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Grandparents: Anchors in Uncertain Times, Alternatives to Adoption?

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I. Introduction

Unfortunately, some parents are unable to provide a safe environment for their children due to reasons such as drug and/or alcohol abuse;¹ profound learning disability; mental illness or domestic abuse.² Challenging circumstances might make long-term placements necessary for these children via fostering, kinship care (potentially with a special guardianship order in place³) or adoption.⁴ The state's aim of providing the child with a safe and loving home, outside of parental care, is balanced against other considerations in the process of providing a child with long-term care. One potential consideration, in the context of determining a 'best fit' long-term placement, is the child's identity rights. The child's identity is protected via Article 8 of the European Convention on Human Rights (ECHR), the right to respect for 'private and family life'.⁵ Identity is also protected via the United Nations Convention on the Rights of the Child (UNCRC) via Articles 7 and 8. Article 8 UNCRC identifies the need to protect 'family relations' as an aspect of identity, which is traditionally construed in terms of the parent/child relationship. It is argued that 'family relations' envisaged under Article 8 UNCRC can be interpreted to apply also between the child and others in his or her wider kinship or cultural network, such as grandparents. While this chapter largely focuses on legal frameworks within UK law, the observations within the chapter could be argued to be applicable within other European jurisdictions with similar systems in place for children in care and, thus, similar flaws in the decision-making processes. This

¹ B Featherstone, A Gupta and S Mills, *The role of the social worker in adoption – ethics and human rights: an enquiry* (London, The British Association of Social Workers, 2018) 33.

² *ibid* 13.

³ Provided for under the Children Act 1989, s 14A. For more detail on special guardianship orders, see Chapter 5 of this volume.

⁴ Adoption and Children Act 2002, s 46.

⁵ *Gaskin v UK* App no 10454/83 (ECtHR, 7 July 1989).

chapter pays particular attention to children with pre-existing relationships with their grandparents, and to the potential relevance of the grandparent/grandchild relationship when children cannot be raised by their parents.

So far, scholarly attention on the child's identity rights under the UNCRC has been focused on the child's right to know his or her origins.⁶ Research on the protection of 'family relations' envisaged under Article 8 UNCRC has tended to explore the protection of relationships between children and parents. This chapter provides a unique contribution to academic literature in this field because of its emphasis on the protection of extended 'family relations' in the development of the child's identity itself and the role of decision-making processes by child welfare professionals and legal practitioners in upholding or failing to protect a child's identity rights. This research has focused on largely ignored aspects of the UNCRC, such as the need for a more complex account of identity. It is argued that the child's identity, and more specifically the 'family relations' that may form part of that identity, is an important consideration that may need to be balanced against other competing interests, such as the child's best interests under Article 3 UNCRC and right to protection from 'physical ... injury or abuse' under Article 9 UNCRC. The child's right to participate in decision making is protected under Article 12 UNCRC. It cannot be presumed either that children will want to reside with grandparents in all cases. Children, taking into account their evolving capacities, may express a desire not to be raised by or spend time with their grandparents. It is thus acknowledged that there are instances where the need to protect a child from significant harm under Articles 3, 9 and 12 UNCRC will outweigh the importance of protecting a child's 'family relations'. Not all grandparent relationships are beneficial to children, and there may be circumstances where these relationships could even be detrimental, where grandparents are unable to protect their grandchildren from physical or emotional harm, or to raise children in a manner conducive to the protection of children's rights under Articles 3, 9 and 12. Despite the need to balance these competing interests, it is argued that insufficient emphasis is placed on children's identity rights under the UNCRC, even where a measured 'weighing' process is employed when a child's welfare is at stake.

This chapter, exploring the UNCRC from a socio-legal stance, challenges the existing conception of 'identity' and considers potential barriers to the protection of the child's identity rights under Article 8 UNCRC, in the context of decisions about long-term, non-parental care. These factors include insufficient viability assessments that over-emphasise factors such as a carer's age, or the reluctance of social workers to recommend post-adoption contact. While, in practice, many relationships in a child's extended network may be of social, emotional and practical value to children, the focus of this chapter is on grandparents, because

⁶ S Besson, 'Enforcing the Child's Right to Know Her Origins: Contrasting Approaches under the Convention on the Rights of the Child and the European Convention on Human Rights' (2007) 21 *International Journal of Law, Policy and the Family* 137.

they are often the first prospective carers considered by social workers when birth parents are unable to care for their children.

Research, including work undertaken within chapter 2 of this edited collection by Bendall and Davey, shows that many grandparent/grandchild relationships are beneficial, practically and emotionally, to both grandchildren and grandparents.⁷ In fact, there is a growing body of literature that demonstrates that grandparent involvement is associated with improved mental health and positive social behaviour in children.⁸ Specifically, it is suggested that, metaphorically and psychologically, those within a child's kinship and cultural networks, such as grandparents, may be powerful 'anchors', linking children to their memories and identities, and 'bridges' to future social and emotional development in adolescent years and adulthood.

This chapter will consider the concept of identity, Family Constellation Theory (FCT) and how a modern conceptualisation of FCT in conjunction with the UNCRC, which encompasses a diverse range of relationships, contributes to understanding both children's identity rights and the benefits of kinship care. While there are many theories that consider the relevance of both genetic and emotional connections, FCT is one of the few psychological theories to focus on the importance of relationships beyond that of the parent and child. Individuals who form part of a child's extended kinship network, such as grandparents, have an important role to play in the context of Article 8 UNCRC and Article 8 ECHR. The discussion will thus consider specific legal provisions of the ECHR and UNCRC. In doing so, the chapter will explore the circumstances in which grandparents become kinship carers and the challenges they may face in doing so, before concluding by exploring the ways in which protection of children's identity can be improved via the grandparent/grandparent relationship.

It is not the purpose of this chapter to argue that grandparent care is always in a child's best interests. Grandparents may, in certain circumstances, be unsuitable carers or be unable to provide care, and in those situations foster care or adoption may be in a child's best interests instead. In cases where grandparents are willing and able to provide care in circumstances where the protection of the child and

⁷ P Coleman and A Hanlon, *Aging and Development* (Abingdon, Routledge, 2017) 115; V Bengtson, 'Beyond the Nuclear Family: The Increasing Importance of Multigenerational Bonds' (2001) 63 *Journal of Marriage and Family* 1.

⁸ J Yorgason, L Padilla-Walker and J Jackson, 'Nonresidential Grandparents' Emotional and Financial Involvement in Relation to Early Adolescent Grandparent Outcomes' (2011) 21 *Journal of Research on Adolescence* 552; B Hayslip Jr and G Smith, *Resilient Grandparent Caregivers: A Strength-Based Perspective* (New York, Routledge, 2013); T Bol and M Kalmijn, 'Grandparents' resources and grandchildren's schooling: Does grandparental involvement moderate the grandparent effect?' (2016) 16 *Social Science Research* 155; A Buchanan and S Attar-Schwartz 'Grandparenting and adolescent well-being: evidence from UK and Israel' (2018) 13 *Contemporary Social Science* 219; B Hayslip and C Fruhauf, *Grandparenting: Influences on the Dynamics of Family Relationships* (London, Springer, 2019); A Buchanan and A Rotkirch (eds), *The Role of Grandparents in the 21st Century* (Abingdon, Routledge, 2020).

his or her identity have been carefully balanced against other fundamental rights, children may receive equally effective (or superior) care from grandparents when compared against other permanence options, such as long-term foster care or an adoption order.⁹

II. Identity and Family Constellations: Who is the Child?

A. How Do We Understand ‘Identity’?

The term ‘identity’ is ‘multidimensional’¹⁰ and, as Blauwhoff notes, ‘has so far not been given a legal definition.’¹¹ ‘Identity’ is a challenging concept to define, but the focus of this chapter is on ‘personal identity’ encompassing a ‘narrative identity’, that is the ‘continuity of psychological connections between a person’s past and present.’¹² Blauwhoff explains that ‘In order to be able to create a narrative identity of one’s own, it will ... often be necessary to tap into the memory that other people may have of ourselves. A narrative identity therefore bridges the historical past to the present and future.’¹³ Grandparents have significance in this context, since they can provide an account of children’s parents and wider familial connections, as well as the child’s historical and genealogical origins. Such knowledge is key in helping a child understand his or her identity and protecting and promoting the child’s identity rights.

More specifically, in terms of a human right to *personal* identity, it is apparent that such a right exists under the ECHR¹⁴ and the UNCRC.¹⁵ Marshall observes, however, that ‘it is not at all clear what this right actually means’¹⁶ and it can be ‘interpreted in different ways.’¹⁷ Marshall observes that ‘identity is largely created by social forces’, ‘moral and social identity ... are intelligible only in terms of the social network in which they are an element.’¹⁸ McLaughlin suggests that ‘An identity therefore gives an individual’s life meaning by framing it in a social and historical context. It provides a bridge between current consciousness and past experiences.’¹⁹ This is especially true for the grandparent/grandchild relationship, as considered in the preceding paragraph.

⁹ Adoption and Children Act 2002, s 46.

¹⁰ RJ Blauwhoff, *Foundational Facts, Relative Truths: A Comparative Law Study on Children’s Right to Know their Genetic Origins* (Mortsel, Intersentia, 2009) 20.

¹¹ *ibid* 20.

¹² *ibid*. See also EH Erikson, *Identity: Youth and Crisis* (New York, Norton, 1968).

¹³ Blauwhoff (n 10) 20.

¹⁴ J Marshall, *Personal Freedom through Human Rights Law?* (Leiden, Brill, 2009) 89.

¹⁵ Also see J Marshall, *Human Rights Law and Personal Identity* (Abingdon, Routledge, 2014) 141.

¹⁶ *ibid* 8.

¹⁷ *ibid* 85.

¹⁸ Marshall (n 14) 89. See also J Triseliotis, ‘Identity and Genealogy in Adopted People’ in E Hibbs (ed), *Adoption: International Perspectives* (Madison, CT, International Universities Press, 1991) 35, 35.

¹⁹ K McLaughlin, *Surviving Identity: Vulnerability and the Psychology of Recognition* (East Sussex, Routledge, 2012) 29.

