

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

Delivered:	<b>19.03.04</b>
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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**FAMILY DIVISION**

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**RE K (APPLICATION TO ADOPT)**

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**GILLEN J**

[1] Nothing in this judgment must be published which would serve to identify the name of the child in this case or any member of her family or the applicants.

[2] This is an application by Mr and Mrs D, a married couple residing in Northern Ireland, to adopt a child K who has been placed with them by an adoption agency pursuant to Article 11 of the Adoption (Northern Ireland) Order 1987. The applicants asked the court to dispense with the agreement of the natural mother of the child on the ground that she is withholding her agreement unreasonably. The child is in the care of the Community Services Trust which I do not propose to identify ("the Trust").

**Background**

[3] The mother of this child ("B") has been troubled by severe mental illness for many years. A consultant psychiatrist, Dr M who is treating her, reported and gave evidence before me to the effect that she first came to psychiatric attention at the age of 23. (She is now 39). She has had a number of admissions to hospital most recently with three admissions in 2002 and two admissions in 2003. She is troubled by daily auditory and visual hallucinations. These interfere with her capacity to function on a day to day basis. At the present time she lives in supported accommodation and according to Dr M it would be in her interests to stay there in the next period. It is possible that she may be able to live independently in the future but only if she has constant support. She is on regular medication and will remain on this medication for the foreseeable future. Her symptoms appear to have been exacerbated by misuse of alcohol and she has attempted self-harm. She

is the mother of three young children namely, T, C and K, born on 20 January 1993 who is the subject of this application.

[4] K was placed with the applicants on 21 October 1994 when she was aged 20 months old. The applicants are her long term foster parents and she has resided with them until this date. She has resided with the applicants on foot of voluntary care arrangement arrived at between the Trust and the respondent mother on the basis that there were concerns in relation to the mother's lifestyle and in particular her mental health wellbeing which has rendered her unable to parent this child and meet her needs.

[5] It is common case that K enjoys a warm and loving relationship with the applicants and enjoys a sibling like relationship with the other children in family. The other children in the family made up of two natural children of the applicants namely B aged 18 and D aged 16. In addition there is A aged 19 who is a former foster child of the applicants and has resided in the family unit for six years, G aged 16 years who is a foster child of the applicants and has resided in the family unit for two years and finally R who is aged 15 years and is a foster child of the applicant and has resided in the family unit for four years.

[6] It has not been possible to trace the whereabouts of the natural father of K. I have already determined in earlier proceedings and repeat today, that all reasonable efforts have been made to trace the whereabouts of the father but to no avail. I have therefore ruled that there be no further steps taken to ascertain his whereabouts. He was an unmarried father whose consent in any event would not have been required to process this adoption. He had not enjoyed any family life whatsoever with the child and has made no attempt to contact her.

[7] It was also common case that the child K had made her views clear that she wished to be adopted by Mr and Mrs D. She wished to be part of the D family and to be known as one of the D sisters. This child has excelled whilst in the care of Mr and Mrs D. She has achieved a grade A in the 11+ examination and intends to commence at a grammar school in the province in the near future. She has also been an excellent athletic excelling at horse riding (where she rides internationally) and at swimming and running. She is clearly a bright intelligent and delightful child who is well able to make her own views clear. The child does continue to have regular meetings with her mother which at the moment occur once per month and she also continues to have regular contact with her half siblings C and T.

[8] Ms O'Hagan, who appeared on behalf of the mother in this case, set out the mother's case very fully and candidly at the beginning of the case. The points she made were as follows:

(a) The mother did not wish to give oral evidence before me but she did put in to the court two letters two pages each in length which poignantly outlined the deep love which she holds for K whilst at the same time recognising that she was not currently able to look after her. I have also read the statements which she put into the court at an earlier stage and she relied on these also.

(b) She recognised that Mr and Mrs D were exemplary foster carers and that the child has thrived whilst in their care.

(c) She did not ask that the child be removed from their care but rather that she should continue to remain with Mr and Mrs D under the aegis of long term foster care or of a residence order. It was her view that adoption was too final a solution and would entail her losing her position as a mother and she did not want this to happen.

