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*Judgment: approved by the court for handing down (subject to editorial corrections)**	*Delivered:* **12/02/2024**

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

Applicant/Respondent

-v-

A MOTHER

Respondent/Appellant

-and-

A FATHER

Respondent/Appellant

IN THE MATTER OF FEMALE TWINS AGED 7½ YEARS

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Mr A Magee KC with Ms C Hughes BL (instructed by the Directorate of Legal Services) for the Health and Social Care Trust
Ms S Simpson KC with Mr P Gillen BL (instructed by Gus Campbell solicitors) for the mother
Ms F McNulty BL (instructed by E & L Kennedy solicitors) for the father
Ms M Connolly KC with Ms S Jones BL (instructed by Walker McDonald solicitors) for the children's court guardian representing the interests of the children

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McFARLAND J

Introduction

[1] This judgment deals with appeals from the mother and father against a decision made by His Honour Judge McGarrity ("Judge McGarrity") at Craigavon Family Care Centre on 8 November 2023 to free their twin daughters for adoption.

[2] I will refer to the children as "the twins" to protect their identity. The twins

are of mixed ethnicity. Both parents are citizens of different EU countries. The father has a European Caucasian ethnicity, and the mother has an African ethnicity.

Background

[3] The twins have been known to social services since their birth. The parents are unmarried, and the father's name is on each birth certificate. The issues at the time of the birth concerning the care provided by the parents have persisted. Judge McGarrity referred to these issues as "exposure of the children to domestic violence, deficient parenting capacity, neglect of their care and education, poor home conditions and inability of the parents to effect sustained positive change despite high levels of professional assistance" (para. 6 of the judge's speaking note). I refer to this speaking note at [12] below. Further references to paragraph numbers relate to this speaking note.

[4] There then followed a significant effort by the Trust to assess the parents, and particularly the mother, and to provide support to her. This took place over a sustained period of time. After discharge from hospital the twins lived with the mother in a Trust approved Mother and Baby placement for three months. The family then lived in the community for a further two years eight months, before the mother and the twins moved into a Women's Aid facility for four months. There then followed a three and a half month Thorndale assessment before a twenty seven month period back living as a family in the community.

[5] Due to the ongoing concerns the Trust sought care orders on 30 April 2020, and these were eventually granted by Craigavon Family Proceedings Court on 27 June 2022. The care plans ruled out rehabilitation into the care of either parent. They rejected the only kinship placement that had been put forward by either parent (the maternal grandmother) largely as a result of the grandmother's failure to respond to contact from the Trust or to attend a meeting. The care plans stated that the twins were to be placed into Trust approved foster care "until any prospective kinship carers are put forward." In the event of a placement breakdown an alternative foster placement would be explored.

[6] On the day of the care order the twins were moved to a concurrent care placement and have continued to reside in that placement which is intended to be their adoptive placement.

[7] At a LAC meeting on 4 October 2022 the care plans were changed to one of adoption. After this decision to change the care plans the mother, for the first time, suggested that her aunt (the twin's great aunt) would be a suitable kinship carer. The Trust contacted the aunt on 5 November 2022 and again on 24 November 2022. As a result of those meetings the Trust did not assess the aunt as a suitable carer. I will deal with this engagement with the aunt in more detail below.

The freeing proceedings

[8] The Trust applied to free the twins for adoption on 9 June 2023.

[9] The mother applied for leave to instruct an independent social worker to report but this was refused on 6 October 2023.

[10] The mother filed her affidavit in response to the freeing application on 11 October 2023 and again referred to the aunt as a potential carer for the twins.

[11] The hearing of the freeing application was listed on 25 October 2023. On the evening before the hearing the aunt personally indicated a willingness to be a carer and she then attended at the hearing. Notwithstanding a failure to lodge a statement, Judge McGarrity permitted the aunt to give oral evidence. Later that day evidence was given by a social worker, with the mother and the guardian giving evidence the following day. Each witness was subject to cross-examination.

[12] Judge McGarrity reserved judgment before delivering his judgment on 8 November 2023 when he granted freeing orders, dispensing with the consent of each parent. It was an oral judgment, but a speaking note has been provided and all counsel who were present on 8 November 2023 agree that the speaking note accurately reflects the content of the oral judgment.

