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Judgment: approved by the Court for handing down | *Delivered:* **21/08/2015**

*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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Between:

WESTERN HEALTH AND SOCIAL SERVICES TRUST

Applicant;

-and-

K AND L

Respondents.

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MAGUIRE J

Introduction

[1] In this case the Trust seeks a Freeing Order under Article 18(1) of the Adoption (Northern Ireland) Order 1987 in respect of two male children, M and N, both of whom were born in 2006. The twin boys are 8 years and 7 months' old at the date of the court's final consideration of the case.

[2] The parents of the children are L, their mother, and K, their father. The parents are not married to each other, but both of their names appear on the children's birth certificates with the consequence that both have parental responsibility.

[3] The Trust's approved care plan for the children is for permanence away from the parents *via* adoption by their dually approved foster carers. The children have lived with these foster carers since July 2012. The parents do not consent to the adoption of the children and hence the issue for the court in these proceedings is whether the parents are unreasonably withholding their consent and whether, if they are, the court should dispense with their consent. Suzanne Simpson QC appeared for the Trust in these proceedings; Mrs Keegan QC and Melanie Rice BL

appeared for L and K; and Grainne Murphy BL appeared for the guardian. The court is very grateful to all counsel for their very helpful written and oral submissions.

The background to the Application

[4] In order to set this application in context it is necessary to set out a basic chronological summary of events with the emphasis being upon recent rather than older occurrences.

[5] The summary is as follows:

(i)	Children born	In 2006
(ii)	Children become subject to an Interim Care Orders - accommodated in foster care	28 November 2006
(iii)	Children return to the care of their parents for the purpose of a residential parenting assessment at Thorndale Family Centre	12 November 2008
(iv)	Children reside with their parents in the community	3 April 2009
(v)	Trust withdraw Care Order applications in order to seek a co-operative way forward with the parents. Court agrees to this despite the opposition of the Guardian ad litem who argued that Care Orders were necessary	22 October 2009
(vi)	Co-operation of parents with Trust fails to materialise	
(vii)	M taken to Erne Hospital with spiral fracture of right arm. Immediate concern over whether injury was a non-accidental injury.	3 March 2011
(viii)	Emergency Protection Orders granted. Both children moved to placement with paternal aunt.	6 March 2011
(ix)	Interim Care Orders granted.	16 March 2011
(x)	Children moved to a further placement with foster carers.	21 March 2011

(xi)	Hearing before Mr Justice Weir in respect of the making of Care Orders ends.	February 2012
(xii)	Judgment of Weir J provided. Care Orders made with a Care Plan for permanence away from the parents *via* adoption.	25 June 2012
(xiii)	Children move to dually approved foster carers where they have remained to date	5 July 2012
(xiv)	Appeal of Weir J's judgment launched by the parents.	1 August 2012
(xv)	Appeal hearing heard.	5 February 2013
(xvi)	Judgment of Court of Appeal dismissing the parents' appeal.	11 September 2013
(xvii)	Matter comes back before High Court in respect of the issue of freeing and contact.	18 September 2013
(xviii)	Beginning of the freeing proceedings.	3 March 2014

[6] The court has no hesitation in considering that the most significant event legally in the above summary was the judgment of Weir J in respect of the Trust's care applications. It is to this the court now turns and it does so bearing in mind that:

(a) Weir J had in October 2009 rejected the guardian's wish to continue with care proceedings in favour of a consensual way forward between the parents and the Trust. This way forward did not, in fact, materialise.

(b) The Court of Appeal upheld the judgment of Weir J when it was challenged by the parents.

[7] Weir J's judgment sets out in some detail the evidence that was before him and his conclusions. His main conclusions were set out at paragraph [32]. They were:

> "(i) That M suffered a spiral type fracture of the right humerus caused by a large force of a twisting type.
>
> (ii) That the fracture could not have been caused by a fall as described by K because the description does not permit of M's hand

having been caught or trapped and his body rotated around it.

(iii) That the account given by K of the circumstances and mechanism of the fracture was incorrect and untruthful and intended by him to deliberately conceal its true aetiology which was non-accidental and involved the deliberate application of a twisting force to the arm by either K or L.

(iv) That L gave a false explanation to the hospital on the instruction of K. L later confirmed having done so in a telephone conversation which was overheard by a nurse. The call was made to K.

(v) That K did speak to Mr Lappin at the hospital following the operation on M and did ask him what he, Mr Lappin, thought had caused the injury.

(vi) That K did give an account to Dr Nelson of the position in which he claimed to have found M following the accident, which was the opposite of the account that he gave to the court. Dr Nelson did make her drawing of the position in his presence and in accordance with K's indication.

(vii) That the children M and N each suffered significant emotional and physical harm at the hands of K and L prior to and continuing at the time of the Trust's intervention and would have been likely to suffer significant continuing harm had it not been for the fact that M's fracture obliged the parents to bring him to hospital and the Trust was then able to intervene.

(viii) That the children's complaints of ill-treatment by their parents were spontaneous and not prompted by social workers, foster carers or the guardian ad litem."

[8] The judge made other findings which are relevant to these proceedings. The court will set these out:

(a) At paragraph 34 the judge indicated that "it is however plain on all the evidence of the social workers, foster carers, GAL, Dr Nelson and Dr Lavery that the children are ill at ease with their parents and, most unusually for children of their age, have vociferously expressed their refusal either to see them or to return to live with them due to the harmful way in which their parents treated them up to the point of the Trust's intervention". The judge was therefore satisfied that if the children were to be returned against their clear will to the care of their parents, with whom their emotional connection seems to have been entirely fractured, they would suffer serious emotional and probably physical harm as a result.

(b) The judge was satisfied that the medical evidence in relation to the fracture and the overwhelming evidence of all the experts pointed clearly to the fact that the children had suffered serious harm while in the care of K and L (paragraph 36).

(c) The judge was particularly impressed by the very detailed and careful report of Dr Lavery, a Consultant Clinical Psychologist, who, the judge remarked, had analysed the case in very great detail and was unswerving in her evidence in relation to the children's need for a settled home away from these parents. The judge entirely accepted this last proposition. Whether it would be possible at any future time to resume any form of contact between the children and their parents would, in the judge's view, depend upon the ability of the parents to acknowledge that they have harmed the children and upon the children's feeling secure in a home away from those parents.

(d) Unless the father (K) was able to accomplish a sea change in his attitude to authority, the judge held that there was little hope of his ever working effectively with social services to improve his relationship with the children and to make contact a worthwhile experience for them. In the judge's judgment, while L remained living with K she would find it impossible to think or act independently of him whether in relation to the children or anything else."

