Neutral Citation No: [2023] NIFam 1	*Ref:*	**McF12058**
	ICOS:	**20/060538**
*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:*	**06/02/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

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Between:

A HEALTH AND SOCIAL CARE TRUST

Plaintiff

v

A MOTHER AND A FATHER

Defendants

IN THE MATTER OF SU (A FEMALE CHILD AGED 3 YEARS)

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Ms M Smyth KC with Mr T Ritchie BL(instructed by the Directorate of Legal Services) for the Trust
Mr Magee KC with Ms N Devlin BL (instructed by Campbell McCrudden solicitors) for the Mother
Mc C MacCreanor KC with Ms Rice BL (instructed by Bernard Campbell & Co solicitors) for the Father
Ms N McGrenera KC with Ms L Murphy BL (instructed by Scullion Green solicitors) for the Guardian-ad-Litem on behalf of SU
Ms G Brady BL (instructed by Flynn & McGettrick solicitors) on behalf of the Foster carers

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McFARLAND J

Introduction

[1] This judgment has been anonymised to protect the identity of the child. I have used the cipher SU for the name of the child. These are not her initials.

[2] I heard an application by the foster carers to be joined to the proceedings on Friday 3 February 2023. I reserved judgment indicating that I would promulgate it administratively later that day, and then give brief written reasons as soon as

possible thereafter. In the afternoon of 3 February 2023, I refused the application, and these are my reasons.

The foster carers' application

[3] SU is the subject of an interim care order with a placement with the foster carers. In December 2022 the care plan for SU changed from what had been a twin-tracked plan of habitation with her father or adoption, to habitation with her father. Unable to issue a residence order application, the foster carers sought to be joined as a party to the public law proceedings with a view to opposing the care plan and seeking a resolution of the case with SU being placed permanently in their care either as part of the Trust's care plan under a care order or under a residence order (the court being able to make such an order notwithstanding the inability of the foster carers to apply for one (see Article 10(1)(b) of the Children (NI) Order 1995 and *Gloucestershire County Council v P* [1999] 2 FLR 61)).

[4] The application was opposed by the Trust and the father but supported by the guardian. Although the mother was represented, she had not given instructions on the issue. Mr Magee KC indicated that his solicitor had received a notice of change of solicitors, but the new solicitor had not attended the hearing to come on record. In the circumstances I refused to allow the current solicitors to come off the record to ensure that the mother remained legally represented.

The current timetable

[5] The case is fixed for final hearing on 8 March 2023.

The Background

[6] The mother and father had a relationship which commenced in or about September 2018. The mother was from Northern Ireland and the father was from a continent outside Europe. He came to Northern Ireland during this period. There were plans to marry at one stage, but by June 2019 the relationship was over and they had separated, with the father returning to his home country. At that stage the mother was pregnant with SU.

[7] In October 2019 the mother made an allegation that SU had been conceived as a result of non-consensual sexual intercourse. The police began an investigation.

[8] SU was born in January 2020 and the father was not registered as the father on the birth certificate. The mother, due to her own personal difficulties, felt unable to care for SU and by April 2020 had agreed with the Trust to have SU placed with the foster carers. This was a potential concurrent placement which would have allowed for long term placement either by fostering or by adoption.

[9] The mother refused to allow the father to have contact with SU and indicated

she wished him to have no part in SU's life. On 28 June 2020 he issued proceedings seeking a residence order and a parental responsibility order.

[10] On 9 September 2020 the Trust issued care order proceedings as the mother was finding it difficult to exercise parental responsibility.

[11] The proceedings were consolidated and transferred to the High Court in November 2020. An interim care order was granted on 19 February 2021.

[12] One significant delaying factor was the mother's allegation and the ongoing police investigation. By 12 January 2021 the PPSNI had made a decision not to prosecute based on the first limb of the test for prosecution, that there was no realistic prospect of a conviction. A review was requested by the mother and on 17 August 2021 the earlier 'no-prosecution' decision was affirmed. The mother then made a complaint to the Police Ombudsman but the case eventually concluded with another 'no-prosecution' decision. To bring clarity to this allegation, this court convened a hearing on 24 January 2023 to enable the mother to bring forward her allegations for determination on what would be a lesser standard of proof, namely on the balance of probabilities. She declined to attend to give evidence and to subject herself to cross-examination. The court made a finding that SU had not been conceived by an act of non-consensual sexual intercourse. On that date the court also made a parental responsibility order in favour of the father.

