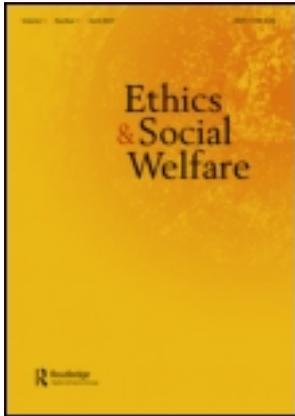


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A Duty of Care—Conflicting Rights: The Importance of Demonstrating Integrity and Accountability when Things go Wrong

Hazel Davies

Introduction

Child protection work involves continuous decision making about the safety of the most vulnerable sector of society in what can only be described as a perennial grey area. For interventions involving children at risk of significant harm rarely have ‘right’ (or ‘wrong’) outcomes: at best, they have outcomes that achieve an essential modicum of stability reached by planning based on the limitation rather than the eradication of risk factors. Harm to the child incurred by remaining with parents when personal problems significantly undermine the standard of care provided must be weighed against the inevitable damage of removal, whether short- or long term, and often it would take the wisdom of Solomon combined with divine omniscience to foresee which is the lesser of the two evils. Add to this the fact that people change, not consistently as professionals might wish but rather unpredictably, sometimes for the worse but occasionally also for the better. For this reason, it is impossible to avoid ‘mistakes’ altogether in social care work and I am continually amazed that social workers ‘get it right’ as often as they do. Society owes the profession a margin of error that it is reluctant to concede. However, miscalculations born of an understandable bias towards the side of caution are compounded when social workers—and other professionals involved in the child protection process—make decisions based on inaccurate information for the consequences of which they subsequently refuse to take responsibility. Family advocates, such as I am, are all too familiar with the tortuous situations that can arise when poor practice is exacerbated by deliberate attempts to conceal human error in a system that is groaning under the strain of its workload. The dilemma which I wish to examine here is the potential for abuse that such a disregard for professional ethics can foster.

‘Parents’ Aid’ is a voluntary organisation that provides support services to families who are at risk of social exclusion in a southern English county, and I have co-ordinated it for over the last 20 years. Most of our users are Social Services’

clients: the case I have chosen to illustrate the dilemma in question was atypical, because the user was a former Social Services' client whose difficulties arose from a case that had gone to court many years previously, in another county. As an advocate, I present the case below in the light of my experience of the protagonists: I recognise that other parties may have a different perspective.

Case Study

A baby girl, S., had been taken into care at just nine weeks in consequence of the death of an older sibling. She was placed for adoption immediately on removal and a full care order was obtained when she was just six months old. These proceedings were conducted under the Children and Young Persons' Act 1969, which gave UK Local Authorities considerably more freedom to make plans for looked-after children than is presently the case under the Children Act 1989. Parental contact was suspended immediately and duly terminated in writing and from that moment on S. was allowed neither correspondence with nor updated information about her birth family. S.'s younger sister, J., was born just 13 months after S. and remained in the care of her mother, who had moved to a different area and divorced the children's father. A 'freeing' order was obtained when S. was three on the grounds that her mother was withholding consent to her adoption unreasonably and she was subsequently adopted.

In 2002, when S. was an adult, the Adoption and Children Act was passed, Section 98 of which provides for the exchange of information between persons who were adopted before 2005 and their birth relatives. This was implemented by the Adoption Information and Intermediary Services (Pre-Commencement Adoptions) Regulations 2005 (SI 2005/890). S.'s birth mother, A., who with J. had sent annual letters and cards to S. through the Local Authority's letterbox contact service—letters which were not given to her—subsequently sought to utilise this legislation to establish contact. A. made an application for intermediary services to the agency instructed by the local authority in question which was dismissively refused on the grounds that provision of the service might compromise the welfare of the subject. The perceived threat to S. was the conflict between the account of the events leading to her adoption now put forward by A. and the version recorded in the file. In particular, the file stated that S.'s elder sister's death had resulted from drowning in her bath while A. was unconscious from a combination of alcohol and prescribed drugs. A. now disclosed that the children's father had returned from a day-long drinking session to find her bathing the infant, assaulted her and gone out again leaving the baby in the bath. She produced blood test results and a written record of property confiscated by the police following the incident which together proved that she had not been intoxicated nor under the influence of any drugs. The allegation that she had collapsed from drink had originated with the father and had previously gone unchallenged due to A.'s fear of his violence, which had been a

severe and recurrent feature of the marriage. No criminal charge had ever been brought against A. and the inquest verdict (this hearing had followed the care proceedings) had been one of accidental death.

