Neutral Citation No. (2002) NIFam 13

Judgment: approved by the Court for handing down
(subject to editorial corrections)

Ref:	GILH3191
Delivered:	17/05/2002

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

_____

IN THE MATTER OF K
(Care Order; Residence Order; Freeing for Adoption)

_____

GILLEN J

At the outset I wish to make it clear that nothing must be reported in this case which could lead to the identification of the child concerned or of any of the parties. To that end I have prepared this judgment in an anonymised form.

This case concerns K who was born on 20 May 2000. Following his birth he was discharged from hospital to foster carers and has remained with foster carers ever since. U is the mother of K. M is the grandmother of K. The father of K is D. U alleges that D is a drug dealer who now lives abroad and she has no contact address for him. He is aware of the child but has never contacted Social Services about him. Attempts were made by the Trust, which I do not propose to name, involved in this case to contact D both by visiting his mother and by forwarding a letter to him through his mother. The letter was returned to the Trust and the mother advised that she had no address for D. Consequently, I am satisfied that reasonable steps have been taken to ascertain the whereabouts of D and to inform him of these hearings but to no avail. As an unmarried father he is not required to consent to any

application to free for adoption but I would have been prepared to take into account any representations that he wished to have made. I am satisfied that he has completely abandoned this child and accordingly has played no part in these proceedings.

The first applicant in this case is the grandmother, M, who seeks a Residence Order in her favour in relation to K. A further applicant is the Health and Social Services Trust (hereinafter called "the Trust"). The Trust applications are for a Care Order under Article 50 of the Children (Northern Ireland) Order 1995 (hereinafter called "the 1995 Order") and, if that is granted, thereafter an application under Article 18 of the 1987 Adoption (Northern Ireland) Order (hereinafter called "the 1987 Order") freeing K for adoption without parental agreement. The Trust opposes the Residence Order application of the grandmother, M. M had been granted leave to be joined as a party and to issue an application for a Residence Order.

The law governing these applications

1. A Residence Order

A Residence Order is an Article 8 Order settling the arrangements to be made as to the person with whom a child is to live. In addition a Residence Order automatically gives parental responsibility to any person in whose favour it is made for as long as the Order is in force. It does not extinguish the parental responsibility of any person and does not affect the legal relationship between a child and his parent. It settles a practical arrangement relating to his accommodation. A court

which is considering making a Residence Order must have regard to the following principles:

(a) The paramountcy of the child's welfare under Article 3(1) of the 1995 Order.

(b) That delay in determining the question is likely to prejudice the welfare of the child.

(c) The welfare checklist set out in Article 3(3) of the 1995 Order.

(d) The presumption against making an Order unless to do so would be better for the child than making no Order at all.

I have taken all these legal principles into account in considering the Residence Order application of M.

2. A Care Order

Under Article 50 of the 1995 Order, on the application of any authority or authorised person, the court will make an Order placing a child with respect to whom the application is made in the care of a designated authority. A court may only make such Order if it is satisfied that the child concerned is suffering or is likely to suffer significant harm and that the harm or likelihood of harm is attributable to 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 to him. Whether or not the court does or does not make an Order depends upon a two-stage process. First, the court must consider whether or not the criteria for making a Care Order has been satisfied, ie the threshold criteria, and secondly, in the light of the care plan and after consideration of the matters contained in the welfare checklist in Article

3(3) of the 1995 Order, whether it is proper to make a Care Order. The court must not only consider the no order principle but it must also act proportionately. Finally before making a care order, contact must be considered.

