Neutral Citation No: [2021] NIFam 43	*Ref:*	**McF11636**
	ICOS:	**18/058583 and 21/018678**
Judgment: approved by the Court for handing down (subject to editorial corrections)*	*Delivered:*	**14/10/2021**

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

Defendant

IN THE MATTER OF GX (A FEMALE CHILD AGED 3 YEARS 9 MONTHS)

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Ms S Ramsey QC (instructed by the Directorate of Legal Services) for the Trust
Ms M Smyth QC with Ms C McCullagh BL (instructed by McIntosh solicitors) for the Mother
Mr M Bready BL (instructed by McCallum O'Kane solicitors) for the Guardian ad Litem on behalf of the child

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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 GX for the name of the child. These are not her initials. Nothing can be published that will identify GX.

[2] GX is now approaching her fourth birthday. She is the child of the mother. The father is not named on the birth certificate. A male has been identified as the father. When approached he did not deny parentage but declined DNA testing. He has been served with papers in both applications but has chosen not to involve himself in the proceedings, or in the child's life. The mother has two older

daughters aged 21 and 16 years. Neither have lived with their mother for a significant period of time and were brought up in paternal kinship placements. The mother continues to have contact with each child.

[3] The Trust seeks a care order in respect of GX with a care plan of adoption. It also seeks an order to free GX for adoption, dispensing with the mother's consent which it claims is being withheld unreasonably. I will deal with the history of the case in short order. The child was in the mother's care for 11 weeks and then, under a voluntary arrangement, went to live with an aunt outside Northern Ireland. GX moved to her present placement in September 2018 again under a voluntary arrangement. An interim care order was made in October 2018. The child has remained in the placement since September 2018.

[4] The matter came on for hearing on 4 October 2021. During the previous week Dr Christine Kennedy, a consultant forensic psychiatrist, who had prepared a report in the proceedings (see [24] below), having been updated with recent developments in relation to the mother's mental health, contacted the guardian ad litem who in turn contacted the court office. A review hearing was conducted on 1 October 2021. This took the form of an informal ground rules hearing particularly in relation to the mother giving evidence, how she would be cross-examined and how certain other evidence would be dealt with. The conduct of the hearing on 4 October 2021, the treatment of the entirety of the evidence and the content of this judgment should be considered in the context of what was discussed and decided at the ground rules hearing.

[5] At the hearing evidence was given by a social worker on behalf of the Trust, the mother, and the guardian ad litem. The guardian ad litem gave evidence by livelink.

Threshold

[6] The Trust relies on a document setting out threshold criteria which has been agreed by the mother. The date of intervention is June 2018, although prior to that the mother required to be hospitalised in March 2018 and her sister cared for the child, then a young baby. It is not necessary to set out the threshold criteria in detail, suffice to say that at the date of intervention the mother was suffering from significant longstanding mental health issues dating from 2002 requiring numerous hospital admissions. As such, it was likely that the child would suffer significant harm if she remained in the care of the mother.

The Law

[7] The law in relation to care orders and a care plan involving adoption is very well established. Kerr LCJ in *AR v Homefirst Community Trust* [2005] NICA 8 at [77] stressed the need for compelling circumstances:

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

[8] Lord Kerr and the other Supreme Court justices dealt with an adoption matter in *Re B (A Child)* [2013] UKSC 33. Lady Hale at [198] set out what is now considered to be the appropriate test:

> "*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.***" (my emphasis)

[9] In determining whether nothing else will do a court is required to carry out a proper balancing exercise when assessing whether removal of the child is proportionate, although there is no presumption in favour of the natural family (see, e.g., *Re P* [2013] EWCA Civ 963 and *Re: H* [2015] EWCA Civ 1284.)

[10] In doing so the court is adhering to the provisions of Article 8 of the ECHR, which sets out the right to respect for private and family life (see *YC v United Kingdom* (2012) 55 EHRR 33).

[11] When a court is deciding whether a child should be freed for adoption it involves a consideration of the provisions of the Adoption (NI) Order 1987 and in particular involves a two-fold test. First, the court considers whether adoption will be in the best interests of the child, will safeguard and promote GX's welfare through her childhood and will provide her with a stable and harmonious home. Secondly, as the mother is not consenting, whether she is withholding her consent unreasonably. This second limb is an objective test and requires the court to consider the circumstances of the mother but to endow her with a mind and temperament capable of making reasonable decisions (see *Re: D* [1977] AC 602 at 625). The overriding consideration is 'reasonableness' in the context of the totality of the circumstances (see *Re W* [1971] AC 682 at 699C.)

