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

Delivered: 17/12/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Plaintiff

-v-

A MOTHER AND A FATHER

Defendants

IN THE MATTER OF AC (A MALE CHILD AGED 4 YEARS 3 MONTHS)

Ms M Smyth QC and Ms C Sholdis (instructed by the Directorate of Legal Services) for
the Trust

Mr M Connolly QC with Ms B-L Herdman BL (instructed by John J Rice & Co solicitors)
for the Mother

Mr G McGuigan QC with Ms L Douglas BL (instructed by Flynn & McGettrick solicitors)
for the Father

Ms A O'Grady QC with Ms C Steele BL (instructed by Conn & Fenton solicitors) for the
Guardian ad Litem on behalf of the child

McFARLAND J

Introduction

[1] This judgment has been anonymised to protect the identity of the child. I have used the cipher AC for the name of the child. These are not his initials. Nothing can be published that will identify AC.

[2] AC is now 4¼ years of age. He is the child of the Mother and the Father who are unmarried. The Father is named on the birth certificate and as a consequence he shares parental responsibility for AC with the Mother. The Mother is aged 28 and

the Father is aged 34. AC sustained serious injuries whilst in the care of the parents in November 2017. This necessitated intervention by the Trust first with an emergency protection order and then an interim care order. AC was placed with foster carers and then moved to his current placement with a paternal uncle and his wife in July 2020.

[3] Threshold (see Article 50(2) of the Children (Northern Ireland) Order 1995) was determined by the court in February 2019, after concessions from both parents, and based on multiple bruise sites on the body and three un-displaced rib fractures. The evidence suggested at least two separate incidents of what could be described as inappropriate and excessive pressure, and general rough handling of the child, then aged 3 months old. The Father conceded that “it was more likely than not that the child sustained the injuries whilst in his care rather than in the care of the mother” and the Mother that she had “permitted the child to be harmed by the father.” At the hearing before me there remained an issue of contention between the parents concerning who the identity of the perpetrator of the injuries was. The Mother, relying on concessions made by the prosecution at the Mother’s appeal against a custodial sentence, asserted that the Father had caused the injuries. This concession made by the prosecution ran contrary to its position as set out to the Crown Court during the original sentencing exercise when both parents were being sentenced in relation to the injuries. Both parents were sentenced for offences of causing or allowing AC to suffer serious physical harm (section 5(1) of the Domestic Violence Crime and Victims Act 2004) and not for inflicting the injuries and the prosecution at that time did not assert which parent caused the injuries. Very little turns on this point and one must also bear in mind the different standard of proof in the Crown Court. However, as far as the family proceedings are concerned the case will proceed on the basis of the threshold findings, namely that more likely than not the injuries were sustained whilst in the Father’s care, and that the Mother permitted the child to be harmed.

[4] A care order was made by O’Hara J on 14 November 2019 based on a care plan of permanence away from the parents in either an adoptive or fostering placement.

[5] The Trust have now issued an application to free AC for adoption with the intention that he remain with his current carers. AC has now lived within that family unit for 16 months. It consists of the paternal uncle, his wife and their three children, now aged 6, 4 and 2. This is an approved placement and is regarded as an extremely stable placement, within which AC is thriving. The Trust’s application is supported by the Father and the guardian ad litem (“GAL”). It is opposed by the Mother, although she takes no issue with regards to the suitability of the placement. The Mother supports the long-term placement, but does not consent to the adoption.

The Law

[6] The test for the court to consider is set out in the Adoption (Northern Ireland)

Order 1987.

Article 9 provides:

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

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

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

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

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

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

Article 18(1) provides:

“Where, on an application by [a Trust], 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.”

And finally Article 16(1) and (2) provides:

“(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 ... 18(1) . . . ; or

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

(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 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)).”*

The Trust have asked the court to proceed under the unreasonably withholding agreement ground and not either of the ill-treatment grounds.

