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*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

*Delivered: 26/4/2019*

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION (FAMILY APPEAL TO THE HIGH COURT)

ON APPEAL FROM THE FAMILY CARE CENTRE SITTING AT CRAIGAVON

IN THE MATTER OF AN APPEAL UNDER THE CHILDREN  
(NORTHERN IRELAND) ORDER 1995

BETWEEN:

GL  
AND  
PH

Appellants;

-and-

A CARE TRUST

Respondent.

IN THE MATTER OF PH  
(A MINOR)

McALINDEN J

The names of the parties in this case have been anonymised in order to protect the interests of the child to whom the case relates. Nothing must be published or reported which directly or indirectly leads to the identity of the child being revealed.

[1] This is the second of two judgments I intend to give in this matter. In the first judgment delivered on 15<sup>th</sup> March 2019, I allowed the appeals of the parents in this case and quashed the Care Order and the Freeing for Adoption Order and put in place an interim Care Order, pending the final disposal of the Appeals. The matter was put back to allow the parties to finalise their positions on whether I should remit this matter for a de novo hearing by a different County Court Judge or whether I should proceed to give rulings on the substantive issues in this case on the basis that the matter had proceeded before the lower Court and before me on appeal without

any oral evidence being adduced and I had considered all the material which was before the lower Court and, indeed, had considered and been addressed upon the contents of various updated reports, records and skeleton arguments.

[2] The matter came back before me on 27<sup>th</sup> March 2019 and on that occasion, the legal representatives for the mother informed me that the mother wished to have the matter remitted to the County Court for a fresh hearing, with her having the opportunity to give oral evidence. At that stage, the father had been readmitted to hospital and it had been impossible for his legal team to obtain instructions from their client. The matter was put back for such instructions to be taken. I was advised by the legal representative of the Trust at that stage that the Trust wished me to give a final ruling on the basis of the evidence that had been adduced and the oral submissions that had already been made.

[3] The matter came before me again on 10<sup>th</sup> April 2019 when I was informed that all the parties were now in agreement that the matter should not be remitted for a fresh hearing by a different County Court Judge and that I should determine the appeal on the basis of the materials and submissions already provided and made to the Court. I was informed that none of the parties wished to make any further representations or submissions. I was also informed that in the event that an order was made freeing the child PH for adoption, the parties had agreed a schedule of post adoption contact, and a copy of that agreement was handed into Court. However, it was stressed that this was not with a view to any specific order being made by the Court.

[4] In light of the agreement of all the parties in respect of the manner in which this appeal should be determined, I indicated to the parties that I would determine the appeal on the basis of the materials and submissions already provided and made to the Court. At the hearing of the appeals, it was made clear to the Court that the parents accepted that the child PH would not be restored to their care and that, in the absence of any suitable kinship placements, the only viable options were between the options of freeing for adoption and long-term foster care, with the child remaining with the child's present carers in either event. The parents remained implacably opposed to an order freeing the child PH for adoption, not least because the three older children of the family were being cared for under separate long-term foster care arrangements and, in the parents' minds, there was really no justification for treating their youngest child in a different manner from her siblings, especially when this would effectively cut off regular contact between the children.

[5] Having regard to the manner in which this matter was contested before the lower Court and on appeal, and, in particular, the concentration on the relative merits of freeing for adoption versus long term foster care, it is clear that I do not need to concentrate on the issues of threshold or the need to make a care order in this case. The threshold document in this case is dated 1<sup>st</sup> September 2016. It relates to all the children of the family. This was refined somewhat in section 7.0 of the Final Social Work Statement prepared for Court Proceedings dated 20<sup>th</sup> March 2018. It was

formally approved by the learned County Court Judge, who determined that the threshold was met and that on the basis of all the evidence, a full care order was required. No issue was taken in respect of these determinations on appeal.

[6] In the circumstances, I do not propose to unduly lengthen this judgment by dealing in extenso with the issues of threshold and the need for a care order. But, by way of background, it is important to note that the Trust's case is that the following threshold criteria were met:

- (a) Domestic violence was a feature of the parents' relationship and the children witnessed incidents of domestic violence.
- (b) The children of these parents including the child PH were on the child protection register.
- (c) The father was and is unable to acknowledge the Trust's concerns and the impact that the mother's behaviour has had on the children including the child PH.
- (d) The parents' abilities to protect their children including the child PH from significant harm is limited.
- (e) The children including the child PH have been exposed to parental aggression/emotional instability.
- (f) The parents prioritise their needs over the needs of the children including the child PH and are unable to prioritise the needs of the children and safeguard them.
- (g) The emotional impact on the child PH of the parents' volatile relationship.
- (h) The parents neglect of health issues, namely registering the child PH with a dentist and attending to her oral hygiene.