[13] Rehabilitation to the mother has never been considered as a realistic option, and after the police investigation and decisions of the PPSNI, the Trust began an assessment of the father. This included an assessment by Dr Christine Kennedy, consultant forensic psychiatrist (report of 17 January 2022) and Mr Paul Quinn, consultant clinical psychologist (report of 18 August 2022). Therapeutic work recommended by Mr Quinn commenced with Dr Carolyn Mitchell, chartered consultant forensic psychologist, with an interim report on 1 December 2022. As a result of these reports and the ongoing work, a LAC meeting on 14 December 2022 changed the care plan to habitation with the father.

[14] A Core Group was convened to manage a unification plan and transition into the father's care. For this purpose, he had travelled to Northern Ireland with members of his wider family. The Core Group is made up of a number of very experienced specialist social workers and includes Dr Leigh Crawford, a specialist clinical psychologist in Permanence and Adoption.

[15] The guardian had expressed some concern about the new care plan and the speed of the transition of SU into the care of the father. On 24 January 2023 the court refused her application for leave to instruct an attachment expert.

The law in respect of applications to join foster carers

[16] The law in this jurisdiction in respect of joinder of a foster carer is set out in

the judgment of Gillen J in *Re M* [2001] NIFam 10, applying the principles in the English case of *Re G* [1993] 2 FLR 839. Waite LJ in *Re G* at 846 D & E stated:

> "The assistance afforded by foster parents to the effective functioning of any system of childcare is invaluable and should never be discouraged. Theirs is a role, nevertheless, which would not normally make it necessary for them to be joined formally as parties to proceedings in which the future upbringing of the children in their temporary care is an issue. There will generally be ample means for making their views known to the court, either directly as witnesses or indirectly through the enquiries of the guardian ad litem, without the necessity of adding them formally as parties."

In *Re G* the Court of Appeal did not interfere with the lower court's decision to join foster carers as parties as the case was described as - "an exceptional case with many unusual features" (at 846C).

[17] Gillen J in *Re M* considered the exceptionality test with a need to find unusual features. He observed that the child had been with the foster carer since she was nine days old and that there was an application by the maternal aunt and uncle for a residence order. The attachment issues were not exceptional or unusual in themselves.

[18] Two later decisions of the English Court of Appeal have reinforced this position. In *Re T* [2015] EWCA Civ 983 the child had been placed with the foster carers as prospective adopters should that be the care plan in November 2014 but by May 2015 the care planning was in support of a special guardianship order (a form of residence order with parental responsibility) in favour of the paternal grandparents. The foster carers applied to be joined as parties. Munby P, sitting with Black and Bean LJs, reviewed the authorities. At [42] he referred to the seminal *Re B* Supreme Court judgment ([2013] UKSC 33), repeating Lady Hale's well-known comments at [198]:

> "the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do."

He continued that these comments echoed what the ECtHR court had said in *YC v United Kingdom* [2012] 2 FLR 332 at [134]:

> "family ties may only be severed in very exceptional circumstances and … 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*" (The emphasis was added by Munby P.)

[19] At [43] and [49] Munby re-emphasised the need for maintaining what was a long-established policy:

> "From the very earliest days of the 1989 Act (which, it will be remembered, came into force in October 1991), the court has set its face against the joinder in care proceedings of foster parents or prospective adopters … In my judgment, there is no reason to depart from this long-established approach and, indeed, every reason to follow it."

[20] More recently in *Re R* [2021] EWCA Civ 875 the matter was revisited when the Court of Appeal, applying *Re T*, reversed a decision of the lower court to join a foster carer of a one year old child who had been in the care of the foster carer from birth.

Discussion

[21] It was acknowledged by all parties that the legal position is well-established and there was a need for the foster carers to show exceptionality and unusual features in the case.

[22] It was argued that certain aspects gave rise to exceptionality. Firstly, although the foster carers were prevented by the provisions from applying for leave to apply for a residence order by Article 9(3)(c) of the Children (NI) Order 1995 as SU had not lived with them for three years, that period will be established in April 2023, in two months' time. It was further argued that there had been a shift in the policy under the 1995 Order as the Assembly had just passed the Adoption and Children Act (NI) 2022 which by section 117 amended Article 9(3)(c) to require a period of residence of one year. (The commencement of this section will be a matter for the Department of Health.)

