

Neutral Citation No: [2022] NIFam 23	<i>Ref:</i>	SIM11851
<i>Judgment: approved by the court for handing down (subject to editorial corrections)*</i>	<i>ICOS No:</i>	21/043722
	<i>Delivered:</i>	20/05/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE MATTER OF THE CHILDREN (NI) ORDER 1995

FAMILY DIVISION

BETWEEN:

A HEALTH & SOCIAL CARE TRUST

Applicant

-and-

[1] A MOTHER

[2] A FATHER

Respondents

(AND IN THE MATTER OF A FEMALE CHILD AGED 1 YEAR)

Moira Smyth QC; Eric Cleland, of counsel, instructed by the Directorate of Legal Services, for the Health & Social Care Trust

Andrew Magee QC; Deborah Harvey, of counsel, instructed by Reavey & Co., for the Mother Adele O'Grady QC; Kathryn Murray, of counsel, instructed by Wilson Nesbitt, for the Father

Joanne Hannigan QC; Victoria Ross, of counsel, instructed by Keenans Solicitors, for the Guardian ad Litem:

SIMPSON J

*Introduction*

[1] I have anonymised all the parties, and nothing should be published which might identify the Child or any part of her extended family.

[2] This judgment is being given following the hearing today of an urgent application by Belfast Health and Social Care Trust pursuant to Article 33 of the children (Northern Ireland) Order 1995 for an order that the court approve the placement of the Child (now aged just one year) with her paternal grandparents in Dublin. As will become

clear this judgment is perforce given in a more truncated form than would otherwise be the case.

[3] Under the rubric "Arrangements to assist children living abroad" Article 33 provides:

"33.—(1) An authority may only arrange for, or assist in arranging for, any child in its care to live outside Northern Ireland with the approval of the court.

(2) An authority may, with the approval of every person who has parental responsibility for the child, arrange for, or assist in arranging for, any other child looked after by the authority to live outside Northern Ireland.

(3) The court shall not give its approval under paragraph (1) unless it is satisfied that—

(a) living outside Northern Ireland would be in the child's best interests;

(b) suitable arrangements have been, or will be, made for his reception and welfare in the country in which he will live;

(c) the child has consented to living in that country; and

(d) every person who has parental responsibility for the child has consented to his living in that country.

(4) Where the court is satisfied that the child does not have sufficient understanding to give or withhold his consent, it may disregard paragraph (3)(c) and give its approval if the child is to live in the country concerned with a parent, guardian, or other suitable person.

(5) Where a person whose consent is required by paragraph (3)(d) fails to give his consent, the court may disregard that provision and give its approval if it is satisfied that that person—

(a) cannot be found;

(b) is incapable of consenting; or

(c) is withholding his consent unreasonably.

(6) Article 58 of the Adoption Order (which requires authority for taking or sending abroad a child for adoption) shall not apply in the case of any child who is to live outside Northern Ireland with the approval of the court given under this Article.

(7) Where a court decides to give its approval under this Article it may order that its decision is not to have effect during the appeal period.

(8) In paragraph (7) “the appeal period” means –

(a) where an appeal is made against the decision, the period between the making of the decision and the determination of the appeal; and

(b) otherwise, the period during which an appeal may be made against the decision.”

[4] The Mother and the Father are presently under investigation by PSNI. On 1 June 2021 the Child was brought to A&E with swelling to her head and injuries were found on the head, face, tongue and body. The injuries were assessed as being non-accidental. Both parents have been charged with offences arising from the finding of injuries on the Child. An emergency protection order was granted on 3 June 2021 and, thereafter, an interim care order was made. The Child was placed into foster care.

[5] The reason for the urgency of this application is because the present foster care placement, which was the second such placement, comes to an end on 22 May 2022. This is due to the retirement of the foster carers.

