Neutral Citation Number: [2019] EWFC 36 **Date: 3rd June 2019**

IN THE FAMILY COURT

IN THE MATTER OF THE CHILDREN ACT 1989

AND IN THE MATTER OF ARTICLE 56, COUNCIL REGULATION (EC) 2201/2003

Before :

Mr. W. J. Tyler QC, sitting as a Deputy High Court Judge

- -

Between :

A Local Authority	**Applicant**
- and -	
M	
F	
The Foster Carers of S, FC1 and FC2	
S (A Minor)	**Respondents**

Re S (No. 3) (Care Proceedings) (Article 56: Placement in the Republic of Ireland

Hearing date: 18th – 20th, 25th – 27th March 2019
Judgment circulated in draft on 27th March 2019
Final judgment handed down on 3rd June 2019

APPROVED JUDGMENT

Mr. Alex Taylor of counsel (instructed by the legal department) for the local authority

Mr. Dorian Day of counsel (instructed by Hecht Montgomery Solicitors) for the mother

Mr. Mark Calway of counsel (instructed by Morrison Spowart Solicitors) for the father

Mr. Michael George of JWP Solicitors for the foster carers

Ms Evelyn Norman of Jones Myers Solicitors for the child

Parties, applications, issues, positions

1. I am concerned with the interests and future of S. S was born in the Autumn of 2017, so she is now 18 months old. S is the daughter of her mother, M, and her father, F. S has lived since her discharge from hospital with FC1 and FC2 ("the FCs") in the capacity initially as foster carers for the Child and Family Agency of Ireland ("the CFA") and latterly, after the English courts accepted the transfer of the care proceedings, as foster carers for an English local authority ("the LA"). S has an older sister, Y, born in the summer of 2013, whom she has never met and who was adopted, following care and placement order proceedings in England, concluding in September 2014, the adoption order being made in 2016. S also has a younger sibling, X, born in late 2018. X was also placed by the CFA with the FCs, pursuant to orders in the courts of the Republic of Ireland ("the RoI"), at birth. The girls have lived together, with the FCs, ever since.

2. The final hearing before me was heard over 5 days on 18th to 20th and 25th and 26th March 2019, judgment being circulated in draft on the sixth day, pending notification of Article 56 consent which was confirmed on 3rd April 2019. The LA was represented by Mr. Alex Taylor, counsel. M was represented by Mr. Dorian Day, counsel. F was represented by Mr. Mark Calway, counsel. The FCs were represented by Mr. Michael George, solicitor. S was represented, via the court-appointed children's guardian (as litigation friend) (see Part 16 and Practice Direction 16A of the Family Procedure Rules 2010 ("FPR 2010")) by Angela Powell ("the CG").

3. The LA applies for final orders by way of proceedings brought pursuant to Part 4 of the Children Act 1989 ("CA 1989"). In the event, however, it does not seek a final care or supervision order (pursuant to section 31, CA 1989); nor does it propose permanence

through adoption. Rather, it seeks to render permanent the placement of S with the FCs by way of the court's making a special guardianship order ("SGO") pursuant to sections 14A and 14B CA 1989.

4. The parties are agreed:

   a. that S should continue to live with the FCs;

   b. that I should make a special guardianship order in favour of the FCs; and

   c. that S should have supervised contact with M and F after the making of the order.

5. The principal issue between the parties is whether the rationale underlying the decision that S should continue to live with the FCs and that there should be a special guardianship order in their favour represents a decision:

   a. that there is no reasonably realistic prospect that it will be in S's interests to return to the care of her parents during her minority, and so the placement with the FCs should be considered as likely and intended to endure throughout S's minority and beyond; or

   b. that M and / or F can be considered sufficiently likely to effect significant changes in their psychological functioning and general circumstances to justify considering the placement as in essence temporary; for various reasons set out more fully below, the parents' positions have coalesced around a target period, at which they would be able to demonstrate that they could safely and appropriately care for S, of no longer than about two years from now.

6. The LA, the CG and, to the extent that they descend into the fray, the FCs contend that the placement ought to be considered permanent. They urge on me the facts first that S

has been the subject of care proceedings in one country or another, and thus of uncertainty in relation to her future, for all of 18 months of her life, and second that the parents' problems are deep-seated and long-standing and that effecting meaningful and enduring change will be a process necessarily bedevilled with uncertainty and no more a speculative prospect of success.

7. M and F, on the other hand, while they do not currently accept the fundamental conclusions of the psychological and social work assessment of them, declare themselves ready, willing and able to embark on the therapeutic processes respectively recommended and fully expect to be able to demonstrate at the conclusion of those processes their ability and suitability to care for S (and, it is their clearly stated intention, for X).

8. To the extent that it is possible to resolve this principal issue, the answer then serves to inform the second issue between the parties: what is the appropriate level of ongoing contact between the parents and S? The parents, asserting as they do that the SGO represents no more than a holding position while they improve their circumstances, before resuming the care of their daughters in due course, seek an order that contact continue at the level of the last 18 months, that is, thrice weekly. Conversely, the LA and the CG assert that the placement with the FCs is a permanent one and thus that the purpose served by ongoing contact relates more to imbuing S with a sense of self and identity through her childhood, rather than the perpetuation of a significant, day-to-day relationship with her parents. The LA would have suggested contact every two months. The FCs, however, with full knowledge of what is entailed, and currently and, it is thought, for the foreseeable future taking X to contact three times every week, at least through the remainder of the two-year care order made by the courts of the RoI, consider that monthly contact between S and her parents is both manageable and appropriate. In those circumstances, the LA and the CG do not disagree.

9. Once the court has determined the appropriate level of contact, there is no consensus as to the way in which this is to be recognised in my final order. The question is complicated by the fact that the order of this court will require recognition and enforcement in the RoI. In the course of submissions, a tension emerged between:

   a. the need for this court to set in place a contact regime, for the benefit of S, the parents and the FCs, which is not susceptible of challenge by way of re-litigation in the immediate future,

   b. recognition of the fact that there is much to change in S's life over coming years and that those responsible for looking after her should have a measure of discretion in when and in what way to reach the relevant decisions; and

   c. acknowledgment that, while future litigation is likely to be unsettling, it would be wrong to contemplate an order of this court when S is 18 months old depriving her parents of a right to access the courts of the RoI for the remainder or any significant proportion of her childhood.

Background

Parents' background

10. The parents have each endured extremely difficult and traumatic lives. The detail of these, although clearly relevant to the adult psychological makeup of each, will not serve hugely to illuminate this judgment or to inform my ultimate decisions and so can appropriately be recorded simply in summary.

11. M was removed from her mother's care aged two, due to significant physical abuse and neglect. Her experiences did not markedly improve thereafter. She was placed in foster care, then with her maternal grandparents, although her grandmother died when M was four and a half years old. The care order was discharged, although it seems clear now that any positive reports of the subsequent care she received were misplaced. M has described a fully sexually active 'relationship' with a 16-year old male when she was nine years old (so clearly, in fact, her being abused); and again with a slightly older boy when she was ten.

12. M has received three relevant cautions.

13. On 15th June 2005, she was cautioned for common assault. Contemporaneous records demonstrate that she admitted that, while babysitting a child, she hit him several times in the face and torso and that the removed his underpants and struck his bottom.

14. On 1st March 2006, she was cautioned for two offences of sexual assault of children, one a two or three-year old boy, the other a young girl, by touching them in the genital area while she worked at a nursery. While she has since disassociated herself from the truth of what she concedes she told police contemporaneously, describing herself as having been misled, she said at the time that she often thought about touching children sexually, or they her. She also said that she frequently thought about hurting children. She admitted having hit her father's partner's son a couple of years earlier, when babysitting, and having struck two other children when looking after them for doing little things wrong.

15. Due to these admissions, as well as being placed on the Sex Offenders Register, M was the subject of sexual risk assessment by the Lucy Faithful Foundation.