[7] In light of all the evidence, threshold is clearly met in this case and the need for a care order is established. As will become apparent when the facts of the case are fleshed out in greater detail in the subsequent paragraphs of this judgment, the children of these parents including the child PH suffered significant harm as a result of the breakdown in their family home, the long-term acrimony between the parents involving domestic abuse, the unsettled lifestyle that they led, their possible exposure to drug and alcohol abuse and their exposure to the mother's mental health issues. Therefore, the issues to be determined by this Court are (a) what care plan serves the best interests of the child PH and (b) whether an order freeing the child PH for adoption should be made.

[8] The statutory background and the relevant legal principles to be applied in this case were set out in the judgments of Gillen LJ in *X Health and Social Care Trust v W and E* [2015] NICA 55 delivered on 11<sup>th</sup> September 2015 and Stephens LJ in *SEHSCT v M* [2018] NICA 50 delivered on 18<sup>th</sup> December 2018. The relevant passages of the two judgments are set out below:

**Statutory background *XHSCT v W and E***

“[4] Where relevant the provisions of the 1995 Order provide as follows in Article 50:

‘(2) A court may only make a Care ... Order if it is satisfied –

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

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

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

[5] The well-known “Welfare Checklist” is found in Article 3 which provides as follows:

‘(1) Where a court determines any question with respect to –

(a) the upbringing of a child ...the child’s welfare shall be the court’s paramount consideration...

(3) In the circumstances mentioned in paragraph (4), a court shall have regard in particular to –

(a) the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);

(b) his physical, emotional and educational needs;

(c) the likely effect on him of any change in his circumstances;

(d) his age, sex, background and any characteristics of his which the court considers relevant;

- (e) any harm which he has suffered or is at risk of suffering;
  - (f) how capable of meeting his needs is each of his parents and any other person in relation to whom the court considers the question to be relevant;
  - (g) the range of powers available to the court under this Order in the proceedings in question.
- (4) The circumstances are that -
- (a) the court is considering whether to make, vary or discharge an Article 8 Order and the making, variation or discharge of the Order is opposed by any party to the proceedings; or
  - (aa) the court is considering whether to make an order under Article 7; or
  - (b) the court is considering whether to make, vary or discharge an order under Part B.
- (5) Where a court is considering whether or not to make one or more orders under this Order with respect to a child, it shall not make the Order or any of the Orders unless it considers that doing so would be better for the child than making no order at all.'

[6] Where relevant the provisions of the 1987 Order for freeing a child for adoption without the parents' consent is found in Article 18 as follows:

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

(2) No application shall be made under paragraph (1) unless -

- (a) the child is in the care of the adoption agency; and

- (b) the child is already placed for adoption or the court is satisfied that it is likely that the child will be placed for adoption.'

[7] Article 9 provides, where relevant, as follows:

'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) a need to be satisfied that adoption or adoption by a particular person or persons will be in the best interests of the child;
  - (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 that, having regard to his age and understanding.'

### **Legal principles *SEHSCT v M***

"[32] Article 9 of the 1987 Order requires that in "deciding on any course of action in relation to the adoption of a child, a court ... shall regard the welfare of the child as the most important consideration and shall have regard to all the circumstances full consideration being given," to amongst other matters, "the need to be satisfied that adoption ... will be in the best interests of the child." This is the welfare principle under which the court is required to consider whether adoption is in the best interests of the child. In circumstances where, as here, the realistic proposals are long term foster care or adoption then a welfare analysis of both of these proposals in respect of the child must be carried out. That is not an option. It is a requirement that both proposals are validly

considered on their own merits as they affect the particular child. It is not sufficient to state that both long term foster care and adoption are permanent. There are important distinctions between long term foster care and adoption that impact on the welfare of a child. The two proposals cannot be equated in terms of what they offer by way of security for a child.

