‘Siblings, contact and the law: an overlooked relationship?’
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INTRODUCTION

Over the last twenty years research about siblings has emerged across a number of disciplines. The starting point for much of this work has been the identification of a paradox: that sibling relationships both have a significant impact on people and play a key role in foundational biblical and classical stories, but that very little scholarly attention has been paid to them. Across all the disciplines commentators have questioned this and a recurring explanation emerges. Smart has observed that sociology has ‘ignored almost completely the importance of sibling relationships’ and links this to the discipline’s almost exclusive ‘focus on couples and their children’ (*Personal Life,* 2007: 46). The historian Davidoff suggests that sibling relationships are ‘taken for granted...an absent presence’, because of their lack of direct effect on reproduction (T*hicker than Water: Siblings and their Relations 1780-1920,* 2012: 1). While in psychoanalytic theory, Mitchell, in a key text in the field, argues that the ‘massive repression’ of their significance reflects the fact that ‘our social imaginary can envisage only vertical authority’ (*Siblings*, 2003: xv).

These findings apply equally to law. Commentaries about cases relating to siblings exist, but legal research rarely foregrounds the relationship and never examines how law addresses the status across legal fields; there are no chapters specifically about siblings in any academic family law textbooks, and limited and sometimes no references to them in their indices. A simple explanation is the fact that the sibling relationship gives rise to few explicit rights and no obligations, and while premised on familial status, it is largely understood to be dependent on elective emotional attachment. Consequently, while in the context of the parent-child and spousal/cohabitee relationship there is much debate about the degree and form of legal regulation, with siblings the question of intervention is more complex and the rationale for state recognition and active interest in the relationship is less certain and far from established.

The aim of our recently published research about siblings, funded by the Nuffield Foundation, had two broad aims. First to map where siblings are referred to in law and secondly, to examine the role that law plays in the specific context of public law proceedings, which often result in siblings being separated with little and sometimes no provision for direct contact. While the latter issue is of direct relevance to practice and a matter of concern to an increasing number of legal and social work professionals (see Pepper, J. ‘Maintaining sibling relationships in care and adoption’ [2017] Fam Law 1112), we argue that locating this issue in a wider context has a role to play in thinking about the possible limits to legal intervention. The key findings from the research have been published in the December issue of Fam Law and a more detailed summary and the full report are available from the Nuffield Foundation website (http://www.nuffieldfoundation.org/siblings-contact-and-law-overlooked-relationship). Here we

discuss two aspects of our findings. First the place of siblings in law generally and, secondly, the reluctance to use contact orders for sustaining siblings separated in public law proceedings.

'LEGAL SIBLINGHOOD'

A surprising finding was the large number of statutory references to siblings. Over one hundred statutes refer to siblings, from predictable contexts such as family and inheritance, to property, crime, taxation, and even ecclesiastical law. And much of the legislation was enacted within the last twenty-five years. That law has a very considerable amount to say about the sibling relationship may have particular significance for children whose legal relationship with a sibling has been severed by adoption that go beyond considerations based on emotional well being.

In mapping the statutory references to siblings two things emerged: the lack of any coherent rationale for their inclusion and the absence of any consistency in both the definitions of sibling and in the terminology used to describe them.

The underlying rationales for the perhaps surprising number of references to siblings are rarely based on exclusively biological or genetic connections. The only clear examples of this are provisions in medical-reproductive law about 'donor-conceived-genetic siblings' and 'saviour-siblings' (Human Fertilisation and Embryology Act 2008, ss 3, 24). Medical rationales also inform restrictions on siblings in the context of criminal law prescriptions of sexual relations and in the prohibited degrees of marriage. But these provisions are also premised on a social or emotional connection. The social rationale is evident in statutes by the fact that siblings are rarely treated as a particular, distinct or isolated relationship, but are more often included within broader categories, not restricted to biogenetic links; the most frequently used is that of 'relative'. But other terms used are 'member of the family', 'connected person', 'qualifying relationship', 'interested person', 'dependant', 'non-qualifying individual, and 'associates'.

In some contexts, assumptions about the nature of the sibling relationship legitimise the denial of legal protections which would otherwise arise. This is evident in employment law, based on perceptions of familial closeness and assumptions about practices within family businesses. Similarly, where someone cares for a sibling, this is excluded from 'qualifying child care' in the contexts of subsidising child care (Finance Act 2004, s 318C). In all these contexts, activities which would otherwise be subject to legal regulation are, on the basis of the relationship, deemed effectively a 'private' matter. In other contexts the same assumption leads to the relationship being perceived as *potentially suspect*: too close to be deemed independent and a mask for subverting legal regulation or avoiding taxation. This explains why siblings are referred to in statutes which on the surface might appear to have little do with care or family life.