[9] In the course of the parents' appeal to the Court of Appeal they initially raised a wide range of issues (see paragraph 17 of the Court of Appeal's decision) but, following further consideration, these were somewhat narrowed. The Court of Appeal fully considered the factual findings of Weir J and cast no doubt upon them in its judgment. The Court of Appeal did not consider that any of the grounds of appeal raised by the parents had been established: see paragraph [28].

Events since the judgment of Weir J

[10] The court has given careful consideration to the train of events following the judgment of Weir J. The children, as already noted, were placed with their dually approved foster carers ("the carers") on 5 July 2012. They have remained with them since. The plan has been that the home of the carers would be their "forever" home. Both carers and the children appear to be committed to this course.

[11] There has unfortunately been little in the way of change in the position of the parents. Each of the parents remain of the view, notwithstanding Weir J's judgment and the dismissal of their appeal against it by the Court of Appeal, that neither has done anything wrong in terms of the care they provided to the children and that Weir J's findings and comments were unjustified. In short, they are unprepared to make any concession about the standard of their parenting and their position today appears to be the same as their position all along in this case *viz* that the intervention of the social services has been groundless and that they are the victims, as are their children, of a conspiracy in which social workers, the Trusts, and the courts have combined to remove their children from them.

[12] As a consequence of the parents' approach, there appears to be not just no working relationship between the parents and the Trust and its social workers but a situation in which the latter appear to be in fear of the former, especially K. Several social workers gave evidence of their concerns for their personal safety which they consider has been and is imperilled by the behaviour of K. The court is in little doubt that the social workers' concerns are justified. There has been a clear history of threats directed at social workers in this case. Indeed K, at an earlier stage in this litigation, was convicted of using threats to kill against a particular member of the

Trust's staff. As a result of this K was sentenced to a period in custody. In the presence of this conviction, the court has no difficulty in accepting the evidence which has been put before it by social workers that a tactic practised by K is that of seeking to place social workers in fear by noting their details; by recording information about the car they drive and by letting them know he knows the information; by engaging in surveillance and gathering information on them; by being aggressive on the few occasions where there have been meetings between them; and by showing interest in tracking down the whereabouts of the children's' placement. The court was told that physical security measures had to be introduced because of the danger represented by K at, at least, one social service office. When meetings in recent times have taken place, social services, because of their concern about K's presence, have had to ensure a police presence at the venue. While K denies these allegations, the court considers that the social workers' concerns are genuine and are based on reasonable grounds brought about by K's intimidatory approach to those concerned. While K's ire has been directed at particular social workers who have been in the forefront of the Trust's decision making in this case, the court is satisfied that his approach is borne out of his sense of grievance which extends well beyond one or two members of the staff of the Trust. For this reason, in the court's estimation, it is unlikely that the removal of one or two of the key social work staff involved in the case would be likely to bring about any change in the situation. Rather the likelihood, in the court's view, is that K would adopt the same aggressive stance to whosoever are the Trust's staff dealing with the case, as those staff will be regarded as wrongfully maintaining the separation of L and himself from their children. While L did not give evidence before the court, the court believes that as Weir J put it "she would find it impossible to think or act independently of [K]". Indeed there is evidence before the court that she too has behaved reprehensively to social workers.

[13] Since the decision of Weir J it is clear that neither parent has sought to take any action to avail of any services which might serve to assist them, in particular, in relation to gaining direct contact with their children. The reason for this, it seems to the court, is that neither is prepared to accept the premise that there is anything in their parenting which requires attention or which would be improved by assistance. The court is satisfied that the Trust has been willing to provide a programme of work for the parents to do in line with recommendations made in the case by other professionals, but L and K have shown no interest in taking up the offers made for the reason already referred to.

[14] In the period since the judgment there has been no direct contact between L and K and the children. The reason for this appears to the court to be the Trust's view, based on Dr Lavery's report, that contact should not take place until such time as the parents are in a position to acknowledge that they have caused the children harm and, even then, only when there is evidence that the children are secure in their placement. Weir J expressly approved this approach (see paragraph [8] (c) above) but it seems clear that at the present time there is little hope of the parents'

giving any ground or making any concession. Until such occurs, it is difficult to see how direct contact is likely to be feasible.

[15] Likewise, in the period since the judgment there has been little indirect contact between the parents and the children. On one occasion the parents did provide certain items to the Trust as Christmas/Birthday presents for the children but these were viewed as inappropriate and/or likely to unsettle the children in their placement and were not delivered. Later, a letter written by the parents intended for the children was given to the Trust but on consideration of its contents, the Trust decided that providing it to the children might only cause unnecessary anxiety. On 29 November 2013 the parents sent birthday cards for the children which the Trust provided to them. These produced a different reaction from each child. M reacted by throwing the card on the floor, kicking it away and then hiding by the side of the couch curled up in the foetal position. In contrast, N read the card and later sought help from a social worker to reply to it. In his response he said: "I love you lots and miss you so much from [N] to [K] and [L]". N's response was provided to the parents together with a letter from the Trust. The letter urged the parents to engage with Trust staff. However, there was no response from the parents to either communication and there has been no indirect contact with either child by the parents since.

The childrens' progress in the placement

[16] Since 5 July 2012 the children have been placed with dually approved carers. The whereabouts of the placement and the identity of the carers have not been disclosed by the Trust to the parents because of the former's concern that to do so would result in the placement, by one means or another, being destabilised. In view of the extensive history in the case of L and K wanting to pursue complaints about carers and wanting to discover the location of earlier placements, in the court's view, the stance of the Trust is easy to understand, especially as at one stage in the past the court itself had to place an exclusion zone around the area of a previous placement to prevent L and K from interfering with it.

[17] The progress of the children in the placement has been the subject of Looked After Children Reviews. The reports of these have been supplied to the court and to L and K. In addition, multiple reports to the court have been prepared specially for these proceedings. The parents have had access to these as well. The overall picture presented has not been uniform. While initially the placement went smoothly, this proved to be in the nature of a honeymoon period. Thereafter problems have emerged with both children and it is clear that the task of caring for M and N has not been an easy one. Both of the children have, at times, presented with behaviours which have been difficult to manage. Each has presented as highly vigilant and very vulnerable. Both, it is acknowledged, have needed and continue to need support, both at school and at home. The root cause of the children's problems has throughout been identified as being related to the harm each sustained during the period when they were parented by K and L. It is thought that during this period N

was treated preferentially in comparison to M so that while the standard of parenting to both was unacceptable, M suffered more than N. Dealing with the aftermath, not easy in the case of either child, appears therefore to have been more difficult in M's case. Overall the variable nature of the situation is captured well in one of the Trust reports where it is stated that "typical of many children who have experienced physical abuse, emotional trauma and a number of placement moves, they have also displayed at various times and to various degrees challenging behaviours". It is clear, however, that there were periods when the transition to life with the carers progressed well with the development of appropriate daily patterns and routines. Unsurprisingly, the greatest difficulties appear to have arisen when the discipline of the daily timetable dissipated, especially in holiday periods.

