Neutral Citation No: [2023] NIFam 7	**Ref: McF12132**
	ICOS ref: 19/085026 & 21/089361
Judgment: approved by the court for handing down (subject to editorial corrections)*	**Delivered: 21/04/2023**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

_____

Between:

A MOTHER

Appellant

-and-

A HEALTH AND SOCIAL CARE TRUST

Respondents

IN THE MATTER OF AB (A MALE CHILD AGED 3½ YEARS)

_____

Mr G McGuigan KC and Mr M O'Brien (instructed by John Fahy & Co solicitors) for the appellant mother
Ms S Simpson KC and Ms T Overing (instructed by the Directorate of Legal Services) for the respondent Health and Social Care Trust
Ms M Smyth KC with Ms M Mullally (instructed by Oliver Roche & Co solicitors) for the children's court guardian representing the interests of the child

_____

McFARLAND J

Introduction

[1] This judgment deals with an appeal by the mother from a decision made by Her Honour Judge Bagnall ("Judge Bagnall") in the Family Care Centre on 9 December 2022 whereby she made a care order in respect of AB with a care plan of adoption and then freed AB for adoption dispensing with the consent of the mother. AB was the cipher selected by Judge Bagnall. They are not the initials of the child. I will also use this cipher. Nothing can be published that can identify the child.

[2] The Trust oppose the appeal, with the support of the guardian. The father has not featured in the child's life or in the proceedings.

[3] The notice of appeal had three main limbs. First, in respect of the care order with a care plan of adoption, the mother raised seven individual grounds, but abandoned six at the hearing. Second, in respect of dispensing with the mother's consent for the freeing order, the mother raised four individual grounds, but abandoned three at the hearing and adjusted the fourth. The third limb was an appeal in respect of a failure on the part of Judge Bagnall to carry out a proper proportionality exercise. This was also abandoned in its entirety at the hearing.

[4] The mother proceeded with the appeal on very limited and focussed grounds, namely on the basis of grounds 1(g) and 2 (d) in her notice of appeal:

> "1(g) Judge Bagnall erred in finding that the kinship options and in particular, the maternal grandmother, were appropriately assessed by the respondent and placed insufficient weight on the evidence that the Trust applied 'disqualification criteria' to the case of the maternal grandmother that were inappropriate for a prospective kinship placement.
>
> 2(d) Judge Bagnall erred in finding that the mother was unreasonably withholding her consent on the grounds that there was a failure to properly assess the maternal grandmother as a kinship carer."

Ground 2(d) was originally drafted as referring to a failure on the part of Judge Bagnall in placing undue weight on a fact not specifically agreed in the threshold. That particular aspect was also abandoned with a focus on a reasonable sense of grievance based on the failure to assess the grandmother properly and by the incorrect application of "disqualification criteria."

Background

[5] The mother had an unfortunate upbringing and had significant involvement with the Trust during her own childhood first when she was voluntarily accommodated as a child in need and then as a looked after child under a care order spending time in secure accommodation, residential care, foster care and in a Child and Adolescent Mental Health Unit. The reception into care was based on threshold relating to significant harm suffered, or likely to be suffered, whilst in the care of the maternal grandmother.

[6] From the age of five years the mother had lived at various times with her mother (AB's maternal grandmother) and her maternal grandparents (AB's maternal great grandparents). She was self-harming at this age and displaying sexualised behaviour with suspicion that she had been sexually abused at the time.

[7] The mother was 18 years old at the time of AB's birth and she declined a

proposal that she move into supported accommodation. The Trust attempted to put in place a family network to provide support, but this broke down in a matter of days. Trust staff then provided what was 24 hour support for about two weeks, but the mother then refused to allow this level of supervision.

[8] Proceedings were issued in September 2019 and the case continued on a 'no order' basis. On 31 January 2020 the police were required to remove AB from the mother's care, and he was placed with the maternal grandmother on an emergency basis. The mother was arrested for the offences of child cruelty, assault, and possession of Class B drugs (cannabis).

[9] The maternal grandmother was unable to care for AB and the placement quickly broke down. An interim care order was obtained on 6 February 2020. AB was moved into a temporary placement and then placed with his current carers (and now proposed adoptive parents) on 21 May 2021. He has remained there to date, is well settled, and is thriving.