16. F's childhood contained far more than his fair share of highly traumatic incidents. He has spoken to professionals over the years of having experienced significant bullying, very strict boundaries, the fracture of his family, childhood bereavement, having been sexually abused by his grandfather and the same grandfather having been caught in possession of indecent photographs of F and his brothers, and subsequently prosecuted.

17. The parents met in 2008.

18. Y was born in July 2013. She first became known to the LA after a referral was made by hospital staff. A core assessment concluded any risk to Y to be low and that there was no ongoing role for the LA. A further referral was made by the GP in October 2013 after M told the GP that F had become angry changing Y's nappy and had been rough with her; also that he had once squeezed her and she had screamed. The LA issued an application for an interim care order in relation to Y on 12th December 2013. Initially Y remained placed with her mother and an interim supervision order was made. Later in the proceedings, Y was removed into foster care.

19. During the care proceedings, M was the subject of further assessments. In the process of these, M admitted to having previously written down her fantasies about sexually touching children and engaging in full sexual intercourse with them, to having previously touched children sexually, herself becoming sexually aroused in the process, to having masturbated herself, with a child in her presence, and to having used adult pornography to augment her masturbatory fantasies involving children.

20. During the final care hearing before HHJ Lynch in September 2014, M came to deny having said these things. (Indeed, she maintains that denial to date and speaks of the professionals and the judge involved in the proceedings in the most denigrating of language.) However, HHJ Lynch found as proved, inter alia:

a. that M had (at that time) ongoing thoughts of a sexual nature in respect of children and that she has masturbated to them;

b. that M posed (at that time) an ongoing risk of sexual harm to children;

c. that M had accepted having caused physical harm to a child and having derived pleasure from doing so;

d. that there was a real likelihood of M acting on her thoughts.

21. In relation to F and his difficulties managing his anger, HHJ Lynch heard from the foster carer who had looked after Y after her removal. The foster carer gave examples of F reacting inappropriately angrily towards her, for example, annoyed in relation to a difference of opinion as to the correct type of milk, threatening her on the telephone that he would *'get in touch with the authorities and make sure that everyone knew and that I would never work again'*, and on other occasions, shouting and behaving aggressively, frightening a two-year old in placement. Although F denied or minimised, HHJ Lynch found the FC to have given an accurate account. The judge also found F to have behaved aggressively to the social workers and the children's guardian in the case (and *'far in excess of what one might see with other parents in an equally stressful situation [in care proceedings]'*). The judge found:

> *'I am satisfied that if [Y] were in her father's care, whether or not her mother was also part of her care, she would continue to be affected by her father's anger. If he comes up against anyone who disagrees with him, who challenges him, particularly where his daughter is concerned, I think he will react in the same way.'*

The judge found as facts that that there had been *'arguments and physical aggression between the parents'* and that F had *'anger management issues'*.

22. A further theme in the case before HHJ Lynch was that F considered that M posed no risk whatever to Y or to any other child, this despite evidence from a number of experts,

the assessing social workers and the children's guardian and having the benefit of legal representation.

23. HHJ Lynch made a final care and a placement order in relation to Y in September 2014. Y was duly placed with prospective adopters, the final adoption order having been made in 2016.

24. In relation to the findings of HHJ Lynch in those proceedings, the parents are now in a somewhat difficult position given that they continue to deny (a) (so far as the mother is concerned) the truth of some of the things she admits having said to professionals, (b) having said some of the things professionals have attributed to them, (c) that the findings of the judge are accurate both in relation to disputed factual matters and the assessment by the judge of the risk. Of course, there is no strictly applied principle of *res judicata* in English children law; in certain circumstances, previous findings can be reopened and considered afresh by a judge. In the current case, however, the parents' formal position has been as recorded in the identically worded preamble included in several of the interim orders in these proceedings:

> *'Neither parent seeks to make any application to reopen in any way the findings made by HHJ Lynch in proceedings LS 13 C 00313 concerning [Y] and accept they are bound by them. […]'*

25. In 2017, the parents moved to the RoI from the north of England. At the time, M was 5 months pregnant with S. M is entirely frank in acknowledging that her flight to the RoI was designed to put her then unborn baby beyond the reach of a family justice system which contemplates non-consensual adoption as a consequence of public care proceedings. Before the birth, the Irish authorities undertook child protection procedures which resulted in orders authorising S's removal at birth in September 2017 into foster care and placement with the FCs.

26. M was briefly admitted to an acute mental health unit shortly after the birth and removal.

27. Since then, M became pregnant again, giving birth to X in November 2018. X was also removed from the parents' care and was placed with the FCs, together with her sister.

Litigation background

28. In order fully to understand the progress of this litigation, this judgment may be read together with the judgments on 12th April 2018 of Francis J, *CFA (Ireland) v F* [2018] EWHC 939 (Fam), on 29th October 2018 of Mr D. R. L. Garrido QC, sitting as a High Court Judge, *Re S (Care proceedings: Article 15: Second Transfer)* [2018] EWHC 3054 (Fam) and mine of 27th February 2019, *Re S (No. 2) (Care Proceedings) (Article 15: Second Application for Second Transfer* [2019] EWFC 12. Each of those three judgments dealt with applications made for transfer of the case pursuant to Article 15 of Council Regulation (EC) No. 2201/2003 ("BIIa"): the first, a request that the English courts accept the transfer of the case from the jurisdiction of the RoI; that request having been upheld, the second and third being applications made by the parents that the case be transferred back from England to the RoI.

29. I set out in my judgment in *Re S (No. 2)* the regrettably long procedural history to the case:

> *3. My decision and this judgment represent the latest in an unusually long series of court decisions relating to the appropriate jurisdiction in which questions of S's future welfare are to be determined:*
>
> *a. 8th January 2018: the District Court in the Republic of Ireland granted an application that the Irish court request the English courts to assume jurisdiction;*

b. 6th February 2018: that decision was upheld on appeal in the Republic of Ireland by HHJ Donnabhain; the request was made of the English courts;

c. 27th February 2018: MacDonald J, sitting in the Family Division of the High Court of England and Wales, made an order nisi accepting the transfer of jurisdiction;

d. 12th April 2018: Francis J, having heard the parents' objections to the same, made a final order accepting jurisdiction – reported as [2018] EWHC 939 (Fam);

e. 29th October 2018: Mr Damian Garrido QC, sitting as a Deputy High Court Judge, gave a judgment arising out of a hearing on 10th and 11th October 2018, rejecting the parents' application that the English court request the Irish court to assume jurisdiction, in short, to take their case back again – reported as Re S (Care Proceedings: Article 15 Second Transfer) *[2018] EWHC 3054 (Fam);*

f. 3rd December 2018: Baker LJ refused M's application to appeal the judgment of Mr Garrido QC;

g. 15th January 2019: M issued a further application that this court ask the Irish court to assume jurisdiction.

30. Notably, in between (d) and (e) (above), the decision was taken that, while the English courts would assume jurisdiction in relation to S, she would remain, in the interim, placed with the FCs, with whom she had lived since birth. While this, of course, has provided S with consistency, it has injected into the case the current complication that, the FCs having become the preferred carers of all parties, the Family Court in England, with its arsenal of English legal concepts, principles and potential orders is seeking to legislate for the placement of and other arrangements for a child in an entirely separate sovereign state.

31. My judgment in *Re S (No. 2)* dismissed the parents' second application for a second Article 15 transfer. My reasons for doing so are set out in full in that judgment. In large part, my rationale derived from the fact that the final hearing of the application was already wholly prepared for and listed in England.

32. It is that final hearing which has proceeded before me last week and this. As well as reading the relatively voluminous papers, I heard evidence only from:

- Melanie Gill, Specialist Assessment Psychologist,
- Clare Matthew, the allocated senior practitioner social worker,
- M,
- F,
- the CG.

