Neutral Citation no. [2005] NICA 47(3) | *Ref:* **SHEC5404**

Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **22 Nov 2005**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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BETWEEN:

DOWN LISBURN HEALTH AND SOCIAL SERVICES TRUST

Applicant/Respondent

-and-

H

First Respondent/Appellant

-and-

R

Second Respondent/Appellant.

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Before: Nicholson LJ, Campbell LJ and Sheil LJ

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SHEIL LJ

[1] While I agree with the other members of this court that it is in the best interests of N that she should be freed for adoption, I do not consider that the learned trial judge was correct in holding that the appellants, her mother and natural father, were withholding their consent thereto unreasonably.

[2] In so finding I am conscious of decisions of the highest court in these lands that:

> "The appellate court should only interfere when it considers that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted,

> but has exceeded the generous ambit within which a reasonable disagreement is possible": Lord Frazer in G v G [1985] 2 All ER 225 at 229b.

Lord Frazer in his speech in that case did state however at p. 228j:

> "Nevertheless, there will be some cases in which the Court of Appeal decides that the judge of first instance has come to the wrong conclusion. In such cases it is the duty of the Court of Appeal to substitute its own decision for that of the judge."

I also refer to the decisions of this court in AR v Homefirst Community Health and Social Services Trust [2005] NICA 8 at paras. 74 to 76 and Homefirst Community Health and Social Services Trust v SN [2005] NICA 14 at paras. 23 to 26.

[3] The meaning of "withholding agreement unreasonably" in the context of a freeing application is to be found in the speeches of the House of Lords in Re W (an infant) [1971] AC 682 where Lord Hailsham, at 669B stated:

> "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 cases where a reasonable parent must so regard it."

In the same appeal Lord Hodson at p. 718B stated:

> "The test of reasonableness is objective and it has been repeatedly held that the withholding of consent could not be held to be unreasonable merely because the order, if made, would conduce to the welfare of the child."

As I stated in SN's case at para. 26:

> "[26] In many cases, and this is one of them, there is a tension between what is in the best interests of the child and the question of whether a parent is

withholding his or her consent unreasonably. In Re F [2000] 2 FLR at 505 at 509 Thorpe LJ referred to the joint judgment of Steyn and Hoffmann LJJ in the case of Re C (A Minor) (Adoption: Parental Agreement: Contact) [1993] 2 FLR 260 at 272 where they stated:

'The characteristics of the notional responsible parent have been expounded on many occasions: see for example Lord Wilberforce in Re D (An Infant) (Adoption: Parents Consent) [1977] AC 602 at 625 ("endowed with a mind and temperament capable of making reasonable decisions"). The views of such a parent will not necessarily coincide with the judge's views as to what the child's welfare requires. As Lord Hailsham of St. Marylebone LC said in Re W (An Infant) [1971] AC 682 at 700:

> 'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'

Furthermore, although the reasonable parent will give great weight to the welfare of the child, there are other interests of herself and her family which she may legitimately take into account. All this is well settled by authority."

[4] There is no dispute in this case as to the sad and worrying history of alcohol abuse and domestic violence in this family over the years prior to July 2003. However by the time this application came on for hearing before Gillen J in January 2005 and his subsequent decision on 31 May 2005, there had been a very marked improvement.

[5] H had managed to stay off alcohol since July 2003 which was a very considerable achievement for one who had had such a severe alcohol problem in the past. This she had managed to do without the benefit of any further counselling. While Mr O'Hara QC, who appeared with Ms Quinn for the appellant H, accepts that by reason of the very nature of alcoholism one can never say that there is no risk that H may succumb again thereto, he submits that the learned trial judge was wrong when he stated at para. 18 of his judgment:

> "I believe it is extremely unlikely that this mother will be able to come to terms with the stressors in her life

> within a reasonable time or, more importantly, a time appropriate to N. This case in my view is easily distinguishable from the two cases in the Court of Appeal in Northern Ireland to which I have earlier adverted because I have come to the conclusion that in this instance the medical evidence, and in particular that of Dr Bownes, has convinced me that there is no realistic possibility of H continuing to remain abstinent during N's childhood."

