Neutral Citation No: [2021] NIFam 22 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **SIM 11556** *ICOS No:* **2020/45191** *Delivered:* **16/6/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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A HEALTH AND SOCIAL CARE TRUST

v

A MOTHER; A FATHER

(In the Matter of A Child: Freeing for Adoption)

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Wendy Davidson, of counsel (instructed by DLS) for the Health & Social Care Trust
Moira Smyth QC; Siobhan McCrory, of counsel, (instructed by D.A. Martin Solicitors) for the Mother
Julie McIlroy, of counsel, (instructed by McAtamney Solicitors) for the Father
Louise Murphy, of counsel, (instructed by Small & Marken) for the Guardian ad Litem

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SIMPSON J

Introduction

[1] This is an application by a Health and Social Care Trust ("the Trust") for an order freeing a child ("the child") for adoption without parental agreement. I have anonymised this judgment. Nothing must be published which would identify either the child or the family in this case. I express my thanks to all the counsel for the efficient and thoughtful way in which this matter was dealt with. As a result of the approach of counsel, it was not necessary to hear oral evidence. Rather the matter has been dealt with by way of the introduction into evidence of a core bundle containing the pleadings, social work reports, expert/medical reports, The Trusts' Statement of Facts, a report from the Guardian ad litem, and affidavits from both the mother and the father.

[2] The child is a boy, and is now aged 3 years, having been born in April 2018. Prior to his birth, he was placed on the Trust's child protection register under the categories of Potential Physical Abuse and Potential Neglect. He was made the subject of an Emergency Protection Order on 13 April 2018, and an Interim Care Order was granted on 27 April 2018. The High Court made a final Care Order on 30 September 2019. At the date of his birth, his mother was 16 years and 4 months; the father was 18 years and 3 months. Since the child's birth he has never resided in the sole primary care of either of his parents, who separated in July 2018 after a stormy relationship lasting some two years. He is presently living in a concurrent placement with foster carers, where he has been since he was 19 days old. The foster carers have been approved as prospective adopters.

The relevant legislative provisions

[3] Material provisions of the Adoption (Northern Ireland) Order 1987 are, first, Article 9 which provides as follows:

> "*9. In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall regard the welfare of the child as the most important consideration and shall –*
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> *(a) have regard to all the circumstances, full consideration being given to –*
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> *(i) the need to be satisfied that adoption, or adoption by a particular person or persons, will be in the best interests of the child; and*
> *(ii) the need to safeguard and promote the welfare of the child throughout his childhood; and*
> *(iii) the importance of providing the child with a stable and harmonious home; and*
>
> *(b) so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding*."

[4] Article 16 of the 1987 Order provides (where material) that an adoption order cannot be made unless the child is free for adoption and that each parent or guardian of the child either agrees or his/her agreement is dispensed with on a ground specified in paragraph (2). The particular ground specified in Article 16(2) which is relied upon by the Trust is 16(2)(b): that each parent is withholding his/her agreement unreasonably.

[5] Article 18, where material, provides:

> "*18. – (1) Where, on an application by an adoption agency, an authorised court is satisfied in the case of each parent or guardian of a child that his agreement to the making of an adoption order should be dispensed with on a ground specified in Article 16(2) the court shall make an order declaring the child free for adoption.*
> *….*"

Some relevant authorities

[6] McBride J, in *WHSCT v N and M* [2016] NIFam 11 said:

> "[66] In an application for freeing for adoption, in the absence of parental agreement, the court is required to address three questions, namely:-
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> (a) Is adoption in the best interests of the child? — (Article 9 Welfare Test).
>
> (b) If so, given that adoption represents an interference with Article 8 rights, can this interference be justified on the basis it is —
>
> (i) in accordance with the law;
> (ii) in pursuit of the legitimate aim; and
> (iii) is necessary/proportionate?
>
> (c) If so, has it been established by the Trust that the parents are unreasonably withholding their agreement to adoption?"

[7] As Gillen J (as he then was) said in *Re L and O (Care Order)* [2005] NI Fam 18: "*It is difficult to imagine any piece of legislation potentially more invasive than that which enables a court to breach irrevocably the bond between parent and child and to take steps irretrievably inconsistent with the aim of reuniting natural parent and child*." The extreme consequences of adoption, and the proper approach of a court, has been dealt with both in domestic and European authorities.

[8] In its decision in the case of *In re B* [2013] UKSC 33, the Supreme Court considered this issue. Lord Wilson said:

> *"33 In a number of its judgments the European Court of Human Rights, ("the ECtHR"), has spelt out the stark effects of the proportionality requirement in its application to a determination that a child should be adopted. Only a year ago, in YC v United Kingdom (2012) 55 EHRR 33, it said:*
>
> > *"134 The Court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the*

maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained."