[18] Illustrations of the progress of each child are plentiful in the papers. While N was identified as having fewer emotional difficulties he nonetheless was described during the early stages of the placement as lacking confidence and presenting with low self-esteem. He is said to have had difficulty in verbalising his thoughts and feelings, though reference is made to him making progress at school. It is noted that N was prone to engage in testing the commitment of the carers. M, after settling well in the placement, is described as being at times distressed and needing reassurance. His progress at school was not as good as N's, though to assist him he was receiving specialised support in school. M is described as having an overriding need to feel safe. His developmental progress was, it was thought, being hindered by reason of the past abusive parenting he had experienced. He was prone to present with challenging behaviours, especially in the aftermath of any break in routine. In the case of both boys the effect of loss of routine was illustrated by events in the summer of 2013 when the carers took the boys with them on a holiday abroad. This unfortunately proved to be a mistake. The loss of security sustained as a result led to a serious deterioration in the standard of their behaviour. Instead of the holiday helping to cement family life its effect was to disrupt it. On return the behaviour of the children remained challenging with episodes of verbal abuse and hitting out at the carers. This led on to events which will be described later in this judgment under the heading "the referral".

The involvement of Professor Iwaniec

[19] At a very late stage in the proceedings the guardian, in circumstances which will be outlined later in this judgment, obtained the leave of the court to commission a report on the parenting and attachment of the children with their current carers. This assessment was carried out by Professor Iwaniec who has a lengthy experience in child care and child protection work, both from a clinical and research perspective. Subsequent to the receipt of her report, the court convened, at the request of L and K, a further hearing to enable her to be cross examined on it. The methodology used by Professor Iwaniec involved her observing and assessing the interaction of the children at home with their carers; a particular individual session between her and N alone (M did not wish to participate in a similar exercise); and a

series of interviews with professionals, including the guardian herself. In addition she was provided with the main documents in the case.

[20] Professor Ivaniec's report, which is dated 16 December 2014, discloses the following main conclusions:

(a) Both the carers were highly committed, dedicated and eager to learn.

(b) The carers were loving, sensitive and warm to the children, which was evidenced by their easiness in their company and their seeking help from them when upset or hurt.

(c) The carers provided excellent physical care.

(d) The carers were unreservedly committed to meeting all the children's needs.

(e) Each of the children had a good relationship with the carers and each demonstrated strong attachment to them and their wider extended family.

(f) The attachment, however, while strong was still insecure because of a prevailing uncertainty and fear that that they might be moved again to another home. Such feelings of insecurity were deep seated and of long duration. They had been triggered by abusive, neglectful and insensitive parenting provided by K and L.

(g) M's traumatisation was greater than N's because he had been treated worse than his twin brother.

(h) Both children, if freed for adoption, would require considerable help and support and their situation would need to be monitored. In particular, M would require a considerable amount of work with Catherine McKevitt, his post adoption social worker, to address his tormented feelings, regulate emotions and build self-esteem and confidence.

(i) Both children would benefit from attachment work and both require continuing help and support at school.

(j) The carers should be able to seek help and advice from the Trauma Centre in circumstances of difficulty. They should be checked regularly to ensure they are coping and dealing with issues in an appropriate way.

(k) Regardless of where the children reside and regardless of what their legal status is the children were likely to show, from time to time, especially when under stress or pressure some emotional reactions which may be upsetting or disruptive. This is because they are troubled children who bear a deep mark of acute traumatisation. They also have been cared for by five different families, had built relationships with them which were then discontinued and consequently they had to start again.

[21] Professor Iwaniec in her report strongly advanced the view that adoption would overall be in the best interests of the children in this case.

The position of the parties in relation to freeing

The Trust

[22] As the moving party the Trust has maintained consistently throughout these proceedings that the court should free the children for adoption. This is the course, it says, which would be most beneficial to their short, medium and long term interests. It is the course upon which Weir J settled when he granted a care order in respect of each of the children and nothing has changed significantly since. In the Trust's case there could be no return of these children to the parents as it was the parents who had been responsible for their suffering in the past, a suffering that remains with them and will require extensive help and support, if it is to diminish or end. What is needed for the children, above all, the Trust submit, is stability - a "forever" home with adopters who will look after them, come what may, and who will love and support them. These children have been the victims of multiple placements and a chopping and changing which has proved deleterious to their interests. They should, the Trust contend, be kept together.

[23] In particular, the Trust argue that this is not a case for long term fostering. Rather the point had been reached when what is needed is a turning over of the leaf in a legal sense so that the children's status becomes settled and secure and where they will be beyond the arena of legal wrangling which can be a feature of long term foster care.

[24] This is not a case, say the Trust, where there is any sort of viable working relationship between them and the parents as the latter are unable or unwilling to understand the reasons why the Trust had to intervene to protect the children and have borne a grudge against the Trust ever since. If the children were to go into long term foster care it is to be expected that the parents' would be likely to seek to undermine the placement by whatever means are at their disposal.

[25] Finally, the Trust submit that the children themselves do not wish to return to the care of L and K. This, the Trust say, is unsurprising, given the background to this case.

L and K

[26] The position of L and K in this case is clear and uncompromising. It is that they wish the children to be returned to their care, pure and simple. As already noted above, they continue to contest the totality of the Trust case. They believe that there has been nothing wrong with their parenting and there was no basis for the steps which have been taken in this case, in particular the making of care orders.

[27] L and K remain convinced that there is in this case a conspiracy against them on the part of all of the professionals involved. Both Weir J and the Court of Appeal failed to detect it.

[28] They also argue, as will shortly be developed in this judgment, that it is reasonable for them to resist the making of a freeing order as the carers are not suitable persons to care for the boys and the Trust not only were aware of this but took steps to cover up the failures of the carers.

The Guardian ad Litem

[29] The guardian has personally been involved with L and K and with this particular case for many years. She had reported on the case to the court on numerous occasions. In 2009 she resisted unsuccessfully the application by the Trust at that time to discontinue care proceedings in respect of M and N – a position later vindicated by events. Neither L nor K have any contact with the guardian despite the guardian's offers in this regard.

[30] In the guardian's view, the court should be guided by the welfare of the children in this case. In her view their welfare is best served by them being freed for adoption. The guardian therefore strongly supports the Trust's application and endorses the Trust's arguments, as already summarised.

[31] In her most recent report the guardian was anxious to stress the important but simple fact that the children, she says having spoken to them, do not wish to return to the care of L and K. This, she says, is their settled position. In her view, the children identify L and K with threat and punishment and any hint of a return to their care would be damaging for them. Having commissioned the report of Professor Iwaniec, referred to earlier in this judgment, understandably, the guardian relies on the strong support provided in that report in favour of adoption as the preferred long term option in this case.