3. An application to free for adoption

The statutory provisions governing an application by the Trust in this instance to free K for adoption are to be found in the 1987 Order. Article 9 sets out the duty to promote the welfare of the child having direct regard to all the circumstances with full consideration being given to certain matters set out in Article 9(a). Article 9(b) enjoins the court, so far as practicable, to first ascertain the wishes and feelings of the child regarding the decision and to give due consideration to them having regard to his age and understanding. Obviously this child is too young in this instance. Article 16 of the 1987 Order states where relevant:

> "1(1) An Adoption Order shall not be made unless –
>
> (a) the child is freed for adoption by virtue of an order made in Northern Ireland under Article 17(1) or 18(1) … or
>
> (b) in the case of each parent or guardian of the child the court is satisfied that –
>
> (i) he freely and with full understanding of what is involved, agrees –
>
> (aa) either generally in respect of the adoption of the child or only in respect of the child by a specified person, and

(ab) either unconditionally or subject only to a condition with respect for the religious persuasion in which a child has to be brought up, to the making of an Adoption Order; or

(ii) his agreement to the making of the Order should be dispensed with on the grounds specified in paragraph 2.

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

…

(b) is withholding his agreement unreasonably."

The freeing of a child for adoption without parental consent is dealt with in Article 18 which insofar as it is relevant states as follows:

"(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."

In such proceedings, the court has power to dispense with the parents' agreement to adoption on one or more of the six specified grounds set out in Article 16(2) of the 1987 Order. In this instance, this aspect of the case, if I reach it, is

somewhat complicated. U has been assessed by Dr Janet McPherson, consultant psychiatrist, as having "a severe mental handicap within the meaning of the Mental Health (Northern Ireland) Order 1986". Dr McPherson concluded that U would not be able to instruct her own solicitor and accordingly the Official Solicitor has been appointed as Guardian ad Litem to represent U in the present proceedings. Two statements have been filed on her behalf. Dr McCartney, consultant psychiatrist, reported on 14 February 2002:

> "1. In answer to the question of whether or not U would have sufficient capacity to understand the nature of adoption proceedings, I believe that U has limited understanding of both the adoption proceedings and indeed of what being a parent entails. I believe that her ability to retain accurate and realistic explanation of both these becomes distorted over a short period of time. In addition I believe that she only has capacity to think of the implications with regard to herself and not with regard to her children or family. …
>
> 2. In answer to the question of whether or not U would be able to give a valid consent to the adoption of her son, K, I do not believe that this is the case. Although U says clearly she wants K to live with her, I do not believe she has a realistic idea of what that would entail."

If the court has decided to make a Care Order and then has proceeded to deal with the application for the child to be freed for adoption, and if the court has decided under Article 9 that adoption is in the best interests of the child, this court would then have to determine whether U is unreasonably withholding her consent. That decision must be made notwithstanding the evidence of Dr McCartney that she would not be able to give a valid consent to the adoption of her son. The law surrounding the present circumstances is dealt with in Re: L (A Minor) (Adoption:

Parental Agreement) [1987] 1 FLR 400. This makes it clear that the relevant Article is concerned to require a court to investigate whether, where consent has been given by a parent, it has been fully and freely given and whether the parent in question has a full understanding of what is involved in adoption. It is not concerned with a contrary circumstance where the mother has withheld her agreement. Where, as here, she is withholding her consent, her incapacity is helpful, not to determine the question of whether she is capable of withholding consent but is an element in the reasonableness or unreasonableness of her withholding consent. In determining the reasonableness of the mother's withholding consent the court has to look at the hypothetical reasonable parent with appropriate insight into all the circumstances of the case.

In summary therefore an application to free for adoption involves the court in a two-stage process:

(1) Is adoption in the best interests of the child?

(2) If so, is a ground or grounds of dispensation proved on the balance of probabilities?

These two stages are separate and must be considered by the court in this sequence. The consideration of whether parental consent should be dispensed with must be undertaken and decided at the time when a freeing for adoption order is made. If in the case of K I make a Care Order and then move on to consider the question of freeing and I conclude that adoption is in the best interests of K, I must then turn to consider whether or not the Trust has satisfied me that U is withholding her consent unreasonably. The leading authority the test that the court should apply

is Re: W (An Infant) [1971] 2 AER 49. Lord Hailsham described the test in this way in the course of that case:

> "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 not 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 must take it into account. It is decisive in those cases where a reasonable parent must so regard it."

