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<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	Delivered: 19/11/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION
 —————

Between:

A HEALTH AND SOCIAL CARE TRUST

-v-

A MOTHER and A FATHER

**(In the Matter of Two Children; Care Orders; Article 33 Application;
 Inherent Jurisdiction)**

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**Andrew Montgomery, of counsel (instructed by DLS) for the Trust
 The Mother represented herself**

**Gregory McGuigan QC; Breige Austin, of counsel (instructed by Faloon & Co.) for the Father
 Martina Connolly QC; Marie Kelly (instructed by Fisher & Fisher) for the Guardian ad Litem
 Louise Murphy, of counsel (instructed by the Official Solicitor) for B in relation to the
 application for declaratory relief**

SIMPSON J

[1] I have anonymised this judgment, including the identity of the Health and Social Care Trust involved. Nothing must be published which would identify the family or the children.

[2] The Trust's application is for a Care Order, under Article 50 of the Children Order (Northern Ireland) 1995 in respect of each of the two female children who, for the purposes of this decision I will call A and B; A being the elder child; B being the younger. Their present ages are, respectively, 14 and 12.

[3] There is a secondary application, which depends on the decision in relation to the Article 50 application, in respect of B.

[4] This case was transferred to the High Court in September 2020.

[5] The background in relation to the two children, and the parents, is comprehensively set out in a large number of reports provided both by the Trust and by a number of professional medical personnel. The facts in relation to each child are somewhat unusual and any significant rehearsal of the particular facts of the case would run the real risk of accidental, or jigsaw, identification of the family and, therefore, one or other or both of the children, so care needs to be taken that only limited facts are recited.

[6] The Trust has had extensive involvement with the family throughout the children's lives. The parents separated in 2013. This coincided with the children being placed on the Child Protection Register because of concerns of emotional abuse and potential physical abuse. Initially, and for a period of some 5 years the children lived with the Father. Because of an allegation of physical abuse made against the Father, the children went to live with the Mother, pending investigation. That position ended, however, after about 9 months following an allegation of physical abuse by the Mother.

[7] The Guardian ad Litem was appointed in June 2019. Interim Care Orders were granted in July 2019 and renewed since then. In September 2019 the children were placed in foster care.

[8] The detailed history thereafter shows that foster care was unsuitable and various placements in respect of each child, even with experienced foster carers, failed. This was essentially due to the behavioural problems, including aggression, exhibited separately by each of the children. The factual narrative is comprehensively set out in the reports which I have read. The children's behavioural problems are explained by Dr Coman, Consultant Clinical Psychologist, in a report dated October 2020. He was jointly instructed by all the parties. What is clear is that both children have psychological and therapeutic needs which are far above what a parent would generally expect to have to provide for a child.

[9] One of the matters which Dr Coman stresses is that stability for the children is a major matter of importance to both.

[10] Following the breakdown of foster placements both children were eventually placed in separate residential care where they remain.

[11] The elder child, A, is in a facility in Northern Ireland, which has been described by her social worker as a large house for up to 6 children. At present 4 children reside there. Each child in the facility has his/her own bedroom. Over and above A's emotional difficulties, she has significant sight problems and she attends a school which caters for such issues. The Trust staff in the residential facility, of which there are 6 on duty at all times, have the benefit of support from Scaffold, an organisation which provides therapeutic help, support and advice both to the children and Trust staff.

[12] The evidence of the social worker was to the effect that the facility is in regular contact with the school, that the child is getting on well at school and that the child's behaviour has markedly improved over time. She now integrates with the other children,

she is confident in going outside the unit and has recently started attending a local youth club. She is described as thriving in this facility.

[13] The social worker also gave evidence that the child says she likes being there, although at times she will say that she hates it.

[14] The younger child, B, is in a specialised facility in the Republic of Ireland, there being no place in Northern Ireland deemed suitable for all her needs, even though one was tried for a period of time. She has been there for some 15 months. She enjoys the benefit of input from Scaffold, which provides for her, in concert with the Trust, a comprehensive therapeutic package.

[15] She is housed in a bungalow with one other child at most. She has an en-suite bedroom. During each day there are 6 staff on duty, social worker, support staff and manager. She has what is described as a tailored therapeutic package. She is assigned 2 key workers and an occupational therapist. While, initially, her placement here was difficult for her and she struggled to manage her emotions, becoming disruptive, these problems have largely settled over time. The evidence of the social worker is that she has come on leaps and bounds and refers to the staff as her family. Prior to the LAC review in September 2021 she was asked if she wished to complete a contribution form. She did so, indicating that she was very happy and enjoys being in the facility.