[12] The judgment of the court (Steyn and Hoffman LJJ) in *Re C* [1993] 2 FLR 260 at 272 suggested another way of framing this test:

> *"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."

[13] A discrete point arose during the hearing concerning involvement of the mother in the decision making process around the time the Trust had formulated its care plan for adoption. The right for respect for family life (Article 8 of the ECHR) also includes implementation of procedural safeguards in the decision making process.

[14] Lord Nicholls in *Re S and Re W* [2002] UKHL 10 at [99] said that:

> *"Although Article 8 contains no explicit procedural requirements, the decision-making process leading to a care order must be fair and such as to afford due respect to the interests safeguarded by Article 8."*

[15] Gillen J in *Re W & M* [2005] NIFam 2 held that the Trust had failed to involve the parents in the decision making process and had failed to take their views and interests into account. In the circumstances, he declined to free the child for adoption. The Trust's involvement had resulted in a Fit Person Order (a pre-Children (NI) Order 1995 order appointing a person as a fit person to look after a child, in this case as a foster carer) in 1996. The children lived in that placement and then due to changed circumstances the foster carer expressed a desire to adopt the children. During the decision making process in 2003 there occurred what Gillen J described as a clear infringement of the parents' Article 8 rights due to their non-involvement in the decision making about their child.

[16] The court refused the Trust's application to free the child. Gillen J appears to have done so on the basis of the first limb of the Adoption Order test and as the rights of the parents had not been protected this weighed more heavily in the consideration. Essentially, it was an application of what was to emerge in later jurisprudence as the proportionality test. There is no reference in the judgment as to how a reasonable parent would consider this when deciding whether to consent to adoption.

[17] That would be part of the second limb of the test. Grievance about procedural, or other, matters could be a factor to be taken into account but would only be a subsidiary factor (see Waterhouse J in *Re BA* [1985] FLR 1008) but courts have stressed that more focus should be placed on the underlying reasons giving rise to the sense of grievance, rather than a parent merely feeling aggrieved about something (see, e.g., the judgment of Higgins J in *Re E & M* [2001] NIFam 2).

[18] *Re W & M* must also be seen in the light of the concluding comments at [24] when Gillen J indicated that a simple re-visiting of the process with suitable compliance could very well solve the matter:

> *"That of course does not prevent this Trust revisiting its decision-making process and mounting a further application if*

and when they have complied with their obligations under the European Convention on Human Rights and the regulations governing such applications."

Consideration

[19] The critical evidence in this case relates to the mother's mental health. It is clear that during periods of stability the mother is functioning at a level which would permit her to have a meaningful relationship with her daughter. When she gave evidence she came across as a thoughtful witness with full cognitive abilities.

[20] A reference has been provided for the mother by a person with whom she works. I understand the mother's employment is part-time and periodic. The referee holds a senior post and describes the mother as well organised, dedicated, conscientious and well respected by other staff. No mention is made of the mother's mental health difficulties or absences from work. For reasons of the mother's privacy it would not have been possible to explore with the referee how the mother's mental health impacts on her work, however it is evidence that supports the view that when the mother achieves a level of stability she is able to function at an appropriate level.

[21] The mother has been able to maintain her commitment to the contact arrangements with her daughter. This is occurring at a frequency of twice weekly. The quality of contact is described as good.

[22] The problem in the case is the mother's inability to maintain a consistent and sustained period of stability in her life. Periods of relapse appear to occur spontaneously without stressor events and with a degree of regularity. They occur even when she is fully compliant with her medical treatment. Over the last eighteen months the mother has been hospitalised on four occasions – in May 2020, December 2020, March 2021 and July 2021. (To put this into context the mother has told the guardian ad litem that her hospital admissions have "significantly reduced" in recent years (see page 16 of the guardian's report)).

[23] During these periods the mother is unavailable for the child. The mother recognises that in the short to mid-term she will not be in a position to care for the child. She harbours an expectation that at some time in the future she can achieve stability in her life. On consideration of the evidence I consider that this is more aspirational rather than grounded in reality.

