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<i>Judgment: approved by the Court for handing down (subject to editorial corrections)*</i>	Delivered: 18/02/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

—————
AN AUNT

Applicant

-v-

A MOTHER

-and-

A FATHER

Respondents

**IN THE MATTER OF RT and SU
(A MALE CHILD AGED 7 YEARS AND 9 MONTHS AND A FEMALE CHILD
AGED 5 YEARS AND 9 MONTHS)**

—————
Ms M Smyth QC and Ms G Brady BL (instructed by Joseph F McCollum & Co solicitors)
for the Aunt

Ms M Connolly QC and Ms W Davidson BL (instructed by McCann & McCann solicitors)
for the Mother

Mr A Magee QC and Mr P McGuinness BL (instructed by Thompson Crooks solicitors)
for the Father
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McFARLAND J

Introduction

[1] This is an application by an Aunt for adoption orders in relation to her nephew who is 7 years and 9 months and her niece who is aged 5 years and 9 months. The parents are objecting, and the Mother is refusing to give her agreement. As there has never been a care order in place for either child, the Trust is

not a party to the proceedings, however it has provided reports on each child in accordance with its obligations under the Adoption (NI) Order 1987 (“the 1987 Order”). A guardian ad litem (“the GAL”) was appointed to represent the interests of the children and has provided two reports. She did not seek legal representation.

[2] This judgment has been anonymised to protect the identity of the children. I have used the cipher RT for the name of the nephew and SU for the name of the niece. These are not their initials and have been chosen randomly. Nothing can be published that would identify either child, without leave of the court.

Background

[3] RT and SU are the children of the Mother and the Father, who are an unmarried couple. They met about 10 years ago and have maintained their relationship since. There is one younger full-sibling who is now 4 years and 2 months. A Trust obtained a care order for that child, it was freed for adoption and has now been adopted into a ‘stranger’ placement. During the freeing application the Mother refused to give her agreement and the agreement was dispensed with by the court.

[4] The Father is not named on either birth certificate so does not hold parental responsibility for RT or for SU. As a child he was the subject of an emergency protection order in 2002 and was in foster care under the provisions of a care order.

[5] The Mother was herself the subject of social services intervention and was placed as a baby with the Aunt’s mother before formal adoption into that family in 2001. There is a 20 year age difference between the Aunt and the Mother.

[6] Due to concerns on the part of social services, after RT was born, the Mother, then aged 18 years, agreed to reside with her adoptive sister the Aunt, from May 2014. Their relationship at the time did not appear to have been particularly strong and it did not improve after they started living under the same roof. At the beginning of 2015 their mother died thus adding to the emotional burden on both the Aunt and the Mother. There was a deterioration in the Mother’s presentation with her spending more time away from the Aunt’s home. Concerns arose about misuse of drugs and alcohol. The Aunt, in an effort to secure RT’s wellbeing applied for and was granted a Residence Order in November 2015, although the Mother had ceased living with the Aunt and RS from as early as April 2015.

[7] SU was then born in May 2016, and was immediately placed with the Aunt. Attempts to habilitate SU into the Mother’s care proved to be unsuccessful. A residence order was made in favour of the Aunt in December 2016.

[8] Contact between both of the parents and the children has been virtually non-existent. The Father never availed of contact. The Mother had intermittent contact but this ceased with the last contact being in December 2016. The Mother did seek contact in 2019 and by court order she was granted indirect contact in

January 2020, but she has never availed of this form of contact, save for a Christmas present and card sent in 2021, during the currency of these proceedings.

The 1987 Order

[9] The relevant articles in the 1987 Order are as follows:

“Article 9:

In deciding on any course of action in relation to the adoption of a child, a court ... shall regard the welfare of the child as the most important consideration and shall –

(a) have regard to all the circumstances, full consideration being given to –

(i) the need to be satisfied that adoption, or adoption by a particular person or persons, will be in the best interests of the child; and

(ii) the need to safeguard and promote the welfare of the child throughout his childhood; and

(iii) the importance of providing the child with a stable and harmonious home; and

(b) so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.

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

...

(b) in the case of each parent ... of the child the court is satisfied that –

(i) he freely, and with full understanding of what is involved, agrees ... ; 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 –

...

(c) is withholding his agreement unreasonably;”

No issue is taken that the other relevant provisions of the 1987 Order have been complied with. These include Article 13 (the children having lived with the Aunt for the requisite period), Article 15 (adoption by a single person) and Article 22 (service of notification). It is not necessary to set out these provisions.

