Neutral Citation No: [2021] NIFam 23 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **SIM 11555** *ICOS No:* **2018/035722** *Delivered:* **16/6/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

FAMILY DIVISION

_____

A HEALTH AND SOCIAL CARE TRUST

v

A MOTHER; A FATHER

(In the Matter of Two Children: Care Order: Freeing for Adoption)

_____

Joanne Hannigan QC (instructed by DLS) for the Health & Social Care Trust
Suzanne Simpson QC; Janice Gilkeson, of counsel, (instructed by Brendan Kearney & Co) for the Mother
Gregory McGuigan QC; Nicola Rountree, of counsel, (instructed by McGee O'Kane) for the Father
Moira Smyth QC; Mary McHugh, of counsel, (instructed by Barr & Co) for the Guardian ad Litem

_____

SIMPSON J

Introduction

[1] I have anonymised this judgment. Nothing must be published which would identify the children or the family in this case. I express my thanks to all the counsel for the efficient and thoughtful way in which this matter was dealt with. As a result of the approach of counsel, it was not necessary to hear oral evidence. Rather the matter has been dealt with by way of the introduction into evidence of a core bundle containing the pleadings, social work reports, expert/medical reports, reports from the Guardian ad Litem, statements from the mother, an affidavit from the father, a

section containing material relating to domestic incidents and a detailed Statement of Facts in relation to each child provided by the Trust. None of the material in the Statements of Facts was challenged and no contrary evidence was proffered.

[2] I have taken into consideration the contents of all of the above material and my failure to mention any relevant fact should not be taken to indicate that I have not considered all the facts.

[3] In addition, Ms Hannigan QC provided a document identifying the core legal principles, with which all the other counsel agreed, and for which I express my grateful thanks. Counsel made submissions based on the contents of the core bundle.

[4] There are two applications before me, in both of which the Trust is the applicant. The first is for a care order under the Children (Northern Ireland) Order 1995 ("the 1995 Order"); the second is for an order freeing the children for adoption, without parental consent, under the Adoption (Northern Ireland) Order 1987 ("the 1987 Order").

[5] There are two children in this case, a girl born in September 2015 (now aged 5) and a boy born in August 2016 (now aged 4). They are the children of the two respondents to this application whom, in this judgment, I will call "the mother" and "the father" or, where appropriate, "the parents". The parents are long separated. The father is currently in jail, having been convicted of an offence of robbery. He is due for release in November 2021. He has had no contact with the children since December 2017.

[6] On 6 December 2017, the children were placed on the Child Protection Register in the categories of confirmed neglect and potential physical abuse, as a result of two episodes of unexplained bruising to the girl in November 2017. On 23 February 2018, following an episode of harm to the girl (see below), the children were first placed in foster care. An Interim Care Order was first made in relation to both children on 20 April 2018 and has been renewed from time to time thereafter. Both children are presently in a concurrent foster care placement with their prospective adoptive carers — the boy since 20 April 2018; the girl since 18 March 2019.

The application for a care order

[7] Where material Article 50 of the 1995 Order provides:

> 50.-(1) On the application of any authority or authorised person, the court may make an order—

(a) placing the child with respect to whom the application is made in the care of a designated authority; or

…

(2) A court may only make a care … order if it is satisfied —

(a) that the child concerned is suffering, or is likely to suffer, significant harm; and

(b) that the harm, or likelihood of harm, is attributable to—

(i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or

(ii) the child's being beyond parental control.

[8] Hence, before a care order can be made the court must first consider whether the threshold criteria in Article 50(2) have been satisfied. The Trust has produced a document entitled 'Threshold Criteria' and dated 18 September 2019. Each parent accepts the threshold criteria contained in the document. However, that does not absolve the court from the requirement to be satisfied.

[9] This is my second judgment in relation to these parties. In the first, delivered on 14 April 2021, I dealt with the issue of non-accidental injuries, in which I identified the perpetrator of the non-accidental injuries as the then current partner of the mother. In that judgment he was "the intervener". In setting out the threshold criteria about which I am satisfied, I will retain that identification. I find the threshold criteria to be satisfied by those matters set out in the Trust's document, in the following modified terms, to take into account my findings in the earlier judgment:

1. On 6 December 2017 the children were placed on the Child Protection Register under the categories of confirmed neglect and potential physical abuse. This was as a result of two episodes of unexplained bruising to the girl in November 2017.

