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Judgment: approved by the Court for handing down | *Delivered:* 22/11/05
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF THE ADOPTION (NORTHERN IRELAND) ORDER 1987

BETWEEN:

DOWN LISBURN HEALTH AND SOCIAL SERVICES TRUST

(Applicant) Respondent

AND

H

(First named Respondent) Appellant

AND

R

(Second named Respondent) Appellant

Before Nicholson LJ, Campbell LJ and Sheil LJ

NICHOLSON LJ

Introduction

[1] This case has, of course, been heard in chambers. It is essential that the identities of the child and her parents are protected. Those responsible for

reporting this appeal in the media must respect their privacy. Any breach will be treated severely by this court.

[2] A Health and Social Services Trust ("the Trust") has sought an order pursuant to Article 18 of the Adoption Order (Northern Ireland) 1987, freeing for adoption the child who was born in April 2002 ("N"). The Family Judge, Gillen J ("the Judge") made the freeing order on 31 May 2005. From this order the mother ("H") and the father ("R") have appealed. They were separately represented in the court below and on appeal. The respondents to the appeal are the Trust and the Guardian ad litem. In the court below all parties were represented by junior counsel. In this court all parties were represented by senior and junior counsel. It was appropriate for H and the Trust to be represented by senior counsel in this court. But R adopted the same point of view as H and the Guardian ad litem supported the Trust.

The History of H and her Family

[3] The story of H's life is a sad one. She told Dr D S Allen, a Consultant Psychiatrist who specialises (inter alia) in substance/alcohol misuse that she came from a large family and was the third oldest child. Her parents were involved in a major car accident when she was 12 years of age and were hospitalised for 5 months. All the children (except for one) went to live in the South of Ireland during that period which she described as a major turning point in her life. She found the situation "desperate". Her parents got a lot of compensation for the accident and her mother used it to drink heavily. Then her father started drinking. She felt that she needed to take care of her family. Her parents fought a lot. Physical violence was shown to the children. Although both parents appear to have behaved badly, she hated her father because she blamed him for everything that had happened – the car accident and what happened post-accident. Her mother is a recovering alcoholic and is active in AA. Her father drinks less now and has had a stroke, she said.

She herself started drinking at the age of 13 or 14. From about the age of 20 she was drinking nearly every day for a long time. She was trying to block out of her memory the death of her second partner, the father of her second child ("P"). She blamed herself for his death (by hanging). She had "worked through" this issue with her sponsor at AA and felt that she was able to live with what happened. But she would always feel that she played a part in his death. In my view she needs further counselling and professional help in respect of this part of her life.

Her first relationship was with a married man who fathered her first child ("H1") when she was 18 years of age. He took no responsibility for the child who was born in 1989. H1 was placed on the Child Protection Register in 1991. Her second partner who committed suicide was not a drinker, was not violent to her and their relationship for 15 months until his death was

settled. P was born shortly before his death. On his death she started drinking heavily and was "going off the rockers". She went to her mother's home. She would not nurse P or have anything to do with him. Both H1 and P were taken into care between 1992 and 1997. She then got a house of her own, met a man who was the father of her third child ("T"). At the news that she was pregnant, he left her. T was born in 1996 and she lived alone with her until they were joined by H1 and P. She said that she was a heavy drinker before 1996 but did not define herself as an alcoholic. She told Dr Allen that Social Services were right to take H1 and P away because she was drinking heavily and this interfered with her care of her children. In between 1996 and 1999 she stopped drinking because, she said, she was a single parent with T and she remained off alcohol until 1999. She told Dr Allen that H1 and P were returned to her care in 1999 and their care orders were discharged, she said. In 1999 she met R and she began drinking again. She told Dr Allen that she started drinking again because T was 3 years of age and H1 and P had just returned home and maybe she could not cope. She had not perceived herself as an alcoholic before then. Her history of events given to Dr Allen does not seem to be accurate as H1 and P appear to have returned to her care gradually or completely in 1997. But, certainly, their care orders were discharged in February 1999.

There was stress in the family home as a result of the behaviour of H1 and P. H spent a period in Cuan Mhuire in April 1999 and the three children were placed with their grandmother. In September 2000 she was admitted to a medical unit and the children were again placed with the grandmother. They were returned home but again, seemingly in the same month, placed in care. They returned to their mother in November 2000 but her problems with alcohol remained and the three children were taken into interim care and made subject to full care orders in October 2001.

H1 and P as Teenagers

H1 returned home in November 2003. This seems to have been a step initiated by H1. P who had been in care since June 2003 and foster care since August 2003 returned home in February 2005. This was a step initiated by him and brought about, he said, by his worry for his mother in respect of the Trust's plans for the adoption of N. H had made it plain to social services on 16 February 2005 that she was not ready to have him back at home. However he said that he would run away if an attempt was made to return him to foster care. The Trust decided to leave him at home.

H1's relationship with her school and her attitude to schooling deteriorated. She had a disrupted school attendance, started drinking away from home, went missing for three days on one occasion and H informed a case conference that H1 was "out of control" and would welcome any help. Social Services were satisfied that any risks to H1 lay in the community, not at

home. She stopped going to school altogether. As a result of a row with her mother she did damage to the house. She tried to steal and sell the family car and she sold her laptop and spent the proceeds. Some of her behaviour was attributable to her concern at the prospect of losing N. She wrote a moving letter to the judge about it and her fear of not seeing N again. H1 is an extremely damaged young person, increasingly resistant to social work support, stated Ms R in a report dated 21 March 2005. But the Adolescence Team is working with her. She appears unaware of the stress which she has placed on her mother and the risk that her mother may resume drinking as a result.

P, who was at grammar school, became disruptive in class. This had become apparent before he returned home but when he came home he started to push his mother "to the limits". She told Social Services that some action must be taken immediately to deal with his schooling problems. The principal of his school had considered that he was clever enough to go on to third-level education. But his behaviour was such that expulsion from the school was threatened. Since he returned home H informed Ms R of a number of fights between H1 and P and said that "things were going downhill". Again P appears to have been unaware of the stress which he places on his mother, and that the misbehaviour of H1 and of himself caused her to resort to alcohol in 1993 and that their misbehaviour makes life even more stressful for his mother than when H1 alone was living with her and increases the risk of a relapse by her.

According to H her son's behaviour in school has improved "tremendously" but there is no corroboration of this statement. The Adolescence Team has taken over responsibility for him. Both H1 and P have been taken off the Child Protection Register. The court has no up-to-date information as to the effect on H of the behaviour of H1 and P since the Judge's Order of 31 May 2005.

The return of P to the family home is described by Ms R, a social worker, in a report dated 21 March 2005. He went to a local disco on 26 February 2005, got drunk and was banned by H from going to it. Despite other misgivings by Ms R about H's attitude to her, the two of them appear to have worked well together in trying to deal with P.

Ms R states that it remains to be seen if H can remain abstinent while coping with the stress of dealing with two adolescents who are acting out the traumas of their childhood experiences. This, she states, is not normal teenage behaviour and H will need to avail of all supports offered to her if she is to help H1 and P to deal with their anger and resentment at being denied a normal family life as they were growing up.

I do not attach much significance to the fact that H or P was removed from the Child Protection Register in March 2005 other than that it shows that the Trust was satisfied that H had not taken alcohol since July 2003 and that R had not shown domestic violence since that date. But I do share the concern of the guardian ad litem that the Trust seems to have had little regard for the stress placed on N by the return of P to the home when H indicated that she was not ready for it. Arguably, they should have sought to return P to his foster carers despite his threat to "run away" and, if he places undue stress on her, an attempt should be made to return him to his foster carers. At the very least he should be told that his behaviour may lead to a breakdown in his mother's health. In December 2004 Ms R considered that P was with foster carers with whom he had been as a toddler, that this was a long-term placement and very stable.

The fact that P was allowed to return home gave rise to a sense of grievance on the part of H. The sense of grievance is, of itself, not relevant but the facts which gave rise to it are relevant.

