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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**FAMILY DIVISION**

**OFFICE OF CARE AND PROTECTION**

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**Between:**

**A HEALTH AND SOCIAL CARE TRUST**

**Plaintiff**

**-v-**

**A MOTHER AND A FATHER**

**Defendants**

**IN THE MATTER OF PE**
**(A MALE CHILD AGED 4 YEARS 11 MONTHS)**

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**Mr A Magee QC (instructed by the Directorate of Legal Services) for the Trust**
**Ms McGrenera QC with Ms N Kerr BL (instructed by Anderson Gillan Barr solicitors) for the Mother**
**Mr G McGuigan QC with Mr A Stewart BL (instructed by Macaulay Wray Solicitors) for the Father**
**Ms L Murphy BL (instructed by Small & Marken Solicitors) for the Guardian ad Litem on behalf of PE**

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**McFARLAND J**

**Introduction**

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

[2] PE will be 5 in September. When he was between 4 and 6 weeks old he sustained serious injuries on at least two separate occasions which resulted in his hospitalisation on 2nd November 2016. A fact finding hearing was conducted by

Her Honour Judge McReynolds sitting as a high court judge and by a judgment of 26th February 2019 (*A Health and Social Care Trust v M and F* [2019] NIFam 3) she set out the following findings at [34], [35] and [36]:

> "At [34] – "*[The mother] was aware that [the father] used cannabis and had a sleep pattern which rendered him incapable of providing good enough night time care as frequently as this was delegated to him.*"
>
> At [35] - "*[PE] sustained the following injuries:*
>
> *Fractures to the right 5th, and 6th ribs and to the left 8th rib;*
> *A metaphyseal fracture to the distal right tibia;*
> *Bi-lateral subdural haemorrhages;*
> *A subarachnoid haemorrhage;*
> *Intraventricular haemorrhage;*
> *Contusion in the left anterior temporal lobe;*
> *Multiple bi-lateral haemorrhages to the eyes.*
>
> *These injuries were all non-accidental and were inflicted on [PE] by an adult carer, namely his father.*
>
> *The injuries were caused by the baby:*
>
> *being grabbed around the rib cage with sufficient force to fracture his ribs; and*
>
> *being shaken with sufficient force to cause the bleeding to his brain and his eyes.; and*
>
> *being grabbed by the leg causing the fracture to his distal right tibia.*
>
> *The baby suffered significant pain and distress as a result of these injuries and this would have been obvious to the perpetrator and any other person present when the injuries were inflicted.*
>
> *The baby sustained these injuries in at least two traumatic events, firstly in or around 25 October 2016 and secondly in or around 2 November 2016.*
>
> *The baby was in the care of his father when the injuries were sustained. [The father] caused the injuries to the baby.*
>
> *The parent who did not inflict the injuries on the baby failed to protect him from harm, and [the mother] prioritised her requirement for sleep over the baby's needs.*

> *[The father] misused cannabis and he smoked cannabis when he was responsible for the baby's care."*
>
> and at [38] – *"[The mother] was **not** physically present when the baby was grabbed and shaken. I am **not** satisfied that the mother has failed to show insight into the significance of his injuries, **nor** am I satisfied that the mother prioritized her relationship with the father over the baby's needs. I am, however, satisfied that it was unreasonable for her to leave the baby in his father's care so frequently for such prolonged periods with knowledge of her partner's cannabis habit and with even the limited knowledge which she had of his nocturnal habits and foreseeable fatigue."*
> [the emphasis was added by Her Honour Judge McReynolds]

[3] The father applied to have a re-hearing in respect of threshold but this was rejected by Keegan J on 15th January 2021 (see *Re Joe* [2021] NIFam 3).

[4] Despite the exhortation by Her Honour Judge McReynolds that the care planning for PE should be expedited the matter has only recently come on for hearing. The Trust seeks a care order with a care plan of permanence in an adoptive placement, and, in addition, it seeks to free PE for adoption asking the court to dispense with the consent of both parents. The guardian ad litem ("the Guardian") supports the applications, but they are opposed by both parents although for different reasons. The mother seeks rehabilitation of PE into her care. The father recognises that rehabilitation to his care, at this stage, is not feasible, but he considers that it could be in the future. He therefore supports the current arrangement as a foster placement. He is opposed to PE being rehabilitated into the mother's care.

[5] At the hearing evidence was given by a number of witnesses including two Trust social workers, an independent social worker, an independent consultant clinical psychologist, the mother, the father, and the Guardian.

**Threshold**

[6] Her Honour Judge McReynolds has determined that PE suffered significant harm as a result of the care given to him by his parents (see Article 50(2) of the 1995 Order), that harm being the direct injuries inflicted by the father on PE, and in circumstances where the mother left PE in the care of the father.

**"Nothing else will do"**

[7] Lady Hale in *Re S-B (Children)* [2009] UKSC 17 set out the background to court interventions with families at [6] and [7]:

> *"In this country we take the removal of children from their families extremely seriously. The Children Act 1989 [the equivalent to the 1995 Order] was passed almost a decade before the Human Rights Act 1998, but its provisions were informed by the United Kingdom's obligations under article 8 and article 6 of the European Convention on Human Rights. These affect both the test and the process for intervening in the family lives of children and their parents.*
>
> *As to the test, it is not enough that the social workers, the experts or the court think that a child would be better off living with another family. That would be social engineering of a kind which is not permitted in a democratic society. The jurisprudence of the European Court of Human Rights requires that there be a "pressing social need" for intervention and that the intervention be proportionate to that need."*

[8] Lady Hale in *Re J* [2013] UKSC 9 returned to this topic reiterating in her opening comments of her judgment at [1] that:

> *"In a free society, it is a serious thing indeed for the state compulsorily to remove a child from his family of birth. Interference with the right to respect for family life, protected by article 8 of the European Convention on Human Rights, can only be justified by a pressing social need."*