[16] The Trust's care plan for each of the children is that they remain in their current facilities.

[17] On the morning of the first day of the hearing the Mother indicated that she no longer wanted to be represented by her experienced counsel and solicitor, but wanted to represent herself. Despite my explaining to her the advantages of representation, and the disadvantages of self-representation, and encouraging her to retain her representatives, the Mother was steadfast in her desire to represent herself. Accordingly, I made an order that the solicitors on record for the Mother have ceased to be her solicitors.

[18] Arrangements were made to provide the Mother with the necessary papers in the case, and I record my appreciation of the way in which the Trust made these arrangements, including providing a taxi for the Mother to transport the volumes of papers home with her. I also record my appreciation of the assistance provided by Mr McGuigan QC who kindly assisted the Mother to focus on the key documents within the significant volume of papers, and to the other counsel in the case for the way in which they adapted to the unusual situation, including changing the order of cross examination to facilitate the Mother.

[19] To allow the Mother time to read necessary papers and prepare, only the Trust's opening of the case and the evidence in chief of the two principal witnesses for the Trust, the social workers, took place on the first day of the hearing. On the second day the Mother cross examined the social workers and gave evidence. I commend the Mother for the way in which she represented herself in court in what were for her, plainly, very

difficult emotional circumstances. She handled herself in a very dignified, temperate and respectful manner.

[20] The Mother gave evidence. For the reasons stated above i.e. the need to avoid reciting very specific facts so as to guard against identification of the family or children, I record the mother's evidence only in very general terms. However, in coming to my decision in relation to the Care Order sought in respect of each child I have taken into account all of her evidence, including the contents of the statements filed on her behalf by her solicitors.

[21] She said that she wanted the future of the two children to be with her, although in cross examination she frankly admitted that she was not "that unrealistic – to suggest they would come back to me" in the immediate future. She was critical of the present arrangements for the children. She did not accept that both were happy in their present placements.

[22] She gave evidence that A was being exposed to inappropriate incidents and that a home with fewer children would ensure that A was not exposed to the poor behaviour of other children. As she put it – A needed a setting with fewer disruptive elements and more structure. She said that A complained of being bullied and assaulted. She referred to an incident where A was found to be well away from the facility with another resident. She gave evidence of videos posted by A about which she expressed her significant concern, as well as concern that, despite her bringing matters to the attention of the Trust, this behaviour continued. She felt that Trust staff did not adequately understand the medical needs of A. She said that A had told her that she, A, had to teach the staff certain things about her. She felt that A was not safe, physically and emotionally, in her present placement.

[23] She gave evidence that B's particular needs were not being properly provided for by the Trust and she felt that the therapeutic improvement which she understood would occur following B's placement had not materialised. She expressed the view that B was not being set proper boundaries by Trust staff, who were allowing B to behave in a way which she, as a mother, would not have permitted. She felt that B would benefit from being in Northern Ireland and closer to her sister, mother and father. She also gave evidence that B's behaviour continues to be poor and that any improvements do not seem to last.

[24] Understandably, the Mother was unable to identify any particular setting which, at present, would meet the respective needs of each child. She accepted that the children could not be placed together, and she accepted that she would "need to do a lot of work" before, particularly B, could be in her care. She bravely admitted that many of the children's problems were due to her. She made the case that other than the children she has no ties in Northern Ireland and only remained in this country to be available to them, if nothing else, then at least as a "fall back option."

[25] The Guardian ad Litem has provided the court with a number of reports, the most recent report being dated 10th November 2021. She has been involved with the children

since June 2019 and has had regular contact with both. The Guardian is supportive of the Trust's care plan for each child.

[26] The Trust considered whether any kinship option was available for either child, but identified none. None has been suggested in evidence. The plan for each child contemplates each remaining in her current placement and each being supported by the appropriate professional staff. In addition, the care plan for each child includes provision for contact with the parents.