The evidence

Melanie Gill

33. Psychologist, Melanie Gill, has assessed both parents. That assessment has been very comprehensive, using a number of models and techniques, but employing as its principal theoretical base Crittenden's Dynamic Maturational Model of Attachment and using a Structured Professional Judgment (SPJ) protocol, which, she writes:

> *'reflects current scientific, empirical, clinical and professional judgment rather than just clinical judgment or just actuarial assessments because there is a large and growing body of literature to support SPJ's superiority over just 'actuarial' (psychometric testing) tools or just clinical judgment.'*

34. I need not burden this judgment with too full a summary of Ms Gill's conclusions, when her executive summary clearly conveys the pertinent findings.

35. In relation to M, Ms Gill writes:

> *The interviews and assessments conducted with [M] showed highly complex post traumatic effects from childhood which continues to influence her emotional and behavioural functioning, and her ability to comfort and protect her children at a fundamental level. Her highly abusive early years formed a*

template of damage that was not ameliorated within the care of her grandfather. [M] has developed significant psychopathology including vulnerable narcissistic traits, complex post-traumatic stress, and callous and unemotional aspects of personality formation.

She is a highly damaged and vulnerable young woman who is also badly affected by the loss of her children but an inability to countenance her own responsibility in their removal. [M] unfortunately continues to present with multiple risk factors to children. I have recommended a package of specialist long term therapy to help her, and hopefully change her future and lower her current risk.

36. As to F:

[F]'s assessments indicated 'disorganised' unresolved trauma from a number of highly negative experiences during his childhood. These cause outbursts of anger that are out of his control. He is psychologically aligned with [M] and unable to act on his individual perspective. In addition, he has been 'triangulated' into the vengeful anger that [M] feels for the majority of professionals who are involved with the family. I have also recommended specific therapy for [F]. Both parents clearly love their children but their individual traumatic pasts have affected their current ability to parent sensitively and with psychological stability to a high degree.

37. Of some relevance to M's current insight and attitude, Ms Gill wrote this:

124. [M wrote,] 'I feel like I have been used and abused by [a social worker] to better his career, why me why my family ?and [a psychiatrist] and [a psychologist] and [a social worker and the judges are all happy destroying innocent peoples lifes like my children and mine. I will take them to a criminal court. Justice has to provail, I follow the lord not satan or the devil ! I was abused as a baby why would I harm any children in anyway I am not like that and i know what it does to you I would not wish the abuse that I read the subconcious flashbacks and the anxiety and ocd on anyone'.

125. Such statements suggest that either [M] actually believes that what she says is true, or she is being deceptive. Both positions indicate significant distorted thought processing and also 'delusional' beliefs as some of the details as she presented them came from her own mind rather than reality, but this was not acknowledged by her. The court process has impinged directly on her sense of 'self' and accentuated her use of 'denied true cognition'. This produces very high anxiety and hypersensitivity, and the perception of 'threat' as pervasive.

> *126. [M] is highly vulnerable and becoming more so because of the severe thought processing distortions she uses, and because she has lost all her children and is now in a state of 'ambiguous loss' caused by the 'relational uncertainty of trying to develop an attachment relationship with her children who are both 'there and not there'; this can produce a very high anxiety'. However, genuinely stable attachment functioning allows individuals to acknowledge their failures, faults, and limitations without defensiveness, anger, shame, and integrate positive and negative self-representations into a complex but coherent global self- concept. [M]'s assessments indicate that she has little ability to do this.*
>
> *127. Of crucial importance in my assessment of her is the subject of her veracity. In her case 'truth' is associated with a substantial distortion of information. Those distortions involve information which is incomplete, ambiguous, irrelevant, and misleading to both her and others. Unfortunately, as previously explained neurological activity in the brain is not geared towards accurate representation of the past but is organised to predict the need to protect the self and develops through attachment relationships. This explains her apparent belief that what she says is both accurate and truthful and the very high level of distress she shows when she feels challenged.*

38. Much of Ms Gill's oral evidence related to her recommendations as to appropriate therapeutic intervention.

39. In relation to M, she recommended either Schema Therapy or Sensorimotor Psychotherapy. Of the latter, for which she seemed to have a preference, she wrote this:

> *Traditional psychotherapy addresses the cognitive and emotional elements of trauma, but lacks techniques that work directly with the physiological elements, despite the fact that trauma profoundly affects the body and many symptoms of traumatised individuals are somatically based (bodily based). Altered relationships among cognitive, emotional, and sensorimotor (body) levels of information processing are also found to be implicated in trauma symptoms. Sensorimotor Psychotherapy is a method that integrates sensorimotor processing with cognitive and emotional processing in the treatment of trauma. Unassimilated somatic responses evoked in trauma involving both arousal and defensive responses are shown to contribute to many PTSD symptoms and to be critical elements in the use of Sensorimotor Psychotherapy.*
>
> *By using the body (rather than cognition or emotion) as a primary entry point in processing trauma, Sensorimotor Psychotherapy directly treats the effects of trauma on the body, which in turn facilitates*

emotional and cognitive processing. This method is especially beneficial for clinicians working with dissociation, emotional reactivity or flat affect, frozen states or hyperarousal and other PTSD symptoms.

Sensorimotor Psychotherapy is a method for facilitating the processing of unassimilated sensorimotor reactions to trauma and for resolving the destructive effects of these reactions on cognitive and emotional experience. Traumatised individuals are plagued by the return of dissociated, incomplete or ineffective sensorimotor reactions in such forms as intrusive images, sounds, smells, body sensations, physical pain, constriction, numbing and the inability to modulate arousal.

These unresolved sensorimotor reactions condition emotional and cognitive processing, often disrupting the traumatised person's ability to think clearly or to glean accurate information from emotional states. Conversely, cognitive beliefs and emotional states condition somatic processing. For instance, a belief such as "I am helpless" may interrupt sensorimotor processes of active physical defence; an emotion such as fear may cause sensorimotor processes such as arousal to escalate. Most psychotherapeutic approaches favour emotional and cognitive processing over body processing, and it has been shown that such approaches can greatly relieve trauma symptoms.

As I explained, this form of therapy will be very challenging for [M] and she may need support from [F], friends, or a specific support group. However, it is important that whoever supports her has some knowledge of the proceedings so that [M]'s current perception of her past is not negatively reinforced. It is important that [M] does not engage with 'counselling' services as the majority accept client information unconditionally, thus negatively reinforcing and exacerbating entrenched perspectives.

The sensorimotor therapist will also need access to my report in full to have an understanding of the complex issues involved in treating [M]. I have found two possible therapists in the […] area [in which the parents live] but would like to speak to them to see if they are able to do this sort of work.

40. Ms Gill indicated in the one similar case she could call to mind in which Sensorimotor Psychotherapy was used, it was two to three years before real progress was seen. In the current case, she was of the view that M would require a course of such therapy lasting *'at least two years, maybe more.'* She was at pains in her oral evidence to point out, as above, that this is an extremely challenging type of therapy for the patient, leading, as it does, to

real physical pain: *'aches, pains, colds, 'flu, and mentally [painful]: once there is an opening of the doors to memories which have been dissociated, you get a trickle, then a flood: it is extremely upsetting to most people.'* And, *'the problem for those as vulnerable as [M], is that, when things get difficult, the brain automatically starts to disconnect; and many give up as just physically too painful.'*

41. In respect of F's therapeutic needs, Ms Gill recommended a short (8 – 10 session) course of Eye Movement Desensitisation and Reprocessing (EMDR), described thus:

> *EMDR is a form of therapy that does not primarily rely on speaking about one's traumatic experiences, but that is able to rapidly and effectively integrate traumatic memories by asking PTSD subjects to focus intensely on the emotions, sensations and meaning of the traumatic experience, while asking to follow the hand of a clinician who induces slow saccadic eye movements.*

42. This would then need to be followed by a course of Psychodynamic Psychotherapy, which, if there were successful and meaningful engagement, would probably take 12 – 18 months to complete.

