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

<i>Ref: GILF3578</i>
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<i>Delivered: 16.01.2002</i>
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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**FAMILY DIVISION**

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**IN THE MATTER OF N, K, T and TM (REQUIREMENT TO DISPENSE  
WITH PARENTAL CONSENT UNDER ARTICLE 18 OF THE ADOPTION  
ORDER (NORTHERN IRELAND) 1987**

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**GILLEN J**

The applicant in this case is a Health and Social Services Trust which I do not propose to name and which I shall refer to as “the Trust”. It makes an application for an order freeing for adoption four children pursuant to Article 18 of the Adoption (Northern Ireland) Order 1987 (hereinafter called “the 1987 Order”). The four children are N born on 8 June 1987, K born on 20 December 1989, T born on 10 September 1992 and TM born on 28 July 1994. The mother of the children died on 14 March 1996. I understand that she died intestate and accordingly there has been no testamentary guardian appointed for the children. TB is the unmarried natural father of the children and this court refused an application by him for parental responsibility in the course of the year 2001, which decision was affirmed by the Court of Appeal in Northern Ireland. Originally the children were made wards of court on 21

August 1996. The relationship between TB and the extended members of the family with whom the children have been placed has been acrimonious and this continues to be the case. Neither N nor K have had access with their father since March 1997 and have consistently indicated that they do not wish contact. On the contrary they wish to be adopted by their present carers. T and TM are in long term foster care also with extended members of the family and they have also indicated that they wish to be adopted by their present carers. The wardship orders have become deemed care orders under the terms of the Children (Northern Ireland) Order 1995. The result of this state of events is that there is no parent or guardian with parental responsibility for these children. I am informed by the Trust and the guardian ad litem that there is no person who is prepared to accept appointment as a guardian of these children in view of the acrimonious relationship with TB.

Article 18, 1987 Order, which governs the present application, reads as follows:

“Freeing child for adoption without parental agreement

18-(1) Where, on an application by an adoption agency, an authorised court is satisfied in the 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.”

Article 16 states where relevant:

“Parental agreement.

16-(1) An adoption order shall not be made unless –

....

- (b) In the case of each parent or guardian of the child the court is satisfied that –
  - (i) he freely, and with full understanding of what is involved, agrees –
    - (aa) either generally in respect of the adoption of the child or only in respect of the adoption of the child by a specified person, and
    - (ab) either unconditionally or subject only to a condition with respect to the religious persuasion in which the child has to be brought up,
      - (i) to the making of the adoption order; or
      - (ii) his agreement to the making of the adoption order should be dispensed with on a ground specified in paragraph (2).
- (2) The grounds mentioned in paragraph (1)(b)(ii) are that the parent or guardian –
  - (a) Cannot be found or is incapable of giving agreement;
  - (b) Is withholding his agreement unreasonably;
  - (c) Has persistently failed without reasonable cause to discharge his parental responsibility for the child;
  - (d) Has abandoned or neglected the child;
  - (e) Has persistently ill-treated the child;
  - (f) Has seriously ill-treated the child.”

The Trust, in making this application before me is therefore confronted by the difficulty that there is no parent or guardian with parental responsibility to consent to the application under Article 18 and equally there is no-one with parental responsibility whose consent may be dispensed with. Although there is a deemed care order, the Trust cannot consent as this would be contrary to the terms Article 52(6)(b)(i) and (ii) of the Children (Northern Ireland) Order 1995 which reads:

“(6) While a care order is in force with respect to a child, the authority designated by the order shall not

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...

(b) have the right -

(i) to consent or refuse to consent to the making of an application in respect to the child under Article 17 of the Adoption Order;

(ii) to agree or refuse to agree to a making of an adoption order or an order under Article 57 of that Order, with respect to the child; or

(iii) to appoint a guardian for the child.”

Whilst the court does have power under Article 159 of the 1995 Order to appoint an individual to be the children’s guardian even though no application has been made to it, the Trust and the guardian ad litem in this case frankly admit that this would be inappropriate given that there is no-one who is prepared to take on the task because of the family history. It is also

considered that it is inappropriate for the Official Solicitor to adopt such a role.