2. On the 21 February 2018 the girl was brought to her GP with a cut to her lip and significant bruising to her face. On 22 February 2018 a joint forensic medical examination was undertaken. Following examination the girl was noted to have sustained the following injuries:

   Bruising which consisted of:

   2.1 an extensive area of different bruises and abrasions on the left side of the face and forehead;

   2.2 on the left side of the forehead, a purple bruise, with a green bruise below it, and three linear abrasions;

2.3 two purple lesions under the left eye and, below them, a large grey lesion, all in keeping with bruising. In addition, there were numerous petechiae throughout her cheeks interspersed between the areas of bruising;

2.4 grey lesions extending to 1cm on the flexor of the left forearm;

2.5 a 1 cm circular, grey lesion, in keeping with a bruise, over the left midline symphysis pubis;

2.6 a circular 1 cm black lesion on the upper lateral aspect of the right thigh, in keeping with a bruise;

2.7 numerous greenish lesions, all circular in nature, over the right knee;

2.8 small circular 0.5 cm brown lesions over the left knee, in keeping with bruising;

2.9 a circular 1 x 2cm yellow/grey lesion over the left anterior superior iliac;

2.10 two circular small greenish lesions over the right side of the lower thoracic area of the back, in keeping with bruising;

2.11 a dark black/bluish lesion on the superior aspect of the scaphoid fossa in the left ear, in keeping with bruising, although there was no bruising on the opposing medial aspect.

3. On the basis of the medical evidence I have found that some of the injuries sustained by the girl were inflicted, non-accidental injuries (see paragraphs [7] and [8] of my previous judgment). I found that the bruising on the left side of the girl's face and ear are consistent with 'inflicted blunt force trauma' and the injuries to her back, supra-pubic region and thigh are likely to be as a result of gripping or grasping injuries.

4. At the time the injuries were sustained, both children were in the care of both the mother and the intervener but, as I have found, the non-accidental injuries were inflicted by the intervener at a time when the mother was not in the premises and the children were in the premises with only the intervener.

5. The mother permitted the intervener to have unsupervised contact with the children. She therefore failed to provide a safe home environment for them and thereby placed them at risk of significant harm, and the girl actually sustained harm.

6. The mother's relationship with the intervener was volatile and characterised by incidents of domestic violence and inappropriate lifestyle choices. The mother was not open and honest with the Trust regarding the events of the 20 February 2018. This exposed the children to the risk of further harm.

7. The father is a sentenced prisoner and, as such, he has been unavailable to parent the children. He was unable to care for the children at the date of the Trust's intervention and had not had contact with the children since December 2017.

8. Neither of the parents was able to place the children's needs above their own and each prioritised their own lifestyle choices.

9. By reason of the foregoing, neither of the parents was able to provide the children with appropriate parenting.

[10] Having been satisfied that the threshold criteria have been met, the court must then decide whether it is proper to make a care order in relation to each child. The court needs to take into account the care plan which is proposed and the matters contained in the welfare checklist in Article 3(3) of the 1995 Order. Thus whilst the parties may be agreed as to the best way forward, there is still an overriding duty on the court to scrutinise the matters put forward for its consideration. The court must also take into account Article 8 of the European Convention on Human Rights and Fundamental Freedoms to ensure that it has accorded the right to respect for family and private life and that the order is proportionate to the legitimate aim of ensuring the paramount interests of the child.

[11] The court also has to bear in mind Article 3(5) of the Order which provides that when "*a court is considering whether or not to make one or more orders under this Order with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all*." In *In re B (A Child)(Care Proceedings: Threshold Criteria)* [2013] UKSC 33 Lord Neuberger said (paragraph 76):

> "*It appears to me that, given that the judge concluded that the … threshold was crossed, he should only have made a care order if he had been satisfied that it was necessary to do so in order to protect the interests of the child. By "necessary", I mean, to use Baroness Hale JSC's phrase in para 198, "where nothing else will do". I consider that this conclusion is clear under the 1989 Act, interpreted in the absence of the Convention, but it is put beyond doubt by article 8*."

