

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

A TRUST

-v-

M and P

MORGAN J

[1] Nothing must be reported in this case which could lead to the identification of the children concerned or any of the parties. To that end I have prepared this judgment in an anonymised form.

[2] This is an application by the Trust to free 2 children for adoption. The parents of the children both oppose the applications. The relevant law is to be found in articles 9, 16 and 18 of the Adoption (Northern Ireland) Order 1987.

“Welfare of children

Duty to promote welfare of child

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-

(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.

Parental agreement

16. - (1) An adoption order shall not be made unless-

(a) the child is free for adoption by virtue of an order made in Northern Ireland under Article 17(1) or 18(1), made in England and Wales under section 18 of the Adoption Act 1976 (freeing children for adoption in England and Wales) or made in Scotland under section 18 of the Adoption (Scotland) Act 1978 (freeing children for adoption in Scotland); or

(b) in the case of each parent or guardian of the child the court is satisfied that-

(i) he freely, and with full understanding of what is involved, agrees-

(aa) either generally in respect of the adoption of the child or only in respect of the adoption of the child by a specified person, and

(ab) either unconditionally or subject only to a condition with respect to the religious persuasion in which the child is to be brought up,

to the making of an adoption order; or

(ii) his agreement to the making of the adoption order should be dispensed with on a ground specified in paragraph (2).

Freeing child for adoption without parental agreement

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.

(2) No application shall be made under paragraph (1) unless –

- (a) the child is in the care of the adoption agency; and
- (b) the child is already placed for adoption or the court is satisfied that it is likely that the child will be placed for adoption.

(2A) For the purposes of paragraph (2) a child is in the care of an adoption agency if the adoption agency is a Board or HSS trust and he is in its care.

(3) Paragraphs (3), and (5) to (7) of Article 17 shall apply to an order made by a court under paragraph (1) as they apply to an order made by a court under Article 17(1).

[3] Both parents accept that rehabilitation is not available or is not likely to be available within a reasonably practicable timescale commensurate with the needs of each child and there is an issue in respect of each child as to whether adoption or long-term foster care is preferable. Although the parents have never been married to each other and the father has never acquired parental responsibility it is clear that he was significantly involved in the lives of these children and I consider that it is appropriate to respect his right to family life under article 8 of the convention by treating him as having the same parental rights as the mother. In each case the Trust asked me to find that the parents are unreasonably withholding their agreement to the adoption of children. The leading authorities on the test of 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. In other words, it required the judge to assume that the mother was not, as she in fact was, a person of limited intelligence and inadequate grasp of the emotional and other needs of a lively little girl of 4. Instead she had to be assumed

to be a woman with a full perception of her own deficiencies and an ability to evaluate dispassionately the evidence and opinions of the experts. She was also to be endowed with the intelligence and altruism needed to appreciate, if such were the case, that her child's welfare would be so much better served by adoption that her own maternal feelings should take second place.

Such a paragon does not of course exist: she shares with the 'reasonable man' the quality of being, as Lord Radcliffe once said, an 'anthropomorphic conception of justice'. 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: see for example Lord Wilberforce in *In re D (Adoption: Parent's Consent)* [1977] AC 602, 625 ('endowed with a mind and temperament capable of making reasonable decisions'). 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."

The background is that a care order in respect of both children was made by McLaughlin J for reasons set out by him in a judgment delivered on 13 December 2005. The children have remained subject to that order since his decision. I shall refer to the parties as he did:

M -- mother of the children who are subject to the application;

P -- Father of the children;

K- first child of the above who was born in February 2002;

S- the second child of the above born in May 2003.

[4] M and P conducted a relationship over a period of approximately 2 years. On a night in November 2003 the younger child S began to exhibit obvious signs of distress. She was not presented to the casualty department of the hospital until 2:30 p.m. on the following day. X-ray examination disclosed a recent fracture of the left humerus and an older fracture of the left ulna. There was also evidence that the child had multiple bruises about her face on other occasions. P admitted that he had caused the fractured humerus but suggested that it arose from rough handling rather than as a result of any deliberate intent to injure. McLaughlin J. concluded that it was clear that P did an act in anger which was capable of causing the injury and that M had understated the reaction of the child. He found that the failure of the parents to detect the injury and the fact that they ignored the need for medical attention was proof of prolonged gross neglect on the part of both. He concluded that the presence of both fractures and the other injuries indicated that S was abused and then neglected in a most serious way which gave rise to very considerable pain, discomfort and distress on her part. He concluded that if either child was returned to the care of either parent, or that one parent should have both children, there was an ongoing risk of serious harm to both of them.