[24] Dr Christine Kennedy reported in March 2020. She identified risks to the child should the child be exposed to the mother's mental state which is likely to be fluctuant, and the child will have no experience of her mother as a consistent and sensitive presence. Exposure to the mother's behaviours and psychotic symptoms would be confusing and frightening for the child.

[25] The child has no specific health issues. She has been in her present placement since May 2018 and that is the intended adoptive placement. No real issue is taken by the mother concerning the suitability of the current placement.

[26] Given the mother's recognition that the return of the child to her care is not achievable in the short to mid-term, the main focus of the hearing has been the nature of the care planning. Should it be adoption or a long-term foster placement?

[27] Black LJ in *Re V* [2013] EWCA Civ 913 at [96] set out the significant differences between adoption and long-term fostering:

> *"i) Adoption makes the child a permanent part of the adoptive family to which he or she fully belongs. To the child, it is likely therefore to "feel" different from fostering. Adoptions do, of course, fail but the commitment of the adoptive family is of a different nature to that of a local authority foster carer whose circumstances may change, however devoted he or she is, and who is free to determine the caring arrangement.*
>
> *ii) Whereas the parents may apply for the discharge of a care order with a view to getting the child back to live with them, once an adoption order is made, it is made for all time.*
>
> *iii) Contact in the adoption context is also a different matter from contact in the context of a fostering arrangement. Where a child is in the care of a local authority, the starting point is that the authority is obliged to allow the child reasonable contact with his parents (section 34(1) Children Act 1989). The contact position can, of course, be regulated by alternative orders under section 34 but the situation still contrasts markedly with that of an adoptive child. There are open adoptions, where the child sees his or her natural parents, but I think it would be fair to say that such arrangements tend not to be seen where the adoptive parents are not in full agreement. Once the adoption order has been made, the natural parents normally need leave before they can apply for contact.*
>
> *iv) Routine life is different for the adopted child in that once he or she is adopted, the local authority have no further role in his or her life (no local authority medicals, no local authority reviews, no need to consult the social worker over school trips abroad, for example)."*

[28] The evolution of the care plan for adoption occurred in 2020. A LAC meeting

of 26 June 2020 ruled out re-unification of the child to the mother. An options appraisal meeting was convened on 6 July 2020 when it was decided that the child should be presented to the Trust's Best Interests Panel with a recommendation of adoption. The Trust's Adoption Panel met on the 7 October 2020 and recommended adoption, with a provisional match with the then current foster carers. These decisions were formally ratified at a LAC meeting on 14 December 2020.

[29] The mother's representatives assert that because the mother was excluded from the process between the two LAC meetings she had not been afforded an opportunity to make representations concerning the type of long-term placement with the child away from her care. They argue that this is a procedural deficiency in the process denying her an input into the child's future and displays a lack of respect for her family life which should have been afforded to her. In this context it must be recognised that the mother has at no time considered that either long-term fostering or adoption could be an option that would be acceptable to her. She maintained that position throughout her engagement with the Trust, the guardian ad litem and the court, right up until the final hearing in this case.

[30] Article 8 does not set out actual procedural requirements and the ECtHR has been reluctant to do so. The right enshrined in Article 8 is a right to a respect for one's family life. The proportionality exercise involves a weighing up of all relevant factors. One of those factors will include the right to respect for GX's family life as well. Any analysis will be case specific so limited value can be achieved from consideration of other cases. In *Re W & M* the basic facts were that when rehabilitation to the birth parents was ruled out in 1998 they remained in the care of their foster carer having lived with her since 1996. That was intended to be a foster placement. In November 2002 at a LAC review the carer indicated she wished to be considered as an adoptive carer for the children. The LAC review was adjourned to consider this option. The reconvened LAC review in January 2003 noted a recommendation from the Trust that consideration be given to adoption. The LAC review was not reconvened until November 2003 being four months outside the required six month period. In the interim the Trust proposed that the children should be adopted and the adoption panel met in June 2003 to make that recommendation approving the current carer. The parents did not receive any written communication about these decisions until January 2004. In summary *Re W & M* involved the significant shift in the care plan and decisions taken over the period of a year with no engagement with the parents.

[31] GX's case has similar themes with a shift in the care plan from long term fostering to adoption. In June 2020 rehabilitation, the mother's only acceptable option, was ruled out, leaving the care plan as long-term placement away from the mother's care in either a fostering or adoptive placement. That plan then shifted to the adoption option following the meetings in July and October 2020. Although the mother's attendance at these meetings may not have been permitted it is acknowledged by the Trust that she should have been advised of the meetings and the proposed agenda. This would have allowed her to make submissions to the

decision makers if that had been her wish.