[12] Because the care plan in this case, for both children, is for permanence by way of adoption, I also have to consider the plan in the light of domestic and European authorities which have addressed the extreme nature of such an order. I respectfully agree with Gillen J (as he then was) when he said in *Re L and O (Care Order)* [2005] NI Fam 18: "*It is difficult to imagine any piece of legislation potentially more invasive than that which enables a court to breach irrevocably the bond between parent and child and to take steps irretrievably inconsistent with the aim of reuniting natural parent and child.*"

[13] In its decision in the case of *In re B* (*op cit*), the Supreme Court considered this issue. Lord Wilson said:

> "*33 In a number of its judgments the European Court of Human Rights, ("the ECtHR"), has spelt out the stark effects of the proportionality requirement in its application to a determination that a child should be adopted. Only a year ago, in YC v United Kingdom (2012) 55 EHRR 33, it said:*

> *"134 The Court reiterates that in cases concerning the placing of a child for adoption, which entails the permanent severance of family ties, the best interests of the child are paramount. In identifying the child's best interests in a particular case, two considerations must be borne in mind: first, it is in the child's best interests that his ties with his family be maintained except in cases where the family has proved particularly unfit; and secondly, it is in the child's best interests to ensure his development in a safe and secure environment. It is clear from the foregoing that family ties may only be severed in very exceptional circumstances and that everything must be done to preserve personal relations and, where appropriate, to 'rebuild' the family. It is not enough to show that a child could be placed in a more beneficial environment for his upbringing. However, where the maintenance of family ties would harm the child's health and development, a parent is not entitled under article 8 to insist that such ties be maintained."*

Although in that paragraph it did not in terms refer to proportionality, the court had prefaced it with a reference to the need to examine whether the reasons adduced to justify the measures were relevant and sufficient, in other words whether they were proportionate to them.

34 In my view it is important not to take any one particular sentence out of its context in the whole of para 134 of the YC case: for each of its propositions is interwoven with the others. But the paragraph well demonstrates the high degree of justification which article 8 demands of a determination that a child should be adopted or placed in care with a view to adoption. Yet, while in every such case the trial judge should … consider the proportionality of adoption to the identified risks, he is likely to find that domestic law runs broadly in parallel with the demands of article 8. Thus domestic law makes clear that:

> *(a) it is not enough that it would be better for the child to be adopted than to live with his natural family (In re S-B (Children) (Care Proceedings: Standard of Proof) [2009] UKSC 17, [2010] 1 AC 678, para7); and*
>
> *(b) a parent's consent to the making of an adoption order can be dispensed with only if the child's welfare so requires (section 52(1)(b) of the Adoption and Children Act 2002); there is therefore no point in making a care order with a view to adoption unless there are good grounds for considering that this statutory test will be satisfied.*

The same thread therefore runs through both domestic law and Convention law, namely that the interests of the child must render it necessary to make an adoption order. The word "requires" in section 52(1)(b) "was plainly chosen

as best conveying...the essence of the Strasbourg jurisprudence" (Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535, [2008] 2 FLR 625, para 125)."

[14] Guidance is also to be gleaned from two recent ECtHR cases involving Norway. In *Strand Lobben v Norway* (2020) 70 EHRR 14, the court said (paragraph 209)

> "*As regards replacing a foster home arrangement with a more far-reaching measure such as deprivation of parental responsibilities and authorisation of adoption, with the consequence that the applicants' legal ties with the child are definitively severed, it is to be reiterated that "such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child's best interests". It is in the very nature of adoption that no real prospects for rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family*."

[15] And in *ML v Norway* (Application No. 64639/16), judgment made final on 22 March 2021, the court said:

> "*80. Furthermore, the Court reiterates that in instances where the respective interests of a child and those of the parents come into conflict, Article 8 requires that the domestic authorities should strike a fair balance between those interests and that, in the balancing process, particular importance should be attached to the best interests of the child which, depending on their nature and seriousness, may override those of the parents. Moreover, family ties may only be severed in "very exceptional circumstances" (see Strand Lobben and Others, cited above, §§ 206 and 207).*
>
> *89. The Court finds reasons to stress, however, that an adoption will as a rule entail the severance of family ties to a degree that according to the Court's case-law is only allowed in very exceptional circumstances (see paragraph 80 above). That is so since it is in the very nature of adoption that no real prospects of rehabilitation or family reunification exist and that it is instead in the child's best interests that he or she be placed permanently in a new family (see, for example, R. and H. v. the United Kingdom, no. 35348/06, § 88, 31 May 2011)*."

[16] In the circumstances, as it seems to me, there is no difference in the approach to the concept of permanence between the domestic and the Strasbourg law.

[17] I have considered the Trust's application separately in relation to each child in light of the statutory check list, the material introduced in evidence and the guidance from the cases discussed above.

[18] In relation to each child, and separately, the Trust has considered options other than adoption, namely rehabilitation with the birth family, kinship placement or placement with extended family members and long-term foster care. In the very detailed Statement of Facts provided in respect of each child, the Trust has carefully analysed each of those options before concluding that none of those options was in the best interests of each child.