The appeals

[13] The appeals are against the freeing order. Initially, the court listed the mother's appeal treating the father as a respondent although at the hearing of the appeal it transpired that the father had actually lodged an appeal. That notice could not be located by the court office. It has now been found and formally processed. As the father's appeal was essentially on the same grounds as the mother's, the court agreed to consolidate the two appeals at the hearing on 5 February 2024. This judgment will deal with both appeals. No issue was taken by any other party to this course of action.

[14] The mother's appeal raised seven grounds, but one was abandoned at the hearing:

(a) The failure to grant the application for an independent assessment of the parents (abandoned);

(b) Judge McGarrity failed to give due consideration, and attached insufficient weight, to the fact that an appropriate option for kinship care was available for the twins;

(c) Judge McGarrity failed to attach sufficient weight to the Trust's failure to properly assess the aunt;

(d) Judge McGarrity failed to attach sufficient weight to the racial and cultural background and needs of the twins in light of the availability of a suitable kinship carer;

(e) Judge McGarrity erred in concluding that the Trust and the guardian had completed an adequate options analysis in respect of the twins;

(f) Judge McGarrity erred in law in finding that the mother unreasonably withheld her consent;

(g) The evidence was insufficient to support the conclusion that freeing was the necessary option for the twins.

[15] The father's appeal raised identical grounds. His sixth ground made reference to the finding that the mother unreasonably withheld her consent. I have treated that as an appeal relating to the finding in respect of him withholding his consent. Both of the appeals were opposed by the Trust and by the guardian.

[16] The focus of the submissions at the hearing of the appeal was on the aunt's potential role as a kinship carer.

Appeals from the Family Care Centre

[17] The legal principles relating to appeals in family cases and the general approach to freeing for adoption applications are very well established.

[18] An appellate court should not interfere with the lower court's decisions unless they are wrong. Waite J in *Re CB* [1993] 1 FLR 920 at 924d stated that:

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

This approach has been followed in this jurisdiction for many years. Keegan LCJ in *Re Joy* [2022] NICA 63 (also a freeing for adoption case) at [25] summed up the position as follows:

> "The appellate test … is simply whether the judge was wrong. The judge may be wrong by misapplying the law or where he or she does not properly assess the various options for a child in a case such as this."

The law in respect of freeing children for adoption

[19] Before freeing a child for adoption a court must be satisfied that such an order is both proportionate and necessary by carrying out a holistic analysis of the realistic options for the child. Ultimately, the decision will be based on what is considered to be in the best interests of the child. The Adoption (NI) Order 1987 provides for a two-fold test when a court is considering the freeing of a child for adoption. Firstly, the court must be satisfied that adoption would be in the best interests of the child, and secondly, should the parents not consent, then the court must determine if they are withholding their consent unreasonably.

[20] The best interests test has to be approached by the application of the well-known judgment in *Re B* [2013] UKSC 33. To use the words of the Supreme Court justices, adoption is a "last resort" (Lord Neuberger) when "nothing else will do" (Baroness Hale) and when "it is really necessary" (Lord Kerr). Although the phrase "nothing else will do" will be very familiar to family law practitioners, there have been warnings about over-applying its meaning. McFarlane LJ in *Re W* [2016] EWCA Civ 793 at [68] said that:

> "[T]he phrase is meaningless, and potentially dangerous, if it is applied as some freestanding, shortcut test divorced from, or even in place of, an overall evaluation of the child's welfare. Used properly, as Baroness Hale explained, the phrase "nothing else will do" is no more, nor no less, than a useful distillation of the proportionality and necessity test as embodied in the ECHR and reflected in the need to afford paramount consideration to the welfare of the child throughout her lifetime."

[21] The need for an holistic evaluation has been stressed again by the Supreme Court in *Re H-W* [2022] UKSC 17). This has been described by McFarlane LJ in *Re G* [2013] EWCA Civ 965 in the following terms:

> "The judicial task is to evaluate all the options, undertaking a global, holistic and … multi-faceted evaluation of the child's welfare which takes into account all the negatives and the positives, all the pros and cons of each option … What is required is a balancing exercise in which each option is evaluated to the degree of detail necessary to analyse and weigh its own internal positives and negatives and each option is then compared, side by side, against the competing option or options."