[33] Article 9(b) requires that in deciding on any course of action in relation to the adoption the court ... shall "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." There is a fundamental requirement in deciding on whether long term foster care or adoption is in the best interests of the child for the court to ascertain, listen to and give due consideration to the voice of the child. As Mason's representative in this litigation the reports and conclusions of the guardian as to his wishes and feelings required detailed consideration. A determination of welfare as between the options of long-term foster care or adoption absent consideration of the voice of the child is deficient.

[34] Articles 16(1)(b)(ii) and 16(2) provide that an adoption order shall not be made unless in the case of a parent the court is satisfied that she is withholding her agreement unreasonably. Again, in deciding that issue the court is required first to ascertain whether long term foster care or adoption is in the best interests of the child and also to listen to the voice of the child. An objective parent in deciding whether to consent would take into account, amongst other matters, what was in the best interests of the child and also take into account the wishes and feelings of the child.

[35] An adoption order (and indeed for instance a care order) amount to an interference with family life, a right protected by Article 8 ECHR. An adoption order may be justified if aimed at protecting the "health or morals" and "the rights and freedoms" of the child. But they must also be "necessary in a democratic society". In *R and H v United Kingdom* [2011] 54 EHRR 28, [2011] 2 FLR 1236 at paragraph [81] the ECtHR stated that in "assessing whether the freeing order was a disproportionate interference with the applicants' Article 8 rights, the court

must consider whether, in the light of the case as a whole, the reasons adduced to justify that measure were relevant and sufficient for the purposes of paragraph 2 of Article 8 of the Convention.” The court also recalled “that, while national authorities enjoy a wide margin of appreciation in deciding whether a child should be taken into care, stricter scrutiny is called for as regards any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure the effective protection of the right of parents and children to respect for their family life.” The ECtHR went on to state that “such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed.” The ECtHR then stated that:

‘for these reasons, measures which deprive biological parents of the parental responsibilities and authorise adoption should only be applied in *exceptional circumstances* and can only be justified if they are motivated by *an overriding requirement pertaining to the child’s best interests ...*’ (emphasis added).

That passage, particularly the part to which we have added emphasis, makes it clear that in determining whether the interference is proportionate there has first to be a welfare assessment which in this case would be a welfare assessment as to whether adoption or long-term foster care is in the best interests of Mason. Absent such an assessment a court cannot form a view as to whether there is an overriding requirement pertaining to the child’s best interests. An alternative way of emphasising the importance of carrying out the welfare consideration is that if the conclusion is that the child is equally well looked after in long term foster care or by virtue of adoption then there cannot be an overriding requirement pertaining to the child’s best interests.”

**Relevant facts and matters deemed relevant to the issues which the Court must decide**

[9] The child PH was born in March 2013, the youngest of a full sibship of 4. The other three children were born in December 2006, June 2008 and September 2009. She has three paternal half siblings, all of whom are in their thirties, residing in England. The parents have been known to Social Services in Northern Ireland since

2010. Issues of domestic abuse of the mother witnessed by the children, mental health problems experienced by her, self-harming behaviours exhibited by her, physical abuse of one of the children by her and possible drug and alcohol abuse, combined with several house moves eventually precipitated action by Social Services. The child PH and the other three full siblings were removed from the care of their parents on 19<sup>th</sup> March 2015, following what appears to have been a complete breakdown of normal family life. Between that date and 2<sup>nd</sup> April 2015, the child PH and her siblings were cared for in two kinship placements. The child PH was made the subject of an Emergency Protection Order on 2<sup>nd</sup> April 2015 which was extended on 9<sup>th</sup> April 2015. She was then made the subject of an Interim Care Order on 16<sup>th</sup> April 2015. The child PH has been cared for by her current carers and her prospective adopters since 2<sup>nd</sup> April 2015. She was just under two years old when she was removed from parental care.

[10] The mother in this case was born in England in 1985 and has been diagnosed with an emotionally unstable borderline personality disorder coupled with intermittent bouts of depression. There is a history of substance abuse. The father was born locally in 1965 but moved to England in his mid to late teens to find work. He was married and subsequently divorced in England and now has three adult children there, all in their thirties. The parents met in England in 2005 and commenced a co-habiting relationship. The father has a history of alcohol abuse and has a long history of poor diabetic control resulting in numerous complications, including a lower leg amputation. He suffers from depression. The parents state that their relationship ended in early 2015 but this may not be true and the present status of the parents' relationship is uncertain.