In other contexts the relationship gives rise to what can loosely be referred to as 'rights' or entitlements, to benefit, to have knowledge or to have contact with or to be informed or consulted. Some are premised solely on the *status* of being a sibling, for example potential inheritance rights under the intestacy laws. Others are premised on idealised or conventional assumptions about inter-sibling *behaviour,* suggesting a degree of emotional care and wellbeing arising from the relationship. A recent example of the latter relates to missing persons, where

the sibling relationship establishes a right to intervene in applications for a guardianship order and similar assumptions inform provisions in mental health legislation (Guardianship (Missing Persons) Act 2017, s 4, 19, 21, 24 and Mental Capacity Act 2005, s 185 (f)). In these contexts law both acknowledges and reflects normative ideals about the relationship but falls short of imposing duties or obligations.

The tensions between the different rationales underlying the statutory references to siblings come to the fore when law attempts to *define* them. The word 'sibling', as opposed to 'brother or sister', appears in statute for the first time in the Children Act 1989. However it is not possible to attach any particular or intended significance to the introduction of the term. It is not attributable to the fact that it is family law legislation; the second statute to use the word 'sibling' (and indeed the first to come into force) was the Breeding and Sale of Dogs (Welfare) Act 1999 and different terminology is used in subsequent adoption legislation. Moreover, the Children Act 1989 does not define 'siblings'. The Adoption and Children Act 2002 makes no reference to the word 'siblings'. They are referred to in provisions about contact (s 26, 51A) as 'relatives' or a 'related person', which is defined as including '...brother, sister...whether of the full blood or half-blood or by marriage' (s 144(1)). The reference to 'by marriage' might extend the provision to step-siblings, but from the drafting it is far from clear. Half siblings are explicitly included in most, but not all, statutory definitions and the terminology varies; sometimes, as in adoption law, the definition includes references to 'full-blood' or 'half-blood', whereas in many other contexts the reference is just to 'brother' or 'half-brother' or 'full' or 'half'. In nearly every context, and regardless of terminology, no distinctions are made between 'full' and 'half'. Exceptions to this are the rules relating to intestacy and certain mental health provisions. No statutory definitions of 'siblings' or 'brother or sisters' refer to foster siblings, but 'step-siblings' are referred to explicitly elsewhere (see, Equality Act 2010, s 86(5); Mental Health Capacity Act 2005, Sch A1, Pt 13, para 185(f)).

There appears to be no obvious reason why 'of the full blood or the half blood' is used in some statutes but 'half-brother' or 'half-sister' is used in others. However the use of the word 'blood' in the context of adoption law is of symbolic significance. And reflects the extent to which legal severance is imagined as akin to a legal 'blood' transplant: law undoes blood. It is an example of how 'blood' is a symbolic concept as much as a physical, material substance. It is hard to reconcile the terminology used with a commitment to recognising the benefits of sustaining birth family and sibling relations. Suggesting that siblings are no longer 'blood relatives' is, at the very least, outdated if not confusing and, potentially, unnecessarily distressing. We note that the Law Commission of New Zealand considered this language to be 'a repugnant and unnecessary distortion of reality' (*Adoption and its Alternatives,* 2000: 43-44).

A key finding from the research was an awareness of the need and and ethical commitment amongst practitioners to think beyond biological connections in determining who is a sibling. As one guardian noted:

> *...you need to look at step-siblings, you need to look at kids that have been raised together. So a sibling relationship isn't necessarily just a sibling relationship.*

The young people from the Family Justice Young People's Board, who participated in the research, expressed strong views about the subject.

> *...it doesn't really matter whether it's half or full, they're still your sisters at the end of the day.*
>
> *… step siblings as well because I have four step brothers … and when they took me into foster care...my little brother...he was literally sat in my front garden like screaming and crying when they came and got me and they were like, 'oh it's just your step brother.*
>
> *I told them I just wanted to see my sisters and he said, "Well we can't really do that because if they were your full sisters then we might put it in place, but right now we can't because they're not...they're your half sisters so it's not as important as like full.*

As these quotes indicate, in practice, often informed by a perception of the law, practitioners sometimes discriminate between types of siblings. As one social worker observed:

> *...maybe you have a kind of mental sliding scale about how important siblings are depending on...if they're a step-sibling, if they're an older step-sibling, are you moving further and further away from...that kind of core belief really.*

A hierarchy emerges which results in the weight placed on the importance of siblings sometimes being informed by the status of the relationship rather than the lived experience. This can at times mean that full and half siblings are treated differently. This is not to say that it is an overarching decisive factor, rather that degrees of 'blood' connectedness are utilised as a factor to legitimise decision making. For example in one case it was held that:

> While separation from siblings is usually undesirable and to be avoided, the children in fact have different fathers (*Re N (a minor)* [2014] EWHC 749 (Fam)).

