

**IN THE HIGH COURT OF JUSTICE IN NORTHERN
FAMILY DIVISION**

—————
RECORD NO 2001/233

BETWEEN:

An
and
Ce and So
Applicant;
Respondent.

—————
McLAUGHLIN J

JUDGMENT

The Proceedings

The application before me is for a Residence Order under Article 8 of the Children (NI) Order 1995 and the subject of the proceedings is Ta., a boy born on 1 January 1996, now aged 6 years 5 months. As it is desirable to anonymise the judgment I have set out below details of the various persons involved in the different family structures for ease of reference.

- An.** - The aunt by marriage of Ta. who seeks the proposed Residence Order.
- Ae.** - the husband of the applicant who is the blood uncle of Ta.
- Ce.** - the natural mother of Ta.
- So.** - the natural father of Ta.

- DI.** - a boy of 11 years who is the son of Ce. by an earlier marriage and stepbrother of Ta.
- La.** - a girl of 12, who is the child of Ce. by the same previous marriage and a stepsister of Ta.
- Te.** - a boy of 4 years who is the full brother of Ta. being the second child of the marriage of Ce. and So.
- Tr.** - the aunt of Ta. and full sister of So. and Ae.

A parallel application for a Residence Order was made by So. but this application was abandoned at the outset of the hearing.

The Two Households

Ce. and So., parents of the subject child, were married approximately seven years ago and lived together in West Belfast until they separated in early 2001. So. came to Northern Ireland from Zimbabwe and is black. When giving evidence, in common with Ae. and Tr., he took the oath on the New Testament and I understand the background of his family is in the Anglican tradition but they also have a strong affinity with the traditional religion of their homeland.

Ce., his wife, was born in Northern Ireland and her mother and grandmother emanated from here. Unfortunately she knows nothing of the history of her father either in terms of his nationality or ethnic origin but she regards herself as black. Although abandoned by a father whom she never saw she stated in her written evidence that:

“This was a source of deep distress to me as not only did I feel part of me was missing but I am

black, like my father, and the only black member of my family. I always felt different and confused. My white family had no sense of black culture and my black heritage was ignored.”

The household of Ce. now consists of the 2 children by her first marriage, La. and Dl. and her fourth child Te. Ce. is of Roman Catholic background and each of the children living with her at present has been brought up in that faith.

An. and Ae. have no children and unfortunately their marriage broke down also resulting in their separation in late 2000. An. now lives in the house with Ta. She is white and of the Protestant faith. Her husband Ae. is black and from Zimbabwe. Their matrimonial home is in a mainly Protestant town in County Antrim.

It is plain to see that potent forces of race and religion pervade the application before me. In effect a white Protestant woman, living in a mainly Protestant town in County Antrim, seeks a Residence Order in respect of a black child who comes from a mainly Roman Catholic family living in West Belfast.

Events Leading to the Application

After Ta.’s birth Ce. began to suffer postnatal depression and was only able to look after him with assistance from her husband’s family. It seems that during that difficult period his uncle Ae. and aunt An. stepped in and helped out by looking after Ta. on frequent occasions. Indeed at one time it appears that they took him on a holiday to Zimbabwe. On another occasion

Ce. had to go into hospital for an operation and Ta. went to stay with An. and Ae. for a short period. Unfortunately after the birth of Te. on 23 March 1998, Ce. became very ill again with postnatal depression and panic attacks. She was much worse this time and the illness appears to have been protracted. She was simply unable to cope with the family and a decision was made that it would help her to cope if Ta. went to live with his Uncle Ae. and Aunt An. This had been preceded by a family discussion which involved the sister of So. and Ae., she is called Tr. and lived in England at that time. She is the oldest member of the family and by custom is regarded as the head of the family. It is clear that Ce. also deferred to her and continues to do so. Throughout this time Ce. had no help from her own Northern Ireland family and she was very dependant on help given by her husband's family. It is unclear what arrangements were intended although it is tolerably clear that it was not thought that Ta.'s move would be permanent although it seems to have been accepted that it might be for a substantial period. This appeared to be a satisfactory arrangement to all concerned because Ta. was still "within the family", was extremely fond of his uncle and aunt and this fondness was reciprocated fully. The exact date of his move is not known but it was not long after the birth of Te. and the evidence was to the effect that it was approximately 4 years prior to the hearing. He has therefore lived for the greater part of his life with his uncle and aunt. Given that he is now just 6 years 5 months, it is understandable that he has no memory of the time when he lived with his parents. During the last 4 years he has been treated by An.

and Ae. as their child and he in turn considers them to be his father and mother and indeed he calls each of them Daddy and Mummy. It is acknowledged that there is a deep-rooted bond between the three of them and there is substantial evidence before me, which I shall deal with in due course, that Ta. wishes to remain living with his Aunt An., even though she has now separated from his Uncle Ae. In the 4 years Ta. has lived with An. he has thrived and he is by common agreement a friendly happy little boy, he is inquisitive, is doing well at school, although he could probably make more of his academic abilities, makes friends easily and in all respects is content.