[11] Following the initial emergency intervention, the Trust engaged in intensive work with the parents in an effort to address parenting deficits with a view to restoring the children to one or other of their parents but this work proved unsuccessful. The parents have been unable to demonstrate the level of stability and loving care that the children including the child PH need in order to promote their wellbeing. The parents both continue to demonstrate a lack of insight into the problems which resulted in the involvement of Social Services in the family in the first place and a lack of insight into the needs of their children. In addition to the above issues, the issues of the mother's poor mental health described in Dr Browne's report and the father's poor and deteriorating health and his inability to remain compliant with diabetic management strategies described in Dr Trinnick's and Dr Fitzpatrick's reports, are issues which are clearly relevant to the question of whether either can or will be able to properly, safely and securely parent the child PH now or in the future.

[12] The possibility of kinship placements including with the child PH's half-siblings was explored and found to be non-viable. By March 2017, the Trust was driven to consider the advantages and disadvantages of the range of possible options with a view to securing permanence for the child PH. It was noted at that time that the child PH had a strong positive attachment to her carers and had

benefited from the stability and security within her care arrangement and this remains the case. PH's carers indicated that they wished to care for PH on a long-term basis. The Trust considered that the child PH's needs were best met by her remaining in the placement where her attachment relationship with her carers could be maintained and could develop further and the stability and security provided thus far could be maintained. Given her young age and the level of stability and security that adoption was considered to provide, adoption was proposed as the preferred route to achieve permanence. The child PH was presented to the Adoption Panel on 23<sup>rd</sup> October 2017 when a best interests recommendation was given. This recommendation was subsequently accepted by the Trust but the birth parents have at all times remained implacably opposed to adoption. A LAC Review took place in respect of the child PH on 7<sup>th</sup> November 2017 and the care plan was ratified as that of adoption. A Final Care Order and Freeing for Adoption Order was made on 10<sup>th</sup> May 2018. These Orders are the subject of the present appeals by both parents.

[13] It is clear from the entirety of the material before the Court that the child PH does not enjoy a close and strong relationship with her siblings. Contact between the child PH and the rest of the sibling group and the parents has been a recurring problem. A Together or Apart assessment which was conducted between October 2016 and January 2017 concluded that the children were best placed apart from one another. Sibling contact has been assessed as being chaotic, unstructured, fractious and of poor quality, with the child PH being bitten, struck, having her hair pulled and being shouted at. In response to such treatment, she behaves very badly and in an unregulated manner. She displays anxiety prior to contact and requires reassurance that her carers will remain close at hand. She is anxious and unsettled post-contact.

[14] During the course of these care proceedings, the mother's contact had to be suspended on three separate occasions on 28<sup>th</sup> June 2017, 9<sup>th</sup> August 2017 and 13<sup>th</sup> September 2017. Following the hearing before the lower Court, parental contact was gradually reduced with the father having bi-monthly visits and the mother having contact once every three months. Sibling contact occurs every three months. Ms Brassil, the Guardian ad Litem in this case has been so concerned about the impact of sibling and parental contact that she has stated that consideration should be given to the termination of direct contact if inappropriate behaviours are not checked as there is a real risk of the child's placement being undermined. The updated Social Work report prepared for the purposes of this appeal dated 4<sup>th</sup> February 2019, graphically illustrates the difficulties which have occurred during recent contact sessions. Sibling contact was chaotic and resulted in the child PH experiencing confusion and anxiety. Parental contact was punctuated with resentment being expressed towards the Trust and behaviours and comments which tended to, and were probably intended to, undermine the care placement.

[15] The independent social work report commissioned by the parents in this case did not support rehabilitation of the child PH or any of her siblings to either joint or single parental care. Following a full hearing, the three older siblings were made the

subject of full care orders on 12<sup>th</sup> April 2018, with care plans of separate long-term foster care.

[16] In contrast to the poor relationships with her parents and siblings, the child PH's relationships with her carers has been consistently noted as close, with strong, positive attachments. The child PH is more integrated into and more loyal to her carers' family. At the same time, she is anxious and seeks reassurance that she will be a permanent member of her carers' family. The child PH does not have an established birth family identity that is important to her and this is in marked contrast to her older siblings.

