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Judgment: approved by the Court for handing down | *Delivered:* **27/06/2014**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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IN THE MATTER OF RE J (FREEING ORDER – INCAPACITY – UNREASONABLY WITHHOLDING AGREEMENT)

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O'HARA J

[1] I have prepared this judgment in an anonymised form. Nothing must be published which might reveal the identity of the child or of either parent.

Introduction

[2] The main issue in this freeing application is whether a mother's agreement to her son being adopted should be dispensed with on the ground that she is incapable of giving her agreement or whether she is withholding her agreement unreasonably. The depressing circumstances can be set out briefly.

[3] The boy (J) was born on 20 May 2012 and is now two years old. His mother (A) was 13 when she became pregnant and 14 when J was born. His father (Z) was 15 when J was conceived and 16 when he was born. J's mother and father are sister and brother. The fact that J is Z's son is disputed by Z but has been proved by DNA testing. In the event Z has played no part in these proceedings except to say that insofar as his view is relevant (since he has no parental responsibility) he supports J being adopted.

[4] J initially lived with his mother and grandparents. A was herself taken into care on 20 July 2012. J followed her into care on 2 October 2012 though in a different setting. Care orders were made for J and for both his parents on 16 September 2013. By then J was in a concurrent placement with a couple – he is still there with all indications being that this placement is entirely suitable. Given the circumstances outlined above it is not surprising that no suitable kinship placement can be found. It is unnecessary to go into any detail on the hugely unsatisfactory family circumstances.

[5] The Trust is clearly correct to take the view that it is in J's best interests that he should be adopted. The Adoption Panel's decision to that effect is not and could not be challenged. Initially the Trust applied for a freeing order on the basis only that both mother and father were unreasonably withholding their consent. On further reflection the Trust amended the application to contend, in the alternative, that J should be freed for adoption because A is incapable of giving her consent.

[6] The relevant statutory provision is Article 16 of the Adoption (NI) Order 1987 which provides as follows:

> "(1) An adoption order shall not be made –
> unless …
> (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 adoption of the child by a specified person, and
>
> (ab) either unconditionally or subject only to a condition with respect to the religious persuasion in which the child is to be brought up,
>
> to the making of an adoption order;
>
> (ii) his agreement to the making of the adoption order should be dispensed with on the grounds specified in paragraph (2).
>
> (2) The grounds mentioned in (1)(b)(ii) are that the parent or guardian –
>
> (a) cannot be found or is incapable of giving agreement;
>
> (b) is withholding his agreement unreasonably …."

A's background and circumstances

[7] A is now 16. She has had an exceptionally difficult life with recurring social services involvement due to a variety of concerns about her, her siblings and her mother and step-father. None of this is A's fault – she is a victim of the way in which she was raised. It is hard to identify any positive life experience which she has enjoyed. On 27 November 2012 she was assessed by an educational psychologist to whom she was referred "due to concerns regarding difficulties with communication and interaction and social, emotional and behavioural difficulties. Referral information also noted that (A) is a school age mother and that she has a history of nocturnal enuresis".

[8] The report provided on A includes the following points:

- In terms of reading ability around 37% of all pupils of A's age would have obtained similar or lower scores.
- In terms of spelling ability, around 55% of pupils of A's age would have obtained similar or lower scores.
- In terms of mathematical ability, her scores were much worse. Only 3% of pupils of the same age would have scored the same or lower on a numerical operations test and only 16% would have scored the same or lower on mathematical reasoning.
- The staff at the children's home reported concerns regarding her understanding of important discussions – she is a "very vulnerable young girl".

[9] For the purposes of the care proceedings Dr Fionnuala Leddy, consultant child and adolescent psychiatrist, was engaged to report on A. Dr Leddy is very experienced in care and freeing cases in this jurisdiction and has contributed with skill and distinction over many years to the benefit of the court. Her report dated 26 June 2013 sets out in grim detail how miserable A's life has been and what effect her experiences have had on her. Dr Leddy was asked specifically whether A was competent for the purposes of the care proceedings. The following is an extract from her response:

> "A cannot reliably weigh up her wishes or acknowledge consistently the risk she faced and those she would face or pose if returned home. She is not psychologically mature or competent for the purpose of these proceedings.
>
> All of this means that in my view A is not in a position to fully understand the possible consequences of the various decisions which have to be made for herself and for J. A's reluctance to fully engage in the assessment process is one manifestation

> of this but the history and her responses during interviews have also informed my opinion in this regard."