In the absence of evidence to the contrary it seems that P, who was exhibiting signs of serious misbehaviour at school when he was with his foster carers and continued to do so when he returned home, has re-established his reputation at school. No attempt has been made by the Trust to reassure us on this score. We are left with the unchallenged statement of H about this important matter.

The Childhood of T

T has been in care since June 2003 and is with long-term foster carers. She has had fewer placements than H1 and P and has not witnessed as much disruption due to alcohol abuse as have H1 and P. As such she is much less damaged than either of the two older children and has therefore attached more appropriately with her present carers who have been made long-term. This does not detract from T's love for her mother but her emotions are less confused than those of the two older children. She is happy living in her present placement and is very attached to that family. She is free to love her mother and her siblings and R without feeling that she has to choose between the two families. Ms R feels that it is vital for her well-being that this continues. The Trust's plan for her is that she will remain in long-term fostering with the C family and with continuing contact with her birth family. If H1 and P's behaviour during family contact is detrimental to T, then a more appropriate way to sustain contact must be found. This may involve contact between T, H and R on their own.

The Birth and Childhood of N

[4] H had met R in 1999. Their relationship could be violent when they were both drunk. They separated for a time but then resumed cohabitation. H had obtained a non-molestation order in January 2002. The couple later were reconciled. Their daughter N was born in April 2002. Throughout her pregnancy H had abused alcohol despite warnings from Social Services of the damage that she might do to N. As soon as she was born N was made the subject of an Interim Care Order and admitted to foster care. H completed a four week residential alcohol treatment course in a hospital where she remained until May 2002, during which time she had contact with N three times a week. In June 2002 H and R commenced a residential assessment with N in the Thorndale Centre which lasted for twelve weeks.

At its conclusion the Thorndale Centre reported:

> "Thorndale staff felt that (the mother) has progressed dramatically in her ability to reflect upon her previous inappropriate lifestyle and care of her children and she has subsequently striven to make the necessary changes in order to offer her children a safe and nurturing environment. (The mother and father) have demonstrated an awareness and acceptance that alcohol has been and will always be their weakness in their lives. Both parents are accepting that the decision to ever consume alcohol again is entirely their own and they are well aware of the consequences of this action. (The mother) has stated that she never wishes for alcohol to be a feature of her life again. However, if she does choose to take a drink then she has only herself to blame for the subsequent actions."

In August 2002 the mother and father returned to the family home with N. The Community Addiction Team remained involved with the mother and she attended AA. The father was encouraged to attend an Anger Management course. In late 2002 the situation appeared stable. In early 2003 H resumed drinking. After a serious incident on 9 June 2003 R told H that he would leave the house unless she undertook to stop drinking. She refused. He left and on 10 June 2003 N was placed with another pair of foster carers. Initially this was a voluntary arrangement. In August 2003 she was transferred to her original foster parents with whom she had been for the first two months after her birth.

But her present foster carers are unable to offer her a long-term placement and therefore another move is certain for this child.

In the meantime N had two weekly contacts with her parents and one weekly family contact supervised by the Child Health Assistant, Ms M. This was reduced to one family contact per month pending the application for a Care Order. H and R's attendance at contact was extremely consistent and they have been distressed at the length of time between contacts. There has been squabbling between H1 and P at family contacts. But at no time has H or R disturbed the relationship between the foster carers and N.

Dr Martel, Consultant Paediatrician, stated in a report dated 28 October 2004 that N's head circumference was small and she had a thin upper lip, both of which findings would be consistent with Foetal Alcohol Syndrome. However she did not have the hyperactivity and behavioural problems associated with that condition. Twelve months have passed. No up-to-date assessment was presented to this court by the Trust. I can only conclude that it is probable that she does not suffer from Foetal Alcohol Syndrome but I would have wished to be reassured on this point. However she has speech and learning difficulties.

The Progress of H and R since July 2003

[5] It is agreed that H has abstained from alcohol since the end of July 2003. Prior to that she had attended "open" meetings of AA. On 28 July 2004 she made arrangements to attend a closed meeting of AA. She stated in a Replying Statement lodged on 30 September 2004 that at closed meetings "you have to open up and confront your problem, meetings are more intense and serious. Whenever you are ready you can choose a sponsor to assist you in the 12 step recovery programme. This has helped me to understand the "origins and nature of my tendency to self harm". She says that she attends four and sometimes five meetings a week and is secretary to her group which allows her to provide support for others as well as gaining support from them. She has a one to one sponsor. She realises that she is an alcoholic and always will be.

She stated that she and R have lived together for six and a half years. This is not accurate but they have certainly associated for that period. In the early years there were periods of separation and reconciliation. They have co-habited since June 2002. She stated that for the past year to 18 months it has been a home. Until then they did no work to the house to make it a home. Some of the work done to the house is set out at para. 11 of her Replying Statement. The house is in her name but it is proposed to put it in joint names. There has been no domestic violence since she stopped drinking. She claimed that one of the most stressful times of their lives was the time of the

Family Care Centre proceedings regarding N and facing the prospect of adoption. Presumably the freeing order proceedings have also been stressful.

Dr Bready, her general practitioner, has been very supportive of her, as evidenced by his letter of 17 January 2005. Powerful support has been furnished by members of AA, writing of her in the most generous and sympathetic way. Jacinta Murphy, a member of the Community Addiction Team indicates her support. H is not an entirely reliable source of information but she has made an effort of which she can be proud to change her way of life for the better.

R's children by his first wife write strongly in favour of their father and have established contact with H's children. So have his two sisters who have offered to take P for week-ends when he has been troublesome. He has played a supportive role in helping H for which he deserves credit.

Application for a Care Order

[6] An application was made by the Trust to the Family Care Centre for a Care Order for N under Article 50 of the Children (NI) Order 1995 ("the 1995 Order"). From August 2003 the Trust had taken the view that adoption was in the best interests of N. They prepared a Care Plan which involved indirect contact with H and R after adoption. This was not in accordance with the later advice which they received from Professor Tresiliotis that it was in N's interests to have direct contact with H and R. They should have been aware of the efforts made by H and R to rehabilitate themselves. At the very least they should have adjusted the Care Plan to take account of Professor Tresiliotis' views. Their application for a Care Order should have been dealt with more speedily. They should have started the process of searching for suitable adoptive parents prepared to allow supportive contact by H and R. When Judge Rodgers approved the Care Plan he indicated that his approval was based in part on Professor Tresiliotis' evidence that it was in N's interests to have direct contact with H and R. The Care Plan had not been adjusted before then. It should have been adjusted when Judge Rodgers made his order in July 2004. The Trust should have sought suitable adoptive parents thereafter, if they had not done so before then. They knew that they were understaffed and would have to turn to a voluntary adoption society, such as the Family Care Society. But they have only done so recently. They knew that H and R were completely opposed to adoption but they should have been aware that there could be no post-adoption contact if H and R maintained their opposition and sought to undermine the adoption.

[7] Judge Rodgers considered the threshold criteria for making an order under Article 50(2) of the 1995 Order. N had been taken into care on 10 June 2003. He was considering the situation in July 2004 and rightly applied the principle for determining the relevant date at which the court had to be

satisfied whether a child is suffering significant harm or likely to suffer significant harm, as laid down in Re M (a minor) (Care Order: Threshold Conditions) [1994] 2 AC 424. As a result the relevant date was 10 June 2003.

The Trust relied on four threshold criteria. Judge Rodgers attached no weight to two of them. The other two were:

1. Alcohol abuse by the mother during her pregnancy with N and whilst the child was living with H and R. Judge Rodgers recounted the incidents which occurred on 9 and 10 June 2003. On 10 June 2003 a social worker called at a house where there were several males and one female together with H, T and N. H's mother described the house as a "drinking den". N's legs were found to be covered in dirt and she had eczema on her legs and bottom and a severe case of head lice infestation. Judge Rodgers was satisfied that, apart from immediate harm, she was likely to suffer significant harm. Article 50(2) of the 1995 order provides:

> "A court may only make a care or a supervision order if it is satisfied –
>
> (a) that the child concerned is suffering, or is likely to suffer, significant harm; and
>
> (b) that the harm, or likelihood of harm, is attributable to –
>
> (c) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give him."

