

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

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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

**IN THE MATTER OF P (FREEING WITHOUT CONSENT: REFUSAL TO
DISPENSE WITH AGREEMENT OF THE PARENT)**

GILLEN J

[1] The judgment in this matter is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and other persons identified by name in the judgment itself) may be identified by name or location and that in particular the anonymity of the child and the adult members of his family must be strictly preserved.

[2] The proceedings in this court relate to a little boy named P who was born on 23 August 1996. C is his mother and is the respondent in this matter. There is no father named on the birth certificate of the child. The person named by the mother as the father has disputed the paternity and made clear from an early stage that he did not wish to have any further contact with the applicant regarding the child. The whereabouts of that man are now unknown and in any event he has played no part whatsoever in the family life of this child.

[3] The relevant Health and Social Services Trust responsible for the child (which I do not propose to name and shall hereinafter refer to as "the Trust") has made an application under Article 18 of the 1987 Adoption (Northern Ireland) Order ("the 1987 Order") to free this child for adoption without the consent of the mother C. The application was originally listed for hearing before this court in June 2003. However in the early summer of 2003, the sister of C, A, indicated an interest in adopting the child. Following a successful completion of a relative carer assessment, P was placed by the Trust with A on 27 June 2003. An assessment of A as a potential adoptive parent of P has been completed by the Trust and at a meeting of the Adoption

Panel on 16 December 2003 a recommendation was made to approve A as an adoptive parent for P. C, the natural mother has indicated that she would be happy for P to be adopted by A. The Trust however wish to proceed with the present application for an order freeing the child for adoption notwithstanding the fact that C does not consent to this application. C objects largely on the basis that since she will consent to adoption by A and that this is the preferred option of the Trust in any event there is no need for an application as broadly based as this one by the Trust.

Background

[4] The background facts to this case are not in dispute. Those facts can be best economically set out by reference to the threshold criteria established by the Trust when obtaining a care order in respect of this child at the Family Proceedings Court in Newtownards in November 2001. At that hearing, the mother conceded the threshold criteria of significant harm and the agreement as to the criteria was couched in the following terms:

“(i) She was unable consistently to budget properly and to provide for all the basic physical needs of the child including an acceptable clean home.

(ii) The mother’s home was being used by a group of unsuitable young men whom the mother was unable to prevent from entering her home or controlling within it. The behaviour of the men, which included drinking alcohol, interfered with P’s sleep and the child presented at school as tired and irritable.

(iii) The child had been present during an assault in his home when a male friend of the mother kick, punched and thumped another male and caused him to sustain two black eyes.

(iv)The mother was dependent on her parents for support and there were difficulties in her relationship with her parents.

(v) The mother on occasions used physical punishment to discipline P and was unable properly to control the child and to establish consistently satisfactory routines for him.

(vi) The mother did not understand the emotional needs of the child and caused him to suffer serious anxiety.”

[5] Subsequent to the granting of the care order the mother failed to engage with a Dr Moore in his assessment of her readiness for formal parent training and in May 2002 Dr Moore concluded that the assessment should therefore be terminated. Since the granting of the care order there have been serious concerns about her lifestyle including her abuse of alcohol, her choice of partner, her capacity to budget and her ability to achieve independent living. There is therefore no plausible dispute that the mother cannot provide satisfactory parenting for P and that some long term permanence for the future of the child has to be considered. Her drinking, abusive relationships, unstable mental health and chaotic lifestyle have made the possibility of rehabilitation with her now irretrievable.

[6] The child, now 7 years of age, requires special educational needs. According to the guardian ad litem, he now talks little of his mother and tends to chat more about his maternal Aunt A, R his cousin, his school and his grandfather. His speech has progressed enormously due to the encouragement from foster carers and his aunt. The guardian ad litem records of P:

“P has little contact with his mum now and she has clearly declined in significance to him. He seldom asks for her and is now calling A ‘mummy’ more and more frequently. It is clear that he is very much settled in with A and R and that he sees this as his home. The transition and settling in have gone really remarkably smoothly. P presents as the happiest and most settled that I have seen him. He is responding well to A’s boundaries and is thriving in the stability of this family placement. This additional security and stability is contributing to P’s continued positive progress in school.”

