

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION

IN THE MATTER OF K, S AND G (REVOCAION OF FREEING ORDER)

GILLEN J

[1] This judgment is being distributed on the strict understanding that in any report no person other than the advocates or the solicitors instructing them (and any other persons identified by name in the judgement itself) may be identified by name or location and that in particular the anonymity of the children and the adult members of the their family must be strictly preserved In this case I have acceded to an application by the mother of three children namely K born 9 July 1990, G born 29 December 1992 and S born 29 January 1992 to revoke an order freeing the three children for adoption made by Higgins J on 16 October 1998. Immediately after revoking the Freeing Orders I acceded to applications by a Heath and Social Services Trust which I do not propose to name ("the Trust") to make Care Orders pursuant to Article 50 of the Children (NI) Order 1995(the 1995 Order) in relation to all three children, an order under Article 53(4) of the 1995 Order authorising the Trust to refuse contact between the three children and their parents and an order pursuant to Article 33 of the 1995 Order granting the approval of the court for K to reside outside the jurisdiction of Northern Ireland. At the time of making the orders I indicated that I would set out my reasons more fully for revoking the Freeing Orders and I now proceed to do so.

BACKGROUND

[2] The events that befell these children and which led to the making of the Freeing Orders reveal a haunting and disturbing documentary of parental abuse. In short, the facts found were as follows:

(a) K was sexually abused whilst in her natural home by her natural parents. Dr Swann MD, DCA, independent medical specialist, assessed these children for the purpose of the 1998 hearing and came to the conclusion that K's child behavioural problems such as significant soiling, sleep problems,

indiscriminate attachment, management problems and developmental delays were all related to emotional deprivation whilst in her natural home. Deprivation was at a serious level and she expressed deep concern about the long-term prognosis for this child. She concluded of K:

“It would be my opinion that as she enters her teenage years there will be many issues for her and at that time she will need intensive therapeutic intervention.”

These were prescient comments. Despite much effort and time there was no adoptive placement forthcoming for this child and she remained with contract carers, eventually moving to her own unique care provisions set up by the Trust. The Trust was compelled to seek a placement in a specialist therapeutic unit in England. It was for this reason that I acceded to the Trust application that an Article 33 Order be granted to allow her to live and benefit from the benefits supplied by this single occupancy specialist unit in England.

(b) Dr Swann concluded that there was a high possibility that S had been sexually abused whilst in her natural home. This child has suffered very substantial behavioural problems due to the abuse and neglect that she suffered within her natural home. Her current placement is and always will be a fostering one. A recent development has been the ill health of the foster mother who had been the mainstay of the home.

(c) There is a possibility that G was sexually abused whilst in her natural home and Dr Swann concluded “there is no doubt that it affected her sexual knowledge”. She however was relatively young when she left the natural home and therefore was not expected to have the intensity of problems that S and particularly K present. She is now in the foster care of a lady of advanced years who takes the pragmatic approach that as long as she is fit and able to provide for G she will continue to do so with assistance from her two daughters who foster and live nearby.

[3] Despite the most earnest endeavours of the Trust and repeated efforts to find adoption placements, it has proved to be of no avail. The Trust now accept that none of these children is ever likely to be adopted. Long-term fostering is the best that can be hoped for. Contact with the parents has now stopped for some time and no Contact Orders were made alongside the Freeing Orders in October 1998. I can conceive of no circumstances in which these children would ever be rehabilitated with their natural parents and equally so I could not conceive at the present moment of any benefits whatsoever accruing to these children by way of contact with their parents.

DOMESTIC LEGISLATION

[4] (1) The Adoption (Northern Ireland) Order 1987 (hereinafter called the "1987 Order").

It is pertinent to be reminded that the 1987 Order, which governed the making of the order by Higgins J in 1998, records at Article 18 where relevant as follows:

" ...

(2) No application shall be made under paragraph (1) (*ie an application by an Adoption Agency to free a child for adoption*) unless -

(a).....

(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."

It is accepted by all the parties in this case namely the parents, the Trust and the guardian ad litem, that not only have these children not been placed for adoption but it is now clear that it is no longer likely that they will ever be placed for adoption.

[5] Turning to the revocation application itself, Article 20 of the 1987 Order as amended by the Children (Northern Ireland) Order 1995 is, where relevant, as follows:

"20(1) The former parent, at any time more than 12 months after the making of the order freeing the child for adoption ,when -

(a) no adoption order has been made in respect of the child, and

(b) the child does not have his home with a person with whom he has been placed for adoption,

may apply to the court which made the order for a further order revoking it on the ground that he

wishes to resume parental responsibility for the child.

