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*Judgment: approved by the court for handing down
(subject to editorial corrections)**

Delivered: 23/05/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant/Respondent

-v-

A MOTHER

Respondent/Appellant

and

A FATHER

Respondent

IN THE MATTER OF AB (A FEMALE CHILD AGED 7 YEARS)

Mr T Ritchie BL (instructed by the Directorate of Legal Services) for the Health and Social Care Trust

Ms K McAleavey BL (instructed by Joseph Magee & Co solicitors) for the Mother
Ms E Sloane BL (instructed by Campbell & Haughey solicitors) for the Guardian ad Litem representing the interests of the child
The father did not appear

McFARLAND J

Introduction

[1] This judgment deals with an appeal from a decision made by Her Honour Judge Bagnall (“Judge Bagnall”) at Craigavon Family Care Centre on 17 February 2022 to free AB for adoption.

[2] I have retained the cipher adopted by Judge Bagnall and have anonymised this judgment to protect the identity of the child.

Background

[3] The mother has been known to social services for some time and two older children live with their father. The mother had significant difficulties with regard to alcohol abuse and domestic violence. AB was born in 2015. Issues with regard to the mother's alcohol abuse have persisted. AB's father had a criminal conviction for the rape of a 14 year old and an agreement whereby the mother was to prevent the father having contact with the child was soon breached as the father was staying overnight with the mother and AB.

[4] Earlier public law proceedings in respect of AB concluded with a supervision order in March 2017. However, the Trust were obliged to become re-involved with AB and obtained an emergency protection order in September 2018 when the mother was found to be under the influence of alcohol and the father was hiding in a garden shed. With the mother undertaking more work with the Trust, AB was returned to her care in December 2019 only to be removed again in February 2020.

[5] Care order proceedings concluded with a care order on 17 November 2020 with a care plan of adoption. AB was placed with her current carers in June 2021 and freeing proceedings were issued with the intention that AB be adopted by those carers.

[6] Judge Bagnall heard oral evidence from the social worker and the guardian who were both cross-examined. The mother declined to give evidence but did file a statement. No issue is taken concerning her refusal to give evidence. The evidence and background was largely agreed and the only real issue was the interpretation of the evidence and the application of the relevant provisions of the Adoption (NI) Order 1987, namely whether adoption was in the best interests of AB and whether the parents were withholding their consent unreasonably.

[7] The father was aware of the proceedings and had been served with the papers but he did not make any appearance before the court. He is named on AB's birth certificate and had parental responsibility for AB.

Appeals from the Family Care Centre

[8] The law is very well established in relation to how an appellate court should deal with an appeal from a lower court. There is a wide discretion vested in the lower court and decisions should not be interfered with unless they are plainly wrong. Waite J in *Re CB* [1993] 1 FLR 920 at 924d stated that:

“No appeal can be entertained against any decision they make ... unless such decision can be demonstrated to have been made under a mistake of law, or in disregard of principle, or under a misapprehension of fact, or to have involved taking into account irrelevant matters, or

omitting from account matters which ought to have been considered, or to have been plainly wrong.”

This approach has been followed in this jurisdiction for many years (see e.g. *Re B* [2013] UKSC 33, *McG v McC* [2002] NIFam 10, *SH v RD* [2013] NICA 44 and *ML v MO* [2020] NIFam 25).

The law in respect of freeing for adoption

[9] The 1987 Order provides for a two-fold test. Firstly, the court must be satisfied that adoption would be in the best interests of the child, and secondly, should the parents not consent, then the court must determine if they are withholding their consent unreasonably.

[10] The best interests test has to be approached by the application of the seminal judgment in *Re B* [2013] UKSC 33 and in particular whether there is any other realistic option for AB, with adoption, to use the words of the Supreme Court justices, being a “last resort” (Lord Neuberger), when “nothing else will do” (Baroness Hale) and when “it is really necessary” (Lord Kerr). The phrase “nothing else will do” has entered the family law lexicon but there have been warnings about over-interpreting its meaning. McFarlane LJ in *Re W* [2016] EWCA Civ 793 at [68] said that:

“[T]he phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase “nothing else will do” is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the ECHR and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime.”

[11] When considering dispensing with a parent’s consent the test is an objective one with the court determining what a reasonable parent would do in these circumstances. The court in *Re C* [1993] 2 FLR 260 at 272 described the test in the following terms:

“[H]aving regard to the evidence and applying the current values of our society, [do] 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 mother's appeal

[12] The case before Judge Bagnall and this court was a relatively straightforward one. The mother has accepted that she will be unable to care for AB during AB's childhood and is agreeable to AB living in the current placement. The father is clearly an unsuitable carer and there are no kinship options. The simple issue is therefore whether AB lives in a foster-care placement or an adoptive placement. The present carers have expressed a desire to adopt AB and should that not be possible they have indicated a willingness to be considered as long-term foster carers.

[13] Although the mother has raised ten points of appeal there is really only one and that is that Judge Bagnall erred in failing to carry out a proper proportionality analysis and that she failed to attach appropriate weight to certain factors and placed undue weight to other factors.

The difference between long-term fostering and adoption

[14] It is important to understand the difference between the position of a child in foster care and an adopted child. Black LJ in *Re V* [2013] EWCA Civ 913 at [95] and [96] made some important comments concerning the differences between adoption and long-term fostering:

"95. ... I do not think that fostering and adoption can, in fact, be equated in terms of what they offer by way of security. I do not intend to embark on a comprehensive comparison of the two arrangements, merely to highlight some of the material differences. What I say should not be taken as a substitute for professional advice to the court from social services and/or the guardian in any case in which this is a significant issue.