(d) She argued that if, as appeared to be everyone's case, the level of contact with the birth mother was to continue at the frequency of once per month, then that level of contact was inconsistent with an adoption order and more consistent with long term foster care. In particular she drew my attention to Re B (Adoption Order) 2001 2 FLR 26, an authority to which I shall return later in this judgment.

(e) Ms O'Hagan relied also on that part of the evidence Dr M where he indicated that if the mother was to lose regular contact with her child it would have a detrimental effect on her mental health. It is the intention of Dr M to introduce some new medication for the mother's mental condition and it is hoped that this will bring about a good improvement albeit the condition will not be completely repaired. In his view if the child was to be adopted and the mother did not consent, that would have some effect on her but not as much a detrimental effect as if contact were to be stopped.

[9] In the course of the evidence, Ms D, a social worker with the Trust in this matter, gave evidence before me. She indicated that K had started to refer to herself as one of the D sisters and was extremely close to the D family. The child was apparently very aware of the court process and had difficulty understanding why her mother was refusing to allow her to be adopted. It was the view of this witness that if the child was not adopted, she was concerned that all the weakness of long term foster care for example the need for a social worker to regularly attend and to approve salient social activities together with a fear of movement of her placement would all serve to undermine this little girl. She described that the situation was very distressing for K and she had great anxiety about her future which the witness felt only adoption could ameliorate. Whilst accepting that her mother had never sought to undermine the placement, and had kept contact with

K, the witness was still minded to the view that the child was showing signs of insecurity. It emerged under cross-examination that initially Mr and Mrs D had been reluctant to adopt the line of adoption in view of the birth mother's reluctance. Having listened to this witness carefully however, I was satisfied that despite the close and informed cross-examination by Miss O'Hagan the Trust had not prevailed upon Mr and Mrs D to change their mind to embrace adoption or that the child had been persuaded that this was an appropriate step. Practical measures such as the needs for this child to obtain permission when going on holiday with Mr and Mrs D, to agree to her participating in horse riding competitions in Scotland were all the kind of intrusive matters that were now impinging on this child's thinking and which served to underline her desire for adoption. Indeed the child had recently gone as far as to ask Ms D whether her placement with Mr and Mrs D might end if she did not get on with her siblings. Although she was reassured that only in exceptional circumstances would the placement end, I think this strongly indicative of the insecurity that this child is currently feeling about her placement. I am satisfied that no undue influence was brought to bear on either the Ds or the child by this social worker or the Trust to embrace the adoption option. In my view it was a natural evolution of the thinking of both Mr and Mrs D and the child that have led to the current desire for adoption. I am satisfied that the mother was involved in the decision-making process throughout and that the child's desire for adoption has emerged in a natural and, in my view, almost inevitable fashion.

[10] The guardian ad litem in this matter reiterated that K not only had strong attachments for Mr and Mrs D but was clear in her own mind that she wished to be adopted. In the early days she had some concerns about adoption but these had all been allayed once she was reassured that she would still see her mother and her relationship with her siblings would be unaffected. In the guardian's opinion adoption would consolidate this child's emotional involvement and attachment to the D family and would validate her personal involvement. She now wants to become as much a part of the D family as is possible. In the guardian's opinion, if adoption was not to be granted, the child was going to be confused, angry and disappointed on an emotional level. In her opinion the child has spent the last few years with adoption very much in the forefront of her mind and any failure at this stage would not only cause her confusion but might engender insecurity. It would also be likely to manifest itself in an anger with her mother which might have a long term detrimental effect on the relationship. In the guardian's opinion a resident order would increase rather than decrease the sense of insecurity so far as K was concerned and long term foster care with a continuation of the status would be inadequate from the child's point of view. The guardian conceded that K was an extremely bright, intelligent and articulate child who had been counselled about adoption over a lengthy period of time to the extent that now they had become extremely important to her and of great significance. She made the pertinent point that one must look at the

situation as it exists now. She has been made aware of the possibility of adoption, has processed those thoughts and has now absolutely embraced the idea. In the guardian's opinion she had become so committed to the notion of adoption that it was now a means of validating her emotional investment with Mr and Mrs D and part of the process of giving her a real sense of security and belonging. In terms adoption was now the appropriate method of consolidating her sense of belonging with D family. In the guardian's opinion any frustration of that desire would cause her long lasting damage and would not make sense to her.