[10] Towards the end of 2020 various assessments of the mother had been completed and at a LAC meeting in November 2020 rehabilitation had been ruled out. As the mother no longer wishes to pursue this aspect of her appeal it is not necessary to go into detail about the mother's difficulties although they are numerous.

[11] The Trust then looked at various kinship options, including three maternal aunts and a maternal great grandmother.

[12] An assessment was also undertaken in respect of the maternal grandmother, and it is this assessment that the mother asserts, was incomplete and flawed.

[13] The assessment was carried out by a fostering social worker in June 2020. The maternal grandmother is relatively young and is still in her thirties. The report of the assessment sets out that she has suffered from depression arising out of difficulties in her own childhood. She suffered from post-natal depression after the birth of the mother and suffered from anxiety.

[14] She reported that her lifestyle had improved in the last five years after she put the father of her two younger children out of her home. It was reported that she was both a victim and a perpetrator of domestic violence.

[15] She has had a history of alcohol and solvent abuse, but this problem has been resolved in recent times, although she still smokes 20 cigarettes a day.

[16] Her physical health is not good as she has five slipped discs and is awaiting surgery. She expressed concern about being able to care physically for AB. She had the full-time caring responsibilities for her three other children, then aged 16 years, 11 years and three years. She is parenting these children without any social services involvement.

[17] The assessor reported that the maternal grandmother was welcoming and presented as honest. It was evident that she had not had a good working relationship with social services and that she may struggle to understand some of the decisions that will have to be made. The report also referred to the grandmother's involvement with social services both as a child and as a parent. The grandmother expressed an opinion that she would not be able to manage her daughter's behaviour if the daughter did not adhere to the plans in relation to AB's care.

[18] The assessor indicated that as the grandmother had 'disqualification criteria', she would not be recommending proceeding to a full assessment. The conclusion of the report indicated these criteria, the grandmother's health, and the expressed opinion of the grandmother that she could not manage the mother's behaviour should the mother attend at her home, had resulted in a recommendation that the assessment should not proceed further.

[19] The Trust report that in June 2020 the grandmother expressed her contentment with the outcome of this assessment and appeared to be more concerned about how the news would be broken to her daughter. The grandmother did however apply for leave to be joined as a party to the proceedings and for an independent parenting assessment on 11 November 2022, four days before the scheduled final hearing. Judge Bagnall refused that application on 15 November 2022 and the grandmother has not appealed that decision. The brief reasons for the decision were mainly focussed on the issue of delay. During that application it was indicated to Judge Bagnall that the grandmother had been given an oral explanation as to outcome of the assessment in June 2020, she had sought through her solicitors more details in August 2021 and written reasons were provided in September 2021, and that the actual report was provided to the grandmother, on her request, in September 2022.

[20] The Statement of Facts in relation to the freeing application stated (at [81]):

> "After an initial assessment with the kinship team it was decided that [the maternal grandmother] had disqualification criteria and it was decided that she would be ruled out as a potential kinship carer."

[21] At the hearing before Judge Bagnall on 16 November 2022, a social worker (not the author of the assessment) gave evidence on behalf of the Trust. An extract of her evidence in respect of this assessment has been provided in transcript.

[22] In her examination in chief she was asked if disqualification criteria automatically ruled the grandmother out or could the Trust look beyond that, and she replied "No, the Trust can look beyond disqualification criteria." She continued:

> "… the concerns were still current, there was still current

> concerns and on top of the disqualification criteria … one of the worries I suppose was around her ability to manage [the mother]"

When asked in cross-examination to comment on paragraph [81] of the Statement of Facts, the witness said:

> "I suppose it's maybe a badly worded paragraph perhaps" and continued "… what it doesn't reflect is the reasons why [the grandmother] has disqualification criteria as well as why the kinship team didn't feel they were able to apply the exemption criteria to this case."

Appeals from the Family Care Centre

[23] Waite J in *Re CB* [1993] 1 FLR 920 at 924d when referring to appeals in family cases stated that:

> "No appeal can be entertained against any decision they make…unless such decision can be demonstrated to have been made under a mistake of law, or in disregard of principle, or under a misapprehension of fact, or to have involved taking into account irrelevant matters, or omitting from account matters which ought to have been considered, or to have been plainly wrong."

This approach has been approved by the Supreme Court in *Re B* [2013] UKSC 33 and more recently in *Re H-W* [2022] UKSC 17. It has been consistently followed in this jurisdiction (see *SH v RD* [2013] NICA 44).