[7] The report from Ms KW the social worker from the family and child care programme of the Trust is equally positive about this new family set up. In her report of December 2003, the social worker records:

“A has been very proactive in attending to P’s special educational needs and feedback received from the school has been very positive in respect of A’s commitment to P. A enjoys the close support of her parents with whom P shares a close and affectionate bond as well as aunts and uncles also keen to support

A in whatever they can, practically, financially or emotionally. P was placed into his maternal aunt A's full-time care on 26 June 2003 where he has remained since that date following a detailed relative carer assessment being completed. The Trust completed an adoption assessment in respect of A which was presented to the relevant Adoption Panel on 16 December 2003. The panel agreed that A was a suitable adoptive parent for P. P has settled extremely well within his placement that he shares with his cousin R (aged 12 years) who is A's natural son and with whom P shares a close relationship."

Statutory provisions

[8] The statutory provisions governing an application to free for adoption are to be found in the 1987 Order. Article 9 sets out the duty to promote the welfare of the child as follows:

"In deciding 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 given due consideration to them having regard to his age and understanding."

[9] I have no doubt that in light of the circumstances in this case, adoption is in the best interests of this child and that all the constituent parts of Article 9 point in this case towards adoption. In coming to that conclusion I have found great assistance in the meticulously prepared report by the social worker KW who has set out all the merits of adoption as opposed to long term foster care in this instance together with the appropriate current authorities on the issue. I share her conclusion that the outcomes for children who are adopted outweigh those for children who remain in the public care system and subject to looked after procedures throughout their childhood. Comparative studies between adults who were either fostered or adopted as children indicated that those with a fostering experience felt their placements had been more insecure and impermanent. In comparison the majority of those adopted felt they had a family for life.

[10] The report of KW however was obviously predicated on the basis that this child would be adopted by A. At page 8 she records:

“It is well documented that a placement with extended family can reduce the separation trauma for children removed from their parents home. Children benefit from familiar faces, surroundings and people they trust will comfort them. Research by T J Gebel (1996) supports the idea that relatives generally have a more positive perception of children in their care than do non-relative carers and are more likely to accept them. The Trust have had no concerns in relation to the care afforded to P by A and believe that P is cared for physically, socially, emotionally and educationally to a very high standard. Life story work remains ongoing with P who can readily express his wish to remain permanently with his Aunt A. P has started calling his aunt ‘mummy’ and would appear to be a fully integrated member of the household. His cousin R has coped extremely well with the changes to his family circumstance and appears to treat P like a younger brother.”

At page 10 of that report she concluded:

“The Trust remains of the view that the advantages of adoption for P by A outweigh the advantages of him remaining with her in his current fostering status or as the subject of a residence order.”

[11] There is no doubt therefore that the Trust have approached this case on the basis that the child should be freed to be adopted by his maternal aunt

A. A wishes to adopt the child and therefore there seems non doubt that this child will be adopted .The only question that remains is the means by which this is to be affected.

[12] In evidence before me KW expressed concerns that whilst C currently consented to her sister adopting her son, she had proven to be quite unstable over the last months, at times engaging with the Trust but at other times allowing her chaotic lifestyle to take over. She illustrated this by indicating that C had been inconsistent in keeping up contact with the child, and in attending with Dr Moore. She would phone up Dr Moore, indicate she was to attend and then simply not turn up. In terms therefore she is unpredictable according to KW. Her profound concern is that at the last moment she would withdraw her consent to the child being adopted by A and attempt to frustrate the process of adoption. However if that were to happen a whole new scenario would be opened up. To date that has not manifested itself and I am unpersuaded that it is likely to occur.

[13] KW was a thoughtful and concerned witness. Her argument was reasonable and relayed in a measured way. However I was rather more persuaded by the evidence of the guardian ad litem who presented her observations on this case in a way that was a paradigm of the manner in which such reports such be presented. She argued that the preferred option in cases such as this is to proceed on a consensual basis. She pointed out that there appears to be no research into the long term impact on children of a freeing order when consent of the mother is withheld .The Guardian drew a sharp distinction between the position where a child grows up knowing his parent opposed his adoption and that where the child is assured that the adoption took place in a family setting with the approval of all concerned. She advocated a policy of minimum intervention in what can only be described as a potentially draconian process of removing a child from his birth mother. This witness was clearly influenced by the fact that this young woman clearly understood what adoption meant, she was clear in her own mind that she could not parent this child, she had identified someone in the care process namely her sister who could care for the child and she had not waived in her acceptance of the proposition that A should adopt her child. Poignantly she posed the question as to why the court should now reject a consensual family adoption and embrace the wider possibilities of adoption to third parties in circumstances where everyone is agreed that A should and ought to be the adoptive parent.

