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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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14/128508

M's (a child) Application [2015] NIFam 8

IN THE MATTER OF M (A CHILD) (THRESHOLD CRITERIA – TERMINAL ILLNESS)

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O'HARA J

[1] In this judgment the names of the parties have been anonymised in order to protect the identity of the child to whom the judgment relates. Nothing must be published or reported which would lead directly or indirectly to the child being identified.

[2] This case is about a four year old boy M and his mother Ms B. The identity of M's father is unknown in that Ms B has declined to disclose his name but has asserted that he died as a result of a drugs overdose after M was born. Ms B has had a difficult life and is now dying of cancer. M has developmental delay but the extent of his problems is not yet clear. Ms B cannot care for him nor can any of her family or friends. The dispute between her and Trust which seeks a care order is whether this case falls within the scope of the care provisions of the Children (NI) Order 1995.

Background

[3] Ms B is 41 years old and has a mild learning disability. She had poor experiences in her own childhood to the extent that she lived in foster care from the ages 5 to 18. A return to her birth mother when she reached the age of majority was unsuccessful and she then spent some time living in supported accommodation before being admitted to a psychiatric hospital after taking an overdose. She lived there for approximately six years before moving to supported living accommodation and then to semi-independent living. In 2010 she became pregnant and was almost immediately diagnosed with breast cancer for which she had a mastectomy.

[4] After M's birth early in 2011 Ms B was able to care for him with the help of a support package from the Trust. This was successful to the extent that M's name was removed from the Child Protection Register late in 2011 as it became apparent that Ms B would be able to care for him. At different times her need for respite care varied and the Trust facilitated these ups and downs. In 2013 M was assessed as having general developmental delay with a possibility of having a long term learning disability. There is a particular concern about his speech. All of this led to M becoming a looked after child within the meaning of the 1995 Order but he remained in the care of his mother.

[5] In June 2014 at a LAC meeting it was apparent that Ms B's health which had been problematic for some time was deteriorating. Apart from the cancer for which she had received treatment in 2010 she was suffering from angina, arthritis and asthma. She agreed that M should be voluntarily accommodated whilst she went for tests. Within a very short time she was diagnosed with terminal cancer. Since then the Trust has worked with Ms B to identify a family member or a friend who can look after M in long term. Unfortunately none has been found. M has stayed with carers since June 2014. He still sees his mother but that contact has become less frequent, in part because she does not want him to be distressed by her appearance.

[6] The Trust issued care proceedings in December 2014. It did so because in the circumstances which have been summarised above it was concerned that no one would have parental responsibility for M. At that time Ms B appeared to accept that this was an appropriate step and she agreed to interim care orders being made. However in February 2015 she stated that she did not want any long term care plan for M to include adoption "as I am concerned about his name potentially being changed and him forgetting about me as his mother". She added that she was fully committed to having as much contact as she could with M, depending on her health. On that issue there is no dispute. It appears that Ms B would not object to M being placed in long term foster care on foot of a care order. However the Trust position is that it has been unable to identify long term foster carers and that, in any event, M's future interests are best protected by way of adoption.

[7] A final hearing of the application for a care order was originally scheduled for March 2015 in the Family Proceedings Court but the case was then transferred to the Family Care Centre and then to the High Court by agreement between the parties and with the approval of the respective judges. One of the complicating features which has emerged is that Ms B has appointed a testamentary guardian, a Ms A. In a statement made in the course of these proceedings Ms A has outlined that she became friendly with Ms B because her mother works for a housing association and assisted Ms B in her semi-independent living. A friendship developed from that work relationship which then extended to Ms A who has got to know both Ms B and M. Ms A has considered whether she could foster or adopt M and has concluded that even with the help of her mother and sister she could not do so. Her reasons for reaching that decision need not be set out in this judgment save to say that they are perfectly understandable. She appreciates that as M's testamentary guardian she

would have parental responsibility for him after Ms B's death. Her position is that she would like to play a role in any decisions which are made about his life e.g. to ensure that he is placed with suitable foster carers and receives the religious sacraments. She envisages herself acting like an aunt to M but with the possibility of reconsidering the extent of her role if any change in her work commitments makes that possible. There is no indication that there will be any such change.

