tNeutral Citation No: [2021] NIFam 35 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **LAR11602** *ICOS No:* *Delivered:* **15/07/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
OFFICE OF CARE AND PROTECTION

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A HEALTH AND SOCIAL CARE TRUST

Applicant

and

A MOTHER

First Respondent

and

A FATHER

Second Respondent

_____

LARKIN J

Introduction

[1] Joy (a pseudonym) was born in April 2017. She is now four years old. She is the fifth child of her mother, and has a younger sister (referred to as P in this judgment) who was born in December 2019 and who resides with her mother and father. P is Joy's full sibling; the other four siblings are Joy's half siblings. I refer to them in descending order of age as L (who resides with maternal grandparents) M and N (who are twins and who live with their paternal grandmother under a residence order), and O who has been adopted.

[2] On 13 August 2017 Joy was removed from the care of her parents (Mr and Mrs T) and placed in a voluntary arrangement of kinship care. On 18 August 2017 she was placed with short-term foster carers (Mr X and Ms Y). Since 5 or 8 May 2018 she has been living with K and J in a long term fostering arrangement. An interim care order in respect of Joy was made on 1 March 2019 and a full care order made on 18 June 2019.

[3] Before me is an application under Article 18(1) of the Adoption (Northern Ireland) Order 1978 that the consent of Joy's parents to the making of an adoption order be dispensed with. The application was made on 10 October 2019 by a Health and Social Care Trust (represented by Mr Andrew Magee QC and Ms Cathy Hughes, barrister). It is resisted by Joy's mother, Mrs T (represented by Ms Claire MacKenzie, barrister) and Joy's father, Mr T (represented by Mr Gregory McGuigan QC and Mr Thomas McCabe, barrister). The Guardian ad Litem (represented by Mr Conor Maguire QC) supported the Trust application.

[4] Sometimes judicial compliments to counsel appear to have a merely formal or ritualistic character. In this judgment I pay an earnest and unreserved tribute to counsel for the considerable assistance that I received from all of them. Counsel not only displayed considerable forensic talent in the presentation of their respective cases in written and oral submissions but also an invariable and gracious forbearance in putting up with my many questions to them. I hope I will be forgiven for not averting to all of the written and oral submissions received – to do so would have unduly delayed delivery of judgment – but they have all been considered and have contributed to the conclusions reached.

The Legislative Framework: an overview

[5] Adoption is not a creature of the common law; it is entirely the creation of the Legislature. The relevant law takes its present form in the Adoption (Northern Ireland) Order 1987. This is an Order in Council made under the Northern Ireland Act 1974. Although, as an instrument made under an Act of Parliament, the Adoption (Northern Ireland) Order 1987 is subordinate legislation, its repeal of Acts of Parliament in its 5th schedule causes it to have the status of primary legislation for the purposes of the Human Rights Act 1998: see section 21(1) of the Human Rights Act 1998 and *Re Close and others* [2020] NICA 20 at [16].

[6] Article 9 of the Adoption (NI) Order 1987 provides:

> "*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 –*
>
> *(a) have regard to all the circumstances, full consideration being given to –*
>
> *(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."*

[7] In this case the application is not founded on a belief by the Trust that adoption generally would be in Joy's best interests but on the Trust's belief that adoption by J and K would be in her best interests. Adoption by persons other than J and K would involve her being moved from the care of persons to whom (as appears more fully below) she has a strong emotional attachment.

[8] Article 18(1) of the 1987 Order provides:

> *"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."*

Article 16(1)(b)(ii) and (2)(b) provide that an Adoption Order should not be made unless the court is satisfied that the agreement of the parents to the making of an Adoption Order should be dispensed with on the grounds that each parent is withholding agreement unreasonably.

[9] Before Joy may be freed for adoption, the court must, prioritising her welfare as the most important consideration, be satisfied, first, that adoption is in her best interests. Even if so satisfied, the court may only free Joy for adoption if it concludes that the parents who withhold consent to adoption do so unreasonably.

[10] Articles 17(3) and 18(3) of the 1987 Order provide that on the making of an order freeing the child for adoption, the parental rights and duties relating to the child shall vest in the adoption agency (the Trust), and Article 12 (2)-(4) of the 1987 Order then apply so as to extinguish Mr and Mrs T's parental responsibility for Joy.

