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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **09/12/2022**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant/Respondent;

and

A MOTHER

Respondent/Appellant;

and

A FATHER

Respondent.

IN THE MATTER OF HS (A FEMALE CHILD AGED 3 YEARS)

Ms W Davidson BL (instructed by the Directorate of Legal Services) for the Health and Social Care Trust
Mr C Maguire KC with Ms J Pauley BL (instructed by McQueenie Boyle solicitors) for the Mother
Ms K Hyndman BL (instructed by TL Murphy & Co solicitors) for the Father
Mr A Magee KC with Mr E Cleland BL (instructed by Scullion & Green solicitors) for the Guardian ad Litem representing the interests of the child

McFARLAND J

Introduction

[1] This judgment deals with appeals from decisions made by Her Honour Judge Crawford ("Judge Crawford") at Belfast Family Care Centre on 8 July 2022 to make a care order with a care plan of adoption and to free HS for adoption.

[2] I have used a randomly selected cipher HS and have anonymised this

judgment to protect the identity of the child.

Background

[3] The mother has been known to social services both as a child and then through into adulthood. She is now 23 years of age. The mother had significant difficulties due to neglect and abuse in her formative years. As an adolescent she was the subject of a secure accommodation order arising from behavioural issues caused by substance abuse and mental health difficulties. A child was born to her in 2017 when she was aged 16 ½ years, and in due course that child was made the subject of a care order and freed for adoption in March 2021. The child has now been adopted and the mother does not avail of contact with the child.

[4] HS was born in October 2019 and has never resided with either of her parents. She was initially placed with a paternal aunt, but the placement broke down with the aunt reporting that she was being placed under pressure by both the mother and the father. In April 2020, aged 5 months, HS was moved to her current placement which is a concurrent placement and is the proposed adoptive placement. This placement is very stable and all HS's needs are being catered for. Neither parent takes issue concerning the quality of care that is being provided.

[5] The hearing before Judge Crawford was conducted over four days – 15, 16, 20 and 24 June 2022. In addition to voluminous paperwork, oral evidence was received from a Trust social worker, Mr McCrum (clinical psychologist), the mother, the father and the guardian. Judge Crawford gave a brief oral ruling on 8 July 2022 with the written judgment being provided on 12 July 2022. The judgment is a comprehensive judgment running to 23 pages and 107 paragraphs.

[6] Since the ruling the mother has declined to have any contact with HS for the stated reason that she finds it too upsetting and proposes to continue this approach pending the outcome of the appeal. As a consequence, HS has not seen her mother for five months. I will deal with the relevance of this evidence later.

The Appeals

[7] The appeals are against the care order and the freeing order.

[8] The mother took no issue with regard to the threshold and the desirability for a care order in the sense that the Trust needed to share parental responsibility for HS. Her main attack was on the care plan which had ruled out rehabilitation of HS back into her care. At the hearing before me, Mr Maguire KC refined the grounds of appeal and indicated that the mother no longer took any issue with regard to adoption being a better outcome for the child's welfare than long-term fostering. The mother's main complaint was therefore focussed upon the Trust's final care plan which ruled out rehabilitation, and Judge Crawford's approval of that plan. In the context of the freeing application, the mother asserts that a reasonable parent would not have agreed to free their child for adoption in light of that care plan, particularly

when the mother had been denied a parenting assessment by the Trust. In these circumstances, adoption, she argued, could never be seen as a last resort when nothing else would do.

[9] The formal grounds of appeal are:

a) Failure of Judge Crawford to give appropriate or adequate weight to the mother having resolved all threshold issues with the child no longer at risk of significant harm in her care;

b) Judge Crawford wrongly relying upon certain allegations and suspicions of the Trust and the guardian as findings of fact when same had been disputed by the mother and there had been no determination in respect of them;

c) Failure of Judge Crawford to find the mother was denied opportunity by the Trust to demonstrate her capacity to care for the child;

d) Failure of Judge Crawford to conduct an adequate analysis of the options either in respect of the care order application or the freeing application and wrongly placing reliance on the oral evidence of the guardian who had failed to carry out any such analysis in either her care or freeing reports and failing to provide a full and specific analysis met by a care plan of freeing wrongly concluding that "nothing else will do" save for adoption;

e) Concluding the mother was unreasonably withholding her consent.

[10] The mother's appeal was supported by the father although he did not participate during the appeal. It was opposed by the Trust and the guardian.