During his period of residence with An. he has visited his Northern Ireland and African families frequently although it is clear from the evidence that An. does not get on well with many of her African in-laws. She did have a good relationship with So. until some period just prior to the present proceedings commenced. In evidence he indicated that the relationship cooled when he realised, as he alleged, that she was encouraging Ta. to call her "Mummy". Difficulties between An. and Tr. go back much further to the time of the visit to Zimbabwe. It appears at that time the two women had a disagreement over the alleged smacking of Ta. by An. The relationship did not break down but merely cooled because Tr. was pivotal in the later decision to allow Ta. to go to live with An. after the birth of Te.

As time passed and Ta. became older and settled into a pattern of living as an integral part of the household of An. and Ae. practical day-to-day problems in his upbringing arose. Ce. was too unwell to cope and had

significant problems with Dl. her son. In the event So. and she were content to allow Ta. to be brought up by his uncle and aunt and I am satisfied that they took very little to do with his day-to-day welfare. This meant that An. and Ae. had to carry the burden of making decisions about matters affecting Ta. such as health and education. Since they did not have parental responsibility for Ta. it is self-evident that they would encounter such problems because they were left with full responsibility for him but inadequate authority to make decisions ordinarily made by parents. In spite of that they arranged for any necessary attendance at a GP, had him enrolled in a nursery school in their local community and attended to his other needs. It was alleged in the course of evidence that An. spoke in terms of adopting Ta., which she denied, but it is clear that some such discussion did take place even if it was at a very general and ill-informed level. I accept the general thrust of An's. evidence that her concern was to be in a position where she could make decisions about Ta's. welfare as he had lived with her at that stage for at least 2 years and there was no indication that the situation might change. I reject suggestions that An. was plotting or scheming to get Ta. away from Ce. and So. I think such allegations are misplaced and unworthy having regard to the selfless role which An. in particular has played in bringing up someone else's child. Given the way the case has developed I think there has been a degree of ex post facto rationalisation of matters which were discussed innocently so as to score points off the opposite side. Ultimately decisions had to be made about which primary school Ta. should attend. I am satisfied

that his parents had very little input into this decision and that was their own choice. In particular I am satisfied that at no time did Ce. express any preference, let alone insist upon, Ta. going to a Roman Catholic school. I accept the evidence of An. that she tried to get Ta. enrolled in a non denominational primary school but was unable to find a place for him. She stated in evidence that the waiting list had been full for some considerable time since a lot of parents put the names of their children down for that school shortly after their birth. Her next choice was a local state school and a place was offered there to Ta. Not only was no objection made to this by Ce. or So., I am satisfied that it was entirely acceptable to them. He has remained at the same school since and he is well settled there and happy. I reject the suggestion that he is not attending a Roman Catholic school contrary to the wishes of his parents as being another example of making something an object of complaint where none existed before this application was made and which is now elevated to a point of principle in order to support opposition to the present application.

Having been faced with the responsibility of dealing with these very important matters, and it being followed some short months afterwards by the breakdown of her marriage in late 2000, I can understand why An. began to be increasingly concerned about her future with Ta. By that stage the bond between them was profound and it is clear that to be separated from him would have been all but unbearable for her. From the reverse point of view the departure of Ae. from the matrimonial home meant that the influence of

the birth family of Ta. was diminished somewhat and this acted as a spur to their consideration of Ta.'s future. This was accelerated further when Ce. and So. separated early in 2001. Although the spouses of each of these marriages have kept an admirable degree of contact with each other, it is clear that So.'s family are unhappy that Ta. is now removed from his African family to a greater degree. I believe that An. realised this and began to think more intensively about protecting her own position. I am satisfied that these circumstances came together to bring about her application for a Residence Order which came before the Family Proceedings Court on 13 September 2001. At that time the learned Resident Magistrate made an order in favour of An. which was effective until 17 December 2001 when a full hearing was due to take place. Thereafter contact continued as arranged by the Social Services who acted as mediators and facilitators in this regard. Unfortunately a most serious incident occurred in early November 2001.

During the school mid term break Ta. paid a contact visit to his natural family. He was due to be returned home the next day but unfortunately this did not occur. The situation continued for 2 to 3 days and resulted in increasing anxiety, perhaps even desperation, on the part of An. Despite telephone contact with the natural father and some of his family, including Tr., the child was not returned to her care which was in breach of the Residence Order made in September. Things became so desperate that An. issued an application on 2 November 2001 to enforce the Residence Order. By a series of emergency sittings on that day the matter passed from the Family