Many adoptive parents and foster carers may have access to information on a child's past, or may have engaged in 'life story'²⁰ work with the child, mapping out his or her personal history. However, many grandparents are likely to have more detailed knowledge of a child's life, including his or her social connections in the community as well as shared genealogy. As O'Donovan argues, 'Ancestry and identity ... are not a simple matter of linear biological relationships or normative definitions of family but necessarily involve contemplation of kinship – the dual role of blood ties and social structures.'²¹ Personal identity, then, can be seen as 'a mixture of genetics and social conditioning',²² with family relationships at the 'heart of understandings of identity'.²³ Ronen claims that identity is influenced by others around us: 'Identity should not be seen as developing in a vacuum, but rather always through dialogue and sometimes struggles with significant others – those persons who matter to the individual constructing their identity'.²⁴

It is argued here, specifically, that in the absence of birth parents, the grandparent/grandchild relationship and thus grandparents are crucial to a child's sense of personal identity. Identity is most often linked to genetic identity, with considerable stress on 'biological origins'²⁵ in case law²⁶ and in literature. As Marshall suggests, '[i]nterpreting a right to personal identity in this way seems to connect to strong and emotive language in wider society and in the proliferation of genetic searching, family heritage and genealogy'.²⁷ Children who are placed into care often have a history based on notes from (sometimes multiple) social workers, rather than on direct first-hand accounts from family members. The stories from the past, which are a notable part of the grandparent role, help children to form a sense of themselves.

The emphasis on genealogy, however, can be seen, for instance, via the historical 'natural parent'²⁸ presumption, which pointed to a preference for genetic connections over social and emotional connections.²⁹ Some cases also seemed to indicate a 'hierarchy' in genetics, with birth parents at times favoured over grandparents in residence disputes, even when secure bonds had been developed

²⁰ This is where a document is produced outlining a child's family history.

²¹ J Reid 'Lost Identities: Denying Children their Family Identity' in R Sheehan, H Rhoades and N Stanley (eds), *Vulnerable Children and the Law: International Evidence for Improving Child Welfare, Child Protection and Children's Rights* (London, Jessica Kingsley, 2012) 235, 236.

²² Marshall (n 14) 90. See also K O'Donovan, 'Enfants Trouvés, Anonymous Mothers and Children's Identity Rights' in K O'Donovan and G Rubin (ed), *Human Rights and Legal History* (New York, Oxford University Press, 2000) 237.

²³ Marshall (n 15) 123.

²⁴ Ya'ir Ronen, 'Redefining the Child's Rights to Identity' (2004) 18 *International Journal of Law, Policy and the Family* 147, 149.

²⁵ Marshall (n 15) 119.

²⁶ *Re H (Paternity: Blood Tests)* [1996] 4 All ER 28.

²⁷ Marshall (n 15) 119.

²⁸ *Re KD (A Minor) (Ward: Termination of Access)* [1988] AC 806; *Re D (Care: Natural Presumption)* [1999] 1 FLR 134. For discussion, see J Fortin, 'Re D (Care: Natural Parent Presumption) Is blood really thicker than water?' (1999) 11 *Child and Family Law Quarterly* 435.

²⁹ Fortin (n 28); K Everett and L Yeatman, 'Are some parents more natural than others?' (2010) 22 *Child and Family Law Quarterly* 290.

between children and grandparents via long-term care.³⁰ Moreover, as Eekelaar observes, grandparents may argue a right to a relationship with a grandchild based on genetics alone.³¹ Therefore, if genetics forms part of a child's identity, the arguments that apply in favour of protecting and respecting the parent/child biological link apply to many grandparents too. It is argued that while 'genetics' is an important factor to contemplate, it is not a sufficient reason, by itself, for valuing grandparental impact on identity and for being a preferred alternative to non-consensual adoption. Grandparents, and other kinship carers, may have established strong emotional bonds with children and/or may form an important part of a child's cultural networks. These key relationships may be important in and of themselves, but may also provide a 'doorway' to relationships that make the child feel more connected within himself or herself, strengthening the child's emotional well-being and sense of who he or she is in the world. Grandparents are a tangible connection to the child's immediate family and a 'living' account of the child's past and, where grandparents are related by blood, the child's genealogy.

In fact, during the last two decades, the superior courts have moved away from the 'natural parent' presumption³² and have placed substantial weight on secure social and emotional connections.³³ As Marshall notes, '[t]he child's genetic parentage plays a large role in his or her identity and is one of the main factors in terms of determining who a person is, but it is not the only factor.'³⁴ Blauwhoff argues that narrative identity is 'able to accommodate the idea that blood ties could be crucial to a person's identity, but it does not dismiss the importance of having a social family either.'³⁵ Thus, while genetic identity is important, and relevant from a human rights perspective, the importance of grandparents may in cases where established relationships exist between child and grandparent, largely be seen via well-developed social and emotional bonds. The importance can also be seen where grandparents can help a child to make sense of his or her past and promote a child's sense of 'connectedness' based on detailed knowledge of the child's life, which might be more challenging for unrelated foster carers or adopters.

B. Family Constellation Theory

'Family Constellation Theory',³⁶ developed by Hellinger and colleagues as a sub-division of family systems theory, is based on the premise that historical and cultural

³⁰ *Re D (Care: Natural Presumption)* [1999] 1 FLR 134.

³¹ J Eekelaar, *Family Law and Personal Life* (Oxford, Oxford University Press, 2006) 70.

³² *Re B (A Child)* [2009] UKSC 5, *Re E-R (A Child)* [2015] EWCA Civ 405; *Re W (A Child)* [2017] 1 WLR 889. For discussion see Everett and Yeatman (n 29).

³³ *Re G (Children)* [2006] UKHL 43.

³⁴ Marshall (n 15) 127.

³⁵ Blauwhoff (n 10) 21.

³⁶ SR Liebermeister, *The Roots of Love, A Guide to Family Constellation: Understanding the ties that bind us and the path to freedom* (Cambridge, Perfect Publishers, 2006).

origins underpin our identity, relationships and interactions with wider civil society.³⁷ The foundation of the theory is that members of a family are interconnected and part of an 'organic system',³⁸ which may be viewed as 'a complex system of atomic particles [that] is affecting and being affected by every other part'.³⁹ The act of adoption⁴⁰ then can be seen as not just complex legally, but potentially complex emotionally, due to the fact of removing a child from one psychological family system and 'transplanting' him or her into another. As Deblasio observes, '[t]he legal ties may be terminated, but the human bonds may be less straightforward to eradicate'.⁴¹ Although for the purposes of the law the child has been integrated into a new family, the child's bonds to birth family such as grandparents may persist. It is argued that, depending on the circumstances, these bonds may be linked to the child's identity.

Family Constellation Theory is based on the principles of 'order' and 'belonging', emphasising that every family member has his or her place in the system.⁴² Although Hellinger's analysis focused on a more traditional conception of the family, often individuals outside of the birth family could nonetheless form part of the 'system'. 'Family members' can therefore include those genetically connected, but also those with a role in a child's life, such as parents and grandparents, and also others with a role in children's lives, such as step-parents. Sélénée observes that, according to FCT, the drive to belong 'is part of what binds us to our family system and to each other'.⁴³ The importance of 'belonging' is crucial in the context of a child's identity after parental separation and adoption, so FCT is a helpful theoretical basis and framework to consider in the context of identity. The Theory entails exploration of a much wider family network, therefore reflecting the diversity of connections and influences on a child, beyond his or her parents. Thus FCT involves exploring how wider familial networks, including grandparents and even now deceased and absent family members, may affect the dynamics of the family unit.⁴⁴ Liebermeister notes a surprising phenomenon whereby 'a later member of the family, a child, identifies with an earlier family member without having any idea that this is happening. He carries his relative's feelings as his own and acts out that person's life ...'.⁴⁵ These consequences are based on what is referred to by Hellinger et al as the 'systematic conscience',⁴⁶ which is intangible but felt by all

³⁷ B Hellinger, G Weber and H Beaumont, *Love's Hidden Symmetry: What Makes Love Work in Relationships* (Phoenix, AZ, Zeig, Tucker & Co, 1998).

³⁸ Liebermeister (n 36) 5.

³⁹ *ibid* 2.

⁴⁰ Provided for under the Adoption and Children Act 2002.

⁴¹ L Deblasio, *Adoption and Law: The Unique Personal Experiences of Birth Mothers in Adoption Proceedings* (Abingdon, Routledge, 2021) 157.

⁴² M Sélénée, *Connected Fates, Separate Destinies* (London, TJ Books, 2021) 4.

⁴³ *ibid* 5.

⁴⁴ Liebermeister (n 36) 7.

⁴⁵ *ibid* 33.

⁴⁶ Hellinger et al, 3–4 (n 18).

members in a family system. Adoption itself has an impact on the child, his or her parents, grandparents and others within the family system.⁴⁷ The absent child has an intangible, emotional effect on his or her birth family and vice versa.

A probable issue with an adoptive placement is that children may carry unconscious conflicts with them into new relationships. Research by Howe, for instance, has shown that birth mothers are often ‘psychologically present’⁴⁸ in the minds of adopted children, regardless of their physical absence. While placement with grandparents may not be without challenges, it is argued that protecting relationships with extended kin may provide increased conscious understanding of deeper family conflicts that are felt by the child (and his or her carers). These conflicts could exist because of neglect and abuse the child has experienced, due to the absence of the birth parents, or due to other factors that impact on the child’s psyche. Continuity within a safe, supportive, social, cultural network familiar to the child may be more beneficial in this context.

Although application of FCT may draw scepticism on the basis that it has ‘esoteric’⁴⁹ origins, phenomenological research⁵⁰ demonstrates that it provides a useful way of understanding lived experiences and identity. It has also had useful application in therapeutic contexts.⁵¹ Similarly to the application of relationality considered in chapter 2 of this volume, the theory considers the importance of wider familial networks to well-being and one’s sense of connectedness. Family Constellation Theory can be conceptualised to assign roles to family members (which may include those without genetic links, who have shaped a child’s life in some way) and bring order to a diverse range of relationships that may affect and shape a child’s identity.

While FCT tends to centre around the parent/child relationship, many other types of relationships are considered to impact on personal identity, since the Theory places an emphasis on family ‘systems’. Grandparents are part of this family system, with many grandparents forming close, loving bonds with their grandchildren. Grandparent relationships may affect a child’s development and identity, consciously and unconsciously.⁵² The importance of extended family as part of a child’s identity is also reflected in aspects of the UNCRC. Despite the significance of grandparents historically, grandparents lack recognition of their rights in English law.⁵³ This author argues that the insufficient priority placed on the grandparent/grandchild relationship may, in some circumstances, serve to weaken

⁴⁷ M Grand, *The Adoption Constellation: New Ways of Thinking About and Practicing Adoption* (Scotts Valley, CA, Create Space, 2010).

⁴⁸ D Howe, *Adopters on Adoption: Reflections on parenthood and children* (London, BAAF, 1996) 4.

⁴⁹ C Watters, *Mental Health and Wellbeing: Intercultural Perspectives* (London, Bloomsbury, 2019) 97.

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² A Green, ‘Grandparents, communicative memory and narrative identity’ (2019) 47 *Oral History* 81.