43. In conjunction with the psychotherapy:

> *[F] would also benefit from music therapy, specifically drumming. The amgydala, a structure in the brain, is part of the limbic system that is involved in the expression of emotion, especially fear, autonomic reactions and emotional memory. Dysfunction in this structure is linked with traumatic stress reactions. Traumatic stress alters the way the body responds to stress, affecting mediators such as stress hormones and neurotransmitters. Music therapy plays a protective role and drumming exercises have been found to greatly reduce stress by altering their brain-wave patterns.*
>
> *In addition, yoga, and horse-riding would also be beneficial. Taking part in such activities might allow [F] to engage in social interactions independently of [M]. [F] would also benefit from support as he accesses therapy which may not be available from [M]. It's likely that any potential therapist would be able to advise on this.*

44. In relation to both parents, it was clearly expressed in Ms Gill's oral evidence that:

a. it would not be safe for either to look after a child while untreated;

b. it would not be appropriate for a child to be placed with either at some point during what was thought or hoped to be productive and positive treatment;

c. conclusion of the recommended treatment cannot somehow be considered the end of the road, nor necessarily will it mark a point at which a child could safely be placed with either or both; rather, it would represent an advance at which point further assessment and individual or parenting work might be indicated.

45. As to availability and funding, the evidence, in combination from Ms Gill and the parents, does not permit of complete clarity. What seems to have emerged is this:

a. Sensorimotor psychotherapy. This may be available where M lives. However, she may have to undertake a trip to a larger city to access this, necessitating a two- to three-hour trip in each direction. There is a possibility that the CFA will agree, or can be ordered, to pay for this, although this has not been confirmed. If not, the parents think they might be able to afford this, although on any view that will be a considerable stretch, and, over two to three years, a mammoth commitment.

b. EMDR. Recognised as an effective treatment, this is likely to be relatively easily accessible to F.

c. Psychodynamic Psychotherapy. This is likely to be available where the parents live. There is no evidence as to whether the provision would be met by the Irish health service or the CFA, although F seemed to think (without any real evidential basis for taking this view) that after registering with a GP (which he has not yet done), such therapy could begin within a few weeks. I am not in a position to take a view either way.

Clare Matthew, the social worker

46. Ms Matthew was the author of a statement, an assessment of the parents and the care plan. Although she had not undertaken the assessment of the prospective special guardians (undertaken in accordance with schedule 21 of the Adoption and Children Act 2002 ("ACA 2002")), she was very familiar with its contents and has had sufficient dealings with the prospective special guardians to have formed a clear view as to their abilities and characteristics.

47. Ms Matthew indicated throughout her evidence that, from the LA's point of view, there is no realistic prospect of the parents being in a position to care for S within a timescale which is consistent with S's welfare. This assessment underpinned and informed the LA opinion that ongoing contact between S and her parents after this court's final order would serve the purpose of meeting S's needs in relation to identity and sense of self. She was not moved in cross examination to depart from this view. The LA view had initially been that contact six times each year would adequately fulfil this function. When the FCs indicated their view that monthly contact would be appropriate, the LA gladly fell in line with this.

48. Although the LA's position seems to have moved somewhat since, Ms Matthew indicated in her evidence in chief that the LA were recommending a defined contact order, not because the FCs were not to be trusted – in fact all they have said and done suggests their absolute recognition of the importance to S of knowledge of her parents; rather it was because she wanted there to be insulation for the FCs' benefit from attempts to reverse the decision of this court (if it accords with the LA and FCs' opinion) when jurisdiction reverts to the RoI.

49. While Ms Matthew accepted that contact at a level of three times weekly had not thus far destabilised S in her placement, she asserted that there was scope for this in the future.

50. Ms Matthew told me of a recent incident after a contact at which it was felt by the RoI social work team that F had been unreasonably challenging of the FCs, to the extent that the CFA has tweaked the 'handover' arrangements for X's contact so that the FCs do not now come into contact with the parents. The LA has not mirrored this stance in relation to the contact with S alone. Without proper evidence I can take this matter no further. I note in passing, though, that, however well-intentioned the adults may be, there is much scope for disagreement when birth parents who desperately desire to care for their child are forcibly prevented from doing so, for reasons they do not accept as valid, and they come into contact with those charged instead with the care of the child.

51. In light of a change of stance by the FCs and the parents, Ms Matthew was able to secure LA commitment to fund the professional supervision of contact between S and her parents, at least at a frequency of once per month.

Michael Lynn, Senior Counsel at the Irish Bar

52. An expert opinion has been sought and obtained from Michael Lynn, a Senior Counsel (the equivalent of a Queen's Counsel) at the Bar of Ireland with particular expertise in immigration law.

53. His extremely clear and helpful advice, so far as it remains relevant to the case in its current form, can be quickly summarised:

    a. S is entitled to assert Irish citizenship, this being pursuant to the provisions of the Irish Nationality and Citizenship Act 1956, and by virtue of her having been born in

the island of Ireland (s.6) to parents at least one of whom was, at the point of birth a British citizen (s.6A);

b. in order to confirm her Irish citizenship, the *'act [to be] done on […] [her] behalf that only an Irish citizen is entitled to do'* (s.6(2)) will include an application being made on her behalf for an Irish passport;

c. whilst this would normally be done by her parents, if (and I have not asked this) they are for any reason reluctant to do this, the application may be made by the FCs once they are invested with parental responsibility.

David Leahy, Counsel at the Irish Bar

54. Expert advice has also been sought and obtained from David Leahy, Counsel at the Irish Bar. Mr Leahy practises mainly in the area of child care, with particular emphasis on the international movement of children.

55. Mr Leahy's two formal written advices have been extremely clear and helpful. They have covered a range of questions and scenarios put to him.

56. Before setting out Mr Leahy's advice, it is helpful to make reference to certain components of BIIa which touch on the current case.

> *Article 21*
>
> ***Recognition of a judgment***
>
> *1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.*
>
> *[…]*

3. Without prejudice to Section 4 of this Chapter, any interested party may, in accordance with the procedures provided for in Section 2 of this Chapter, apply for a decision that the judgment be or not be recognised.

[…]

Article 23

Grounds of non-recognition for judgments relating to parental responsibility

A judgment relating to parental responsibility shall not be recognised:

(a) if such recognition is manifestly contrary to the public policy of the Member State in which recognition is sought taking into account the best interests of the child;

(b) if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State in which recognition is sought;

(c) where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defence unless it is determined that such person has accepted the judgment unequivocally;

(d) on the request of any person claiming that the judgment infringes his or her parental responsibility, if it was given without such person having been given an opportunity to be heard;

(e) if it is irreconcilable with a later judgment relating to parental responsibility given in the Member State in which recognition is sought;

(f) if it is irreconcilable with a later judgment relating to parental responsibility given in another Member State or in the non-Member State of the habitual residence of the child provided that the later judgment fulfils the conditions necessary for its recognition in the Member State in which recognition is sought.

or

(g) if the procedure laid down in Article 56 has not been complied with.

Article 26

Non-review as to substance

Under no circumstances may a judgment be reviewed as to its substance.

Article 28

Enforceable judgments

1. A judgment on the exercise of parental responsibility in respect of a child given in a Member State which is enforceable in that Member State and has been served shall be enforced in another

Member State when, on the application of any interested party, it has been declared enforceable there.

[…]

Article 56

Placement of a child in another Member State

1. Where a court having jurisdiction under Articles 8 to 15 contemplates the placement of a child in institutional care or with a foster family and where such placement is to take place in another Member State, it shall first consult the central authority or other authority having jurisdiction in the latter State where public authority intervention in that Member State is required for domestic cases of child placement.

2. The judgment on placement referred to in paragraph 1 may be made in the requesting State only if the competent authority of the requested State has consented to the placement.

3. The procedures for consultation or consent referred to in paragraphs 1 and 2 shall be governed by the national law of the requested State.

4. Where the authority having jurisdiction under Articles 8 to 15 decides to place the child in a foster family, and where such placement is to take place in another Member State and where no public authority intervention is required in the latter Member State for domestic cases of child placement, it shall so inform the central authority or other authority having jurisdiction in the latter State.