In Re: C (A Minor) (Adoption: Parental Agreement: Contact) [1993] 2 FLR 260 the court suggested that the test may be approached 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. That is an approach that has received further judicial approval in Re F (Adoption: Freeing Order) [2000] 2 FLR 505. I consider that Hershman McFarlane, Children Law and Practice, Section H at paragraph 124 sets out the appropriate criteria as follows:

> "1. The reasonableness of the parents' refusal to consent is to be judged at the date of the hearing.
>
> 2. The judge must take account of all the circumstances of the case.
>
> 3. Whilst the welfare of the child must be taken into account it is not the sole or necessarily paramount criterion.
>
> 4. The test is an objective test – could a reasonable parent in the position of this parent withhold consent.

5. The test is reasonableness and nothing else.

6. The court must be wary not to substitute its own view for that of the reasonable parent.

7. There is a band of differing reasons, each of which may be reasonable in any given case."

I must also bear in mind that before making an order freeing the child for adoption, in the case of a child whose father does not have parental responsibility, I must satisfy myself in relation to any person claiming to be the father that he has no intention for applying for a Parental Responsibility Order or Residence Order or if he did make such an application it would be likely to be refused.

Finally, in all these matters I must bear in mind the cardinal rule that any intervention of the State between parents and child should be proportionate to the legitimate aim for the protection of family life and I must take into account the Human Rights Act 1998 in this regard (see Re: O (A Child) (Supervision Order) [2001] 1 FLR 923). To that end I must bear in mind the rights of the applicant, M, and the respondent, U, to the right to a family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Conclusions

Applying these legal principles and having made a number of factual findings which I shall now outline, I have come to the following conclusions. I dismiss M's application for a Residence Order for the following reasons:

1. Although I am not in a position to ascertain the wishes and feelings of this child because he is too young, his physical and emotional and educational

needs clearly require protection because of his tender years. I do not consider that M is in a position to protect him. She has exhibited in the past an inability to protect her daughter U against abuse of a physical and sexual nature and I am, therefore, concerned that she would be unable to afford similar protection to K. Instances of this are as follows:

(a) There was unchallenged evidence that U's uncle, J, had been a regular visitor to her mother's house and that he had been sexually abusing U over a prolonged period. It was clear that M permitted U to be left alone in the house with her uncle during times when he had mistreated her sexually. She appeared unwilling to protect U from J. When he eventually did leave the home, M refused to divulge his whereabouts. In 1994 a psychologist had interviewed U in her home and during that interview it emerged that J was still present in the house and that M was not only aware of it but was not objecting to him being there. At one point M interrupted U to say that she was going out and to remind U to make sure and waken J before she herself went out. This suggested that M had not taken seriously U's concerns that her uncle was continuing to sexually abuse her. Before me, in her evidence, M said that he was only there to do some painting and decorating. I regard this as a totally inadequate explanation for exposing U to further possible abuse when left on her own with this man.

(b) Another maternal uncle, BK, had also been involved in sexual abuse of children. Notwithstanding this he was permitted to come and live in

the house with M whilst U was there between April and June 2001. She told me that she was afraid to tell the Social Services because he was violent to her and that U had prevailed on her not to tell the Social Services as she was afraid of suffering more beatings. However, she clearly misled the social worker in this case, CD, because on one occasion when she visited, M told her that K was simply a painter. I reject M's explanation for this matter and I think that she was again wilfully exposing U to danger during these periods.

(c) U herself was convicted of offences of gross indecency in 1994. However, her probation as a result of these offences was regularly frustrated by M who refused to admit U's offending despite the fact that U openly admitted it. This led to missed appointments and more seriously to U being in the company of young children unsupervised. Despite constant warnings to M, this continued throughout the period of her probationary supervision. I have, therefore, concluded that K could well be exposed to significant dangers if he was residing with M.

2. M has proved to be unreliable and inconsistent particularly in her dealings with social workers. Although she now purports to accept U's conviction and that J had abused U, she had regularly adopted a contrary position. I find this inconsistency and unreliability in her approach to these very serious matters something that concerns me greatly.