⁵³ F Kaganas and C Piper, ‘Grandparent contact – another presumption?’ (2020) 42 *Journal of Social Welfare and Family Law* 176.

protection of children's identity rights and fail to acknowledge the importance of grandparents within the 'family constellation'.

Liebermeister observes that the loss of a parent (or parental figure), through either death or an extended absence in the provision of care, is traumatic and affects the child's psyche.⁵⁴ Thus, removal of a child into care and, potentially, a subsequent adoption is not always associated with improvement in mental health.⁵⁵ Children may, for instance, suffer 'genealogical bewilderment'⁵⁶ through the distress of not knowing about their birth family or having uncertain knowledge of them (unless children have suffered severe neglect and/or abuse). In a minority of cases,⁵⁷ adoption placements may be disrupted or break down completely.⁵⁸ Lansdown suggests it is essential to consider whether adoption 'is consistent with the promotion of the child's rights to an identity'⁵⁹ and indicates there should be a presumption that 'as far as is possible, there should be continued and extensive contact with members of the birth family'.⁶⁰ Certainly, when the matter of adoption is viewed through the lens of FCT, the child may be affected negatively by absent birth parents. Most children with less biographical information tend to fare worse emotionally than children who have more knowledge of their roots and have had placements with kinship carers prior to adoption.⁶¹ Thus, perhaps some of these difficult feelings could be mitigated with more information, but this does not address the loss of the relationships or of the opportunity to develop these relationships. It is believed, for instance, that even very young children may experience feelings of grief or loss when separated from a birth parent (or another primary carer). Thoburn argues that

too little attention has been paid, in some of the cases that have gone badly wrong, to the child's likely behaviour when separated from carers to whom he or she is attached. This applies especially to pre-verbal children, toddlers and disabled children whose only way of articulating their confusion and grief ... will be to behave in a way which may bring them into conflict with the parents they currently live with.⁶²

Many children with adoptive parents are settled in their placements and may not prioritise discovery of genetic and cultural origins. Nonetheless, research shows

⁵⁴ Liebermeister 102–03 (n 36).

⁵⁵ A Paine et al, 'Early adversity predicts adoptees' enduring emotional and behavioral problems in childhood' (2020) 30 *European Child Adolescent Psychiatry* 721.

⁵⁶ R Barn and N Mansuri, "I Always Wanted to Look at Another Human and Say I Can See That Human in Me": Understanding Genealogical Bewilderment in the Context of Racialised Intercountry Adoptees' (2019) 3 *Genealogy* 71.

⁵⁷ Often unreported.

⁵⁸ J Selwyn, D Wijedasa and S Meakings, *Beyond the Adoption Order: Challenges, Interventions and Adoption Disruptions* (London, BAAF, 2015).

⁵⁹ G Lansdown, 'The welfare of the child in contested proceedings' in M Ryburn (ed), *Contested Adoptions: Research, law, policy and practice* (Aldershot, Ashgate Publishing, 1994) 70.

⁶⁰ *ibid.*

⁶¹ Paine et al (n 55).

⁶² J Thoburn, 'Reunification from care: the "permanence" option that has most to offer, but the lowest success rate' (2009) 18 *Seen and Heard* 44, 48.

that often even children who are happy within their adopted families may still feel conflicted about where their ‘loyalties’⁶³ lie, which may cause emotional difficulties. According to Blauwhoff, ‘adopted children are more likely than other children to suffer identity problems.’⁶⁴ Children may experience negative emotions other than grief later in life. Liebermeister, for instance, suggests that ‘an adopted person frequently remains angry with the original parents.’⁶⁵ They may also experience anger towards their adoptive parents.⁶⁶ These feelings of anger are often associated with a sense of rejection, which is a common occurrence with adoptive arrangements,⁶⁷ regardless of how loving the adoptive parents might be. Although kinship placements may still present emotional challenges for children and carers alike, living with grandparents may help to salve a child’s anger. Being raised by grandparents may have an ‘anchoring’ effect, since it enables children to maintain some link with their previous life with their birth parents, helping to ground a sense of personal identity and protect a child’s rights under Article 8 ECHR and Article 8 UNCRC.

This sense of ‘identity’ is reinforced not simply via ‘genetics’ but through the importance of culture. Grandparents may be able to provide details about a child’s cultural background to ‘fill in gaps’ for the child. Grandparents may be central figures in outlining a child’s historical origins and in facilitating relationships with other birth family members, including the parents. In some cases, where appropriate, safe and in accordance with their wishes, children may be able to have contact with birth parents (either indirect or direct). Grandparents may therefore be able to use their role within the ‘family system’ to foster the development of a future relationship during adulthood (in accordance with the child’s wishes and evolving capacities under Article 12 UNCRC).

Indeed, it is important to recognise the value of existing connections beyond the parent/child relationship and the impact of these on children’s sense of identity. The child cannot be seen in isolation from the family unit. Herring has considered the importance of ‘relationality’,⁶⁸ in that a child’s rights (such as identity) may be ‘interrelated’ with the rights and interests of other family members rather than be opposed to them.⁶⁹ He suggests that ‘[i]n a radical sense our relationships

⁶³ C Thomas, *Adoption for Looked After Children: Messages from research* (London, BAAF, 2013) 25.

⁶⁴ Blauwhoff (n 10) 8. See also HD Grotevant et al, ‘Adoptive Identity and Adjustment from Adolescence to Emerging Adulthood: A Person-Centred Approach’ (2017) 53 *Developmental Psychology* 2195.

⁶⁵ Liebermeister 196 (n 36).

⁶⁶ Howe (n 48) 87.

⁶⁷ D Hindle and G Shulman, *The Emotional Experience of Adoption: A Psychoanalytic Perspective* (Abingdon, Routledge, 2008) 81; HJ Hamilton, *The Secrets in My Eyes* (Manitoba, Friesen Press, 2016); S Roszia and A Davis Maxon, *Seven Core Issues in Adoption and Permanency* (London, Jessica Kingsley, 2019) 62–80.

⁶⁸ J Herring, *Law and the Relational Self* (Cambridge, Cambridge University Press, 2020). See also Barn and Mansuri (n 56).

⁶⁹ See ch 2 of this volume for detailed discussion of the importance of ‘relationality’ and its role in adapting the law and legal practices to acknowledge the importance of extended kin, such as grandparents.

constitute ourselves.⁷⁰ This perspective also applies in relation to the child's identity, since it is not just the child's identity and emotions that may be affected adversely by adoption; the entire family constellation may be affected, and there may be a rippling effect on the emotional well-being of birth parents and the extended family. Deblasio notes that 'the adversarial family justice system creates a damaging interplay of blame and trauma, causing long-term harm to families'.⁷¹ As Parr highlights, 'When their child is finally adopted birth relatives are often left powerless and with an immense loss'.⁷² Thus, placement outside of the birth family and the child's existing social and emotional connections can affect the welfare and rights of others connected to him or her, including grandparents. As noted in chapter 2 by Bendall and Davey, rights cannot always be treated in isolation, with a 'relational' approach being crucial towards understanding the relevance of grandparent/grandchild relationships.

While placement with grandparents will not necessarily eliminate all the emotional and practical challenges a child will face, grandparent care may make the transition from parental care easier. Where there are pre-existing relationships, placement with a grandparent may be a more 'incremental' step and be less of an upheaval for a child, especially where a child has lived with or spent a considerable amount of time with a grandparent. Cantwell, for instance, has observed:

Among the identified advantages of kinship care are preservation of the child's family, community and cultural ties; avoidance of trauma resulting from moving in with strangers; and less likelihood of multiple placements. However, kinship or friendship is no guarantee of welfare, protection and ability to cope.⁷³

Thus, it is suggested that the priority should be protecting pre-existing relationships between grandparents (along with other kinship carers) and grandchildren. In the case of children, including those placed into care at birth, retention of links with grandparents, birth family and other members of the child's extended network is important when viewed through the lens of Article 8 ECHR and Article 8 UNCRC. Kinship placements provide the benefit of continued connection to birth family, acknowledge the extended family's interests and facilitate direct connection to a family framework. The kinship network is crucial since it encompasses genetic, social and emotional connections within which children's identities are firmly embedded. While it is important to protect a child's right to identity, encompassing his or her ties to extended kin, of course this cannot be at the expense of a child's emotional and physical well-being. Such placements must, ultimately, be in the child's best interests (ie within the scope of Article 3 UNCRC).

⁷⁰ J Herring, *Vulnerable Adults and the Law* (Oxford, Oxford University Press, 2016) 12.

⁷¹ Deblasio (n 41) 2.

⁷² V Parr, 'The Forgotten Corner of the Adoption Triangle' (2005) 15 *Seen and Heard* 43.

⁷³ N Cantwell, 'The Human Rights of Children in the Context of Formal Alternative Care' in W Vandenhoe et al (eds), *Routledge International Handbook of Children's Rights Studies* (Abingdon, Routledge, 2015) 257, 263.

As considered in detail later, weak viability assessments may mean that the child's best interests, and the benefits of a kinship placement (with a grandparent, for instance), may not be explored sufficiently. It is argued that every regard ought to be given to the possibility of grandparent care, where it is safe and possible to do so, due to the importance of the kinship link to the child's identity.

C. Identity, Race and Culture

As established previously, the importance of the grandparent/grandchild relationship to identity may extend beyond a rudimentary understanding of genetics and the value of social and emotional bonds. O'Donovan observes the intersectionality between individual and group identity: 'The focus on context demands we pay attention to all strands of identity such as ethnicity, culture, race, class and that we belong to multiple identity categories.'⁷⁴ These features of identity are also crucial in the formation of wider bonds within cultures and communities,⁷⁵ which may serve children throughout their lives. It is argued, therefore, that grandparents not only have a genetic connection that it is important to acknowledge (and, where appropriate, protect), but also, often, have an important role within the 'family system' in helping children make sense of highly specific features of their identity, such as culture, religion and ethnicity. Grandparent care also increases the likelihood of encouraging and protecting ethnic and cultural identity, which are important factors when professionals make decisions about long-term care and in the context of FCT. This is relevant as regards non-consensual adoption cases, where adoption might be the preferred option over grandparent care.

Until the Adoption and Children Act 2002 was amended, there was a requirement to give 'due consideration' to race (and thus racial matching) in the adoption process. This was repealed by section 3 of the Children and Families Act 2014 to speed up the adoption process, especially for children from ethnic minorities who tend to be over-represented in the care system.⁷⁶ This repeal mirrors the approach taken in US law, which amended equivalent legislation on adoption law, the MEPA,⁷⁷ in 1996.⁷⁸ This amendment received 'vociferous'⁷⁹ opposition and was seen as minimising the importance of black culture.⁸⁰ Similarly, there has been concern about the removal of the 'due consideration' requirement within English

⁷⁴ O'Donovan (n 22) 242–43.