...

(3) The revocation of an order under Article 17(1) or 18(1) ('a Freeing Order') operates -

- (a) to extinguish the parental responsibility given to the adoption agency under the Freeing Order;
- (b) to give parental responsibility for the child to:
 - (i) the child's mother; and
 - (ii) where the child's father and mother were married to each other at the time of his birth, the father; and
- (c) to revive:
 - (i) any parental responsibility agreement,
 - (ii) any order under Article 7(1) of the Children (Northern Ireland) Order 1995, and
 - (iii) any appointment of a guardian in respect of the child (whether made by the court or otherwise),

extinguished by the making of the Freeing Order.

(3a) Subject to paragraph (3)(c) the revocation does not -

- (a) operate to revive:
 - (i) any order the Children (Northern Ireland) 1995, or

- (ii) any duty referred to it in Article 12(3)(c), extinguished by the making of the Freeing Order; or
- (b) effect any person's parental responsibility so far as it relates to the period of the making of the Freeing Order and the date of the revocation of that Order.
- (4) Subject to paragraph (5), if the application is dismissed on the ground that to allow it would contravene the principle embodied in Article 9 -
 - (a) a former parent who made the application shall not be entitled to make any further application under paragraph (1) in respect of the child, and
 - (b) the Adoption Agency is released from the duty of complying further with Article 19(3) as respects that parent."

[6] It was conceded by Ms Robinson acting on behalf of the second applicant in this case, namely L the father of the child, that he was not entitled to make these applications as he is an unmarried father and no parental responsibility agreement had been set up. Accordingly he was not a "former parent" within the meaning of the 1987 Order as amended by the 1995 Order in terms of parental responsibility. The only successful applicant, therefore, could be the first applicant, namely the mother E.

Principles governing this application

i A court considering a revocation application will clearly take particular note of the work of the Trust in trying to place the child and of its assessment of the prognosis for future placement. Any change in the circumstances and views of the former parent or the children, will also be of relevance. The court must decide the matter having regard to all the circumstances, bearing in mind Article 9 of the 1987 Order which states:

“In deciding 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”.

ii In cases where it might be unsafe to return the child to the parents' care, a court in dealing with an application to revoke a Freeing Order, is not confined to dealing with the matter solely upon the provisions within the 1987 Order, because this Order operates alongside and is part of the general legislation concerning children and is not a separate and exclusive code. In RE G (Adoption: Freeing Order) 1997 2FLR 202, the House of Lords considered the Adoption Act 1976 which is in most respects comparable to the 1987 Order. That case involved an application to revoke an order freeing a child for adoption, no adoption Order having been made within 12 months of the Freeing Order. Lord Browne-Wilkinson said at p.202F:

“But the 1976 Act does not exist in isolation. It is a code regulating adoption which takes effect in the context of the wider legislation regulating children viz formally the Children Act 1975 and now 1989 Act. Section 20 of the 1976 Act, regulating adoption, provides for the undoing of the steps which have been taken towards the pending adoption which has subsequently failed to materialise. It restores the status quo ante save that the care order in force at the date of the freeing order is not revived. The failure to revive the care order is explicable since, in the changed circumstances giving rise to the revocation of the freeing order, it may well not be right for the child to revert automatically to the care of the local authority. ... The 1976 Act does not purport to limit in any way the powers under the 1989 Act. If, as a result or as a condition of revocation, it is appropriate that the powers under the 1989 Act should be exercised, there is nothing in the 1976 Act to exclude them. In my judgment there is no lacuna in the 1976 Act; it operates alongside and as part of the general legislation regulating powers over children. I can see no reason why the provisions of the 1976 Act have to be read as a self-sufficient code for all purposes; the powers conferred in relation to adoption by the 1976 Act can, if necessary, be used in conjunction with and supplemented by the powers of the 1989 Act”.

iii I am satisfied that within the ambit of the 1995 Order, there are a number of steps which can be taken to protect children if a freeing order is revoked, but it is still necessary for the child to be reverted to the care of the local authority. There are a number of powers under the 1995 Order which can be exercised to afford that protection. These include:

“52(3) While a care order is in force with respect to a child, the authority designated by the order shall -

- (a) have parental responsibility for the child; and
- (b) have the power (subject to paragraphs (4)(2)(9)) to determine the extent to which a parent or a guardian of the child may meet his parental responsibility for the child.”