[10] The issue of competence was revisited in the current freeing proceedings. In a report dated 10 January 2014 Dr Leddy outlined that A understood the purpose of her meeting Dr Leddy i.e. to see what A's understanding was of what was to happen to J. At paragraph 3.10 of the report Dr Leddy states:

> "At the end of the interview I reminded her of the purpose of this appointment. I also reminded her of our previous interview and how after I had asked her a particular question she responded with 'I am only 15'. I told her that my view is that she is still too young to reach decisions of responsibility with regard to J's future. I said that in my view although she is old enough to make decisions in some issues for herself, there are other issues upon which she should not have to feel responsibility and that it was appropriate for adults to allow her to feel free of such a burden of responsibility in my opinion. A made no objection. She maintained eye contact and seemed to understand the distinction I was making."

[11] At paragraph 4.01 Dr Leddy continued:

> "It is notable that A reverts to immature, hostile and obstructive conversation when asked to consider J's best interest and future. She makes a superficial statement regarding the outcome she wants for J without evidence of ability to consider the consequences for him. A is not able to show any development in her understanding of his needs over the past year. While it is likely that her understanding of his needs has developed, she is not able to articulate or communicate this or to weigh up and consider in detail her conflicted feelings. A is developmentally immature because of her own history of faulty parenting and because of the sexual abuse she has suffered."

[12] All of this led Dr Leddy to conclude as follows at paragraph 5:

> "5.02 … Her emotional immaturity becomes particularly evident when J's needs and care plan are being discussed with a marked deterioration in her

> attitude, rigidity of thought, poor tolerance or frustration, impulsive responses and hostile hopeless mood state. This emotional immaturity, together with her own poor appreciation of the issue at hand, mean that A is not competent for the purposes of the adoption proceedings."

[13] In response to a letter dated 21 January 2014 Dr Leddy advised further on 22 January 2014:

> "1. A does not have the capacity to provide or withhold consent for the purpose of the proposed freeing application.
>
> 2. A does not have capacity to give instructions on the issue of potential post-adoption contact.
>
> 3. Her capacity in these respects is unlikely to change in the immediate future."

[14] Unfortunately Dr Leddy was unable to attend the hearing of this case to contribute anything further to these opinions. I will proceed, therefore, on the basis of the written reports. I note, however, that in a position statement submitted on A's behalf in December 2013 it was stated that A was aware of the application to free her son for adoption and did not want to make any representation. It was also stated that A believed she should have direct contact with him more than twice a year. This paper was prepared by counsel instructed by the Official Solicitor on behalf of A, the Official Solicitor being involved because of A's lack of competence.

Submissions

[15] I am indebted to all counsel for their helpful detailed and analytical submissions on the sometimes complicated issues which have arisen in this case.

[16] Mrs Keegan QC, who appeared for the Trust with Ms M Connolly, referred to the decision of Gillen J in Re G and S [2001] NIFam 14 in which psychiatric evidence showed that the mother did not have capacity to give valid consent to an adoption order. In his judgment the learned trial judge relied on the speech of Lord Wilberforce in Re D (An Infant) (Adoption: Parent's Consent) [1977] AC 602. That case involved a couple who had a son but who had then divorced on the basis of the father's homosexuality. The father's contact with his son had been regular initially but had gradually reduced and then stopped entirely. When the mother remarried she and her new husband applied to adopt the boy. The father opposed their application and was held by the trial judge to be unreasonably withholding his consent. The Court of Appeal reversed that finding but it was restored by the House of Lords.

[17] In his speech Lord Wilberforce said, at page 625f:

> "What in my understanding is required is for the court to ask whether the decision, actually made by the father in his individual circumstances, is by an objective standard reasonable or unreasonable. This involves considering how a father in the circumstances of the actual father, but (hypothetically) endowed with a mind and temperament capable of making reasonable decisions, would approach a complex question involving a judgment as to the present and as to the future and the probable impact of these upon a child. To say all this is no doubt excessively refined and judicial decisions are made by a simpler process than this: but when we are faced with different decisions, it is difficult to avoid some such analysis."