⁷⁵ Marshall (n 15) 145.

⁷⁶ For discussion, see L Ferguson. 'Families in All Their Subversive Variety: Over-Representation, the Ethnic Child Protection Penalty, and Responding to Diversity Whilst Protecting Children' (2014) 63 *Studies in Law, Politics, and Society* 43.

⁷⁷ Multiethnic Placement Act 1994.

⁷⁸ E Bartholet, 'Contested Child Protection Policies' in JG Dwyer (ed), *The Oxford Handbook of Children and the Law* (Oxford, Oxford University Press, 2020) 415, 427.

⁷⁹ RR Banks, 'Race and the Adoption of Children' in Dwyer (ed) (n 78) 227, 229.

⁸⁰ *ibid* 230.

law.⁸¹ Although this shift in approach affects all ethnic minority children, it has the most impact on black children because they comprise the highest proportion of ethnic minority children in care.⁸² Hughes argues that the removal of 'due consideration' is the 'wrong solution'⁸³ to the problem of the high number of black children in care and that it is 'discriminatory'.⁸⁴ Arguably too, such an approach minimises the importance of 'race' as a component of identity, covered by Article 8 UNCRC. Hughes notes that

[a]dopted children have to deal with the fact of being adopted. The additional emotional burden to their identity development and sense of self as a result of being inappropriately placed is an unnecessary burden which we consider is not in their interests.⁸⁵

Trying to racially match children protects the development of their identity in many ways, including by increasing the likelihood that children will be provided with 'tools'⁸⁶ on how to navigate racial hostilities. Transracial placements can undermine children's self-confidence and self-esteem.⁸⁷ Children may feel anger due to powerlessness, or a sense of being 'different',⁸⁸ especially in such placements.⁸⁹ Such adoptions may 'reinforce power imbalances by using white middle-class standards'.⁹⁰ Moreover, adoption may give 'children a legal status that may leave them feeling alienated in their own culture'⁹¹ if they are not placed with adopters of the same race. According to O'Halloran, 'the emerging consensus is that where possible placement arrangements should reflect a child's ethnic background and cultural identity'.⁹² Hughes and Wilson reflect that

a black child's race, culture and language are central to who they are and the person they become in later life. Black children have many issues to grapple with and their identity and sense of belonging are fundamental to their ability to think of themselves positively ...⁹³

⁸¹ J Hughes, 'Black children's lives matter: NAGALRO campaign to reinstate the repealed provisions of s1(5) Adoption and Children Act 2002' (2021) 31 *Seen and Heard* 62.

⁸² Department for Education, *Children looked after in England including adoption 2019 to 2020* (ONS, Department for Education, 2020) at <https://explore-education-statistics.service.gov.uk/find-statistics/children-looked-after-in-england-including-adoptions/2020>.

⁸³ Hughes (n 81) 62.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ J Hughes, 'The Acculturation Process of Adella' (2020) 30 *Seen and Heard* 35, 35.

⁸⁷ *ibid.*; Banks (n 79) 235–36.

⁸⁸ J Feast and T Philpot, *Searching Questions: Identity, Origins and Adoption* (London, British Association for Adoption and Fostering, 2003); T Patel, *Mixed-Up Kids? Race, identity and social order* (Lyme Regis, Russell House, 2009) 50–51.

⁸⁹ K O'Donovan, 'Interpretations of children's identity rights' in D Fottrell (ed), *Revisiting Children's Rights* (Dordrecht, Kluwer, 2000) 73 at 74.

⁹⁰ Patel (n 88).

⁹¹ Lansdown (n 59) 71.

⁹² K O'Halloran, *The Welfare of the Child* (Abingdon, Routledge, 1999) 253.

⁹³ J Hughes and Y Wilson, 'NAGALRO's Black Children's Lives Matter: Response to the "Adoption Strategy – Achieving Excellence Everywhere"' (2022) 32 *Seen and Heard* 63.

Most black children tend to enter the care system at an older age⁹⁴ and are thus more likely to have pre-existing relationships with their grandparents compared to white children. The removal of children from ethnic minorities (especially black children) into care and placement for subsequent adoption has given rise to concern about whether sufficient protection is provided to these children's identities.⁹⁵ Huh and Reid express concern that 'if children are uprooted from their own culture, their sense of ethnic identity may become confused or conflicted'⁹⁶ Moreover, Banks argues that '[a] denial of carers of the need, early in a child's life, for accurate ethnic identification may lead to intense anxiety, confusion⁹⁷ and later anger when racial slurs are encountered'.⁹⁸ In these circumstances, where grandparents share the same racial characteristics, such placements may be of particular importance to help to protect children's identity rights under Article 8 ECHR and Article 8 UNCRC, through acknowledging their ethnicity and/or culture. Where children are trans-racial, matters may be more complicated, as a child may identify more closely with one race than another. In such circumstances, grandparent care may need to be more closely scrutinised to ensure that a grandparents' cultural and social networks will serve the child's need to develop his or her racial and cultural identity. It is also argued that it is of particular importance in such cases to make children central to these decision-making processes about their understanding of 'who' they are and 'where' they want to live, in accordance with a child's evolving capacities under Article 12 UNCRC.

In fact, the European Court of Human Rights (ECtHR) has regarded ethnic identity as an essential component of individual identity that is protected under Article 8 ECHR.⁹⁹ Marshall articulates the importance of protecting minority rights under Article 8: 'When your identity is different to that of the majority in any society ... there is the potential vulnerability to prejudice and discrimination.'¹⁰⁰ Grandparent care may be beneficial to children from ethnic minorities, since grandparents may be of the same race and be part of the same social and cultural networks as the grandchild. Thus, an awareness of identity and origins is important in developing a sense of personal identity.¹⁰¹ It is argued that identity is formed via place within a family unit and through individual relationships, such as the grandparent/grandchild relationship. Although some children may experience a sense of grief and loss when separated from their parents, for black children especially, the likelihood is greater that adoption will involve loss of

⁹⁴ *ibid.*

⁹⁵ Hughes (n 81).

⁹⁶ NS Huh and WJ Reid, 'Intercountry, transracial adoption and ethnic identity: A Korean example' (2000) 43 *International Social Work* 75, 75.

⁹⁷ Patel (n 88) 106–07.

⁹⁸ N Banks, 'Issues of attachment, separation and identity in contested adoptions' in Ryburn (ed) (n 59) 105, 118.

⁹⁹ *Ciubotaru v Moldova* App no 27138/04 (ECtHR, 27 April 2010).

¹⁰⁰ Marshall (n 15) 157.

¹⁰¹ Banks (n 98) 119.

cultural as well as familial connections due to the relative paucity of carers available from ethnic minorities in proportion to the number of children from ethnic minorities in care.¹⁰² Therefore, the protection of ‘identity’ and potential benefits of grandparent care are even more important for children from ethnic minorities, where children themselves express a wish to maintain these relationships.

Recent research by the Family Rights Group into local authorities seeking to create or re-establish links between children in care and their wider familial and friendship networks, has shown that these relationships are valued by young people. Children in care seek to ‘develop their sense of identity’¹⁰³ and find the maintenance of kinship networks or ‘relational stability’¹⁰⁴ beneficial to their well-being. Arguably, where grandparent care is not appropriate, ‘open adoption’ (ie adoption with contact taking place between children and their birth family) should be explored more fully. The difficulty is that most adoptions are ‘closed’¹⁰⁵ and take place without face-to-face contact between children and their parents or extended birth family, including grandparents. Ryburn has argued that adoption would benefit from ‘flexibility and inclusiveness’, for example by maintaining contact between children and natural grandparents post-adoption.¹⁰⁶ There is intrinsic value in protecting children’s identity via the maintenance of grandparent relationships, where it is safe and in a child’s wider best interests under Articles 3, 9 and 12 UNCRC to do so.

D. The Value of Kinship Care to Identity

While ‘identity’ is often drawn from conscious, established relationships, the power of the unconscious should not be underestimated. Most adoptions are of children between 1 and 4 years of age,¹⁰⁷ a time of significant growth of neural networks¹⁰⁸ and unconscious learning.¹⁰⁹ Children learn skills, such as acquiring language, from their experiences. but may have no conscious awareness of doing so.¹¹⁰ Arguably, then, these important developmental processes also facilitate the

¹⁰² J Selwyn, L Frazer and A Fitzgerald, *Finding Adoptive Families for Black, Asian and Black Mixed-Parentage Children: Agency policy and practice* (London, NCH, 2004).

¹⁰³ Family Rights Group, *Lifelong Links: Embedding practice* (Oxford, Family Rights Group, 2022) 5.

¹⁰⁴ *ibid* 16.

¹⁰⁵ E Neil, ‘Rethinking adoption and birth family contact: is there a role for the law?’ [2019] *Family Law* 1178.

¹⁰⁶ Ryburn (ed) (n 59) 17.

¹⁰⁷ Department for Education, *Children looked after in England including adoptions* (London, Department for Education, 2021).

¹⁰⁸ D Siegel, *The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are*, 3rd edn (New York, Guilford Press, 2020).

¹⁰⁹ *ibid*.

¹¹⁰ J Dunn, K Kirsner and S Lewandowsky, *Implicit Memory: Theoretical issues* (Abingdon, Taylor and Francis, 2014) 249.

unconscious development of identity vis-à-vis familial relationships. Benions suggests:

It is common knowledge that even little children who are too young to understand the biological significance of their parents to them, can accept that several people may be important to them without confusion. For instance, two year olds already know that Granny and Grandpa are significant to them, as well as Mummy and Daddy.¹¹¹

Children can be affected by parental separation in various ways, such as a sense of divided loyalties. Blauwhoff argues that unconscious loyalty towards birth parents may be innate:

Since loyalty is represented ... as a function of nature rather than nurture, it would be understandable why so many adopted children seem to experience identity problems, because loyalty towards the socio-legal parents would almost irretrievably entail a form of disloyalty towards birthparents.¹¹²

This type of unconscious conflict could be minimised with the retention of familial links via a kinship placement or an 'open adoption', as considered earlier.¹¹³ Research has demonstrated that many children removed from home sought out their birth families because they had 'become their main point of personal identity'.¹¹⁴ Therefore, regardless of whether children have memories of birth family, they have an impact on children's psyche. As Ronen points out, 'the child's loss of earlier relationships along with all traces of their pre-adoption identity is widely recognised as potentially damaging to some children'.¹¹⁵ For children who maintain a grandparent/grandchild relationship, the grandmother especially can be seen as a 'reservoir of memories and connections to their social network'.¹¹⁶ Reid argues that extended family are important to identity:

Ancestry and identity ... are not a simple matter of linear biological relationships or normative definitions of family but necessarily involve consideration of kinship – the dual role of blood ties and social structures.¹¹⁷

Grandmothers thus are often a 'bridge' to extended kinship and cultural networks, which can be beneficial for children's welfare. These connections help to improve children's sense of 'belonging' and 'identity', which can be more challenging in adoptive placements, since adopted children often feel they do not 'fit in'.¹¹⁸

¹¹¹ R Benions, 'Natural Contact for Children in Care' (1992) *Seen and Heard* 31, 32.