'Disqualification criteria'

[24] The disqualification criteria referred to in the evidence is a reference to Part X of the Children (NI) Order 1995 which relates to privately fostered children. Article 106(1)(c) provides that a privately fostered child is not a child cared for by a relative of the child. Article 107(2) provides that a looked after child is not a privately fostered child. The criteria have therefore nothing to do with a case of this type.

[25] Article 109 sets out certain disqualification criteria and 109(1) provides that if a person is disqualified under regulations, then unless the facts are disclosed and the appropriate authority gives its written consent, then that person is disqualified from a private fostering arrangement.

[26] Regulation 2(a)(i) of the Disqualification from Caring for Children Regulations (NI) 1996 states that a person is disqualified if they are a parent of a child who at any time has been made the subject of a care order.

Adoption care planning and freeing for adoption

[27] The law in respect of a court approving a care plan of adoption and freeing a child for adoption is well established. To use the terminology of Lord Neuberger and Lady Hale in *Re B*, adoption is a "last resort" and when "nothing else will do."

[28] The court will always adopt the least interventionist approach. In the aftermath of *Re B*, the Court of Appeal (consisting of the Master of the Rolls, the President of the Family Division and Lady Justice Black) clarified certain issues arising from that decision. Munby P in *Re B-S* [2013] EWCA Civ 1146 at [23] stated:

> "Behind all this there lies the well-established principle, derived from [article 3(5) of the 1995 Order], read in conjunction with [article 3(3)(g)], and now similarly embodied in s 1(6) of the 2002 Act, that the court should adopt the 'least interventionist' approach. As Hale J, as she then was, said in *Re O (Care or Supervision Order)* [1996] 2 FLR 755, 760:
>
> > 'the court should begin with a preference for the less interventionist rather than the more interventionist approach. This should be considered to be in the better interests of the children … unless there are cogent reasons to the contrary.'"

[29] He continued at [27] in the following terms:

> "[T]he court "must" consider all the options before coming to a decision … What are these options? That will depend upon the circumstances of the particular cases. They range, in principle, from the making of no order at one end of the spectrum to the making of an adoption order at the other. In between, there may be orders providing for the return of the child to the parent's care with the support of a family assistance order or subject to a supervision order or a care order; or the child may be placed with relatives under a residence order or a special guardianship order or in a foster placement under a care order; or the child may be placed with someone else, again under a residence order or a special guardianship order or in a foster placement under a care order. This is not an exhaustive list of the possibilities; wardship for example is another, as are placements in specialist residential or healthcare settings. Yet it can be seen that the possible list of options is long."

[30] Section 1(6) of the Adoption and Children Act 2002:

> "In coming to a decision relating to the adoption of a child, a court or adoption agency must always consider the whole range of powers available to it in the child's case (whether under this Act or the Children Act 1989); and the court must not make any order under this Act unless it considers that making the order would be better for the child than not doing so"

has no current equivalent in the Northern Irish legislation. Neither is a special guardianship available in Northern Ireland. However, the courts in this jurisdiction have embraced the main thrust of the *Re B-S* judgment relating to the outworking of the speeches of the various Supreme Court justices in *Re B*.

[31] The outworking also includes the application of the important decisions of *Re Y* [2014] EWCA Civ 1553 at [24] and *Re R* [2014] EWCA Civ 1625 at [59] which confirm that the duty of the court is to consider what are realistic options when considering care-planning. Munby P was quite clear in *Re R* as to what was required:

> I emphasise the words "realistically" (as used in *Re B-S* in the phrase "options which are realistically possible") and "realistic" (as used by Ryder LJ [in *Re* Y] in the phrase "realistic options"). This is fundamental. *Re B-S* does *not* require the further forensic pursuit of options which, having been properly evaluated, typically at an early stage in the proceedings, can legitimately be discarded as not being realistic. *Re B-S* does *not* require that every conceivable option on the spectrum that runs between 'no order' and 'adoption' has to be canvassed and bottomed out with reasons in the evidence and judgment in every single case. Full consideration is required only with respect to those options which are 'realistically possible.'"

and emphasised at [60] that "'nothing else will do' does not mean that 'everything else' has to be considered."

Dispensing with parental consent when making a freeing order

[32] After a court has decided that the first, or 'welfare' limb, of the freeing for adoption test (article 9 of the Adoption (NI) Order 1987) has been satisfied it must then consider whether a parent is withholding his or her consent unreasonably. The law is well established. This is an objective test requiring the court to consider the circumstances of the parents in this case but endowed with a mind and temperament capable of making reasonable decisions (see the speech of Lord Wilberforce in *Re: D* [1977] AC 602 at 625).