[17] The child PH is described in the papers as a happy, chatty, sociable, delightful and articulate child who is very independent and head-strong. Academically, she is considered to be very capable and, additionally, she participates in after-school activities of ballet, speech and drama and singing. To date, she has enjoyed good health and she has met all her developmental milestones. She transitioned easily from nursery into school and is considered to be doing well and is happy at school and is now coming to the end of her Primary 2 year. She is very well settled with her foster carers and has been in their care for the last four out of the six years of her life. There is no doubt that this placement has provided the child PH with a safe and secure environment where she has received a high level of care on a consistent basis. This has resulted in the child PH forming a secure attachment and secure bond with her carers. She is not usually an anxious child but both her carers and her teachers have noticed that she is anxious on the days when contact with her birth family is due to take place.

[18] Ms Brassil the Guardian ad Litem in this case has expressed the view that given the young age of the child PH, she does not have a sound understanding of the applications before the Court. However, observations of the child in her placement would indicate that she needs to be given certainty that she will be remaining there. The Guardian ad Litem agreed with the Trust's decision to undertake a Child Specific Adoption assessment of the long-term carers of the child PH and the subsequent decision in March 2018 matching them as potential adoptive parents for the child PH. The Guardian notes that the child PH spontaneously refers to her long-term female carer as "mummy". She notes that the child's primary attachment is with her long-term carers. Contact with her birth family is and has the potential to disrupt and undermine the emotional and physical stability which the child PH enjoys with her long-term carers.

[19] It is the Guardian's view that in the event that the child PH is adopted as opposed to being fostered, the opportunities for the birth parents to disrupt her emotional and physical stability by undermining the child's placement and carers will be limited. It is the Guardian's view that adoption will not only provide greater certainty for the child PH, it will also spare her from ongoing Court applications which are likely to occur if she remained in long-term foster care, given that the birth parents do not accept the Trust's intervention and are resistant to engaging in

constructive work with professionals. The Guardian is of the opinion that adoption will provide the child PH with a higher level of emotional security, a greater sense of belonging and will enhance her general wellbeing to a greater extent than could be achieved by long-term foster care.

[20] Taking into account all these matters, it is necessary for the Court to carefully examine the two viable options for the long-term care of the child PH and to come to a decision as to which option is in the best interests of the child.

### **Long-term foster care versus adoption.**

[21] In the context of long-term foster care, formal parental responsibility would be shared between PH's birth parents and the Trust. However, having regard to the nature and extent of the deficits in parental capabilities in this case, even with ongoing and intensive supports in place, it is unlikely that the exercise of parental responsibility by the parents in this case would in anyway positively impact upon the life of the child PH. The birth parents still do not recognise the concerns of the Trust in respect of the reasons for Social Services' intervention. Given the lack of insight of the birth parents as to the needs of the child PH and the ongoing concerns of the Trust, it is unlikely that the birth parents would ever work constructively in partnership with the carers in the best interests of the child PH.

[22] The child PH's current carers have indicated that they wish to adopt her but they would also wish to be her long-term foster carers if that care option was favoured by the Court. Therefore, the child PH will be in a place where she receives safe, secure and consistent care, irrespective of whether that care is provided in the context of long-term foster care or adoption.

[23] Long term foster care would enable the child PH to retain her birth family name and her sense of birth family identity. However, as indicated above, the child PH has been cared for by her present carers since just before her second birthday. She is now over six years old. The child PH does not identify with her birth family and parental and sibling attachments are not strong. She does identify with and is strongly attached to her long-term carers. She is anxious for reassurance that this is permanent arrangement. Being able to fully integrate into the family that has cared for her from the age of two would enhance her sense of belonging and her feelings of security. The birth parents in this case argue strongly that it is wrong to treat the child PH differently from her other three siblings in that they are being cared for under long-term foster care arrangements which enable them to maintain and develop their sibling relationships and maintain and develop their relationships with their birth parents. They argue that if the child PH is adopted, her chances of enjoying close relationships with her birth parents and siblings will be stymied.

[24] The flaw in this argument is that it totally ignores the fact that the older three children have a strong sense of attachment and belonging to the birth family which is essentially absent in the case of the child PH who has been cared for most of her

life by her present carers. Her sense of attachment and belonging is directed to her carers not her birth family. To try to redirect this to her birth family at this late stage would be confusing, damaging and undermining of the present placement.