[27] In relation to the elder child, A, contact with the Mother is currently face to face once per month, with telephone contact once per week (or more if the child wishes it). It is proposed that this be increased to two direct contacts per month, one in the facility and one in the community, with an example being given of attendance at the Belfast Christmas market. The Mother's contact with the younger child is currently once per month, direct, and once per month, indirect. It will be up to the child if she wishes this to change to two direct contacts per month. The current contact takes place in the facility. The Mother has very difficult and emotionally draining issues which she has to deal with in England and which require her to travel there from time to time. The Trust has indicated that it will seek to make arrangements for the Mother to see both children at times suitable to her and to fit in with her other responsibilities. Contact with the Father is currently indirect. The Trust have indicated that contact with the father will be monitored and steps taken to promote contact.

[28] The issue of rehabilitation has to be considered. The Trust's evidence is that the Mother was ruled out as a carer in 2019.

[29] There is a detailed report from Dr Quinn dealing with the Mother's history and her ability to provide the necessary care for each child and I have read and considered that report. There is no requirement for a detailed recitation of the Mother's background suffice to say that it is clear that the Mother endured a very troubled childhood, involving physical abuse of her, and troubled teenage years, leading her to go into local authority care, including supported living, when she was 15. She has described her own lifestyle at that time as "dangerous" and she became involved in antisocial behaviour. In her more adult years she describes what Dr Quinn calls "a very complex history of romantic relationships", which involved abuse of her. He considered that the Mother has had an emotionally disturbed history. He has diagnosed that she suffers from Emotionally Unstable Personality Disorder, key features of which are instability of mood and behaviour, particularly in times of stress. He considers that she has limited insight into the children's emotional and behavioural difficulties and the likely impact of her poor ability to parent the children. She has limited insight into their needs and he considers that her own emotional needs are likely to dominate over those of the children.

[30] His conclusion is that:

"The nature and extent of [the Mother's] difficulties are such that I do not believe that she will be able to achieve and

maintain lifestyle and parenting changes sufficient to act as the children's sole/primary carer."

[31] In addition, I have been provided with a report from Dr O'Reilly, whose report was commissioned on behalf of the Mother. This report deals with the Mother's then ability to care for the younger child. Dr O'Reilly, in her report, describes the Mother as socially isolated and considers that the Mother was minimising the concern for the children voiced by social services. She did not think that (at that time) the Mother had the capacity to meet the needs of the younger child.

[32] Accordingly, and notwithstanding the Mother's love for the children, I am satisfied that rehabilitation into the care of the Mother is not in the best interests of the children.

[33] The Father has made it clear that he does not consider that he is capable of caring for them.

[34] Having read the significant documentation in the case, and having listened to the evidence, including that of the Mother, I am satisfied, first, that the threshold criteria have been satisfied. The Trust identified certain criteria in its document of 25th May 2019. I am satisfied that the children have suffered significant harm and that each of the criteria is met.

[35] I have considered other orders which might be made rather than the Care Orders sought by the Trust. I am satisfied, first, that to make no order would not be in the best interests of the children. If no order was made only the Father and Mother would have parental responsibility for the children. I am satisfied from all the evidence that both children would suffer significant harm which would be attributable to the parenting of the Father and the Mother, or either. Dr Coman is of the opinion that neither child should be returned to the care of either parent as the intensity of the needs of both "far outweighs" the capacity of either parent to meet them, even with support. I am satisfied that it is in the best interests of both children that parental responsibility be shared with the Trust.

[36] I have separately considered whether a Residence Order or a Supervision Order would be in the best interests of the children, and am satisfied that neither would. Dr Coman stressed the importance of stability for the children. Neither such order would provide stability and neither would ensure the level of therapeutic support which each child plainly needs.

[37] In light of all the evidence, I am satisfied that I should make the Care Order sought by the Trust for each child. I am satisfied that it is in the best present and future interests of each child that they continue in the respective facilities in which they are currently living. I am satisfied with the current contact arrangements (although the Mother has taken issue with some of the detail) and I note that contact arrangements, in respect of both parents, will remain under review by the Trust.

[38] In relation to the younger child, B, there remains the issue which arises by virtue of the fact that the Care Order requires her continued residence outside Northern Ireland.

The issue arises because of the wording of Article 33 of the 1995 Order. Where material, this provides:

“33.—(1) An authority may only arrange for, or assist in arranging for, any child in its care to live outside Northern Ireland with the approval of the court.

...

(3) The court shall not give its approval under paragraph (1) unless it is satisfied that—

- (a) living outside Northern Ireland would be in the child’s best interests;
- (b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;
- (c) the child has consented to living in that country; and
- (d) every person who has parental responsibility for the child has consented to his living in that country.