The Voice of the Child

[32] As has been noted at the outset of this judgment, the children at the centre of this application are now over eight years old. An issue which arose in the course of the proceedings was whether the court should be prepared to meet and offer to them the opportunity to speak to the Judge directly. In order to decide whether this would be appropriate the court canvassed the views of all of the parties at the hearing. L and K were strongly in favour of this course and the Trust and the guardian were also supportive of it. In these circumstances the court decided that the children should be asked by the guardian whether they would wish to meet and speak with the Judge dealing with their case. The answer to this query came back in the affirmative, the children expressing a clear desire to speak with the Judge. In the light of this steps were taken to facilitate such a meeting. However, matters at this point did not go smoothly as the court received a letter from L and K 's solicitor. In this letter it was indicated on their behalf that they now did not wish the Judge to see the children. The reason given for this new position was expressed to be relating to "the manner in which the meeting will be conducted and in particular the professionals who will accompany the children to such meeting". The court took this to be a reference to the fact that it was the guardian who was undertaking the task of bringing the children to see the Judge.

[33] While the court gave consideration the L and K's new position, it decided that the meeting should, nonetheless, go ahead. In the court's view, any other approach would have been likely to disappoint the children who had reportedly indicated no little enthusiasm for it.

[34] In the event the meeting did take place. Because of the concerns expressed by L and K the court decided that only the Judge and a court official should be present when the Judge spoke with the children about the case in May 2015. The guardian, while she brought the children to see the Judge, did not herself attend the meeting between the children and him.

[35] The meeting, in the court's eyes, was helpful. The children were both lively and interested. They had a basic understanding of the proceedings and the issues. Both were unequivocal in stating that their present home was their "forever" home and that they wished to live with their current carers (who they refer to as mummy and daddy) and not with L and K.

[36] Their views on contact with L and K were different with N expressing a willingness to have direct and/or indirect contact with them and M expressing a view against any form of contact. The difference in outlook on this issue may owe something to the factor mentioned above at paragraph [17] *supra.*

[37] The court will take account of the views the children conveyed to the court though they are, of course, just one of a large number of factors in this case which the court must consider.

The Referral

[38] A considerable amount of time was spent at the hearing discussing the above. The referral in question, which described its primary concern as being "emotional abuse", was from the NSPCC to the applicant Trust. It was made on 28 August 2013. The information given in the referral was from an anonymous source. It arose out of a telephone call to the NSPCC's helpline. The contents of the referral referred to three children who, it was alleged, were being verbally and emotionally abused by their foster mother. The three children, it later was established, were M, N and a female adopted child who lived with M and N and their foster carers. The essence of the referral consisted of allegations that the foster mother had a history of shouting at these children but that the shouting had become significantly worse over the preceding 5-6 months. The informant went on to state that the shouting was heard most days and at times was constant. She called them "liars". On occasion the children were said to be very distressed. The crying was "unbelievable". A particular incident, said to have occurred a few days before, was referred to. This involved one of the boys around 7 am standing on the doorstep as punishment wearing just his pyjamas. The informant did not know for how long the child had been there. The allegations contained in the report were directed principally at the female carer. She was accused of not being "emotionally warm" to the children and as being "unpredictable".

[39] The referral was investigated by the Trust's staff who had been dealing with this application *viz* the applicant Trust's Children's Court Team. The police were not involved. Initially a decision was made not to address the referral immediately. This was taken because it was understood that the carers were to attend a family wedding on 29-30 August 2013 and it was considered that the referral was not a "child protection" referral but simply one involving poor parenting. It therefore could be addressed after the wedding. The investigation seems to have involved discussions with the foster carers at their home on 3 September 2013; with other social workers described as "link workers"; with the children themselves; and with the children's school principal. These discussions led to the holding of a multi-agency meeting on 6 September 2013.

[40] The outcome of the investigation confirmed, at least, the broad accuracy of the matters referred to in the call to the NSPCC's helpline. While the female carer took issue with some aspects of the referral (for example, that she had called the children "liars" or the child outside the door incident occurred at the time alleged and when he was dressed only in pyjamas) she did not dispute that she had, on occasions, shouted at the children and the children, on occasions, cried in a high pitched way.

[41] When the matter was discussed at the multi-disciplinary meeting, while there was condemnation of some of the strategies used by the carers in their care of the children, there was also understanding of the difficulty of their task. It was, for example, noted that even before the referral, there had been conversations with the female carer in which she had indicated that she was struggling to cope with the behaviours of the children during the summer period. M and N, it was accepted,

were troubled children and caring for them would test the most able of parents. If the placement was to be sustainable, greater supports for the carers needed to be put in place. In turn the carers had to be committed to engage with the supports which could be made available. Inappropriate strategies deployed by the carers would have to be discontinued. A programme of work for the carers with the Trauma Centre and with Adoption UK and others was to be put in place.

[42] Professor Iwaniec's report, to which reference has already been made, was commissioned in part to consider, in the light of the measures put in place in the period after the referral, the carers' capacity to meet the needs of the children. Its broad conclusions have already been referred to at paragraph [20] above. In the context of the referral, Professor Iwaniec in her interview with the carers sets out that the carers had first become involved with M and N when they were six months old. At this time they established a strong bond with them. The carers were, however, devastated when the children were taken away from them to attend the parenting assessment with L and K at Thorndale Family Centre. They grieved at their loss. However, after a considerable period of time (*circa* 3 years) the carers were approached by the Trust to look after the boys again. They agreed to do this but when the children arrived back with them they were shocked on seeing their state. They described the children as being unhappy, stressed and frightened. Both presented as insecure and afraid that K and L might come and take them away. It is at this time that the difficulties of managing the children became more evident. The female carer in particular found herself under pressure and struggling to cope. M was particularly difficult to manage and there appear to have been numerous confrontations between the children (and the carers' adopted daughter) and them. Professor Iwaniec identified the children's behaviour as concerned with their feelings of insecurity born of the many changes in their lives and of neglectful and insensitive parenting in the past. When they returned to the carers' care they remained distrustful because they had been let down before and hence they engaged in testing the carers' availability to them. In her view, the carers, in turn, had made assumptions that they could cope but these were to be falsified by events. The referral, therefore, brought matters to a head and, in Professor Iwaniec's view, acted as a catalyst for positive changes which were brought forward in its aftermath. As already noted when discussing the broad conclusions of her report, it is clear that she was of the view that the relationship between these carers and the children is sound though there is a need for continuing support both for the carers and the children. In respect of the carers, it is clear that arrangements have been in place to ensure that they have access to advice and assistance to help them manage the children in their care. A psychotherapist has developed strategies and techniques in this regard. They continue to have access to the Trauma Centre and the support being offered to them will continue into the longer term. The court has already noted measures of on-going assistance for the children. Away from the school environment much of the support is being delivered by a specialist adoption social worker who has worked extensively with N. In respect of M, in the social worker's opinion, there is also a need for work but it is necessary to proceed slowly. He may require, she says, a sensory integration programme as his sensory system is over-alert. In

evidence to the court, the adoption social worker was of the clear view that the referral had brought to the fore the need for on-going support for the carers. However, she was optimistic and was of the firm view that the carers were meeting the children's needs to a high standard with the consequence that there was a growing sense of emotional security developing between the children and them.