[14] I commence my deliberations on this issue by recognising the draconian nature of the legislation which is now being invoked by the Trust. It is difficult to imagine any piece of legislation potentially more invasive than that which enables a court to break irrevocably

the bond between parent and child and to take steps irretrievably inconsistent with the aim of reuniting natural parent and child. It also represents potentially the clearest of interferences with the right to respect for family life and a violation of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the European Convention"). Any interference with the right to respect for family life entails a violation of Article 8 unless it is "in accordance with the law, has an aim or aims that is or are legitimate under Article 8(2) and is necessary in a democratic society for the aforesaid aims. The notion of necessity implies that the interference must correspond to a pressing social need and in particular that it is proportionate to the legitimate aim pursued. Parliament has thus conferred on the court far reaching powers to order the lives of minors for whom they are giving statutory responsibility. However it is of the utmost importance that such power should be exercised not only with responsibility but with the sensitivity which is demanded where the exercise of power can create raw wounds in a highly emotionally charged situation. This is particularly so when considering the delicate and intimate engagement between mother and child. Whilst therefore I have formed a clear conclusion that adoption is in the best interests of this child having regard to all the circumstances, I must bear these matters in mind when turning to the quite separate consideration under Article 16 of the 1987 Order by which an adoption order shall not be made unless the court is satisfied that the agreement of the parent should be dispensed with. In this case it is submission of the Trust that the relevant ground for dispensing with the agreement of the mother is that she is withholding her agreement unreasonably pursuant to Article 16(2)(b).

[15] The leading authority on the meaning of this ground and the tests that the court should apply is Re W (1971) 2 AER 49. During the course of the leading opinion in this case, Lord Hailsham described the test in this way:

"It is clear that the test is unreasonableness and not anything 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 regard it so."

[16] In Re C (a minor) (adoption: parental agreement: contact) 1993 2 FLR 260, Steyn and Hoffmann LJ (as they then were) defined the reasonable parent as follows at paragraph 272D:

“Such a paragon does not of course exist: she shares with the ‘reasonable man’ the quality of being, as Lord Radcliffe once said, an ‘anthropomorphic conception of justice’. The law conjures the imaginary parent into existence to give expression to what it considers that justice requires as between the welfare of the child as perceived by the judge on the one hand and the legitimate views and interests of the natural parents on the other.”

The judges continued at page 272G:

“Furthermore, although the reasonable parent will give great weight to the welfare of the child, there are other interests of herself and her family which she may legitimately take into account. All this is well settled by authority. Nevertheless, for those who feel some embarrassment at having to consult the views of so improbable a legal entity 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 appears 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.”

[17] This exposition of the law was expressly approved by Dame Butler-Sloss and Thorpe LJ in the case of Re F (adoption: freeing order) 2000 2 FLR 505 where the Court of Appeal in England suggests 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 appears sufficiently strong to justify overriding the views and interests of the objecting parent.

[18] Accordingly therefore whilst the test is primarily an objective one, the court must ask itself whether objectively a person capable of making a reasonable decision would be properly influenced by the subjective circumstances that exist in the particular case to the extent that when

consideration is given to all the circumstances of the case, a decision could reasonably be reached that it is appropriate to withhold consent.

[19] In this case the birth mother has shown determination and commitment to the notion of adoption by her sister. Whilst she has been inconstant in many aspects of her chaotic life, she has been singularly wedded to this notion for some time. Equally so, A is completely committed to this child and is perfectly prepared, as I understand the position, to make an application to adopt this child, an application to which C will willingly consent. What she objects to, is the Trust now seeking a relief which would permit them to have the child adopted by a yet as unascertained third party even though everyone, including the Trust are currently of the view that the child should be adopted by A.

[20] In my view to dispense with C's consent would be to burden a new start for this child with the sombre legacy of the past. An opportunity is being presented in this instance to actively encourage a consensual adoption which would bring some measure of agreed closure to this poignant and unhappy case. Not only will the mother find this easier to bear but such a consensual approach enacted between the two sisters in a close family setting with the public authority taking a back seat in the process may accrue to the child's benefit when this whole process is explained to him at an age appropriate time. There may be much to be said for the voice of caution of the guardian concerning the as yet unexplored area of the long term impact of a child learning of his adoption in the context of an opposed application. I am therefore unpersuaded that the Trust have satisfied me on the balance of probabilities that C is withholding her agreement unreasonably to the adoption in these circumstances and accordingly I dismiss the application. Needless to say, if the extremely unlikely event were to arise in which A no longer wished to pursue the adoption of this child or failed to apply in the near future, then a new set of circumstances would have arisen and the Trust might well wish to renew their application with more prospect of success.