In Re H and R (Child Sex Abuse: Standard of Proof) [1996] AC 563 AT 585F Lord Nicholls of Birkenhead said of the expression "likely to suffer harm" at p95:

> "In my view, therefore, the context shows that in section 31(2) [the equivalent provision in England and Wales] `likely' is being used in the sense of a real possibility, a possibility that cannot sensibly be ignored, having regard to the nature and gravity of the feared harm in the particular case. By parity of reasoning, the expression 'likely to suffer significant harm' bears the same meaning elsewhere in the Act …"

I consider that the word `likely' in Article 50(2) should be so construed.

Judge Rodgers had before him Professor Tresiliotis' first report, in which the professor considered the position in the future if the mother resumed drinking and said that in such circumstances N's future would be "very seriously marred" and a second report in which he said that it would be "catastrophic".

2. Domestic violence by the father

The father admitted to Judge Rodgers only one episode of domestic violence in January 2002 when H was pregnant. Judge Rodgers found that there was another incident on 1 May 2003 in which the father initially attacked the mother and when H1 intervened he attacked her. The confrontation ended when H1 struck the father with a glass. The father denied this. H retracted her allegations. H and H1 had reported the incident to the police. This weighed heavily with Judge Rodgers who was satisfied that the presence of domestic violence on the part of the father would make it likely that N would suffer significant harm. (It should be noted that H told Dr Allen that she had made a false allegation of sexual abuse by her father on a sister and that H1 subsequently made allegations of ill-treatment by R which she withdrew and which were likely to have been untrue. I do not attach as much significance to the history of domestic violence as Judge Rodgers or the judge did, although I agree with the Judge that no form of physical domestic violence is excusable in any circumstances and that it serves no purpose to re-open findings of fact by Judge Rodgers).

On the issue of domestic violence Judge Rodgers recorded the answers given by R about the anger management course which he underwent. He said that he took part in the course for the Social Services rather than his own good; that he considered it "a bit of a laugh"; and that he did it "to get out of the house". These answers, said Judge Rodgers, showed a lack of commitment to controlling anger. He was satisfied that Article 50(2)(a), (b) and (c) had been established by the Trust: he rejected an application for a Residence Order by H's mother. It is pointless to debate this decision.

He stated that N was still young enough to make a further move. Due to accommodation difficulties she would have to move in any event from her present foster parents. He decided that the appropriate order would be a care order, subject to consideration of the care plan and arrangements for contact. He believed that N required permanence outside her birth family and approved the course envisaged in the care plan. Contact would be gradually reduced. He noted that Professor Tresiliotis suggested three to four annual face to face contact meetings in the event of adoption. Accordingly he approved the Trust's care plan, but it is not clear whether he ordered that it should be amended in relation to contact. As to Article 8 of the Convention he considered that the making of a care order was a proportionate response in

view of all the matters he had set out in his judgment. I am concerned that the Trust appears to have taken little, if any, notice of his approval of contact with the birth parents.

The appellants sought to appeal from his judgment and served a Notice of Appeal. But legal aid was refused. The first ground of appeal was that the judge erred in law and in fact in failing to properly investigate the issue of when and why the mother began drinking. No counsel asked any questions of Dr Bownes in order to explore this issue nor was H asked any questions as to when and why she began drinking. If this had been explored at the hearing, presumably Dr Bownes would have made the recommendations which were agreed by him and by Dr Allen as appropriate for the treatment of H. But this ground of appeal would have been difficult to sustain in fact of the failure on behalf of H to explore this issue at the Family Centre hearing. Nonetheless I do not consider that the Trust gave sufficient consideration to contact by the birth parents on adoption. They attached too much weight to the hostility shown by H and R to adoption.

The second ground of appeal was that the judge should not have taken into account that H was drinking during her pregnancy. But I consider that Mr James Munby QC (as he then was) sitting as a deputy High Court judge was correct when he said in Re P (Care Proceedings: Designated Authority) [1998] 1FLR 80 at p. 1101 in a different context:-

The "circumstances … in consequence of which a care order is made will include any circumstances, whenever and wherever they arose whether before or after the child was born." Judge Rodgers was right to apply the reasoning in Re P.

The third ground of appeal was that the judge was wrong in taking the child's condition at the time she was taken into care as evidence of the child suffering significant harm. But in my view the judge was right to follow the decision of the House of Lords in Re M (a minor). I can discern no arguable ground of appeal in the remainder of the Notice of Appeal.

Application for a Freeing Order

[8] The application by the Trust for the Freeing Order commenced in January 2005. When they applied for the Freeing Order they must have been aware that the judge would not impose conditions, if he made a Freeing Order. Yet they did not seek suitable adoptive parents. Nor did the judge direct them to do so. After a hearing which involved a number of adjournments and a re-convening of the court to hear further evidence in April 2005 judgment was delivered on 31 May 2005 and the order of the court was drawn up on that date. The judgment was thorough, included a forcefully written resumé of the facts, set out the legal principles and reached

the clear conclusion that a freeing order should be made and that the parents were unreasonably withholding their consent. The judge accepted that the benefits of adoption would outweigh the benefits of post adoption contact. The effect of this ruling was that if adoptive parents were unwilling to consent to post adoption contact, H and R would lose contact with N.

Arguments on Appeal on behalf of H

A. Is it in the interests of N to be adopted?

[9] At paragraph 31 of the skeleton argument on behalf of H it was submitted that the judge erred in concluding that the medical evidence supported his conclusion that there was no realistic possibility of the [appellant], H, continuing to remain abstinent during the child's childhood.

Mr O'Hara QC in oral argument on behalf of H referred to the judge's summary of Dr Allen's evidence. He criticised the statement at p15 of the judgment:

> "Dr Allen accepted the basic thrust of Dr Bownes when he said in his report of 22 April 2004:
>
> > `Clearly the likelihood of H not experiencing a de-stabilisation of her support networks or the onset of insurmountable pressures from the present day to the time N achieves independence is extremely unlikely. If one examines closely the periods in the past that H relapsed to a state of alcohol dependence it is probable that there was a critical shift in the dynamics of her life … and hence the periods of abstinence were not dependent solely upon her level of determination or commitment to avoid alcohol but rather her ability to cope with aversive external and internal negative influences'."

Dr Allen indicated that this assessment `hit the nail on the head' in identifying the problem, said the judge. Mr O'Hare argued that this summary of Dr Allen's evidence was wrong. He referred to the transcript of Dr Allen's evidence.

Mr O'Hara pointed out that the first part of the passage in Dr Bownes' report was put to Dr Allen in cross-examination by counsel for the Trust. Then counsel for the Trust said:

> "It seems to me that Dr Bownes takes that from looking at past history. Would you agree that that is a potent and important indicator. You have to look at past …"
>
> Dr Allen: "Absolutely, I do agree, In fact I say in my report that he does hit the nail on the head in identifying it. The only thing that I would say is different – taking into account timescales of course – is that there is some potential for change."
>
> Counsel: "That line that I have read to you says that in Dr Bownes' opinion he uses the phrase `extremely unlikely' in terms of a breakdown. Just maybe if you would read through it again and comment on it if you have a contrary view."
>
> Dr Allen: "I agree fully with that because all that I am saying is that her coping mechanisms – destabilisation comes when things are going around in a lull. If her coping mechanisms were 100% then it would not matter how much went wrong. All I am saying is that what would be altered is not what is going on around her but her ability to cope to a limited extent."

Mr O'Hara referred to Dr Allen's report which he relied on in his first answer to counsel for the Trust. He had concluded that "H has suffered from Borderline Personality Disorder. This diagnosis is the equivalent of the … Disorder … mentioned in Dr Bownes' report" … (See p. 82 of Bundle C).