Accordingly, if I revoke the 1998 order of Higgins J, conditional upon a care order being made, this would permit the Trust to exercise its power under Article 52(3) to limit the extent either of these parents could exercise their parental responsibility. In a case such as this where the parental misuse of parental responsibility had been so stark and the prospect of meaningful implementation of parental responsibility in the future represents an unedifying spectacle in light of the past history, any Trust would have a very considerable discretion to act in pursuance of Article 52(3).

Article 53(4) where relevant states as follows:

“(4) On an application made by the authority or the child, the court may make an order authorising the authority to refuse to allow contact between the child and any person who is mentioned in sub-paragraph (a) to (d) of the paragraph (1) and named in the Order”.

This would clearly embrace the parents in this instance. Given the history of abuse and the lack of any contact in the last number of years, it is likely that a court would be, and in this instance is, sympathetic to any such application by the Trust. This would protect the children from any abusive intention on the part of these parents.

Article 179(14) of the 1995 Order, where relevant, reads as follows:

“On disposing of any application for an order under this Order, the court may, whether or not it makes any order in response to the application, order that no application for an order under this Order of any specified kind, may be made with respect to the child concerned by any person named in the order without leave of the court”.

Accordingly the court has power to prevent applications to the court being made which are likely to cause distress or harassment to the children or indeed to the Trust. The initial hurdle placed by Article 179(14) is valuable, therefore, in sifting any attempts by parents to misuse parental responsibility.

iv. The 1987 Order made it clear that a child will not be freed for adoption unless it is at least likely that that child will be adopted. I consider that the legislative purpose of that Act would be diluted if the Trust was able to maintain and preserve such an order, when it becomes indisputably clear that that provision could no longer apply. Children who are subject to the 1995 Order do not have the added protection, even in the most extreme cases, of an automatic termination of parental responsibility of those who have caused them to be in care. They do, however, have the protections which I have already outlined. I do not believe that Parliament intended that children freed for adoption should somehow be in a stronger position than children subject to a care order even when the criteria for that freeing order clearly cease to operate. It is not for the courts to embark on an independent and unfettered appraisal of what they think is required by public policy on any issue. Judicial activism has to be tempered by due restraint and the drawing of boundaries is often a delicate and somewhat controversial area. I consider that if I was to refuse this application, however unedifying the spectacle of these parents now pleading the best interests of these children may be, I would be crossing a permissible boundary and my action would constitute an unjustified departure from the intention of Parliament. I am fortified in this view by what Lord Browne-Wilkinson said in Re G (supra) at p.208:

“The extinguishment of all parental rights, parental responsibility and the statutory rights under the 1989 Act is a draconian step. It is a necessary corollary to enable an adoption to take place. But if the proposed adoption giving rise to the freeing order fails to materialise and there is no other proposed adoption pending, it is hard to accept that Parliament can have intended that the parents should continue to be deprived of all these rights leaving the child in an indefinite adoptive limbo”.

v Clearly Parliament has never intended that any step should be taken which would positively damage the welfare of children, However, I consider that by virtue of the legislative package which includes both the 1987 Order and the 1995 Order, it has been recognised that there are sufficient safeguards built into the 1995 Order to afford protection to children such as those in this case where the purpose of a freeing order, namely to ensure children are adopted, has failed. I do not rule out rare instances in the future where that might not be possible given the particular circumstances, but I am unpersuaded in this instance that the intention of Parliament as drafted in the 1987 Order can be diluted.

vii I have also considered a potential breach of Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms in respect of the first applicant’s right to respect for family life. Self evidently the order freeing the children for adoption amounted to an interference with

the rights of the applicant. Whilst the Human Rights Act 1998 was not in force at that time nonetheless those measures would, at the time, have constituted legitimate aims in accordance with the law to be regarded as necessary and proportionate in a democratic society. One of the cornerstones of that order, the likelihood of the children being adopted, has now been removed. I no longer consider that the preservation of that order could be in accordance with the law. Accordingly, I accede to the applicant to revoke the Freeing Orders of Higgins J in 1998, but I make this order conditional upon the making of the following orders pursuant to the 1995 Order, namely;

- a. A care order in relation to each child pursuant to Article 50,
- b. an order authorising the Trust to refuse to allow contact between any of the children and either of the respondents
- c. an order pursuant to Article 179(14), that no application shall be made by either of the respondents in respect of a residence order under Article 8, a contact order under Article 53 or a Discharge of care order pursuant to Article 58 without the leave of the court. This order shall remain in place for 5 years.