¹¹² Blauwhoff (n 10) 14.

¹¹³ Thoburn (n 62). See also PA Costa, A Gubello and F Tasker, 'Intentional Kinship through Caring Relationships, Heritage and Identity: Adoptive Parents' Inclusion of Non-Biological and Non-Affinal Relationships on Family Maps' (2021) 5 *Genealogy* 85.

¹¹⁴ C Hardy, 'Permanence in Practice' (1995) 6 *Seen and Heard* 28, 32.

¹¹⁵ Ronen (n 24) 154.

¹¹⁶ A Souralova, *New Perspectives on Mutual Dependency in Caregiving* (Abingdon, Taylor and Francis, 2016) 101.

¹¹⁷ Reid (n 21) 237.

¹¹⁸ Howe (n 48) 87.

Therefore grandparents are an important part of the ‘family system’ or ‘family constellation’, and may help to mitigate feelings of loss and anger as well as the trauma that can result from separation from and/or mistreatment by parents.¹¹⁹ Kinship care can be valuable in ‘reining in the damage to challenging children, especially given that the children’s needs may be volatile, intermittent and flexible.’¹²⁰ This is particularly the case for older children, who are likely to have memories of and bonds with their birth family. As mentioned, statistically most adoptions take place between the ages of 1 and 4. Banks suggests that adoption placements for children aged between 1 and 4 are often perceived as unlikely to have problems, when in fact around 54 per cent of such children demonstrate difficult behaviours, including problems sleeping, eating, concentrating or managing emotions.¹²¹ Therefore, decisions regarding permanent placements for children warrant the careful balancing of the potential benefits and dis-benefits of particular kinship arrangements, against the possible benefits and dis-benefits of adoption.

Despite the clear advantages that come with the stability of an adoption placement, research shows that adoption is far from perfect. Placement with a family or friend carer, followed by SGOs or residence orders, are far less likely to face placement disruption than when children are placed with unrelated carers¹²² and children are ‘overwhelmingly’¹²³ positive about their kinship care experiences, despite the lack of financial and practical support received by carers (such as grandparents) when compared against adoptive parents.¹²⁴ Therefore, where it is possible for grandparent care to take place (or, indeed, other kinship placements) there is a robust argument for doing so, based on the importance of protecting existing social and emotional connections and integration into cultural and social networks, which may be beneficial to the child.

Although adoption is sometimes treated as a ‘holy grail’ for each child, as Deblasio argues, ‘the system cannot guarantee that children are safer in care or that adoption will be the happy ending.’¹²⁵ Therefore, it can be concluded that while adoption may offer many benefits, grandparent care may have the distinct benefit of enabling children to place themselves within their ‘family constellation’ and have a firmer sense of identity. Section III explores which rights frameworks may be applicable when children cannot be reunited with their parents and it becomes necessary for social workers to explore long-term placement options.

¹¹⁹ J Alper and A Edwards, ‘Assessing Potential Kinship Placements’ in J Alper and D Howe (eds), *Assessing Adoptive Parents, Foster Carers and Kinship Carers* (London, Jessica Kingsley, 2017) 149, 155.

¹²⁰ Children and Young Persons Bill 2008 (HL) 17 March 2008, available online at <https://publications.parliament.uk/pa/ld200708/ldhansrd/text/80317-0009.htm>.

¹²¹ Banks (n 98) 109.

¹²² Selwyn et al (n 36).

¹²³ J Hunt, *Two decades of UK research on kinship care: an overview* (Family Rights Group, 2020) 9.

¹²⁴ Kinship, *Out of the Shadows: A vision for kinship care in England* (Kinship, March 2022).

¹²⁵ Deblasio (n 41) 61.

III. The ECHR, UNCRC and English Law

A. Law and Policy Frameworks in English Law

The relationships between grandchildren and grandparents must be seen on a spectrum that ranges from a non-existent relationship (ie grandparents who have never met their grandchildren) to grandparents who are heavily involved in the lives of their grandchildren and have developed powerful mutual bonds. These bonds may have been developed via regular contact or through grandparents and grandchildren living together. Some grandparents have served as ‘substitute parents’,¹²⁶ who have taken over care from parents on a temporary or ongoing basis. This caregiving may be an arrangement from birth, or a response to a parenting ‘crisis’ that has necessitated state intervention. This might include, for instance, Social Services involvement in family life. In these circumstances, children might be cared for or live with their grandparents in an unofficial capacity with the agreement of the mother (who has automatic parental responsibility¹²⁷) or both parents, as appropriate. Such caregiving arrangements might even have been approved by Social Services without a care order in place. In other situations, children might be living with their grandparents with the seal of judicial approval obtained via a court order. This could be through a child arrangements order specifying the child’s residence,¹²⁸ a special guardianship order,¹²⁹ a care order¹³⁰ or, in rare cases, an adoption order in favour of grandparents.¹³¹ In other circumstances, grandparents may put themselves forward as carers and may be rejected as a form of alternative care. As considered below, there are cases where this may be due to the lack of an in-depth viability assessment.

Under section 22C(7)(a) of the Children Act 1989, when a child is looked-after, local authorities must give preference to relatives or friends as connected person foster carers. Moreover, under section 22(4)(d) of the Act, local authorities are duty-bound to consider ‘any other person whose wishes and feelings the authority consider to be relevant’ (eg, extended kin such as grandparents) before placing children with unrelated carers (either as long-term foster placements, or short-term foster placements preceding removal of the child into a different family unit and the subsequent making of placement and adoption orders or fostering for adoption placements). When an adoption order is made and the welfare checklist is applied under section 1(4)(f) of the Adoption and Children Act 2002, the

¹²⁶ J Hunt, ‘Grandparents as substitute parents in the UK’ in Buchanan and Rotkirch (eds) (n 8) 45; J Poehlmann, ‘An attachment perspective on grandparents raising their very young grandchildren: Implications for intervention and research’ (2003) 25 *Infant Mental Health* 149.

¹²⁷ Within the meaning of the Children Act 1989, ss 2–4.

¹²⁸ *ibid*, s 8.

¹²⁹ *ibid* s 14A (as amended by the Adoption and Children Act 2002).

¹³⁰ *ibid* s 31.

¹³¹ *Re T (A Child: Refusal of Adoption Order)* [2020] EWCA Civ 797.

court must consider 'the relationship which the child has with relatives' before making an adoption order. This demonstrates that legislative frameworks make some provision for grandparents, albeit indirectly.

Grandparents' interests (and children's relationships with grandparents) tend to be minimised in adoption proceedings.¹³² This is the case, as already considered, despite the fact that many grandparents (and other kinship carers) may have an important 'anchoring' role in their grandchildren's lives via the commitment to and mutual bonds they have formed with each other. Research demonstrates that children themselves see the advantages of living with kin, such as stability, avoidance of being in care, maintaining links with family and friends, maintaining racial and cultural heritage.¹³³ In kinship placements, some grandparents are not only a stable and continuous presence but also provide a tangible connection to children's genealogical roots.¹³⁴ Moreover, as Tingle has found via empirical research, "They [grandparents] are fearful, too, of their adopted grandchild growing up not knowing its family of birth and of being rootless because of it."¹³⁵ Thus, a child removed from his or her 'family constellation' may grow up with a sense of loss, which serves, at least in part, to define identity. In other words, who we become is formed not just by the significant people present in our lives, but also by the absence of those who are significant and who may provide tangible links to social and cultural networks. This challenge might be avoided via the increased utilisation of grandparent care. This would, in turn, lead to greater protection of children's identity under Article 8 ECHR and the UNCRC (see sections III.B and III.C).

Grandparents may encounter several hurdles to looking after grandchildren who have been subject to care proceedings¹³⁶ (see also discussion in chapter 4). They may be rejected as carers for their grandchildren due to unsuccessful initial viability assessments or court-ordered assessments conducted by social workers. In many cases, a thorough assessment will have been undertaken that protects and promotes children's best interests. Unfortunately, due to time constraints or lack of training, often these assessments may not always be of sufficient quality to deliver the best long-term care option for children. Grandparents face additional barriers to challenging unsuccessful assessments, such as the lack of automatic eligibility to legal aid¹³⁷ and the lack of automatic party status.¹³⁸ This problem has long been an issue in care and adoption proceedings, as shown by David Hinchcliffe's

¹³² S Davey, *A Failure of Proportion: Non-Consensual Adoption in England and Wales* (Oxford, Hart Publishing, 2020) 167–69.

¹³³ B Broad, R Hayes and C Rushworth, *Kith and Kin: Kinship Care for Vulnerable Young People* (London, Jessica Kingsley, 2001) 29.

¹³⁴ Souralova (n 116) 101.

¹³⁵ N Tingle, 'A view of wider family perspectives in contested adoptions' in Ryburn (ed) (n 59) 175, 176.

¹³⁶ Care orders are made under the Children Act 1989, s 31.

¹³⁷ A Daly, 'Good Relations: Kinship Care in Liverpool, UK and the Views of Professionals on Human Rights' (2021) 13 *Journal of Human Rights Practice* 67.

¹³⁸ D Bloomfield, 'A Grandfather at Court: Rights and Reality' [2004] 14 *Seen and Heard* 36.

comments, found within the Hansard debates on the bill that became the Children Act 1989:

I had fought for a woman who is the grandparent of a six-year-old child. She brought up the child, was the only figure in the child's life and loved and cared for him in the absence of a mother. Then he was adopted, and she had no rights. She could not get legal aid, because she had no right to be heard in court. I am angry about that. The law is wrong.¹³⁹

Tingle is critical of the current legal framework, describing it as 'unjust law that gave scant recognition to the important part that many grandparents play in the lives of their young relatives'.¹⁴⁰ The removal of children for adoption is 'traumatic'¹⁴¹ for grandparents and could be avoided in many cases by opting for grandparent care. Tingle's research provides a case study of a grandmother and grandchild that is illuminating. The grandmother had regular contact with a child, who was removed from the father due to the father's mental illness and child abuse. Once in care, contact between the child and grandmother was terminated and the child was placed for adoption. The placement was unsuccessful. The social workers involved in the case asked the grandmother for assistance, and once she resumed regular contact with the child, the child's behavioural issues improved considerably.¹⁴² Although this example draws on research from the 1990s,¹⁴³ it is just as relevant today. This example shows that where adoption is in the child's best interests, retaining contact with kinship carers such as grandparents may be beneficial to the child's well-being and sense of self. This may thereby protect the child's identity rights under Article 8 ECHR and Article 8 UNCRC.