57. Limited to what is relevant to the case as it now stands, I summarise Mr Leahy's advice thus:

a. For the purposes of enforcement of the English order, the provisions of Article 28 BIIa (enforceability in England; service on the respondents) are satisfied by an order made in the Irish enforcement proceedings exhibiting the English Annex II certificate, ideally supported by an affidavit of service of the English order.

b. The grounds of non-recognition set out in Article 23(a) to (f) do not arise in the current case.

c. Article 23(g) requires compliance with Article 56. The safest course is to seek an Article 56 consent from the Irish Central Authority. (This approach has been

confirmed via advice from the Office of the Head of International Family Justice (England and Wales) as being appropriate when an English court contemplates placing pursuant to a special guardianship with a non-relative (a term of art, strictly interpreted).)

d. Although there is no equivalent in Irish law to an English special guardianship order, such an order can be enforced in Ireland (see Finlay Geoghegan J in *Carmarthenshire County Council v C.D.* [2016] IEHC 418, High Court, 30 June 2016). It would be *'highly desirable for the English order to provide as much detail as possible as to the meaning and effect of such an order'*.

e. An order for enforcement is sought by way of ex parte application to the Master of the High Court; in an emergency, this application can be made and the order for enforcement made on the same day (subject to the availability of the relevant documentation, including an Annex II certificate). (This latter advice was particularly relevant at a time when it was envisaged that the United Kingdom might leave the EC without a withdrawal agreement, so with a fatal effect on the application of BIIa as between England and the RoI, just two days after final judgment was due in this case.)

f. A 'mirror order' would be unlikely to be made by the Irish Court in circumstances where a private international law instrument can achieve the same effect.

g. In the event of a 'hard Brexit' looking imminent, seeking permission to place pursuant to Article 33 of the 1996 Hague Convention would also be prudent.

h. There is no complete clarity as to what orders the parents and the special guardians could seek in Ireland to determine the question of how much contact there should be. It is conceivable that the Guardianship of Infants Act 1964 would provide a jurisdiction to consider such questions.

i. In order to protect against an application being made by the parents seeking to undo the special guardianship order by applying (pursuant to section 11(2) of the Guardianship of Infants Act 1964) to reverse the attribution of the 'custody' of the child, the English order should explicitly be described terms of being a 'final order' (if that is what is intended) and not amenable to variation on the application of the parties. This would make it *'clear to any subsequent Irish court that the domestic provisions on guardianship are to be treated with caution'*.

j. If the question of 'access' to the child is regulated by an order of the English court, it is unlikely that it would be open to an Irish court to interfere with the order, as the child arrangements order element of the final order would be deemed a *'judgment regarding rights of access'* within the meaning of BIIa and so the beneficiary of a right of automatic enforceability in Ireland under the provisions of Article 41 of the Regulation.

58. Mr Leahy provided a helpful summary of his advice in relation to the question of post-order contact (or 'access') thus:

> *If it is sought to exclude the role of the Irish courts on questions of access, then it is probably preferable that the special guardianship order be accompanied by a child arrangements order. If, on the other hand, it is preferred that such decisions should be determined by an Irish Court, then it is probably preferable that the English special guardianship order should be made alone, and a recital could be added to the effect that nothing in the Order should be taken to interfere with the possibility of an application being made to the Courts of Ireland in respect of access.*
>
> *Finally on the question of access, if it is intended that the proposed special guardians alone should be empowered to determine the extent of parental access/contact, then a clear recital to that effect should be inserted into the Order, so that insofar as that may be necessary, that distinction can be relied upon to limit the types of application that might be made in Ireland under the Guardianship of Infants Act 1964.*

The parents

59. Neither parent felt able to travel from RoI to participate in the proceedings in that way. This was in part due to the fact of the frequent ongoing contact with S and X in the RoI and in part to their profound mistrust of the English courts, child protection system and professionals. Given their perception of the manner in which their eldest child was removed from their care and adopted without their permission, there can be no real surprise at or criticism of the parents for holding the views they do.

60. Very fortunately, both were represented by English solicitors and specialist English counsel. I should pay tribute in passing to the highly professional way in which the parents' lawyers ensured the complete representation of their lay clients, in less than ideal circumstances.

61. Both of the parents gave evidence to me by video-link from the RoI. I was impressed with the politeness and respectfulness of both. (I was also particularly grateful to the mother's solicitor, Miss Hoare, for travelling to the RoI in order to ensure that the parents were both prepared for and able to give their evidence and that the technical arrangements worked; given that there were recurrent issues with the technology, I suspect that her physical presence saved the day.)

62. It was clear from M's evidence that:

    a. she desperately wants to have the opportunity to parent S (and X);

    b. she considers that she has wrongly been deprived thus far of this opportunity;

c. she does not accept the findings or conclusions of HHJ Lynch in the proceedings relating to Y;

d. with some reluctance, she is prepared to agree to a special guardianship order, with S to remain placed with the FCs;

e. she sees this as a temporary measure;

f. although she does not accept the need for the same or the psychological assessments of her to date, she intends to procure and engage in the recommended therapy;

g. she fully intends to apply to be in a position in two years (if not sooner) to contend for the care of both S and X.

63. It was apparent that M lacks insight into and acceptance of the extent of her difficulties. That said, this is entirely unsurprising, given Ms Gill's evidence as to her highly advanced psychological defence systems; nor is such a position necessarily to be seen as a contra-indicator to the possibility of the effectiveness of the Sensorimotor Pyschotherapy recommended.

64. As to F, he shares each of the views I attribute to M at sub-paragraphs (a) to (g) (above). He told me that he did not have a problem with anger; rather, he was very 'emotional' at various points in previous proceedings. His view of any professional whose assessment of him or M was not positive was that they had *'turned on [him]'*, that their behaviour was *'shocking'*. To the final question in cross-examination on behalf of the CG, whether any of the criticisms of him or M had been fair, he indicated his clear view that they had not.

65. His very final words in evidence, however, were poignant. When I asked him if there was anything else he wanted to tell me, he said, *'I would like to say: as soon as I've done the therapy*

work, I would like to discharge the SGO for [S]; I would like the chance to be a father. I never got that with [Y]; don't want that to happen a second time.'

66. On the part of both parents, insight into the past and into the degree of their individual and collective problems is clearly still very limited, notwithstanding this being their third set of child care proceedings to be reaching a conclusion. That said, I do not put much store by the degree of defensiveness and the absence of insight I discerned in both of the parents in their evidence: their current attitudes are exactly as described by Ms Gill and are not doubt attributable to their individual psychopathologies, also as described.

Angela Powell, the children's guardian

67. Ms Powell accepts Ms Gill's assessment. She agrees with the LA's assessments both of the parents and of the FCs as prospective special guardians.

68. She was at pains to point out that she sees S's home with the FCs as being *'a home for the rest of her childhood'*. S, the CG was clear, needs a clear decision as to her permanent future family. In striking and graphic terms, she spoke of how S – clearly fond of, familiar and happy to spend time with her parents – regards the FCs as (what adults might dub) her primary attachment figures.

69. The CG was equally clear that contact should be significantly reduced from its current very high levels. After an order is made which – on her case – reflects the permanence of S's placement with the FCs, the frequency of contact should be adjusted to reflect its amended purpose. She took no issue with the relatively swift reduction programme proposed by the LA, nor with the proposed frequency of monthly.

70. The CG was entirely confident in the FCs' ability to recognise the importance of maintaining contact between S and her parents and to make appropriate decisions for her in her best interests. She was worried about an order tying the FCs into a regime which was not ultimately appropriate and was eager to protect them, to the degree that this is possible, from being dragged into litigation in the RoI.

The Law

71. In making decisions about S, I am bound to treat her welfare as my paramount consideration (s.1(1), CA 1989).

72. I must bear in mind both the non-exhaustive list of factors set out in the so-called welfare checklist (s.1(3), CA 1989) and the 'no-delay principle', viz.:

> *In any proceedings in which any question with respect to the upbringing of a child arises, the court shall have regard to the general principle that any delay in determining the question is likely to prejudice the welfare of the child.* (s.1(2) CA 1989)

73. Article 8 of the European Convention on Human Rights is clearly engaged, and is protected by virtue of section 6 of the Human Rights Act 1998: the court must respect the private and family life of the protagonists. In the current case, S clearly has 'family life' (within the meaning of Article 8) with her parents, with her sister X, and, in my view, with the FCs. It follows that each of M, F, FC1 and FC2 have 'family life' with S.