The distinction can sometimes result in siblings being kept together. For example in upholding a decision that a child should be placed for adoption with an already adopted older sibling, rather than with his father's cousin, Munby, P held that the placement of the two full siblings together was preferable to separating them, even though separating would have allowed one to live with birth relatives.

> How else was the judge to proceed? She was confronted with the fact – the reality – that B's *only full sibling*, H, a sibling close to her in age, had been adopted. (*Re B (A Child)* [2018] EWCA Civ 20, at para 24, emphasis added).

Similarly in a strongly worded judgment that placed considerable weight on a sibling relationship, Keehan J observed that 'BT and GT are not *just simply siblings* they are twins' (para 90, emphasis added) and held that:

> ‘It is almost impossible to imagine the circumstances in which it would be considered appropriate to separate twins and place them for adoption by different prospective adopters’ (*Prospective Adopters for BT and others v Herefordshire District Council* [2018] EWFC 76, para 1).

While not necessarily wrong, what is un-theorised and rarely questioned is why and to what extent the hierarchy of siblings - twins, full, half, step, foster - should matter. The contingency of the weight placed on these distinctions arguably demonstrates an underlying uncertainty about the social and emotional understandings that inform the significance of the relationship.

SIBLING CONTACT ORDERS

A recurring finding throughout this research has been the reluctance of courts to use their powers to order contact between siblings. Judicial awareness of the possibility of making orders is not in doubt, but there appears to be a lack of clarity about when, in practice, the orders should be used. This is the case in all contexts where court orders can be made: whether for children in care (Children Act 1989 s 34); alongside a placement for adoption order or alongside or after an adoption order (Adoption and Children Act 2002 ss 26, 51A) or by way of private law applications by siblings with looked after or adopted siblings (Children Act 1989 s 8).

Proposals have been made to remove the leave requirements which apply in some contexts (Pepper, J. ‘Maintaining sibling relationships in care and adoption’ [2017] Fam Law 1112; Ashley, C., ‘FRG and the Children and Social Work Bill’ [2017] Fam Law 355). We support these proposals but one of our key findings is that the leave requirements are not the primary barrier to applications for sibling contact orders. Lack of knowledge about the possibility of applying for contact and access to information and support in making applications were perceived as more important.

The only other barrier to contact orders that has a legal or doctrinal basis is the perception in adoption proceedings that, because contact orders are exceptional and required only where contact is deemed essential, it can be argued that alternatives to adoption should be considered, but that as a result the ‘nothing else will do’ threshold has not been met.

While not disregarding the points above, we found that the current lack of orders could more fundamentally be explained by the existence of deep seated attitudes and assumptions. The frequency and matter-of-fact dominance of these views was evident from the case review and all the professionals we spoke to. Some of these were particular to types of proceedings. For example, the view that orders under Section 34, in connection with children in care, were ‘unnecessary’ because contact ‘usually happens’ was never expressed in the context of contact orders in adoption proceedings. Conversely, the assumptions that contact orders will reduce the pool of potential adopters, that contact is only appropriate with the agreement of adopters, and, in split placements, will undermine the placement, were not mentioned in the context of care proceedings. And the view that orders under section 26 were ‘pointless’ and not ‘meaningful’ because adopters were not yet identified, distinguished contact orders at the placement stage from those at the time and after adoption orders were made.

But alongside these rationales were three assumptions that explain the absence of and resistance to the making of contact orders across the board. First, that court orders are inflexible, secondly that courts are, at best, not a 'child-friendly' or appropropriate environment for the resolution of these disputes and, are at worst, damaging for children, and thirdly, that orders are unenforceable. Combined, these three assumptions result in the widely shared view that agreement rather than orders is preferable; more effective and in a child's 'best interests'. As one solicitor acknowledged:

> *Ending up in court, that would feel like a defeat really in terms of trying to do what's best for certainly the subject child but also the other siblings.*

Some of the social workers expressed strong reservations about court orders and highlighted the perception of them as punitive:

> *I suppose for me if you put a court order on something it's seen as being quite punitive whereas actually what you're talking about is educating them as to the benefits of it and making it this really positive thing I suppose, isn't it.*

Our young adviser's views about the use of court orders were notably distinct from any of the adult professionals we spoke to, for example one noted that:

> *Well the courts are involved in loads of different other parts of people's lives...they make orders for kids to see parents, make orders sometimes for kids to see grandparents as well, so why not just throw in siblings as well?*

Our argument is not that the courts *should* be making more sibling contact orders, but that in the context of widely held concerns about the inadequacy of existing contact provision, the role of the courts and the effective limitation on their powers by the dominance of these views is worth questioning and agree with Neil that a conversation about court orders is timely ('Rethinking adoption and birth family contact: is there a role for the law?' [2018] Fam Law 1178).

