Neutral Citation No: [2018] NIFam 1 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE10563** *Delivered:* 22/2/2018

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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IN THE MATTER OF AN APPEAL

BETWEEN:

XY

Appellant

-and-

A HEALTH AND SOCIAL SERVICES TRUST

Respondent

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KEEGAN J

This judgment has been anonymised given that it involves a child. Nothing must be published which would identify the child or the family in any way. The name given to the child in this judgment is not the real name of the child.

Introduction

[1] This is an appeal from a decision of His Honour Judge Rafferty QC given on 20 December 2016 whereby he made an order freeing the child for adoption who for the purposes of this judgment I will call Sam. That child was born on 1 November 2015.

[2] The Notice of Appeal is dated 9 January 2017 and it set out four grounds of appeal:

(i) That the learned trial judge erred in failing to take into account that the evidence was limited about the intensive psychological support that the mother required/had a lack of evidence to support the finding that it would take many years to complete.

(ii) The learned trial judge erred in his application of the Supreme Court decision of Re B.

(iii) The learned trial judge erred in failing to give consideration to significant improvements and motivation on behalf of the mother.

(iv) The learned trial judge erred in his finding given that it argued that it was disproportionate.

[4] I heard this appeal and gave a judgment on 8 May 2017. At that hearing Ms Meenan BL appeared for the mother who also attended at the court. Ms Sholdis BL appeared for the Trust. Ms Mullally BL appeared for the Guardian Ad Litem. At that stage all counsel wished that the matter be heard upon oral submissions and they also presented written arguments which I considered. I delivered an ex tempore ruling on 8 May and I decided to allow the appeal on the basis of ground one in that I considered that there was insufficient evidence in relation to the mother's potential to parent the child within a reasonable timescale. I allowed the appeal on the basis that more information was required to decide on freeing. I disagreed with the trial judge's decision not to allow the mother her own independent assessment. I considered that the mother should have her own independent assessment given the order being sought was freeing. I considered that this report would assist the court to see whether or not the mother could parent this child. I also thought that an independent assessment would assist the mother in dealing with the case. At that stage I specifically said that the mother may well accept the situation if the evidence was against her or the situation will become clearer in relation to her capacity if the evidence was for her. I also commented that there was no prejudice to the child who is happily settled in a concurrent foster placement. I stressed that the process would not be indefinite and that I would grant leave for an expert if it was expeditiously brought before the court and I would hear the case in September 2017.

[5] What transpired after that ruling was not entirely satisfactory in case management terms. Firstly, an application for an appropriate expert Dr Galbraith was granted. Some time elapsed before the appellant's solicitor indicated that Dr Galbraith was no longer available and an alternative doctor would have to be found. Then an application was made to bring Mr Paul Quinn into the case. This led to a delay in the case and ultimately for a variety of other reasons the case could not be heard until February 2018. I resumed the case for hearing in February and at that hearing Ms Simpson QC led Ms Meenan. Ms Sholdis continued to appear for the Trust. Mrs Dinsmore QC led Ms Mullally. Updated information was filed by the Trust and the Guardian and updated written submissions were also filed. The report from Mr Paul Quinn was available and having received it at a directions hearing I asked that Mr Quinn speak directly to the mother's therapist about certain issues and so I directed an addendum. The parties approached the case by asking that the court hear oral evidence from Mr Quinn and he was examined and cross-

examined. The parties did not call any additional evidence. The mother was present but did not give evidence. The Guardian's reports were accepted and the Trust reports were accepted without the need for formal proof. I pause at this stage to say that the court in these types of cases is always receptive to hear any oral evidence that the parties wish to present.

Background facts

[5] I do not intend to recite the considerable background in this case for the purposes of this ruling. It is however important to note the mother's own very difficult history including abuse from a very early age involving sexual abuse within her family and neglect and placement in care including residential care. It is an understatement to say that she has not had an easy life. She has four other children; the eldest is placed in a kinship arrangement with the maternal grandmother and the other three are placed with their father under care orders. The mother has contact with all three children and one of them has now actually returned to her care, although that is not with the blessing of the Trust. The child at the heart of this case has regular sibling contact. I should say that the position of the father in this case is unclear which is very unfortunate. This is a case where an allegation was made that the pregnancy was concealed or at the very least that it was not known and there were issues with antenatal care.

[6] The statement of facts in relation to this case is extremely comprehensive. It sets out the Trust case in favour of adoption. I have considered it in detail and I have also seen the two expert reports which are of historical nature and were filed from Dr Gerry McDonald dated 26 August 2009 and Mr Mike Falcus dated 4 October 2009. These reports are obviously of some vintage. That in itself led me to a position that the mother should have an updated report. In any event these reports deal with the elder children at a time when the father was also assessed. The reports were not without their positives in relation to the way forward. In summary, drawing from those two reports, Dr McDonald indicated that the mother was functioning above average with an estimated IQ of 94. He also opined that she had no personality difficulties. He and Mr Falcus opined that rehabilitation should be attempted with the older children. Both experts pointed to the fact that the mother needed some help to deal with her own traumatic past.