[33] Higgins J in *Re E & M* [2001] NI Fam 2 set out a number of factors to be taken into account as to how to assess the approach of a reasonable parent:

> "A reasonable parent would consider the welfare of the child and look at all the circumstances and apply the test to the circumstances as they exist at the date of hearing … the prospect of rehabilitation, the level of contact if any, the nature and security of the present placement of the child. The prospect of rehabilitation is relevant as is the failure of a parent to seek rehabilitation. The degree of responsibility for the current situation which is attributable to the parent would be relevant as would be the extent and regularity of contact. The age of the child and the length of time he is in care as well as the length of time the child has been cared for by the parent or not are relevant. Those are factors which a reasonable parent would consider."

He then spoke about the relevance about any grievance that may be felt by a parent:

> "Often parents feel a sense of grievance against Social Services for the way they perceive they have been treated by them. In some cases that sense of grievance may be justified. But the sense of grievance itself is not a relevant factor, difficult as it may be for a reasonable parent to ignore it. However, the factors giving rise to that sense of grievance are relevant and would and should be taken into account by a reasonable parent".

[34] It is, however, important, to apply perspective to this issue. It is only one of the factors to be taken into account and it has limited weight in the decision-making process. Butler-Sloss LJ in *Re B* [1990] 2 FLR 383 at 396D said that it would only be on rare occasions when "a sense of grievance can justifiably have an important effect on a reasonable parent with a decision to refuse consent, and I find it difficult to envisage when that can occur." In *Re E* [1995] 1 FLR 382 at 389D, Bracewell J stated that:

> "A sense of grievance can be relevant to the reasonableness of a mother withholding agreement providing that the facts are established that would have been likely to undermine the confidence of a reasonable mother in a decision by a local authority to apply for freeing for adoption. The facts must provide the weight and not the emotional sense of grievance. It is only rarely that such matters can be relevant, and for my part I find that this local authority did not go beyond what might be described at its highest as an error when contact was

discontinued."

[35] I will leave the last word on this matter to Waterhouse J in *Re BA* [1985] FLR 1008 at 1032D:

> "In my view a bona fide and reasonable sense of injustice may be a relevant factor affecting the mind of a reasonable parent on the question of consent, even though it is difficult to visualize any circumstances in which it could be more than a subsidiary factor"

Judge Bagnall's judgment

[36] Judge Bagnall's judgment of 15 November 2022 runs to 60 paragraphs and to 20 pages. Most of the judgment has focussed on the mother's case that AB should be rehabilitated back into her care. In relation to the grandmother, Judge Bagnall noted at [20] a capacity to change report from Barnardo's (on the mother) which stated that there were challenges and difficulties in the mother and the grandmother's relationship especially when the mother was not getting her way.

[37] At [31]–[33] Judge Bagnall dealt with the assessment of the grandmother in the following manner:

> "[31] In January 2021 the maternal grandmother was initially considered as a viable kinship carer for AB. It was determined that she had disqualification criteria and was ruled out. In the context of this assessment the fact that the maternal grandmother had herself had a child taken into care (the mother) qualified as a disqualification criteria. The maternal grandmother brought a C2 application on the morning of the final hearing on 16th November 2022 asking for the case to be adjourned so that she could be joined to the proceedings and have an independent social work assessment. This application was grounded on the argument that the Trust had ruled her out without properly assessing her. In particular she referenced that she looked after her younger children including a five-year-old without any involvement of social services. This application was refused. However, the question of whether a proper assessment of the maternal grandmother as a kinship carer for AB is still a relevant issue in relation to the Trust's care plan of adoption.
>
> [32] [The] social worker gave evidence that while the disqualification criteria were relevant in this assessment there is always scope to look beyond them in appropriate

> cases. In this case there were other factors which ruled the maternal grandmother out as a kinship carer. In particular the Trust considered the dynamics of the relationship between the maternal grandmother and the mother. She would have to manage contact; she had already expressed concerns about caring for AB and the impact on her own family. [The social worker] explained that it is very different looking after a child who has experienced trauma as AB has and looking after your own child. She stated that the Trust have to look at the long-term placement and its stability. She confirmed that when these matters were discussed with the maternal grandmother at the time of the viability assessment in 2021, she agreed with the decision of the Trust.
>
> [33] I am satisfied the Trust has carried out a full viability assessment in relation to all five members of the maternal family and that none of them are appropriate as carers for AB."