The Course of the Hearing

[11] Over five days (15, 16, 21, 24 and 25 June 2021) I heard evidence from Ms Hayley McNeice, Ms Tanya Graham, Dr Kerry Sweeney, from the Guardian ad Litem, and from Mrs T. Ms McNeice and Ms Graham are social workers. Ms McNeice, who is no longer employed by the Trust, worked on Joy's case from around August 2019 to January 2021. Then, or shortly afterwards, Ms Graham acquired that responsibility. Dr Sweeney is a clinical psychologist and prepared a

report dated 20 February 2021. The Guardian, Mr Sean Mulligan, had prepared two reports, one dated 24 February 2021 the other 5 May 2021. Mr Mulligan had, in addition to involvement in Joy's case and P's case, also been involved in care proceedings with respect to M, N and O.

[12] All of the witnesses, with the exception of Mrs T, supported the Trust application.

[13] After the hearing on 25 June 2021, I received further written submissions on behalf of all of the parties and heard time-limited oral submissions on 9 July 2021.

[14] These proceedings were not characterised by significant disputes over what happened. Facts were, with largely insignificant exceptions, not disputed. Dispute between the parties centred on the conclusions that ought to be drawn from generally undisputed evidence. I do not, and cannot, *know* what the future holds for Joy, far less what alternative futures might have held for her, but an essential element of this case involves an evaluation of Joy's interests if she were to be adopted by J and K, in the context of available alternative arrangements. As Stephens LJ observed in *South Eastern Health and Social Care Trust v M* [2018] NICA 50 at [42] "Almost every family case involves a predictive exercise." That is plainly true also of this case.

[15] J and K are both in professional employment. They have been Joy's principal carers from May 2018. They wish to adopt her. In her evidence, Ms McNeice described them as "anxious about their position", that is worried about any step that the Trust (or anyone else) might take that would jeopardise the fulfilment of these wishes.

[16] Ms McNeice readily accepted that Mrs T loves all of her children. Ms McNeice's analysis was that Mrs T found herself unable to cope shortly after Joy's birth and sought help from the Trust. Ms McNeice accepted that there had been a failure to provide Mrs T with the Cognitive Behavioural Therapy, 'CBT', that had been recommended by Dr Philip Moore, consultant clinical psychologist, referred only by her GP in June 2017 and even then, mistakenly, to what was not, in fact, CBT. Mrs T has shown a high level of commitment to all of the assessments and courses that have been made available to her. She has done all that has been asked of her.

[17] P, Joy's younger sister, is at home in parental care after Mr and Mrs T successfully underwent assessment at Thorndale. By December 2020 the Trust had withdrawn their Care Order application for P. P has since resided happily at home with Mr and Mrs T. The Thorndale experience has been acknowledged to have been a significant event in the lives of Mr and Mrs T and P. The support, education, supervision and assessment available there have strengthened the ability of Mr and Mrs T to parent well.

[18] Ms McNeice accepted that the contemplated post-adoption regime of four contact visits would probably not constitute a context for the relationship between P and Joy to flourish. The relationship is important for both siblings.

[19] In the LAC review of 14 November 2018 there were significant failures by the Trust. The relevant report was given to Mr and Mrs T only on the morning of the review. Understandably, they considered that they could not deal with these at the review and declined to attend it.

[20] The chair of the review then aggravated this unfairness by securing the consent of Mr and Mrs T to the review proceedings in their absence. The minutes indicate that considerations of convenience drove this approach, but it was quite improper for this to have been elevated above the right of Mr and Mrs T to participate effectively in such an important review. On 14 November 2018 the Trust decided to proceed to seek a care plan for adoption. From that date onwards the Trust does not appear to have considered anything else. I observe that a feature of this case is the building up of momentum behind a particular outcome (here adoption by J and K) and a concomitant resistance to the consideration of alternatives.

[21] Ms McNeice accepted that if the court was asked to consider the issue of threshold for a Care Order now, it would be apparent that the threshold conditions which pertained in July 2019 are no longer in existence.

[22] She also accepted that there had been failures to secure timely therapeutic service provision for Mrs T before Joy's birth. Further, after care proceedings had commenced with respect to Joy, there had been significant delay in obtaining Dr Moore's reports and the Trust had failed to make provision for CBT as recommended, by Dr Moore in July 2019 as a 'core need.'