Dr Allen proceeded to state in his report:-

> "It seems to me reading all the paperwork in this case that problems have arisen because alcohol has been looked at as a factor in isolation … Ian Hands' (sic) (presumably Hanley) report is optimistic with regard to her alcohol use and, I think in broad terms, rightly so since she does appear to me to have made a major change in her approach. However I believe that one needs to look at Dr Bownes' report to understand the key issue … Most significantly in my judgment, the

> work which needs to be done is on her underlying persona; even if there are not active symptoms of Borderline Personality Disorder this does not mean that the underlying problem is not there. Essentially, what she lacks are good foundations to parenting; she can learn techniques, she can reduce dysfunctional responses by not drinking alcohol but what she has not addressed is what she did not have as a teenager growing up and that is positive parenting, leading to self-confidence, independence and a sense of self-worth."

When Dr Allen said that Dr Bownes had hit the nail on the head, Mr O'Hara argued, he was saying that Dr Bownes had made the right diagnosis (which was equivalent to Borderline Personality Disorder). He was not agreeing that it was extremely unlikely that H would abstain from alcohol.

Counsel for the Trust also put the second part of the passage from Dr Bownes' report referred to in the judgment with which Dr Allen agreed. He accepted that he was saying that there was some potential to move H on to look at her difficulties. She had not reached the stage where she could say that she was off drink but she knew why. She had not reached that stage because she had not started any proper counselling. In a way she could not be blamed for not having reached the insight as she had not had the counselling.

Dr Allen said:

> "If, for argument's sake … someone came back and saw me in six months, having had that sort of work and they could not give … a very clear account of what they saw as the triggers for drinking … I would say that that person would not have a very good prognosis for the future."

He put the timescale for counselling at six months to a year. Then one could look at formal psychotherapy work. Assuming that they had done six months' preliminary work one was probably looking at about another 18 months.

In answer to counsel for the Guardian ad litem he said that she was ready for counselling now but not necessarily at some earlier time. In answer to the judge he said that if no work was done in six months one had the same stresses and strains. After six months of counselling one could make a pretty good judgment about how much progress had been made. If things went

well in six months, he thought that was an indicator that the more in-depth psychotherapeutic work would be successful.

Mr O'Hara contended that Dr Allen had not said that a relapse was extremely likely. Moreover Dr Bownes had agreed with Dr Allen's report so that the judge was doubly mistaken. Dr Bownes' evidence was that he would essentially agree with Dr Allen's view of the timescale. If it was demonstrated in six months that a person was basically very intensely motivated to change then any competent psychotherapist would be willing to take the work forward. The timescale that Dr Allen had put forward was based on the best scenario. Psychotherapy could go on for two-three-four years depending on the issues. He said that from his point of view the alcohol abuse by H was really a form of self-medication to deal with the intrinsic deficits and deficiencies that both he and Dr Allen had identified. He agreed that he was not really disagreeing with Dr Allen's report at all. There was difficulty in Northern Ireland in accessing treatment, as compared with England, but this was a matter of logistics. When he wrote his report for the Trust it was not one of his tasks to make recommendations [about counselling or therapeutic interventions.]

Mr O'Hara argued that at no time did Dr Bownes assert in his evidence that there was no realistic possibility of H continuing to remain abstinent during N's childhood. He also reminded this court that in AR v Homefirst Trust this court had been critical of reliance by the Trust on medical experts who had not been dealing with the mother on a regular basis. In the present case the judge had had the assistance of H's general practitioner, of Jacinta Murphy from the Community Addictions team and testimonials from members of AA who had worked with H. There was also a report from Dr D Gbolo-Teye. These had not been given adequate weight.

It was not surprising, said Mr O'Hara, that a care order was made in July 2004 but the situation had changed when the Freeing Application was made. H had made significant improvement, shown growing maturity, was reconciled with her own parents. There was a strong balance of medical evidence in favour of the mother. N's most significant attachment was to her mother. The judge was plainly wrong in his assessment of the medical evidence, he said. There were also very helpful written submissions on behalf of R.

[10] I listened with care to counsel for the Trust. Mr O'Donoghue QC reiterated what had already been conceded by Mr O'Hara. He referred this court to G v G [1985] 2 All ER 225 in which the House of Lords held that the principles applicable to the Court of Appeal's jurisdiction when reviewing a judge's exercise of discretion in cases involving the welfare of children were the same as those which applied to the Court of Appeal's general appellate jurisdiction. Having regard to the fact that in such cases there were often no

right answers and the judge at first instance was faced with choosing the best of two or more imperfect solutions, the Court of Appeal should only intervene when it considered that the judge at first instance had exceeded the generous ambit within which judicial disagreement was reasonably possible, and was in fact plainly wrong, and not merely because the Court of Appeal preferred a solution which the judge had not chosen.

In Re W [1971] AC 682 Lord Fraser of Tullybellon had cited with approval the passage in the judgment of Sir John Arnold P in the Court of Appeal where he said:

> "I believe that if the court comes to the conclusion, when examining the decision at first instance, that there is so blatant an error in the conclusion that it could only have been reached if the judge below had erred in his method of decision – sometimes called the balancing exercise – then the court is at liberty to interfere; but that, if the observation of the appellate court extends no further than the decision in terms of the result of the balancing exercise was one with which they might, or do, disagree as a matter of result, then that by itself is not enough, and that falls short of the conclusion, which is essential, that the judge has erred in his method."

He also cited with approval the statement of Cumming-Bruce LJ in Clarke-Hunt v Newcombe (1982) 4 FLR 482 at 488 when he said:-

> "There was not really a right solution; there were two alternative wrong solutions. The problem of the judge was to appreciate the factors pointing in each direction and to decide which of the two bad solutions was the least dangerous, having regard to the long-term interests of the children, and so he decided the matter … I am sitting in the Court of Appeal deciding a quite different question: has it been shown that the judge to whom Parliament has confided the exercise of discretion, plainly got the wrong answer? I emphasise the word `plainly'."

He referred to the statement of Asquith LJ (as he then was) in Re F (a minor) [1976] 1 All ER 417 AT 439-440 which I need not set out here. Gillen J applied these principles in McG and McC (2002) NI Fam 10 (23 April 2002).

We were further referred by counsel for the Trust to Re M [1995] 1 FLR 546 in which Butler-Sloss LJ (as she then was) said:

> "If a decision does not exceed the generous ambit within which reasonable disagreement is possible, it would be inappropriate for an appellate court to interfere, not having had the advantages of the Family Proceedings Court who saw and heard the witness."

However she added:

> "One must not overlook, however, that the appellate court has to be satisfied that the trial judge took into account all the relevant matters and did not take into account irrelevant matters in the balancing exercise which it carried out …"

We were also referred [by counsel for the Trust] to the danger of second-guessing.

[11] But no attempt was made on behalf of the Trust to justify the judge's findings, to which Mr O'Hara took exception, by reference to the transcript of the evidence of Dr Bownes and Dr Allen or their reports. The answers given by Dr Allen are confusing, given the way in which questions were put by counsel for the Trust and the somewhat obscure passage in Dr Bownes' report of April 2004.

B The judge substituted his own views of what a reasonable parent should do, faced with the issue of consent to adoption

[12] Mr O'Hara argued that the judge rightly set out the test to be applied at paragraph [19] of his judgment when he cited the familiar passages from In Re W in the course of which Lord Hailsham said:

> "The test is reasonableness and nothing else. It is not culpability, it is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the context of the totality of the circumstances. But although welfare per se is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if, and to the extent that a reasonable parent would take it into account. It is decisive in those case where a reasonable parent must so regard it."

Lord Hailsham went on to say:

> "… 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. The question in any given case is whether a parental veto come within the band of possible reasonable decisions and not whether it is right or mistaken. Not every reasonable judgment is right, and not every mistaken exercise of judgment is unreasonable. There is a band of decisions within which no court should seek to replace the individual's judgment with its own."