[6] In anticipation of the ending of the foster placement the Trust undertook kinship assessments on both sides of the family - ie assessments of the maternal great-grandparents and the paternal grandparents. On 14 April 2022 assessment in respect of both sets of potential carers were presented to a kinship panel and both sets of carers were approved.

[7] On 9 May 2022 the Trust convened a Family Network meeting to ascertain whether the families could come to an agreement as to which placement the Child should move. I have seen the detailed minutes of that meeting. Agreement could not be reached.

[8] On 12 May 2022 the Trust undertook an Options Analysis meeting at which the six social workers involved considered the benefits and the disadvantages of a placement with each set of grandparents/great-grandparents. I have seen the detailed record of this meeting. As a result of this, the decision was reached that the Child should be placed with her paternal grandparents, who live in Dublin. I note that the Guardian ad Litem supports the Trust application, she having seen and read all the relevant documentation.

[9] I have also seen the Care Plan prepared by the Trust, which is a twin track plan whereby the Trust will seek to rehabilitate the Child to the care of her parents. If this cannot be achieved there will be permanence through kinship. The primary aim is to ensure that the Child is safeguarded and the kinship placement will continue until assessments are concluded. I also note the contingency plan that if there is any issue with the placement with the paternal grandparents, it is anticipated that there is a viable alternative placement with the maternal great-grandparents. The plan also details the contact proposals with both the Mother and the Father and with the maternal great-grandparents.

### *Discussion*

[10] I have considered the submissions of counsel, written and oral, and I have read all the documentation before the court including medical evidence, the Trust's documentation and the report from the Guardian ad Litem. It must be understood that while I have taken all these into consideration time does not allow for all of the matters relevant to my decision to be rehearsed in this judgment. The absence of any matter from this judgment does not mean that it was not carefully considered by me.

[11] I make the following findings in relation to the matters in Article 33(3):

- (a) That living outside Northern Ireland would be in the best interests of the Child. While this was clearly a finely balanced matter, nevertheless in the light of the assessment by the experienced professionals in the particular circumstances of this case I consider that the best interests of the Child at this juncture will be served by placement with the paternal grandparents in Dublin;
- (b) I am satisfied from the documentation in this case that suitable arrangements have been made for the reception and welfare of the Child in Dublin with the paternal grandparents. I also note that, pursuant to Article 33 of the Hague Convention, the relevant authority in Ireland has been consulted and has consented to the placement;
- (c) Clearly, the age of the Child means that she is unable to give consent. Accordingly, pursuant to Article 33(4), I disregard Article 33(3)(c).

[12] Article 33(3)(d) has to be read in the light of Article 33(5)(c) which is relevant to this case. While the Father has given consent, the Mother has not given her consent. Accordingly the court has to consider whether, in the particular circumstances of this case, she is withholding consent unreasonably.

[13] The approach to be taken in relation to the withholding of consent was considered by McFarland J in the case of *A Health and Social Care Trust v A Mother and A Father (In the Matter of OM)* [2021] NIFam 16. Where material he said:

“[14] Dealing first with the consent of the parents, when considering whether a parent is withholding consent unreasonably, the court should follow the same approach as in

cases involving freeing a child for adoption (see *Re G (Minors)* [1994] 2 FLR 301 and *Re M* [2014] NICA 73). Even though a move to the Republic of Ireland is considered to be in the child's best interests, parental consent is still required, or it must be dispensed with.

[15] The question for the court to consider is whether the refusal of [a parent] is unreasonable. It is an objective test and requires the court to consider the circumstances of the parent but endowed with a mind and temperament capable of making reasonable decisions (adopting the description of Lord Wilberforce in *Re: D* [1977] AC 602 at 625).

[16] In the words of the Court of Appeal of England and Wales in *Re: C* [1993] 2 FLR 260 at 272:

'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.'