Criticism of how the referral was handled

[43] Significant criticisms were made at the hearing on behalf of L and K about how the Trust handled the referral issue. The criticisms fall into two categories: procedural and substantive. As regards the procedure used by the Trust the parents have argued that the Trust failed to tell them about the referral at the time or at any time prior to the matter being exposed through cross-examination in court in the course of the hearing. As regards the substance, the parents' view is that the Trust failed properly to investigate the referral and adopted an approach to it which lacked rigour and which simply favoured the continuation of existing relationships.

[44] The court has no difficulty in accepting that prior to the hearing before it the parents were not sufficiently notified of the circumstances which gave rise to and surrounded the referral and its investigation. The following appears to the court to be established:

(a) The parents were not informed about the referral by the Trust at all at the time when it was made and was being investigated.

(b) The first sign of it from the parents' point of view was when they received the papers for a Looked After Children Review which was to be held in October 2013. In the papers for this meeting there was a passing reference to a referral being received on 28 August 2013. It was said to further evidence "the challenges of managing three children with emotionally complex needs". The papers then referred to there being frank discussions with the carers about the reality and about associated challenges they were facing. The need for intensive support for the carers is then noted.

(c) When the meeting associated with the LAC Review took place there appears to have been no step taken to go into any of these matters. While the parents attended the meeting, which took place on 11 October 2013, the minutes show that the parents were unwilling to have a senior social worker in the Trust, dealing with the case, present. This social worker therefore left the meeting. While some discussion then took place with the chairman of the meeting and the parents about the children this did not encompass the referral. The parents themselves did not raise it.

(d) In the context of the papers compiled in connection with this freeing application, the issue of the referral is mentioned in a report compiled by a senior social worker dated 22 January 2014. This referred, under the heading

"Progress in Placement", to the receipt by the Trust of a referral on 28 August 2013. This was said to be further evidence the challenges and struggles the carers were facing in managing the children's behaviours. The need for support for the carers is then referred to.

(e) In the discovery made by the Trust in the context of these proceedings it is now clear that a substantial volume of material was not disclosed, though this was later rectified in the course of the hearing.

[45] None of the above, the court regrets having to say, properly brought to the parents' attention the true nature of the referral. At the same time, however, it cannot be said that the Trust covered the whole matter up. If that had been the Trust's intention one might have expected no reference at all in Trust documents to the referral. Such references as there were, on any view, fell a long way short of the basic requirements of transparency which ought to apply in a matter of this kind, a point which was accepted by the Trust at the hearing, but only after the matter had been raised in cross-examination of a witness of the Trust by counsel for the parents. In that witness's evidence in chief she had not mentioned the referral. Thus the matter only came into the open by reason of the diligence of counsel when cross-examining to probe what the reference to a referral was all about. The court is left to ask: why was this issue not given the prominence it deserved? The answer to this question cannot be provided with total confidence but it seems to the court that a number of factors brought about this situation, including a desire on the part of the Trust not to do anything which might undermine its proposal for an adoptive solution in this case and a fear on the part of some of the social workers of the parents' reaction to the revelation of such information.

[46] Counsel for the parents was also critical of the substantive investigation which was carried out in this case in respect of the matters raised by the referral. In her submission, the referral did raise issues of child protection, contrary to the Trust's view that it only raised questions of poor parenting. Consequently, the investigation which was carried out failed properly to define the issues under investigation and failed to confront the reality of the situation.

[47] The court is unable to endorse the approach of the Trust to the investigation as being one concerned only with poor parenting. The allegations which had been made were serious ones which, in the court's view, merited immediate investigation with the primary objective of ensuring that the children were safe from harm. In the court's view it must be doubtful that the right persons to carry out this investigation were the Court Children's Team involved in these proceedings. This team will inevitably have had a bias towards maintaining the *status quo*.

[48] Whether or not any of the criticisms addressed at the way the referral or investigation were handled by the Trust affects the court's view of the outcome of this application is a matter the court will consider later.

The legal position in relation to freeing orders

[49] Before considering the relevant provisions of the adoption legislation in Northern Ireland, it is both convenient and appropriate for the court to refer to the nature of a freeing order. Any judge dealing with such an order should bear in mind that its object is to extinguish parental responsibility of the natural parents in respect of their child or children as a prelude to adoption. The effect of making an order is to terminate virtually all of the rights of the natural parents in respect of the child or children and their upbringing. Consequently, freeing orders have rightly been described as "draconian in nature" per Lord Carswell in Down and Lisburn Trust and Another [2006] UKHL 36 at paragraph [45].

[50] Freeing orders, self-evidently, also are interferences with the Article 8 rights of a parent to have his or her right to family life respected. This has been recognised by the Strasbourg court, for example, in the Northern Ireland freeing order case of R and H v United Kingdom (2012) 54 EHRR 2. In that case the court held that such orders call for strict scrutiny. As the court put it at paragraph [81]:

> "…measures which deprive biological parents of [their] parental responsibilities and authorise adoption should only be applied in exceptional circumstances and can only be justified if they are motivated by an overriding requirement pertaining to the child's best interests".

[51] Usually there will be no difficulty in establishing that freeing orders are in accordance with law and serve a legitimate aim (usually the protection of the child) but such orders will also have to be necessary in a democratic society and proportionate. This means that an individual order must strike a fair balance between the competing interests. In short, there must be relevant and sufficient reasons of the making of the order: *ibid* at [72] and [89].

[52] The relevant provisions of the Adoption (Northern Ireland) Order 1987 are as follows:

> "**Welfare of children**
>
> Duty to promote welfare of child
>
> 9. 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."

Parental agreement

16.—(1) An adoption order shall not be made unless—

(a) the child is free for adoption by virtue of an order made in Northern Ireland under Article 17(1) or 18(1), made in England and Wales under section 18 of the Adoption Act 1976 (freeing children for adoption in England and Wales) or made in Scotland under section 18 of the Adoption (Scotland) Act 1978 (freeing children for adoption in Scotland); or

(b) in the case of each parent or guardian of the child the court is satisfied that—

(i) he freely, and with full understanding of what is involved, agrees—

(aa) either generally in respect of the adoption of the child or only in respect of the 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; or

(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—

(a) cannot be found or is incapable of giving agreement;

(b) is withholding his agreement unreasonably;

(c) has persistently failed without reasonable cause to discharge his parental responsibility for duties the child;

(d) has abandoned or neglected the child;

(e) has persistently ill-treated the child;

(f) has seriously ill-treated the child (subject to paragraph (4)).