Proceedings Court to His Honour Judge Markey QC in the Family Care Centre at Belfast and ultimately to the Wardship and Adoption Office in the High Court. On that same day Mr Justice Higgins made an order in Chambers making Ta. a Ward of Court under the inherent jurisdiction and prohibiting him being removed from the jurisdiction without the permission of the court. It also ordered the delivery forthwith of Ta. by Ce. and/or So. to a social worker with the assistance of the Royal Ulster Constabulary if necessary, and thereafter that he be delivered to An. This order was obtained ex parte and because of the circumstances the duty social worker, a Mr Burns, went to try to recover Ta. Due to the resistance of the natural family the police were present in large numbers. Something in the nature of a standoff and a row ensued which took approximately 2 hours to sort out. Eventually Ta. left West Belfast with So. and the social worker and they travelled to the house of An. where he was handed over to her. Unfortunately members of So.'s family followed them to the house of An. and in turn members of her family arrived to assist her. It is clear that a very unsavoury scene unfolded during which Ta. was sheltered in the livingroom of An.'s house by Mr Burns whilst the events continued outside. In order to protect Ta. the curtains were drawn. It does not appear that an actual fight developed but certainly threats were made and strong language was used. It is alleged by Tr. that appalling racist language was used towards her and her family, that a hammer was produced by one of the members of An.'s family and the net result was that Ta. was extremely upset. I can well understand why emotions would have

been at the point of exploding. A child had been taken away from its natural parents to be given over to someone else. They had no notice of the application. They had no opportunity to make their case or protest. They were confronted not just with the force of a court order but also a large body of police officers, alleged to be 16 in number, who arrived in large vehicles with "Crimestoppers" printed thereon all of which caused a great deal of attention, embarrassment and disturbance in the vicinity of the house.

A considerable amount of this evidence was disputed by An. It was admitted by her however that at the very least some member of her family used the word "savages" towards her in-laws. It also appears that a hammer has been retained by the local police although I heard no evidence from the police about that. Mr Burns, the social worker who accompanied Ta, was obviously more concerned about Ta's safety and well-being than what was said outside and he was unable to make out individual words used but he confirmed that a major row took place. I do not consider that it is possible at this stage to make any meaningful findings about which words were spoken but I think it highly probable that racially abusive language of a particularly objectionable nature was used by members of An's family in the course of this unseemly incident. There was no evidence that An. was in any way responsible for this language, nevertheless in light of that background it is hardly surprising that it was impossible for the parties to reach any form of agreement in the interests of Ta.

From that point onwards I have the advantage that the relevant events have been monitored by Social Services because at a review hearing on 5 November 2001 this court ordered that a social worker should be appointed by Homefirst Community Health and Social Services Trust and a Statement of Evidence filed on its behalf by 28 November 2001. The person nominated to prepare the report was Dawn Wharry, Senior Practitioner, of the Family and Childcare Team of the Children Services Department of the Trust. I had the advantage also of hearing evidence from Niamh Donnelly, a Social Worker employed by North and West Belfast Social Services Trust who for a substantial period now has been responsible for assisting Ce. and her family by arranging welfare support. The Official Solicitor has also intervened on behalf of Ta. and her opinion was also put before me by agreement. I shall therefore review their evidence given its central importance in the determination of this dispute.

The Evidence of the Welfare Agencies

Mrs Wharry has provided 3 reports for various court hearings dated 30 November 2001 and 30 January and 5 April 2002. Her first report was prepared at the direction of Mr Justice Higgins following the wardship hearing and was intended as a preliminary report for the purposes of determining where Ta. should live pending final resolution of the dispute. She sets out the views of An. and Ce. together with their respective partners at the material time. Of most importance however was her assessment of Ta. at that time. It was clear to her that he was happy in the care of An. and that

he regarded her as his mother figure. He also enjoyed fruitful contact with his birth mother and father and particularly enjoyed the time he spent with his younger brother Te. She recorded quite unambiguously however that it was Ta.'s express wish to remain in the care of An. and to continue to visit his birth mother and father frequently and to stay overnight "sometimes" at their house. She was satisfied that he was content living with his aunt, was happy at his primary school, had lots of friends, was popular with them and that his emotional and physical needs were being met. For that reason the court sanctioned his continuing residence with An. Miss Wharry also recorded that Ce. was mentally well and managing her 3 other children at that time with support from North and West Belfast Trust. She was concerned at that point however as to any impact on her of a return of Ta. to her household given her responsibilities in respect of the other 3 children. Contact had been suspended following the incident at Halloween. Shortly after that it was re-established and in her second report Ms Wharry reviewed the quality of contact which occurred with members of the birth family. She observed contact on 4, 11 and 18 December 2001 and 8 January 2002. I think it is fair to summarise her assessment of it as being very positive from both perspectives. Ta. clearly enjoyed contact with his birth family, his step-siblings and especially his full brother Te. He displayed physical affection towards his mother, father and other members of the family. It was suggested that Ta. was distressed at the end of these contact visits when he was being taken home. In consequence Miss Wharry visited with a view to assessing the

situation which pertained on the termination of contact. She did not observe any distressing events. In her evidence before me she elaborated further on this theme indicating that she had raised with Ta. himself whether or not he had been upset when contact ended. The only information she could get was that on one occasion Ta. had cried when leaving but only because his half-brother Dl. had promised to show him a Michael Jackson video but he was unable to watch this as time had run out due to the fact that his uncle had arrived to collect him to bring him back home. On another occasion he had cried when he wanted his full brother to come home to stay with him but this had not been possible for various reasons. It is clear to me that these incidents of so called distress have no sinister implications. The birth parents have alleged that Ta. was upset on a number of occasions when leaving but the evidence about this is too vague to be able to draw any inference that this was due to actual distress at being parted from his birth parents with a view to being returned to An.