[9] The approach when considering care planning is proportionality. In *Re C and B (Care Order: Future Harm*) [2000] EWCA Civ 3040 Hale LJ at [31] said that:

> *"One comes back to the principle of proportionality. The principle has to be that the local authority works to support, and eventually to reunite, the family, unless the risks are so high that the child's welfare requires alternative family care."*

[10] It is well established that for the court to sanction care planning which involves the severance of family ties by adoption there must be very compelling circumstances. Kerr LCJ in *AR v Homefirst Community Trust* [2005] NICA 8 at [77] said that:

> *"the removal of a child from its parents is recognised … as a draconian measure, to be undertaken only in the most compelling of circumstances."*

[11] These comments were echoed and repeated in the case of *Re B (A Child)* [2013] UKSC 33, and in particular by Lady Hale in her use of the expression "nothing else will do" when describing court-sanctioned care-planning:

> *"It is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do."* (at [198]).

[12] Subsequent judicial utterances, whilst acknowledging the strength of the exhortation that "*nothing else will do*" have emphasised the need for a proper balancing exercise to be carried out when assessing proportionality, with no presumption in favour of the natural family (see, for example, *Re P (Care Proceedings: Balancing Exercise)* [2013] EWCA Civ 963 and *Re: H (a child)* [2015] EWCA 1284.)

[13] The court must also adhere to the provisions of Article 8 of the ECHR - the right to respect for private and family life, the articulation of which in the context of adoption of children is set out by the ECtHR in *YC v United Kingdom* [2012] 55 EHRR 33 at [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."*

[14] The Strasbourg court has returned to this theme recently in two Norwegian cases (*Strand-Lobben* (2020) 70 EHRR 14 and *ML* (application 64639/16). In doing so it has reiterated the established law, and has not added anything to it. I agree with the observation of Simpson J at [11] in *Re A* [2021] NIFam 22:

> *"There is no difference in the approach to the concept of permanence between the domestic and the Strasbourg law"*

**Threshold and care planning**

[15] Bearing this legal framework in mind, it must be acknowledged that the case has presented the Trust, the professionals advising the Trust and the court with very

difficult decisions. This has been compounded by the excessive delay in the case given that we are now making final decisions about the upbringing of PE as a result of injuries that he sustained when he was 5 weeks old.

[16] Her Honour Judge McReynolds has held that those injuries were perpetrated by the father on at least two occasions. The fault and deficiencies of the mother lay in the fact that she prioritised her need for sleep over the needs of the child, and as a consequence she permitted the father, who she knew had a significant drug misuse problem, to have the direct care of the child for prolonged periods at night.

[17] The care planning after these findings effectively ruled the father out as a carer for the child in the immediate future. The Trust obtained various reports during 2019, which culminated in a decision to seek the rehabilitation of PE to his mother's care. A trajectory for the return of the child was put in place, but the events of 20 September 2019 resulted in a reassessment by the Trust, and then in a change of direction by the Trust on 12 November 2019 with a rejection of the plan for rehabilitation to the mother, and the endorsement of a plan for adoption.

[18] It is common case that the current placement is excellent with very competent and dedicated carers. PE is very well established within the family unit and his primary attachment is to his foster mother, the intended adoptive mother.

[19] It is essential that before a full consideration of a care plan which severs the parental link between the mother and the child is sanctioned by the court, that one analyses why PE was removed from his mother's care as a 5 week old child. He suffered serious injuries at the hands of his father, a man who was misusing drugs. The fault of the mother was that she was tired and required sleep (a not uncommon occurrence in mothers of young babies) and she placed too much reliance on her manipulative partner (again a not uncommon occurrence in some parents).

[20] This is a case of significant harm being perpetrated against PE by his father. That is sufficient threshold to trigger consideration of a care order. No harm has been perpetrated by the mother. In fact it is arguable that the only harm suffered by PE in relation to his mother is the fact that he has been separated from her since he was five weeks old over a period now approaching five years. The fault attributed to her was essentially permitting PE to be cared for by the father when she was asleep.

**Evidence relating to the care planning**

[21] The mother has at all times co-operated fully with the Trust, save for her opposition to the allegations made by the Trust that she had harmed her child. That opposition, given the findings of Her Honour Judge McReynolds, was justified. This cooperation has extended to her engagement with the various assessments that she has been asked to undertake. She has taken all the steps advised to her to improve her well-being and in addition included steps taken on her own initiative.

[22] I consider that she has been honest in all her dealings with the Trust, professionals involved in her assessments and well-being and with the court. There have been several instances of her disagreeing with a Trust record of what she said or did on several occasions. On balance, I prefer the record made by the Trust to be an accurate record of what was said or done, but I do not regard any of these discrepancies in her recollection to be significant.

[23] Throughout PE's life, she has remained fully committed to him as evidenced by her preparation for, and attendance at, contact. The main motivating factor behind her engagement with the Trust and other professionals was to achieve the rehabilitation of PE to her care.

[24] After the threshold finding in January 2019, the Trust approached care planning on a three-track basis – rehabilitation to the mother, and failing that placement with the maternal grandmother, and failing that permanent foster or adoption placement. The accepted view (which is not challenged by the mother) was that the grandmother was not a suitable full-time carer and the care-planning became a twin-track approach.

[25] To inform that process, assessments were sought from Anna Nicholl of the Family Centre and from Dr Jonathan Dowd a consultant forensic psychologist. These reports, when received, were largely positive, although both reports raised issues about the mother's mental health and particularly her high levels of anxiety as well as an apparent lack of social network available to provide support. Dr Dowd assessed her as having above average cognitive functioning with a standard IQ of 116.