In opening up a conversation about contact orders we contrast the position in public law with that in private law contact disputes and look at the issue through the framework of children or sibling rights.

Some of the judges we spoke to were keen to distinguish public and private law proceedings. The following observations were typical.

> *Well private and public law are very, very different animals.*

> *The problem with a contact order in public law context is that it promotes litigation which really isn't helpful in the public law arena.*

What is striking about the common assumptions about contact orders in public is the extent to which concerns about them mirror those raised them in private law contact disputes; they are perceived as inflexible and unenforceable, there is a preference for agreement, and courts are

perceived as being 'child-unfriendly'. And yet in practice the use of court orders differs substantially. One judge queried the different expectations about contact:

> *...in care cases, you know, children will see siblings and see parents once a month / four times a year, yet if it was a private law case, it'll be once a fortnight and you will not tell me there's a difference. I can't figure out what the difference is....You ask that question of a social worker in a witness box, or a guardian, they look at you as if you are mad and they chuck out stability, security, undermining placement. ...I don't get it*.

In private law disputes the benefits of contact with non-resident parents, in reality usually fathers, create a presumption about contact that is difficult to rebut and has been strengthened by recent statutory reform (Kaganas, 'Parental involvement: A discretionary presumption'. *Legal Studies*, 2018). The majority of private law contact disputes are resolved without going to court, but where applications are made, court orders are the norm rather than the exception. Moreover, the resolution of disputes about contact outside of the courtroom, whether by legal advice or mediation, operates in the shadow of the very clear statements from the courts about the presumption about contact. Consequently, while the advantages of reaching an agreement about contact are emphasised in both private and public law, in the latter context adopters in particular are not under any pressure to agree. Case law, guidance and our findings here make clear that while leave is likely to be granted where there was a prior agreement about contact, on the substantive issue the making of an order against the wishes of adopters is exceptionally unlikely. The contrast between representations of and responses to *adopters* unwilling to agree to contact between siblings, and *mothers* unwilling to agree to paternal contact is stark. Concerns about a perceived failure to address the problem of 'intransigent' and 'unreasonable' mothers in private law has resulted in expressions of judicial anxiety about the public confidence in the courts, an increased willingness to countenance enforcing contact orders by both punitive and therapeutic measures, and legal reform (see, ibid Kaganas, 2018). It is important to emphasise that while our findings suggest that the resistance to contact by adopters is indeed at times perceived as 'intransigent' and 'unreasonable' we are not suggesting that adopters *should* be treated more like mothers in private law proceedings. The contexts are substantially different: siblings are not parents and the assumptions underlying developments in private law have been subject to rigorous criticism. But noting the contrast is valuable to the extent that it highlights the contingency of law's role in resolving contact disputes. In particular the comparison highlights how assumptions about contact post-adoption and contact post-parental separation are *both* dominated by understandings of, and political investments in, the value of enhancing parental responsibility. In the context of non-resident fathers this has led to a more active, invasive role for law, whereas in the context of adopters it has led to the opposite. In both contexts it is possible to question the extent to which it is assumptions about the role of these parents, as opposed to a focus on the needs of individual children, which informs decision making, and in particular understandings of the role of the courts.

When judges in our research considered the differences between public and private approaches to contact, many of them identified that the purpose of orders in the private context was to resolve a conflict which the parties were unable to.

...if you need an order at all it's because the parents simply cannot agree.

I think with private law, what you're having to do is to step in and be a parent where the parents have fallen out so badly they can't exercise their parental responsibility.

The judges also emphasised that their involvement was premised on the presumption about benefits of contact with a non-resident parent.

Well in private law proceedings, it is a given that the purpose of the proceeding is to try and preserve the role of both parents in the life of the child. That's a very different scenario from the scenario you get in care proceedings and in adoption proceedings.