[38] The final relevant extract of the judgment relates to the mother's lack of consent in the context of the grandmother's assessment. This is dealt with at [45] as follows:

> "The mother is withholding her agreement to adoption on two grounds, the first is that the maternal grandmother was not properly assessed as a kinship carer and therefore it cannot be said on this issue that 'nothing else will do'. I have already addressed this issue earlier in the decision when I endorsed the care plan of adoption as in AB's best interests."

Consideration

[39] The 'disqualification criteria' insofar as they relate to fostering arrangements do not apply to fostering arrangements under care orders and do not apply, in any event, to family placements. If there is any fault on the part of the Trust, it lies in them specifically referring to the criteria in the terms that it did. The real issue is not that the grandmother's own child (the mother) had been the subject of a care order. It is the facts surrounding the reasons why the mother was made the subject of a care order. The use of this phraseology in the initial report and subsequent documents was wrong, but it is not a fundamental flaw that has somehow permeated into the entire assessment process and has resulted in a flawed process. At its height it was an error in the same league as described by Bracewell J in *Re E* (see [34] above]).

[40] The social worker in her oral evidence before Judge Bagnall gave a perfectly acceptable explanation. Judge Bagnall was alert to this. Stripping away the incorrect

reference to disqualification criteria, the actual assessment covered a much wider field and looked at the reasons for the care order in respect of the mother, and also the current issues in the grandmother's life.

[41] Judge Bagnall clearly considered this evidence not only in the context of the grandmother's potential involvement in the proceedings when she applied for a residence order but also in the context of consideration of what were the realistic options other than adoption.

[42] The judgment reflects a correct approach and a correct analysis. It could not be said that Judge Bagnall was wrong in rejecting the grandmother as a potential carer for the child or dismissing the attack on the Trust's assessment process.

[43] The reality in this case, as Judge Bagnall alluded to at [32] in her judgment, was that it was necessary to look beyond the fact that the mother had been the subject of a care order. This included the consideration of why the mother became the subject of a care order, the grandmother's ability to care for AB in the context of her own caring obligations for her other children and her ability to manage the mother.

[44] If one was to raise a criticism of the judgment it is that Judge Bagnall imported the phrase "disqualification criteria" into her analysis. That phrase should only have relevance to private 'stranger' fostering arrangements outside a care order. It has nothing to do with the proceedings relating to AB. It crept into case when wrongly used by a social worker. However, whilst the disqualification criteria, have no relevance, the fact that the grandmother's child was the subject of a care order is an obvious relevant fact to be taken into account. It cannot be discarded as irrelevant when considering the welfare of AB. It is one of the factors to be taken into account, as are the grandmother's physical health in the context of her other existing caring responsibilities, and the grandmother's ability to manage the mother.

[45] Judge Bagnall was alert to this and having heard and seen the witnesses was able to come to her decision, the reasons for which are set out in her judgment. On that basis it could not be said that she was wrong in respect of her decision in relation to the first limb of the test, which relates to AB's welfare. Ultimately, in this case there is little evidence to suggest that there is a realistic alternative to adoption.

[46] In relation to the second limb relating to dispensing with the mother's consent, Judge Bagnall could have been a little more expansive in her reasoning. At [45] in her judgment she referred back to her decision that adoption was in AB's best interests. No analysis is made concerning whether there is a genuine cause for any grievance, and if so, what weight should be given to it. There was no appeal raised, either in the notice of appeal, the written skeleton argument, or the oral submissions before me, about the adequacy of reasoning. That is understandable because the brief reference made by Judge Bagnall to the issue stressed the welfare of AB, and there is a clear inference that Judge Bagnall considered this to be a primary factor

that a reasonable parent would take into account.

[47] Having considered the evidence, including the oral evidence of the mother, Judge Bagnall was well placed to assess the genuineness, or otherwise, of the mother's grievance, and ultimately, how much weight could be given to it. At its height it was an error in phraseology, and one of form rather than substance.

Conclusion

[48] For the reasons given, I consider that it could not be said that Judge Bagnall was wrong in relation to both limbs of the test, and for this reason the appeal is dismissed.

[49] I will hear counsel concerning any consequential orders.