[26] Although the levels of anxiety were regarded as high, it is worthwhile noting that her GP and treating psychiatrist assessed the ongoing family proceedings as a significant factor. Her medical history indicates some underlying problems from her teenage years. However, it is perfectly understandable that by the summer of 2019 she had high anxiety levels. This is a mother who at the age of 22 gave birth to a son who suffered serious injuries at the hands of a man she trusted and who has continuously lied to her and others about the injuries. The circumstances of the injuries and the subsequent investigation resulted in the child being removed from her care, and her misguided loyalty to that man resulted in the child being kept from her care for a period in excess of two years. After vindication from the court, she was then faced with the prospect of having to rehabilitate her son back into her care with all the uncertainties of parenting 2½ year old child on her own for the first time, knowing that her every action would be monitored and scrutinised by the Trust.

[27] The decision to commence rehabilitation was made on the 14 August 2019, and it then involved the implementation of a trajectory which would increase the contact, move the contact to the mother's home, start over-night contact and then eventually move the child into the full-time care of the mother. This was a steep

trajectory, but the Trust was of the view that it was in line with recommended practice in cases of this type. The mother at the time expressed the view that the trajectory may be too steep and on one occasion used the expression that she was "petrified" about the prospect. Notwithstanding this, contact between PE and his mother started to move in line with the plan.

[28] On the 20 September 2019 when the contact worker arrived with PE at the mother's house she was asleep in her bed. Her explanation was that she had had a panic attack in the night and must have switched her alarm off and had gone back to sleep. When speaking to the contact worker, and later that day to the social worker reference was made to panic attacks to the point of incontinence and what the mother described as a diagnosis of post-traumatic stress disorder (PTSD) by her therapist, Anne Morris.

[29] It is important that this episode is not over-analysed. Panic attacks and PTSD are expressions widely used within the community, and on many occasions are a self-diagnosis. They are genuine psychiatric conditions but the conditions manifest themselves in many degrees of severity. Ms Morris is not qualified to make the diagnosis attributed to her, and in any event, she denies ever having made such a diagnosis.

[30] The Trust state that this was the first time it had become aware of the existence of panic attacks. The mother had disclosed them to Anna Nicholl and Dr Dowd, but she had not described the regularity and intensity. She had made disclosure to her GP and her treating psychiatrist.

[31] The Trust's view is that the existence of the severe panic attacks at this time reflected the mother's severe anxiety and this had the potential to impact on her capacity to parent. Such a view is entirely appropriate, but no evidence has been put before the court concerning any deficits in her ability to parent at that time (save for her sleeping in on the 20 September 2019).

[32] There then followed a network meeting on 27 September 2019 which included her mother, her brother and a friend. It emerged from that meeting that there was a general low assessment of the progress of rehabilitation of PE into his mother's care.

[33] A decision was made to pause, so as to enable the Trust to make an assessment of the mother's mental health and to access the community mental health team records.

[34] A therapeutic team meeting (TT-LAAC) was convened on 16 October 2019. A document was produced during the hearing. It is a letter from Martina Barry a senior practitioner TT-LAAC to Majella Guthrie, the social worker. Although it is a letter, it purports to be a minute of the meeting. It states that only two people attended the meeting and it took place over the telephone. This is clearly incorrect as according to the evidence of Majella Guthrie, she and Frances Bell (of the Family

Placement Team) did indeed participate by telephone but the Therapeutic team members were in attendance. The letter indicates the concerns about the capacity of the mother to provide consistent care to PE. The stated evidence for the concerns are that the mother had a poor experience of being parented, had little experience of parenting, had low self-esteem and a very limited support network around her. This is a significant document. Majella Guthrie had recent concerns about the mother's panic attacks, however the minute of the meeting which runs to four pages does not mention these attacks, and does not mention the mother's mental health, her perceived anxiety or the impact that this may have on her ability to parent. It is not a case of this being inadvertently missed as the minute expressly states that "*everyone present at the consultation was familiar with PE's case history.*" Clearly TT-LAAC did not regard it to be a matter of any significance, and no individual participant at the meeting is recorded as having raised it. The only reference to the mother's anxiety or concerns is – "*[the mother] has recently said that the plan is going too quickly, she has asked that the plan be slowed down.*"

[35] The TT-LAAC recommendation was that the contacts would gradually increase up to four times a week, although a note in the letter indicates an adjustment in this advice on 17 October 2019 that rather than increasing contacts up to four days a week it may be more beneficial to introduce a weekly overnight contact.

[36] The social worker spoke to the mother about this on the 22 October 2019. At this point due to the pausing of the rehabilitation after 20 September 2019 it was being maintained at a five hour session twice a week. The mother expressed her concern about the intensified plan. On the same day the social worker spoke to the community mental health team who were reporting an improvement in the mother's presentation which was attributed to a change in her medication.

[37] On 7 November 2019 the mother was advised by the social worker that rehabilitation of PE into her care was no longer considered to be appropriate, and on 12 November 2019, the LAC meeting decided to stop all rehabilitation efforts. It accepted the analysis of the social worker that there was a need for good consistent parenting and if he was removed from that parenting currently provided by his placement he would suffer grief, loss and trauma and would need additional skilled care-giving to compensate. Given the mother's reported vulnerabilities at that time, it was unlikely that she could provide that additional level of parenting.

[38] At the same time the foster carers were reporting changes in PE's presentation which was interpreted as being the result of an alteration in his stability and security. Recent attendance at a playgroup three days a week may have been a factor although the primary cause suggested by the Trust was his increased contact with his mother.

[39] At this stage PE was just over 3 years of age. He had been separated from his mother's care for his entire life, save for the first few weeks. Two and a quarter

years had been spent determining that his father had caused the injuries to him, six months in assessing the mother and three months in attempting to rehabilitate him to his mother's care, which the Trust had considered a failure.

[40] The matter came back into the court arena and in January 2020 the court granted leave to the mother to instruct an independent social worker. It had been anticipated that a report would be available by March 2020, however there was delay because of a change in social worker, and then the Coivd-19 pandemic resulted in the report not being completed until February 2021. Because the social worker, Anne Millar, did not have access to a complete set of documents a final addendum to her report was not available until May 2021.