Ms Wharry's conclusion as a result of her involvement with the family groups since November 2001 is quite clear. Ta.'s primary attachment is to his Aunt An. He is entirely comfortable in her company and regards her as his mother. She also took the opportunity of speaking to his class teacher at his primary school who confirmed to her that he is a very popular mischievous boy with lots of friends and that he presents no cause for any concern to the school. She was also quite clear that his uncle Ae. is a very important figure in his life. Apart from the fact that he considers him to be his father, Ae. also

drives him to and from contact with his birth family as he is the only one with a motorcar. It is clear that Ae. takes a lot of trouble at some personal inconvenience to keep these contact arrangements and I am confident that his role is an entirely positive one. In giving evidence before me Mrs Wharry confirmed that not only was Ta.'s primary attachment with An. but that any change in his residence would have an adverse impact on him. He has expressed clearly to her that he wishes to remain with his aunt and actually wanted assurances that he could stay there. She put it to me in terms that "he will be a very unhappy little boy if moved." Any move from his present residence would also involve having to change school, he would not only have to cope with very different domestic circumstances because he would live no longer in an intimate one to one relationship with an adult but would have to share his parents and a home with 3 other children.

The evidence of Miss Niamh Donnelly was also of crucial importance. Her involvement with the family of Ce. and So. was unrelated to the court proceedings. She has been involved with the family since 7 July 1999 as a result of a referral from the Education and Welfare Services in respect of Dl. who had presented at school with problems. She was asked to assess the home conditions. Unfortunately Dl. has suffered from considerable behavioural difficulties including frequent temper tantrums, engaging in dangerous activities such as setting fire to shoes, bedclothes, carpets, etc indoors. There was also a very disturbing incident when he placed glass in the pram of Te. shortly after he was born. This should be seen in the light of

an admission by Ce. that Dl. had threatened to choke Ta. and had also brandished a knife at him. Both Miss Donnelly and Mrs Wharry agree that the return of Ta. to his birth mother could create problems not just for her in terms of the extra burden that she would have to meet but also might have adverse affects on Dl.'s behaviour. There was also concern that Ce. had failed to engage in arranging proper therapy for Dl. which had been suggested by Social Services. She was insistent that he had a psychiatric condition but the investigations by North and West Belfast Trust drew a blank in that regard and it was considered that his problems were essentially behavioural and that he required therapy to deal with it. Clearly a failure to engage in such proffered therapeutic assistance is a matter of considerable concern.

At the time of the hearing North and West Belfast Trust provided day-care for Te. on 4 - 5 days per week. This involves going to a crèche in the morning time and to a childminder in the afternoon. Ce. has also received assistance from a Mental Health Social Worker and Dr McGarry, Consultant Psychiatrist. In addition, Miss Donnelly sees her once per month. The assessment of the latter is that Ce. was unable to provide enough stimulation for Te. on her own and so it was necessary to provide this level of support to achieve it. This assistance has led to a considerable improvement in the situation and Miss Donnelly is of the opinion that after these proceedings these various supports could be reduced. She did not suggest however that they might be removed altogether. Clearly the introduction of Ta. into the household could potentially introduce new problems which might alter the

equation. Ce. is coping at present with the emotional and physical needs of the 3 children who live with her but this is within a structure of ongoing support from the relevant Trust. Miss Donnelly felt that Ce. was very resilient and could cope in the long-term but I detected some degree of reservation in the answers which she gave about this matter and I consider that the evidence leads inexorably to the conclusion that Ta. could not be introduced into the household of his natural mother without substantial continuing support in the short and probably medium term. It might also require longer term support but that cannot be assessed at present. Ultimately Miss Donnelly stated that she could not really say what the effects would be of re-introducing Ta. to his natural mother's household.

Each of the Social Workers agrees that Ce. has provided a comfortable and well maintained home for her children and that she is a good mother but that due to her health difficulties and Dl.'s behavioural problems the future course of events would be unpredictable. These might well be exacerbated if Ta. was to be returned to her care against his will as there would be inevitable difficulties of adjustment. Her report concluded by stating:

"This agency would have reservations regarding firstly, (Ce's) ability to provide adequate care for all her children and secondly (So's) commitment to providing support to his wife in her role as main carer to all her children."