[7] First the court will consider whether adoption is in the best interests of AC, and then, secondly it will consider if the parents are withholding their consent to adoption unreasonably. Although the Father has made a statement to the court confirming that he does consent to the adoption, and this was confirmed by his counsel at the hearing, no formal consent has been signed and submitted, and therefore the court is still required to address this issue, although it will do so in a perfunctory fashion.

[8] I recently dealt with issues arising from a contested kinship adoption (in not dis-similar circumstances to this case) in *Re FD* [2021] NIFam 18. I took the opportunity to examine existing case-law in relation to this type of application. I do not propose to quote extensively from that judgement, the relevant section being at paragraphs [9] – [20]. At [19] I summarised the approach as follows:

“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."

The reference to *Re B* is a reference to the decision of the Supreme Court in *Re B* [2013] UKSC 33.

[9] The strength of a kinship adoption is that it maintains the blood link between child and the wider family. It must however be recognised that the kinship relationship will only involve one side of the family. In the case of highly dysregulated relationships such as this one, the placement with one side of the family may be to all intents and purposes a placement with a stranger as far as the other parent is concerned. It may even be worse as the animosity that sometimes exists within fractured relationships can well spill over into relationships with members of the extended family. As with all cases involving the family courts there are no hard and fast rules and each case and each child needs to be dealt with on the basis of what is in the best interests of that child in the circumstances of the particular case.

[10] The mother has also raised the fact that the Trust's approach to decision making was such that she had perceived at a very early stage that the decision had been made to place AC with his paternal uncle and that the process of considering the options was largely a 'box ticking' exercise with no real engagement and discussion of the various options. This is evidenced by, amongst other things, the Trust stating that one of the disadvantages for AC in a fostering arrangement would be that he would have a different surname from his carers and a corresponding advantage in an adoption arrangement would be that the attachment between AC and his adopters would be enhanced by AC having the same surname as the adopters (paragraphs [156] and [158] of the Trust's application). This can be a valid reason in some cases, but in this case as AC's birth surname is the surname of the paternal uncle it was totally irrelevant. It was clear that the author of that application had either not researched the background to this case and/or was going down a checklist of generic reasons why adoption can be preferred to fostering.

[11] In *Re V* [2013] EWCA Civ 913 at [96], Black LJ set out the legal differences and the outworking of those differences between adoption and long-term fostering, and Trusts should undertake any options exercise using her comments as a starting point and then applying the particular circumstances of the child they are dealing with. Black LJ stated:

"i) Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely therefore to "feel" different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change,

however devoted he or she is, and who is free to determine the caring arrangement.

- ii) Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is made, it is made for all time.*
- iii) Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) Children Act 1989). The contact position can, of course, be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions, where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the adoption order has been made, the natural parents normally need leave before they can apply for contact.*
- iv) Routine life is different for the adopted child in that once he or she is adopted, the local authority have no further role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example)."*

[12] The relevance of any deficiency, or perception of deficiency, in the decision making is that it may impact on the proportionality exercise when considering the mother's article 8 rights (respect for her family life) and if there is a genuine grievance on the mother's part then that may impact on whether she is withholding her consent to AC's adoption unreasonably.

Consideration

[13] The matter came before the court and by agreement, the parties declined to give evidence, relying on their statements and reports, and the submissions on their behalf by counsel.

[14] The key issues for the court are whether adoption is in the best interests of AC, whether the Mother is withholding her consent unreasonably, and finally, should there be an adoption order, what would be appropriate level of contact between AC and each of his parents.

Best interests

[15] There is no issue that given the unfortunate circumstances of AC coming into care and coupled with the inadequacies of both parents there is no prospect of AC returning to the care of either.

[16] Reports suggest that AC has made a full physical recovery from his injuries. He is well integrated into his uncle's family, and regards that family as his own, using expressions such as 'mummy', 'daddy', 'sister and brothers'. He is attending pre-school, his uncle being a teacher at the attached primary school. He is collected from school by the paternal and maternal grandmothers (of this family).