Appeals from the Family Care Centre

[11] The legal principles relating to appeals from the Family Care Centre and the general approach to adoption care planning and freeing applications are very well established and there was general agreement between the parties on this issue.

[12] 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 although it is felt

that it is no longer necessary to require consideration of whether the decision was 'plainly' wrong, rather than simply wrong (see eg *Re B* [2013] UKSC 33, *McG v McC* [2002] NIFam 10, *SH v RD* [2013] NICA 44, *ML v MO* [2020] NIFam 25 and most recently *Re Joy* [2022] NICA 63). Keegan LCJ in *Re Joy* (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 care planning of, and freeing for, adoption

[13] Having found threshold applies, the court must be satisfied that a care order with a care plan of adoption 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 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.

[14] The best interests test has to be approached by the application of the seminal 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."

[15] The need for a holistic evaluation has been stressed on numerous occasions (see *e.g. Re B-S* [2013] EWCA Civ 1146, *Re H-W* [2022] UKSC 17 and *Re Joy*) and it has been articulated, again 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."

[16] Before leaving this issue it is important to bear in mind that when carrying out the holistic evaluation there is no right or presumption that a child should be brought up by her natural family. McFarlane LJ in *Re W* was clear on this point at [71]:

> "The repeated reference to a 'right' for a child to be brought up by his or her natural family or the assumption that there is a presumption to that effect, needs to be firmly and clearly laid to rest. No such 'right' or presumption exists. The only right is for the arrangements for the child to be determined by affording paramount consideration to her welfare throughout her life in a manner which is proportionate and compatible with the need to respect any Article 8 rights which are engaged."

and later at [73]

> "It may be that some confusion leading to the idea of there being a natural family presumption has arisen from the use of the phrase 'nothing else will do' but that phrase does not establish a presumption or right in favour of a natural family; what it does do, most importantly, is to require the welfare balance for the child to be undertaken after considering the pros and cons of each of the realistic options, in such a manner that adoption is only chosen as the route for the child if that outcome is necessary to meet the child's welfare needs and it is proportionate to those welfare needs."

[17] 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."

[18] In respect of the evidence concerning the mother's decision to cease contact with HS after Judge Crawford's judgment, as the appeal takes the form of a review of the decision-making based on the evidence available to the first-instance judge, evidence relating to a subsequent period would not normally be taken into account.

[19] The evidence is of modest relevance in any event. If a decision is wrong at first instance then it is wrong and any subsequent evidence is unlikely to change that. If it was right, then, again, subsequent evidence is largely irrelevant. In certain rare instances there may be evidence that showed that what had been contemplated by the original order had not in fact occurred or the basis upon which the order was made had proved wrong. In such cases fresh evidence may be considered but it is a matter for the appellate court (see *Children Law and Practice: Hershman & McFarlane)* paragraphs E[87]–[95]). This proposed fresh evidence does not fall into either of these categories and in the circumstances I have not considered it in the context of the appeal.

Consideration

[20] Judge Crawford dealt with the prospect of rehabilitation of HS into the mother's care at paragraphs [29]–[60] and then at [84]–[85]. Threshold in this case related to the child's birth as the date of intervention and the key findings (conceded by the mother) were:

- A history of social work involvement with the mother as a child and as an adult;
- Concerns about the mother's mental health, substance misuse and lifestyle choices;
- The relationship between the parents was dysfunctional and acrimonious with the mother suffering domestic abuse
- A previous relationship where the mother suffered domestic abuse;
- Substance misuse including using cannabis and aerosols;
- The mother's chaotic lifestyle;
- The mother's inability to prioritise the child's needs over her own;
- Mother's failure to demonstrate insight into the Trust's concerns.

[21] The mother asserts that the contents of paragraph [29] of the judgment appears to be evidence that the mother had resolved all the threshold issues (appeal

ground (a) – see [9] above). This misunderstands what Judge Crawford actually said. Paragraph [29] of the judgment is a summary of the mother's evidence – stability in her mental health, ending the relationship with the father, a new positive relationship, abstinence from substance abuse and a settled and well maintained home. A judge recording what a witness said in evidence is not a judge making a finding of fact in respect of that evidence. The statements by the mother in her evidence have to be seen in light of all the other evidence in the case which has also been recorded by Judge Crawford, particularly the evidence of the Trust and Mr McCrum.