[23] In addition, the foster carers argue that the delayed emergence of the father as a potential carer and the additional geographical issue with the potential relocation of SU to her father's home country and the severing of direct ties with all those involved to date in her life are unusual features. They also argue that there is further exceptionality because there is no forum for them to argue for the maintaining of their placement and for it to be established as a permanent one.

[24] I do not accept that these factors are either unusual or exceptional. The legislation has not been commenced and the law has not been changed. The Act of

the Assembly does indicate that the Assembly members appear to have heralded a change of approach in respect of what are described as "authority foster carers" ie foster carers with whom children have been placed by a Trust, either under a voluntary arrangement or an interim or full care order. Unless the foster-carer has the approval of the Trust, or is a relative of the child, the three year period of residence is required. The applicable law has not been changed yet and it is not known when it will actually change. It should also be noted that the English legislation changed in 2002 to allow the one year residency provision for foster carers to apply for a residence order, and the decisions in *Re T* and *Re R* were made well after that change.

[25] Gillen J in *Re M* referred to paragraph 1476 of Halsbury's Laws of England 4th Edition reissue Volume 44(1):

> "Where an enactment prohibits the doing of a thing, the prohibition is taken to extend to the doing of it by indirect or roundabout means…"

I tend to the view that this application is an attempt to circumvent the law as it currently applies.

[26] In addition, the other factors raised are neither exceptional or unusual. The period of time SU has spent with the foster carers is significant. This period has been caused by the initial delay arising from what are now considered to be the mother's unproved allegations. The geography was a factor, as were the delays in the provision of what were regarded as necessary extensive assessments of the father. Throughout this period the Covid-19 epidemic was a factor acting as a drag to the progression of this case. Overall, the delay of three years, however, is not an unusual factor in itself.

[27] There is a need to bear in mind the caution expressed by Gillen J in *Re M* not to "do a disservice to any meaningful definition of the adjective 'unusual.'"

[28] Black LJ in *Re B* [2012] EWCA Civ 737 stated that there was no real test to be applied when considering joinder or leave decisions. The main focus should be on the weighing up of all the relevant factors when determining the proper order.

[29] The attachment between SU and the foster carers, and the impact on SU of the severance of the placement will be clearly a relevant factor for consideration. At the final hearing the court will have available to it the evidence from the Trust witnesses, the evidence of the guardian, and should they be called to give evidence, the evidence of either, or both, foster carers.

[30] Joinder will, however, augment the status of the foster carers which the current legislation does not allow and may divert the focus of the court away from the issue before it. This distraction was specifically referred to by Munby P in *Re T*

when he stated at [53]:

> "A very real risk that if, in a case such as this, the forensic process is allowed to become in effect a dispute between the prospective adopters and the birth family, the court will be diverted into an illegitimate inquiry as to which placement will be better for the child. That, it cannot be emphasised too much, is *not* the question before the court."

[31] The main issue for the court is the care plan of placement of SU with her father. That is due to be determined in five weeks' time. SU's welfare will be paramount and the potential of any change of circumstances after nearly all of her three years of life with the foster carers will be a significant factor for consideration. But as Munby P in *Re T* stated at [50] that is for the guardian to consider:

> "It is the children's guardian (who will be aware of [the foster carers'] stance and can, if necessary, address their suitability) who has the task, indeed is under the duty, of subjecting the local authority's care plan to rigorous scrutiny and, where, appropriate, criticism."

[32] Should the court consider that the permanent severance of SU's family ties is justified in what would be exceptional circumstances then a failure to approve such a care plan will require an assessment of alternative options, but only at that stage. Even if we reach that stage, it may not be necessary for the foster carers to be joined as parties.

[33] One further factor that has weighed heavily in the balance is further delay. This case has been before the courts for far too long and SU needs a final decision to be made about her future. Joining the foster carers as parties will create a severe challenge to the viability of the current hearing date.

Conclusion

[34] The foster carers have not made out any exceptional or unusual feature, either taken in isolation or cumulatively with other features, and in the circumstances, I refuse to grant them leave to be joined as parties to these proceedings.

[35] I will hear the parties should there be any issues relating to costs.