[32] The mother was in attendance with her solicitor at the LAC review in December 2020. Prior to that review the Trust had specifically spoken to the mother to appraise her of the recommendations emerging from the meetings so in preparation for the LAC review in December 2020 the mother and her solicitors were fully aware of the situation. She did have an opportunity to make representations at that stage or to ask for an adjournment for that purpose. There is no record that she did so. There is also no record that she raised this procedural irregularity at the time, or at any time until the hearing of the case. The guardian ad litem, who has had a much higher level of engagement in the case than the court, specifically refers to this at 8.9 (page 31) of her report

[33] It must however be acknowledged that the decision at the LAC review was essentially ratifying earlier decisions and by the time the matter came before the LAC review in December 2020 a body of influential decision makers had already considered the matter and decided in favour of adoption without an input from the mother.

[34] I consider that *Re W & M* is of limited authority. It is very fact specific and I consider that the breaches which Gillen J highlighted as flagrant were much more significant than in this case. I have already quoted from paragraph [24] of the judgment which appears to suggest that the matter could have been re-visited with a further application, provided the Trust complied with its obligations the second time round.

[35] The failure to engage with the mother at this time was an interference of her Article 8 rights but the interference was limited in extent. It is a matter to be taken into account when carrying out a balancing proportionality exercise, but it does not trump other considerations as it did in *Re W & M*.

The balancing exercise

[36] As Lord Nicholl in *Re B* [2001] UKHL 70 at [16] observed:

> *"There is no objectively certain answer on which of two or more possible courses is in the best interests of a child. In all save the most straightforward cases, there are competing factors, some pointing one way and some another. There is no means of demonstrating that one answer is clearly right and another clearly wrong. There are too many uncertainties involved in what, after all, is an attempt to peer into the future and assess the advantages and disadvantages which this or that course will or may have for the child."*

The purpose of the balancing exercise is to weigh up the positives and negatives for each of the realistic options. This will involve an analysis of the existing evidence,

and a peering into the future, as Lord Nicholls suggested.

[37] The mother recognises that rehabilitation into her care is no longer realistic in the short to medium term given her mental state. This is a recognition by her of the reality in the case. In her evidence she asserted that her mental state was improving and that if she were to achieve a degree of stability for a period of, say two years, then the Trust should consider a phased rehabilitation into her care. She suggested that this would need to be done over a period of time.

[38] GX will be five and half years old should the mother start her two year period of stability now. She will have lived her entire life, save for the first few weeks, outside the mother's care. To even attempt to set in place a trajectory for rehabilitation for GX leaving her current placement with all the security that it provides would be fraught with difficulties with GX bearing the brunt of any of those difficulties.

[39] This speculation, and I put it no higher, is predicated on the mother's mental health having actually improved and that she can achieve stability in her mental health. The prognosis of Dr Kennedy in her report of March 2020 has been confirmed by events. There is no evidence placed before the court that could lead the court to accept the basis of the mother's analysis. There is nothing to suggest that two years' stability would be enough and more particularly when the two year period is likely to begin.

[40] The reality of this case is that rehabilitation is highly unlikely within a realistic time-scale when one considers the welfare checklist, and in particular:

a) GX's emotional and educational needs;

b) the likely deleterious effect on GX's emotional wellbeing caused by the change in her circumstances by moving back to live with the mother;

c) the emotional harm which GX is at risk of suffering with such a move; and

d) the lack of any proven ability or experience on the part of the mother to meet the GX's needs both now and in the future. In this context there is no evidence to suggest that the mother has any support network of either family or friends.

[41] The balancing exercise is therefore a consideration of the competing positives and negatives of a foster placement or an adoptive placement. The scope for a kinship placement is very limited. All realistic options have been explored, and rejected. The placement will therefore have to be outside the birth family.

[42] Given the likely permanence of this situation it would be a strong positive that GX be adopted. She is very well settled and integrated into this existing family

unit. Adoption would copper fasten her position within that family. It would eliminate the need for social services involvement and avoid any further significant interventions by the mother in the child's life. The mother still holds fast to some entirely unrealistic aspirations for her family life and although to date she has not sought to undermine the placement as GX grows older it could not be said that this position will be maintained. A fostering solution retains the active role of the Trust with the continuing duty to consider rehabilitation which will only fuel the mother's aspirations. The guardian ad litem at page 23 of her report does register a certain foreboding about future relationships between the mother and the carers due to recent developments.