[22] This evidence included an acknowledgment that the highly abusive relationship with the father had ended. It had ended due to his unfaithfulness rather than because of his abusive conduct towards the mother. The mother's engagement with Women's Aid had been a superficial 'tick box' exercise rather than educative work. Other evidence indicated a refusal on the part of the mother to undertake hair follicle drug testing, insisting that she only provide urine samples at a regularity dictated by her and not the Trust.

[23] Judge Crawford did make findings on this issue at [60] reflecting that the mother did not demonstrate sufficient insight into, and understanding of, the Trust concerns. The progress made by the mother was acknowledged but had to be seen against the background of a protracted history of instability in her mental health. Later at [80] Judge Crawford notes that these improvements were recent and unsustained, and even if they could be sustained it would then require a further period of assessment. This had to be seen in the context of a young girl of three years of age requiring that a final decision be made about her future.

[24] The second ground relates to Judge Crawford relying on facts asserted by the Trust and the guardian without making specific findings on these facts, as they were disputed by the mother.

[25] There is criticism of a failure to find facts in relation to drug taking. The mother had admitted taking pregabalin (a C class controlled drug) which had not been prescribed for her. Professor Davidson (consultant psychologist) in September 2020 stated that it was "absolutely imperative" that there was hair follicle drug testing. It is correct that Judge Crawford did not state her findings, but the reality is that Judge Crawford is a very experienced family judge and it would have been obvious to her, as indeed it would have been obvious, I suggest, to the mother, what inferences can be drawn from a scenario of historic misuse of drugs, admitted drug misuse, with a request by the Trust for the mother to provide a hair follicle sample for testing, and then a refusal but an offer to provide a urine sample for testing (every six weeks). Judicial notice can be taken of the efficacy of the different types of tests with regard to detection of drug use over a specific period. Certain drugs will be absent from a urine sample after a matter of days of consumption but remain in a hair follicle sample for months. That is the reason why hair follicle testing is preferred. The obvious inference is that the mother is continuing to take drugs and her failure to provide a hair follicle sample is due to a fear that she will not be able to

show that her body is drug free. By regulating her drug use, her urine sample provided at a time of her choosing would be able to provide a negative test result. An excuse for the mother's refusal to provide a hair follicle test was proffered before me. It was suggested, through her counsel, that she found the giving of such a test to be too upsetting. This has to be seen in the context of a lady who self-reports that she has no mental health issues. An earlier excuse was that she did not want to cut her hair.

[26] The mother also takes issue with regard to Judge Crawford relying on a figure of 30% attendance by the mother at contact sessions. It is acknowledged that the figure is based on incomplete contact records, and that some of the missed contact sessions were due to circumstances outside the mother's control. This is dealt with by Judge Crawford at [43]–[49] but the context of the evidence was twofold. The first was that attendance at contact was considered by Judge Crawford as a strong indicator of motivation and commitment towards the child. The second is that the mother was asserting that the reason for her missing the contact sessions was the fault of the Trust.

[27] No evidence has been placed before me as to the actual level of contact attendance. Although the guardian's calculation of 30% is challenged, Judge Crawford does refer to some of those factors raised by the mother. Irrespective of the actual percentage the evidence does point to a significant number of contact sessions missed with a long-standing history of very poor attendance. One could always argue over what is a poor record and what is a very poor record. Much will depend on a subjective judgment. Judge Crawford did not rely specifically on a 30% attendance record but rather on the attendance generally. Paragraph [47] of the judgment records a specific and recent event of a special extended contact session being arranged which required a significant level of preparation which the mother missed because she was uncontactable and later claimed that she was asleep.

[28] The third ground of appeal relates to what the mother claims is the denial of an opportunity to demonstrate her capacity to care for the child. This primarily relates to the Trust's refusal to organise a parenting assessment, although it is understood that there was a later application to the court for leave to instruct an assessor which was also refused.