[7] In this case a care order was agreed on 1 September 2016 before the Family Proceedings Court. That was by consent however, I note that an appeal was lodged but not pursued. The threshold criteria had been agreed and so it is clear that the mother recognised her risks and deficits. There is no suggestion that the mother disrupts the foster placement, although I note that her co-operation with the Trust has been sporadic at times.

[8] The main plank of the Trust case for a care order and indeed for a freeing order at first instance before Judge Rafferty was a "Home on Time" assessment

which is dated 26 June 2016 and authored by a social worker Ms Aideen Kelly. This is a comprehensive report of 57 pages. I pause to observe that the issue of "Home on Time" was agreed at a Looked After Child Review (LAC) in December 2015 some four weeks after the birth of Sam. To my mind that is a remarkably short time after the birth for important decisions to be made.

[9] However, the mother engaged in this assessment and her contact was increased to allow her to undertake it. In particular, I note that she had travelled by way of two buses to get to appointments. This report is also not without its positives even though a large portion of it is dedicated to history. This is a practice which is prevalent in social work reports and in my view it often leads to parents becoming disheartened in that the positives are not properly reflected and it is perceived that there is more emphasis is placed upon the negatives. In this report there is some encouragement for the mother, but the conclusion was that she could not parent at that point. In fact the mother accepts that. But the question is actually whether the mother could reach a point within a reasonable time when she could parent this child.

[10] I do have some difficulty with the "Home on Time" Assessment in this case and the use of it as an appropriate tool. In broad terms I consider that the criticisms in the report, particularly those regarding the issue of food provision, were too harsh. But fundamentally this case came down to whether the mother could deal with her past, so I wonder why the "Home on Time" assessment was attempted without that foundation. In other words no matter how well the mother did, it was clear from this report and indeed clear from the previous papers that she needed therapy to deal with her past. These assessments cannot be used to set parents up to fail or to speed up adoption as O'Hara J said in the recent decision of <u>A v Health and Social Care Trust v C</u> [2017] NI Fam 5.

[11] It is very clear that the issue in this case was the mother's past and how that would impact on her ability to look after the child. I have great sympathy with the trial judge as the application for an independent assessment was raised at the last minute and without any focus. However, in my view the issue required some careful consideration because the judge was not equipped with an up-to-date assessment of the mother. The point was made that therapy would take a long period of time but there was no forensic basis for that view. In fact it was only on the receipt of Mr Paul Quinn's report that it became clear that the mother's IQ was not at the level given by Dr McDonald. Mr Quinn did undertaken the Wechsler tests and found that the mother's IQ is 78, so she in the borderline category for learning disability. She is not functioning at a normal level.

[12] The other issue that Mr Quinn unearthed is that the mother has an emotionally unstable personality disorder, something that Dr McDonald did not diagnose. Indeed in his evidence Mr Quinn said that this was first referenced when the mother was 16 and she became known to mental health services. I cannot stress

enough the importance of expert diagnosis as it informs professionals of the issues. Early identification of issues leads to proper engagement with issues. In this case it seems to me that there have been some failings in relation to the issue of therapeutic intervention notwithstanding the fact that it was patently obvious that that was what was needed. I temper my comments by recognising that when encouraged, the mother was not swift in accessing therapy. However, I am now in a position where I have to adjudicate a number of years into the case and decide whether or not the timescales are in favour of therapeutic intervention and whether or not it would work. As all counsel conceded in this case, time has been lost by virtue of the fact that the correct work was not identified and that the correct intervention was not put in place.

[13] I then come to the evidence of Mr Quinn. He filed two reports as I have said. He made the diagnosis of borderline learning difficulty and emotionally unstable personality disorder. In his evidence Mr Quinn was very clear that this was one of the worst cases he had seen in terms of the mother's very difficult history. He said that that had to be borne in mind in terms of the extent of the work that would be needed to change. This is a case where the mother did refer to therapeutic services and worked with Ms Haveron. However, she was discharged from that service in October 2017 having sustained an unsettled period in her life and an incident in September 2017 with the father of her other children. Mr Quinn looked at all of this and really said that the problem with this case was that Ms Haveron was undertaking trauma work and that there was not the foundation for doing this and in fact what this mother needed was skills based dialectal behavioural therapy or DBT. He said this could be offered and would need to take place for approximately one year and thereafter there would have to be a period of six to eight months settlement in the community before you could introduce a child. He also said trauma work would have to follow. Mr Quinn said that the type of intervention was offered now by Western Health and Social Services and that there could be a referral, but he pointed out there was a waiting list of approximately twelve months.