In Re D (an infant) [1977] AC 602 at p625 Lord Wilberforce said

> "What, in my understanding, is required is for the court to ask whether the decision, actually made by the [parent] in … individual circumstances, is, by an objective standard, reasonable or unreasonable. This involves considering how a [parent] in the circumstances of the actual [parent], but (hypothetically) endowed with a mind and temperament capable of making reasonable decisions, would approach a complex question involving a judgment as to the present and as to the future and the probable impact of these on the child."

These are principles which the judge rightly took into account. One does not have to write a treatise on child care in a judgment. The judge dealt fully with these legal principles. It goes without saying that it does not follow from the fact that the test is reasonableness, that a court is entitled to substitute its own view for that of the parent. "It should be extremely careful to guard against this error." See Re W per Lord Hailsham. The judge expressly agreed.

The judge understandably cited a passage from the judgment of Sheil LJ in Homefirst Community Health and Social Services Trust v SN [2005] NICA 14 at para [26] in which he referred with approval to a passage from the joint judgment of Steyn and Hoffman LJJ in the case of C (a minor) (Adoption: Parental Agreement (Contact) [1993] 2 FLR 260 at 272. I will set it out in slightly greater detail when I deal with the issue of contact later in this judgment.

The judge stated at paragraph [21] of his judgment that he had been wary not to substitute his own view for that of the reasonable parent.

However Mr O'Hara QC argued that the judge, when giving his reasons for concluding that the parents were unreasonably withholding their consent, approached their refusal from a subjective view-point. He contended that the judge disclosed his subjective point of view in a number of passages at pp 43-47 of his judgment. Mr Long QC on behalf of the guardian ad litem countered this by arguing that Gillen J was merely following what Sheil LJ had said the judge should do in the case of SN.

Should a Freeing Order be made?

[13] There are a number of issues:-

(1) First of all, is adoption in the best interests of N when there is no guarantee of direct contact with her birth parents? Or would it be better for her to have long-term foster care with the possibility of adoption and the guarantee of direct contact with H and R.

(2) May H and R as reasonable parents be entitled to say:

> "We refuse to give our consent to adoption because N will be able to return to live with us in the near future and in any event the Trust did not satisfy the judge that prospective adopting parents would permit direct contact with us."

(3) Have H and R's rights and the rights of N's siblings been infringed under Article 8?

[14] **The Statutory Provisions**

A **The Adoption (Northern Ireland) Order 1987** ("the 1987 Order")

> "**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.

…

The making of adoption orders

12(1) An adoption order is an order giving parental responsibility for a child to the adopters, and such an order may be made by an authorised court on the application of the adopters.

(2) The order does not affect parental responsibility so far as it relates to any period before the making of the order.

(3) The making of an adoption order operates to extinguish –

(a) the parental responsibility which any person has for the child immediately before the making of the order;

(b) any order of a court under the Children (Northern Ireland) Order 1995;

…

(4) …

(5) …

(6) An adoption order may contain such terms and conditions as the court thinks fit.

(7) …

Parental Agreement

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

(a) the child is free for adoption …

(b) the case of each parent … of the child the court is satisfied that –

(i) …

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

(2) The grounds mentioned in paragraph (1)(b)(ii) are that the parent or guardian –

(a) …

(b) is withholding his agreement unreasonably;

(c) …

(d) …

(e) …

(f) …

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) …

Revocation of order freeing child for adoption

20.-(1) The former parent, at any time more than 12 months after the making of the order freeing the child for adoption when –

(a) no adoption order has been made in respect of the child, and

(b) the child does not have his home with a person with whom he has been placed for adoption,

may apply to the court which made the order for a further order revoking it on the ground that he wishes to resume [parental responsibility for the child.]

B **The Children (Northern Ireland) Order 1995 ("the 1995 Order")** provides:-

3.-(1) Where a court determines any question with respect to –

(a) the upbringing of a child; or

(b) the administration of a child's property or the application of any income arising from it,

the child's welfare shall be the court's paramount consideration.

(2) In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child."

B. I have set out an account of the birth and childhood of N at paragraph [4]. I need not repeat it here.

C. I have read the reports of Professor Tresiliotis of 21 March and 15 April 2004. In evidence before the judge he was taken to his second report by counsel for the Trust and reminded that he had said that a relapse by H would be catastrophic for N. He replied: "I used it and I would use it again." He went on:

> "N is a very troubled child. She has some significant attachments to her parents and some attachments to her foster carers. But it does not stop her being a child without core attachments. She is in effect a very needy child who has to receive fairly soon optimum kind of parenting to develop the kind of attachment that she now misses. I would say that perhaps 6 months might not be too important. But anything beyond that is taking her almost to a Rubicon point – where the possibility of making up on what she has missed so far will recede exceedingly … Dr Allen is suggesting further work – it is that further work that is bothering me … This kind of work should have been started a long time ago … Under the circumstances adoption would be the preferred plan …"

[15] It was put to him by counsel for the Trust that he had said that she should have 3-4 annual face to face contact meetings with her parents.

The Professor replied: "I have said so after considerable thought." He then described a contact meeting between N and her parents and criticised severely the Trust for placing N with a foster family where there was a foster child of the same age as N. N lacked a proper core of self in attachments. He had read 2000 pages of material from the Trust and there was nowhere a suggestion that the foster placement was not meeting N's needs. This was really worrying. It was no reflection on the carers. He said that he disagreed with the Trust's plans for no contact after adoption. It is clear that the Trust had disregarded what he had said in his report and what Judge Rodgers had said about contact when approving the care plan.

The placement and the child settling in her placement was "paramount", he said, but it was in the child's interest to have direct contact that was also "paramount". It was crucial that the natural parents supported an adoption placement. There could be no form of direct contact if they did not fully support the adoption plan. If there was to be contact they had to accept the adoption and let the little girl settle down and grow up more

securely without undermining the placement. Just because they opposed the freeing was not necessarily a sign that they would continue to do so. They were not undermining the foster placement. He stated:-

> "In my view it is in the interests of this little girl to have some form of direct contact with her parents but the parents must accept totally the adoption plan …" He went on to say: "… an adoptive family has to be sought who can accommodate this periodic contact, say three times per year. Not selected first and then put the contact issue after that … contact can be as paramount as finding a family … feelings of rejection and loss haunt about 50% of adopted people … . If [N] were to be cut off without post-adoptive contact this could generate and increase feelings of rejection and loss … I view it as being in the interests of the little girl … it could help N to attach to her new parents … If I were pushed too far I would say that if no family could be found to accommodate this need then the Trust may have to look for a long-term foster family which could develop subsequently into an adoptive one. … long term foster care would be preferable if no adoptive family could accommodate direct contact where it is necessary in the interests of the child … A prospective adoptive parent needs explanation … agreement is much preferable to contact orders … I think I did say before that prospective adoptive parents should be selected with that possibility in mind … In this very technological age increasingly it will be very difficult to have closed adoption … So I think I come back to what kind of people the court decides the parents are. Use the opportunity before the adoption order of how they conduct themselves during contact and even after the adoption order and on the first sign of any undermining then contact should stop. Contact is not about shared parenting. It's simply to preserve a continuity and to pre-empt feelings … I would prefer [the adoptive parents] to be a childless couple. If there is a child of maybe 8 or 9 it has to be assessed … how threatened or otherwise he [she] might be … In most children the age of memory starting to register is about 2½ and then it strengthens much faster after that. So I

> would expect that even with … her development being slower … it should be strengthened … much will depend on the kind of support that the adopters get … it is one of the characteristics of adoption that adopted parents persevere considerably … I was not recommending that contact stops after freeing. But I am suggesting that it continues … Time is not on [N's] side … my studies have shown that [adoption] does provide much more emotional security than any other kind of arrangement … I repeat that it is in her interests that she does have periodic contact …
>
> In answer to counsel for R he said:-
>
> If the Trust can't find prospective adopters who will facilitate direct contact then [they] must fall back on long term fostering … it is easier to find adoptive parents if a child is freed …"

Professor Tresiliotis gave this evidence on 25 January 2005. He returned to the witness box on 15 February and was cross-examined on behalf of the guardian ad litem. It was, he said, still his view that there should be direct post-adoption contact … adoptive parents need explanation about what contact is about and why … the British agencies for adoption say that this need [for contact] has to be clarified from the start, the assessment stage … I would want to know if [N] was advertised as a three year old where there is a need for … periodic contact and see what the … responses are.