[43] One factor which diminishes the positive feature of permanence being extremely beneficial for GX is the issue of contact with the mother. The present contact regime is two contact visits a week, one direct and the other indirect by livelink. Whether the outcome is fostering or adoption this will be reduced to reflect the permanence of the care plan, but in the case of adoption, the reduction will be more drastic. The need for such a reduction is recognised given the necessary re-evaluation of the purpose of contact. The proposal is an incremental reduction and should an adoption order be granted then this is likely to be reduced to three times a year with one additional indirect contact. GX has a good attachment to the mother. She refers to her as 'Mummy [Christian name].' All contact is currently supervised and is likely to remain so for a significant period given the vulnerabilities of the mother. The guardian ad litem records that during contact the mother is warm and nurturing in her approach. The guardian ad litem also records that the child speaks warmly about her mother and her enjoyment when playing with her.

[44] The guardian ad litem's analysis suggested that the original proposal of twice per year was at the lower end of the spectrum and she suggested a level of four times a year with the mother (post order) with some additional indirect contact. The Trust adjusted its plan in light of these suggestions.

[45] In addition to contact with the mother, there will be other arrangements for GX's step sisters and her maternal aunt (with whom she lived as a baby).

[46] Having weighed up the factors both in favour of adoption and fostering and against adoption and fostering I consider that adoption is the better method to protect and enhance the welfare of GX. I make this order bearing in mind the failure on the part of the Trust to engage fully with the mother during the summer and autumn of 2020. I also consider that taking into account all the factors in this case that the Trust have shown that nothing else could realistically be done for GX.

[47] I therefore consider that a care order with a care plan of adoption should be granted. I approve the proposed post-order contact arrangements.

Freeing for Adoption

[48] Taking all these welfare factors mentioned above into account I consider that the Trust has also satisfied the first limb of the freeing test, namely that it is in GX's best interests, it safeguards and promotes her welfare during her childhood and it provides her with a stable and harmonious home.

[49] The question of parental consent requires the court to revisit some of the issues considered in the welfare evaluation but from a different approach, that of a reasonable parent. I refer specifically to the Trust's failure to engage with the mother and the level of contact with its proposed reduction.

[50] The mother does have an understandable level of grievance concerning the Trust's approach to decision making. However, the reality is that since ascertaining the process before and at the LAC review in December 2020 the mother has not sought to raise this as an issue, as she has maintained a general rejection of any solution not involving rehabilitation to her. She has never contemplated a long-term placement outside her care. That approach therefore diminishes the sense of grievance. In addition, having considered the reasons for that grievance I do not consider them to be so severe that a reasonable parent would regard them as sufficient to override the wider consideration of GX's general welfare.

[51] The other issue is contact and the level of attachment between the mother and GX. This contact, when the mother is well and available, is twice a week and is regarded as generally positive. Some concerns have been raised by the foster carers recently but overall the contact is good and worthwhile. How much weight would a reasonable parent give to the level of attachment between the mother and the child, and the child and the mother? Recognising that as a consequence of adoption this level of contact will require to be reduced. How much weight would a reasonable parent give to that?

[52] A loss, or reduction, of contact is a matter which a reasonable parent would take into account when considering whether to consent to adoption. A reasonable parent would consider the welfare of the child and recognise the state of that parent's health, and whether health considerations would weigh heavily as a factor in the ability to care for the child. I believe that a reasonable parent in this case would consider that the health consideration would eliminate the possibility of not only caring for the child but also unsupervised contact with the child. A reasonable parent would then appreciate that contact will take on a different objective which is primarily to maintain the relationship between child and parent and to enhance the narrative of the child in the birth family. Bearing these matters in mind I consider that a reasonable parent standing back and looking at all issues in this case would consent to adoption and would, in particular accept a reduction in contact to the proposed level of four times a year.

[53] I therefore dispense with the consent of the mother to the adoption of GX as I

consider that she is withholding it unreasonably.

Conclusion

[54] In the circumstances in addition to the granting of a care order I will free GX for adoption.

[55] I discharge the guardian ad litem. There will be no order as to costs between the parties, but the costs of the legally assisted parties shall be subject to the usual taxation orders.