Submissions

[8] Ms J Lindsay for the Trust emphasised that it does not and never has suggested that the issues about M's future care represent any attribution of fault to Ms B. She acknowledged that the Trust initiated proceedings in December 2014 when Ms B's condition was deteriorating after it had tried to find a suitable future carer and on the understanding that when Ms B dies nobody would have parental responsibility for him. That has changed in light of the emergence of Ms A's position as a testamentary guardian but, she said, that does not fundamentally alter the position which is that M is a four year old boy with an entirely uncertain present and future and who is at risk of coming to significant harm..

[9] Ms Lindsay referred to the test for making a care order which is set out at Article 50(2) of the 1995 Order:

> "(2) A court may only make a care or a supervision 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
>
> (ii) the child's being beyond parental control."

Ms Lindsay submitted that without it being anybody's fault Ms B cannot care for her son as a result of her terminal ill-health and her combination of illnesses. She further submitted that it does not matter at what date threshold criteria are assessed. In June 2014 Ms B placed M in voluntary accommodation without an interim care order when she was too unwell to care for M. At that date she did not know that she was dying. Later in December 2014 when the Trust issued care proceedings, Ms B was still too unwell to care for him but did know that she was dying. In her

February 2015 statement Ms B said that she could no longer care for M on a daily basis. That statement is correct but also reflects the true position from June 2014 onwards.

[10] The threshold criteria proposed by the Trust are that:

- M is a four year old child who is likely to suffer significant harm because the care given to him and likely to be given to him if the order were not made is not what it would be reasonable to expect a parent to give to him.

- M's needs as a result of his known and possible level of disability are such that he needs additional care and support.

- Apart from Ms B who cannot provide the care which M needs, there is no other person who can provide such care.

[11] Mr B Devlin for Ms B submitted that the Trust's application is misconceived because it was based on the misconception that nobody would have parental responsibility for M after his client's death whereas Ms A will in fact have that responsibility as his testamentary guardian. He further contended that Ms B is currently capable of exercising parental responsibility because she is able to make decisions about M's welfare.

[12] In developing his submission Mr Devlin relied on the judgment of Thorpe J in Birmingham City Council v D; Birmingham City Council v M [1994] 2 FLR 502. Those cases involved two different sets of children. In one family the mother had died and the unmarried father declined any responsibility for the children. In the other family both parents were dead. The public authority which was accommodating the children applied for care orders, concerned that nobody held parental responsibility for them. The difficulty facing the court was whether threshold criteria could be established. Holding that they could not be, the judge held that "it would be a plain distortion of the threshold test to find some theoretical risk of harm when none in reality is discernible". The reason for there being no discernible risk was that the Children Act 1989 (in terms identical to the 1995 Order) imposes on public authorities a duty to provide accommodation for any child who requires it as a result of there being no person who holds parental responsibility. That duty extends to safeguarding and promoting the child's welfare and to make use of such services as appear reasonable. Since that was happening the care order provisions were not applicable.

[13] The Guardian Ad Litem was represented by Mr M Bready whose initial submission on her behalf was that the Trust was on the wrong track by seeking a care order when it should be applying for leave under Article 173 of the 1995 Order to pursue wardship. That approach was suggested because the Guardian adopted the reasoning put forward on behalf of Ms B about threshold criteria. However the Guardian later reconsidered her position and now endorses the Trust's approach.

She does so because she accepts that culpability is not necessary for threshold to be established and because the Trust's exercise of its duties to promote the welfare of M is not sufficient protection for him.

[14] As Mr Bready correctly submitted, Article 173 provides that the court retains its inherent jurisdiction to make children wards of court. However that power is not to be exercised unless the court is satisfied that the result could not be achieved other than through the exercise of the inherent jurisdiction. Accordingly wardship only arises if the various powers available through the 1995 Order would not protect M from the likelihood of significant harm.