[41] In summary the assessment of Anne Millar was very much in line with the Trust assessment. She stated that the mother did not identify the emotional needs of her son and that she lacked emotional intuition. Her opinion was that the mother lacked insight into the impact that would result from the change of placement. She would not be able to cope because of her fragile mental state and her lack of support network.

[42] The guardian ad litem ("GAL") was appointed in December 2018, as a replacement guardian. She has therefore been in post during the entire period of the significant developments in the case. In short, her assessment is on a par with those of the Trust and Anne Millar. Her main concerns were the mother's capacity to meet the child's emotional needs and her lack of a support network. As the child had now experienced the safe, secure and consistent care with his current placement and intented adopters and change of his circumstances would have a significant impact on him and she was of the opinion that the mother would not be able to cope.

[43] During the 2019 period and after, the mother also engaged in work that had been identified as being beneficial to her. She attended work with Women's Aid, re-engaged with a local charismatic evangelical church group and commenced therapeutic work with Alison Morris. Alison Morris did not carry out a parenting assessment and her involvement was to provide assistance to the mother. Of particular note was her assessment that the mother's self-esteem had improved. The journey had not been easy and she categorised it as two steps forward one step back but Alison Morris described the mother by June 2021 as presenting with a "massive change physically and emotionally." In all, the mother has attended over 80 sessions with Alison Morris and the work is continuing.

**The welfare of the child**

[44] The welfare assessment involves a consideration of all the evidence and applying the provisions of Article 3 of the 1995 Order. The non-intervention principle provided for by Article 3(5) requires the court to consider and be satisfied that making an order is in the best interest of the child.

[45] Article 3(3) requires the court to take account of seven matters, although these would not preclude consideration of any other relevant matter. The seven factors are:

a) The ascertainable wishes and feelings of the child;
b) His physical, emotional and educational needs;
c) The likely effect on the child of any change in circumstances;
d) The child's age, sex, background and any other relevant characteristics;
e) Any harm which the child has suffered or is at risk of suffering;
f) How capable of meeting the child's needs is each of the parents, and any other person considered to be relevant;
g) The range of powers and orders available to the court.

[46] The assessment is not just a simple decision as to whether or not living with the proposed adoptive parents would be a more beneficial environment for PE. The court is mindful of the well-known, and often quoted, passage in the judgment of Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 at [50]:

> "*Society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent … it is not the provenance of the state to spare children all the consequences of defective parenting. In any event, it simply could not be done.*"

These sentiments have been approved of on many occasions by higher courts and must be taken as the underlying approach in each case both in relation threshold and care planning.

[47] In this case Her Honour Judge McReynolds has determined the threshold criteria which permits the court to intervene with the making of a care order or supervision order. It is essential that the findings against the mother are emphasised:

a) She failed to protect PE from harm at the hands of his father as she prioritised her requirement for sleep over PE's needs;

b) It was unreasonable for her to leave PE in the father's care so frequently for prolonged periods with knowledge of his cannabis habit, his nocturnal habits and his foreseeable fatigue.

[48] Munby LJ in Re A (A Child) [2015] EWFC 11 at [94] set the test for cases of this type as follows:

> *"has the local authority established that A's welfare requires that he be adopted, that "nothing else will do?"*

[49] The Trust's case, and this is supported by the GAL, is that when rehabilitation

was being considered in 2019 the key problems were the mother's mental health and her lack of a suitable support network. After the planned trajectory was put in place it was halted in September 2019 because it was considered that both these issues remained unresolved. The concern then, and now, is that the change in PE's circumstances caused by removing him from his current placement of a very settled integration within a family would create significant emotional needs for PE and that the mother would not be able to cope, given her own frailties and her lack of support. There was limited evidence presented to the court concerning PE's presentation within the foster placement during the rehabilitation period, although this was only over a short period of time and a complete analysis of other potential stressful events in his life was not presented.

[50] The Trust focuses on the length of the placement of four years and eight months and suggests that removing him now will create acute grief and loss which will impact on his short and long term emotional and mental health.

[51] The GAL has also put forward a suggestion that the mother lacks emotional warmth and this is supported by the opinion of Anne Miller. Both have formed this opinion after their observations of the mother during contact with PE. I do not view this as in anyway significant. Emotional warmth can be regarded as part of what could be described as 'good parenting' but courts should not remove children from the care of parents who do not display it. The observations of the GAL and Anne Miller could be said to run contrary to what has been recorded in various contact records by Trust contact workers. It is also noted that the observations were during the Covid-19 pandemic restrictions when there were strict instructions about personal contact. Having observed the mother giving her evidence and from reading the various reports about her, I consider her to be a thoughtful person who might lack the outward expression of emotion, but this is not a major deficit in her parenting skills.

[52] There is no doubt that the four years and eight months living away from PE's mother has been a significant factor. Hindsight may be a wonderful thing, but when one looks at this case, the mother's deficits identified by Her Honour Judge McReynolds would not be sufficient to remove PE from her care, had the full story been available to the Trust and the court at the time. The only risk of future harm would be if the mother remained in a relationship with the father, or entered into another unsuitable relationship with a man with a similar violent disposition towards young children. She initially remained within that relationship choosing to believe his lies. Fortunately the relationship came to an end in January 2019 and it is highly unlikely it will ever be repeated or replicated.

[53] I consider that the Trust, when they decided to embark on rehabilitation adopted a much too rigid approach with regard to the trajectory. The concerns of the mother were genuine, and I consider that she was not given sufficient support, and when the incident of the 20 September 2019 occurred, the Trust were far too quick to abandon all attempts to rehabilitate PE to his mother.