The judge put a question based on "the family background, the drinking and all that". Professor Tresiliotis answered:

> "I think in the end having known the case I would go for adoption [without contact] but with some regret that adoptive parents would be so exclusive."

Professor Tresiliotis explained his change of stance on the basis that the Trust had promised that there would be proper advertisements, that the court would be satisfied that everything had been done and would be shown to be done in order to find adoptive parents who would give contact to the birth parents of N for her sake. He agreed with counsel for R that his judgments were fine and balanced judgments. He would like to think that the parents would have the opportunity to meet the prospective adopters before the process of adoption.

[16] Mrs McC gave evidence to the judge that in her opinion the Trust would be able to achieve a placement for N because she is young, she has

been able to make attachments with her foster carers and children who have made attachments can make attachments again. Although the Trust had been unable to find appropriate adoptive parents because they were understaffed there were other adoptive agencies which could be used. If the Trust had not been understaffed, they would have secured a placement. By turning to outside agencies they would find adoptive parents, she was confident. But she could not guarantee that they would permit direct contact with the birth parents. I accept that adoptive parents are likely to be found.

[17] The principles which guide the courts in determining whether a child such as N should be adopted or placed in long-term foster care are well known. In this jurisdiction MacDermott LJ said in Re MC (Unreported: 31 October 1997):-

> "For my part, and in the absence of evidence to the contrary I remain satisfied that the clear opinion stated by Ormrod LJ in Re H (1981) 3 Fam LR 386 represents as good sense today as it did 16 years ago. He said:
>
> > `To that the answer is always the same – and it is always a good one – adoption give us total security and makes the child part of our family, and places us in parental control of the child; long term fostering leaves us exposed to changes of view of the local authority, it leaves us exposed to applications, and so on, by the natural parent. That is perfectly sensible and reasonable approach; it is far from being only an emotive one.'
>
> The late Mr Justice Higgins expressed a similar view in Re Warnock saying:
>
> > `For the child there is also security and stability and the sense of being cherished as a full member of the adopters' family. An adoption order also brings to an end the regular visitation and supervision by a social worker, which in my experience is disliked and resented by many foster children.'

> As I said in my judgment in J's case I share that view and would adopt it. I remain of that opinion."

In AR v Homefirst Community Trust [2005] NICA 8 Kerr LCJ stated in the course of the judgment of the court at paragraph [91]:

> "It is unsurprising that research into the subject discloses that it is desirable that permanent arrangements be made for a child as soon as possible. Uncertainty as to his future, even for a very young child, can be deeply unsettling. Changes to daily routine will have an impact and a child needs to feel secure as to who his carers are. It is not difficult to imagine how disturbing it must be for a child to be taken from a caring environment and placed with someone who is unfamiliar to him. It is therefore entirely proper that this factor should have weighted heavily with the Trust and with the judge in deciding what was best for J. But, as we have said, this factor must not be isolated from other matters that should be taken into account in this difficult decision. It is important also to recognise that the long term welfare of a child can be affected by the knowledge that he has been taken from his natural parents, particular if he discovers that this was against their will."

In Z and T, Re Freeing Application [2005] NI Fam 6 (23 June 2005) Gillen J accepted that it has been identified that adoption:

(a) provides a permanent and secure care arrangement outside public care;

(b) facilitates life long commitment to the child as few adoptions break down;

(c) is the most "normal" circumstances outside the family of origin and reduces the child's sense of difference;

(d) affords significantly lower rates of maladjustment than those in long term foster care;

(e) provides, in adulthood, a stronger sense of self-worth and adopted children function more adequately at the personal, social and economic level than those fostered;

But he also accepted that there are clear disadvantages to adoption:

(i) the disadvantage to the birth family and their loss of relationship with the child;

(ii) the child's loss of contact with its parents can lead to a deficit through the potential loss of identity;

(iii) the adoptive family does need to be thoroughly prepared to best meet the needs of the child.

It is unnecessary to set out the numerous examples of similar statements of principle to be found in cases in England and Wales.

[18] Applying those principles I have reached by a different route the same conclusion as the judge that it is in the interests of N that she should be freed for adoption, subject to the issue of consent under Article 16(2) of the 1987 Order and the rights of H, R and N's siblings under Article 8 of the Convention. Professor Tresiliotis has said so and I share his opinion. Time is not on the side of N and on the best scenario of H's progress, N would be 5½ years old before it would be safe to return her to her parents. By that time N would almost certainly be too old to be adopted successfully and although I consider that the probability is that H will not relapse, I am not prepared to take the risk that she will do so under the stresses and strains of coping with H1 and P as she did in 1996. I recognise that she is almost 10 years older and much more mature but the risk of serious harm to N is there and the damage caused to H1 and P is evident. The damage to N if she was returned would be, to quote Professor Tresiliotis: "catastrophic".

But as I have indicated I do not take the pessimistic view of the judge about H and R. The birth parents are capable of supporting the bonding of adoptive parents with N. If this proves wrong, H and R would have only themselves to blame. If a Freeing Order is made, they will need counselling not merely from someone who helps H to understand why she resorted to drink but from Mrs McC. Moreover, if there is a relapse, this should not operate as a bar to contact with N, provided that it is supportive. I realise that H and R have been antagonistic to adoption. That is not surprising, especially having regard to their own achievements since 2003. But the Trust must realise that if a Freeing Order is made, their hostility may change, not least as they will otherwise lose all contact with N.

Furthermore, if a Freeing Order is made the Trust must be shown to the judge dealing with the adoption as having made every effort to find prospective adoptive parents who will be prepared to permit supportive contact by the birth parents in the interests of N, as Professor Tresiliotis has urged.

In order to ensure that the Trust fulfils its obligations it has been agreed with Gillen J, who is the Family Judge, that if a Freeing Order is made, Campbell LJ should be the judge who deals with the adoption. Hopefully, it will put pressure on the Trust to meet their obligations. The judge himself indicated his concern that direct contact should be available to H and R if they prove supportive to adopting parents.

As Sheil LJ differs from the majority of the court on the issue of refusal of consent, with which I am about to deal, it would be unfair to ask him to be the judge who deals with the adoption. As a former Family judge he would otherwise be the choice of the majority of the court.

Refusal to give consent to adoption

[19] I now turn to the issue of the reasonableness of the birth parents' refusal to give consent to the adoption. I reject the argument of Mr O'Hara QC that the judge substituted his own views of what a reasonable parent should do, faced with the issue of consent to adoption. The judge stated the legal principles which he considered to be applicable and I do not consider that the criticisms made by Mr O'Hara were justified. However, I am concerned about his decision that the issue of direct contact should be left to the judge who deals with the adoption. Having studied the debate between him and counsel and Mrs McC I realise that this issue caused him great concern. But, in this case, I consider that the Trust should have been required to provide evidence as to the availability of prospective adopting parents who would permit direct contact with supportive birth parents.

I would have adjourned the hearing of the appeal in order to give the Trust the opportunity to call evidence on this issue if this had been feasible.

[20] The leading authority on the issue of refusal of consent by the parents is Re W. In that case Lord Hailsham carefully drew the distinction between a custody case and an adoption case and he said at p693G:-

> "… in adoption cases what is in issue is the parent-child relationship itself and in that relationship the parents as well as the child have legitimate rights … The result is that in the Adoption Act 1958 Parliament has enacted provisions for the protection of natural parents the normal effect of which is to enable the parent to veto an Adoption Order unless one of the exceptions which it provides enables the court to dispense with parental consent."