3. She has not shown herself responsive to attempts by professional agencies to assist her. As recently as October/November 2001 attempts had been made

to provide a placement in PACT for U so that she could be assessed. However, on 25 October 2000 when U contacted the Trust Department advising that she was moving into a house which she intended to rent privately and was not in fact going to PACT, her mother could be heard shouting in the background "You tell her you're moving into that house on Monday and you'll not be going to Belfast". This was a thoroughly irresponsible action on the part of M albeit that subsequently she did encourage U to go to a further PACT arrangement. I share entirely the view expressed by the Guardian ad Litem in this case who records at paragraph 9.50 of her report:

> "M's lack of grasp on reality at times and her vulnerability to being significantly distracted and move into denial at points of stress indicate a poor prognosis for her capacity to parent K. She does indicate a willingness to co-operate fully with Social Services, but past behaviours indicate that while this can be achieved, M is equally vulnerable to exhibiting deceptive and rejecting behaviours and attitudes towards professionals when under stress."

4. It is clear that both U and M are extremely dependent on each other. I have no doubt that U would be present with M a great deal of the time. U herself, as I will presently indicate, has already admitted that she simply is not capable of caring for this child. My fear is that M would expose K to unsupervised control by U. M can also herself be extremely volatile. I had before me a very threatening letter which she sent to the social worker, CD, and it is a matter that had caused me profound concern.

I have absolutely no doubt that M does love this child and will have great difficulties reconciling herself to the fact that K will not be residing with her. Nonetheless, she must appreciate that the over-arching concern here is the welfare of this child and this must be paramount. For all these reasons, therefore, I reject her application.

I have come to the conclusion that a Care Order must be made in this case for the following reasons:

1. U herself admits in the course of her statement of 16 April 2002, paragraph 5, the following:

> "I do not therefore object to this Honourable Court concluding that, at the time of his birth, K was likely to suffer significant physical harm by virtue of my learning difficulties and was likely to suffer significant emotional harm by virtue of my inability to protect him. I further do not object to this Honourable Court concluding that I cannot look after K."

2. U clearly is not in a position to protect K. She is a woman of very limited intellectual ability and, according to Paul Quinn, consultant clinical psychologist, falls within the bottom 2.5% of the population. She requires a high level of support and assistance if she is to live independently and not experience chaotic and dysfunctional life. She is open to manipulation and negative influences of those of greater intellectual ability than herself. If she was to provide adequate care for K, she would need very high levels of support and assistance throughout the life of the child on a 24-hour basis. Mr Quinn concludes:

> "It was only because PACT had this level of support available that it was considered possible to have U attend here. Realistically this type of support is usually only available where families in conjunction with statutory services are assessed as capable of providing this. Both my reading of the documentation relating to this case, as well as attendance at a Looked After Child Review on K held on 29 November 2001 and being privy to the discussion of this case at that meeting, I believe that such supports do not currently appear to be available to U. As such I would reluctantly have to conclude that U would currently be unable to provide an acceptable level of care for K in order to prevent him from experiencing significant harm. I would further add that the latter is more likely to happen as a result of omission rather than commission on U's part."

I share this view of Mr Quinn and it is further indication that this child is at risk of significant harm if he remains in U's care.

3. I wish to make it absolutely clear that this decision is not based solely on the fact that U is a person significantly below average intellectual ability. However, she has demonstrated sexually inappropriate behaviour towards a young girl. She has effectively failed to engage with professional attempts to motivate her and to assist her. It is interesting to note that when Dr Bownes, consultant forensic psychiatrist, last reported on 6 February 2002 he recorded that she would adopt various strategies including denying her original admissions when attempts were made to explore in more details her various admissions. He concluded:

> "U has a strong tendency to indecisiveness and frequent changes of mind … and I would feel that further attempts to effectively re-engage U in a comprehensive assessment process of the nature previously envisaged would not be successful."

I, therefore, share the view of Dr Bownes that all reasonable steps have been taken by professionals involved in this case to facilitate U in determining the level of risk she would pose to a child placed in her care. I am satisfied that she does present a significant risk to K and as such this militates strongly in favour of a Care Order being made.