[14] The core question was whether or not Mr Quinn could be confident that there was purpose in undertaking this work in terms of realistic prospect of success. There are a number of parts in the report that state that this work is not realistic and in evidence Mr Quinn said he was pessimistic about outcome within a timeframe of years. This leads to a position where in essence the mother has no evidence upon which to go in relation to rehabilitation. I should say that her case was directed towards rehabilitation. So the purity of the argument leads to the question of whether or not the child can be rehabilitated within a realistic timeframe. In looking at this I obviously have considered the updated evidence of Mr Quinn. I also considered all of the social work reports, the Guardian's reports, the mother's statement and the written and oral submissions of counsel.

Legal context

[15] There are a number of provisions of the Adoption (Northern Ireland) Order 1987 which must be applied to the facts of this case. Firstly, Article 9 contains the duty to promote the welfare of the child. This reads as follows:

> "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."

Article 16 of the 1987 Order states that:

> "16.—(1) An adoption order shall not be made unless—
>
> (a) The child is free for adoption.
>
> (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 –

(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—

(b) is withholding his agreement unreasonably."

The child must also be subject to a care order. There was no issue taken with that requirement and there was also no issue taken with the fact that the child is likely to be placed for adoption given that the child is with concurrent carers who may become adopters.

[16] The other important consideration in any application of this nature is the Human Rights Act 1988. Article 8 of the European Convention on Human Rights provides for respect for family life and an adoption order or an order freeing for adoption is clearly an interference with family life and can only be made if it is justified in accordance with Article 8(2). This issue is core to any freeing application and the Supreme Court in the case of Re B (A Child Care Proceedings – Threshold Criteria) [2013] 1 WLR 1911 looked at the issue of necessity and proportionality in cases where there is a care plan of adoption. This is well-trodden legal ground now, and whilst various different articulations of the test were expressed by the different judges, the argument is that adoption should be a last resort where "nothing else will do".

[17] Re B has caused some consternation in legal circles and a suggestion that it has made the test for freeing for adoption or adoption more difficult. However, in my view this case represents an articulation of the Article 8(2) test under the European Convention and is a reminder that any application must be proportionate in pursuance of the legitimate aim which is to secure the best interests of the child throughout his childhood as stated in the Adoption (Northern Ireland) Order 1987. Of course I should point out at this stage that the adoption regime in Northern Ireland is very different from the adoption regime in England and Wales which is subject to the Adoption and Children Act 2002. In fact it is arguable that in Northern Ireland the freeing regime allows a parent a greater input by virtue of the unreasonable withholding consent test which is maintained in our freeing legislation.

[18] This test was dealt with in the case of Down Lisburn Health and Social Care Trust v H and Another [2006] UKHL 36. In that case Lord Carswell giving the lead judgment articulated the unreasonable withholding test applying the established jurisprudence which effectively states as follows in paragraphs [69] to [70]:

> "Making the freeing order, the judge had to decide that the mother was withholding her agreement unreasonably. This question had to be answered according to an objective standard. The characteristics of the notional reasonable parent have been expounded on many occasions. 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*:
>
> > '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… 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."

[19] The Down Lisburn case was taken to the Strasbourg Court and in a decision reported as R and H v United Kingdom [2012] 54 EHRR 2 the Strasbourg Court determine that freeing for adoption *per se* did not breach the Convention and that the applications of this nature was within a State's margin of appreciation. Paragraph [88] of that judgment reads as follows:

> "It is in the very nature of adoption that no real prospects of rehabilitation or family reunification exists and that it is instead in the child's best interest that she be placed permanently in a new family. Article 8 does not require the domestic authorities make endless attempts of family reunification; it only requires that they take all necessary steps that reasonably be demanded to facilitate the reunion of the child and his or her parents … Equally the court

> has observed that, when a considerable period of time has passed since the child was originally taken into public care, the interests of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited."

[20] The strong emphasis upon the interests of the child is articulated in numerous cases both nationally and in the European jurisprudence. The precedence of this factor in the balancing exercise is also explained in YC v United Kingdom [2012] 55 EHRR 33, paragraph [134]:

> "The court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family is proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to rebuild the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However if the maintenance of family ties would harm the child's health and development, a parent is not entitled under Article 8 to insist that such ties be maintained."

[21] Numerous other cases have been referred to me in legal argument. However, it is important to note that each case is fact sensitive and so it is dangerous to directly compare decisions in this area. However the principles apply and to those I now turn in reaching my conclusion.

Consideration

[22] The first question is whether adoption is in the best interests of this child. Sam is 2½, he has been in care all of his life and he has never lived with his mother. There was no strong argument made in the oral submissions by counsel that foster care was in fact better than adoption as a permanency option for this child. However, I have to consider whether the more draconian option of adoption is

appropriate and I bear in mind that the mother would undoubtedly prefer foster care. The proper analysis of the options has been properly undertaken in the papers by both the Trust and the Guardian and senior counsel on behalf of the mother took no issue with this. However, I must reach my own conclusions on this issue which I so do as part of my consideration.