Freeing child for adoption without parental agreement

18.—(1) Where, on an application by an adoption agency, an authorised court is satisfied in the case of each parent or guardian of a child that his agreement to the making of an adoption order should be dispensed with on a ground specified in Article 16(2) the court shall make an order declaring the child free for adoption.

(2) No application shall be made under paragraph (1) unless—

(a) the child is in the care of the adoption agency; and

(b) the child is already placed for adoption or the court is satisfied that it is likely that the child will be placed for adoption."

[53] Of particular importance to this appeal are two issues which arise from the above provisions *viz*:

(i) Is the court satisfied that adoption will be in the interests of the children?

(ii) Are the parents withholding their agreement to adoption unreasonably?

[54] A substantial volume of jurisprudence has grown up in respect of issue (ii) above. In Re W (An Infant) [1971] 2 AER 49 Lord Hailsham when considering the test of unreasonableness said:

> "The test is reasonableness and nothing else. It is not culpability. It is not indifference. It is not failure to discharge parental duties. It is reasonableness and reasonableness in the context of the totality of the circumstances. But although welfare *per se* is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent must take it into account. It is decisive in those cases where a reasonable parent must so regard it."

[55] In Northern Ireland Gillen J (as he then was) in the case of In Re C (Freeing for Adoption Contact) [2002] NI Fam. 1 has expanded on the appropriate test in this context. He states:

> "In Re C (A Minor) (Adoption: Parental Agreement: Contact) [1993] 2 FLR 260 the court suggested that the test may be approached by the judge asking himself whether, having regard to the evidence in 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".

[56] Finally in this jurisdiction Morgan LCJ has recently considered the matter in In the Matter of TM and RM (Freeing Order) [2010] NI Fam. 23. He notes at paragraph [6] that the leading authorities on the test the court should apply are Re

W (An Infant), Re C (A Minor) and Down and Lisburn Trust v H & R which expressly approved the test proposed at Lord Steyn and Hoffmann in Re C which he then set out as follows (citations omitted):

> "… 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 that 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. She was also to be endowed with the intelligence and altruism needed to appreciate, if such were the case, that her child's welfare would be so much better served by adoption that her own maternal feelings should take second place. 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 characteristics of the notional reasonable parent have been expounded on many occasions: see for example Lord Wilberforce in Re D (Adoption: Parents Consent) ('endowed with a mind and temperament capable of making reasonable decisions'). 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 (An Infant) …
>
> > '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

> 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."

The Convention

[57] Recently the Supreme Court has had the opportunity to consider the requirements of the Convention in the case of a stranger adoption in the case of Re B (A Child) [2013] UKSC 33. Of particular importance is what the court had to say about when such an adoption will be proportionate for the purpose of justifying interference with the Article 8 rights involved. Such interference in general had to be necessary (this court's emphasis) to satisfy Article 8. At paragraph [34] Lord Wilson indicated that a high degree of justification was required before an adoption order could be made. Lord Neuberger at paragraphs [76]-[78] said that adoption must be necessary and that nothing else would do. Lord Kerr chose the language of the need for there to be a high degree of justification before an adoption order could be made (see paragraph [130]), whereas Lord Clarke said that only in the case of necessity would an adoption order be proportionate (see paragraph [135]). Finally, Lady Hale's view, like that of Lord Neuberger, was that an adoption order should only be made where nothing else will do (see paragraph [198]).

Assessment

[58] It is appropriate for the Court to consider the issues in sequence (see; R1 (Court Order: Freeing without Parental Consent) [2002] NI Fam 25 per Gillen J (as he then was). First the court will consider the issue of whether adoption in this case is in the best interests of M and N. Second, the court will consider whether it has been established by the Trust that L and K are withholding their consent to adoption unreasonably. Finally, the court will consider whether in the particular circumstances of this case adoption is a proportionate measure, bearing in mind the tests set by the Supreme Court in Re B (A Child) referred to above.

Is adoption in the best interests of the children?

[59] In the court's view, there is abundant evidence in this case to support the conclusion, which is that which the court arrives at, that adoption is indeed in the best interests of the children. The court has reached this conclusion for the following main reasons:

(i) Firstly, taking account of the children's own views, the court is satisfied that the children themselves are (and each individually is) in favour of living permanently away from L and K in what they identify as their "forever" home with their current carers. While the court bears in mind the age of the children in determining the weight which should be given to their views, it is in no doubt that the children do not want to return to live with L and K and do wish to have the certainty of knowing where for the future they will be living and with whom. They cry out for stability and permanence in lives which unhappily to date have been characterised by instability, uncertainty and impermanence. In the court's estimation adoption is the step which is clearly supported by the children in this case.

(ii) Secondly, the court is of the view that adoption is the natural extension of the logic of this long running litigation to date. It is consistent with the outcome of the proceedings before Weir J and with the clear evidence which was before him, especially that of Dr Lavery. It is unnecessary to replicate here the summary of Weir J's judgment which the court has set out above (see paragraphs [7] and [8] above). But it is impossible to ignore Weir J's clear and powerful rejection of L and K's case that the children's future should be living with them. That option was rejected then and this court also rejects it, notwithstanding that L and K have argued in this court for the return of the children to their care now. It must not be forgotten that Weir J held that both children had suffered significant emotional harm at the hands of L and K and that this harm would have continued had it not been for the Trust's intervention. He held that a return of the children to L and K would mean that the children would suffer serious emotional and, probably, physical harm. In this context this court has no hesitation in concluding that in the intervening period nothing of significance has changed which casts doubt on the applicability of Weir J's conclusions to the current situation. The reality, which this court is bound to take into account, is that there has been no change of substance in the attitudes and posture of L and K since Weir J's judgment, which they continue to maintain is wrong and without merit. Consequently, they have been unprepared to acknowledge any case for change or any need to work with the Trust or other professionals to improve their parenting or to assist them in their quest for contact with or responsibility for their children. In short, L and K's stance that there has been and is nothing wrong with their parenting, a position unsustainable on the basis of the evidence before the court, is a fixed and settled one unrelentingly

pursued by them over a period of many years now. In the court's estimation there is no reason to believe that it is a position which will change. A return of the children to the care of L and K, the court judges, would not be in M and N's best interests and is not a viable option at this time.

(iii) The court accepts the evidence of Professor Iwaniec which has been, in its essentials, summarised above at paragraphs [20] and [21]. Her report strongly concluded that adoption would be in the best interests of the children.