96. With that caveat, I make the following observations:

- i) Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely therefore to "feel" different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.
- ii) Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is

made, it is made for all time.

- iii) Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) Children Act 1989). The contact position can, of course, be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions, where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the adoption order has been made, the natural parents normally need leave before they can apply for contact.
- iv) Routine life is different for the adopted child in that once he or she is adopted, the local authority have no further role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example)."

Consideration

[15] Judge Bagnall was able to hear evidence from the social worker and the guardian. Both had prepared a detailed options analysis carefully setting out the advantages and disadvantages of adoption and foster care for AB. This was the type of professional advice that Black LJ was referring to in *Re V* at [95]. The analysis was clearly set out and based on reliable evidence.

[16] One of the criticisms of Judge Bagnall is that she gave undue weight to the reported wishes and feelings of AB in that she "longed to be claimed." I do not accept this criticism. These are not the stated comments of the child, but rather the observation by the social worker which was supported by the guardian. There is no doubt that AB is very well settled in this home, she has thrived within the home environment and she regards this as her permanent home, or 'forever home' to use the preferred term. She wishes to be fully integrated with the use of the family's surname. Those are her wishes and feelings, expressed both in what she is saying and by her general demeanour and attitude. She is however a seven year old girl and will lack a full appreciation of her situation. Nonetheless, she is likely to have memories of the life she endured in her mother's care and the transient nature of her upbringing. She is well able to compare her previous existence with her current situation.

[17] This case is not a simple application of one of the welfare factors – the ascertainable wishes and feelings of the child (Article 3(3)(a) of the Children Order), and giving it prominence. It is rather a proper consideration of the child’s emotional needs (Article 3(3)(b)).

[18] The context is that this child has undergone ten placement moves in her young life. Four were for very short respite periods. The court does not simply ignore the impact on a child of a number of different adults looking after her. Of particular concern has been the failed attempts by the Trust to maintain AB in her placement with her mother. That initially failed, she was removed and then returned only to be removed again. The social worker and the guardian were able to observe the current interaction between AB and her current carers and it is a perfectly valid observation to say that AB is longing to be claimed. This is a strong and overwhelming emotional need of this child. It is also noteworthy that the guardian in her evidence not only preferred adoption to long-term fostering but was of the view that long-term fostering would actually be to AB’s detriment.

[19] Given her age she will only have a superficial understanding of what adoption actually means so her wishes and feelings have to be considered in light of her limited understanding. This is not a case of the professionals and the judge placing undue weight on the wishes of the child as the mother suggests, but rather placing appropriate weight on what are the emotional needs of the child.

[20] The options analysis by the social worker carefully weighed up the positives and negatives and it is difficult to appreciate the mother’s argument that Judge Bagnall was somehow wrong in accepting their conclusions. The mother stresses the well-established relationship between her and the child and the mother’s support for the current placement. These are important factors but would not weigh significantly in the balance. They apply equally to whether the placement is foster care or adoption. Post-freeing contact has been put in place to maintain a link between AB and her mother. The strong emphasis of this contact is to reassure AB and to allay her fears concerning her mother. The unfortunate circumstances of the child’s upbringing are that she has had to grow up and observe the damaging lifestyle of her mother and is now as a seven year old concerned about her mother’s wellbeing. It is important that AB has the security of a strong and permanent home and family to assist her in managing this concern for her mother. Any insecurity in her own life is unlikely to assist her in this regard.

[21] In all the circumstances it could not be said that Judge Bagnall was wrong or erred in her decision that it was in AB’s best interests that she be freed for adoption. There are only two realistic and viable options and on consideration of both she rejected long-term fostering and therefore there was nothing else for AB but adoption. It has to be noted that this was not a decision made by Judge Bagnall contrary to the available advice. The care plan back in November 2020 when the care order was made had been for adoption and would have been approved based on the social work opinion at that time. Subsequently, the matter has been through

the Looked after Child (LAC) process and then before the Best Interests Panel. This was an overwhelming body of social work opinion determining that adoption was the preferred option and that nothing else could do for AB.

[22] The second test concerns the dispensing of the consent of both parents. In her written judgment Judge Bagnall correctly set out the law relating to this objective test. She identified the child's needs in the context of her life experience as being a factor a reasonable parent would take into account.

[23] The reality is that a reasonable parent would always have the major factor of the best interests of the child at the forefront of their considerations. It is not simply bending to the will of a seven year old child that she wishes to be adopted. The reasonable parent would examine the full background, and in particular why the child is expressing that view. The reasonable parent having conducted that exercise would then appreciate the compelling need to provide the permanence that adoption would bring to this child.

Conclusion

[24] The decision on adoption was categorised by the social workers as being a finely balanced one. I defer to their professional opinion although I may not have expressed it in such terms. Both options may be regarded as viable, but adoption is not only regarded as the better option, but, as the guardian observes, foster care would be to the child's detriment. Judge Bagnall weighed up all the relevant factors and came to her decision which could not be faulted or described as wrong in any way. There is ample evidence to support her conclusion that nothing else will do for AB except adoption. The appeal is therefore dismissed.

[24] There will be no order as to costs between parties but legally assisted parties will have a taxation order. The guardian is discharged.