[11] The guardian ad litem dealt fully with an issue that troubled me initially. The proposal by the Trust, and approved by the guardian ad litem, is that if this child is freed for adoption and subsequently adopted, contact would be at the level of once per month ie. 12 times per year between child and birth mother. Ms O'Hagan suggested to this witness that a high level of parental contact post adoption is usually associated with long term foster care and anathema to the concept of adoption. I pause to observe at this stage that the inter-disciplinary structure of the family justice system is increasingly manifest in the cases to come before this court. In a few other areas of law is the diversity of professional contribution so extensive. Hence I found it encouraging to observe in this case an informed exchange between counsel and the guardian ad litem based on recent academic and professional input into the subject of post adoption contact. In particular reference was made to a recent text book by Carol Smith and Janet Logan entitled "After Adoption: Director Contact and Relationship" together with an article by Neil, Beek and Schofield entitled "Thinking about and Managing Contact in Permanent Placements: The Difference and Similarities between Adoptive Parents and Foster Carers" published in Clinical Child Psychology and Psychiatry Volume 8(3) 401-418. I was a common thread in each of these publications that post adoption contact at this level, although occurring, was the exception rather than the rule. However, the guardian ad litem emphasised that one has to look at the particular facts of this case where exceptionally, Mr and Mrs D had made great efforts to maintain good relationships with the birth mother, the child was extremely intelligent and knows both families extremely well, and has been managing this level of contact for a very long time. K was able to accommodate emotionally managing both the birth family and Mr and Mrs D. There was no reason to change this now at a time when the child was so strongly wishing to embrace Mr and Mrs D as her adopted family.

[12] The statutory provisions governing an application for adoption are to be found in the Adoption Order (Northern Ireland) 1987 (hereinafter called "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 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; 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.”

[13] As I have already indicated, this child has made perfectly clear her views that she wishes to be adopted and of course I must take that very strongly into account. In turning Article 9(a), the circumstances are the background matters that I have already averted to in this case. I have come to the conclusion that this child does require the stability and harmony of a home with Mr and Mrs D and their family and that this is the only way to safeguard and promote her welfare. I am mindful of the argument that has been put before me that the high level of post adoption contact militates against adoption ..... for this child. In this context I have considered Re B (Adoption Order) (2001) 2 FLR 26. The facts of that case repay some close attention given its differences from the present instance. In Re B a child had been happily accommodated at his mother’s request with a foster mother. Throughout the child maintained regular contact and an excellent relationship with the father and the father’s family. The father had subsequently applied for a residence order and at that hearing all the parties, with the exception of the local authority, agreed that there should be a residence order to the foster mother buttressed by an Section 91(14) order restraining the father from applying for a residence order without the leave of the court. The father was granted parental responsibility and was to have generous contact under the terms of the residence order. However, the local authority, unhappy with the agreement, encouraged the foster mother to apply for adoption. The judge, after considering the alternatives of continuing the status quo, as recommended by the guardian ad litem and the

psychiatrist instructed by the father, for making an adoption order, as supported by the social worker in the case, came down in favour of the order. In contrast to the present case therefore, the guardian ad litem and the psychiatrist in the case opposed an adoption order and favoured a residence order for the father. In this case everyone with the exception of the mother, favours adoption. Lady Justice Hale said at paragraph 24 page 31:

“It is important, it seems to me, that everyone concerned recognises that there is more than one way of securing legal permanence. One way is adoption. But in a case such as this, there are at least three problems with it. The first is that it takes something away from J. It removes his relationship with his father, his brothers and his father’s family. I pause to observe that this is quite the contrary to the present case where the relationship remain exactly as it is.

Secondly, it is only a viable solution in a case like this if it combined with a contact order. That is something which generally the courts are not willing to impose upon the adoptive parents, although there may be cases where it is entirely appropriate to do so. But, more importantly, it is designed to maintain a level of continuing contact between J and his whole paternal family which calls in question the appropriateness of the wholesale transfer and legal terms which it adopts and brings about.”