(4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, or other suitable person.

(5) Where a person whose consent is required by paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person—

...

(c) is withholding his consent unreasonably.”

[39] In light of the evidence which I have before me about the younger child, I could not be satisfied that the younger child has sufficient understanding to provide the appropriate consent and it would, therefore be dangerous for the court to proceed on the basis in (3)(c) above. Since the younger child is to live in the facility which I have described above, the problem is created by paragraph (4) – the court’s approval may be given “if the child is to live in the country concerned with a parent, guardian, or other suitable person.” Clearly the child will not be living with a parent, guardian or suitable person.

[40] The whole question of how the courts should approach this conundrum has been comprehensively dealt with by McFarland J in his judgment in *In the Matter of OM (A Male*

Aged 10½ Years) [2021] NIFam 16. After a careful analysis of the authorities McFarland J decided that wording of Article 33(4) – in circumstances akin to those in the present case – meant that the court was not in a position to approve the child living in the Republic of Ireland.

[41] I respectfully agree with his analysis and his conclusion. Accordingly, the court is not in a position to make an order under Article 33.

[42] The High Court retains the inherent *parens patriae* jurisdiction, but its inherent jurisdiction must be considered in the light of the statutory regime in the 1995 Order.

[43] Again, this matter was dealt with by McFarland J who concluded in paragraph [60] of his judgment (where material):

“I am therefore satisfied that this court is able to exercise its inherent jurisdiction. ... It would not be incompatible with the 1995 Order. In fact, applying Article 3 (1)(a) of the 1995 Order the court when considering OM’s upbringing is required to treat his welfare as its paramount consideration. Lord Dyson in *R v Secretary of State for Work and Pensions ex p The Child Poverty Action Group* [2010] UKSC 54, at [34] stated that:

‘The question is whether, looked at as a whole, a common law remedy would be incompatible with the statutory scheme and therefore could not have been intended by co-exist with it.’

The suggested inherent remedy lies in perfect co-existence with the 1995 Order as the placement of OM in the institution in the Republic of Ireland is clearly in his best interests and if not approved he will be placed in a situation where he may well suffer significant harm because of the non-availability of a suitable placement in Northern Ireland.”

[44] Once again I am in respectful agreement with what McFarland J has said. Accordingly, I intend to exercise the court’s inherent jurisdiction and will treat the Trust’s Article 33 application as an application to invoke the jurisdiction. In such circumstances, as Ms Connolly QC for the Guardian ad Litem correctly submits, the ‘check list’ in Article 33 does not fall to be considered. However, as a useful cross check against the Article 33 criteria I consider that living outside Northern Ireland would be in B’s best interests and I am satisfied that suitable arrangements have been, and will continue to be, made for her reception and welfare in the Republic of Ireland. The Father has consented to her living in the Republic of Ireland. The Mother has not consented and, again by way simply of cross check, I have considered that aspect. In doing so I consider that I should follow the same approach as in cases involving freeing a child for adoption (see *Re G (Minors)* [1994] 2 FLR 301 and *Re M* [2014] NICA 73).

[45] 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*:

‘...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.”

[46] On the basis of that test, if I had had to deal with the issue of the Mother's consent, I would have held that the Mother was unreasonably withholding consent.

[47] I grant the leave sought, as I am satisfied that the provisions of Article 173(3) apply, and I grant permission to the Trust for the child to reside in the institution in the Republic of Ireland.

[48] I make the Care Order sought by the Trust in relation to each of A and B.

[49] I indicate that I approve of the current contact arrangements and I note that the Trust will continue to work with the Mother, Father and the children to seek to make the arrangements work to the benefit of all.

[50] While I recognise that the Mother will be deeply disappointed with this decision, I would encourage her to work with the Trust as closely as possible to enhance contact. This will clearly significantly benefit the children, but I think it is also bound to benefit the Mother.

[51] I make no order as to costs save that:

- (1) the Mother's former representatives' costs be taxed under the appropriate legal aid schedule up to and including the first day of the hearing, 15th November 2021;
- (2) the Father's and the Guardian ad Litem's costs be taxed under the appropriate legal aid schedule.

[52] I certify for senior counsel for the Mother, Father and Guardian ad Litem. Finally, I discharge the Guardian ad Litem.