Although in that paragraph it did not in terms refer to proportionality, the court had prefaced it with a reference to the need to examine whether the reasons adduced to justify the measures were relevant and sufficient, in other words whether they were proportionate to them.

34 In my view it is important not to take any one particular sentence out of its context in the whole of para 134 of the YC case: for each of its propositions is interwoven with the others. But the paragraph well demonstrates the high degree of justification which article 8 demands of a determination that a child should be adopted or placed in care with a view to adoption. Yet, while in every such case the trial judge should … consider the proportionality of adoption to the identified risks, he is likely to find that domestic law runs broadly in parallel with the demands of article 8. Thus domestic law makes clear that:

(a) it is not enough that it would be better for the child to be adopted than to live with his natural family (In re S-B (Children) (Care Proceedings: Standard of Proof) [2009] UKSC 17, [2010] 1 AC 678, para 7); and

(b) a parent's consent to the making of an adoption order can be dispensed with only if the child's welfare so requires (section 52(1)(b) of the Adoption and Children Act 2002); there is therefore no point in making a care order with a view to adoption unless there are good grounds for considering that this statutory test will be satisfied.

The same thread therefore runs through both domestic law and Convention law, namely that the interests of the child must render it necessary to make an adoption order. The word "requires" in section 52(1)(b) "was plainly chosen as best conveying...the essence of the Strasbourg jurisprudence" (Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625, para 125)."

[9] Guidance is also to be gleaned from two recent ECtHR cases involving Norway. In *Strand Lobben v Norway* (2020) 70 EHRR 14 the Court said (paragraph 209)

"As regards replacing a foster home arrangement with a more far-reaching measure such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child are definitively severed, it is to be reiterated that "such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests". It is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family."

[10] And in *ML v Norway* (Application No. 64639/16), judgment made final on 22 March 2021:

> "*80. Furthermore, the Court reiterates that in instances where the respective interests of a child and those of the parents come into conflict, Article 8 requires that the domestic authorities should strike a fair balance between those interests and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents. Moreover, family ties may only be severed in "very exceptional circumstances" (see Strand Lobben and Others, cited above, §§ 206 and 207).*
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> *89. The Court finds reasons to stress, however, that an adoption will as a rule entail the severance of family ties to a degree that according to the Court's case-law is only allowed in very exceptional circumstances (see paragraph 80 above). That is so since it is in the very nature of adoption that no real prospects of rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family (see, for example, R. and H. v. the United Kingdom, no. 35348/06, § 88, 31 May 2011).*"

[11] In the circumstances, as it seems to me, there is no difference in the approach to the concept of permanence between the domestic and the Strasbourg law.

Discussion

[12] The Trust has carefully considered the alternatives to adoption, and these are dealt with comprehensively in the documentation placed before the court. In considering the option of rehabilitation to parental care, the Trust has noted social services' involvement with both parents in their respective childhoods, which has required support and intervention from services such as CAMHS and reports to PSNI about their behaviour. The Trust's concerns are set out in detail in the Statement of Facts. Having considered all the relevant matters the Trust concludes that the concerns identified in respect of either parent's ability safely to parent the Child "*have not diminished or ameliorated*."

[13] Neither parent is presently in a position to make the necessary commitment to make the necessary changes to their life. The father has not engaged in any meaningful way with the Trust since December 2018, although he now says that he is making efforts to change his life. The mother is pregnant and in a relationship with a different partner. The child requires stability and security now, both of which he receives from the foster carers. The Trust says:

> "Based on the Trust's knowledge of both parents, the relevant history, the assessments undertaken, the lack of engagement by [the father] and lack of any evidence of change, or that it could be achieved within a timescale commensurate (*sic*) for the child, the Trust believes that neither parent would be able to safely meet the need of their son at this time or within a timeframe that is commensurate with [the child's] needs and best interests."

[14] In my view it is not in the best interests of the child to delay further. In this connection, I note that Article 3(2) of the Children (Northern Ireland) 1995 provides: "*In any proceedings in which any question with respect to the upbringing of a child arises, the court*

shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."

[15] I am satisfied that the Trust is right to reject as an option rehabilitation with the parents.

[16] The Trust has explored the option of kinship placement — i.e. with other members of one or other birth parent's family. The child has never resided with any such person. Both grandmothers underwent an initial viability assessment, but neither was deemed to be a viable option. No other family member has been put forward or identified as a viable option.