[25] The advantage of the higher levels of contact with the birth family which is associated with long-term foster care is lost if contact is undermining of the foster placement and damaging to the child's psychological welfare. If adoption is favoured by the Court, any post adoption contact with the birth family will be at a level which will promote and enhance her overall sense of identity and, as she gains maturity, will allow her to obtain information and knowledge about her birth family and her background. It is acknowledged that as an adopted child, the child PH may come to experience a sense of loss and uncertainty as to who she is as a result of the realisation that legally she is not a part of her birth family but the role of the adoptive parents and, if necessary, the Trust's Adoption Team, will include providing age appropriate explanations as to how this situation came about.

[26] In relation to contact, it is common for carers in long term fostering arrangements not to attend with the child during contact with the birth family, this role being performed by Social Services personnel. In adoption situations, the adoptive parents usually do attend contact sessions and this is perceived as providing a level of support and comfort, if contact becomes difficult or challenging.

[27] Under long-term foster care, four weekly social work visits would continue for as long as the child PH remains in foster care (up to 18). This can be highly beneficial and reassuring when there are any concerns about the physical, psychological and emotional wellbeing of the child or her educational or social development. However, in the absence of any such concerns (and I emphasise the fact that there are no such concerns in this case), such regular visits can be intrusive and can serve to stigmatise a child as one remaining in the state care system long-term. Adoption does not involve such intrusive supervision. However, if needed, the Trust's Adoption Team will be on hand to provide support and, if necessary, to facilitate contact with the birth family.

[28] One of the stated advantages of long-term foster care is the availability of 16+ services, aftercare support and a personal advisor. However, these supports are there to support a young person when his or her time in foster care is coming to an end. It hardly needs repeating that with adoption, the relationship does not terminate at a certain age. These supports do not point towards long-term foster care having an advantage over adoption. They are in place to make up for one of the disadvantages of foster care.

[29] One of the stated advantages of foster care is that the foster carers are required to abide by safe parenting practices as per Trust policy. But for young children, the same safe parenting practices do not permit an adult carer being present in a bed with a young child who might be ill or frightened or might have

experienced a bad dream. In such circumstances, the foster carer could not provide comfort to the child in a manner that an adoptive parent could.

[30] The perceived shortcomings of long-term foster care are its impermanence, lack of security, with the birth parents being entitled to regularly challenge the continuance of a Care Order, and possible lack of continuity. It is unlikely that the present carers of the child PH will give up that caring role if long-term foster care is determined to be in the best interests of the child PH. Therefore, a lack of continuity of care is not a major concern in this case. However, it is much more likely that there will be a lack of continuity in relation to social work personnel involved in the child PH's case. If made the subject of long-term foster care, it is likely that the child PH would have a large number of different social workers involved in her case during the remaining twelve years of her time in foster care. Although this may be unavoidable, it is not an ideal situation.

[31] As young children mature in the care system in foster care, they may become aware of the lack of permanence of their home arrangements and they can grow up feeling that they do not fully belong in a family. Long-term foster care also subjects children to corporate and bureaucratic parenting, involving monthly statutory visiting, annual medical examinations, LAC reviews every six months and the need to obtain permission for holidays, outings and overnight stays with school friends, although it is possible for foster carers to be given delegated authority to consent to matters such as visits to hair salons, minor medical and dental treatments and sleep overs.

[32] In the case of situations where formal consent is required for medical treatment, an Assistant Senior Social Worker would have to attend the hospital or clinic to sign the consent form on behalf of the child PH and this has the potential of highlighting her status as a child in the care system. An Assistant Senior Social Worker would also have to sign a consent form to enable the child PH to leave the jurisdiction of Northern Ireland, even for as short a period as part of a day. This makes spontaneous day trips out of Northern Ireland impossible for children in foster care. Furthermore, as parental responsibilities are shared between the Trust, the foster carers and the birth parents, there is the potential for conflict and disagreements which may ultimately require recourse to the Court for determination of issues relating to schooling and holidays. No such difficulties arise with adoption. The adoptive parents are able to provide the necessary consents.

[33] Although there are a wide range of outcomes for children in the care system, it is recognised that those who have been in the care system long-term are more likely to do less well in education, are at a higher risk of experiencing mental health difficulties and are more likely to engage in criminal conduct in later life. In contrast, adoption should provide the best opportunity for the child PH to develop and to reach her full potential within a safe, caring and stable environment.