[54] The Trust had clearly earmarked the foster carers as prospective adopters at this stage. It was suggested during the evidence that the foster carers had only expressed a wish to adopt, after the attempts to rehabilitate had failed and been ruled out, in other words after 12 November 2019. I accept that Anna Guthrie's recollection may have been mistaken, but the TT-LAAC minutes indicates that by the 16 October 2019 all concerned in the Trust knew that the foster carers wanted to be considered as adoptive parents. This perception has persisted as is reflected in the report of the GAL of 21 May 2021 where she states at [1.11] *"when rehabilitation was ruled out, as a family [the foster carers] indicated to the Trust that they wanted to be considered as adoptive carers for [PE]."* I am satisfied that the Trust were very aware that the foster carers were prospective adopters, they had been approached and had given that indication before a decision had been taken to terminate the rehabilitation. The TT-LAAC meeting, the social work staff and the participants in the LAC meeting of 12 November 2019 were aware of the position.

[55] The series of events and the decision making at this time does not sit well with the concept that "nothing else will do." The 20 September 2019 incident was a 'bump on the road' and the Trust, with an easier option and plan available, too readily became attracted to that alternative.

[56] The Trust abandoned the prospect of reconciliation. It correctly made further enquiries concerning the mother's mental health and her support network, but failed to consider putting in place support for the mother in respect of both factors.

[57] I now return to the issue of PE's best interests and the 'welfare check list' in Article 3 of the 1995 Order. PE is too young to have established ascertainable wishes and feelings about his long-term future. He is clearly well settled in his current placement. He has not suffered any harm, physical or emotional, at the hands of his mother. There is no evidence that he is likely to suffer any physical harm from her in the future, or that she is likely to repeat her mistake in the past of relying on the father, or a man of similar attributes and failings. The Trust has identified another harm that PE is likely to suffer from and that is emotional harm. This harm would come initially from the separation from his current placement which could be compounded by the inability of the mother to manage this separation and to parent him in a safe manner given his particular needs.

[58] There is no evidence to suggest that PE has any particular needs over and above those of any 5 year old boy.

[59] His needs have been met by being safely nurtured in a secure environment by his current carers for a period of nearly 5 years, and this secure environment should be maintained or replicated to a sufficient standard. During that period he has not been a stranger to either parent and has had very regular contact with both. He knows both parents to be his mother and father. The contact with his father is reported to be very good with a strong emotional bond. I prefer the evidence

recorded by the contact workers as supported by the evidence of Alison Morris and my own assessment of the mother when observing her in the witness box to the evidence of Anne Millar and the GAL. I consider that the mother also has a strong emotional attachment to her son, as has PE to her.

[60] There will clearly be an impact on PE should he be restored to his mother's care. He will be removed from his current placement and will be moving to live with his mother. That will create obvious issues with regard to how that change is managed and how the mother is able to cope. Having considered the evidence from all the witnesses, and particularly the mother and Alison Morris, I consider that the mother will have the capacity to cope with the change. Her mental state is reported by Alison Morris to be improving. It would be foolish to suggest that there will be no stressor events. The mother, as a single parent, will require to dig deep into her reserves, and will need to seek help. I consider that there is a limited bank of support within her family and within her church fellowship. I accept that the family situation is not ideal and that there have been problems in the past, but this family network should not be written off as being totally inadequate. The church network can only offer limited assistance. I have no doubt that the support will be offered and will be available, but much will depend on the degree of engagement that the mother maintains with the church, and her ability to establish and develop relationships with the other members of the church, particularly those who can offer support.

[61] There was little evidence placed before the court about what assistance the Trust will be in a position to offer the mother. The court report of 22 November 2019 speaks of the need for a "*high level of therapeutic support.*" The warning that 'nothing else will do' not only applies to a court when deciding these types of cases, but also to the Trust. Nothing else will do, should mean that there is nothing the Trust could do to provide the necessary support to the mother. I accept that the Trust has set its face against the rehabilitation of PE to his mother since November 2019, but it still has an obligation to consider what it can do to assist the mother.

[62] At the time of the attempt to rehabilitate in the autumn of 2019 it had been anticipated that the foster carers would be in a position to provide support to the mother in the form of respite care and assistance with PE. The GAL reported to the court that in very recent times, albeit in the duration of a single telephone call on 21 May 2021, the foster carers have told her that they do not feel that they will be able to cope with a court decision adverse to their desire to adopt PE, and in the circumstances would not be in a position to offer respite care. This has to be seen as a negative factor, as the family in which PE has lived for 5 years would be seen as a potential harbour in a storm.

[63] There is no issue that the foster carers and their children create a stable family which satisfactorily meets PE's current needs. Those needs will change in the future and there will, no doubt, be challenges when identity issues for PE come more to the fore and questions about his parents and why he is not living with his parents are

raised. There is no evidence to suggest that the foster carers would not be in a position to deal with these, or similar problems. The foster carers would appear to have a capability to meet PE's needs.

[64] If the question was simply which of the foster carers and the mother are more capable of meeting PE's needs, then the answer would be straightforward. The foster carers would be, based on the evidence of what has happened to date and what is likely to happen in the future.

[65] The question is however much more nuanced. The question to be posed is - is the risk of harm to PE resulting from him returning to live with his mother so great, that nothing else will do?

**The proportionality exercise**

[66] The proportionality exercise requires a 'balance sheet' approach to the only two realistic outcomes to this case – rehabilitation to the mother or adoption.

**Rehabilitation to the mother**

[67] The positive aspects of rehabilitation to the mother's care are obvious. PE would be living with his natural mother and within his natural family. This would cater for his emotional needs as being part of his family within which he will have a secure identity attachment.

[68] Much of the emphasis in this judgment to date has focused on the mother as opposed to the father. I will deal briefly with the father's position later, however on the basis that rehabilitation to the father's care has been ruled out, the ability of the father to maintain and develop his attachment to PE is likely to be improved if PE is in the care of his mother as opposed to any adopters. Contact with the father is likely to be on a much more regular basis. The contact will be much more meaningful and the existing attachment between father and son will be enhanced.