That comment was made in the context of a report for a court sitting on 7 February 2002 and must be seen in the overall context of the evidence which she gave in examination-in-chief and under cross-examination which I have

summarised above. I am satisfied that the effect of Miss Donnelly's evidence, based on her extensive knowledge of this family, is that Ce. is a caring loving mother who would want to do her best for her children, who is operating under considerable stress due to her illness and the behavioural problems of Dl. and who has 3 children to look after at present so that a fourth child would bring inevitable increases in her burdens. She suffers from the absence of her husband from the home for most of the time and is likely to need some continuing support from the Trust. Her home is well maintained and accommodating and it is probable that she can meet the basic needs of Ta. provided she has some degree of continuing support from the Trust in the short and probably medium term at least.

I heard also the evidence and opinion of Mrs Rosalind Johnston, Acting Official Solicitor. She has intervened to represent the interests of Ta. Her opinion is clearly in line with that of Miss Wharry. She believes that the child has expressed a clear wish to remain with An., that any change of residence would be disruptive to a very considerable degree and could only be contemplated in the context of a significant management programme. She confirms that in Ta.'s mind the only home which he has ever known is with An and that he stated clearly to her that he wished to remain living with An. The significant extent of the attachment between them was also confirmed and she agreed with the opinion of Miss Wharry that An. is the most important figure in the life of Ta. Her initial report, dated 22 January 2002, was supplemented by answers to a series of questions posed in writing by the

senior counsel representing Ce. and So. respectively dated 15/4/02 in which she held to her original recommendation that there should be no immediate change of residence and that any change could only be contemplated in the context that it would be handled properly and sensitively to mitigate any risks to the child's interests but she noted that such precautions would not negate these concerns entirely.

In addition to the evidence of these professionals I had the benefit of hearing from each of the principle parties, namely, Ce., So., An. and Ae. And important evidence about the family history, tradition and cultural background was given also by Tr. I had interesting evidence from a Mr Abasi of the Black Youth Network Ireland with a view to helping me understand the needs of black children and young people in the United Kingdom and the wider world today. The evidence of these witnesses is probably best assessed in the light of the various considerations which will influence my ultimate decision, namely, the consideration of the paramountcy principle, the welfare checklist and the presumptions which apply in this context, namely that ordinarily a child should be brought up by its natural parents and that brothers and sisters should, wherever possible, be brought up together.

The Ethnic, Religious & Cultural Issues

At the outset I referred to the potent mix of these highly sensitive and important issues, which were present in the case, and it is necessary to elaborate on these.

So. and Ae. are brothers and Tr. their sister; there are also other members of their immediate family who live in Northern Ireland at present. They all came to the United Kingdom from Zimbabwe where they were born but it would appear that their family originated in Mozambique. All of the witnesses I heard from speak perfect English and they appear to converse freely with each other in that language but I am satisfied also that in family circles they sometimes speak together in their customary languages of Shona (from Zimbabwe) and Sena (from Mozambique). Whilst they are principally of the Anglican tradition they also adhere to aspects of their traditional religious practices, often in the context of family meals when African foods are eaten and cooking techniques employed. I have found it difficult to get a clear picture of how profound the allegiances are to these customs and traditions. Tr., as head of the family, stated that conversations in Shona and Sena were frequent when only family members were present and that customary eating practices were commonplace. She described this in her written statement as follows: -

“There is a significant importance attached to the rituals and ceremonies surrounding mealtimes and food in our culture. Our staple diet consists of a dish named Sadza eaten everyday and there is ritual and ceremony attached to it. The family gather together and pray to bless the food before it is consumed. The adults are grouped together and the children are grouped separately in the same room and we pray to our ancestors. This involves all present to be seated on the floor cross legged with a main bowl of Sadza in the middle of the other African food and chicken cooked in the African way.

The oldest members of the family lead the prayers. We ask our ancestors to look after the family and we pour wine onto the floor while chanting to the ancestor for the ancestors to drink. We also take a white plate and place fish and African rice on it with the Sadza. The children participate fully in this ritual. After the meal there is traditional music played and all who are gathered dance to this music. We play African games with all the children, who sit on the floor and sing and speak Shona and tell them about African folklore. The whole process is to teach them about their identity and African heritage and embrace the family... “

This evidence contrasted significantly with that given by Ae. who stated that such meals and customs were practised only on special occasions, perhaps on the anniversary of the death of a relation or similar occasion. He gave me no hint that adherence to these customs and traditions was anything like as steadfast as Tr. said. His evidence was not challenged or qualified by his brother So. who was in court to hear it. The explanation for the significant discrepancy may lie in the fact that Tr. has until very recently lived in England and was at a considerable remove from the other members of the family for most of the time. It maybe therefore that she is not so fully familiar with what actually happens in the family setting on a day-to-day basis. No doubt as head of the family she would be more fervent in her desire to preserve family traditions but we ought also to recognise that these can be difficult to preserve in a foreign and alien environment. I found all of Ta's African family members to be impressive, articulate and concerned people. I do not find that Tr. was exaggerating consciously, I do think however that living in a foreign culture has loosened adherence to traditional cultural

practices within the family and this is surely not unusual in well established immigrant populations.