[18] In Re G and S Gillen J cited this passage which he believed "still holds good" and continued:

> "I am also satisfied that in any event the proper [construction] of Article 16 of the 1987 Order is that the court must investigate whether where consent has been given, it has been fully and freely given or whether the parent has a full understanding of what is involved in adoption. In other words the question of her capability only arises if consent has purportedly been given. Whereas in this case, consent has not been given and thus the ground to be relied on by the Trust under Article 6 of the 1987 Order is that the respondent is unreasonably withholding her agreement (see *Re L (a minor) (Adoption Parental Agreement)* (1987) 1 FLR 400."

[19] I was also referred by the Trust to paragraphs [69] to [71] of the speech of Lord Carswell in Down Lisburn Trust v H and Another [2006] UKHL 36 in which he charted the progression of the test of unreasonably withholding consent. In particular, Lord Carswell referred to the speech already cited above of Lord Wilberforce and to the joint judgment of Steyn and Hoffman LJJ in Re C (A Minor) (Adoption – Parental Agreement: Contact) [1993] 2 FLR 260 at 272:

> "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. In other words it required the judge to assume the mother was not, as she in fact was, a person of limited intelligence and inadequate grasp of the emotional and other needs of a lively little girl of four. Instead she had to be assumed to be a woman with a full perception of her own deficiencies and an ability to evaluate dispassionately the evidence and opinions of the experts. …..
>
> 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 fiction, we venture to observe that precisely the same question may be raised in a demythologised form by the judge asking himself whether, having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views and interests of the objecting parent or parents. The reasonable parent is only a piece of machinery invented to provide the answer to this question."

[20] The Trust was somewhat ambivalent in its submission, notwithstanding these authorities, because of an unease about whether A was truly unreasonably withholding her consent or whether she was simply not capable of making a decision for the reasons explained by Dr Leddy. On the issue of what "incapable" means in this context counsel referred me to the fact that there is still no statutory test in Northern Ireland and that the legal test of capacity is that set out by the Court of Appeal in England and Wales in Masterman-Lister v Brutton [2002] EWCA Civ. 1889. At paragraph [58] Chadwick LJ stated:

> "The authorities are unanimous in support of two broad propositions. First that the mental capacity required by the law is capacity in relation to the transaction which is to be effected. Second, that what is required is the capacity to understand the nature of that transaction when it is explained."

[21] The Trust's alternative submission, which it ultimately advanced as its primary contention, was that in light of Dr Leddy's evidence A should be regarded as incapable of giving agreement to J being adopted on the tests set out above. On

that basis J can and should be freed for adoption on the ground that his mother's agreement is dispensed with under Article 16(2)(a) rather than (b).

[22] On behalf of the mother, the Official Solicitor, represented by Ms McGrenera QC with Ms MacKenzie originally stated the following in a position paper dated 13 December 2013:

> "In terms of the application to free J for adoption, the Official Solicitor believes that this in both J's and A's best interests and accordingly she consents to the application. The Official Solicitor would emphasise the importance of concluding these proceedings as swiftly as possible so as to spare A further distress and uncertainty."

[23] That position was subsequently amended (or clarified). It is the final position of the Official Solicitor that, while she accepts that J should be freed for adoption, she does not herself have the authority in this case to provide the statutory consent under Article 16 of the 1976 Order. She further stated:

> "The Official Solicitor would confirm that on behalf of A she is neither consenting nor objecting to the freeing application and that as a matter of policy she would not normally consent to such a draconian order in the absence of this being the wishes of the client whom she is representing."

[24] Helpfully, counsel have highlighted the nature and content of the forms which have to be completed and signed by a parent who is consenting to adoption. The point of this exercise was to illustrate how far beyond the understanding of A those forms are, even if they were stripped of their legal language and explained in language which A found easier to follow.

[25] Ultimately the position of the Official Solicitor is that J should be freed for adoption and that it is up to the court whether to follow the decision of Gillen J in Re G and S or alternatively find that A is incapable of giving her agreement. In any event the result is the same but the route chosen, I was told, is important beyond this case for the wider work of the Official Solicitor.