[17] Lord Hailsham LC in *Re W (an infant)* [1971] AC 682 at 699C, stressed that the overriding consideration is reasonableness:

'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. But, although welfare *per se* is not the test, the fact that a reasonable parent does pay regard to the welfare of his child must enter into the question of reasonableness as a relevant factor. It is relevant in all cases if and to the extent that a reasonable parent would take it into account. It is decisive in those cases where a reasonable parent must so regard it.'

but the court must guard against substituting its own view for that of a reasonable parent (see *Re E & M* [2001] NI Fam 2)."

[14] I respectfully agree with everything said by McFarland J.

[15] Essentially, as outlined in paragraph 16 of the Mother's position paper and in written and oral submissions by Mr Magee QC, the withholding of consent relates to two

matters: first, what for the sake of easy identification was referred to as the geographical issue; secondly, what has been referred to as a jurisdictional issue.

[16] The Mother considers that the geographical issue is such that her consent is not being unreasonably withheld. She identifies both the travelling to and the reduction in occasions of contact (as opposed to total time of contact), the fact that she will not be able to attend the Child's medical appointments as easily as at present, that in the event of an emergency she would not be able to be immediately present for the Child and that difficulties will be created in the Trust's assessments of mother and child together. In my view these are not insurmountable issues. The paternal grandparents have indicated, through Ms O'Grady QC, that they will facilitate contact, for example by travelling to the contact location in either Newry or Dundalk at a time coinciding with the child's nap. I can see no reason why the Mother cannot be informed of medical appointments and attend if she wishes. Equally, no matter where the Child was placed, by the very nature of an emergency the Mother might not be immediately available. The assessments by the Trust of Mother and Child together will continue notwithstanding the Child being in a placement in Dublin.

[17] In the circumstances of this case I consider these objections raised by the Mother are objectively unreasonable

[18] The issue of jurisdiction arises, *per* Mr Magee QC, essentially on the basis that by placing the Child with the paternal grandparents in Dublin there exists the risk (at some undefined time in the future) that the Child's habitual residence might change, thus causing complications. He says that potential issues about habitual residence are part of the considerations as to the reasonableness or otherwise of the Mother's withholding of consent.

[19] The Child's habitual residence is Northern Ireland. There is no indication that it is any party's intention that her habitual residence should change.

[20] The court is being asked to give approval to the placement on welfare grounds while the care plan for the Child is finalised. This placement is clearly being made on an interim basis.

[21] There is no compelling reason to believe that the proceedings will be protracted, thus running the risk identified by Mr Magee. Even if such an eventuality was to occur, the case could be transferred from the Republic of Ireland to Northern Ireland under the provisions of The Hague Convention, Article 8 of which provides:

“... the authority of a Contracting State having jurisdiction under Article 5 or 6, if it considers that the authority of another Contracting State would be better placed in the particular case to assess the best interests of the child, may either

- request that other authority, directly or with the assistance of the Central Authority of its State, to assume jurisdiction

to take such measures of protection as it considers to be necessary, or

- suspend consideration of the case and invite the parties to introduce such a request before the authority of that other State.”

[22] I consider the risk asserted by Mr Magee to be an unrealistic one in the light of the particular circumstances of this case.

[23] In addition to the above, at a late stage in the case the maternal grandparents raised issues under the European Convention on Human Rights. These will, if pursued, require a finding by the court. This urgent application, which requires an urgent judgment, is not the place for such a finding. The Trust needs to know today where the Child is to be placed so that the appropriate arrangements can be made before Tuesday of next week.

### *Disposition*

[24] Accordingly, I grant the application brought by the Trust and give the approval of the court to the Child living outside Northern Ireland.

[25] I express my gratitude to all counsel for the helpful position papers, produced hastily for the hearing, and for their succinct submissions. I also express my thanks to the Guardian ad Litem for her comprehensive analysis of the position, which I found to be of significant assistance.

[26] I order legal aid taxation in relation to the Mother, the Father and the Guardian ad Litem.

[

27] Finally, I discharge the Guardian ad Litem.