4. I have already expressed my views on M, the child's grandmother, and I have taken these into account in coming to the conclusion that a Care Order should be made. In particular I am very concerned that M has indicated significant ambivalence as to the reality and nature of U's sexual offending behaviour and the abuse perpetrated against U by others. M has not parented her own children with the exception of U in terms of assuming the parental role in an independent environment. As the Guardian ad Litem has said, there is therefore very little evidence overall in terms of her capacity to parent other than the history of a relationship with and providing care for U. I am satisfied with the explanation given by the Trust as to why M did not attend the Alderwood "Programme for Partners". It is important to appreciate, as CD made clear, that her attendance was to give her insight into U's abuse and look after her family and was not geared to M's ability to look after K. Whilst M has indicated now before me in her evidence a willingness to co-operate fully with Social Services, past behaviours indicate that while this can be achieved, M is equally vulnerable to exhibiting deceptive and rejecting behaviours and attitudes towards professionals when under stress. I have

concluded therefore that not only is M unable to care for K, but she could not provide adequate support for U to do so.

Accordingly, I am satisfied that given this background the threshold criteria have been satisfied and that this child was likely to suffer significant physical harm by virtue of U's inability to protect him and was also likely to suffer significant emotional harm in the future on the same basis.

I have considered the care plan which is to the effect that K should be placed in a "dual" placement where he could remain for the purpose of adoption should a Care Order be granted and the court sanction the care plan of adoption and grant a Freeing Order. In short the aim of the care plan is that K is permanently secured within a family outside of his birth family via adoption. Contact arrangements suggested by the Trust reflect this ultimate aim. I have read this care plan and I consider it appropriate. I have also applied Article 3(3) of the 1995 Order, ie the welfare checklist:

(a) K is too young to ascertain his wishes and feelings.

(b) He is described as having "global delay" and may, therefore, need intensive special assistance in respect of achieving his milestones etc. Neither U nor M are in a position to afford him this.

(c) Already K has had two disruptions in his life and a further change in terms of a transfer from his present excellent foster carers could be detrimental to him.

(d) I have already indicated that I believe that K was at risk of suffering significant harm and is at real risk of suffering future harm due to U's inability to protect and care for him. Similarly, I have concluded that M's

capacity to care for him is inadequate and of an insufficiently good enough standard. The two of them reside together and obviously are so dependent on each other that the cumulative effect would be detrimental to the need for the care that K requires.

(e) Clearly U is incapable of meeting his needs for the reasons I have already set out. Similarly, M is incapable of meeting his needs for the reasons I have set out.

I have considered the range of powers available to me under this Order, for example making no order or making a Supervision Order. I have taken into account Article 3(5) and I am aware that a court should not make an order unless it considers that doing so would be better for the child than make no order at all.

Before making a Care Order a court is obliged to consider arrangements for contact and to invite the parties to comment. I have looked at the question of contact and I shall deal with it later in the course of this judgment. Suffice to say at this stage that I agree with the Trust's suggestions about contact and I believe that they represent good sense.

I conclude, therefore, that a Care Order should be made in this case.

I turn now to consider the application by the Trust to free this child for adoption. I have come to the conclusion that the court should make such an Order for the following reasons:

1. I have had regard to the welfare of this child as the most important consideration and I have given full consideration to:

(a) The need to be satisfied that adoption will be in the best interests of the child. I have decided that it would be in the best interests of the child given the complete absence of any prospects for rehabilitation with U or with M.

(b) The need to safeguard and promote the welfare of the child throughout his childhood. I have come to the conclusion that the only way that K can be protected is for him to be adopted.

(c) It is crucial that this child be provided with a stable and harmonious home. I am absolutely satisfied that neither U nor M can provide such a home for him.

As I have indicated before the age of this child is such that his wishes and feelings can not be properly ascertained.