As already considered, there may be reasons why grandparents may be unsuitable carers. Factors such as age and ill-health, for instance, are relevant welfare factors under section 1(4) of the Adoption and Children Act 2002. There may be cases where grandparents may be neglectful and/or abusive or emotionally harmful to grandchildren due to racist or misogynistic outlooks on life, which may detrimentally affect children's welfare. It is argued, however, that there may be cases where disproportionate weight is attached to grandparental vulnerabilities based on health and age, thus failing to provide sufficient emphasis on the child's right to identity under Article 8 UNCRC and the need to protect diverse relationships extending beyond the textbook 'nuclear' family. In other circumstances, where kinship care is not in a child's best interests, open adoption might be beneficial. Open adoption may provide an opportunity for a child to develop and maintain his social and cultural networks and minimise the child's sense of grief and loss.

¹³⁹ D Hinchcliffe, HC Deb 27 October 1989, vol 158.

¹⁴⁰ Tingle (n 135) 175.

¹⁴¹ Featherstone, Gupta and Mills (n 1) 28.

¹⁴² Tingle (n 135) 180.

¹⁴³ See, eg, T Festinger, 'Adoption Disruption: Rates and Correlates' in D Brodinzky and M Schechter (eds), *The Psychology of Adoption* (Oxford, Oxford University Press, 1990) 201.

B. Relationships and Identity under the ECHR

The ‘family constellation’ is relevant to the work undertaken by social workers to find a permanent home for a child who requires substitute care. Social workers develop a ‘genogram,’ mapping out relevant family members who can provide such care. While this document focuses on genetic relatives, it may include extended networks, including step-parents and step-grandparents. When family members are ruled out, other options are explored, such as long-term fostering and adoption. As Kelly and Das observe, ‘[a]doption can be a remarkably successful intervention in the lives of abandoned and neglected children.’¹⁴⁴ Moreover, for many children in care, it is the best measure to protect them from harm, protect their ECHR rights and promote their welfare within the meaning of the welfare checklist in section 1(4) of the Adoption and Children Act 2002.

Adoption does, however, have serious and irreversible consequences for the relationships between children and their birth families, and may constitute an interference with their mutual right to respect for private and family life under Article 8 ECHR. Non-consensual adoption has been described as ‘life changing’¹⁴⁵ and even ‘draconian,’¹⁴⁶ since it terminates the birth parents’ parental responsibility¹⁴⁷ and severs the legal link between children and their birth families. Adoption is typically irrevocable,¹⁴⁸ with few exceptions.¹⁴⁹ The courts are reluctant to set aside adoptions, unless procedural irregularities exist.¹⁵⁰ As Ronen argues, ‘the legal system lacks the tools to fully safeguard the child’s sense of belonging in each and every case.’¹⁵¹ Therefore, out of all court orders that can be made in relation to children, adoption has the greatest impact on the child’s identity throughout his or her life. While adoption is a long-term measure of care that may protect children’s welfare and right to protection from harm under Article 3 ECHR, it may also clash with children’s other rights. These include the protection under Article 8 ECHR, the right to respect for private and family life, which protects children’s family relationships (including extended family such

¹⁴⁴ G Kelly and C Das, ‘Should Adoption Be an Option’ in D Fottrell (ed), *Revisiting Children’s Rights* (Dordrecht, Kluwer, 2000) 254.

¹⁴⁵ Featherstone, Gupta and Mills (n 1) 3.

¹⁴⁶ Kelly and Das (n 144) 254; *P, C and S v UK* [2002] ECHR 604. Also P Parkinson, ‘Child protection, permanency planning and children’s right to family life’ (2003) 17 *International Journal of Law, Policy and the Family* 147.

¹⁴⁷ Parents have automatic parental responsibility when registered as birth parents on the child’s birth certificate. Adoption has the effect of terminating this parental responsibility and vesting it in the adoptive parents.

¹⁴⁸ *Webster v Norfolk County Council and others* [2009] EWCA Civ 59.

¹⁴⁹ For discussion of examples of cases where revocation has occurred, see P Morgan, ‘ZH v HS & Ors (Application to Revoke Adoption Order): three groups of revocation cases’ (2020) 42 *Journal of Social Welfare and Family Law* 246.

¹⁵⁰ *Webster* (n 148).

¹⁵¹ Ronen (n 24) 156.

as grandparents) and ‘identity’¹⁵² rights. It is apparent from the jurisprudence of the ECtHR that the ‘mutual enjoyment’ between ‘grandparent and child, of each other’s company’¹⁵³ qualifies as family life.¹⁵⁴

The existence of family life under Article 8 ECHR can, however, be construed as dependent on the reality of personal ties¹⁵⁵ and demonstrable benefit to the child’s welfare.¹⁵⁶ Draghici suggests that ‘[f]amily-related guarantees under the ECHR are therefore a constellation of rights amenable to different organisational criteria.’¹⁵⁷ Thus, depending on the facts of the case, although grandparents will be able to engage rights to a relationship with their grandchildren under Article 8 ECHR, this may be on the basis either of a right to respect for private life or of a right to respect for family life.¹⁵⁸ According to the ECtHR, children have the right to know facts pertaining to their identity,¹⁵⁹ and ‘identity’ can be regarded as the ‘inner core’¹⁶⁰ of one’s right to respect for private life under Article 8 ECHR. The UNCRC, especially Article 8, has relevance under the umbrella of Article 8 ECHR. It is argued that the right to identity under the UNCRC, encompassing the right to ‘family relations’, may also be protected under Article 8 ECHR. The UNCRC has, since its conception, been influential on the ECHR and has importance for the ECtHR’s interpretation of identity. Furthermore, ‘identity’ is encompassed within the child’s best interests, which is not only a substantive right protected by Article 3 UNCRC but is also protected within the scope of Article 8 ECHR.¹⁶¹

C. Identity and the UNCRC

Although the UNCRC is non-binding, it is the most authoritative legal document on children’s rights¹⁶² and an ‘important interpretative tool’.¹⁶³ This is because it provides more detail on the individual rights of children compared with the ECHR. Moreover, the UNCRC includes a cluster of ‘familial’ rights,¹⁶⁴ and provides for

¹⁵² *Mikulić v Croatia* [2002] 1 FCR 720. See also Y Al Tamimi, ‘Human Rights and the Excess of Identity: A Legal and Theoretical Inquiry into the Notion of Identity in Strasbourg Case Law’ (2018) 27 *Social and Legal Studies* 283.

¹⁵³ *L v Finland* [2000] 2 FLR 118, para 101.

¹⁵⁴ *Monaco de Gallicchio v Argentina* Comm No 400/1990 HRC (3 April 1995).

¹⁵⁵ *Todorova v Italy* App no 33932/06 (ECtHR, 13 January 2009).

¹⁵⁶ S Choudhry and J Herring, *European Human Rights and Family Law* (Oxford, Hart Publishing, 2010) 271.

¹⁵⁷ C Draghici, *The Legitimacy of Family Rights in Strasbourg Case Law* (Oxford, Hart Publishing, 2017) 32.

¹⁵⁸ *Marckx v Belgium* App no 6833/74 (ECtHR, 13 June 1979).

¹⁵⁹ *Gaskin* (n 5).

¹⁶⁰ *Jaggi v Switzerland* App no 58757/00 (ECtHR, 13 July 2006).

¹⁶¹ *Gaskin* (n 5). See also J Collinson, ‘Making the best interests of the child a substantive human right at the centre of national level expulsion decisions’ (2020) 38 *Netherlands Quarterly of Human Rights* 169.

¹⁶² G Van Bueren, *The International Law on the Rights of the Child* (Leiden, Brill, 1995).

¹⁶³ U Kilkelly, ‘The Impact of the Convention on the case-law of the European Court of Human Rights’ in D Fottrell (ed), *Revisiting Children’s Rights* (Dordrecht, Kluwer, 2000) 87.

¹⁶⁴ See Arts 7–9 UNCRC.

the collective rights of children and adults, via provisions including Articles 5, 7, 8, 20 and 30, and also the United Nations Guidelines for the Alternative Care of Children.¹⁶⁵ Articles 2, 7, 8, 16 and 30 UNCRC, in particular, all have the effect of protecting children from various forms of interference with identity.¹⁶⁶ It is suggested that the UNCRC acknowledges the importance of children's relationships with parents and extended kin. Additionally, it has been argued elsewhere that the UNCRC is so significant that it ought to be considered when determining the proportionality of non-consensual adoption.¹⁶⁷ Lansdown has noted the potential value of the UNCRC in this regard:

The use ... of the key principles of the [UN] Convention as a yardstick to measure every decision in adoption would begin to offer an external consistency and rigour to the decisions taken in all adoption matters, and in particular to those in the very difficult circumstances where parents and professionals disagree.¹⁶⁸

In other words, where there is scope for disagreement over which measure of long-term care might be best, including grandparent care, the UNCRC could have a helpful role. Here, it is suggested that the principles of the UNCRC ought to have greater significance when choosing options for long-term care, particularly Article 8 UNCRC. Article 8(1) UNCRC has defined identity as 'including nationality, name and family relations'. Hodgkin and Newell note that 'a child's identity means more than just knowing who one's parents are ... Siblings, grandparents and other relatives can be as, or more, important to the child's sense of identity as his or her parents are'.¹⁶⁹

Similarly, FCT acknowledges that 'family relations' past and present form part of a child's identity. The cases brought before the ECtHR that have involved contemplation of identity rights recognised under the UNCRC have impliedly (eg *Gaskin v UK*¹⁷⁰) or explicitly (eg *Odièvre v France*¹⁷¹) tended to focus on the children's right to know who they are, rather than on the role of family members in forming personal identity itself. It is argued that a child's 'identity' should be interpreted as broadly as possible, through acknowledging 'family relations' as part of a child's identity itself, as envisaged within the UNCRC. In fact, there are further steps that could be taken to recognise and acknowledge the importance of the 'family constellation' and the impact on a child's identity. Ronen, for example, proposes 'redefining the child's right to identity as a right to state protection of ties meaningful to the child'.¹⁷² This would involve seeking the child's wishes and

¹⁶⁵ Davey (n 132) 176.

¹⁶⁶ R Hodgkin and P Newell, *Implementation Handbook for the Convention on the Rights of the Child*, 3rd edn (New York, UNICEF, 2007) 113.

¹⁶⁷ Davey (n 132) 46–48.

¹⁶⁸ Lansdown (n 59) 67.

¹⁶⁹ Hodgkin and Newell (n 166) 114.