Later he said:-

> "The test is whether at the time of the hearing the consent is being withheld unreasonably. As Lord Denning MR said in Re L:
>
> > `In considering the matter I quite agree that: (1) the question whether she is unreasonably withholding her consent is to be judge at the date of the hearing; and (2) the welfare of the child is not the sole consideration; and (3) the one question is whether she is unreasonably withholding her consent. But I must say that in considering whether she is reasonable or unreasonable we must take into account the welfare of the child. A reasonable mother surely gives great weight to what is better for the child. Her anguish of mind is quite understandable; but still it may be unreasonable for her to withhold consent. We must look and see whether it is reasonable or unreasonable according to what a reasonable woman in her place would do in all the circumstances of the case.'"

He went on to say that this passage from the judgment of Lord Denning MR may now be considered authoritative. I have already referred to other passages in Lord Hailsham's speech and to what Lord Wilberforce said in Re D (an Infant) [1977] AC at paragraph [12] of this judgment and need not repeat them.

Purchas LJ in Re H; Re W (Adoption: Parental Agreement) [1983] 4 FLR 614 said at p624:-

> "… this Court has moved towards a greater emphasis upon the welfare of the child as one of the factors to be considered when dealing with (Section 16 of the 1976 Act) but it is clear that short of amending legislation or further consideration in the House of Lords, there must be a limit to this shift."

In Re C (a Minor) (Adoption: Parental Agreement, Contact) [1993] 2 FLR 260 at 272 Steyne and Hoffman LJJ in a joint judgment said:-

"'The law conjures the imaginary' (reasonable) 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 that one hand and the legitimate views and interests of the natural parent on the other… 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" (referring to the characteristics of the notional reasonable parent expounded by Lord Wilberforce in *Re D* supra at p.625G – "how a father in the circumstances of the actual father but endowed with a mind and temperament capable of making reasonable decisions would approach a complex question involving a judgment as to the past and the future and the possible impact of these upon the child" -), "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 … How this conflict of views and interests should be resolved may in some cases strike different minds in different ways. Judges who are all conscientiously trying to make decisions which reflect generally accepted values may in fact be employing somewhat different scales. It is natural, for example, that one judge may give less weight than another to parental interests when they stand in the way of his firmly held views about what the interests of the child require. His 'reasonable mother' will be more altruistic, more impressed by expert opinion than her sister in the court of a different judge. Since judges are human, such diversity is inevitable and, within fairly broad limits, acceptable."

In the present case the Trust decided to present the application for a freeing order to the judge without prospective adopters, notwithstanding that they had decided that adoption was the only way forward for N from August 1993.

In Re C (Minors) Adoption (1992) 1 FLR 115 Balcombe LJ said:-

> "At first sight, it would seem that the procedure of freeing for adoption is intended for the case where the child has not been placed for adoption; if he has been so placed, the prospective adopters can apply directly for an adoption order. However, we were told that even when a child has been placed for adoption, the local authority (being the relevant adoption agency) may prefer to use the procedure of a freeing application to protect the prospective adopters from stress; it also avoids the necessity for the prospective adopters to present the statement of facts in support of the application and thereby become aware of all the details relating to the natural parents. There may, for all we know, be other advantages."

Later in his judgment he said:-

> "If the judge had decided that the children's interests required continued access by their father, then he would have been faced with the alternatives of a long term foster placement or an open adoption, as recommended initially by the guardian ad litem. But on an order freeing for adoption, there is no power to attach a condition for access, as there is on an adoption order under s. 12(6) of the 1976 Act – see *Re C (A Minor) (Adoption Order: Conditions)* [1989] AC 1, [1988] 2 FLR 159. If Mr and Mrs X had been made parties, and the judge had decided that open adoption was appropriate, it might have been possible to convert the proceedings into an application by Mr and Mrs X for an adoption order, with the appropriate access condition attached. Even if this was not technically possible – and we did not investigate the technicalities – it would have been possible to secure from Mr and Mrs X, as the basis for making an order freeing the children for adoption, an undertaking that they would, on the

> subsequent adoption application, consent to the attachment of a condition for access by the father."

Later again he said:-

> "In the absence of Mr and Mrs X, whose attitude was crucial to this central issue of access by the father, the judge was deprived of material vital to his decision, and it is this which entitles this court, on the principles of *G v G (Minors: Custody Appeal)* [1985] FLT 894, to interfere with the exercise of his discretion.

Mr and Mrs X were, of course, foster parents who were caring for the children. In this case prospective adopters have not been identified. I do not advocate in this case that prospective adopters should have been made parties to the proceedings but I do consider that evidence should have been received from the outside agency which the Trust decided to use and that the guidelines of the Department should have been followed.

In Re P (Adoption: Freeing Order) [1994] 2 FLR 1000 at p. 1004 Butler-Sloss LJ said:-

> "The future of these children and the future of the adoption proceedings is inevitably uncertain. No guarantee can be given to the mother that there will be an adoption with continuing contact, and in the absence of such uncertainty, why was the mother unreasonable in saying no? In my view, the judge was not justified in the position in which he found himself on a freeing application to say that she was unreasonably withholding her agreement when he also held that there was to be contact after the adoption, and it was only on the basis of contact after the adoption that it was unreasonable for her to have her consent dispensed with.
>
> In my view, this judge should have been more robust. Either he should have refused the application and said, 'this is a matter to be dealt with on adoption', or he should have said, as in *Re A* to which I have already referred, that 'adoption is more important than contact', and the reasonable, hypothetical parent would find it to be so. Or he might have said 'contact is so important that if suitable adopters cannot be found to agree

> to adoption, then these children will have to be fostered long term', but, in any event, as in the first of the three premises that I have suggested, refusing to make the freeing order.
>
> As I see it, he has fallen between two stools in not saying either, 'adoption in any event although contact is highly desirable', or leave it to the adoption application when the mother can fight her corner as to whether or not at that stage the adopters should be accepting contact or there should not be an adoption order. But the mother must, on the basis of the judge's findings, have the right to be heard on the condition to be attached or not attached (as the case may be) to the actual adoption order.

The decision of a judge of first instance on the question whether a parent is unreasonably withholding consent is not a decision where the welfare of the child is paramount. The principles on appeal were considered by Lord Wilberforce in Re D [1977] AC 602 at 626. After pointing out the advantages derived by the judge in seeing and hearing the parties, he said:-

> "Within these limits, courts of appeal are entitled to review the judge's decision and I think that, in the cases which include *Re W*, this case and *Re P (An Infant) (Adoption: Parental Consent)* [1977] Fam 25, they have been wise to avoid a strict and technical separation of law from fact which can hardly be helpful in this type of case. For, apart from findings depending on credibility, demeanour and impression, and other primary findings of fact, as to which the judge's views can clearly not be disturbed, decisions as to adoption involve judgments of value and policy and questions of interpretation of the Adoption Act and of decided cases of considerable difficulty. As was said in *J and J v C's Tutor* (1948) SC 636 at p 642, adoption proceedings are sui generic; per the Lord President (Cooper), and the important issues for individuals which they involve cannot be resolved by mechanical rules.
>
> In this case, important questions which arose were whether the objective standard is that of a hypothetical parent, or the actual parent, and if the latter, whether on the assumption that he is

> heterosexual or homosexual; and whether, and to what extent, the adoption court should leave short-term or medium-term decisions, as to access and the like, to a court exercising matrimonial jurisdiction. Such issues, and questions as to the meaning of reasonable (cf *Re W* [1971] AC 682] are questions for an appellate court to consider. But, as I have stated, the appellate court should recognise the large area of fact and factual appreciation which must be left to the trial judge."

[21] I am, of course, conscious of the fact that in Re KLA (Unreported: 22 January 1999) Sir John MacDermott said that the freeing application under Article 18 of the 1987 Order introduced a new concept. The purpose, he stated, was to find out if a child would be available for adoption before prospective adopters were found and their hopes frustrated if the adoption court ruled that consent was not being unreasonably withheld.

With respect, I do not consider that all freeing applications should be approached in this way. There are cases, of which this is one, in which it would have been a considerable advantage to the judge to know that the prospective adopters were willing to permit contact to birth parents supportive of adoption. The Trust had decided in August 2003 to apply for a care order with a view to adoption. By the time that they applied for a freeing order they had ample time to seek and find prospective adopters and know what their attitude would be. They did not follow the Department's guidelines in respect of Freeing Orders.