In coming to these conclusions I have taken into account all the factual matters which I have already found above with relation to the unsuitability of U and M to care for this child. The Guardian ad Litem has properly drawn my attention to the DHSS guidance in respect of permanency planning for children (see Departmental Guidance: Permanency Planning for Children: Adoption – Achieving the Right Balance, May 1999). At paragraph 2.1 of the DHSS circular, it is noted that the importance of "family life to child cannot be overstated". The earlier this can be done the better. U has indicated that should K not be placed in the care of her mother, she would prefer long-term fostering as opposed to adoption. She would wish to be involved in the day-to-day planning for K. I do not believe that such arrangements can be achievable. Whilst there may well be circumstances, therefore,

where long-term fostering is better than adoption, I do not consider that this is a case in this instance. There is no strong climate for agreement here between the parent and the placement. The positives of adoption, namely permanency and security are vital for this child and I believe that in this case they can only be effectively achieved by adoption.

I turn then to consider the question of whether or not U is unreasonably withholding her consent in the circumstances and on the legal principles to which I have already alluded. Applying the principles set out before, I have come to the following conclusions:

1. I have judged U's refusal to consent at the date of the hearing.
2. I have taken into account all the circumstances of the case including those which I have already set out in my factual findings.
3. I have recognised that the welfare of the child, although it must be taken into account, is not the sole or necessarily paramount criterion.
4. I have applied an objective test. Could a reasonable parent in the position of U withhold consent? I have come to the conclusion that a reasonable parent in the position of U could not possibly withhold consent given the factual findings I have made.
5. I have recognised that the test is reasonableness and not anything else.
6. I have been wary not to substitute my own views for that of a reasonable parent.
7. I have recognised that there is a band of differing decisions, each of which may be reasonable in a given case.

Weighing all these matters up I have decided that the factual findings I have made clearly indicate that U is withholding her consent unreasonably. As in the case of the Care Order, I have looked at the rights of the parties involved under the European Convention for the Protection of Human Rights and Fundamental Freedoms and I have concluded that an order freeing this child for adoption is a proportionate response to the legitimate aim of securing the welfare of this child.

I am satisfied that the father in this case has no intention of applying for a Residence or Parental Responsibility Order and if he did so the court would be likely to refuse such an application. I am satisfied under Article 17(5) that U has been given an opportunity of making, if she so wishes a declaration that she prefers not to be involved in future questions considering the adoption of the child.

I am also satisfied under Article 18(2) that the child is in the care of the Adoption Agency and that the child will likely be placed for adoption.

In all these circumstances, therefore, I consider it appropriate that an order should be made freeing this child for adoption.

The effect of a Freeing Order is that it discharges a Care Order. However, a court can make a Freeing for Adoption Order accompanied by a Contact Order under Article 8 of the 1995 Order. This would allow future contact to be defined and would afford some security in relation to future contact arrangements. However, the court may make such an order only if it is satisfied that this is better for the child than making no order. I have decided that no order should be made about contact in this instance. It seems to me that contact in the future is going to depend on how both U and M react and accommodate themselves to this Freeing Order. I have

absolutely no doubt that both of these women love this child K. It has been clear to me throughout the consideration that I have given to all of the papers that this thread runs through the entirety of the case. The problem is that love for this child is simply not enough to secure his care and protection. However, I trust that when they have had time to reflect upon the decision of this court, they will recognise that it has been given purely in K's interests and that they will come to terms with this realisation. The Trust is clearly open to permitting contact pending the adoption with both these parties. Obviously the adopters will have to be considered and their views carefully taken into account. I earnestly hope that U and M will react appropriately to this Order and that they will not attempt to undermine the stability of this child's placement. If they can convince the Trust of that, and if contact is carefully supervised, then I hope that the Trust can come to the conclusion that some measure of contact can be afforded. However, this will very much depend on the Trust's assessment of how matters proceed from this date onwards. I consider it would be premature for me to make any recommendation about contact in these circumstances until the new situation has been assessed. I accordingly make no order in relation to contact.

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF K
(Care Order; Residence Order; Freeing for Adoption)

JUDGMENT

OF

GILLEN J
