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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **27/01/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

Between:

A HEALTH AND SOCIAL CARE TRUST

-v-

A MOTHER and A FATHER

(In the Matter of Two Children: Freeing for Adoption)

Claire MacKenzie, of counsel (instructed by DLS) for the Trust
Eric Cleland, of counsel (instructed by Brian Feeney & Co.) for the Mother
Kathy McKee, of counsel (instructed by Joe Mulholland & Co.) for the Father
Grainne Brady (instructed by Campbell & Caher) for the Guardian ad Litem

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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 in relation to the two children is that they be freed for adoption. Neither the Mother nor the Father is prepared to agree to the children being freed.

[3] The Mother and the Father are Latvian. The Father has been known to Social Services since 2011. Although the Father was living in Northern Ireland in 2016, the Mother and Father met in Latvia in that year and the Mother came to live in Northern Ireland. They have lived here since then. They are not married.

[4] Their first child, a male (to whom I will give the initials LM), was born in 2018; their second, a female (MM), was born in 2020. The initials are not the actual initials of the children.

[5] Within days of LM's birth an Emergency Protection Order was granted and he was placed in Trust foster care. An Interim Care Order was made on 13th July 2018. The High Court made a full Care Order — the plan being for permanence via adoption — on 17th December 2019.

[6] Shortly after MM's birth an Interim Care Order was made and she was placed in foster care with her brother. On 15th December 2020 a full Care Order — again the plan being for permanence via adoption — was made in relation to her.

[7] Since April 2020 the children have been placed together with foster parents, who are the prospective adopters.

[8] There is a detailed statement from the Trust in relation to each child setting out the history and background of both cases and articulating all the concerns which the Trust has in relation to both children. I confirm that I have read each statement and taken their contents into consideration in arriving at my conclusion. Care orders having been made in respect of each child, there is no need to rehearse the significant history outlined in the Trust's documentation. Suffice to say that throughout the Trust's involvement with the Mother and Father there have been issues of financial management, domestic violence and substance abuse. A psychological assessment following the birth of LM concluded that the Mother was not able to care independently for him or to provide him with safe care or develop his upbringing. It was further concluded that she was unable to assess the child's health status and that she required control and advice at all times. Other reports make it clear beyond peradventure that the Mother is a very vulnerable lady. She remains in the relationship with the Father.

[9] Throughout what has been for the Mother a very difficult process she has engaged with the Trust, and with her legal advisers, in a polite and respectful manner. With the assistance of the Official Solicitor and with help from an interpreter, the Mother has provided a statement of evidence. She makes it clear that she loves the children and while she supports the children living together, and with their current carers, she has expressed concern that adoption will diminish the bond between the children and her and that they will forget her. She feels unable to provide her agreement to adoption.

[10] The Father has not engaged with the Trust. For a time he disengaged with his legal advisers. No statement of evidence is available from him. Fortunately his counsel was able to make contact with him on the morning of the hearing. Having heard from his counsel I am satisfied that he is aware of the nature of these proceedings and that they were to be heard on the day of hearing. No application for an adjournment was made. In any event I am satisfied that it is not in the interests of the children to delay the final decision in this case any further. The Father's instructions to counsel were that he loves the children, that he does not want the children to be freed for adoption, that he wants to

see them and that he feels disempowered because he considers that the social workers do not understand his Roma culture.

[11] In a very helpful report, the Guardian ad Litem has indicated that she supports the Trust's application. She has described the prospective adopters (who themselves have a mixed cultural background) as being culturally sensitive and attuned to the cultural needs of the children. They have made efforts to learn some Latvian phrases to use with the children.