[34] Unlike long-term foster care, adoption provides legal, physical and emotional security, a sense of belonging, and a sense of confidence in the continuity and permanence of care, symbolised by the child taking the name of the adopting family. It is common for adopted children to feel a strong sense of belonging to their adopted families and to feel that they have a normal family life with the support of an extended family network.

[35] Adoption of the child PH by her present carers will enhance the opportunity for her to develop a sense of identity and develop a strong and effective sense of self. It is the Trust's case that in this regard, research suggests that better outcomes are achieved for children of the child PH's age if they are adopted than if they remain in foster care.

### **Determination of best interests.**

[36] Having regard to the matters set out above and conducting the mandatory welfare analysis of both the viable proposals identified in this case, and paying due regard to the reasoned and cogent views expressed by the Guardian ad Litem in this case, it is clear to me that a Care Plan for Permanence by Adoption is in the best interests of the child PH. I am mindful of the important guidance given by the UK Supreme Court in *Re B* [21013] UKSC 33 and how this guidance has been interpreted in subsequent appellate decisions. Gillen LJ in *X Health and Social Care Trust v W and E* [2015] NICA 55 had this to say at paragraphs [57] to [60].

“[57] The” [Children (Northern Ireland)] “Order” [1995] “itself makes no mention of proportionality, but it was framed with a developing jurisprudence under Article 8 of the European Convention on Human Rights and Fundamental Freedoms very much in mind. Once the Human Rights Act 1998 came into force, not only the Trust but also the courts as public authorities, came under a duty to act compatibly with Convention rights.

[58] Lady Hale considered the Strasbourg case law in this area and concluded at paragraph [198]:

‘... 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”.

[59] The court in *Re B* held that Article 8 has no application when considering the significant harm test but it is applicable at subsequent stages – for example in relation to the decision as to what form of intervention and family life is appropriate/proportionate.

[60] Maguire J fully recognised this concept. He pointed out at paragraph [155] of his judgment that in Re B Lord Wilson at paragraph [34] indicated that a high degree of justification was required before an adoption order could be made. Lord Neuberger at paragraphs [76]-[78] said that adoption must be necessary and that nothing else would do.”

[37] Taking full account of the need to be satisfied that the making of a Care Order with a Care Plan for Permanence by Adoption is a proportionate interference with the Article 8 rights of the parents and the child PH, and that the concept of proportionality in the context of adoption has received careful judicial consideration by the Supreme Court, I have no hesitation in concluding that long-term foster care would not serve the interests of the child PH as well as adoption will. The latter option is clearly better than the former. It is not only better, there are issues in this case that make it necessary for adoption to be the chosen option. Nothing less than adoption will do. The clear and obviously demonstrated need on the part of the child PH for security, permanence, a feeling of belonging, a feeling of being an integral part of a loving, stable, protective and secure unit and the need for that set up not to be threatened, jeopardised or undermined by the actions of the birth parents can only be effectively addressed and assured by adoption. Long-term foster care would not meet those needs or achieve those goals or provide anything like the necessary degree of protection. Recognising that it is a draconian intervention and a significant interference with the Article 8 rights of the birth parent and the child, I am satisfied that it is, in the circumstances of this case, a proportionate response which satisfies the strict test set out in Article 8 (2) as explained in *Re B* and later appellate decisions.

## Consent and the unreasonable withholding of same.

[38] An Order freeing a child for adoption can only be made in the absence of the informed consent of the parents, if the Court concludes that in withholding their consent, the parents are acting unreasonably. It is important when assessing the reasonableness of the refusal of the parents to take account of the fact that the course of action that they are refusing to countenance has been subjected to intense forensic scrutiny and has been determined to be in the best interests of the child in question. It is also important to take into account the views of the child as expressed in the opinion of the Guardian ad Litem. As Stephens LJ stated in *SEHSCT v M*: “An objective parent in deciding whether to consent would take into account, amongst other matters, what was in the best interests of the child and also take into account the wishes and feelings of the child.”