I consider it important also to note and record that Mr Abasi, who was called by the acting Official Solicitor, stated that in his experience such traditional eating and religious practices would vary from family to family and might be performed only once per month, three months or for a specific event such as a birthday. He did not suggest that it was a daily cultural practice or that it could be absorbed only in a situation where the child resided full time with the birth parents.

There is no question that the customary practices described by Tr. are a very significant part of the cultural and ethnic heritage of this part of Ta's family. It is essential that he should know about it, understand it and value it and this must be achieved by ensuring that it becomes an integral part of his upbringing. It must also be recognised however that if these practices are not part of the daily, weekly or perhaps even monthly routine that it may not be necessary to grant residence to his birth family in order to preserve the desirable state of knowledge and appreciation of them. I am satisfied that the use of the customary language, religious and eating practices occurs on an intermittent basis within the family and nothing like as frequently as that suggested by Tr. I must also remind myself that this aspect of his family background represents just half of his cultural heritage. His mother, although of mixed race, is from Northern Ireland, she is a Roman Catholic as are her other children and these must be taken into account as well as his African

heritage. The evidence given by An. is that she is open to promoting knowledge of Ta's African heritage as much as possible, that Ae., his uncle and father figure, is committed to this also, which is confirmed by his evidence. It is said this would help ensure that on those occasions when his African family meet for these reasons that it would be simple to ensure his attendance, since Ae. would not just bring him to meet the rest of the family but would be an active participant. The fact that So. no longer lives with Ce. reduces the force of the argument that only residence with his birth family can secure his African cultural heritage.

The other matter, which must be considered, is the religious upbringing of Ta. His mother said she is anxious that he should be brought up as a Roman Catholic and is unhappy that he attends a controlled school, which she perceives as Protestant. Of greater concern to her is that not only does Ta. not receive any instruction in the beliefs of the Roman Catholic church but he is, or was until recently, receiving instruction in a non-Catholic faith in that he has attended a Sunday school and Church services which are quite different to those of the Roman Catholic church. There is no suggestion that the beliefs of the church which she has attended are hostile to Roman Catholicism, as some others might be. These concerns are very real because if Ta. is to be integrated fully into his birth family traditions, but live with An. He will be perceived as Protestant whereas his mother, brother and step-siblings are of the Roman Catholic tradition. In later life this could cause problems when he visits west Belfast where they live. Whilst all of the above

are legitimate concerns of Ce., they must be balanced against the clear evidence given before me that at no time before these proceedings commenced did either Ce. or So. ever specify that Ta. should be raised as a Roman Catholic and no complaint was ever made about his school not being in the maintained sector. His parents made no arrangements then, or even yet, to have him taken to Roman Catholic services other than occasional set events such as a Confirmation. Neither he nor Te. are baptised into the Roman Catholic church and no arrangements for attending instruction in that faith were ever made or suggested by them. Ce. stated in her evidence that she did not practice her faith obligations by attending church on a weekly basis, rather she stated that she attended at set times or occasions such as Christmas, Easter, confirmations or christenings. Whilst her faith may be important to her, and her beliefs may be genuine, the outward appearances of practice are clearly not vital to her. Accordingly, I am not convinced by her evidence now in the context of this contested hearing that her religious beliefs are felt deeply. I am forced to the conclusion therefore that her anxiety that Ta. should be brought up in the Roman Catholic faith is not as strongly felt as she has conveyed to me in the course of her evidence. The timing of the articulation of these concerns leads me to the view that whilst I should give weight to what she said I should temper her statements by reference to the other evidence and practical commonsense. Ta. will have a full exposure to the Roman Catholic, Anglican and traditional religion of his father's homeland through his birth family but I see no justification for saying that he

cannot live with An. because she is a Protestant. It is simply one factor which I shall take into account, accord considerable weight and balance it in deciding where in his best interests he should reside.

The legal framework

Article 3(1) of the Children (NI) Order 1995 requires a court, when determining any question with respect to the upbringing of a child, to regard the child's welfare as the paramount consideration. Since this is an application for a residence order pursuant to Article 8 of the 1995 Order I am required also by Article 3(3), when deciding whether to make such an order, to have regard in particular to the following:

- “(3) In the circumstances mentioned in paragraph (4), a court shall have regard in particular to –
- (a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
 - (b) his physical, emotional and educational needs;
 - (c) the likely effect on him of any change in his circumstances;
 - (d) his age, sex, background and any characteristics of his which the court considers relevant;
 - (e) any harm which he has suffered or is at risk of suffering;
 - (f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;

(g) the range of powers available to the court under this Order in the proceedings in question.”

In addition to these statutory considerations there are also certain so called presumptions which I must take into account. The first of these is the “strong supposition that, other things being equal, it is in the interests of the child that it shall remain with its natural parents” as it was put by Balcombe LJ in Re W (a minor) (Residence Order) [1993] 2 FLR 625. He did of course state that proposition in the context that it is the welfare of the child that is the true test to be applied against which that supposition is set and the clear recognition that it must “give way to particular needs in particular situations”. Put another way I consider it is accurate to say that in assessing the welfare interests of the child it will ordinarily be considered to be in his or her best interests to be brought up by a natural parent if possible, but there will always be the possibility that some circumstance will override that supposition. One such circumstance might be that the natural attachments and bonding between a child and its natural parents has been broken and replaced by others which are more meaningful and which will promote his or her welfare where resumption of residence with the natural parents might damage it.