74. The order I am asked by all parties to make is a special guardianship order. This is a creature of statute, whose advent was brought about by the insertion into the Children Act 1989 of sections 14A to 14G in December 2005 (by operation of the Adoption and Children Act 2002).

75. Insofar as relevant, sections 14A to 14D provide:

> ***14A Special guardianship orders***
>
> *(1) A "special guardianship order" is an order appointing one or more individuals to be a child's "special guardian" (or special guardians).*
>
> *(2) A special guardian—*
>
> *(a) must be aged eighteen or over; and*
>
> *(b) must not be a parent of the child in question,*
>
> *and subsections (3) to (6) are to be read in that light.*
>
> *(3) The court may make a special guardianship order with respect to any child on the application of an individual who—*
>
> *(a) is entitled to make such an application with respect to the child; or*
>
> *(b) has obtained the leave of the court to make the application,*
>
> *or on the joint application of more than one such individual.*
>
> *(4) Section 9(3) applies in relation to an application for leave to apply for a special guardianship order as it applies in relation to an application for leave to apply for a section 8 order.*
>
> *(5) The individuals who are entitled to apply for a special guardianship order with respect to a child are—*
>
> *(a) any guardian of the child;*
>
> *(b) any individual who is named in a child arrangements order as a person with whom the child is to live;*
>
> *(c) any individual listed in subsection (5)(b) or (c) of section 10 (as read with subsection (10) of that section);*
>
> *(d) a local authority foster parent with whom the child has lived for a period of at least one year immediately preceding the application;*
>
> *(e) a relative with whom the child has lived for a period of at least one year immediately preceding the application.*
>
> *(6) The court may also make a special guardianship order with respect to a child in any family proceedings in which a question arises with respect to the welfare of the child if—*
>
> *(a) an application for the order has been made by an individual who falls within subsection (3)(a) or (b) (or more than one such individual jointly); or*
>
> *(b) the court considers that a special guardianship order should be made even though no such application has been made.*
>
> *(7) No individual may make an application under subsection (3) or (6)(a) unless, before the beginning of the period of three months ending with the date of the application, he has given written notice of his intention to make the application—*

(a) if the child in question is being looked after by a local authority, to that local authority, or

(b) otherwise, to the local authority in whose area the individual is ordinarily resident.

(8) On receipt of such a notice, the local authority must investigate the matter and prepare a report for the court dealing with—

(a) the suitability of the applicant to be a special guardian;

(b) such matters (if any) as may be prescribed by the Secretary of State; and

(c) any other matter which the local authority consider to be relevant.

(9) The court may itself ask a local authority to conduct such an investigation and prepare such a report, and the local authority must do so.

(10) The local authority may make such arrangements as they see fit for any person to act on their behalf in connection with conducting an investigation or preparing a report referred to in subsection (8) or (9).

(11) The court may not make a special guardianship order unless it has received a report dealing with the matters referred to in subsection (8).

(12) Subsections (8) and (9) of section 10 apply in relation to special guardianship orders as they apply in relation to section 8 orders.

(13) This section is subject to section 29(5) and (6) of the Adoption and Children Act 2002.

14B Special guardianship orders: making

(1) Before making a special guardianship order, the court must consider whether, if the order were made—

(a) a child arrangements order containing contact provision should also be made with respect to the child,

(b) any section 8 order in force with respect to the child should be varied or discharged.

(c) where a provision contained in a child arrangements order made with respect to the child is not discharged, any enforcement order relating to that provision should be revoked, and

(d) where an activity direction has been made—

(i) in proceedings for the making, variation or discharge of a child arrangements order with respect to the child, or

(ii) in other proceedings that relate to such an order,

that direction should be discharged.

(1A) In subsection (1) "contact provision" means provision which regulates arrangements relating to—

(a) with whom a child is to spend time or otherwise have contact, or

(b) when a child is to spend time or otherwise have contact with any person;

*but in paragraphs (a) and (b) a reference to spending time or otherwise having contact with a person is to doing that otherwise than as a result of living with the person.**]***

(2) On making a special guardianship order, the court may also—

(a) give leave for the child to be known by a new surname;

(b) grant the leave required by section 14C(3)(b), either generally or for specified purposes.

14C Special guardianship orders: effect

(1) The effect of a special guardianship order is that while the order remains in force—

(a) a special guardian appointed by the order has parental responsibility for the child in respect of whom it is made; and

(b) subject to any other order in force with respect to the child under this Act, a special guardian is entitled to exercise parental responsibility to the exclusion of any other person with parental responsibility for the child (apart from another special guardian).

(2) Subsection (1) does not affect—

(a) the operation of any enactment or rule of law which requires the consent of more than one person with parental responsibility in a matter affecting the child; or

(b) any rights which a parent of the child has in relation to the child's adoption or placement for adoption.

(3) While a special guardianship order is in force with respect to a child, no person may—

(a) cause the child to be known by a new surname; or

(b) remove him from the United Kingdom,

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(4) Subsection (3)(b) does not prevent the removal of a child, for a period of less than three months, by a special guardian of his.

[…]

14D Special guardianship orders: variation and discharge

(1) The court may vary or discharge a special guardianship order on the application of—

(a) the special guardian (or any of them, if there are more than one);

(b) any parent or guardian of the child concerned;

(c) any individual who is named in a child arrangements order as a person with whom the child is to live;

> *(d) any individual not falling within any of paragraphs (a) to (c) who has, or immediately before the making of the special guardianship order had, parental responsibility for the child;*
>
> *(e) the child himself; or*
>
> *(f) a local authority designated in a care order with respect to the child.*
>
> *(2) In any family proceedings in which a question arises with respect to the welfare of a child with respect to whom a special guardianship order is in force, the court may also vary or discharge the special guardianship order if it considers that the order should be varied or discharged, even though no application has been made under subsection (1).*
>
> *(3) The following must obtain the leave of the court before making an application under subsection (1)—*
>
> *(a) the child;*
>
> *(b) any parent or guardian of his;*
>
> *(c) any step-parent of his who has acquired, and has not lost, parental responsibility for him by virtue of section 4A;*
>
> *(d) any individual falling within subsection (1)(d) who immediately before the making of the special guardianship order had, but no longer has, parental responsibility for him.*
>
> *(4) Where the person applying for leave to make an application under subsection (1) is the child, the court may only grant leave if it is satisfied that he has sufficient understanding to make the proposed application under subsection (1).*
>
> *(5) The court may not grant leave to a person falling within subsection (3)(b)(c) or (d) unless it is satisfied that there has been a significant change in circumstances since the making of the special guardianship order*

76. The true essence of the order is tucked away in section 14C(1): a special guardian:

a. holds parental responsibility for the child; and

b. may exercise that parental responsibility to the exclusion of any other holder of parental responsibility (subject to any other CA 1989 order).

Given the fact that a special guardianship order cannot be granted in favour of a parent, it can be seen as falling on the spectrum of English orders between:

a. a section 8 child arrangements ('live with') order in favour of a non-parent who, subject to any particular and specific orders, would not be entitled to enforce any decisions over the mother or any father holding parental responsibility, and

b. an adoption order, by which the adopter acquires parental responsibility for the child who is treated in law as the child of the adopter, whereas a birth parent's parental responsibility is extinguished and the child is treated in law as not being the child of any other person. (See sections 46 and 67 of the Adoption and Children Act 2002)

As such, this type of order is useful and used either in underpinning a non-consensual, non-parental placement (where adoption is not in the child's interests) or in ensuring that, even in a consensual, non-parental placement, the child's home and security is protected from being destabilised by the actions, decisions or aspirations of the non-resident parents.