[19] As to the first option, there is a very detailed Parenting Capacity Assessment Report in relation to the mother, dated February 2019. This identifies a number of significant issues and notes that the mother "*does not appreciate the extent of concerns and how her children have suffered physically, emotionally and socially due to her parenting deficits*." It states that the mother "*seems drawn to relationships which are unhealthy and which can put her at physical and emotional risk. A notable risk factor/concern is [her] inability to identify risk. She often prioritised her own need for a relationship over her children's needs*."

[20] The assessment concludes that it

> "*does not indicate a level of parenting whereby [the children's] safety, emotional and protection needs, alongside their generic requirements, could be adequately met by [the mother]. [The children] are at a stage in their development when they are totally dependent on the adults in their life to meet their physical and emotional needs. [They] need to feel safe, secure, warm, well fed and loved. They need carers to be totally committed to them and put their* [i.e. the children's] *needs before their own, providing a safe, secure environment free from chaos, turmoil and stress and not overwhelmed by their* [i.e. the carers'] *own issues and needs. This assessment highlights that [the mother's] capacity to provide good enough parenting is limited.*"

[21] While the mother has worked positively to improve her parenting skills, there remains considerable work to be done. The Trust considers that further delay, of uncertain duration, is not in the children's best interests. In relation to delay, I remind myself that Article 3(2) of the Children (Northern Ireland) Order 1995 provides that in proceedings where "*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*."

[22] The Trust notes that the father has had no contact with the children in recent times and has established no relationship with either. He has expressed a desire that he should be allowed to undergo assessment with a view to the children coming to live with him in England where all of his family reside. In my view, this is unrealistic and could not be said to be in the best interests of the children. Even if it were, the inevitable lengthy delay while appropriate assessment was carried out would prejudice the welfare of both children.

[23] In all the circumstances, I am satisfied that the alternative of rehabilitation with the birth parents is not in the best interests of either child.

[24] The Trust identified a number of possibilities of kinship placement/placement with extended family. These included a maternal aunt, the maternal grandmother and a paternal aunt. The maternal aunt was not approved as a carer for either child because of concerns about the stability of her relationship with her partner and issues around the complex needs of the children when placed alongside the family and work commitments which the maternal aunt already had. The maternal grandmother began assessment but withdrew from the process indicating that she did not wish to be the children's main carer. The paternal aunt withdrew from a four-day assessment programme after day 2. Accordingly, there is no viable kinship/extended family placement available.

[25] Long-term foster care would involve the continuing input into the lives of the children by Social Services, which the Trust considers could lead to frustration and potential instability. In this type of placement, there inevitably remains a degree of uncertainty and the potential for the placement to be undermined. The continued involvement of professionals has the potential for embarrassment as the children get older, bringing with it, as it does, issues about the scrutiny of friends and the requirement for permission for matters like holidays and overnight stays with e.g. school friends. Having considered this option the Trust concluded that it would not offer the same level of emotional, psychological and legal security for each child which adoption would offer and that it would not be in the best interests of either child.

[26] Having read and considered all of the documents presented in the bundle agreed by the parties, I am satisfied that none of the other options is in the best interests of either child.

[27] I note the submissions of the Guardian ad Litem who has been involved with the children in excess of 3 years. She describes the current placement of the children as 'excellent' and one which meets the needs of the children. She is of the opinion, from her involvement with the children, that none of the other options (discussed above) is in either child's best interests. This leads her to support the Trust's applications.

[28] The present carers of the children are the prospective adopters. Both children are happy and contented within their current placement and the Trust, from their detailed knowledge of the placement, is satisfied that the children have the necessary security, feeling of permanence, love, care and nurturing within a home where they will be supported into adulthood.

[29] It is the intention of the Trust, if the orders sought are made, to continue with the mother's contact with the children once per month. This is being kept under review and will be further reviewed at the adoption hearing, if I accede to the

second of the Trust's applications. It is heartening that the mother supports the present placement and has indicated that she will do nothing to undermine the placement. For the father, it is the intention of the Trust to facilitate indirect contact through life story work.

[30] I have taken into account the parents' submissions as to the level of contact which each would wish, but I am satisfied that the Trust's present intentions are appropriate.

[31] In all the circumstances of this case, I am satisfied that a care order should be made in relation to each child and that the appropriate care order in respect of each child is that proposed by the Trust.

Adoption without parental agreement

[32] The second of the Trust's applications is for an order declaring the children free for adoption.