The other proposition which must guide my decision is that a child has the right ordinarily to be brought up with its brothers and sisters. Again it is axiomatic that such a proposition must be looked at in the overall context of ensuring the proper promotion of the welfare of the child concerned.

(a) *The ascertainable wishes and feelings of the child concerned*

The child in this case is just 6 years and 5 months old and his wishes and feelings must be considered in the light of his age and understanding. The wishes and feelings of this child have been established beyond doubt in my opinion. He has been interviewed at length by Miss Wharry and Mrs Johnston. They have stated in the clearest possible terms that Ta. has expressed the wish to remain with An. and not to be returned to his mother Ce. The suggestion has been made, as is so common in cases of this kind, that a boy of that age is vulnerable to suggestion and that he has been influenced to express this opinion to the professionals concerned. Obviously a child of that age can be suggestible. I am entirely satisfied by the evidence put before me however that great care has been taken in order to establish his true wishes with full knowledge that it is often the case that a child has been coached or influenced to express the preference which he does. There is no evidence that any such suggestion has been made to the child nor has he ever hinted to anyone that such is the case. It is noteworthy throughout the course of three interviews with Ms Wharry, the most recent of which was conducted on 4 April 2002, that the child has remained consistent in his stated desire to remain with An. This has not altered with the recent increase in contact with his birth family. The Official Solicitor is satisfied also that the views of Ta. were settled opinions held by him. The professionals have assessed his expression of preference in the light of their considerable experience and I am

content to rely upon the views which they have conveyed to me as being his true wishes.

(b) His physical, emotional and education needs

It is established clearly before me that all of Ta's. physical, emotional and educational needs are currently being met by An. supplemented of course by contact with his uncle Ae., his natural parents, his brother and half-siblings. The suggestion that he should be moved back to the home of his natural mother does give rise to some concerns under this heading however. There is some risk of physical harm to Ta. from his half-brother Dl. I do not wish to overstate this but it cannot be ignored. There has been a threat made directly by Dl., which was not executed, and he has behavioural problems which have resulted in disturbing episodes of attempted fire raising that would endanger anyone living in the same household. The illness suffered by his natural mother, which required Ta. to be handed over to the care of An. in the first place, has resulted in a substantial support structure being put into place to protect the family and promote its welfare. Bringing Ta. into that home may well create substantial problems for his mother, may result in some kind of set back and would undoubtedly prolong the need for the support systems presently in place. The fact that he would live in a household of four children with a mother who has some residual mental health difficulties and who can only provide for her existing family group with social services support, is not to be underestimated. It is true that An.

has fibromyalgia but there is nothing in the evidence to indicate that this has impacted in any way upon her ability to provide for the physical, emotional or educational needs of Ta. The evidence is to the contrary and indeed it has been her responsibility entirely to ensure that his educational needs have been met to date.

(c) The likely effect on him of any change in his circumstances

The evidence in this issue again is stark and unambiguous. Ms Wharry is of the firm opinion that Ta. does not want to go back to live with his natural mother and that any enforced move would result in making him “a very unhappy child”. Such a process could only be attempted by putting a careful programme in place which would be designed, insofar as possible, to reduce the trauma and upset which it is recognised such a move would induce. It would also have the effect of requiring him to change school and to go to live in a very different community from that which he lives in at the moment and with which he is comfortable. There could be no guarantee of success.

(d) The age, sex, background and any characteristics which the court considers relevant

I have already set out in detail the racial, ethnic and religious undertones which affect this case. They are the primary matters to be considered under this heading. It is essential that Ta’s African heritage is

known and explained to him and that the cultural traditions of his birth family should be experienced and appreciated also. The importance of this matter must be gauged in the light of the emphasis placed upon it by his own family and I should be astute to how there is a natural inclination to put increased emphasises on some of these issues when contentious court proceedings are in prospect. I am satisfied that to date the religious, ethnic and racial, practices, traditions and customs which his natural parents thought sufficiently important to impart to him have been received by Ta. Whatever decision I arrive at should ensure that a continuing appreciation of these matters is given to him.

(e) *Any harm which he has suffered or is at risk of suffering*

I do not consider this to be of any independent significance in the context of the case overall and counsel have not made any particular point about it. The relevant matter is considered earlier in the context of concerns about D1's problems.

(f) *How capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant*

To some extent these matters have been considered earlier. The health background of his natural mother is important as is the fact that she cannot provide for the needs of her family at present without substantial support from social services. It must be recorded that so far as any of the independent

evidence before me goes that it is clear that An. has to date provided more than adequately for his needs.