(iv) Legally adoption best fits with the need for the children to be able to enjoy the benefits of stability and certainty for the future. In effect, the children's new parents will not have to share parental responsibility with anyone else and will be committing themselves to their role permanently. The benefits of family life will be available in the short, medium and longer terms and the ability of others to interfere with it will, at the same time, be substantially curtailed. Adoption will create a new legal landscape and will be likely best to promote continuity of care and a measure of security for the boys which has been lacking in the past. In turn, these factors should be able to create and foster the most propitious circumstances in which the children may effect a recovery from their disrupted attachments and from the abuse and neglect they suffered while in the care of L and K.

(v) Fifthly, compared with other options, the court is firmly of the view that the balance of advantage falls on the side of adoption. As indicated above, return of the children to the care of L and K is not a feasible option. There is, moreover, no kinship option which has been identified in this case. While the option of long term foster care is available, it does not bring with it, at least to the same degree, the advantages of adoption, particularly those related to legal certainty, permanence and security. In this particular case long term fostering as a way of maintaining relationships with the natural parents and of avoiding shutting doors permanently has very limited appeal given the fixed outlook of L and K and the need to maintain and enhance the children's prospects of reconstructing their attachments and of putting the past behind them. The prospect of M and N taking their place as a permanent part of an adopted family to which each belongs seems to the court to be the better option of those available.

(vi) Finally, the court does not view the events described in paragraphs [38]- [42] above under the heading "the referral" as of such gravity as to negate the conclusion as to the children's best interests it has arrived at. The management of these damaged children, in the court's estimation, was never going to be easy and with the assistance of

> hindsight the presence of impediments to a smooth progress were only to be expected. While the episode giving rise to the referral can be viewed as a serious one, it must be kept in perspective and viewed in its proper context. In the court's view, Professor Iwaniec's analysis, summarised at paragraph [42] above is a helpful one, which the court accepts. In effect the matters giving rise to the referral brought into the open the pressures the carers, particularly the female carer, were under, as well as those which underlay the children's insecurities, and have served as a catalyst for positive change, which has been effected. To conclude that the events lying behind the referral should seriously undermine, or negate, the otherwise strong case for adoption of the children by the carers, the court considers, would be a reaction out of proportion to the events.

Is the consent of L and K to adoption being withheld unreasonably?

[60] In considering this issue the court must stand back and look objectively at the course of events which have led to the Trust's application and to these proceedings. It must have regard to the totality of those events. It must take into account the twists and turns of the long road of litigation which has characterised this case. The court must accept that L and K are entitled to have their views respected, provided that they are acting reasonably. In assessing L and K's views, the welfare of the children will, no doubt, be a significant consideration but it is not the sole or paramount criterion: see paragraph [19] of Gillen J's judgment in R1 *supra.*

[61] The court has concluded, applying the test of reasonableness and nothing else, that L and K in this case are withholding their consent unreasonably. Their opposition is outside the band of reasonable responses which might be adopted in a case of this sort.

[62] At its core, the reason for the court's conclusion is that both L and K have consistently failed to engage with the reality of the events in respect of their children for a prolonged and sustained period. L and K, faced with mounting concerns about their children on the part of the Trust and its social workers, the guardian, and professionals such as Dr Lavery and Professor Iwaniec, have chosen to bury their heads in the sand and ignore the growing volume of evidence which has been assembled demonstrating the harm which has resulted to the children from the poor parenting they provided to them. When that concern crystallised in the judgment of Weir J, L and K chose to disregard it. When the judgment of Weir J was upheld in the Court of Appeal their stance did not change. When offered assistance by the Trust as a prelude to their being able to develop their relationships with their children, their response unflinchingly has been to reject it. In the way they have addressed these proceedings and participated in them, they have evidenced only their sense of grievance and their bitterness to social workers in particular. The unavoidable conclusion is that by reason of their own self-imposed inability to take

into account relevant matters they have put themselves far beyond the band of reasonable decision makers.

[63] Before dispensing with the consent of L and K the court must acknowledge that L and K have argued that the court should not treat them as withholding their consent unreasonably because they, it is said, have a justifiable sense of grievance "regarding the actions of the Trust and the proposed adoptive parents" (written submission). It is asserted that this sense of grievance arose from revelations in court exposed as a result of cross examination of Trust witnesses in respect of the NSPCC referral. The court has already in this judgment explained how this issue arose and how the Trust dealt with it. It has recorded the criticisms made of the Trust (and to a lesser extent of the guardian) by L and K and has offered its view about them. L and K now say that "the manner in which the evidence was hidden … gives the parents a justifiable sense of grievance which means that their consent should not be dispensed with" (*ibid*). The court has given careful consideration to this submission but has concluded that it should not accept it, even though it has already accepted that significant criticisms properly have been directed at the way the Trust handled the matter.

[64] The court's reasoning on this point is as follows:

(i) As is clear from discussions earlier in this judgment, the oppositional position of L and K to the Trust's plans has long been established and has not altered over time. Even if there had been no referral, their stance in respect of the Trust application for a freeing order would have been one of total resistance. The court is therefore not dealing with a situation where, on a true analysis, it can be said that L and K's withholding of consent for adoption of M and N is the product of the way the Trust or others handled the referral.

(ii) Nonetheless the court considers that it should be prepared to assess L and K's stance in respect of the referral on its merits. This involves taking into account and examining whether on a freestanding basis L and K's position leads to the conclusion that in refusing their consent they are acting reasonably and so should not have their consent dispensed with.

(iii) In its assessment it is inevitable that the court must have regard to the question whether, notwithstanding all that has occurred in the context of the referral, the best interests of the children are best served by adoption. In respect of that issue the court has already reached the conclusion (set out at paragraph [59] (vi) above) that adoption is in the children's best interests.

(iv) A reasonable parent, in the court's view, in considering the issue would have to bear in mind the overall context and not over-react or

act disproportionately. Such a parent would treat the outcome for the children as the most important factor and would not allow any sense of grievance to cloud their judgment in this regard.

(v) The court does not believe that L and K have approached the matter in the way described above. In the court's view, there is no sign that they have in any way engaged with the issue of what best serves the interests of M and N in this context, notwithstanding the events under discussion. They have not sought to draw any distinction between how best to secure those interests, on the one hand, and their sense of grievance, both historic and in respect of how the Trust have dealt with them in the context of the referral issue, on the other. The latter factor, in the court's view, is so strong that L and K have been unable to see beyond it. That was true before the specific issue of the referral came along and it has been true since.

(vi) No rounded assessment of the situation of the children now, so far as the court can see, has been made by L and K. This is so despite the passage of a substantial period since the referral occurred; despite the fact particular measures have been taken to assist both the foster carers and the children in the light of the difficulties which had occurred; and despite the rectification of the Trust's failure to disclose relevant material for the purpose of this hearing.