[17] He has contact with the Mother. This has continued on a 3 weekly basis since recommencing in June 2021 following the Mother's release from prison. The carers have kept a record of post-contact behaviour. This behaviour is unsettled and disruptive. It can continue for a period of up to 7 - 10 days. Efforts have been made to reduce the disruption with the carers accompanying AC to contact with the Mother. This disruptive behaviour is at the carers' home and not at school or at the grandparents' homes.

[18] A discrete issue arose after the conclusion of the hearing about the evidence concerning the level of disruption. The Mother has asserted that the decision-making about contact has been erroneous as the Trust were relying on inaccurate and misleading information. The source of this information is the carers. The issue arose very late in the proceedings because of the late discovery of the relevant records. The discrepancy appears to be between the diary entries made by the foster carers after the 25 June 2021 contact and a text message from a foster carer and the Trust on 6 July 2021. The diary entries had been summarised in tabular form by the foster carers and entries from the period 26 June 2021 - 2 July 2021. Both the diary entries and the table have been discovered and they reveal unsettled and disruptive behaviour.

[19] The text message was sent as an update on the social worker's return from leave. It stated that AC had "*actually been quite good ... there's been nothing major ... I think he had a little wobble the day after but he's really been good.*" The explanation given by the foster carer was that by 6 July 2021 AC's behaviour had settled, it had been a very busy time at home, and it was a quick text message in response to an enquiry.

[20] I do not regard this as a significant issue. The explanation for any apparent discrepancy is satisfactory. There is no evidence that the foster carers are being dishonest or deliberately inventing the descriptions given to AC's behaviour. That behaviour is recorded in individual diary entries which appear to be contemporaneously entered and are much more likely to be an accurate and a complete record than a brief text message completed after the disruptive behaviour had settled.

[21] The Trust has considered all viable kinship placements. No issue is taken

concerning the rejection of a maternal great uncle and his partner. The only viable kinship placement is with the paternal uncle and his wife.

[22] I have considered whether or not this long term placement could be a foster placement. There is nothing to suggest that the carers would not be available should this be the order of the court. The carers have their own children, have a very settled family life, and are completely dedicated to the upbringing of their nephew. They have invested a lot of time and energy into integrating him into their family. There is little evidence to suggest that either would need, or benefit from, the constant presence of the Trust in AC's life through the usual monitoring, support, check-ups and reviews.

[23] The inescapable reality in this case is that AC was the victim of grossly inadequate parenting, and whilst in the care of both of his parents he suffered significant physical injuries. Both parents received prison sentences for causing or allowing him to be harmed. (The Court of Appeal when reducing the sentence to a probation order did take into account that the Mother had already served 2 months of the sentence and decided that at that stage a probation order was appropriate.) The Father remains in prison. The Mother has limited contact with AC every 3 weeks, and since her release has not been able to avail of contact for two of these sessions. Contact with the Mother triggers emotional stress which lasts for a significant period. The continuing obligation on the Trust to promote contact between AC and both of his parents has the potential to be a negative factor as it is likely to impact on the stability of the placement.

[24] In fact, there is little evidence that there are any positive factors to be considered in respect of long-term fostering, save that it does not remove the parental responsibility of the parents.

[25] Negative factors would be the failure to sever the family ties as it will mean that both parents will continue to exercise parental responsibility, and although they have not to date attempted to exercise that responsibility in an inappropriate fashion as time passes and the memory and reality of their incarceration fades, it could not be guaranteed that either parent would continue to maintain this non-interventionist approach. The attitude of the Mother in recent expressed views about social workers as reported to the GAL, and her interaction with the GAL in terminating the call when discussing AC's future, would not suggest that she is fully supportive of the placement. Although the Trust can take over-riding decisions there is a duty to engage with each of the parents. As their mental health problems still persist in conjunction with their substance abuse, there is a significant amount of instability in their own lives.

[26] Although it is the stated view of the Mother that she will not attempt to challenge the care order, that cannot be guaranteed. Even without the challenge to the order itself, reviews concerning contact are a potential difficulty.