[11] This court in *Re FD* [2021] NIFam 18 set out the law as it applies to what would be described as kinship adoptions. At paragraph [19] the law was summarised in the following terms:

“In summary, although the statutory provisions apply to all types of adoption, the approach directed by the Supreme Court in Re B that adoption is only necessary when ‘nothing else will do’ primarily relates to ‘stranger’ adoptions. In family member adoptions, which would include aunts, uncles, grandparents, great aunts and great uncles, as well as one natural parent and a step-mother or step-father, the same proportionality exercise should be conducted based on the individual facts of the case, but when doing so the court should be mindful of the degree to which the two types of outcome will interfere with Article 8 ECHR rights. Stranger adoptions are at the extreme end of the spectrum, and family adoptions are elsewhere on the spectrum. As to where the case sits on the spectrum will depend on the facts, particularly the relationships within the family.”

And at [20] the approach to the application of the provisions of the 1987 Order was summarised as follows:

*“[T]he well-established principles relating to adoption generally and the withholding of consent by parents, will apply. There is a two-fold test. First the court considers whether adoption would safeguard and promote [the child’s] welfare through her childhood and secondly, as each parent is not consenting, whether the parents are withholding their consent unreasonably. Whether the withholding of consent is unreasonable is an objective test and requires the court to consider the circumstances of the parents in this case but endowed with a mind and temperament capable of making reasonable decisions (to adopt the description of Lord Wilberforce in *Re: D* [1977] AC 602 at 625). But the ultimate test is ‘reasonableness’ in accordance with the speech of Lord Hailsham LC in *Re W (an infant)* [1971] AC 682 at 699C:*

‘It is clear that the test is reasonableness 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.’”

[12] Although mindful of McFarlane LJ's observations in *Re W-C* [2017] EWCA Civ 250, that this area of law is "*bedevilled by headline catchphrases*", it is necessary to consider one more. Essentially, the child's welfare test is an evaluation of realistic options. A full consideration is required, but only in respect of realistic options. Mumby P in *Re R* [2014] EWCA Civ 1625 carried out a useful summary of the law of adoption in the aftermath of the Supreme Court's decision in *Re B* [2013] UKSC 33 and the Court of Appeal's decision in *Re B-S* [2013] EWCA Civ 1146. His conclusion was expressed in the following terms:

"In many, indeed probably in most, cases there will be only a relatively small number of realistic options. Occasionally, though probably only in comparatively rare cases, there will be only one realistic option. In that event, of course, there will be no need for the more elaborate processes demanded by [the case law]. The task for the court in such a case will simply be to satisfy itself that the one realistic option is indeed in the child's best interests and that the parent's consent can properly be dispensed with ..."

[13] The Father is not named on the birth certificates of either child and therefore he does not have parental responsibility for either. His agreement to adoption is therefore not required, and any failure on his part to agree does not have to be formally dispensed with by the court. However, his rights as the father of both children are properly protected when the court is addressing the proportionality test and evaluating the various options. A decision on the part of the Mother not to register him as the father at each child's birth does not in any way diminish his rights as a father and does not mean that he does not have a right to respect for his family life (as protected by Article 8 ECHR).

The options for RT and SU

[14] Neither parent is proposing that either child can be rehabilitated back into their care. Although rehabilitated is a word frequently used and understood in this context the facts of this case clearly indicate that the correct word should be 'habilitated' as apart from a few months at the beginning of RT's life, neither child has lived with either parent and to all intents and purposes they are strangers to the children.

[15] It is not suggested that the Aunt should not care for the children for the remainder of their childhoods. The evidence confirms that she is very capable of caring for them, and has, to date, provided excellent care for the children. There is nothing to suggest that this will not continue.

[16] The only options are therefore the proposed adoption or the children continuing to live with the Aunt under the terms of the current residence order arrangements.

Evaluation of the options

[17] The first factor to take into account is the issue of parental responsibility and how it has been, and will continue to be, exercised.

[18] Under a residence order, the Aunt shares parental responsibility for the children with the Mother. There is no evidence before the court to suggest that this has resulted in a detriment to the children to date, save for one matter which I will deal with below. The Aunt has been able to make decisions about the children without any real input from the parents. The parents have largely disengaged from the children's lives. They show little interest in them. Although the Mother has expressed a desire for this to change she has not done anything about it.

[19] The matter about which I referred occurred in May 2019 when the Aunt wished to apply for Irish passports for the children. This is a straightforward enough process but it does require the signature of the parents. The Mother refused to sign the applications. Correspondence has been placed before the court. This was concluded by the Mother on 29 May 2019 at 21.05 with:

"I am not signing the passports why should I? You won't let me see my kids come up with some ridiculous rules so I am now seeking legal advice as I have concerns on the emotional well-being resulting in future emotional harm Don't contact me again only through solicitors."

[20] The Aunt was then forced to issue proceedings for a specific issue order to facilitate the signing of the forms and this forced the Mother to back down. She agreed to sign the forms and a court order was not required.