[23] If rehabilitation is realistic, adoption is not in the best interests of this child. Also, if rehabilitation is a realistic option the mother could not be held to be unreasonably withholding her consent. This latter test is an objective one which must be judged at the date of hearing. It has also been adjudged in the jurisprudence that the reasonable mother would take into account the welfare of the child.

[24] A further element in relation to this test is a justifiable sense of grievance However the Court of Appeal in Re E (Minors) (Adoption: Parents' Consent) [1992] FLR 397 said that there is a distinction between the sense of injustice which is irrelevant and the facts which give rise to the sense of injustice. A mother was entitled to say that she did not have a proper opportunity to demonstrate that continued access could benefit her children and the court's decision had been pre-empted by the premature issue of a freeing application which in turn prevented her access application being considered. In those circumstances the mother's proper sense of injustice led to a decision that she was not withholding her consent unreasonably, despite the fact that the court also held that at the date of the hearing, the child's welfare required that there should be no further contact with the mother. Where there are grounds for a parent to have a sense of grievance, that factor has to be weighed alongside the other circumstances of the case, in particular the welfare of the child and the advantages of adoption (see Re E (Adoption: Freeing Order) [1995] 1 FLR 382.

[25] Well in this case the mother can realistically say that she has some sense of grievance because her therapeutic needs have not been met. That is notwithstanding her efforts to access therapy which are to be encouraged although I recognise that these were late in the day. However I have to weigh that in the balance against the other factors in deciding if she is unreasonably withholding her consent.

[26] The assessment by Mr Quinn is really the lynchpin of this case and his evidence was quite clear in relation to a number of important signposts. Firstly, he talked about the magnitude of the task for the mother given her history. Secondly, he talked about the potential for some work but the fact that it would take a long period of time. Thirdly, and most importantly, he clearly said that he was pessimistic about the chances of success. Overall, and on the basis of the evidence, I have to conclude that there is no realistic prospect of rehabilitation in this case. Even if this expert had been cautiously optimistic I could have seen a way forward. But I am afraid that his written reports and his oral evidence point towards a very different conclusion and bearing that in mind I regretfully cannot find in favour of the mother in relation to the various legal tests.

[27] Having considered the papers and the written arguments, I also consider that adoption is preferable to foster care in this case. I find that adoption is in the best interests of the child and that the mother is unreasonably withholding her consent on the basis of all of the evidence and adjudged at the date of this hearing. As such I am left with no option other than to affirm the freeing order in this case. However I cannot let the case pass without some comment on other matters.

[28] Firstly, I am concerned about some of the practices which were highlighted in this case. The first concern relates to the use of the "Home on Time" project model. As I have said, however the mother did she needed therapy. Trusts need to be careful that there is not a usage of this assessment model without addressing the core issues. I am not impressed that the correct therapeutic intervention was not identified until a very late stage. It is also hard to understand how this lady was not diagnosed earlier with an emotionally unstable personality disorder and borderline learning difficulties given the results that Mr Quinn highlighted to the court. The Trust should be well aware of the robust scrutiny that the courts undertake in cases regarding freeing for adoption. This type of application dispenses with parental rights. It denotes a very serious interference with Article 8 of the Convention and so a high degree of justification must be applied. The Trust must also be aware of the positive duty they have to reunite families as part of the Article 8 consideration.

[29] The child in this case is happily doing very well and is settled in a placement. I have been impressed with the description of the foster carers who meet the mother at contact and who have no animosity towards her. It seems to me that this is a case where there is the potential for the adults to develop mutually respectful relationships notwithstanding the fact that there is a gulf between them in terms of connection with the child. I note in the papers that this is to be an open adoption with direct post-adoption contact for both the mother and the siblings. That is a very good plan and I sincerely hope it comes to pass. Even though the mother will be disappointed that the freeing order is maintained she should grasp the opportunity to undertake adoption counselling and take up post-adoption contact.

[30] The final word is for the mother in this case. I have great sympathy for her; she has had no opportunity throughout her childhood to observe a stable model of parenthood. She was abused from an early age and it is not surprising that she has had difficulties parenting her own children. However, to her credit, she has remained drug free for two years. She has also engaged in some therapy with Ms Haveron. Her life has been unstable and that has continued but I hope she will see that I have certainly found her to be someone who wants to try and improve herself. In a nutshell this mother has done all that she could to try and parent Sam. I know that she loves him and that she tried and in later years Sam will also know this.

Conclusion

[31] Accordingly, I have decided that on the basis of the evidence, freeing for adoption is appropriate in this case and in those circumstances the appeal will be dismissed.