Conclusion

It is clear that whatever decision I make is going to cause immense upset, indeed heartbreak, for some of the parties. By all accounts Ta. is a loving and loveable child. It is hardly surprising therefore that there is such competition for his affections. A great emphasis has been placed upon the need to promote knowledge of his ethnic, cultural and religious background and I have expressed my own acceptance of the importance of this. His African family have understandably emphasised the difficulty in a white person being able to explain these important matters properly. These issues took up a considerable amount of time in the course of the hearing. I should remind myself however that his Irish and Catholic background should not be forgotten either and are, arguably, just as important. I have had the clear impression from the anxiety about these matters expressed by his aunt Tr. that there is a fear that an undercurrent of racial bias may affect my decision. This is not something which I sensed was directed at me personally but rather at a fear that institutions in one culture may instinctively favour that culture over that of another and foreign country. It is probably true that no judge can be free of bias of some kind about some matters in life. Benjamin N Cardozo, reflected on this matter in his series of lectures entitled *The Nature of the*

Judicial Process and in his introduction to the first lecture 'The Method of Philosophy' he said:

"We are reminded by William James in a telling page of his lectures on Pragmatism that everyone of us has in truth an underlying philosophy of life, even those of us to whom the names and the notions of philosophy are unknown or anathema. There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of 'the total push and presence of the cosmos', which, when reasons are nicely balanced, must determine where choice shall fall. In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own."

These biases are subtle and present because of ordinary human limitations. One can only struggle to recognise them, set them aside and decide in good conscience. But I repeat and adopt respectfully the words of Rose LJ when as Chairman of the Criminal Justice Consultative Council he stated:

"Although, like all judges, I speak only for myself, it can safely be assumed that the judiciary are implacably opposed to racism and that no one who harbours racist views is fit to be a judge."

I am particularly mindful of the wishes of this little boy. It is of course easy to dismiss these as the views of someone who is little more than an infant and with barely two years of schooling behind him. I consider to do so

would be grossly unfair. The evidence is clear and to the effect that Ta. has strong views of his own. He can be assertive in class and express preferences very clearly. He knows which teachers he likes and which children he prefers to play with and with whom to form companionships. His expression of opinion is in my opinion a cry for the comfort and security of the home which he has known for four years. It may well be a reflection of some inherent instinct that in the home of his natural parents things are not quite stable and that security is not guaranteed to him. Whatever the source the message is clear. I am satisfied also that if he was to be moved from his current home it would result in a very significant disturbance of his sense of security and equilibrium however sensitively managed. Such problems will be contributed to significantly by the additional disturbance of having to change school and to live in a significantly different environment from that which he has experienced to date in day to day life. I have come to the conclusion that the best interests of Ta. will be served in the long term if he is allowed to continue residing with An. In reaching that decision I am conscious of the fact that I am acting contrary to the presumptions which I outlined earlier. I am satisfied however that by reason of the nature and quality of the attachment that has been formed between Ta. and An., and to a lesser extent with Ae., that he regards them as his parents and that the attachment which he has to his natural parents is of a much lower quality. To remove him in those circumstances from his perceived parents would be seriously detrimental to his well-being and would give rise to significant insecurity. I

am also satisfied that the presumption that he should be brought up with his siblings would equate to living with his natural parents and must take second place to what I consider to be the overriding welfare considerations.

Obviously An. cannot by herself meet all of the complex needs of this child and very careful consideration will have to be given to contact arrangements and other details of his upbringing. It has been agreed, however this matter is resolved, that there must be very substantial contact with both his natural and substitute parents and I have no doubt that the various agencies will be able to come up with propositions which will satisfy these needs and can be approved by the court in due course. Promoting his ethnic, racial and religious inheritances will not be easy, but I am satisfied that however important they are they should be secondary to his need for security, stability, continuity and permanence which he finds in his present home. These other matters can all be promoted sufficiently by satisfactory contact arrangements and by ensuring that religious instruction and cultural heritage classes in suitable groups are arranged for him. Mr Abasi's group and his family circle are obvious starting points in one respect and I cannot see any problems in finding effective religious instruction if it is wanted in Northern Ireland of all places. If necessary I can give further rulings or directions on these issues if they cannot be resolved by consent.

I conclude by expressing the hope that in the course of his life Ta. will not have cause to look back and feel that I have let him down. If his future is to be safeguarded and his prospects in life realised to the full, then the

wholehearted co-operation of his birth family will be required. I hope it shall be forthcoming for his sake. For her part An. must accept that full respect must be accorded to his wider birth family and not just to his parents. Not all family members can be expected to get on well together but her role is a particular one, a special trust is being placed in her and she will best secure Ta.'s happiness and security in the long term by encouraging for him the fullest possible relationships, love and appreciation of all of his family circle.

IN THE HIGH COURT OF JUSTICE IN NORTHERN
FAMILY DIVISION

RECORD NO 2001/233

BETWEEN:

An

Applicant;

and

Ce

Respondent.

JUDGMENT OF

McLAUGHLIN