[23] Dr Sweeney gave evidence via Sightlink. She saw J and K in their home with Joy. She did not see the parents in their home with P. Perhaps the most helpful aspects of her oral evidence were (1) her acceptance of a positive relationship between J and M and Mr T and Mrs T and (2) her acceptance that it was "entirely possible" for Joy to sense and respond to the anxieties of J and K about the Court processes, (3) her acceptance that if J and K were reassured that Joy was staying with them then less anxiety would result, (4) her opinion that it was impossible for Joy to have a secure attachment with her parents since she was removed from their care at 3 months and had not lived with them since then, (5) her opinion that long term foster care can be a form of permanence. She agreed that if Joy were able to stay permanently with J and K in long term foster care her sense of security would be likely to develop.

[24] While Dr Sweeney in oral evidence maintained, consistently with her report, that adoption would be in Joy's best interests, given Joy's need for stability and security, she acknowledged the adverse impact of the reduction in sibling contact to

4 contact sessions each year and accepted that was being compromised in the interests of stability and security.

[25] Ms Graham's evidence usefully confirmed that Joy enjoys contact with Mr and Mrs T and P. The two sisters are enjoying spending time together. She accepted that the bond was growing between them. She accepted that Joy was particularly unsettled around late November/early December 2020. She also agreed (as had Dr Sweeney and Ms McNeice) that Joy may have been responding to the anxiety of J and K around that time. Ms Graham confirmed that by the LAC review of April 2021 Joy was more relaxed, settled and secure in the home of J and K.

[26] Ms Graham accepted that the sibling bond between Joy and P would not develop if contact between them was reduced to 4 times each year. Mrs Graham was reluctant to accept that the Trust had insufficiently acknowledged the importance of the sibling relationship between Joy and P. She did, however, acknowledge that this sibling relationship was one that, if permitted to develop, would naturally become more important with the passing years.

[27] Regrettably, Ms Graham's report of 20 April 2021 gives a skewed picture of Mr and Mrs T. She was driven to accept that the reference (internal page 15) to Cognitive Behavioural Therapy, 'CBT' having taken place in September/October 2018 was inaccurate, an inaccuracy that was surprising given the reference to Ken Walsh and CBT in an entry for 28 August 2020 in a report by Ms McNeice of that date. Worryingly, her report was simply silent on the progress that the parents made once given educative and therapeutic support at Thorndale. While paragraph 1.28 of her report noted that Mr and Mrs T had entered Thorndale, there was no evaluation of its outcome or, indeed, any indication that Mr and Mrs T had progressed (as they were acknowledged by Ms McNeice and the Guardian to have done) in the community.

[28] Although the evidence of the Guardian ad Litem, Mr Sean Mulligan, has at times been criticised by counsel for Mrs T, I found it very helpful and marked, in particular, by balance. Mr Mulligan did not shift in his view that adoption was the best outcome for Joy but readily accepted that paragraph 13.1 of his report with its reference to long-term fostering as being "a less satisfactory outcome" did not reflect the correct legal test.

[29] I was struck by Mr Mulligan's concern for the sibling relationships in this case. He considered that existing provision for sibling contact between Joy, L, M, N and O was inadequate. Mr Mulligan accepted these sibling relationships were unlikely to develop or flourish if Joy were to be adopted.

[30] Mr Mulligan accepted where multiple children of the same parent have come into care seriatim a certain 'tunnel vision' may be experienced by social workers. For his part, Mr Mulligan believed that parents should be given a chance with a new child. Mr Mulligan had given effect to that belief with respect to P and, in so doing,

had supported the position of Mr and Mrs T against that of the Trust. The outcome of the care proceedings involving P had been successful. He considered that in this case the Trust may have been unable to acknowledge, or to acknowledge fully, the extent of parental progress.

[31] It was accepted by Mr Mulligan that Mr and Mrs T's behaviour in relation to the Trust could not be characterised as other than reasonable in all the circumstances. He commended the attitude of Mr and Mrs T towards J and K, singling out the constructive nature of their relationship and instancing the use of 'mummy' and 'daddy' to describe them. Mr Mulligan acknowledged that one of the problems with residence orders other than in cases of kinship arose from a lack of constructive pre-existing relations; that feature was not present given the established and constructive relationship between Mr and Mrs T and J and K.