[27] There is clear evidence that contact with the Mother has an impact on AC, yet the Mother is not prepared to countenance a reduction in contact and is now appearing to challenge the accuracy of the reported level of disruption. It was discussions about reduction in contact that caused the Mother to terminate her call with the GAL.

[28] In addition, with such an integrated family unit and four children all being close in age, any actual or perceived difference is likely to create a significant problem for AC.

[29] There is a strong and compelling case that the long term security offered by adoption by the formal and legal integration of AC into his carers' family would have significant benefits for AC. The Mother's objection is understandable but it is largely emotional in nature. Although she recognises the positive benefits to AC and the current high standard of care given to him, I consider that the animosity that she feels for the Father is transferred to the Father's brother. She feels that the Father will have a normal relationship with AC given the familial ties and she will be cut off. There is no basis for this, as the father does not appear to have any relationship with his brother, and it is quite clear that should the father seek to somehow re-integrate himself back into AC's life, this will be resisted and the Father will be kept at a suitable and appropriate distance.

[30] Although AC is of an age that he cannot reasonably be expected to express an informed view on this matter, he is very clearly integrated into this family and regards himself as a member. Adoption is in his best interests, it safeguards and promotes his welfare throughout his childhood (and beyond) by providing him with a stable and harmonious home and family.

[31] The potential problems which can arise with familial adoptions with the skewing of relationships are not apparent in this case, and have not been mentioned by social workers or the GAL as a potential problem.

[32] The Mother has raised the issue concerning the Trust's approach to the decision making. The point concerning the surname has been highlighted, but the complaint goes further and indicates that no real fact specific analysis was ever conducted. When this deficiency was pointed out, a specific issue LAC on 28 April 2021 was convened to consider the options. Contact records indicate that the carers were not spoken to until 27 April 2021 about the various options open. The mother dismisses this LAC as an attempt to add a gloss of retrospectivity to the flawed process. The Mother has expressed, through a position paper filed on her behalf, her suspicions that the Trust from as early as February 2019 (the time of the finding in relation to threshold) had already determined what was to happen. There is no evidence to support this. The Trust's care plan that was approved in November 2019 was a twin track approach at that stage. It was certainly permanence away from the parents, but either by fostering or adoption. Having made a decision earlier in 2019 as the Mother suggests, it is unlikely that the Trust would formulate a care plan

contrary to that decision.

[33] The problem in this case was the report attached to the application to free for adoption and the glaring error relating to the surname and other generalised comments with no real consideration of the child and the placement. The LAC meeting did consider the options. The fact that the decision that emerged was the same as the earlier decision does not mean that it was just a retrospective attempt to justify a flawed process. Recently the ECtHR in *Strand-Lobben v Norway* [2019] EHCR 615 confirmed the position with regard to the need to ensure procedural fairness to protect the Article 8 rights of parents. At [212] it stated:

“In cases relating to public - care measures, the Court will further have regard to the authorities' decision-making process, to determine whether it has been conducted such as to secure that the views and interests of the natural parents are made known to and duly taken into account by the authorities and that they are able to exercise in due time any remedies available to them ... What has to be determined is whether, having regard to the particular circumstances of the case and notably the serious nature of the decisions to be taken, the parents have been involved in the decision-making process, seen as a whole, to a degree sufficient to provide them with the requisite protection of their interests and have been able fully to present their case.”

[34] I am satisfied that the parents have been afforded sufficient involvement in the process, taking into account the circumstances of the case. There is no evidence to support the Mother's suspicions and they are little more than speculation on her part. They have been fuelled by imprecise drafting of the application to free, but I am satisfied that the decision making has been reasonable and participants at the various decision-making meetings weighed up all the relevant options.

Parents' consent

[35] The Father by a statement filed with the court and through a submission made by his counsel at the hearing and in his presence has expressed a view that he consents to AC being freed for adoption. There is no formal written consent signed in the case. I therefore consider that the Father's consent can be dispensed with as a reasonable parent on agreeing that adoption is in the best interests of the child would sign the appropriate form. In the circumstances I consider that he is acting unreasonably and I dispense with his consent.