[29] The background to this ground is a meeting of the Family Assessment and Intervention Team (FAIS) on 26 April 2021. This meeting did not recommend an assessment. The main complaint is that the minutes indicate that there was no consideration of positive aspects in the mother's life at that time. Judge Crawford dealt with this at [40]–[42] in the judgment and acknowledged this failure. The positives (as well as the negatives) were reflected in the report of Mr McCrum and earlier reports of Professor Davidson. The guardian did attend the meeting and her evidence is recorded by Judge Crawford. That evidence was that had the mother completed the work with Mr McCrum to a sufficient level then a community or residential based assessment may have been possible. However, the evidence was that the work had not been completed. It is also important not to inflate the role of

FAIS. The result of the meeting on 26 April 2021 was described by the minutes of the later decision-making Looked after Child (LAC) meeting as "the outcome from the Trust's consultation with the [FAIS]"). It was therefore a consultation to inform the decision making of the Trust, through the LAC process.

[30] The actual decision-making was made at the LAC meeting on 5 July 2021. This was the formal decision making forum on the issue. The minutes of that meeting reflect that the mother's case was put by her Voice of Young People in Care (VOYPIC) representative and the response of the chair – "[The chair] clarified that professional reports have provided evidence that no assessment can be progressed." It is these reports that the mother relies on as they reflect some positive progress, but there is no evidence that either the FAIS consultation or the LAC meeting did not have these reports before them or that the attendees had not read them. It was at the LAC meeting that the care plan changed from twin track of rehabilitation into the care of either parent to twin track of rehabilitation into the care of the father or adoption. (At a later stage when rehabilitation into the father's care was rejected it became a single track care plan of adoption.)

[31] Much of this feeds back to the mother's first ground and her assertion that she had resolved all the threshold issues in this case. It is on this premise that she promotes her case, but it is not a premise with a sound foundation. There had been positives in respect of the mother, and these are recorded in the various reports and by Judge Crawford in her judgment, but the mother's case is that these should be seen in isolation taking no account of the remaining problems in her life, the majority of which, in any case, she denies. Paragraph [59] of the judgment correctly reflects that "it is far from surprising that the Family Centre determined that a parenting assessment was not merited."

[32] The fourth ground of appeal is that Judge Crawford failed to carry out an adequate analysis of the options, with an added criticism that Judge Crawford relied on the evidence of the guardian, who in turn had not carried out such an exercise. I can find little evidence to support this ground. Judge Crawford looked at all options – rehabilitation to the mother, rehabilitation to the father, kinship placements, and then a long-term placement outside the family in either foster care or adoption. The Trust carried out a full options analysis in its care plan and statement of facts. Whilst it is correct that a list of advantages and disadvantages is not set out by Judge Crawford, on any reading of her judgment, it is clear that the analysis was being conducted. Above all, it is an analysis which is mindful of the legal principles involved and those principles were applied.

[33] The final ground relates to the dispensing of the consent of both parents. The mother's case is set out in paragraphs [51] and [52] of her skeleton argument. Essentially her case is that a reasonable parent would take into account the progress that she claims to have made, the refusal of an opportunity to demonstrate her parenting ability and what she describes as "strong attachment and high quality contact." (Other factors relating to the difference between long-term fostering and adoption are no longer relevant as the mother has abandoned that aspect of her

appeal.)

[34] As previously noted the mother's assessment of her own progress is not supported by the evidence. Her assertion relating to the strength of attachment is entirely subjective and the assessment of contact ignores the occasions when the mother has not availed of contact.

[35] Judge Crawford did set out her reasons for dispensing with the consents at [98] – [102] of her judgment. That is a complete and accurate analysis and is soundly based on the facts of the case. It takes into account each of the points raised by the mother but also stresses that a reasonable parent would counter-balance these points with the mother's history, the evidence of the experts (Davidson and McCrum), and the inconsistent history of attendance at contact.

Conclusion

[36] Taking everything into account it cannot be said that Judge Crawford was in any way wrong in relation to her decision making. Her judgment was comprehensive and applied the correct legal principles. The unfortunate situation for this young mother is that she still has problems and issues arising from her own childhood. These have been clearly identified in the various reports. HS was approaching her 3rd birthday at the time of the hearing before Judge Crawford and HS could not wait for a time in her mother's life when the mother would be able to address those problems and issues. As Judge Crawford put it (at [99]) "[R]ehabilitation to either parent is not viable within [HS's] timescales."

[37] Based on the evidence it could be said that the decision was not only not wrong, but, in fact, it was right. The appeal is therefore dismissed.

[38] There will be no order as to costs, but legally assisted parties will have the usual certificate for taxation.

[39] The guardian is discharged.

[40] I would like to record my thanks to all counsel for their helpful skeleton arguments supplemented by their oral submissions during the hearing.