[39] What constitutes unreasonably withholding consent was considered by Morgan LCJ in *Re A (adoption; unreasonable withholding of consent)* [2011] NI Fam 19. Paragraph [11] of the judgment of the Lord Chief Justice summarises the law:

“[11] The applicants ask me to find that the mother is unreasonably withholding her agreement to the adoption of children. The leading authorities on the test the court should apply are Re W (An Infant) [1971] 2 AER 49, Re C (a minor) (Adoption: Parental Agreement, Contact) [1993] 2 FLR 260 and Down and Lisburn Trust v H and R [2006] UKHL 36 which expressly approved the test proposed by Lords Steyn and Hoffmann in Re C.

‘...making the freeing order, the judge had to decide that the mother was 'withholding her agreement unreasonably'. This question had to be answered according to an objective standard. In other words, it required the judge to assume that the mother was not, as she in fact was, a person of limited intelligence and inadequate grasp of the emotional and other needs of a lively little girl of 4. Instead she had to be assumed to be a woman with a full perception of her own deficiencies and an ability to evaluate dispassionately the evidence and opinions of the experts. She was also to be endowed with the intelligence and altruism needed to appreciate, if such were the case, that her child's welfare would be so much better served by adoption that her own maternal feelings should take second place.

Such a paragon does not of course exist: she shares with the 'reasonable man' the quality of being, as Lord Radcliffe once said, an "anthropomorphic conception of justice". The law conjures the imaginary parent into existence to give expression to what it considers that justice requires as between the welfare of the child as perceived by the judge on the one hand and the legitimate views and interests of the natural parents on the other. The characteristics of the notional reasonable parent have been expounded on many occasions: see for example Lord Wilberforce in *In re D (Adoption: Parent's Consent)* [1977] AC 602, 625 ('endowed with a mind and temperament capable of making reasonable decisions'). The views of such a parent will not necessarily coincide with the judge's views as to what the child's welfare requires. As Lord Hailsham of St Marylebone LC said in *In re W (An Infant)* [1971] AC 682, 700:

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

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

parent is only a piece of machinery invented to provide the answer to this question’.”

[40] Keegan J in the case of *XY v A Health and Social Services Trust* [2018] NI Fam 1 commented further on this issue at paragraphs [19] and [20] of her judgment:

“[19] The *Down Lisburn* case was taken to the Strasbourg Court and in a decision reported as *R and H v United Kingdom* [2012] 54 EHRR 2 the Strasbourg Court determine that freeing for adoption *per se* did not breach the Convention and that the applications of this nature was within a State's margin of appreciation. Paragraph [88] of that judgment reads as follows:

‘It is in the very nature of adoption that no real prospects of rehabilitation or family reunification exists and that it is instead in the child's best interest that she be placed permanently in a new family. Article 8 does not require the domestic authorities make endless attempts of family reunification; it only requires that they take all necessary steps that reasonably be demanded to facilitate the reunion of the child and his or her parents ... Equally the court has observed that, when a considerable period of time has passed since the child was originally taken into public care, the interests of a child not to have his or her de facto family situation changed again may override the interests of the parents to have their family reunited.’

The strong emphasis upon the interests of the child is articulated in numerous cases both nationally and in the European jurisprudence. The precedence of this factor in the balancing exercise is also explained in *YC v United Kingdom* [2012] 55 EHRR 33, paragraph [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 is 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, if 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'."

[41] Having carefully considered the facts of this case, I readily conclude that the advantages of adoption for the welfare of the child PH appear sufficiently strong to justify overriding the views and interests of the objecting parents. I am satisfied that two parents standing in the shoes of these parents but with unimpaired insight, perception and understanding of their own deficiencies and their physical, mental and emotional problems, and possessing the ability to evaluate dispassionately the evidence and opinions of the experts and professionals in this case and being endowed with the intelligence and altruism needed to appreciate that their child's welfare would be so much better served by adoption and that views expressed on behalf of the child supported such an outcome, could not, if acting reasonably, withhold their consent to adoption in this case.

[42] In the circumstances, I make a Care Order with the Care Plan being Permanence by Adoption and I make an Order Freeing the Child PH for Adoption. I also make an Order terminating the appointment of the Guardian ad Litem. I note that agreement has recently been reached on the extent of contact which the child PH will have with the birth parents and siblings in the event that Orders of the nature referred to in this paragraph were made and that agreement was reduced to writing on 10<sup>th</sup> April 2019. In the circumstances, I do not propose to make any Order in respect of post adoption contact. I will simply express my obiter view that such contact seems appropriate in the circumstances of this case and it is to be hoped that such contact enures to the benefit of the child PH.