¹⁷⁰ *Gaskin* (n 5).

¹⁷¹ *Odièvre v France* App no 42326/98 (ECtHR, 13 February 2003).

¹⁷² Ronen (n 24) 147.

feelings about his or her relationships, an exploration of the child's culture and reflection on how 'these ties delineate the child's identity'.¹⁷³ Ronen further adds that '[i]dentity should not be seen as developing in a vacuum, but rather always through dialogue and sometimes struggles with significant others – those persons who matter to the individual constructing their identity'.¹⁷⁴ Therefore, relationships that have helped to 'construct' the child's existing identity are deserving of protection if they are capable of protecting the child's welfare. As argued earlier, when considered through the lens of FCT, grandparents may be key to some children, and may help children maintain their existing identities and maintain and develop networks within their existing cultures.

Article 5 UNCRC has a contribution to make towards the concept of how the protection of family ties, in turn, protects identity. It provides that 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family ...'. As Kamchedzera observes, Article 5 has a 'flexible conception'¹⁷⁵ of family since it refers to 'members of the extended family or community'.¹⁷⁶ Article 5 also does not hold the child in isolation, since 'Article 5 of the CRC is very much about parents and other key carers',¹⁷⁷ with the Committee on the Rights of the Child making specific reference to grandparents.¹⁷⁸ Hodgkin and Newell observe that there is an 'overall trend towards greater diversity in family size, parental roles and arrangements for bringing up children',¹⁷⁹ and note the increase in grandparent-headed families.¹⁸⁰ This acknowledgement of the importance of protecting diverse family forms can be seen in General Comment 18, where it is stated:

Where diverse concepts of family, 'nuclear' and 'extended' exist within a State, this should be indicated with an explanation of the degree of protection afforded to each ... State Parties should also indicate whether and to what extent such types of family and their members are recognised and protected by domestic law and practice.¹⁸¹

This increased recognition of the impact on a child's well-being of family networks beyond the nuclear family can be seen via FCT. As shown from chapter 10, jurisdictions such as Nepal place emphasis on the importance of extended family networks. This is not necessarily the case, however, in western jurisdictions such as the UK. The UNCRC, interpreted expansively, therefore has an important role to

¹⁷³ *ibid.*

¹⁷⁴ *ibid.* 149.

¹⁷⁵ G Kamchedzera, *A Commentary on the United Nations Convention on the Rights of the Child: Article 5 The Child's Right to Appropriate Direction and Guidance* (Leiden, Martinus Nijhoff, 2012) 14–15.

¹⁷⁶ Committee on the Rights of the Child, General Comment No 7, 2005, CRC/C/GC/7/Rev 1, para 15.

¹⁷⁷ Kamchedzera (n 175) 20.

¹⁷⁸ Committee on the Rights of the Child (n 176) para 19.

¹⁷⁹ Hodgkin and Newell (n 166) 76–77.

¹⁸⁰ *ibid.*

¹⁸¹ UN Doc HRI/GEN/1/Rev.1, 28 (1994).

play in protecting diverse relationships. Recognition of extended family units, it is argued, is key because of the vital role various family members may play in raising, educating, mentoring and supporting children, but also because of the impact of their absence on a child's psyche. Ronen suggests that Article 5 UNCRC 'supports the psychological rationale for the definition of the right to identity'.¹⁸² In other words, the development of family ties through social and emotional bonds may form part of the child's identity itself. Kamchedzera also considers the importance of Article 5 UNCRC for the grandparent/grandchild relationship, arguing that:

The correlative duties to the child's rights are ... not on families or communities. Instead, the duties are on individuals who may belong to relevant social units. This interpretation would also justify court decisions that have upheld the rights of grandparents to bring up and to have contact with a child ...¹⁸³

Hodgkin and Newell note that psychological parents (which could include grandparents where a pre-existing relationship exists) 'are intimately bound up in children's identity and thus their rights under article 8'.¹⁸⁴ Therefore, it is argued that Articles 5 and 8 UNCRC, in conjunction, provide comprehensive protection to children's identity through protecting relationships with extended kin, including grandparents. Identity can also be construed to include personal and ancestral history,¹⁸⁵ encompassing various influences since birth, such as carers and the child's race, culture, religion and language, physical appearance, abilities, gender identity and sexual orientation. Thus, the mutually reinforcing nature of Articles 5 and 8 UNCRC highlight the importance of acknowledging the impact of the family constellation on identity.

Preservation of these elements of identity (ie race, culture, religion, etc) can also be argued to be upheld via Article 20 UNCRC. Hodgkin and Newell observe that 'Article 20 ... provides that children deprived of their family environment should where possible have continuity of upbringing, particularly with regard to their ethnic, cultural and linguistic background'.¹⁸⁶

Moreover, Article 20 UNCRC refers to family, not parents, an important distinction since the state should seek placement within wider family (in accordance with Article 5 UNCRC) before looking elsewhere.¹⁸⁷ Thus, according to Ronen, Article 20 'can be seen as seeking to protect the child's ties to a personal world' despite the lack of explicit reference to identity.¹⁸⁸ Article 20 can further be seen as fitting well within the scope of FCT. While FCT focuses on the effect of 'missing' family members, Article 20 can arguably be viewed as attaching weight to the effect

¹⁸² Ronen (n 24) 161.

¹⁸³ Kamchedzera (n 175) 20.

¹⁸⁴ Hodgkin and Newell (n 166) 106.

¹⁸⁵ Barn and Mansuri (n 56).

¹⁸⁶ Hodgkin and Newell (n 166) 113.

¹⁸⁷ *ibid* 278.

¹⁸⁸ Ronen (n 24) 161.

of ‘missing’ a wider family environment and the ethnic, cultural and linguistic benefits that the birth family can provide. Although adoption can be a very beneficial arrangement for many children, placement with extended kin provides the best form of protection to the identity aspects considered under Article 20, including ‘family relations’ with extended kinship networks, including grandparents.

Protection of the child’s identity can also be seen via Article 30 UNCRC. The provision contains a requirement that children from minority backgrounds have the right to enjoy their own culture and practise their own language and religion. Thus, viewed through the lens of FCT, an adopted child may suffer the loss of important social and emotional heritage drawn from culture, language and religion. Lansdown is critical that current adoption practice ‘largely ignores’¹⁸⁹ this facet of Article 30 UNCRC. This failure to acknowledge the importance of culture can be seen from the lack of a requirement to match children with prospective adopters from the same racial group or cultural group. The UNCRC therefore, through the provisions considered above, affords protection to kinship networks and aspects of identity, including ethnicity and culture. The importance of familial networks and the ‘absence’ of individuals (such as grandparents), which could be interpreted expansively to include absence of recognition of culture, are key elements of FCT. It can be concluded that the UNCRC, directly and indirectly, protections and promotes considerations inherent within FCT.

IV. Law, Carer Assessments, Family Constellations and Identity

The legal frameworks and rights facilitate ‘family constellations’ and a recognition of the importance of wider families in the formation of ‘identity’. Kelly and Das acknowledge that it is legitimate to regard adoption without parental consent as proportionate to the aim of ‘protecting children from persistent abuse and neglect’,¹⁹⁰ but that adoption will only be a proportionate measure if ‘all available efforts have been made and opportunities given to remedy the problems in the child’s family’.¹⁹¹ Viability assessments, which are used to identify potential long-term carers for children in care, can serve as a stumbling block to this process.

Under the Children Act 1989, local authorities have a statutory duty to look for kinship carers. Once a possible carer, such as a grandparent, has been identified, the first stage is a viability assessment. This is an assessment that, according to Morgan,

will involve looking at the carer’s experience of child-raising, their financial and working position, their accommodation, age, health and motivation for being willing to raise

¹⁸⁹ Lansdown (n 59) 73.

¹⁹⁰ Kelly and Das (n 144) 260.

¹⁹¹ *ibid* 261.

the child, as well as their understanding of why the local authority is concerned about the child.¹⁹²

Social workers may, depending on the local authority, apply the *Good Practice Guide on Assessments* to assist in conducting initial and subsequent care assessments.¹⁹³ If the outcome of the viability assessment is positive, the court will order a full assessment to take place under section 14A(8) of the Children Act 1989. In terms of the substance of the assessment, social workers should consider a range of factors and, using their own judgement, determine whether a grandparent is a 'viable' carer. These factors are based on grandparents' personal characteristics, lifestyle choices and opinions. As Hunt identifies, there may be practical constraints that impact on grandparents' ability to 'parent' children, such as 'age, poverty, illness/disability, parenting alone, lower levels of education, the length of time since they have parented, the effect of prior adversities on the children'.¹⁹⁴ Moreover, grandparents may reject a finding of fact in a court of law that a child has sustained neglect or abuse at the hands of a parent.

Research has shown that viability assessments can be of variable quality¹⁹⁵ and they have been subject to judicial criticism.¹⁹⁶ Grandparents may have been subject to comprehensive assessment or to a modest 'viability assessment' (eg grandparents living abroad, contacted via telephone or video conference). These factors, alone or together, are relevant considerations that may militate against the use of grandparent care as an option for the short-term care and/or a long-term placement of a child.

The admirable work of the late Bridget Lindley brought attention to the gaps in the viability assessment process.¹⁹⁷ This work led to the development of a viability tool¹⁹⁸ that is used by some local authorities, but there is yet to be research that fully evaluates the use of the tool and whether it has led to improvement in viability assessments. It is clear, however, that there are still further challenges that may prevent a thorough assessment. Because of inexperience¹⁹⁹ or excessive paperwork, many social workers struggle 'to carry out the kind of complex family work demanded by kinship care',²⁰⁰ which means that important factors in grandparents'

¹⁹² P Morgan, *Family Law* (Oxford, Oxford University Press, 2021) 809.

¹⁹³ *Initial Family and Friends Care Assessment: A Good Practice Guide* at <https://bettercarenetwork.org/sites/default/files/VIABILITY-MASTER-COPY-WHOLE-GUIDE.pdf> 4; Reid (n 21) 236.

¹⁹⁴ Hunt (n 126) 46–47.

¹⁹⁵ Grandparents Plus, *Rethinking Family Life: Exploring the role of grandparents and the wider family* (London, Grandparents Plus, 2009) 24–25; J Harwin and J Simmonds, *Special Guardianship: A review of the evidence* (London, Coram BAAF, 2020).

¹⁹⁶ *Re B-S (Children)* [2013] EWCA Civ 1146; *K, T and U (Placement of Children with Kinship Carers Abroad)* [2019] EWFC 59.

¹⁹⁷ *Good Practice Guide* (n 193).

¹⁹⁸ *ibid.*

¹⁹⁹ J Hunt, *Two Decades of UK Research on Kinship Care: An Overview* (London, Family Rights Group, 2020) 35.