[22] Before leaving this issue it is important to bear in mind several factors. Firstly, the evaluation only need cover "the options which are realistically possible"

(see *Re B-S* [2013] EWCA Civ 1146 at [34]). Secondly, there is no right or presumption that a child should be brought up by their natural family (see *Re W* at [71] and [73]).

[23] When considering dispensing with a parent's consent the test is an objective one with the court determining what a reasonable parent would do in the same circumstances. The court in *Re C* [1993] 2 FLR 260 at 272 described the test in the following terms:

> "[H]aving regard to the evidence and applying the current values of our society, [do] 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."

Consideration

[24] It is essential that the potential involvement of the aunt is put into context. At the time of the hearing before Judge McGarrity, the twins were seven years old. The Trust had had a role during the entirety of their lives. If anything, the failure on the part of the Trust to act sooner and with more decisiveness, could be the subject of comment. It would have been obvious to the parents, and those advising them, that rehabilitation back into the care of either parent was not a realistic option, and that other kinship carers would have to be considered.

[25] During the period of the care order proceedings (April 2020 – June 2022), the mother had only suggested her mother and no one else. When the care orders were made with care plans specifically referring to the need for "any prospective kinship carers [to be] put forward", the mother made no further suggestions. Either at, or shortly after, the LAC meeting on 4 October 2022 which changed the care plans to adoption, the mother suggested her aunt and contact was made by the Trust with the aunt. I will deal with that in more detail below, but by 24 November 2022 the aunt was in agreement with the Trust's initial assessment that she was not a suitable full-time carer for the twins, and should she change her mind, the aunt was aware of her ability to challenge that assessment. A letter of 30 November 2022 confirmed the position concerning the aunt's agreement with the Trust's assessment.

[26] It is unclear as to the mother's knowledge about her aunt's engagement with the Trust. In any event neither the mother nor the aunt took any further steps after November 2022 to indicate the aunt's willingness to be a carer for the twins until 11 October 2023 when the mother swore her replying affidavit to the freeing application which had been issued four months earlier. During this 10 month period there were four separate LAC meetings during which the mother did not mention the aunt as a potential carer.

[27] The aunt took no steps to involve herself in the legal proceedings such as applying for leave to commence a residence order application. The mother took no

steps to adduce evidence from the aunt by filing a written statement, and the only indication of the aunt's renewed interest in the matter was on the eve of the hearing.

[28] The context of the aunt's renewed involvement is that this was a very much last-minute effort by the mother to put forward her aunt as a kinship carer for her seven year old twins two weeks before the final hearing.

[29] As for the actual substance of Judge McGarrity's assessment of the position, he dealt with it in a manner that could not be criticised. The parents had made an application to adjourn the hearing to enable the aunt to be assessed as a carer. Judge McGarrity decided to hear evidence from the aunt despite the fact no statement had been filed. In his assessment of her evidence (paras 4 and 5) Judge McGarrity acknowledged that two factors weighed heavily in favour of giving the Trust an opportunity to assess the aunt – the availability of a quality potential kinship carer and the ethnicity and cultural background issue. Against this Judge McGarrity noted the aunt's choice not to challenge the initial rejection by the Trust (with which she agreed) in November 2022 until October 2023. Despite hearing and observing her giving evidence he found that delay "inexplicable." He considered that there was sufficient evidence before the court to enable him to make an informed decision and added that the needs of the children would not be served by delaying the necessary determination. On that basis, the application to adjourn was refused.

[30] In the overall context of this case, delay is a significant factor, and I can see no valid criticism of Judge McGarrity in his approach. These children were seven years old, known to social services all their lives, and formally before the court since June 2020. Article 3(2) of the Children (NI) Order 1995 specifically refers to the general principle that any delay in determining any question with respect to the upbringing of a child is likely to prejudice the welfare of the child. The speech of Lord Nicholls in *Re S Re W* [2002] UKHL 10 is often put forward in an effort to explain and justify delay as "planned and purposeful delay", but those words at para [95] refer to uncertainties in the care plan for the child:

> "In this context there are sometimes uncertainties whose nature is such that they are suitable for immediate resolution, in whole or in part, by the court in the course of disposing of the care order application. The uncertainty may be of such a character that it can, and should, be resolved so far as possible before the court proceeds to make the care order. Then, a limited period of 'planned and purposeful' delay can readily be justified as the sensible and practical way to deal with an existing problem."

