for the child for at least one year preceding the application. The qualifying period of one year is an important part of the overall structure of section 9(3). It is a recognition by Parliament that those who have acted in the role of foster carer for a period of one year or more are to be treated differently to those who have performed that role for a lesser period. Non-relative foster carers who have looked after a child for more than a year can make an application seeking leave to apply for a section 8 order without LA consent. It is the fact of having looked after the child for one year or more which "carries the day" and allows them to make a leave application. But those who cannot satisfy that one year qualifying period need LA consent. If they do not, section 9(3) bars them from pursuing a leave application.

24. Applying the statute in this way, I turn to the position of Mr and Mrs N. They have acted as foster carers for H and E within the last 6 months. But the children have not lived with them for at least one year. Indeed, they fall a long way short of that qualifying period. The LA does not consent to them making an application. They are not related to H and E. Therefore, they cannot surmount the section 9(3) hurdle. It operates as a statutory bar to any leave application being made by them.

25. In circumstances where section 9(3) of the 1989 Act operates as a statutory bar to Mr and Mrs N making an application for leave to apply for a section 8 order, I ask myself where this leaves their application under section 24(2) of the Adoption and Children Act 2002 for leave to apply to revoke the Placement Orders in respect of the boys. In the course of oral submissions before me today, Mr Priestley, the Solicitor acting for Mr and Mrs N, accepted that these two leave applications are inextricably linked. He put it in this way: "They either live together or they die together".

26. I consider that Mr Priestley was right to make that concession. Let me spell out why. In my Judgment, it cannot be right that if (as they are) Mr and Mrs N are prevented by statute from making an application for leave to apply for a section 8 order they can nonetheless seek to thwart the LA's planning for these children by seeking leave to apply to revoke the Placement Orders. Section 9(3)(a) of the 1989 Act is there for a purpose. The statute allows the LA to refuse consent where a foster carer (who is not a relative and who has not cared for a child for over one year) wishes to seek to leave to apply for a section 8 order. In the ordinary course of events, a local authority is likely to exercise that "veto" under section 9(3)(a) when the foster carers' proposed application is contrary to the LA's plan for the child. That is exactly the case here. The very reason why the LA has refused its consent to Mr and Mrs N making an application seeking leave to apply for a section 8 is because (i) it runs counter to the LA's plans for H and E that were approved when the Placement Orders were made on 27 August 2017; and (ii) the LA is now at an advanced stage of planning to place the children for adoption. In such circumstances, it cannot be right that Mr and Mrs N can seek to prevent that process by another means, namely by seeking leave to apply to revoke the Placement Orders. To do so would render redundant the clear legal effect of section 9(3) of the 1989 Act. Accordingly, I refuse that application also.

**HHJ Hayes QC**

**18 th May 2018**