[21] This episode is important. The Mother knew that the signing of the forms was required to allow the children to go on a holiday, and Euro Disney was mentioned as a possible destination. The Mother used the passport issue as a potential lever to force contact, in the knowledge that previously she had been afforded contact but failed to avail of it and at that time still had the benefit of a contact order, provided the conditions of the contact would be agreed by the Aunt and social services. There were genuine safeguarding concerns at that time, and the Mother hoped to use the tactical advantage she had gained as the only person able to sign the forms. She was also willing to expose the children to emotional harm by interfering with the plans for a holiday. Her conduct had no legal or moral justification yet she maintained it until forced to back down.

[22] It was a single incident but speaks volumes about the Mother's approach to parenting and raises the potential for interference of a similar type in the future. Such interference would be destabilising for the children and the Aunt. As the Aunt would have to share parental responsibility with the Mother there is a potential risk

that it could be repeated. The Mother through her conduct since this matter arose, in her statement to the court, through the position paper and oral submissions made on her behalf has expressed no contrition for her conduct. In May 2019 she indicated that she was going to seek legal advice about signing the forms. The court is not entitled to know whether she actually did seek the advice and if she did, what that advice was. The court does know that she did not sign anything until after court proceedings were issued. As the children grow older the exercise of parental responsibility could become more involved with medical, schooling and other issues. SU is a child with special needs. As she grows older, parenting will require decision making over and above that required for a child without special needs. This will start to place an additional burden on the Aunt as she must decide whether or not to act unilaterally, or to consult, or seek permission, from the Mother. Schools and medical practices, with an attitude of caution, may well insist on parental approval for certain matters, notwithstanding the existence of a residence order.

[23] Her counsel has suggested that court orders could restrict this occurring in the future by limiting the exercise of parental responsibility and prohibiting any applications without leave of the court. I do not consider that this approach would work in practice. These orders could be made, but they still do not prevent the Mother or the Father seeking leave. Although this acts as a filter, it will have the potential of upsetting the Aunt and the potential undermining of the placement.

[24] The family proceedings court has already ruled on the issue of contact and that decision has been made on the basis of safeguarding issues. The contact situation remains unresolved in the mind of the Mother. She has taken no steps to address the genuine issues of concern but still feels that she is being denied contact at the whim of the Aunt.

[25] It is also uncertain that the Irish passport authorities will accept a court order from Northern Ireland to by-pass the need for parents to sign passport applications for their children.

[26] The current inability of the Aunt to exercise full and exclusive parental responsibility is, and will continue to be, a significant concern both legally and emotionally within the family unit of the Aunt, RT and SU.

[27] Emotional security is also another benefit that adoption brings as opposed to a residence order. The legal security copper-fastens the emotional security. It reflects the reality of the current family life for RT and SU, it provides the security to all in the family unit that there is a permanence to their family and, in the words of Keehan J in *Re T* [2020] EWCA Civ 797, it enables the Aunt *“to be [the children’s mother] as well [their] emotional, social psychological [mother].”*

[28] There is no direct social services involvement with the family as there would be if there was in place a care order, so the regular visits, LAC meetings and the requirement to consider habilitating the children back into the care of either or both parents will not be present in this case.

[29] I have considered the 'skewing' of relationships which can sometimes arise in kinship adoptions. This is an aunt - nephew/niece adoption, but is nuanced both by the fact that the Mother and the Aunt although full sisters in the eyes of the law, are not biological sisters. There is a 20 year age difference and the various reports and statements of evidence suggest that they do not have a strong sisterly bond. Despite this it is noted that the Aunt has expressed a sense of protectiveness towards the Mother and has told the GAL that in spite of everything she will always be there for her sister.

[30] The GAL has reported that as a result of her observations, both children clearly identify the Aunt as 'mummy', and this is confirmed by the head-teacher at their school. The Aunt has, however, provided for the display of relevant family photographs in the living room of the home which show the Mother holding SU as a baby, and another showing the three siblings together. Currently the Aunt is taking both children through their life story narratives. RT is aware that he has a 'tummy mummy' and specifically refers to the Mother as 'mummy [the Mother's first name]'. Whilst it is acknowledged that the Mother objects to the children using the term 'mummy' for the Aunt (see the message of 18 May 2019 at 20.36 - "*there is nothing more disruptive than them calling you "mummy" that would mess there (sic) heads up even more than me seeing them!*") and this is an understandable emotional reaction from any mother in such circumstances, the reality is that there is no likelihood of any skewing of family relationships should this matter proceed by way of adoption.