[5] He noted that P had an unfortunate and difficult early life when he was subject to physical and emotional abuse and found him to be a man of limited intellectual ability. He had a history of cannabis use and substantial excess of social drinking. He concluded in respect of M that there was little to suggest that she was equipped with the skills to meet the changing needs of young children placed in her care. She had suffered relationship difficulties with her mother which had required social services involvement in her early teens arising from her admission to hospital and subsequently was referred to the Community Addiction Unit.

[6] An assessment at that time in respect of P showed that he had skills with the children and was much more imaginative in play situations with his children and demonstrated more natural skills in organising play than their mother. He was also much more aware of safety issues in general play. There were emotional deficits in his personality however which were demonstrated when he failed to pick up on cues to lift or hug the children when they were clearly seeking warmth of that kind. He had a strong bond with K but was much less spontaneous with S. S placed very few demands on him. All the reports indicated a strong bond between P and K.

[7] The expert evidence before McLaughlin J identified the need for permanence, security and the avoidance of any risk of breakdown in respect of any future placement. Adoption was the preferred option at that time and he had no hesitation in accepting the advice which accorded with the opinions of many experts in other cases of a similar kind. An appeal was to be pursued by the father in respect of that decision but was dismissed on 24 April 2006.

[8] Until that time both parents had enjoyed contact twice per week with their children. After the appeal decision that was reduced to once per week. Sometime in July 2006 both children were removed from their foster carers with whom they had lived for approximately 2 1/2 years to dual approved foster carers in a different area for the purpose of implementing the plan for adoption. There is no doubt that this was a time of considerable change and difficulty for the children. The change of carer was matched by a change of parenting style. It became apparent that in her previous placement S had not achieved any secure attachment. In the case of K he had developed ambivalent attachment relationships. I am satisfied that the new carers had not anticipated that the children would have the difficulties that they exhibited and that they felt to some extent overwhelmed by the behavioural problems exhibited. These included temper tantrums, biting and inappropriate behaviour. The male carer prepared a detailed account of a day in the life of the children in October 2006 which showed the extent of problems with which they were dealing. I am satisfied that this was designed to reinforce the need for the trust to give assistance to the carers at that time and that the trust responded by providing effective professional involvement which continues. I am further satisfied that this assistance has been highly successful in enabling these carers to address the difficulties which both children exhibited.

[9] During the latter part of 2006 and the early part of 2007 contact continued between the children and the parents. Both parents demonstrated their commitment by their regular attendance at these contacts. The quality of the contacts was invariably good. Both Professor Tresiliotis and Mrs Wassell who gave expert evidence in this case accept that there is evidence of significant emotional attachment particularly between K and P

and K also appeared to derive significant benefit from the contact particularly during 2006. Although this is less pronounced with M there is also evidence of significant emotional attachment and benefit between K and M. The view of both experts is that S has not in fact formed any attachment relationships and there is little in the way of benefit for her.

[10] Both experts have also had an opportunity to review the extensive information in respect of the parents. Both are satisfied that the parents each have difficulty in being able to give the positive support to the new placement for these children which is necessary if they are to achieve the reassurance and security which is critical to their emotional development. If the parents are to achieve that ability it will require considerable work on their part by way of birth parent counselling. Both parents have been offered such counselling. This is difficult work which involves an exploration of the circumstances leading to the present situation and the reasons for it. The children in due course will want explanations as to why it was necessary for them to move to new carers and reassurance that they were in no way to blame for the events which occurred. M attended five such sessions between 16 October 2006 and 19 December 2006. I am satisfied that the extent of work involved in the sessions was limited by the fact that M had fallen pregnant again to P and her child was born at the end of December 2006. I am further satisfied that there is a considerable distance to go before M has benefited from the sessions to the point where she can begin to give the children the necessary approval for their new situation.

[11] P will undoubtedly find the sessions difficult and in his case he will be handicapped by the intellectual difficulties recorded in the medical reports. He attended 2 sessions but found it too difficult to continue any further. In fairness to him he had to deal with the emotional impact of the anticipated birth of a further child to M, the fact that he had pleaded guilty to 1 count of AOABH in respect of the fractured humerus sustained by S and the expectation of a further child to his partner due in April 2007.

[12] I am further satisfied on the basis of the evidence of the trust social worker who is dealing closely with the carers that the children were disrupted for a period of days after each of the contacts. The evidence suggests, however, that this was well managed by the carers.

[13] Of more significance is the evidence of Professor Tresiliotis and Mrs Wassell that K in particular was starting to display significant emotional conflicts in his most recent contacts. Both experts were of the view that unless there was an unambiguous permission from the parents for the placement it was likely that K would develop confusion at the point where he should be beginning to deepen his attachment to his long-term carers. S was just beginning to develop a capacity for primary attachment and any confusion caused by contact could interrupt that.