[69] The mother in her evidence set out what her general approach to parenting in the future would be. I consider that she has adopted a very child-focused approach and whatever her feelings towards the father, she has expressed a desire that PE should be able to maintain and develop a relationship with his father. There are obvious safety concerns, but as PE grows older, those concerns may become less relevant. The current attitude of the mother is such that should she be given the care of PE there would be little resistance on her part to PE having regular and positive contact with his father. This in turn, would provide further support to the mother.

[70] The negative aspects would be the mother's inability to cope with how PE will react to the immediate change in his circumstances. I consider that the impact on PE's emotional well-being, given the period of time he has spent living in the foster carers' family, will not be insignificant. PE has no underlying issues that will

exacerbate the problem, but the mother's ability to cope will be stretched. I take into account the recorded improvement in her mental state, and the existence of a form of support network, albeit on a limited scale. I also take into account the potential input of the Trust, should it be required to maintain a role in the child's life, under, for example, a supervision order, or by fulfilling its general statutory function.

[71] The question of the emotional harm which PE will almost inevitably suffer by moving from the current placement to live with his mother is a very relevant factor. It therefore must be considered a negative factor in the balancing exercise.

[72] A similar negative aspect would be the mother's ability as a sole parent, to cope with the needs of PE as he matures. Again, much will depend on the development of the relationship between mother and son and the development of the mother's support network.

[73] The positive aspects of adoption would be that PE is already in that secure placement. He has been there for nearly 5 years and is very well settled with good attachments to all members of the family, both adult and children. He would remain in that placement.

[74] The permanence of the placement would provide stability and reassurance to PE. Adoptive placements tend to have a low rate of breakdown and greater legal security is granted. It should be noted that the evidence to date is that both the mother and father have maintained a very positive approach to the foster carers and it is highly unlikely that there would be any interference from them, should the permanence be achieved by a foster, rather than an adoptive placement, or in relation to contact issues.

[75] Negative aspects would be a difficulty in PE adjusting to the reduced contact regime for both his mother and father. The current contact regime is twice per week with the mother (one direct and one indirect) and one direct contact with the father per fortnight (part of which is shared with the paternal grandmother). Post adoption, this would be drastically reduced.

[76] This leads to a further negative aspect, namely that as PE grows older the question of his birth family will undoubtedly arise. This in turn could result in feelings of anger, loss and rejection. A narrative will, no doubt, be made available, but assuming the narrative follows the story of his life, PE may well start to question why he was taken away from his mother when, on the face of it, she did nothing wrong, did not harm him, and did not want him removed from her care. In addition if he were to have become estranged from his father, he may find difficulty in maintaining any form of relationship when he is told what injuries his father inflicted upon him. The intervening redemptive work undertaken by the father (albeit it still lacking at this stage a confession) will be lost.

[77] So far, I have focused on the provisions of the Children (NI) Order 1995 and

have not mentioned the Adoption (NI) Order 1987. For completeness I refer to Article 9 of the 1987 Order which provides:

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

[78] It is not necessary to consider what, if any, differences exist between the approaches directed by the two pieces of legislation. I have considered the proportionality assessment taking into account both Article 3 of the 1995 Order and Article 9 of the 1987 Order.

**The tilting of the balance**

[79] The facts in the case of *Re B* (above) were completely different to this case, but they do bear a degree of similarity to this mother's situation in that there had been no actual harm perpetrated, the concern being that there was a likelihood of harm. It was a troubling case because it was questionable whether the threshold was actually met. Lady Hale delivered a dissenting judgment for those reasons. She set out the dilemma at [174]:

> *"Lewison and Rix LJJ were clearly deeply troubled by the case. Lewison LJ was concerned about proportionality: here was a child who had not suffered any harm, who had a warm and loving relationship with her parents; the threshold had not been crossed in the most extreme way, but the order made was the most extreme that could have been made (para 142). But their task was not to make the decision but to examine whether it fell "outside the generous ambit within which reasonable*

*disagreement is possible" so he would not push his doubts to dissent (para 148). Rix LJ also acknowledged the difficulties in the case, but agreed that one should trust the judge of trial."*

[80] She then, at [197] and [198], articulated the correct approach to such a case where threshold has not been crossed in an extreme way:

> *[197] Thus it is not surprising that Lewison LJ was troubled by the proportionality of planning the most drastic interference possible, which is a closed adoption, in a case where the threshold had not been crossed in the most extreme way (see para 174 above). However, I would not see proportionality in such a linear fashion, as if the level of interference should be in direct proportion to the level of harm to the child. There are cases where the harm suffered or feared is very severe, but it would be disproportionate to sever or curtail the family Thus it is not surprising that Lewison LJ was troubled by the ties because the authorities can protect the child in other ways. I recall, for example, a case where the mother was slowly starving her baby to death because she could not cope with the colostomy tube through which the baby had to be fed, but solutions were found which enabled the child to stay at home. Conversely, there may be cases where the level of harm is not so great, but there is no other way in which the child can be properly protected from it.*
>
> *[198] Nevertheless, it is quite clear that the test for severing the relationship between parent and child is very strict: only in exceptional circumstances and where motivated by overriding requirements pertaining to the child's welfare, in short, where nothing else will do. In many cases, and particularly where the feared harm has not yet materialised and may never do so, it will be necessary to explore and attempt alternative solutions. As was said in Re C and B [2001] 1 FLR 611, at para 34:*
>
> > *'Intervention in the family may be appropriate, but the aim should be to reunite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and the relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child.'"*

[81] In her analysis of the proportionality exercise Lady Hale after setting out the negative aspects of the parents' lives said that these had to be balanced against the evidence of the harm it was feared that the child might suffer in the future (see [221]). In essence the proportionality test to be carried out has to bear some relation

to the harm the child has suffered and/or is likely to suffer in the future. This is a specific statutory requirement under the provisions of Article 3 (3)(e) and (4) (b) of the Children (NI) Order 1995 – when a court is considering a public law order, the court shall have regard to, amongst other factors, any harm suffered by the child or any harm the child is at risk of suffering.