Ms O'Hagan, who appeared on behalf of the Trust, tentatively submitted that by virtue of the death of the mother, it might be argued that the parent was incapable of giving agreement. This argument does not find favour with me. In the first place, I do not consider that the deceased mother is still a parent. Secondly, I am satisfied that Article 16(2)(a) requires a court to investigate, where consent had been given by a parent, whether it had been fully and freely given and whether the parent had a full understanding of what the adoption involved and not the contrary circumstance where a mother has withheld her agreement. That clearly does not apply in this instance because since the parent is dead she has not given her agreement and accordingly the question of incapacity to give that agreement does not arise (see Re L (A Minor) (Adoption: Parental Agreement) 1987 1 FLR 400 at 403). However I think that Ms O'Hagan, and for that matter the submissions of Ms McGaughey who appeared on behalf of the guardian ad litem, find a surer foundation once it is argued that Article 16 simply does not arise in this instance because the consent of the parent/guardian does not need to be dispensed with in light of the death of the mother and the absence of a guardian or anyone with parental responsibility. The key to the matter lies in looking at the legislative purpose of the order. The court must be wary of forming an interpretation which is inconsistent with a purposive construction

and which would serve to dilute the object of concern of the legislation.

Article 9 of the 1987 Order states:

“Welfare of children

Duty to promote welfare of children

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

The fundamental duty cast on the court therefore is to promote the welfare of the child in the determination of “any course of action in relation to the adoption of a child”.. Whilst I recognise that Article 16 is couched in mandatory terms, I do not believe that it was ever the intention of Parliament that a strict interpretation of Article 16 would serve to frustrate the best

interests of children by way of adoption. Many years ago Lord Campbell CJ said in Liverpool Borough Bank -v- Turner (1861) 30 LJCH 379 at 380:

“No universal rule can be laid down ... it is the duty of courts of justice to try to get to the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.”

The interpreter’s task is therefore always to scrutinise an act and determine, in the light of its particular provisions, the legal consequence most likely to have been intended. The mischief addressed by Article 16 is to ensure that parents or guardians have input into any adoption before that adoption is granted. They must have a right to object. I do not believe it was ever intended that the absence of a parent or guardian to consent to an adoption should therefore preclude children being adopted. Since I have been satisfied that there is no person with parental responsibility for these children and no person appropriate to be appointed as guardian Article 16 does not have any application and most certainly does not deflect from the duty cast on this court under Article 9 of the 1987 Order. Accordingly in such circumstances the need to dispense with the consent of the parent or the guardian does not arise.

The Human Rights Act 1998 was carefully designed to promote the search for compatibility, rather than incompatibility, between primary legislation and the Convention for the Protection of Human Rights and Fundamental Freedom (the European Convention on Human Rights) (Rome, 4 November 1950: TS71 (1953) Cmd 8969). Respect for family life as in Article 8 is fundamental to the philosophy underpinning this Convention. In

this context however it is important to bear in mind the need to secure for a child who has been deprived of a life with his family of birth a life with a new family who can become his new “family for life” to make up for what he has lost (see Hale J in Re W and B (Children) (Care Plan) 2001 2 FCR 450 at page 473). Accordingly the 1987 Order must be interpreted in a manner compatible with the notion and not so restrictively as to frustrate it. This underlines the necessity to interpret the Order as I have done.

I pause only to observe that the Trust might consider in this case whether an application under Article 18 to free these children for adoption is the more appropriate avenue to pursue. Such applications usually serve the purpose of determining questions of consent or withholding of consent of parties or guardians before the prospective adoptive parents make the adoption application. Since in this instance the matter does not arise, the more appropriate course may be for the proposed adoptive parents to institute proceedings for adoption without the interim stage of the Trust making an application to free for adoption under Article 18. However this must be a matter which is within the discretion of the Trust and I do not seek to fetter that discretion.



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**J U D G M E N T**

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