[26] For the Guardian Ad Litem Mr McGuigan QC, with Ms McCloskey, agreed that J should be freed for adoption, whichever route is chosen.

Decision

[27] While I did not have the advantage of hearing from Dr Leddy, I am satisfied from her reports that A is not competent to make a decision on whether J should be adopted. I find A to be incapable within the meaning set out in Masterman-Lister v Brutton above. (I have also taken into account the other submissions on this issue, including the reference to the provisions of the Mental Health Act 2005 which now applies in Britain). A is undoubtedly capable of making some decisions as is shown by some elements of the psychological assessment but not a decision which is of a magnitude and which has the consequences of the present one. It appears to me that this finding on her competence undermines the proposition that she can be properly regarded as unreasonably withholding her agreement to adoption. I conclude that agreement is withheld unreasonably by a parent who can agree to adoption but will not do so. I also conclude that it is unreasonably withheld by a parent who neither consents nor objects i.e. a parent who declines to make a decision. I further conclude, however, that agreement is not unreasonably withheld by a parent who is not capable of making a decision in the first place.

[28] While I am slow to depart from the approach taken by Gillen J in Re G and S, I do so. In Re D Lord Wilberforce specifically referred to "the decision actually taken by the father". That decision was to withhold his consent to his son being adopted by his ex-wife and her new husband. There is no equivalent decision in the present case because A is not capable of reaching any decision. Similarly, in Re C, Lords Steyn and Hoffman were considering a case in which the mother was of limited intelligence and inadequate grasp of the emotional and other needs of her daughter. Sadly that sort of case is not uncommon in the Family Division but it is quite different in law from the case of a mother who is not competent. Not all parents of limited intelligence are not competent – but A is. I also note that in "demythologising" the relevant question, the two Law Lords asked whether the views and interests "of the objecting parent" should be overridden. A is not an "objecting parent". On the evidence before me she is no more capable of objecting than she is of consenting, a fact which strikes me as being central to the debate. If on the one hand A could not validly agree to adoption because of her incapacity, she should not on the other hand be taken to be unreasonably withholding such agreement.

[29] In my judgment the proper approach to Article 16 is as follows:

(i) Consider whether under Article 16(1)(b)(i) a parent has freely and with full understanding of what is involved agreed to the making of an adoption order.

(ii) If there is no agreement, the court can dispense with the agreement of parents to adoption if

those parents cannot be found under Article 16(2)(a).

(iii) The court can also dispense with the agreement of parents to adoption if those parents are incapable of giving their agreement because they are not competent to do so.

(iv) The court can dispense with the agreement of parents to adoption if those parents unreasonably withhold their agreement provided that they are capable of giving their agreement even if they are limited in various respects because of their intelligence or life experiences.

[30] For these reasons I am satisfied that the agreement of A to the making of an adoption order for J should be dispensed with because A is incapable of giving her agreement. If, however, my analysis is wrong and if the analysis of Gillen J is correct, I would still order that the agreement of A to the making of an adoption order should be dispensed with because A is withholding her agreement unreasonably.

Contact

[31] The only remaining issue involves contact. Inevitably A wants to continue to have contact with her son. The Trust proposal was to stop contact if a freeing order was granted but to allow twice yearly indirect letterbox contact with A (and once yearly indirect letterbox contact with Z). That approach was based on Dr Leddy's report of June 2013 and was endorsed by the Guardian. Subsequently the Trust modified its position. That modification, which is accepted by the Official Solicitor and by the Guardian, is as follows:

> "The Trust are open to the consideration of one annual direct contact post-adoption on condition that the mother positively engages in educative work and guidance around the issue of contact. The issue of contact will be subject to a professionals' meeting prior to finalisation of adoption proceedings."

[32] I record the fact that the Official Solicitor has accepted that compromise wording subject to an undertaking from the Trust that the Trust will alert the Official Solicitor to the initiation of any adoption proceedings and the proposals for contact which are contained in them so as to allow the Official Solicitor a chance to consider the position at that time. In this context it is helpful that the prospective adopters are open to the idea of contact if they are reassured that the work which is

to be done by A has a positive outcome and if A is committed to working with them and the Trust.