land by the recreational users which] may be relevant to a determination of whether user has been sufficient to bring home to the reasonable owner that the local inhabitants have been asserting a right to use the land … It is a question of fact and degree in every case".

This latest judgment concerned with the registration of new greens clearly tells us that deference by the recreational users to the owner's use is material to whether use is as of right. It also tells us that deference will be fatal to an application to register a new green where such deference prevents a reasonable landowner from recognising that the recreational users are using his land in such a manner as to give the impression of asserting a legal right to use the land. What it does not, and cannot tell us is when that threshold is met.

The test for determining whether user is as of right becomes ever more complicated. The ability to predict whether the test will be satisfied is, consequently, diminished. The likelihood of further litigation is, therefore, more or less inevitable.

ROWENA MEAGER

## THE PECULIAR FINALITY OF ADOPTION

IN *Webster (The Parents)* v. *Norfolk County Council* [2009] EWCA Civ 59, three children of Mr and Mrs Webster had been removed from them under care orders on the basis that one or both of them had non-accidentally injured their second child, B. Adoption orders were made in relation to the children under the Adoption Act 1976. There had been unequivocal medical evidence to the effect that the type of injuries sustained by B were inconsistent with ordinary childhood accidents. There was a high probability that they were caused by forceful twisting or pulling of the limbs. But there was also a highly unusual feature, namely that B, who was nearly two, had never eaten solid food and for the previous nine months had been fed only soya milk. Over a year after the adoption orders were made, the parents obtained powerful contradictory medical evidence that "it was highly likely if not inevitable" that child B suffered from scurvy and that the pattern of bone disorder was "the classical picture seen in scurvy but not that of non-accidental injury". Faced with this new evidence the local authority quickly withdrew care proceedings in relation to the Websters' fourth child. The parents applied to set aside all the previous orders in relation to their other children on the basis that those orders had been founded on a mistake and had resulted in a serious miscarriage of justice.

The Court of Appeal refused permission on two grounds. First, even if there had been a miscarriage of justice, which was not

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established, public policy required the integrity of the adoption system to be upheld. There was clear authority that an adoption order, unlike other orders affecting children, was irrevocable other than in "highly exceptional and very particular circumstances". These were confined to cases of procedural irregularity, particularly breaches of natural justice (*Re M (Minors) (Adoption)* [1991] 1 F.L.R. 458 and *Re K (Adoption and Wardship)* [1997] 2 F.L.R. 221). There was no wider, more general, inherent power to set aside adoption orders (*Re B (Adoption: Jurisdiction to Set Aside)* [1995] Fam. 239). Secondly, the adoption orders had been made three years previously and, even if the power to set aside had existed, it could not be in the best interests of the children to exercise it at this late stage.

This is a profoundly disturbing case, as all three Lord Justices conceded. As Wall L.J. said, "any miscarriage of justice – or potential miscarriage of justice – is both regrettable and embarrassing". Accurate diagnosis of injury is at the heart of this case and a key lesson which emerges from *Webster* is, as the Court acknowledged, the need to obtain second opinions on children's injuries at the earliest opportunity and especially where the facts, as here, are unusual.

Yet, for all the sympathy expressed for the Websters, it may be hard to explain to them why the family justice system is apparently capable of rectifying a breach of natural justice but not a miscarriage of justice. Forty years ago the House of Lords in *J* v. *C* [1970] A.C. 668 recognised that justice to parents or consideration of their rights could not intrude into the judicial enquiry of what was best for the child. But this was a *private law* case and Parliament specifically rejected any such unrestrained application of welfare of the child in the *public law*. If the State wishes to remove a child compulsorily from parents it must cross a threshold of establishing "significant harm", or the risk of it, which is attributable to a deficit in parental care (Children Act 1989, s. 31 (2)) and it must *prove* its case (*Re B (Care Proceedings: Standard of Proof*) [2008] UKHL 35, [2009] 1 A.C. 11). In *Webster* Wilson L.J. concluded that there were "substantial grounds for doubting whether, at a rehearing, Norfolk would again succeed in establishing … that the injuries suffered by child B … were non-accidental". In *Oldham MBC* v. *GW and PW* [2007] 2 F.L.R. 597 parents were vindicated on a rehearing and in *Re K (Non Accidental Injuries: Perpetrator: New Evidence)* [2005] 1 F.L.R. 285 the Court of Appeal directed a rehearing on the basis that it was in the public and the children's interest to identify wherever possible the perpetrators of non-accidental injury or to exonerate the suspects. Justice required this as did the pragmatic consideration that the children concerned might ultimately have contact with, or be reunited, with them. *Re K* was distinguished in *Webster* solely on the basis that final adoption orders had not been made in that case.

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This suggests that a second lesson should be learned from *Webster*, namely the danger of courts granting public law adoption orders too readily or too quickly without fully exploring alternative options. Wall and Wilson L.JJ. described the judge's decision to free the Webster children for adoption as "cursory", but the Court's own treatment of this critical issue was no less cursory. After all, on one view, it was the central issue in the case. Had those adoption orders not been granted, there would almost certainly have been a rehearing, an opportunity for the Websters to clear their name and be reunited with their children.

We now have the Adoption and Children Act 2002 and Wall L.J. regretted the fact that the judge in *Webster* did not have the advantage of reading the Court of Appeal's interpretation of it in *Re P (Placement Orders: Parental Consent)* [2008] 2 F.L.R. 625. In that case, the Court emphasised the lifelong implications of adoption; that since adoption is the most extreme interference with family life cogent justification must exist for parental consent to be dispensed with; that it must be demonstrated that the child's welfare *requires* adoption as an imperative to other orders; and that judicial rigour needs to be deployed where an application to place a child for adoption follows on quickly from a care order. In other words, the fact that a care order is warranted does not mean that adoption is. Moreover, the statutory principle which militates against delay (Adoption and Children Act 2002, s.1(3)) should be applied with caution where adoption is part of the care plan. Indeed it can be argued that there ought always to be a respectable interval between care orders and placement orders given the magnitude of the adoption decision.

In the future the Webster children might exercise their statutory rights to access their birth certificates and take steps to re-establish contact with their birth parents. In the meantime Strasbourg may be the Websters' last refuge. But the implications of this case go well beyond the Websters. Given the fallibility of the family justice system, there should be urgent reconsideration of the doubtful official policy which prefers public law adoption as the best long-term option for "looked after" children.

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## AGREEMENTS FOR GROWN-UPS?

THE Privy Council decision in *MacLeod* v. *MacLeod* [2008] UKPC 64 on Manx law identical to the Matrimonial Causes Act 1973 provides valuable clarification of the law relating to various types of agreement between spouses concerning the financial consequences of divorce, and

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