[31] Article 9(b) of the 1987 Order requires the court to give consideration to the ascertainable wishes and feelings of the children. Both are young and will not have a full understanding of what adoption is or will mean for them. What is clear from the evidence is that they regard their family as the Aunt, RT and SU, they are happy within that family and want it to continue.

[32] Having evaluated the two options for RT and SU in this case, I consider that the children's best interests are served by an adoption order. Such an order would safeguard and promote the welfare of both children throughout their childhood and they will be provided with a stable and harmonious home. I am therefore satisfied that the test in Article 9 of the 1987 Order is met.

Dispensing with the Mother's agreement

[33] The Mother has indicated that she does not agree with either child being adopted. The court can dispense with her agreement if it considers that a reasonable parent in her circumstances would agree to adoption.

[34] First and foremost, a reasonable parent would consider the welfare of their children to be a significant factor in their approach. The approach that most reasonable parents apply to parenting is to do what is best for their children. The children's welfare would weigh heavily in the decision making.

[35] A reasonable parent would also analyse whether there is any realistic possibility of habilitating either child back into their care. There is no evidence to suggest that there would be in this case.

[36] A reasonable parent would take into account the attachment that the parent has with the children, and the children with the parent. In this case, a reasonable parent would recognise that there is very little attachment, the Mother not having seen the children since December 2016 and the Mother not having availed of the opportunity of providing indirect contact by gifts and cards, save for the Christmas present and card in 2021.

[37] My view having considered all the evidence, and in particular the Mother's statement and the written and oral submissions made on her behalf, is that she is acting unreasonably in withholding her agreement. In the circumstances, I will dispense with her agreement under Article 15(1)(b)(ii) of the 1987 Order.

[38] It is not necessary to consider the position concerning the Father, as Article 2(2) of the 1987 Order restricts the definition of 'parent' to those exercising parental responsibility. Should the court need to consider what a reasonable father would do in the Father's position, the same approach would apply, particularly as there is no recorded instance when the Father has ever seen his children, he has never sought to do so, either by himself or in conjunction with the Mother.

[39] The father's approach is perhaps best summed up in a message exchange immediately prior to the message mentioned in [30] above on 15 May 2019:

- Mother at 16.56 – *"Just out of curiosity with I ever get to see [RT] and [SU] again"*
- Aunt at 17.33 – *"In the future if it's in the kids interests rather than disrupting them at a sensitive age."*
- Father (using Mother's device) at 17.35 – *"[Father] here if that's so then see you in court! Just goes to show you are playing happy families and won't even let there (sic) own mother see them!"*

It is confrontational in tone, but lacking in any personal commitment.

Decision

[40] The court will therefore make adoption orders in respect of RT and SU in favour of the Aunt

Contact

[41] It is highly desirable that both children should have contact with their parents after the adoption order has been made. Ward LJ described the benefit that can be achieved for the child in *Re G* [2002] EWCA Civ 761 at [14] as:

"the children simply knowing who the natural parental figures are. It is to remove the sense of loss, as they reach adolescence and begin to search for their own identity, with the double crisis not only of adolescence itself but of coming to grips with the fact that they are adopted. That is why current research is in favour of some contact in adoption."

It does not need to be stressed by this court that this is particularly the case with what is a kinship adoption.

[42] The Aunt has indicated that she is willing to facilitate contact, and has been ready to do so for some time. The court has no reason to doubt that commitment. The difficulty in this case is that for whatever reason neither parent has appeared to be willing, or able, to engage in contact.

[43] This is a highly undesirable state of affairs but the court cannot force the parents to do something that they do not wish, or feel unable, to do. Should they change their mind, there will be a need for this to be dealt with in a sensitive manner so that the parents can be introduced into the lives of each child. Professional help is available to the Aunt through social services and she should avail of this help when this situation arises.

[44] Without the commitment from the parents to seek contact, the court will not impose a regime on the Aunt, but in broad terms a core contact regime of once or twice per annum (Christmas and birthdays) indirect contact would be sufficient. We are not yet at the stage of direct contact as a carefully planned introductory phase will be necessary, with assistance from social services. Should that be established there is sufficient scope for more informal contact to develop, but at a pace with which the children and the Aunt are comfortable.

[45] Contact arrangements with the full sibling in his adoptive placement are underway and there is no need for any court intervention.

[46] In the circumstances I will make no formal order for post-adoption contact.

Conclusion

[47] For the reasons given, it is therefore the court's intention to make the adoption orders. The court has been advised by the GAL that should the court be minded to make the order then both children would like to attend the hearing. The court will facilitate this. After this judgment has been delivered a date will be fixed for the formal promulgation of the order at which the Aunt and the children can attend to finalise the adoption orders.

[48] There will be no order as to costs, but legally assisted parties will have a taxation order. The GAL will also be discharged from the cases.