[31] Judge McGarrity referred to a potential six month delay (see para. 3). The situation arose because both the mother and the aunt decided to take no steps to promote the aunt again as a potential kinship carer until the eve of the hearing. No finding was made as to whether this was a manipulation by the mother, indifference

on her part or just a last-minute thought, but it was not necessary as Judge McGarrity was correctly treating the welfare of the children as his paramount concern and not the conduct of the mother. The mother had been given ample opportunity to put forward the aunt as a kinship carer, but she did not do so.

[32] It could not be said that his decision to refuse to adjourn was wrong in any way. In fact, from all the evidence available to him, it was clearly the correct decision.

[33] The various grounds of appeal can be treated as a single ground which relate to the correct application of the "nothing else will do" principle (see *Re B*) when considering adoption.

[34] Judge McGarrity stated at para. 21 "that, whilst well-meaning, [the aunt's] availability is an unduly late development." He then makes his own assessment of her.

[35] Before considering this it is necessary to revert back to the Trust's assessment in November 2022. Two contact records and a letter from November 2022 were submitted to provide further background to the decision-making. I agreed to allow them to be admitted before me. The first record (5 November 2022) indicates that the aunt (despite being their god parent) did not even know that the twins were in care or that there had been any court proceedings. When advised about the Trust involvement she then thought that the twins were in care because of their speech and that they had missed some school. When appraised about the real reasons she became overwhelmed by emotion. The aunt's own personal circumstances were discussed. Her husband had recently died, and she had sole caring responsibility for their two children. The aunt wanted some more time and said she needed to speak to the mother about this new information which had been revealed to her.

[36] The social workers had a further meeting on 24 November 2022. The social workers revisited the earlier discussions and reported to the aunt the current position on the ground. The record reflects that the aunt "agreed with everything we were saying and understood this however she had to try for her parents' sake" and that the aunt was advised that if she was not in agreement with the decision of the Trust, she should seek legal advice.

[37] It was clear that in November 2022 the aunt was accepting of the decision by the Trust. Judge McGarrity may have mis-described this as a 'withdrawal' by the aunt from the process, but he was correct in describing her decision, which was an acceptance of the Trust's assessment rather than a withdrawal, to have been an "informed and reasoned decision" (para. 5).

[38] The mother has sought to argue that the Trust's November 2022 assessment had not been complete and lacked substance. An identical argument that the assessment was flawed was raised before Judge McGarrity, but rejected by him. He noted that the social workers had regarded the aunt as an "honest, direct and

resilient lady with appropriate home conditions" and that her two children were "polite and engaging." Judge McGarrity heard evidence that she was working part-time night shifts in a local factory and re-training as a nurse. She has a good relationship with the twin's current carers and has facilitated contact with the twins and herself and her children.

[39] Although Judge McGarrity did not have a full social work assessment of the aunt's parenting abilities, he was entitled to make his own assessment from the evidence before him. He had already considered the absence of this formal assessment but had ruled that the children could not suffer from further delay in consideration of their case. At para. 21 he dealt with this in the following way:

> "Even if it were possible to purposefully delay the matter to again facilitate her assessment as a kinship carer, I have considerable misgivings as to the value in doing so as, in the main, the significant demands on her and the personal circumstances that made her determine that she should withdraw from the assessment process in 2022 remain. One hopes that going forward [the aunt] and her children can play an important role in the lives of the subject children and I am reassured to know that all involved appear committed to promoting contact in this respect."

This extract indicates an entirely correct approach to the issue. He accepted that she was well-meaning, but he still harboured misgivings concerning her own personal circumstances and how they would impact on the aunt's ability to care for the twins in addition to her own personal responsibilities. Setting aside his reference to her withdrawing, he has correctly acknowledged the problems identified in November 2022 and acknowledged by her, as remaining. He came to that conclusion after hearing and observing the aunt giving evidence and it is not the role of an appellate court to interfere with such an assessment of that kind unless there is any suggestion that it was in any way wrong. That conclusion was well within the range of decisions available to the judge.