Further, one of N's siblings, H1, wrote to the court setting out her attachment and affection for N. It goes without saying that in normal circumstances children should be raised by their natural parents together with any siblings which they may have.

[6] N was born on 19 April 2002 and had accordingly reached the age of 3 when judgment was given on 31 May 2005.

[7] Dr Allen, in reply to a question from the learned trial judge as to "the hopes and prospects for this young woman in the context of a time sequence for this child" stated that it was two years at the outside bearing in mind that counselling has not yet begun and that it could be somewhat earlier if H responded well to psychotherapy. Dr Allen went on to say that one could give some indication of the prognosis within six months of the start of such psychotherapy. (I8). Dr Bownes did not dissent from this opinion. (D15). H had been due to see Dr Patterson for assessment on 30 September 2005 but this had been cancelled by the Trust due to a problem with funding. This funding issue should be resolved sooner rather than later.

[8] In the present case the issue of contact with her parents after any adoption is an important factor. Professor Tresiliotis stated in his evidence (C8) that if N, who has significant attachments to her parents, were to be cut off without post-adoptive contact this could generate and increase feelings of rejection and loss on the part of N, and long term foster care would be preferable if no adoptive family could be found who would accommodate direct contact which is in the best interests of N. Later on in his evidence in response to a question from the learned trial judge (C46) Professor Tresiliotis stated that in the event of such adoptive parents not being found who would allow contact with N's natural parents, he would with some regret opt for adoption. This indicates that this is a finely balanced judgment, namely whether or not one should proceed in the instant case to free N for adoption even if prospective adoptive parents have not as yet been found who will allow contact between N and her natural parents. To date such adoptive parents have not been identified.

[9] Mr O'Hara also points out that in the present case, unlike the two cases in the Court of Appeal to which Gillen J referred, AR v Homefirst Community Trust [2005] NICA 8 and Homefirst Community Health and Social Services Trust v SN [2005] NICA 14, there is a strong bond of attachment between N and her mother and that N is not settled at present, it being clear that she has to move from her present foster carers because of their own family commitments, and that as yet future carers, either in the form of foster carers or prospective adoptive parents who will allow contact, have not as yet been identified.

[10] While it is desirable that if adoption is to take place, it should normally take place by the time a child has reached the age of 4, Kerr LJC in AR v Homefirst Community Trust (a "care order" case) stated in the course of the judgment of the court in that case at para. 91:

> "So, while there may be many cases in which prompt decisions as to the placement of children are warranted, this is not inevitably or invariably the best course. In C v Solihull MBC [1993] 1 FLR 290 Ward J said that while normally delay in making arrangements for a child is adverse to his interest, where it is required to fully investigate the matters necessary to ensure that the right decision is taken, delay is not only not wrong, it should be supported. …. We consider that in the present case there were sound reasons to postpone the decision as to where J should ultimately be placed. As the judge rightly observed, it might be many years before Mrs R could finally demonstrate that she had completely overcome her problems with alcohol and lack of insight, but it does not inevitably follow that no delay in deciding what should become of J was warranted. There was already cause for optimism and with close supervision it is at least distinctly possible that Mrs R would have been able to care for her son. … Although a decision on J's future that would have allowed permanent arrangements to be made was desirable, this did not, in our opinion, outweigh the need to give Mrs R the chance to prove herself. Taking into account 'the imperative demands' of the Convention in relation to her Article 8 rights, the need to have matters settled for J should not have been allowed to predominate to the extent that the mother's Convention rights could be disregarded."

[11] In the instant case H has managed to stay off alcohol since July 2003 without the benefit of any counselling and has also been regularly attending Alcoholics Anonymous with favourable reports therefrom. There has been no domestic violence since July 2003 and she has been reconciled with her mother. N has strong attachments to both of her parents, particularly her mother, both of whom faithfully attend contact with N limited though that is at present to once a month.

[12] In the present case if the court does not free N for adoption, the care order will remain in place for the time being.

[13] In my opinion it cannot be said that N's parents are withholding their consent unreasonably to her being freed for adoption.