What was noticeable from the comments by the judges was the centrality of parental responsibility as a factor that legitimises recourse to the making of contact orders. Both the inability of parties to resolve a conflict and the potential benefits of clarity apply just as much in sibling conflicts in public law cases. But in the public law context parental responsibility is not the fault line. Birth parents are severely compromised when attempting to foreground arguments about sibling contact; whether or not their children are adopted. And the courts are reluctant to instruct either local authorities, as the corporate parent for children in care, or adopters in how to exercise their parental responsibility.

Piper links the underlying approach to the wider context, observing that:

> The currently important political message that individuals must take responsibility for their lives, their children and their actions is not a novel message: the giving of priority to the exercise of parental responsibility, if necessary over other aspects of the child's well-being, has a very long history ('Assumptions about children's best interests' (2000) JSWFL 22(3): 271).

Applying this framework to contact disputes about siblings in public law helps explain the courts' reluctance to make orders, despite the importance of sibling relationships being widely recognised. Managing inter-sibling child relationships falls squarely within the remit of parental responsibility.

In contrasting public with private law approaches to contact orders, while the different role of parents is critical, it is also possible to identify a distinctive approach to assessments of children's best interests. One of the solicitors we interviewed suggested that the needs of children in public law are perceived differently.

...there's an assumption...that these children are damaged goods in some way, have higher levels of need...people are less willing to...worry about things like contact between children because the focus is on just dealing with all the observable symptomology in the child.

What is noticeable here is the extent to which the emphasis on the value of stability, which might preclude contact, mirrors the approach to understanding children's welfare in private law disputes in an earlier period. Smart et al identified that prior to the current dominant ideal in

private law which emphasises co-parenting, biological families and, consequently, an enhanced role for non-resident fathers, the dominant assumptions about child welfare emphasised continuity of care, stability and avoidance of conflict, and that these ideas were supported by the 'scientific' research at that time (*The changing experience of childhood: families and divorce*, 2000). The change in private law occured not by law, but by the emergence of new assumptions about 'best interests' which reflected shifting social and political attitudes. In the same way, the approach of the courts to sibling contact is most likely to change not through any specific legal reform but by a shift in assumptions about children's 'best interests'.

CONCLUSION

A critical question is in what circumstances are the benefits of the sibling relationship, while acknowledged, likely to be perceived as capable of outweighing other counter-assumptions. That at present the sibling relationship is routinely outweighed by other factors attests to the powerful coming together of a number of factors, in particular the privileging of parental responsibility generally. But listening to young people suggests that this emphasis can overlook what they themselves often consider as important. Our young advisers highlighted the value of thinking about children's rights as extending to, or including an appreciation of, the importance of the sibling relationship.

> *...obviously a parent and a sibling's different but they should have kind of like near enough similar rights if you get me. Because no matter what, a sibling will have that special connection that a parent doesn't have.*
>
> *It's like siblings don't actually have rights to see each other but they should have ... Again, it's all about our rights as a young person, our sibling rights.*

This call to rights is compelling. In terms of bringing about change, without any doubt the language of rights and mobilising an identity through 'rights' is an important and effective vehicle. Campaigns for fathers and grandparents attests to this and the absence of sibling rights being spoken of or understood in the same way is notable. The acceptance of a child's right to have contact with his or her parents is deeply embedded in legal practice, to the extent that it is understood to impose a duty on the state to facilitate it. The concept of the 'judicial reasonable parent' legitimises a highly proactive role (see, *Re M (Children)* [2017] EWCA Civ 2164). But underlying this stance is the perception that parents not only have rights but a role to play. 'Parenting' is not just a status but an activity imbued with deep psychological, political and cultural significance. The sibling bond or relationship may undoubtedly have a deep and enduring impact on children and young people's lives, but it is not a relationship that society has attributed a role to, a function. Lord and Borthwick, in their influential guide suggested that:

> 'The decision to separate permanently siblings who have lived or are currently living together should, in our view, be treated with *the same seriousness* as the decision to separate children permanently from their parents.' (*Together or Apart? Assessing Siblings for Permanent Placement,* 2008: 21, emphasis added)

That this view is not applied might have something to do with the fact that, as Sander notes, ‘the rules for conducting a sibling relationship have never been established, ambivalence is its keynote and instability its underlying condition’ (*The Brother-Sister Culture in Nineteenth Century Literature,* 2002: 1). In a context of heightened focus on essential role of parents, acknowledging this is a challenge facing policy makers and practitioners concerned about the undervaluing of the sibling relationship. Attributing considerable more weight to the value of the sibling relationship in proceedings may only be possible with a more radical re-evaluation of relational roles within the family. What form that takes, whether it is desirable and whether law has a role to play are matters for debate.