A. had referred to Parents' Aid requesting advocacy and support during the application process. She was now told at an interview with the agency's CEO that, were she to accept responsibility for her baby's death, an intermediary service which might put her in touch with S. would be provided. However, were she to refuse, intermediary services would be withheld. This position obliged her to plead guilty to a manslaughter which she was able to prove that she had not committed as the price of contact with her adopted daughter. She continued to refuse to acknowledge the validity of the file version.

J. then requested an intermediary service in her own right and she and S. were allowed to exchange letters via the agency, so 'protecting' S.'s anonymity. S. wrote one friendly letter but despite e-mailing occasional news updates over a period J. then heard no more from her. Perplexed, she pressed the agency—seemingly reluctant to engage with her—for information and was told that S. had decided contact made her feel uncomfortable. Both A. and J. wrestle with the suspicion that S. may be subject to manipulation by those who have her ear, an anxiety perhaps understandable in consideration of the way they had been treated.

The Ethical Dilemma: The Tension between Opposing Rights

This case study throws into sharp relief the conflicting rights, both of the adopted person and their birth relatives, which compete for predominance when the quality of social work reporting has been so poor that allegations which were presented to the Court as evidence are still the subject of dispute 30 years later. On the one hand, the discovery that the facts underlying her adoption might be at variance with the account with which she had grown up could cause S. confusion and distress. Presented indelicately to her, the very evidence that cleared her mother of criminal responsibility for her sister's death could imply a challenge to the legality of her adopted status, with all that this entailed for her identity and security. On the other, as an adopted adult she has a right to the full facts about her heritage. As if to lend credibility to the negligence scenario which had formed the basis for the care order, A. is described in the file as an unstable woman with a psychiatric history who, it is implied, was capable of having drowned her baby in some sort of alcohol-induced psychotic fit. In fact she had obtained a university degree prior to her marriage and following S.'s adoption pursued a successful business career. A. argued that the history as presented to S. was not only inconsistent with the facts but distorted to a degree likely to damage the adoptee's self-image; she objected to decisions on the part of professionals to keep information from S. on the basis that their control over her access to the truth effectively eradicated her freedom of choice. A. believed that

S., now in her late 20s, had the right to make her own decisions about her future in the light of the full facts about her past. The social workers involved in the case, however, clearly felt their duty was to safeguard S. from the impact of discovering that the file version of her history was not necessarily reliable. Yet the only way to 'protect' this young woman from the possible emotional consequences of this revelation was to continue presenting to her as truth a fallacy likely to feed a negative self-concept. The cost of sparing her the facts was deliberately to keep her believing a myth, isolated from all possible contact with or information about her birth family.

The moral rights, both those of the adoptee and of her birth relatives, which in tension create the dynamic in this poignant situation are enshrined in statute and equally worthy of respect. They are to be found in the European Convention on Human Rights and the Human Rights Act 1998. According to Article 6 of this Act, for example, A. had a right to a fair trial when the Local Authority accused her of negligence resulting in her baby's death.¹ She forfeited that right because self-defence would have exposed her to retribution from the husband whose violence against her had been the most consistent feature of their marriage and who was at liberty and living with her. According to Article 14, A. was likewise entitled to freedom from discrimination.² Yet whilst J. was automatically granted an intermediary service on request, A. was refused this service explicitly because she now refuted the responsibility for her baby's death alleged by the same Local Authority who controlled access to S. It appeared that whilst J. was deemed deserving of communication with the adoptee, A. was denied the same privilege because she disputed the case against her.

However, S. also has rights demanding recognition: she has, for example, the right under Article 8 of the Act to have her private and family life respected.³ S. had been adopted many years previously and there is no reason to doubt that she has settled happily into her new family. She was not at this time actively seeking information about birth relatives. The Local Authority might therefore argue that there could be no justification for thrusting information upon her unasked that would inevitably restructure her mental and emotional landscape and so might undermine the security she had established as a member of her adoptive family. Based on a form of Act Utilitarianism⁴ the Local Authority might claim that S.'s stability should not be disrupted even if it were founded on misconception. It might maintain that, for lack of evidence to the contrary,

1. Para. 3.49 reads: 'A criminal case can include a case that is not classified in that way in U.K. law. What matters is whether the nature of the offence and the seriousness of the possible punishment make it virtually the same as a criminal case.'