[17] The Trust also considered long-term foster care. It considered in detail the advantages and disadvantages, which I do not intend to rehearse in this judgment. I do, however, note in passing that it does not offer a secure family for life; the child will be subject to 'corporate parenting' involving, as it does, LAC reviews, social work visits, there can be multiple placements throughout a child's life, other children may come and go from and to the foster carers' home, permission must be sought for overnight stays, outings etc.

[18] In all the circumstances of this case, I am satisfied that the Trust has properly considered the options and has rightly concluded that none of those options is in the child's best interests.

[19] As noted above, the child has been in foster placement with his present carers for more than 3 years and they wish to make a lifelong commitment to him by adopting him. The Trust considers that they provide for the child the security, continuity, protection, love, care and permanence which he requires for his wellbeing and development to be safeguarded and promoted.

[20] The Guardian ad Litem supports the Trust's conclusions in relation to options other than adoption, and supports the Trust's plan for adoption. She commends both parents for accepting that the child "*is thriving in the care of his foster parents and for acknowledging the impact on [the child] if he was removed from his primary carers*."

[21] As to contact with the mother, the Trust makes it clear that arrangements will be kept under review, but that its intention is to implement a phased reduction to direct contact twice per year, which contact will also include the maternal grandmother. The mother has proposed in addition, two-way indirect contact with photographs and cards at the child's birthday and at Christmas. The Trust is content with indirect contact being facilitated through social services, although not at these times, since they are emotive times of year. They would be agreeable to a photograph being provided once per year, on the condition that it would not be posted by the mother on any form of social media and would be for her private use only. This condition is clearly to protect the child's privacy and I consider that the overall approach of the Trust is appropriate.

[22] As noted above, the father has not engaged for some significant time with the Trust, notwithstanding its attempts to encourage him to engage in indirect contact. The Trust expresses its hope that the father will engage so that indirect contact could occur twice-yearly.

[23] I am satisfied (McBride J's tests above) that adoption will be in the best interests of the child and that in the circumstances of this case it is proportionate. I am satisfied that the Trust's proposed arrangements for contact are in the best interests of the child and I further note that they will be reviewed at any adoption hearing.

Freeing for Adoption

[24] The Trust seeks an order freeing the child for adoption on the basis as provided for in Article 16(2)(b) of the 1987 Order that each parent is withholding his/her agreement unreasonably.

[25] In a way it is unfortunate that the legislation uses the word 'unreasonably', conjuring up as it does in the public mind the concept of a selfish parent or a parent who is putting their own wishes ahead of the interests of the child or one who refuses to listen to reason. The parents in this case both love the child and genuinely want the best for him. What they feel emotionally unable to do is to consent to the relinquishment of their parental rights for ever. This is an entirely understandable position for any loving parent to take. Nothing in this judgment should be taken by the parents, or anyone who reads it, as a criticism of these parents' stance in withholding their agreement. They should understand that there is a narrow, legalistic meaning to the concept of unreasonably withholding agreement.

[26] The approach to be taken was considered by Morgan LCJ in *In the Matter of TM and RM (Freeing)* [2010] NI Fam 23. At paragraph [6], where material, he said:

> "*The Trust asked me to find that the mother is unreasonably withholding her agreement to the adoption of children. The leading authorities on the test that the court should apply are Re W (An Infant) [1971] 2 AER 49, Re C (a minor) (Adoption: Parental Agreement, Contact) [1993] 2 FLR 260 and Down and Lisburn Trust v H and R [2006] UKHL 36 which expressly approved the test proposed by Lords Steyn and Hoffmann in re C.*
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> > "*…making the freeing order, the judge had to decide that the mother was 'withholding her agreement unreasonably'. This question had to be answered according to an objective standard. … The law conjures the imaginary parent into existence to give expression to what it considers that justice requires as between the welfare of the child as perceived by the judge on the one hand and the legitimate views and interests of the natural parents on the other. The characteristics of the notional reasonable parent have been expounded on many occasions: … The views of such a parent will not necessarily coincide with the judge's views as to what the child's welfare requires. As Lord Hailsham of St Marylebone LC said in In re W (An Infant) [1971] AC 682, 700:*

'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'

Furthermore, although the reasonable parent will give great weight to the welfare of the child, there are other interests of herself and her family which she may legitimately take into account. All this is well settled by authority. Nevertheless, for those who feel some embarrassment at having to consult the views of so improbable a legal fiction, we venture to observe that precisely the same question may be raised in a demythologised form by the judge asking himself whether, having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views and interests of the objecting parent or parents. The reasonable parent is only a piece of machinery invented to provide the answer to this question.""

Conclusion

[27] In light of those authorities, I am satisfied that the parents are unreasonably withholding agreement within the meaning of article 16(2)(b) of the 1987 Order and I will make an order dispensing with the consent of each parent to adoption.