

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

Delivered: 14/12/10

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF TM and RM (FREEING ORDER)

MORGAN LCJ

[1] Nothing must be reported concerning this case which would serve to identify the children or the mother with which this case is concerned.

[2] This is an application for a freeing order in respect of two children, TM born in April 2005 and RM born in September 2006. There is a substantial history of social services involvement with the family. The father is deceased. The mother has given birth to 9 children. Six of these children live together, the oldest being now twenty years old. One child is placed with friends and family. The children the subject of this application are the mother's youngest children.

[3] Both children were made the subject of care orders in 2007. The mother underwent a parenting assessment in early 2007 and moved into the community shortly thereafter with the children. Unhappily concerns about the safety and security of the children quickly arose as a result of which the children were removed from the mother's care in April 2007. An assessment of the mother's ability to provide a secure and safe environment for the children was conducted by an independent social worker but she doubted the mother's ability to transfer her cognitive understanding into practical support for the children.

[4] In June 2009 both children were moved into the care of prospective adopters where they have remained since. They continue to enjoy monthly contact with the mother which the Guardian considers the mother has managed very well. The Guardian recognises, however, that the mother would be unable to meet the children's needs over a prolonged period.

[5] The mother does not consent to the freeing application. The Guardian considers that she is unable to bring herself to do so although she recognises that none of her 9 children are in her care. She has not engaged with her legal advisers since April 2010. The relevant law is to be found in articles 9, 16 and 18 of the Adoption (Northern Ireland) Order 1987.

“Welfare of children

Duty to promote welfare of child

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.

Parental agreement

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

(a) the child is free for adoption by virtue of an order made in Northern Ireland under Article 17(1) or 18(1), made in England and Wales under section 18 of the Adoption Act 1976 (freeing children for adoption in England and Wales) or made in Scotland under section 18 of the Adoption (Scotland) Act 1978 (freeing children for adoption in Scotland); or

(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 is to be brought up,

to the making of an adoption order; or

(ii) his agreement to the making of the adoption order should be dispensed with on a ground specified in paragraph (2).

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.

(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.

(2A) For the purposes of paragraph (2) a child is in the care of an adoption agency if the adoption agency is a Board or HSS trust and he is in its care.

(3) Paragraphs (3), and (5) to (7) of Article 17 shall apply to an order made by a court under paragraph (1) as they apply to an order made by a court under Article 17(1)."

[6] The Trust asked me to find that the mother is unreasonably withholding her agreement to the adoption of children. The leading authorities on the test that 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."

[7] Although it is clear that the mother has strong feelings for the children I have no doubt that I should dispense with her consent in this case. She is not in a position to offer these children security and stability. This is a clear interference with her rights as a mother under article 8 of the ECHR but is necessary in the interests of the children.

[8] It is proposed that contact with the mother and her half siblings with these children should occur 3 times per annum with indirect contact for the older children who do not attend and also for the half siblings on the father's side. The precise detail of this should be flexible so as to accommodate the needs of the children but it seems clear that there is much to be said for the involvement of the carers of the other children in order to promote order within the contact.

[9] In making this decision I have taken into account the submissions made to me about the positive changes in the mother's life and her aspirations for the future as well as her continuing vulnerability. I realise that this decision will be a disappointment to her but she still has an important role to play in the lives of these children and can help them for many years to come.