[32] While being concerned about the potential for upset arising from litigation, Mr Mulligan accepted that there was no history of Mrs T engaging in litigation save as a last resort, to secure contact with M and N.

[33] Mrs T was an apprehensive and, at times, emotional witness. Her apprehension was understandable given the importance of this litigation for her family. I found her to be an entirely truthful and, given the pressures on her, an impressive witness. She showed a willingness to accept during cross examination that her behaviour had, in the past, fallen short of the necessary levels of good parenting; indeed, so ready was she to accept propositions put to her by Mr McGee that he reminded her courteously that she was not required to agree with him.

[34] This reminder proved, in fact, to be unnecessary. On key issues Mrs T was firm. When it was put to her that she might change her mind and seek to have Joy return to live with her and her husband, she maintained that she would not seek to take Joy away from K and J. She acknowledged that she had changed her mind in the past and that her current position and that of her husband had emerged only after, and in response to, Dr Sweeney's report. She pointed to her history of constructive cooperation with the carers of her other children. She became emotional when she considered that the passage of time, her own difficulties, Trust inaction or unfairness and the firm attachment of Joy to K and J now prevented the return of Joy to her and her husband, but, responsibly acknowledged that she should not and would not now seek this.

[35] Although she was pressed on the point – and from different directions – Mrs T remained firm: she would not seek to disrupt the placement of Joy with J and K. I believe her.

[36] Mrs T's vision for the future was of "one big family", that is, Joy residing with K and J as her main carers but with Mr and Mrs T remaining her parents and with such contact with them and between P as would permit the relationship between Joy and P (and Joy's other siblings) to flourish. I am satisfied that Mrs T was not only

sincere in the articulation of that vision but that she possessed the capacity, determination and good will to deliver it.

Discussion

[37] The Guardian acknowledged the improvement in the parenting skills of Mr and Mrs T. He acknowledged the work and commitment both had displayed in Thorndale and he acknowledged, too, the care and preparation that Mrs T put into contact with Joy. Mr and Mrs T do not attempt to undermine Joy's placement with J and K and both Mr and Mrs T use the words 'Mummy' and 'Daddy' with reference to them. Mrs T has pointed to the deference she has always paid to those who care for L, M, N and O. While she acknowledges that there have been difficulties over contact with M and N (Mrs T does not assign fault in her evidence but it seems to me that she is generous in not doing so) she points to her support for, and appreciation of, the religious tradition in which M and N are being reared which is different from her own.

[38] I do not believe that the stability that Joy currently enjoys with J and K would be endangered if the present application were refused, and long-term fostering to continue. There is a mature, mutually respectful relationship between Mr and Mrs T and J and K. It is clear that Mr and Mrs T are grateful to J and K for the care they give to Joy and, having heard from Mrs T, I am satisfied that neither she nor her husband would do anything to undermine the relationship between Joy and J and K. The generosity of spirit evidenced, for example, in Mr and Mrs T's use of 'mummy' and 'daddy' with respect to J and K is not only (as the Guardian accepted) unusual, it is significantly reassuring.

[39] Evidence available to me from Ms McNeice and Ms Graham about the disposition of J and K towards Joy causes me to believe that they would not love her any less, nor diminish their care of her if they were not to become her legal parents. I do not underestimate the disappointment that refusal of this application will occasion to J and K but nothing that I have heard about them leads me to conclude that they will do anything other than continue to love Joy and work constructively with Mr and Mrs T in Joy's best interests.

[40] The relationship between Joy and P would not, I believe, flourish as it should if Joy were adopted. The Guardian, in his evidence, described the importance of the sibling relationship in general. He was right to do so. The age gap of some two years between Joy and P will diminish in significance with the passing years. Without, I hope, devaluing the importance of relationships between Joy and her other siblings, the relationship between Joy and P ought to be a source of great happiness and strength for both of them. But that relationship cannot be maintained adequately – far less flourish as it should – if Joy is adopted by J and K and contact is reduced, as is planned, to around 4 times each year. The Guardian candidly expressed his fear that this relationship would suffer if Joy were adopted.