2. Para. 3.105 reads: 'Discrimination means treating people in similar situations differently ... without proper justification.'

3. Para. 3.68 reads: 'You have the right to respect for your private and family life, your home and your correspondence. Article 8 is an example of a qualified right in the ECHR. This means that there is a framework in place against which any interference with your rights by the state must be judged to see if it is acceptable.'

4. 'Act Utilitarianism' is a utilitarian theory of ethics which states that the right action is the one which produces the greatest amount of happiness or pleasure for the greatest number of beings.

it could reasonably be assumed that S. was content with the existing situation, as were her adoptive parents and extended family members. The discovery that the circumstances surrounding her adoption were less clear-cut than they had been led to believe might well disrupt the internal harmony of this unit and jeopardise the relationships which underpinned it. The mere fact that A.'s human rights may have been violated nearly 30 years previously could therefore hardly warrant such irresponsible intrusion.

However, the problem with this philosophy is that it has been formulated by individuals who are outside the frame. Whilst it may be true that S.'s adoption has proved successful, supposing we were to learn that her adoptive mother had tragically passed away whilst she was still quite young? Having lost two primary carers before reaching adulthood, she might well hunger for a mother's love. Updated information about A. might free S. to contact her and perhaps seek nurturing from the mother she had lost in infancy to satisfy her unmet emotional needs. But whilst S. believes A. negligent and uncaring, she would, of course, be unlikely to take such a step. The fact is that only S. can decide whether accurate information about her birth family would benefit her and she cannot make that judgement without knowing that information more accurate than she has been given previously exists. It is a choice that only S. can make and to withhold from her the facts which would enable her to make that choice is to rob her of it. To rob individuals of their freedom of choice is a characteristic of the abuse of power.

Our focus must not be deflected from the fact that the divergence between A.'s account of her history and the record of the file is the direct result of the poor-quality reporting evidenced therein. When allowed access to her file, A. discovered in it error after factual error: the file contained inaccuracies in relation to her educational qualifications, her medical record and (in one case) an alleged criminal conviction which she possessed the documentation to disprove. It appeared that in the aftermath of her baby's death professional imaginations had run riot and local gossip had been deemed an appropriate source of relevant information. In consequence, the picture of A. presented to the magistrates' Court at the time of the care proceedings and subsequently to S.'s adoptive parents was wildly distorted. The legal process itself could have heightened this tendency, as parties assumed adversarial positions and social workers may subconsciously have resorted to character assassination to justify the removal of a baby from a mother who was already bereaved. A., in particular, feels that she has been the victim of defamation and that her trust and the trust of her adopted daughter have been abused. The response from the Local Authority which she expected, at the very least, would have been for a more balanced and objective account of her history to be annexed to the adoption file and for S. to be informed that necessary corrections had been so added. Whether or not she should access that information, of course, would be for S. to decide. But the response which A. has received to date is one of dismissal. Article 12 of the Universal Declaration of Human Rights reads: 'No-one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to

attacks upon his honour and reputation. Everyone has the right to protection of law against such interference or attacks.' The law unquestionably failed A.: has it not therefore failed S. also?

Lessons to be Learned

There must surely be lessons to be learned from this sorry story. The question that none of the professionals involved appears ready to ask is: whatever is S. going to make of their conduct in the event that she one day re-establishes contact with J.? Any mistakes that were made a generation ago were made in good faith and we should all like to believe that social work has moved on in the interim. But the shifting arguments that have been used to justify withholding the full facts of her history from S. do not speak of professional integrity: they are marked by dissembling, incongruence and a worrying lack of transparency. These characteristics could indicate that the Local Authority has an agenda of its own distinct from and possibly inconsistent with S.'s best interests. Yet the royal principle safeguarding the purity of all social work is the commitment to place the welfare of clients before any personal or professional advantage. Sacrifice this ethic and social workers, however adept, are at risk of exploiting vulnerable individuals for their own ends—individuals for whom they have a duty of care.