²⁰⁰ Grandparents Plus (n 195) 25.

favour may be overlooked in the process of screening grandparents as potential carers. As Deblasio observes, evidence presented in court and administrative practice are ‘explicitly linked’.²⁰¹ It is argued that a viability assessment is a form of ‘administrative practice’²⁰² that directly impacts on grandparents’ likelihood of becoming kinship carers when other options, such as non-consensual adoption, might be on the table. Without a positive viability assessment, grandparents’ chances of being considered as carers or of being granted a child arrangements order or special guardianship order will be low. Thus, the importance of grandparents within the ‘family constellation’ could be minimised. In such circumstances, children’s identity rights under the ECHR and the UNCRC may not be fully protected if children lose significant, diverse relationships extending beyond the ‘binary’ model of parenthood and/or connections with wider social and cultural networks.

Another inherent problem, as identified in chapter 4 of this volume, is the timing of grandparent involvement. While many grandparents are informed in a timely manner that their grandchildren are to be adopted, this is not always the case. In some cases, court proceedings are underway before grandparents become aware that a grandchild is to be adopted. In such circumstances, they face an uphill struggle to put themselves forward as kinship carers. Sometimes grandparents are not informed at all, for instance because birth parents oppose grandparent care. The organisation Grandparents Plus has argued that grandparents ought to be notified about care and adoption proceedings, unless it can be shown that to do so would not be in the best interests of the child.²⁰³ Grandparents Plus has stated that viability assessments treat relatives the same as non-relatives, suggesting that it is inappropriate to apply the same assessment to kinship carers, who may be ruled out because they do not ‘fit’ the ideal profile. Reasons for exclusion, they propose, may include being a smoker or living in a small house, and they suggest that such an approach ‘is like fitting a square peg into a round hole’.²⁰⁴ Family members are often aggrieved when after 10-minute interviews with professionals like psychiatrists, these professionals produce reports that include negative comments²⁰⁵ that can impact on grandparents’ likelihood of becoming kinship carers. Often, grandparents’ relationships with social workers are ‘very strained’.²⁰⁶

Although the report was published in 2009, subsequent work by Hunt (covered in chapter 4), demonstrates that grandparents and extended kin still face challenges in becoming carers. It is argued that a more flexible, nuanced viability assessment that is tailored to grandparents²⁰⁷ would be the best approach. Although the Good Practice Guide encourages this type of approach, it is not known how

²⁰¹ Deblasio (n 41) 197.

²⁰² *ibid.*

²⁰³ Grandparents Plus (n 195) 36.

²⁰⁴ *ibid.* 25.

²⁰⁵ Tingle (n 135) 182–83.

²⁰⁶ *ibid.* 181.

²⁰⁷ Grandparents Plus (n 195) 25.

many local authorities apply its principles in practice. There is a need for more transparency and consistency across local authorities, to ensure that sufficient weight is placed on children's identity rights, thereby providing more protection to children's rights under Article 8 ECHR and Article 8 UNCRC. This would also provide further acknowledgement of the importance of grandparents within the family constellation.

Ageism towards the elderly, Herring suggests, is a significant 'social problem'.²⁰⁸ Age is clearly a factor that may impact on the likelihood of grandparents' being regarded as 'viable' kinship carers. Unfortunately, Coleman and Hanlon express concern that such 'negative and ageist attitudes towards ... older people can be widespread and problematic'.²⁰⁹ Many grandparents, therefore, are regarded by social workers as being 'too old'²¹⁰ to be caregivers. Moreover, Buchanan and Rotkirch observe that ageism, in a range of contexts, has the potential to undermine 'the importance and status of grandparents'.²¹¹ Decisions to rule out grandparents as carers based on age may be based on a 'stereotype'²¹² that grandparents lack good health due to their age. Coleman and Hanlon opine that stereotypes can lead to 'assumptions that older people are senile, lonely, ill, demented or disabled'.²¹³ Although a disadvantage of an increased lifespan is potentially 'higher levels of disability and frailty',²¹⁴ it can be argued that parents themselves could suffer from disability and ill-health, or be older parents. As Clarke and Roberts observe, 'more older people are experiencing grandparenthood and even great grand parenthood than ever before'.²¹⁵ Thus, disproportionate weight should not be placed on such factors, when determining whether a child ought to be placed with grandparents or prospective adopters.²¹⁶

While age is a factor that might impact on a kinship carer, including a grandparent, and his or her ability to provide long-term care, it should be balanced carefully alongside other factors, such as the strength of the child's relationship with his or her grandparent and the availability of developing and maintaining wider social and cultural networks. Research demonstrates that legislation on equality, including the Equality Act 2010, has not eradicated such age discrimination.²¹⁷

²⁰⁸ J Herring, *Life through the Life Course* (Bristol, Bristol University Press, 2021) 42.

²⁰⁹ Coleman and Hanlon (n 7) 91.

²¹⁰ Grandparents Plus (n 195) 24.

²¹¹ A Buchanan and A Rotkirch, 'Twenty-first century grandparents: global perspectives on changing roles and consequences' in Buchanan and Rotkirch (eds) (n 8) 1, 5.

²¹² Grandparents Plus (n 195) 24.

²¹³ Coleman and Hanlon (n 7) 95.

²¹⁴ *ibid* 134.

²¹⁵ L Clarke and C Roberts, 'Policy and rhetoric: The growing interest in fathers and grandparents in Britain' in A Carling, S Duncan and R Edwards (eds), *Analysing Families: Morality and rationality in policy and practice* (London, Routledge, 2002) 166.

²¹⁶ S Mills, 'Perpetuating Ageism Via Adoption Standards and Practices' (2011) 26 *Wisconsin Journal of Law, Gender and Society* 69.

²¹⁷ V Heaslip and J Ryden, *Understanding Vulnerability: A Nursing and Healthcare Approach* (Hoboken, NJ, Wiley, 2013) 1994. Generally see M Sargeant, *Age Discrimination: Ageism in Employment and Service Provision* (Abingdon, Routledge, 2016).

Grandparents Plus suggest a campaign to promote forthcoming age discrimination legislation and ‘to promote a culture of respect for older and younger people.’²¹⁸ While age is certainly a relevant factor to be considered during assessment, the weighing process may be ‘out of balance’ if significant attention to grandparental age takes place at the expense of attention to children’s identity rights. Moreover, stressing age as a factor in the provision of care may even result in discriminatory practices²¹⁹ that are at odds with section 5 of the Equality Act 2010. A recent decision along such lines, *Mander v Windsor and Maidenhead RBC*,²²⁰ demonstrates the importance of non-discrimination in the selection of prospective long-term carers. In this case, a couple were not added to the register of adopters based on racial characteristics. This approach was determined, by the court, to amount to race discrimination. It is argued, therefore, that ruling out kinship carers (or prospective adopters) because of age could also amount to discrimination.

That is not to say that grandparent care, despite its advantages, is without its challenges. Kinship carers are undoubtedly at risk of ‘intra-familial conflict over the division of responsibilities and decision-making powers,’²²¹ and are also less likely to access the services and support available to foster carers.²²² Research by Hunt has shown that children in grandparent care may require more help in developing social networks,²²³ which can also affect the development of children’s identity. Hunt notes that there can be an issue with the ‘generation gap, with grandparents having old-fashioned views about rules and appropriate behaviour and sometimes being overly restrictive about social activities.’²²⁴ Undoubtedly, though, there are ways to alleviate such issues if they arise in kinship placements. For example, proactive targeting of grandparents so that they attend children’s centres, Sure Start and other local services²²⁵ could provide grandparents with further support and socialisation for children outside of nursery care and school settings. It is therefore ‘vital’²²⁶ to ensure that grandparents receive a wide range of support, such as respite care, education, mental-health services, counselling, legal help, transport,²²⁷ so that they can thrive in their role as kinship carers and help children thrive and develop their identities, in accordance with their evolving capacities under Article 12 UNCRC.

²¹⁸ Grandparents Plus (n 195) 19.

²¹⁹ Mills (n 216).

²²⁰ *Mander v Windsor and Maidenhead RBC* (2019) 12 WLUK 79.

²²¹ Cantwell (n 73) 263.

²²² *ibid.*

²²³ Hunt (n 126) 51.

²²⁴ *ibid.* 49.

²²⁵ Grandparents Plus (n 195) 12.

²²⁶ Hunt (n 126) 52.

²²⁷ *ibid.*

V. Conclusion

If grandparents can provide alternative care to adoption, in a manner consistent with promoting a child's welfare, this promotes children's identity rights within the scope of Article 8 UNCRC and Article 8 ECHR. This chapter has identified potential barriers to the provision of alternative care by grandparents. These barriers include variability in carer assessment practice and age. Factors such as age may be relevant considerations. Regardless, over-emphasis on these factors may be to the detriment of the child's welfare and identity rights, provided for explicitly under Article 8 UNCRC and Article 8 ECHR, and implicitly via Articles 5, 20 and 30 UNCRC.

It is argued that the bundle of 'identity' rights within the UNCRC ought to be prioritised. The UNCRC, viewed through the lens of 'Family Constellation Theory', protects the rights of children, including their identity rights under Article 8 UNCRC. An incidental, beneficial effect would be improved protection of grandparents' relationships with their grandchildren. Grandparent care may be as effective (or better) than adoptive placements if grandparents are mentally, emotionally and physically capable of caring for their grandchildren. Grandparent care has many benefits. These include the development and maintenance of familial relationships, knowledge of origins and a prospective 'anchoring' role for grandparents who have strong existing mutual bonds with their grandchildren. In situations where grandparents may be unable to act as long-term carers there may, nonetheless, be benefits from open adoption.

It has been argued that 'identity' should be an explicit, rather than implicit, factor to be considered when weighing up non-consensual adoption versus grandparent care. While grandparent care might not be appropriate in every case, there are many situations where such care will afford effective protection of the child's identity. This chapter has therefore explored the extent to which issues identified during viability assessments constitute relevant factors to be balanced against the child's identity and relationships with his or her birth family, which are protected under the Article 8 UNCRC and Article 8 ECHR. It is proposed that viewing the UNCRC and family constellations in juxtaposition highlights the importance of emphasising grandparents' role in grandchildren's lives when children cannot be raised by their parents.

Adoption is a beneficial arrangement that may be the 'anchor' needed for many children. It is argued, however, that emphasis must be placed on the importance of placement with extended family members, including grandparents. Grandparents can help their grandchildren make sense of their past and provide meaningful connections and relationship continuity, which facilitate the child's development of personal identity. Thus, it is submitted that protection of the relationships between children and their wider kinship and cultural networks, such as the grandparent/grandchild relationship, may afford greater protection to children's identity rights, especially under Article 8 UNCRC and Article 8 ECHR.