77. It is important to note that while an adoption order is all but irrevocable, a special guardianship order is susceptible of variation or discharge. However, the bar is set high: any application to vary or discharge brought by a parent requires leave, which will only be granted if the parent can demonstrate *'a significant change in circumstances since the making of the special guardianship order'*. (See subsections 14D(3)(b) and (5), CA 1989). It is important to note that, while establishing a requisite change in circumstances will open the door to being given permission to proceed with an application, it will in no way be determinative of that application. The paramountcy of the child's welfare will, as always, steer the adjudication of the application. If, effectively, a change of the child's place of residence and primary carers was being sought, it is likely that, other things being equal, significant account would be taken of the longevity of the child's placement with the special guardian(s), the degree of attachment to them and the likely impact on the child of a significant change in her circumstances.

Discussion

Return to the parents

78. In many ways the parents have improved their situation since the 2013-14 proceedings before HHJ Lynch. Their move to the RoI has enabled them to realise a number of tangible benefits and improvements. They are both immersed in the community of the church of which they are members. As such, they, and in particular M, have a support network which was not available to them in previous years. Their relationship seems to be in a relatively stable stage. F is working. They have accommodation, albeit somewhat limited, and describe being in a financially buoyant position. M's physical health is good and her mental health stable and free of recent acute deterioration.

79. Even if the parents do not accept the validity of the conclusions of Melanie Gill, the fact they are both professing themselves eager to avail themselves of and to engage in the recommended therapy can only be positive.

80. That they have maintained frequent and regular contact over, now, some 18 months, demonstrates both a commitment to S (and, latterly, X) and a degree of stability in their lives.

81. However – and to their credit – they accept that S cannot currently return to their care. They are right to make this concession.

82. This is because, sadly, there is also much which has not changed since the previous proceedings. The principal difficulty is that these two adults are the product of their respective dysfunctional and abusive childhoods. They cannot in any real sense help being

the people they are now, or, more accurately, having the psychopathological issues identified by Melanie Gill, whose (largely unchallenged) evidence I accept.

83. Ms Gill concluded (I summarise) that:

a. S would be at risk of harm in M's care due to M's anxieties.

b. M continues to pose a sexual risk to her children.

c. M presents a physical risk to her children.

d. These risks are compounded (or at least not neutralised) as F is unable to challenge her; if anything, this particular difficulty has deteriorated since earlier assessment:

> *'[…] [F] is aligned with [M]'s perspective to an extreme degree. In addition, he has attenuated the vengeful anger that [M] uses against professionals to the extent that information from the past is being increasingly distorted as he attempts to comply within his relationship with her. This is an entirely unconscious process.'*

e. F poses a risk of physical harm to S. This is due to the combination of his capacity for *'show[ing] anger which is outside his control'* and *'his ability neurologically to attune with S [being] compromised because his primary attachment processes are tied to [M].'*

84. I accept this assessment of risk. As articulated by me in the above paragraph, I find that all of these risks are currently present, that they are significant, and that the harm likely to be caused is potentially grave.

85. It is a positive feature in the parents' lives that Melanie Gill has identified, with some precision, what types of therapy, over what likely timescales, might – if there is successful engagement – lead to a meaningful improvement in the parents' psychological functioning. It is also of significance that the parents declare themselves as eager to source and to take advantage of the appropriate therapeutic resources.

86. Thus it is that both of the parents consider that, within two years at the most, they will both be able to demonstrate that they are able to assume the care of S (and of X).

87. It seems to me that the prospects (a) of the successful conclusion of the proposed therapy, and (b) within the sort of timescales the parents propose, are very much less than solid. There is a whole host of uncertainties inherent in the proposed process. First, it is currently unclear whether there is an appropriate provider of the Sensorimotor Psychotherapy required by M. While it is more likely that F could find appropriate therapists, the second difficulty is funding: I am not persuaded by any evidence that either the CFA or the Irish Health Service will necessarily fund what is identified as needed; nor do I consider it realistic to suppose that the parents will be able to fund this, especially over a sustained period, as they contend. Thirdly, for both of the parents, the level of engagement and commitment required is huge. Whether either or both are able to engage to the extent and for the duration needed is entirely untested. I accept their relative doggedness (as demonstrated, for example, by their move to the RoI in order to defeat the prospect of non-consensual adoption), but what is required to engage in this sort of therapeutic process is of an entirely different magnitude. Melanie Gill spoke of the mental and physical pain which is to be expected during the therapy she proposes for M; the outpouring of negative memories can be *'very upsetting'* and the process may also be '*just physically too painful*'; she told me that, for this reason, many are simply unable to maintain attendance and commitment. The prospects of prolonged, successful engagement are entirely uncertain. Fourthly, the timescales, it seems to me, are longer than the parents might hope. In relation to the Sensorimotor Psychotherapy, Melanie Gill's evidence was that this would take weekly commitment for *'at least two years, maybe more.'* Even at the point of the 'successful' conclusion of the proposed therapy, it is likely that significant

further work will be needed in order to improve the parents' ability to provide appropriate, safe, nurturing parenting.

88. In short, notwithstanding their strong desire to do whatever is necessary to assume the care of their children, it seems to me very unlikely that the parents would be in a position to demonstrate the ability to do so within a period even close to two years.

Placement

89. As I have found, the parents are not able to provide safe or appropriate parenting, now or in the short-term or predictable medium-term future.

90. Conversely, S is placed with FC1 and FC2. They began their parenting of S as foster carers for the FCA of Ireland, latterly as foster carers for the English LA. Across these two guises they have had the care of S for 18 months. There is no suggestion but that they have provided an excellent standard of care at all times. It is clear that S is settled in the home and attached to each of them. I have read a long and comprehensive assessment of them, their lifestyle, their characteristics and their abilities. It is entirely positive. I have heard the oral evidence of the English social worker and the CG. In relation to the FCs, this was also expressed in glowing terms.

91. Of particular importance is the professional assessment that the FCs demonstrate an ability to make child-focussed decisions, in S's best interests, and that they hold strongly to the view that S's parents must remain a part of her life.

92. Comparing the options for S, it seems abundantly clear that she cannot live with her parents. She should remain living with the FCs. To the extent that this represents an

interference with her and with her parents' Article 8 rights, I consider this to be both necessary and proportionate to the risks from which I must protect S.

Type and longevity of order

93. There was debate at various points as to whether the placement with the FCs should be underpinned by a care order (pursuant to section 31, Part 4, CA 1989), by operation of which the English LA would retain parental responsibility for S, the FCs acting at all times as her foster carers, or by a special guardianship order (pursuant to section 14A, CA 1989), which would invest the special guardians with (over-reaching) parental responsibility and reduce the status of the LA to a body with statutory responsibility to provide certain support services.

94. None of the parties contended for a care order. I agree.

95. Mr Day, in his very helpful written, closing submissions, set out twelve factors militating against the making of a care order in preference to a special guardianship order. I accept each of those factors, which I paraphrase and collate below:

a. S would be subjected, by a care order, to long-term corporate parenting which is intrusive and attracts stigma;

b. a care order is not required for S's protection; there is no evidence that it is required for her welfare;

c. there will, in any event, be some ongoing social work involvement; in all likelihood, the LA would delegate its responsibility to the local social care team; they are involved anyway, by virtue of X;

d. the FCs are capable of exercising parental responsibility; a care order would not give them parental responsibility, still less the power to exercise this to the exclusion of other holders; without parental responsibility, the FCs would be required to consult in relation to all but the mundane decisions with the LA;

e. the order would require management from a long distance;

f. there might be an impact on the ability to register S as an Irish citizen;

g. the LA does not seek a care order; given the above, there are no *'strong and cogent reasons'* here present to justify its imposition on a local authority (see *Oxfordshire County Council v L* [1998] 1 FLR 70 and *Re T [2009] 2 FLR 574*).