[41] Understandably, the Trust places an emphasis on the quality of contact rather than the quantity of contact. While this is an understandable forensic position for the Trust to take, it fails in, at least, two ways to capture what would be lost to Joy if she were adopted. First, there is simply no substitute for the time together that would be lost to Joy and P. Children need time together that cannot always be evaluated (at least by adults) as 'quality time.' It is often the time spent doing not very much (at least to adult eyes) that siblings come to know and love each other, and to experience the interplay, not always straightforward, between knowing and loving. Second, the Trust skates over the distinction between the possibilities available, indeed enforceable, in long-term fostering arrangements and what is possible in adoption. The Guardian gave evidence, of his experience of contact between siblings having being lost after adoption.

[42] Ms McNeice, Ms Graham and the Guardian have all, in oral evidence, acknowledged the increased maturity and emotional growth in Mr and Mrs T. Mrs T has had a hard life; her previous relationships have seen domestic violence, domestic violence had occurred (three incidents but none since October 2017) between Mr and Mrs T, and Mrs T has had episodes of poor mental health and difficult pregnancies. Mrs T was herself adopted. Mr and Mrs T have overcome obstacles that are often not readily overcome. They are acknowledged to be good parents to P. They do not have the affluence or professional standing of J and K but their love for Joy is obvious – and has been forcefully presented to me in the evidence of Mrs T. I consider that Joy's life would be diminished if she did not have her parents in it at the very least to the same degree that they are at present.

[43] In the light of the foregoing I cannot conclude that adoption by J and K would be in Joy's best interests. Although the 'big family' described by Mrs T is unorthodox, I consider that the provision of long-term care by J and K with the loving support of Mr and Mrs T, who will continue as Joy's parents, is an arrangement more likely to secure Joy's best interests than adoption by J and K.

[44] In *NHSCT v AR and BR* [2018] NI Fam 2 at [29] Sir Reginald Weir drew approvingly on a paper by McFarlane LJ in which the following test was propounded:

> *"If it is not necessary to protect a child by removing her permanently in fact and in law from her birth family and grafting her into another family by adoption, it is highly unlikely that it will otherwise be in her best interests to do so."*

[45] Although in that case Sir Reginald disposed (at paragraph [36]) of the application before him emphatically on the ground that consent to adoption had not been unreasonably withheld (making more muted reference to the best interests test), I consider that the test is most usefully applicable (cf. "Welfare and Proportionality are not in fact two distinct concepts but are in reality two sides of the same coin") when the best interests of the child are under consideration. It is in this

consideration and through the application of this test that the demands of Article 8 ECHR are aptly channelled through the 1987 Order. That is not to say that Article 8 plays no part in the evaluation of whether or not consent has been unreasonably withheld but its role there may often be more modest, particularly if proportionality has been applied at the welfare stage.

[46] I find that far from there being any necessity to protect Joy by having her adopted by J and K that this is a case in which the material and intellectual advantages that J and K offer Joy as well as their love for her will continue without her being adopted. Adoption will bring stability, the benefits of which I fully acknowledge, but adoption will come at a cost – the diminution of contact with loving parents, and the inability to maintain and to develop fully relations with siblings. For Joy I consider that the cost of adoption is too high.

[47] Even if I had concluded that the benefits of adoption so outweighed the losses that would be consequential on it, so as to satisfy the test of McFarlane LJ, I could not consider that withholding consent to adoption was unreasonable. To place a high value on preserving the existing relationship between parents and child, to wish to maintain and develop the relationship between Joy and her siblings, to see these both as endangered by adoption, to see adoption in these circumstances as unnecessary, indeed, undesirable, together form, in the circumstances of this case, a reasonable position, and one that I certainly could not describe as unreasonable.

[48] Lord Hailsham LC in *Re W (an infant)* [1971] AC 682 at 699C, gave classic expression to reasonableness in this context:

> *"It is clear that the test is reasonableness and not anything else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the context of the totality of the circumstances. But, although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it."*

[49] Delivered in a different legal context, the words of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1064 remain apt:

> *"The very concept of administrative discretion involves a right to choose between mere than one possible course of action upon which there is room for reasonable people to hold different opinions as to which is to be preferred."*

The court must, therefore, guard against simply substituting its own view for that of a parent, with the former (inevitably) canonised as reasonable, and the latter castigated, in contrast, as unreasonable: see *Re E & M* [2001] NI Fam 2.

[50] The application is refused.