[82] Lady Hale in *Re B* also took the opportunity to re-iterate the warning in such a case as this to avoid the temptation of following a route involving social engineering. She quoted with approval several extracts from well-known judgments, which bear repetition - Lord Templeman in *In re KD (A Minor)(Ward: Termination of Access)* [1988] AC 806 at 812:

> *"The best person to bring up a child is the natural parent. It matters not whether the parent is wise or foolish, rich or poor, educated or illiterate, provided the child's moral and physical health are not endangered."*

Butler-Sloss LJ in *Re O (A Minor) (Custody: Adoption)* [1992] 1 FLR 77 at 79:

> *"If it were a choice of balancing the known defects of every parent with some added problems that this father has, against idealised perfect adopters, in a very large number of cases, children would immediately move out of the family circle and towards adopters. That would be social engineering."*

and Hedley J in *Re L (Care: Threshold Criteria)* [2007] 1 FLR 2050 at 2063:

> *"It follows inexorably from that, that society must be willing to tolerate very diverse standards of parenting, including the eccentric, the barely adequate and the inconsistent. It follows too that children will inevitably have both very different experiences of parenting and very unequal consequences flowing from it. It means that some children will experience disadvantage and harm, while others flourish in atmospheres of loving security and emotional stability. These are the consequences of our fallible humanity and it is not the provenance [semble: province] of the state to spare children all the consequences of defective parenting."*

[83] For completeness I will also refer to the comments of Gillen J in *Re S* [2002] NIFam 26 at pages 60/61:

> *"The question is not whether [the adoptive parents] will provide a better home but rather I must ask if there are compelling factors requiring me to override [the right of a child to an upbringing by its natural parents]."*

[84] Another important issue is how important is the harm likely to be suffered by PE if he should be removed from his current stable placement. Cases such as *Re W* [2016] EWCA Civ 793 and *Re M'P-P* [2015] EWCA Civ 584 suggest that the relationship already established with new carers is at the core of one side of the balancing exercise (see McFarlane LJ at [66] in *Re W*). However, in these cases the court was considering a wider family placement – grandparents and an aunt – all of whom had had no previous contact with the children.

[85] The comments of McFarlane LJ at [65] in *Re W* are informative and of assistance:

> *"Where an adoptive placement has been made and significant time has passed so that it can be seen that the looked for level of secure, stable and robust attachment has been achieved, the welfare balance to be struck where a natural family claimant comes forward at this late stage to offer their young relative a home must inevitably reflect these changed circumstances. At the earlier time when a placement order is being considered, that side of the balance, which must now accommodate the weight to be afforded to the child's place within the adoptive family, simply does not exist. The balance at the placement stage, therefore, naturally tilts towards a family placement where the relatives have been assessed, as these grandparents have, as being able to provide good, long term care for a child within their family. At the placement order stage, the other side of the scales (against a family placement) are likely to be populated by factors such as the risk of harm and the need to protect the child. The question of harm to the child occurring as a result of leaving their current placement will normally not arise as a factor at the pre-placement stage given that such a child is likely to be in temporary foster care and will have to move in any event either on to an adoptive placement or back to the natural family."*

[86] Although it would be wrong to place too much emphasis on a legalistic approach to these comments, and also bearing in mind the different procedures in place on both sides of the Irish Sea, at this stage of the proceedings this court is considering whether the child should be freed for adoption. It is not the equivalent of the English 'placement order stage' which is reached when a court has authorised a local authority to place a child with approved prospective adopters.

[87] I consider that in this case we are dealing with a rather hybrid state of affairs. PE has not yet been placed with his current carers as an adoptive placement. The passage of time and the evolution of the case has resulted in both the Trust and the carers considering it to be a *de facto* adoptive placement. The present application is to add legal certainty to that perception. Following McFarlane LJ's analysis, the balance is still in favour of the mother as we are at the 'placement' stage and not yet

at the 'placement order' stage.

**Conclusion**

[88] I have weighed up all the factors, both individually and collectively. I have taken into account the reason for the original Trust involvement with this family and the basis by which the court can consider the making of a public family law order. I consider that the making of a care order with a care plan of permanence by way of adoption with his current foster-carers does not best meet PE's welfare needs. I do not consider that this case satisfies the test that 'nothing else will do'.

[89] In considering the balancing exercise I have given extra weight to the position of the mother, and the fact that she has perpetrated no harm on PE. For this reason, there is a strong emphasis in this case towards rehabilitation of the child into her care. Added to that would be the obvious benefit of PE being brought up within his birth family, and affording to him a real opportunity to enhancing his current attachment to his father. Negative features will include the harm that PE will suffer from his separation from his carers' family environment after nearly five years. I do not consider that this will be so great as to justify preventing him from returning to live with his mother. I consider the mother's ability to safely parent her child, together with the support she can obtain from her existing network and from the Trust will act to reduce any risk which may attach to PE's separation from the carers.

[90] I come to this conclusion accepting the love and dedication shown by the foster carers for PE and recognising that they, as opposed to the mother, may be in a position to provide a better home for PE. But we are considering the permanent severance of a birth family bond, and I am not satisfied that any harm that PE will be exposed to in the future in his mother's care, will be so great as to justify an adoption order. I have rejected the opinions of the Trust's social work staff, the independent social worker and the GAL. I do not do this lightly, but feel that all have become focused on the simple question – is it better for PE to live with the foster carers or his mother? The answer to that question is relatively simple and has determined the approach that each has adopted. Unfortunately it is the wrong question.