[40] The Trust's initial assessment was to an extent limited, but it had identified key factors in the aunt's life at the time and, crucially, she agreed with the assessment. Judge McGarrity correctly found this to be an appropriate assessment. He then had the benefit of further reports and oral evidence from the key witnesses and was perfectly entitled to come to the view that he set out in his judgment.

[41] Two further matters require comment. The first relates to the racial and cultural background of the twins. This is an important issue however it is not as straightforward as is suggested by the parents. The twins have a mixed ethnicity – white European/black African. The mother and aunt have an African ethnicity. The mother was born in Europe, but it is understood that her family are from a country in West Africa. This country was a former colony of the European country of the mother's birth and her citizenship of that country derives from that connection. The

father has a white Caucasian ethnicity.

[42] The current carers, and prospective adopters are a couple from Northern Ireland. As white Europeans they share the same ethnicity as the father but not his cultural background which derives from his country of birth in southern Europe. The mother has lived in Northern Ireland since 2002, the father since 2015 (save for a short period when he returned to his birth country in 2022) and the twins all their lives.

[43] In the circumstances the issue falls to be considered as part of the welfare checklist and in the proportionality exercise but only insofar as this relates to the realistic options for these children. As I mention below, rehabilitation to the parents or placement with the aunt are not realistic options. The only realistic options are in a long-term placement outside the family network, which would entail either long-term fostering or adoption. The ability to cater for the mixed racial and cultural background of the twins is an important factor, but the factor cannot be promoted to the extent that it makes an unrealistic option a realistic one. It is not, and cannot ever be, a deciding factor.

[44] The importance of the role of the aunt in this context has been noted and was recognised by Judge McGarrity as shown in the extract quoted above at [39] when he emphasised the important role the aunt could play in the future in the lives of the twins through contact arrangements.

[45] The second issue refers to the options analysis prepared by the Trust and the guardian. The options analysis is the approach now recommended (see [21] above). This, of course, relates to realistic options. Judge McGarrity ruled out rehabilitation and kinship care as realistic options. That approach cannot be faulted. The only realistic options were therefore long-term fostering outside the family or adoption. Judge McGarrity at paras. 22 and 23 carries out his options analysis weighing up the pros and cons of those options and concludes at paras. 25 and 26 as follows:

> "25. Treating each child's welfare as paramount and comparing each option against the other, the court is driven to the conclusion that adoption is the only course that can meet the children's immediate and lifelong welfare needs. It will provide them with the opportunity to form secure attachments with loving care givers, which will provide them with the necessary stability and security from which they can continue to develop physically, socially and emotionally. The girls are children whose best interests are clearly served by adoption rather than long term foster care.
>
> 26. I am mindful that freeing for adoption is a draconian order which interferes with the Article 8 Convention rights of the parents. The order can only be

> made if it is justified in accordance with Article 8(2) of the Convention. I am satisfied that all other options have been fully explored. All necessary steps that can reasonably be demanded to facilitate the reunion of the children with their parents have been taken. I find that the order sought is necessary and proportionate in pursuance of the legitimate aim of securing the best interests of the children throughout their childhood. I am satisfied that freeing for adoption is in the best interests of each child."

[46] In my view given the state of the evidence the judge's options analysis was perfectly adequate, as was the analysis prepared by the Trust in its Statements of Facts and by the guardian in her report.

[47] The final issue relates to the dispensing of the consent of each of the parents. Judge McGarrity correctly identified this as an objective test. It is not what these parents would actually do, but rather what a reasonable parent in the position of these parents would do. His conclusion was that "any proposal for rehabilitation to parental care, kinship care or to keep the children in long term foster care demonstrates a lack of appreciation of what work needs to be done as well as the needs of the girls" (para. 28). A reasonable parent, unlike these parents, would be properly attuned to what is required to protect and promote the welfare of their children. There is no basis for the argument that Judge McGarrity did not apply the correct legal principles to the facts in this case. It is not necessary for me to dwell on what Judge McGarrity described as the frailties, limitations, difficulties and deficits of each parent (see para. 28). They are well documented in this case and will be known to the parents. The inability of both parents to act reasonably when approaching the question of consent required Judge McGarrity to dispense with the consent of each parent.

Conclusion

[48] For the reason given I will dismiss both of the appeals with no order as to costs as between parties. The usual order is made concerning taxation of the legal costs and expenses of legally assisted parties. The children's court guardian is discharged.