[14] It is clear on the evidence before me that if these children are to enjoy stable, secure and harmonious family life it is critical that they should develop secure attachment relationships within the family structure within which they are to live and be nurtured. As siblings it is in their interest to stay together. K is at an age where the risk is increasing markedly that he may fail to achieve such attachments in the absence of stability and security. Long-term foster care introduces an element of doubt and uncertainty which I am satisfied would mark these children out from their peers and potentially undermine the stability and security of the placement. I am quite satisfied that adoption is in the best interests of children. I am further satisfied that the dual approved carers have shown commitment to these children and that it is their intention to adopt at the earliest opportunity.

[15] The next step is to consider whether each of the parents is withholding their consent unreasonably. I recognise that both parents have indicated their desire to continue to contribute to the lives of the children and have indicated their commitment to the children in the contact sessions which have continued until recently. I accept that the past history of contact and the advantage for the children of direct contact in the future is a relevant and important consideration in deciding whether consent to adoption is being withheld unreasonably. I further accept that one should be cautious about placing undue weight on the inference that might be drawn from a small number of recent contact sessions. In particular I consider that the contact in February 2007 was quite unsatisfactory. Each of the parents was advised that this might be their last direct contact with the children. Neither had the benefit of preparation for that contact and in particular neither of the parents had support as to the messages which it might be important to communicate to the children. In those circumstances I am inclined to disregard the criticism by the trust of P's emotional reaction during the contact.

[16] Although I recognise that the quality of the sessions has been good in terms of the enjoyment of the children I accept that the stage has now been reached where it is important that the parents can start to address with the children the reasons for their situation and can give them reassurance and support in respect of the placement. In order to do that I am satisfied that both parents will have to participate in demanding birth parent counselling which will take many months and possibly longer. I consider that in the absence of such preparation the continuation of direct contact is likely to undermine the placement and that this risk substantially outweighs the risk that K may respond badly to the withdrawal of contact. Given the age of the children, the reasons why they are in care, the length of time that they have been in care, the requirement that they remain together, the absence of the prospect of rehabilitation and the security which adoption provides I consider that the evidence strongly favours the view that the consent of each parent is being unreasonably withheld.

[17] Before reaching a final view, however, I consider that it is important to take into account the extent to which direct contact post adoption might be achieved for these children. Each of the parents is anxious that such contact should be achieved. Although neither of the parents gave evidence in the hearing I accept on the basis of their written statements that they are committed to undergoing counselling with a view to achieve such contact. I am also satisfied on the basis of the evidence from the trust that the trust will provide support to enable each of the parents to avail of birth parent counselling and the trust expressly accepts that each of the parents has a legitimate expectation to that effect.

[18] At the hearing there was considerable debate about the position of the present carers. It is common case that at the time of the initial placement in July 2006 the carers did not envisage that they would be able to facilitate anything other than indirect contact. Since that time the carers have been on a considerable learning curve. They have had substantial support from the trust as a result of which they have indicated that they now realise that there is a rationale that would dictate that in certain circumstances direct contact would be appropriate and demonstrably beneficial for one or both children. Their present position is that they would be prepared to facilitate direct contact post adoption on the basis that it would clearly be focused on the needs of the children.

[19] Although this may not represent an enthusiasm to embrace direct contact it does demonstrate a considerable movement on the part of the carers and is further rooted in an understanding that these issues have to be determined taking into account the best interests of the children. It is impossible at this stage to predict the circumstances that may arise but I am satisfied that the trust is committed to working with both parents, the prospective adopters and the children with a view to securing direct contact in the future if that is in the interests of the children. The more the parents feel able to participate in the opportunities made available to them by the trust the more likely it is that such contact will be achieved.

[20] The parents have been given an opportunity to make a declaration pursuant to article 17(5) of the Adoption (Northern Ireland) Order 1987 but have chosen not to do so. The children at all material times have been in the care of an adoption agency. In my view this is an appropriate case to make the freeing order on the basis that the parents are unreasonably withholding consent to adoption. I anticipate that the work with the parents will continue and that the trust will also review the position with the carers after the adoption which I am confident will be pursued expeditiously. The trust envisages indirect contact in the interim and post adoption. Until there is a prospect of direct contact for the benefit of the children that appears appropriate.

[21] I recognise that this an order which will interfere with the family life of the parents and in particular with their article 8 rights under the convention. I make this order only because it is appropriate in order to protect the children from long term harm and achieve stability for them. Because of the work which the trust will undertake with the parents and the carers and children and the continuation of indirect contact the adverse impact on family life may well be ameliorated to some extent. It is important that the work referred to above should continue.

[22] These children came into care towards the end of November 2003. It has taken well over three years to reach this point. For children of this age with these needs that is a deeply unsatisfactory period of time in which to come to conclusions about their need for stability.