[12] The Trust has considered all other options in arriving at its decision that the care plan for each child should be adoption. I am satisfied from the evidence that rehabilitation with the Mother and Father would result in a significant risk that neither child's needs would be met and that both children would be at risk of significant harm, in light of the parents' lifestyle choices and the well-founded concerns about their backgrounds. No extended family carer has been identified, notwithstanding contact with the Latvian authorities, who have indicated that they do not wish to intervene. Long-term foster care has been ruled out and I am satisfied, properly so. It would require the children to remain within the care system, with statutory involvement, until at least age 18 and the arrangements would be open to challenge. They would remain "looked after" children, with all the stigma attached to that status and the bureaucracy which can attend regular decisions relating to the children. They are likely to have to move a number of times during their young lives, with resulting insecurity.

[13] The children have been placed together with the prospective adopters for almost 2 years. LM was placed with them at approximately age 21 months. He feels secure in their care. MM was placed with them at approximately 3 months of age. It is clear from the Trust's comments, and those of the Guardian ad Litem, that the children are happy and enjoy a stable environment within a strong network of family and friends of the prospective adopters. Adoption in general affords children greater stability and security. It affords a real sense of belonging, which cannot be underestimated. To borrow the phrase used by Ms Brady, they will have all the benefits of a "forever family." That is clearly in the best interests of each child.

[14] 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."

[15] 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 para (2). In this case 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.

[16] 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.
> …."

[17] 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).
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> (b) If so, given that adoption represents an interference with Article 8 rights, can this interference be justified on the basis it is —
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> (i) in accordance with the law;
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> (ii) in pursuit of the legitimate aim; and
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> (iii) is necessary/proportionate?

(c) If so, has it been established by the Trust that the parents are unreasonably withholding their agreement to adoption?"

[18] As Gillen J 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."

[19] The extreme consequences of adoption, and the proper approach of a court, has been dealt with both in domestic and European authorities. 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:
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> > '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.'
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> Although in that para 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 para 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)."

[20] 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 (para 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."

[21] And in *ML v Norway* (Application No. 64639/16), judgment made final on 22nd 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, paras 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 para 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, para 88, 31 May 2011)."

[22] Accordingly, as it seems to me, there is no difference in the approach between the domestic and the Strasbourg law.

[23] The Court should adopt the least interventionist approach. In all the circumstances of this case, and considering the interests of each child separately and considering, as I have, the other options, I am satisfied that adoption is in the best interests of each child and that the order sought by the Trust in respect of each child is proportionate and necessary.

[24] The approach to be taken in relation to the parents' withholding of agreement was considered by Morgan LCJ in *In the Matter of TM and RM (Freeing)* [2010] NI Fam 23. At para [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:
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> > '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.'
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> 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."

[25] As I have previously said, it is in a way 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 a parent who refuses to listen to reason. The parents in this case both love the children and genuinely want the best for their children. What they feel emotionally unable to do is to consent to the relinquishment of their parental rights forever.

[26] 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.

[27] In light of the authorities cited above, I find that the each of the Mother and the Father is unreasonably withholding her/his agreement to the adoption of the children. I will dispense with the consent of the Mother and the Father to the adoption of the children.

[28] The Father has not had any contact with LM since August 2018 and has had no contact with MM. This is by his own choice. Until his attitude changes the Trust does not foresee his having contact. If he re-engages the Trust will look at the matter afresh.

[29] The Mother has contact once per fortnight; one direct contact and one by video. The Trust has presented to the Mother a schedule of gradual reduction of contact to reach the desired position of 2 direct contacts per year. In addition, the Trust considers that the Mother might want to continue bringing modest gifts to the children, such as Latvian food and to send a birthday card and Christmas card to the children. The Trust is prepared to facilitate the taking of a photograph of the Mother with the children and the provision to her of a hard copy; on the strict understanding that the photograph is not to be posted on social media.

[30] I consider that the suggested contact arrangements are appropriate.

[31] I make an order freeing both children for adoption. I make no order as to costs save that the Mother's, the Father's and the Guardian ad Litem's costs be taxed under the appropriate legal aid Schedule. Finally, I discharge the Guardian ad Litem.