96. I am quite satisfied that a special guardianship order is the appropriate means by which to secure S's placement with the FCs. This will enable them to continue to look after her, to make decisions for her without having to consult with a corporate entity on the other side of the Irish Sea and to protect her from the risks posed to her by her parents, whether of direct harm or through the destabilisation of the placement.

97. S is now 18 months old. It has taken an unconscionable amount of time for her case to reach this final hearing. I shall not burden this already long judgment with further comment in relation to this. However, the upshot is that S has spent her whole life the subject of legal uncertainty as to her future. It is a huge advantage to her both that she has spent this whole period with one set of carers and that it is these persons with whom she is to stay. This means that in fact she has not suffered the disruption of moving carers and breaking attachments.

98. Notwithstanding this advantage, the time has more than come when final and permanent decisions must be made for S. It is overwhelmingly in her interest, in my view, that the

decision made to place her with her current carers qua special guardians is explicitly a long-term, final decision. Neither she nor they should be subjected to years of uncertainty as to whether at some unspecified point in the future there will be an attempt to discharge the order and to place S in the care of her parents.

99. It might not, in the usual course of events, be necessary to state this in such strident terms. I recognise, however, the importance in the current case of there being clarity as to the intention of this court in making the orders it does: there may come a point in the future when a court in the RoI finds itself grappling with applications to vary or discharge orders which are alien to the Irish family justice system and which are based on precepts equally foreign.

Contact

100. The parents have seen S three times every week throughout her life. They have attended well. The quality of contact is, in general terms, good. S enjoys seeing and spending time with her parents. At 18 months, she has no understanding of the facts that the people she sees at the contact centre are her birth parents, or the people with whom she lives and to whom she is primarily attached are not.

101. It is urged on the parents' behalf, in the attractive and measured submissions of Messrs. Day and Calway, that contact should remain at this (or an only slightly reduced) level. It is rightly said by them:

a. that S, and the FCs, are already used to this pattern and frequency of contact;

b. that S has not thus far been destabilised by it, rather, she has been able to settle and to form secure and healthy attachments with her carers;

c. that S is much loved by her parents and that they have shown a huge commitment to contact with her; and

d. that X will be attending contact at this level for the foreseeable future in any event (this being the level set by the CFA during the currency of the two-year care order in place in respect of her).

102. Implicit in counsel's submissions and explicitly expressed by the parents is the relevance of the aspiration of the latter to apply, in no more than two years' time, for the discharge of the special guardianship order and the move of S to their care.

103. I have already set out above that this is not and cannot be the intention underpinning or even an aspiration co-existing with the special guardianship order. The placement with the FCs is to be S's long-term placement. As such, the purpose of the contact between S and her parents changes markedly. It is no longer contact at a deliberately high level, with a view to its being consistent with a court-ordered assumption by the parents of the care of S at some point in the near future. Rather, it is contact at a level sufficient for S to have a knowledge of and some relationship with her parents, in order to allow her to establish and maintain a healthy sense of identity, of self and of her life story as she grows. Moreover, she must be enabled fully to develop in the family now judicially sanctioned as being permanent for her. The focus must be on her enjoying a normal family life with them.

104. None of this is consistent with her seeing her parents at the frequency that she does. It is of little relevance that X continues to do so: I was told by Mr Leahy that, if there comes a point when the Irish courts or the CFA consider that her reunification with her parents is effectively ruled out, then contact monthly, or even less frequently than that, may well result.

105. In my view, the preference expressed by the FCs that contact between S and her parents take place monthly more than provides for its revised purpose. The impact on S of the change in her circumstances will be mitigated entirely, in my view, by there being a phased reduction plan (as in fact proposed by the LA) and the fact that she can now spend the time she would have spent in contact enjoying activities with her carers in her baby sister's absence.

Order

106. I shall make a special guardianship order in favour of the FCs. This is expressly on the basis that I foresee S's placement with them as being permanent and enduring throughout S's minority (and, quite possibly, into young adulthood).

107. In relation to contact, the question of the appropriate order to make is more difficult.

108. First, I am clear that contact at a frequency of about monthly is in S's current interests.

109. Secondly, I am content that the FCs consider, from time to time, any request for an ad hoc, additional contact, perhaps to celebrate a birthday or Christmas; and that they have complete discretion over this sort of matter.

110. Thirdly, it is important that there is a period during which the FCs are able to settle into the new regime, to adjust to their new status, and are not susceptible to unsettling applications being made, effectively to undo the decisions of this court.

111. Fourthly, I also consider it important that the FCs are not somehow bound for all time by an order which may, for whatever reason, cease to be consistent with S's needs. What if, for example, in two years' time, the CFA or the Irish court reduces X's contact to six

times per year? It may not be appropriate for S to see her parents more often than her sister. What if – I hope this is not the case – contact ceases to be a positive experience for S? I consider that vesting a degree of discretion in the FCs in relation to such matters would be appropriate.

112. Fifthly, the parents must be protected in their position. It was suggested during submissions that the FCs be given absolute discretion to decide the level of contact, the proposed order containing recitals as to their current views in relation to its appropriate frequency and purpose. If, for whatever reason (and I stress there is currently no suggestion that this would happen) the FCs decided that there should be no contact, or virtually none, and if the order were deemed unassailable in the Irish court due to the provisions of Articles 21 and 26 of BIIa, the parents might wrongly be left with no remedy.

113. Finally, while I am doing my best in this judgment to legislate for what is best for S both now and in the future, my gaze forwards can only see so far. I am placing a child with carers in the RoI, whose parents are in the RoI, whose younger sister's circumstances and future are being decided by the courts of RoI. It would be wholly wrong, in my view, to seek to ensure and maintain the primacy of my view about S's welfare – at a point when she is but 18 months old – long into the future.

114. In light of all of the above, my intention is make an order:

a. which records in its recitals the current views and intentions of the FCs in relation to contact between S and her parents;

b. which requires them to make S available for contact with her parents 12 times each year for the next two years;

c. which requires them thereafter to make S available for reasonable contact with her parents, this to be decided by them in their discretion, after consultation with the parents, but subject to order of the Irish courts to the contrary;

d. which records in its recitals:

- my intention that my order as set out at (b) (above) is a final order of this court and not to be susceptible to review on its merits during its currency, save that, in the event of a significant change of circumstances which fundamentally alters the assumptions made in this judgment, an application may be made to the courts in the Republic of Ireland for permission to apply to vary; (I include this latter provision, hoping it will have effect in the Republic of Ireland, in response to Mr Day's well-made point that to do otherwise would be to impose a regime stricter even than would be a restriction pursuant to section 91(14) of the Children Act 1989 and which would deprive either the parents or the FCs from having any recourse to a court, regardless of the nature of any supervening circumstances).

- but that my order as set out at (c) (above) expressly contemplates that the Irish courts have jurisdiction to adjudicate on any valid and lawful application made to them.

Article 56

115. The current consent from the Irish Central Authority to S's placement with the FCs is explicitly tied to its being in accordance with the LA's *'interim care plan'* and describes the FCs as *'foster carers'*. Accordingly, it seems clear that, they not being relatives, further and fresh consent is needed.

116. For various reasons, the request to the Irish Central Authority to consent to the placement of S on a permanent basis with the FCs as her special guardians was not made as early as it should have been.

117. At the point of the preparation of this judgment and its circulation to the parties in draft at the end of the hearing, consent had not been received from the Irish Central Authority.

118. Accordingly, and in order to protect my order against the strictures of Article 23, I refrained from handing down this judgment in final form and from making the final special guardianship order until after receipt, on 3rd April 2019, of written confirmation of the Irish Central Authority, pursuant to Article 56.

Postscript

119. I know that my decision, as recorded in this judgment, will represent a huge disappointment to the parents. I very much hope that they are not deterred by the setback from doing all they can to obtain the assistance and therapy they both need in order to make real and enduring positive changes to their lives.

120. I am grateful to the advocates for their skilful handling of the case, not least in circumstances where the subject child and the respondent parents have been in a different country. I am also very grateful to the social workers and the children's guardian for their diligent work both on the ground and in the presentation of the case to the court.