[36] The Mother objects to adoption and I must consider what a reasonable parent would do in her circumstances. Obviously a reasonable parent would take into account the best interests of the child. They would recognise the harm caused to the child by both parents, the lack of any real prospect of rehabilitation into either

parent's care, the continuing emotional difficulties caused by contact between the child and the Mother, the stability of the current placement and the positive benefits available to the child should he become adopted into that family, with whom he has a familial link.

[37] A reasonable parent would also take into account the proposed contact arrangements. I will deal with these in more detail below but the plan is to reduce contact to a point when it is once a quarter with the Mother prior to an adoption order, and subject to any review, it would be maintained at this level post-adoption. This would be at a higher frequency than would normally be the case after adoption, but does recognise the familial nature of the arrangement.

[38] A reasonable parent would recognise that post-adoption contact would have to reduce. Even with a fostering arrangement, after the court order brings finality to the proceedings it is highly likely that contact would reduce in any event. A reasonable parent would also take into account the impact that contact is having on the child when balancing this against any benefits obtained by the parent by contact. Contact at a one-to-one level between AC and the Mother is good with no real issues (leaving aside the Mother's failure to attend on occasions) but there is the emotional reaction by the child when he returns to the carers' home, and this lasts for a period of up to 10 days. A reasonable parent would be concerned by this and would recognise that whatever benefit the parent derives from contact the fact that contact is disturbing the child and disturbing his life within his placement, would suggest that reducing contact would be actually beneficial for the child. A reasonable parent would therefore not use his or her wishes about contact to override what is in the best interests of the child.

[39] I have mentioned the decision making processes of the Trust. I accept that a reasonable parent would be concerned about the content of the application and the fact that a generalised approach had been recorded, with a glaringly obvious mis-statement about the child's name. However the issue about grievance is not the grievance itself but the underlying cause. A reasonable parent on examining the process in more detail would understand that the Trust had made a fair decision weighing up all the options. Although a reasonable parent may not necessarily accept the decision made, they would appreciate that the process was fair.

[40] In all the circumstances I consider that the mother in this case is withholding her consent unreasonably, and I will dispense with it.

Contact

[41] The final issue is the proposed contact between AC and his parents. With a decision now made concerning freeing, it is necessary to consider a reduction in contact to a level that is AC's best interests in light of his future, particularly his future as an adopted child. This necessitates a reduction in the regularity of contact with his mother. In any event, at 3 weekly intervals with a 7 - 10 day recovery

period after each contact, it is very hard to justify the current level. The proposal is to reduce this eventually to every quarter, and I consider that this target is pitched at the correct level. An earlier proposal was for contact to be twice a year after adoption but the Trust has re-considered this plan. The proposal is for a phased reduction to achieve this goal. Everything will be subject to review. Much will depend on how AC can cope with the contact arrangements and how the Mother can commit to this regularity.

[42] The Mother submits that contact should be maintained at its current level. This is not realistic as it fails to take into account the momentum of the case towards adoption and the impact that the current contact is having on AC. The Mother's focussed criticism appears to be that somehow she will have a lesser contact regime than that afforded to the Father. The Father does not have contact with AC at present, and whether he does will much depend on his level of engagement, a level which to date has been depressingly low. Much work needs to be done by the Father before any contact can commence. The Mother's criticism is not based on the reality of the situation.

[43] The contact arrangements are adequate and are in the best interests of AC. They seek to maintain a link between both the Mother and the Father, and will be pitched at a regularity that is of benefit to him and is manageable. The Father recognises this, but the Mother remains focussed on her own position and interests. This is an understandable position for her to take, but ultimately the court must consider the position for the child.

Conclusion

[44] AC will be freed for adoption. The contact arrangements are approved. There will be no order as costs between parties and there will be a taxation order for legally assisted parties. The GAL is discharged as this order marks the conclusion of the matter.