Discussion

[15] As I have indicated above, at an earlier stage in the proceedings it seemed that Ms B was not hostile to the Trust's application for a care order. She seemed to have been agreeable to M being found a long term foster placement. It may therefore be that the real issue is what the care plan is, whether long term foster care or adoption. That is however a matter for future debate. No care plan has yet been formulated. At this stage I am only asked to consider whether threshold criteria can be and have been established. Even if Ms B was consenting to a care order I would have to be satisfied on that issue anyway so the disagreement between the parties has helped me by enabling me to be provided with well-reasoned and argued submissions on the point.

[16] In many applications for care orders there is obvious fault on the part of parents or carers e.g. cruelty or neglect. In others the problems arise from faults which are also weaknesses such as addiction to alcohol or drugs. There are also cases which feature parents who themselves grew up in deprived and inadequate circumstances so that they do not understand and have never been shown what acceptable parenting involves. Some other parents have very low IQs and do not know and cannot be taught how to raise children. Yet more parents have mental health problems which disable them from being able to protect their children. Of course there are cases in which some or all of these features overlap. It is for that reason that the statutory requirements for a care order are not couched in terms of fault – that is not a prerequisite for the making of orders.

[17] This issue was considered recently by the Justices of the Supreme Court in their decision in Re B (A Child) [2013] UKSC 33. At paragraph [191] of those judgments Lady Hale stated:

> "The harm, or the likelihood of harm, must be 'attributable to the care given to the child or likely to be given to him if an order were not made, not being what it would be reasonable to expect a parent to give to him'. ….. This reinforces the view that it is a deficiency in parental *care*, rather than in parental

> *character*, which must cause the harm. It also means that the court should be able to identify what that deficiency in care might be and how likely it is to happen."

[18] Ms B is unable to care for M because of her physical illness in an equivalent way to that in which a parent with severe mental health problems may not be able to care for a child. This is not Ms B's fault any more than it is the fault of another parent that he or she suffers from schizophrenia, dissociative identity disorder or any other identified psychiatric condition.

[19] I do not accept Mr Devlin's submission that the decision of Thorpe J can be applied to the present case by analogy. In that case there was nobody with parental responsibility for the children. In this case Ms B has parental responsibility but is unable to care for her son. I make that finding despite her contention that she is currently capable of exercising parental responsibility because she is able to make decisions about M's welfare. The tragic fact is that M is only being protected from inevitable harm, namely the impairment of his health or development, because of the Trust's intervention in June 2014. Mr Devlin has submitted that as at the date of the Trust's intervention in June there was no likelihood of significant harm because at that point Ms B was only unwell and had not been diagnosed as being terminally ill. That is an artificial distinction which does not stand up to scrutiny – the only real difference between her condition in June 2014 and her condition from July 2014 is that her condition had been diagnosed by the later date. At the earlier date it existed but had not yet been diagnosed.

[20] In these circumstances I am satisfied that the Trust has established the threshold criteria set out at paragraph [10] above. On that basis the case can proceed to final hearing. It is now incumbent on the Trust to present a care plan by reference to which a care order may be made. It does not follow from threshold criteria being established that a care order will necessarily be made and there are obvious issues to be considered about whether long term foster care or adoption is to be preferred.

[21] I conclude by referring back to the reasons given by Ms B for opposing the adoption of M. Her concerns were that his name might be changed and that he would forget about her as his mother. It is true that adoption would more likely lead to a change in his name than would be the case if he remained in long term foster care. However on the second issue about him forgetting about her it appears to me that there is little difference between the two options. Whether and for how long M will remember Ms B may be affected by the extent of his developmental delay and any disability which emerges. This is however a case in which it is obvious that a life story record must be prepared so that as M's life continues he can be informed about his background. That is what happens in most cases and there are powerful reasons for it being done here. Furthermore it would require little effort or imagination to devise a role in M's future for Ms A through whom an appropriate and supportive memory of Ms B could be maintained. The Trust has a

long and positive record of working with Ms B to help her and her son. Its application to the court has been made with the best of intentions. It would be disappointing if a way could not be found through the differences between it and Ms B at this late stage of her life.