In this case of course far from having contact imposed upon the adoptive parents, it is their express wish, as well as that of the child, that contact should be at the level I have described. “Thirdly, and I agree with my Lord that this is most important point, it requires parental agreement”. Parental agreement is of course withheld in this case. It is my view in this case that for the time being the contact is not only at a level which the child wishes, but it has been ongoing in this form for many years now. The time has come now to secure the permanence of the situation and the child’s emotional link with the D family whilst at the same time reserving the link she has with her birth family. I have therefore come to the conclusion that adoption with a high level of contact between child and birth mother would be in the best interests of this child.

[14] Under Article 16 of the 1987 Order, an adoption order shall not be made in the case of each parent of the child unless the court is satisfied that the agreement of the parent should be dispensed with and the ground for doing so in this case is that specified in Article 16(2)(b) namely that the parent is withholding her agreement unreasonably. In such circumstances, the Trust

must satisfy me on the balance of probabilities that the mother is withholding her consent unreasonably. The leading authority on the meaning of the ground and the tests that the court should apply is initially that set out in Re W (1971) 2 AER 49 where Lord Hailsham set out the test as follows:

“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.”

[15] In Re D (an infant) (1977) 1 AER 145, Lord Wilberforce set out the test in this way:

“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 on the child.”

[16] More recent authorities, namely Re C (a minor) (adoption: parental agreement: contact) 1993 2 FLR 260 and Re F (adoption: freeing order) 2000 2 FLR 505 have 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 appears sufficiently strong to justify overriding the views and interests of the objecting parent. I consider that the principles dealing with these applications are set out in their component parts in Re W (supra) and helpfully adverted to in Hershman and McFarlane Section H at paragraph 124. They are as follows:



“(1) The reasonableness of the parents refusal to consent is to be judged at the time of the hearing and I accordingly do that.

(2) I take into account all the circumstances of the case which I have set out.

(3) I recognise that whilst the welfare of the child must be taken into account it is not the sole or necessarily paramount criterion.

(4) I have applied an objective test.”

There is of course a subject development in that the personal circumstances of each parent must be taken into account and the test must then be expressed as whether the reasonable parent with all the characteristics of the objecting parent would consent. I take into account the personal circumstances of this mother but I have come to the conclusion that no such reasonable parent with her characteristics could withhold consent in the circumstances of this case.

[17] Before making a final determination I must also consider the right of this mother to family life under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as contained in the Human Rights Act 1998. Two recent authorities are apposite in considering the impact on a case such as this. K A v Finland (2003) 1 FCR 201 and Kutzner v Germany (2003) 1 FCR 249. These authorities make it clear that the essential object of Article 8 of the Convention is to protect the individual against arbitrary action by public authorities. The mutual enjoyment by parent and child of each others company constitutes a fundamental element of family life. In interference with the right to respect for family life entails a violation of Article 8 unless it was “in accordance with the law”, had an aim or aims that is or are legitimate under Article 8(2) and was necessary in a democratic society for the aforesaid aims. The notion of necessity implies that the interference corresponds to a pressing social need and in particular that it is proportionate to the legitimate aim pursued. The court must look at what additional measures of support can be put into place or what alternatives can be visited which will obviate the need to make an order of such an extreme nature as an adoption. Ms O’Hagan argues that the satisfactory arrangements for the child that are now in place without the benefit of an adoption order indicate that the status quo can continue. It is her submission therefore that any interference of the nature now sought is disproportionate. I have come to the conclusion that the legitimate of securing the best interests of this child renders an adoption order an proportionate response. I have therefore engaged in the balancing exercise and necessary under the European Convention and I have come to the conclusion that the right to a family life under the aegis of adoption with

Mr and Mrs D is both proper and proportionate in the circumstances. Needless to say before coming to this conclusion it will have been clear from my earlier comments that I am satisfied that contact between mother and child should continue at the present level. However this child's need and wishes may change as time progresses and accordingly I do not consider it appropriate to make an order to this effect. It seems to me that the no order principle should apply in this instance and that the flexibility which necessarily attends upon developing needs and wishes of a child at this age is the best option. I therefore make no order other than to indicate my view that it is in interests of this child that contact along the current lines should be preserved as long as possible. She still continues to have contact with other members of her birth family and whilst it may well be that there is a growing gap between the other children and K, contact should be encouraged so long as it concurs with the child's wishes and bests interests.