[91] The GAL in her report of 23 April 2021 at [12.2] stated:

> "*Adoption is not an option of last resort and to regard it as such is a failure to understand the nature of adoption and its advantages.*"

I accept the GAL's experience in the field of social work and at one level her statement is correct from a social work perspective. It is however, not the approach which the courts, and the Trust, are required to follow. I accept the context in which the GAL came to that stated conclusion, but it is an unfortunate use of phraseology. Lord Neuberger in *Re B* at [74] set out the legal test and what a last resort means:

> *"A care order in a case such as this is a very extreme thing, a last resort, as it would be very likely to result in Amelia being adopted against the wishes of both her parents."*

[92] I therefore consider that a care order with a care plan of permanence by way of adoption is not in the best interests of PE. I will deal with the practicalities of this ruling later.

**The position of the father**

[93] The vast majority of the evidence presented to the court concerned the mother, and for this reason a significant portion of the judgment reflects this.

[94] The father is clearly in a different situation having physically abused the child, and then engaged in misleading the mother, his own mother and the social workers about his involvement. He has caused actual harm, which to recap from the findings of Her Honour Judge McReynolds, included fracturing three ribs, fracturing the distal right tibia, causing bi-lateral subdural, subarachnoid and intraventricular haemorrhaging with multiple bi-lateral haemorrhages to the eyes and a contusion in the left anterior temporal lobe.

[95] He resists a care plan of adoption on different grounds to the mother. He also seeks rehabilitation to his care. Whilst recognising his continuing refusal to acknowledge responsibility for the injuries sustained by PE is a significant factor, he nonetheless stresses the strong bond and attachment between him and PE, his own good family support network and good working relationship with social work staff. His own current social background indicates a stable lifestyle, good employment, and a settled relationship with his present partner.

[96] It must also be recognised that despite the father's continuing dishonesty, a 5 year old boy is less likely to fall victim to a father's assault than a 5 week old baby and consequently the risk to PE is greatly reduced.

[97] Although causing the injuries to PE does not present an unsurmountable barrier for the father to climb, it is a significant factor, when coupled with his continuing denials. It should also be noted that the father, when dealing with this matter in the court arena, has deliberately failed to give evidence on his own behalf, preferring to rely first on the mother before her Honour Judge McReynolds and then on his mother before Mrs Justice Keegan. It was a disingenuous and cowardly approach which does not sit easily with his stated desire for an outcome to this case which involves rehabilitation of PE to his care.

[98] I do not consider that rehabilitation into the father's care is a feasible option in either the short or medium term. In the context of this case, which requires a decision now to determine PE's future, that is a significant finding.

[99] I do not propose to attempt to separate any ruling in this judgment between mother and father. They are separated now on a permanent basis. The father does not support rehabilitation to the mother, but notwithstanding his objection, I consider that it is in PE's best interests that PE should return to live with his mother.

[100] As I have mentioned above, although the father may regard this reasoning as perverse, the best way of achieving the result that he seeks, would be through rehabilitation to the mother. This avoids the severance of his ties with PE and avoids the potential of a reduction of contact between him and PE that would automatically flow from an adoption order. The mother, in turn, has expressed a desire that PE should develop a relationship with the father, and that she is prepared to foster it. I believe her. Subject to the necessary safeguards being put in place, and these will diminish as PE grows older, there should be no reason why the father's involvement in PE's life should not increase. This would have a major benefit to PE, and has the potential to address some of the factors which have troubled the care planners to date by adding to the support network available to the mother.

[101] I do not propose to make any finding in relation to the Trust's case against the father, save that, absent the ability of the mother to care for PE, I would have considered adoption with the foster carers as being in PE's best interests. The availability of the mother to fulfil that role makes such a finding of little relevance.

[102] For all the reasons set out above, I consider that it would be inappropriate for the court to make a care order which is based on the Trust's care plan of adoption. In addition, it follows that the child should not be freed for adoption.

**The way forward**

[103] The court cannot dictate to the Trust what its care plan should be, but the current one is not considered to be in the best interests of the child.

[104] The court considers that rehabilitation into the mother's care is in the best interests of the child. Whether that can be managed best by a care order with a revised care plan with a supervision order, or by a residence order in favour of the mother with or without a family assistance order in place, will be a matter for further consideration by the Trust. Having considered all the evidence to date, I consider that the supervision order may be the most desirable outcome for the child and his best interests.

[105] I therefore propose to adjourn this matter, and will hear counsel about any appropriate timetable as to when the matter can come back to court. I am prepared to permit the operation of the existing interim care order to maintain continuity pending a final decision.

[106] I would also consider that with the current involvement of the Trust, the GAL and the retention of legal representatives, active consideration should be given to

agreeing the terms of a contact order with the father, not only for the present time, but also into the future. Provided sufficient confidence can be placed on the father's current partner and his mother there is no reason why this could not develop to non-Trust supervised contact, and then unsupervised contact. In the long-term this could also be overnight contact.

[107] I appreciate that this judgment will be an extreme disappointment to the foster carers who have invested so much in bringing up PE. Should the Trust consider it appropriate I have no objection to them being given access to this judgment (with suitable redactions to protect the privacy of the mother and father) which I hope will go some way to explaining how the court has approached the decision making process. The court respects the position of the foster carers with regard to the future as it has been reported by the GAL. The role that they have provided to date in respect of PE's upbringing has been essential and they have been and will remain a vital feature in his life. Should the foster carers change their minds about future contact, it is noted that the mother has expressed a desire to avail of their support, and it is hoped that the mother will still maintain that attitude.

[108] In conclusion I revert back to *Re B* and the comments of Rix LJ in the Court of Appeal at [150], such comments being quoted by Lord Neuberger at [102] in the Supreme Court judgment. All the appellate judges (save for Lady Hale) felt unable to interfere with the first instance judgment as it fell within the generous ambit afforded to the judge, but the concern, as articulated by Rix LJ, still remained:

> *"I also wonder whether this case illustrates a powerful but also troubling example of the state exercising its precautionary responsibilities for a much loved child in the face of parenting whose unsatisfactory nature lies not so much in the area of physical abuse but in the more subjective area of moral and emotional risk."*

As far as this mother is concerned, the absence of any actual abuse on her part, has raised identical issues.