(vii) In the court's view, a reasonable parent would have weighed carefully in the balance the welfare of M and N together with all other relevant factors, including those related to the referral, in making their decision to grant or withhold their consent to the Trust's application. L and K have not done this. If they had done it, the court is of the view that this would have led them to conclude that, all things considered, the case for adoption is so strong and the advantages of adoption so much greater than the disadvantages, that it would be outside the range of reasonable responses not to support it.

Is adoption proportionate in the circumstances of this case?

[65] The tests to be applied in this area of the case have already been set out at paragraph [57] *supra.* They have, it seems to the court, been deliberately pitched high because it is accepted that to deprive natural parents of parental responsibility is a step of the greatest significance which can only be taken when there are overriding requirements pertaining to the child's best interests.

[66] However it is clear that there will be cases where adoption will be proportionate, even though such cases may be exceptional. The Strasbourg court has recognised this in many judgments. In RH v United Kingdom (*supra*) the position was explained realistically by the Strasbourg court as follows:

> "88. … it is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that she be placed permanently in a new family. Article 8 does not require that domestic authorities make endless attempts at family reunification; it only requires that they take all necessary steps that can 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 a child was originally taken into public care, the interest 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...".

It is the court's view that the above has a resonance in the present case.

[67] In the present case, as the preceding paragraphs of this judgment have sought to make clear, the options available for the future care of M and N are limited. The court has already explained why it is of the view that reunification with L and K is not a viable option in this case. It has explained that a kinship option is also not available. The court's reasons for believing that adoption is a better option than long term foster care have also been set out. What is needed, it seems to the court, is a permanent and stable arrangement which will be secure into the future. This can, the court believes, be best achieved by adoption even though, it must be acknowledged, this will be at the expense of the natural parents. But their position must be set against the chronology of this case as a whole. The children have been cared for by L and K for only a limited period of their lives, though there is clear evidence that they sustained significant harm during that period. This is, moreover, a case where attempts have been made at family reunification. However the attempts made have unfortunately been unsuccessful. Equally help has been offered to L and K by the Trust but the evidence is that such assistance, particularly latterly, has been spurned. The court is left to conclude that this is a case where adoption is necessary and that nothing else will do. A freeing order is therefore appropriate and the court judges that such an order passes the tests set by the Supreme Court in the area of proportionality.

Freestanding breaches of Articles 6 and 8 of the Convention

[68] L and K, in connection with the manner in which the referral (discussed at length above) was dealt with, have sought to make the case that the failures of the Trust to disclose to them in advance of the hearing what had occurred amount to a breaches of their human rights under Article 6 and 8 of the European Convention of Human Rights. As has already been noted by the court, there are legitimate

criticisms which can be made of the way the Trust dealt with the matter (see paragraphs [43]-[48] *supra)* though it is also right to record that in the aftermath of the situation being exposed in court, the Trust acted appropriately in adjourning the proceedings and later providing extensive further discovery. They also apologised for what had occurred.

[69] It seems to the court that the question it must ask itself in seeking to determine whether these matters give rise to a breach or breaches of the articles referred to is whether looking at the matter as a whole and in its proper context such a finding is appropriate. In particular, the court should keep in mind that not every deficiency in the way in which a public authority behaves necessarily should be viewed as a breach of Article 6, where the context is litigation, or Article 8, where the context is that of respect for family life.

[70] In respect of the alleged breach of Article 6, the court must decide whether the proceedings before it were fair viewed in their totality: see Mantovanelli v France (1997) 24 EHRR 370 at paragraph 34 and Shenk v Switzerland (1988) 13 EHRR 242 at paragraph 46.

[71] Applying the test above, the court is of the view that there has been no breach of Article 6 in this case. The court is satisfied that when the proceedings are viewed as a whole and when regard is had to the steps taken to remedy the deficiencies which were exposed in relation to the way the Trust managed the matter, the proceedings viewed overall were not unfair.

[72] The court applies the same approach to the alleged breach of Article 8 but similarly concludes that when the matter is addressed in its due context and as a whole no breach of Article 8 has been established.

Contact

[73] Given the opposition of L and K to the Trust's involvement with their children, their unwillingness to acknowledge any deficit in the standard of their parenting and their aggression to social work and other Trust staff, the issue of contact in this case has for long been a fraught one. In fact there has been no direct contact between the children and L and K for a considerable period of time (since 2011) and there has only been very limited indirect contact. Weir J in his judgment of 25 June 2012 was of the clear view that contact between L and K and the children depended on the willingness of L and K to acknowledge that they had harmed the children and upon the children feeling secure in a home away from L and K. Since that judgment L and K have, disappointingly, demonstrated no willingness on their part to provide the acknowledgment sought by Weir J and, despite offers by the Trust to seek to assist them in this regard, there has been no progress made in this area.

[74] At this time the Trust's view is that contact would undermine the children's sense of security and safety in their placement and that a fundamental change in outlook on the part of L and K would be required to change the dynamics of the situation. Without any acceptance by L and K of the placement and the reasons for it and of the plan for adoption and without attitudinal change away from their long expressed hostility to Trust staff, the Trust considers that contact would be likely to be damaging for M and N.

[75] The guardian is of the same view as the Trust. She argues that the past experiences of M and N in the area of contact have been difficult and upsetting, particularly in the case of M, but also, though perhaps to a lesser degree, with N. The guardian notes that there was a differential response as between the children in respect of contact with L and K, as evidenced by the incident described at paragraph [15] *supra*. This, she believes, is a reflection of more favourable parenting by L and K of N as compared with M. In her view, in the context of contact, especially indirect contact, the children should be treated equally as to do otherwise might reinforce patterns of preferential parenting which had been practised by L and K.

[76] As noted above (at paragraph [36]) different views were expressed by the children to the court in respect of the issue of contact, with M being opposed to any form of contact but N expressing a willing to engage in contact with L and K.

[77] L and K are anxious to have contact with the children though, as noted above, they have not been prepared to address Weir J's or the Trust's requirements in this area.

[78] In the court's assessment, there is no sufficient basis at this time for the establishment of contact arrangements and the court makes no order in this area. The court accepts the concerns which have been expressed by the Trust and the guardian. There is a real risk that contact would, at this time, be counter-productive and rather than advance would set back the smooth development of arrangements which are designed best to serve the children's interests. In particular, the court is of the opinion that the approach of Weir J should continue to be adopted. While the evidence before the court suggests that each child has his individual view on the issue of contact, the court is not attracted by any proposal now to put in place separate arrangements in respect of contact for each child. The children are both at an age where to create or reinforce distinctions between them would, in the court's estimation, be highly undesirable.

Conclusion

[79] The court will make the freeing order sought by the Trust in respect of each of the children.