As appears from the evidence of Mrs McC the Trust were understaffed and it was going to be necessary to get assistance from an outside agency. But they chose not to do so until they obtained a freeing order. Therefore, Mrs McC was unable to guarantee that prospective adopters would consent to direct contact with the birth parents, as advocated by Professor Tresiliotis.

This enables H and R to argue that they are not refusing consent unreasonably, since, as reasonable parents, they are entitled to know whether prospective adopters would consent to contact in the interests of V. Ironically, it is apparent that the Trust would not have looked for prospective adopters willing to consent to adoption.

[22] The judge gave eleven reasons for concluding that the parents were unreasonably withholding their consent. The first was that the history of H was so replete with failure to repair herself sufficiently so as to provide good enough parenting and the prospects of future success so fragile that he could not risk permanent damage to the child. The history was rife with opportunities for rehabilitation being afforded and spurned. As I have

indicated earlier I do not accept this pessimistic assessment. I consider that it is unjustified by the evidence.

The second was that N was approaching 3 years of age. I remind myself that she is now 3 ½ years of age. She has, as the judge said, suffered a disruptive background. "A troubled child, without core attachments requires now desperately to move on and re-establish permanent attachments in a final move. The present placement cannot remain permanent…. She is going to have to make a move and I believe that that move must now be a permanent one giver her age. All the literature relied on in this case indicates that the crucial period of attachment for children is between 6 months and 4 years. The time span for resolution of H's problems is simply too long for this timescale." I agree. In my view a reasonable parent in the position of H would have the insight to realise that resolution of her own problems will not take place before N is at least 5 ½ years of age, too late for adoption.

I disagree with some of the judge's comments in setting out the third reason for dispensing with the consent of the parents. I do not accept that prospects of success in counselling and psychotherapy are not good. But he was right about the timescale.

I also consider that he overstated the danger of history repeating itself in giving his fourth reason. But I do consider that a reasonable parent would recognise the risk of serious harm to N if the stresses and strains of coping with H1 and P led H to a relapse and would accept that N must not be put at such risk.

I have already expressed my view that he overstated the risk in giving his fifth reason but the risk is there and I consider that a reasonable parent would recognise it. I appreciate that H and R do not at present have the insight to recognise the risk but the test is an objective one.

I consider that he was generous to the Trust, having regard to their failure to ask Dr Bownes whether any assistance could be given to H and their failure to provide counselling uptil the hearing of this appeal. But the judge is right in saying that H cannot place the burden of her problems on the Trust. A reasonable parent might legitimately have a sense of grievance against the Trust but such sense of grievance is insufficient to refuse consent to a freeing order. Again the judge expresses himself forthrightly and I remind myself that he saw the witness and I did not. I would have expressed my views on the sixth and seventh reasons much less strongly than he has done.

He dealt with the crucial issue of post-adoption contact as his ninth reason, rejecting the proposition that the Trust should have taken steps to identify a couple before proceeding with this application. Again he expressed his views forthrightly. I do not share them. I consider that it is illogical to argue that "both parents could operate a veto on adoption by behaving so

badly that no one would agree to post adoption contact." Professor Tresiliotis made it clear that post-adoption contact could only be allowed if the birth parents were supportive of adoption.

[23] I share the view of Professor Tresiliotis that post-adoption contact is in the interests of N and it is to be hoped that prospective adopters will agree to it. But in my view reasonable parents would accept that if prospective adopters cannot be found who will permit contact, N should still be adopted. The judge found no difficulty in reaching this conclusion. I consider that it is a finely balanced judgment and it has given me considerable difficulty. I am not surprised that Sheil LJ has reached a different conclusion.

[24] I do not consider that it would have been inappropriate for the judge to look at the question of contact post-adoption in the context of making a freeing order in this case. But I am not prepared to hold that he was wrong in declining to do so. I strongly support his statement at paragraph [23] of his judgment that if at all possible N should have the benefit of continued contact with both H and R at the frequency suggested by Professor Tresiliotis for the reasons that he gave in evidence. If the birth parents can both accept the new position and help N to settle down without undermining the placement, I too believe that this can be of great assistance to N now and in the future.

The prospective adoptive parents must be carefully counselled as to the benefits of post-adoption contact, having regard to the views expressed by Professor Tresiliotis.

[25] The judge has had the benefit of hearing Mrs McC give evidence in this case and in previous cases and I note his commendations of her. My concern has been that the Trust and Mrs McC in particular have grudgingly agreed that they will look for prospective adopters who are prepared to permit direct contact. I have also been concerned that the Trust and Mrs McC might paint a picture of H and R to prospective adopters which would make the latter anxious to avoid contact with the birth parents.

I am satisfied, however, that the Trust and Mrs McC in particular have now got the clear message that they must seek and, if at all possible, find prospective adopters who will support direct contact with H and R and, in my view, H1. It may take time for the birth parents and the prospective adopters to realise the advantages of such contact. But every effort must be made to persuade them of these advantages. All my criticisms of the judge set out at [22] to [24] reflect differences of approach. I consider that his decision "does not exceed the generous ambit within which reasonable disagreement is possible."

[26] I wish to make it clear that I admire H and R for the efforts which they have made since July 2003. I do not lose sight of the fact that H is more mature than she was in 1999 and has made significant changes to her lifestyle

which the Trust has been slow to acknowledge. I also consider that insufficient account has been taken of R's efforts to rehabilitate H and himself. His relationship with his daughters by his former marriage and the bonds of affection displayed by his sisters have been given insufficient acknowledgment by the Trust. Nonetheless both of them need counselling which the Trust must supply at once. They need it for a number of reasons. H needs it not merely in respect of her life as a child, as a teenager and in her twenties but also needs to understand that H1 and P and to a much lesser extent T have suffered from her alcoholism. She must realise that H1 and P are not behaving as normal "rebellious" teenagers but because she has damaged them through her alcoholism and owes it to them to repay to them what she herself suffered in her childhood and teenage life as a result of her parents' inability to help her. She must also realise why N is being freed for adoption. She must work with H1 and P, assisted by individuals in the Social Services, instead of seeing "the social services" as ogres. In the same way R must realise that domestic violence which was seen by H1 and P has damaged them and that domestic violence is inexcusable, whatever the provocation may be. He must also realise that it is essential to call in Social Services if H has a relapse.

In addition H and R need counselling from Mrs McC on the basis that they must come to terms with the loss of N as <u>their</u> child and realise that if they are allowed to help her and her prospective adopters and refuse to do so, they will lose all contact with her. They must learn to accept that despite all their efforts time has run out for N and her best chance of happiness is to make a success of adoption and that they may well keep limited contact with her and see her grow up as a happy child and repay her for the harm which they have unintentionally done to her.

<u>Article 8 of the Convention</u>

[27] I am satisfied that the judge gave careful consideration to the Article 8 rights of H and R and N's siblings. I bear in mind the steps taken by the Trust to rehabilitate H and R after the birth of N and the fact that she was placed with them in August 2002 and only taken away in June 2003 when H had a relapse. The decision to make a freeing order is the most drastic step which can be taken in breaking the bond of parent and child. I have read all the relevant authorities which were drawn to our attention. I have disagreed with the judge's assessment of a number of important matters. But I am satisfied that a freeing order is a proportionate response to the legitimate aim of ensuring the welfare of N, bearing in mind her rights and the rights of H and R and N's siblings under Article 8.

[28] On a freeing order a court cannot attach conditions. I have made clear my views on the issue of contact post-adoption. It will be a matter for the judge at the adoption hearing to determine whether suitable adoptive parents

have been found. Consensual arrangements for contact between adopting and birth parents are much to be preferred.

[29] As I have already indicated, it has been agreed with the Family Judge that Campbell LJ will be the judge at the adoption hearing. In these circumstances I would make a freeing order under Article 18 of the 1987 Order.