[33] Material provisions of the Adoption (Northern Ireland) Order 1987 are, first, Article 9 which provides as follows:

> "*9. In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall regard the welfare of the child as the most important consideration and shall –*
>
> *(a) have regard to all the circumstances, full consideration being given to –*
>
> *(i) the need to be satisfied that adoption, or adoption by a particular person or persons, will be in the best interests of the child; and*
> *(ii) the need to safeguard and promote the welfare of the child throughout his childhood; and*
> *(iii) the importance of providing the child with a stable and harmonious home; and*
>
> *(b) so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding*."

[34] Article 16 of the 1987 Order provides (where material) that an adoption order cannot be made unless the child is free for adoption and that each parent or guardian of the child either agrees or his/her agreement is dispensed with on a ground specified in paragraph (2). The particular ground specified in Article 16(2) which is relied upon by the Trust is 16(2)(b): that each parent is withholding his/her agreement unreasonably.

[35] Article 18, where material, provides:

> *"18.—(1) Where, on an application by an adoption agency, an authorised court is satisfied in the case of each parent or guardian of a child that his agreement to the making of an adoption order should be dispensed with on a ground specified in Article 16(2) the court shall make an order declaring the child free for adoption.*
> *…."*

[36] In a way, it is unfortunate that the legislation uses the word 'unreasonably', conjuring up as it does in the public mind the concept of a selfish parent or a parent who is putting their own wishes ahead of the interests of the child or one who refuses to listen to reason. The parents in this case both love the children and genuinely want the best for their children. What they feel emotionally unable to do is to consent to the relinquishment of their parental rights forever.

[37] This is an entirely understandable position for any loving parent to take. Nothing in this judgment should be taken by the parents, or anyone who reads it, as a criticism of these parents' stance in withholding their agreement. They should understand that there is a narrow, legalistic meaning to the concept of unreasonably withholding agreement.

[38] I dealt above with the extreme nature of permanence via adoption and continue to bear in mind those relevant authorities. Notwithstanding this, in light of all the circumstances of this case, and taking into account all of the material which I have been provided with — including the submissions of the parents — I have indicated that I am satisfied that adoption will be in the best interests of each child. I have considered all of the other potential options and I am satisfied that, in relation to each child, there is no other option which will meet the best interests of each.

[39] I am satisfied that adoption is proportionate in all the circumstances of this case.

[40] The approach to be taken was considered by Morgan LCJ in *In the Matter of TM and RM (Freeing)* [2010] NI Fam 23. At paragraph [6], where material, he said:

> *"The Trust asked me to find that the mother is unreasonably withholding her agreement to the adoption of children. The leading authorities on the test that the court should apply are Re W (An Infant) [1971] 2 AER 49, Re C (a minor) (Adoption: Parental Agreement, Contact) [1993] 2 FLR 260 and Down and Lisburn Trust v H and R [2006] UKHL 36 which expressly approved the test proposed by Lords Steyn and Hoffmann in re C.*
>
> *"…making the freeing order, the judge had to decide that the mother was 'withholding her agreement unreasonably'. This question had to be answered according to an objective standard. … The law conjures the imaginary parent into existence to give expression to what it considers that justice requires as between the welfare of the child as perceived by the judge on the one hand and the legitimate views and interests of the natural parents on the other. The*

characteristics of the notional reasonable parent have been expounded on many occasions: … The views of such a parent will not necessarily coincide with the judge's views as to what the child's welfare requires. As Lord Hailsham of St Marylebone LC said in In re W (An Infant) [1971] AC 682, 700:

'Two reasonable parents can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable.'

Furthermore, although the reasonable parent will give great weight to the welfare of the child, there are other interests of herself and her family which she may legitimately take into account. All this is well settled by authority. Nevertheless, for those who feel some embarrassment at having to consult the views of so improbable a legal fiction, we venture to observe that precisely the same question may be raised in a demythologised form by the judge asking himself whether, having regard to the evidence and applying the current values of our society, the advantages of adoption for the welfare of the child appear sufficiently strong to justify overriding the views and interests of the objecting parent or parents. The reasonable parent is only a piece of machinery invented to provide the answer to this question.""

[41] In light of those authorities, I am satisfied that the parents are unreasonably withholding agreement within the meaning of Article 16(2)(b) of the 1987 Order and I will make an order dispensing with the consent of each parent to adoption.

Conclusion

[42] Therefore:

(i) I make the care order sought by the Trust in relation to each child;

(ii) I make an order pursuant to Article 18(1) of the 1987 Order freeing each child for adoption.